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CONSTITUTIONAL AND BIBLICAL INTERPRETATION: UTILIZING SPEECH-ACT THEORY IN SUPPORT OF OBJECTIVE MEANING AND HERMENEUTICAL REALISM

Allison R. Church[*]

ABSTRACT

Interpreting and applying the Constitution requires making sense of texts written in vastly different times and cultural contexts than the one in which we now live. Yet, by nature, a constitution carries binding legal authority for generations to come, despite the changing landscape of culture, language, and context. Legal scholars and jurists have acknowledged these challenges and addressed them in various ways throughout the history of constitutional interpretation.

This Article seeks to add to that dialogue by inviting in a new conversation partner, namely biblical hermeneutics. Recognizing that biblical interpreters face many of the same challenges in seeking to bridge cultural and linguistic gaps to discover the meaning of ancient texts and their contemporary application, this Article explores the commonalities between constitutional and biblical hermeneutics, specifically focusing on the insights that speech-act theory has to offer for originalist interpretative methods.

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INTRODUCTION

How does one go about making sense of a text that was written long ago, in a different time and cultural context than the one in which we now live? Can today's readers find continuing relevance for such a text that purports to speak to the ages but was written in a different situation? Constitutional interpretation is bound together with biblical hermeneutics in its quest for answers to these questions.[1] Because of the

[1] There are striking similarities between biblical hermeneutics and constitutional originalism: both attempt to make sense of ancient texts written in a different context, and both search for continuing relevance in the texts. *See* Lawrence B. Solum, *Legal Theory Lexicon 084: Corpus Linguistics*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_

similarity between the issues that arise in these two disciplines, fruitful dialogue may be possible that will enable the participants in each debate to come away more informed and with clearer perspective.

Indeed, dialogues taking place in the contexts of constitutional and biblical hermeneutics have much in common. Each discipline deals with an ancient text written for a different audience than today's readers but which contemporary readers believe in some sense still speaks, as binding authority or at least as helpful or wise guidance.[2] Yet many difficult questions arise in each context, leading to debates over the proper approach to interpretation. Is the text itself authoritative or is tradition a binding interpretive authority?[3] Can readers adequately discover the text's meaning by using the ordinary rules of grammar and syntax and examining textual and historical context?[4] How does one take the text literally without becoming "literalistic?"[5] Is there a stable core of fixed

theory_lexicon/2017/10/legal-theory-lexicon-084-corpus-linguistics.html (Nov. 22, 2020) [hereinafter Solum, *Corpus Linguistics*] (showing that originalism attempts to solve this problem through corpus linguistics. Corpus linguistics is the use of data sets to investigate the meaning of words in context over time and it helps interpreters discover the fixed meaning of historical texts); Lawrence B. Solum, *Legal Theory Lexicon 019: Originalism*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_1.html (June 20, 2021) [hereinafter Solum, *Originalism*] (showing that originalists apply the fixed meaning of the Constitution to modern issues); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 723–25, 723 n.124, 724 n.130, 725 nn.131, 133 (2011) (asserting that interpreters use biblical hermeneutics to find universal truths and the central message of the Bible, transposing it from its ancient cultural and historical context); *id.* at 706 (showing that biblical hermeneutics finds the continuing modern relevance that transcends its cultural context).

[2] *See* KEVIN J. VANHOOZER, IS THERE A MEANING IN THIS TEXT? 113–15 (1998) (citing multiple groups throughout history, such as Jewish philosopher, Philo, and Antiochene scholar, Theodore of Mopsuestia, that use different methods of biblical interpretation); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 19–20 (2011) (noting that "[t]he Supreme Court has never claimed the authority to render decisions that are inconsistent with the constitutional text").

[3] *Compare* VANHOOZER, *supra* note 2, at 172–73 (The Reformation view "assign[ed] supreme authority to the text rather than to an interpretive tradition.") *and id.* at 323–24 (discussing the claim that "Scripture interprets Scripture"), *with* Lawrence B. Solum, *Legal Theory Lexicon 077: Living Constitutionalism*, LEGAL THEORY BLOG, http://lsolum.typepad.com/legal_theory_lexicon/2017/05/legal-theory-lexicon-077-living-constitutionalism.html (Sept. 4, 2020) ("Common Law Constitutionalism . . . is the view that the content of constitutional law should be determined by a common-law process.").

[4] *See* VANHOOZER, *supra* note 2, at 171 (discussing Martin Luther's view that Scripture's meaning is "clear for those who attend[] to the grammar of the text and to the leading of the Spirit"). Note that this view does not require a belief that interpretation is easy, but merely that adequate interpretation is possible. *See id.* at 315–17; *cf.* ANTONIN SCALIA ET AL., A MATTER OF INTERPRETATION 45 (Amy Gutmann ed. 1997) (explaining that "[t]here is plenty of room for disagreement as to what original meaning was," but that "[o]ften . . . [the original meaning] is easy to discern and simple to apply").

[5] *See* VANHOOZER, *supra* note 2, at 426 (discussing the "inordinate desire for objective certainty" motivating fundamentalists, and contrasting "literalistic" interpretation

meaning, or does the text's meaning change with the times? In other words, is it necessary to interpret certain provisions differently from their plain or literal meaning in order to apply the text to new contexts?[6] Methodologically, how do we go about determining the meaning of words used in a historic document?

By way of preview, I will argue that speech-act theory provides helpful insights into the answers for some of these questions. The idea that a speech act is a completed action fixed in the past implies a distinction between "meaning" and "significance," which provides helpful support for constitutional originalism's "fixation thesis" and "interpretation-construction distinction."[7] While meaning is inherent to a past action and is thus fixed at the time a text is written, a text may have ongoing significance for contemporary readers that could change over time, because it is not part of the original action.[8] Meaning is accessed through the activity of "interpretation," while significance is determined and applied through the activity of "construction."[9]

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with "literal (or literary) interpretation, where the latter is sensitive to the diverse genres in Scripture and to the various forms of communicative action"); SCALIA, *supra* note 4, at 23 (cautioning that "[t]extualism should not be confused with . . . strict constructionism").

[6] *Compare* ANDREW PURVES, PASTORAL THEOLOGY IN THE CLASSICAL TRADITION 38–39 (2001) (discussing the Alexandrian school of interpretation, which utilized allegorical interpretation to find contemporary meaning for ancient texts, especially in search of application for Old Testament texts after the events of Christ's life), *and* Solum, *supra* note 3 (discussing "Contemporary Meaning" living constitutionalism, a view holding that "the meaning of the constitutional text does change and that it is the contemporary meaning and not the original meaning that should constrain[] constitutional practice"), *with* PURVES, *supra*, at 39–40 (discussing the Antiochene school of interpretation, which sought to understand Scriptural texts in context using ordinary language rather than allegory), *and* Solum, *supra* note 2, at 13–16 (explaining that contemporary originalists seek the public meaning of the Constitution, which generally relies on the ordinary meaning of words at the time).

[7] *See* VANHOOZER, *supra* note 2, at 259–60 (showing that textual meaning is fixed at the time the author wrote the words, but significance comes from how the interpreter explains, evaluates, and applies that meaning in his or her context); Solum, *supra* note 2, at 4 (defining "fixation thesis" and "interpretation-construction distinction").

[8] *See* Solum, *Originalism*, *supra* note 1 (explaining that contextualized linguistic meaning is fixed in the past—the time of the Constitution's framing and ratification—but a legal practitioner's ongoing application of that meaning to issues of modern significance could change over time).

[9] *See* Lawrence B. Solum, *Legal Theory Lexicon 086: Context and Meaning*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2019/01/legal-theory-lexicon-086-context-and-meaning.html (Dec. 6, 2020) (explaining that meaning is discerned through the communicative content of a text, while the goal of construction is to discern and apply the purposes, policies, goals, and values inherent in the text).

The issues of overlap between these two disciplines fit into at least three categories.[10] The first group of debates relates to the nature of meaning: Is meaning "fixed" or does it change with time?[11] Is the original meaning even accessible to modern readers?[12] The second set of issues relates to methodology: How do we access original meaning?[13] Finally, a third group of questions deals with normative considerations: Should we follow the original meaning of the Constitution as binding law?[14] Should we obey Scripture?[15]

The answers to this last group of questions, namely normative arguments for or against following the original meaning of the Constitution and arguments for or against biblical authority, will diverge greatly. Arguments for a particular method of constitutional interpretation may include a belief that this methodology best provides stability and supports the rule of law, is most in accord with popular

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[10] *See* Smith & Tuttle, *supra* note 1, at 694–97 (demonstrating the similarities between biblical hermeneutics and originalism as it pertains to (1) believing the texts having a fixed meaning, (2) developing a methodology to ascertain that meaning, and (3) discussing that each discipline believes the text to be normative—even if on different grounds).

[11] *Compare* VANHOOZER, *supra* note 2, at 259 ("Textual meaning does not change because it is tied to what an author intended, and did, in the past."), *with* André LeDuc, *Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism*, 16 U.N.H. L. REV. 51, 70 (2017) (rejecting originalists' presumption "that the meaning of the text is invariant").

[12] Some biblical literalists argue that "the meaning of the biblical text is accessible to all people through the ordinary exercise of reason . . . ." Smith & Tuttle, *supra* note 1, at 699, 705–06, 705 nn.46 & 48. *But see id.* at 700 n.17, 701–02 (showing that liberal theologians instead emphasize that there is an "unbridgeable distance between God and human reason" and human language is inadequate to convey that meaning). And some originalists believe the original meaning of the Constitution is also accessible to all people. *Id.* at 713–14, 713 n.86. *But see* LeDuc, *supra* note 11, at 81–82, 110 (demonstrating that classical originalism has been criticized by some scholars who believe the Constitution is indeterminate and general, and assert that it is implausible to assume modern readers can discern the Constitution's original meaning).

[13] *See* Smith & Tuttle, *supra* note 1, at 700 n.20, 743 n.229, 745 n.242 (explaining the debate among Protestants over whether biblical literalism is the appropriate method for determining the meaning of the biblical text); *id.* at 743–45 (demonstrating the growing support among legal scholars viewing originalism as the best interpretive method for understanding the Constitution's original meaning).

[14] *See id.* at 709–11 (stating that most originalists believe the Constitution's original meaning is discoverable, authoritative, and binding today until amended); *id.* at 761 & n.296 (showing there is a debate over whether judges should decide cases based on the Constitution's original meaning); Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1370 (2009) (asserting that some living constitutionalists do not treat the Constitution as binding law).

[15] Smith & Tuttle, *supra* note 1, at 701–03, 702 n.33 (showing that some biblical interpreters hold that the Bible has binding authority and should be obeyed as the word of God, while more liberal theologians believe the Bible contains "human words about the human experience of God").

sovereignty and democratic legitimacy, or promotes justice.[16] In contrast, arguments for following the Bible as "the rule of faith and life" may center around a belief in divine inspiration and the testimony of the Holy Spirit.[17] While these discussions are essential to each discipline, the area of overlap between them is small, and a comparison between these arguments may not be particularly illuminating.

A comparison of the methodologies employed in the respective disciplines may prove more fruitful. Constitutional interpreters have turned to the discipline of corpus linguistics as a "new tool to improve originalist methodology," making inferences about the meaning of words and phrases in the Constitution by analyzing the use of similar words and phrases in "a large corpus of Founding-era documents."[18] The standard method that biblical scholars use to determine the meaning of biblical words closely parallels the techniques of corpus linguistics.[19]

The barriers to understanding the Bible are likely greater than those involved with understanding the Constitution, because the various parts of the Bible were written thousands of years ago rather than

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[16] *See* Solum, *supra* note 2, at 38, 40, 43, 50 (arguing that originalism promotes stability and supports democracy because the original, fixed meaning of the Constitution was created and ratified through democratic means).

[17] *See* WESTMINSTER CONFESSION OF FAITH: WITH PROOF TEXTS 3–9 (5th prtg. 1992) (explaining that Christians affirm a belief in the divine inspiration of the Bible, which makes the Bible true and authoritative for human living). *But see* DEREK FLOOD, DISARMING SCRIPTURE 44–45 (2014) (arguing that readers should question whether to embrace or reject the "bad parts of the Bible," approaching it with an attitude of faithful questioning rather than unquestioning obedience).

[18] Lawrence M. Solan, *Can Corpus Linguistics Help Make Originalism Scientific?*, 126 YALE L.J.F. 57, 57 (2016); *see also* James C. Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J.F. 21, 21–22, 22 nn.6, 13 (2016) (explaining that corpus linguistics is a method to determine original public meaning at the time of the text's adoption based on patterns of usage); Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017) [hereinafter Solum, *Originalist Methodology*] (suggesting that, in addition to dictionary definitions, context plays a central role in corpus linguistics); Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1621, 1624 (2017) (stating that corpus linguistics uses large-scale data sets to provide evidence of linguistic usage and considers the linguistic and conceptional context existing at the time of the text's ratification to discern its meaning).

[19] *See, e.g.*, JACOB MILGROM, LEVITICUS 1–16, 339–45 (1991) (analyzing various uses of the Hebrew word *'āšām* throughout the Old Testament in their respective contexts to determine the likely meaning of the term in Leviticus 5:15); S. M. BAUGH, EPHESIANS 84–88 (H. Wayne House et al. eds., 2016) (discussing the Greek phrase *eis hyiothesian* and making inferences about its meaning and connotations by analyzing its usage in various contexts and comparing it with similar phrases in biblical Greek and other manuscripts from the time).

hundreds, in Hebrew, Aramaic, and Greek rather than in English.[20] Although the meaning of some English words has shifted since the enactment of the Constitution, the linguistic distance is not as great as that involved with biblical interpretation.[21] Additionally, while the Constitution is a legal document, the Bible contains numerous genres, including law, poetry, narrative, and epistles.[22] Different interpretive "methods" must be used to access the meaning conveyed by these various genres, introducing another layer of complexity into the interpretive process.[23] Nevertheless, despite these differences, a foray into the techniques used by each discipline may be informative and helpful for scholars seeking to improve their methods. A study of methodology, while potentially fruitful, is outside the scope of this Article.

I will seek to unpack the remaining category, namely debates surrounding the underlying issue of the nature of meaning. Specifically, I will discuss the work of biblical theologian and hermeneutician, Kevin Vanhoozer, as he interacts with various scholars on questions of biblical hermeneutics, focusing especially on his use of speech-act theory in support of the fixation and knowability of meaning.[24] My analysis

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[20] *See* HENRY CLARENCE THIESSEN, LECTURES IN SYSTEMATIC THEOLOGY 45–46, 50–51 (Vernon D. Doerksen, rev. ed. 1979) (affirming the authenticity of the Bible and that it was written over the span of 1,600 years before the end of the Roman Empire); GORDON D. FEE & DOUGLAS STUART, HOW TO READ THE BIBLE FOR ALL ITS WORTH 28 (2d ed. 1993) (stating that the Bible was written in Hebrew, Aramaic, and Greek).

[21] *See* Solum, *Corpus Linguistics, supra* note 1 (asserting that the meaning of some English words has shifted over time).

[22] VANHOOZER, *supra* note 2, at 245–46, 346 (listing the various genres in the Bible including law, psalm, gospel, letter, history, wisdom, apocalyptic, canon, and prophecy).

[23] *See generally id.* at 245–46 (explaining that discerning meaning requires a reader to understand how literary conventions and rules governing each genre are applied).

Note that the term "method" can be used in various ways. In one sense, an interpretive method is the complete methodology one uses to interpret texts. In this sense, the same "method" is used in all cases to recover interpretive content: we must always examine the semantic meaning of words, as understood in light of their context, and determine how the meaning is enriched by pragmatics. But the more specific "methods," or the precise practices that are followed when interpreting a given text, will vary, since different types of texts set out diverse interpretive tasks. For instance, different genres will create different contexts, which will affect the way that we understand words within a text (e.g. metaphorically), and the act of "construction" will vary greatly with different categories of texts (e.g. a poem versus an imperative). In this latter sense, the "method" that will be used to uncover the meaning of a legal text may differ significantly from the types of practices used to uncover the meaning of, e.g., a novel. *See infra* pp. 18–22, 64–65 for a more detailed discussion about the methodology of interpreting genre.

[24] *See* VANHOOZER, *supra* note 2, at 6, 243 (discussing the use of speech-act theory in determining meaning and also comparing and critiquing speech-act scholars Searle and Grice); Kevin J. Vanhoozer, *Discourse on Matter: Hermeneutics and the "Miracle" of Understanding*, *in* HERMENEUTICS AT THE CROSSROADS 3, 3–5, 13–14 (Kevin J. Vanhoozer et al. eds., 2006) [hereinafter Vanhoozer, *Discourse on Matter*] (asserting the knowability of

throughout this Article will rely on Vanhoozer's work, although I may differ from his positions in various ways. I will argue that the use of speech-act theory to undergird a distinction between "meaning" and "significance" supports the originalists' closely related distinction between "interpretation" and "construction" as well as originalism's fixation thesis. I will then explain how these arguments may be fruitfully employed to support originalist claims against challengers, specifically addressing the work of André LeDuc, who argues for multiple modalities of constitutional argumentation, and the work of Francis J. Mootz III, who claims that constitutional meaning changes over time.[25]

I will argue that the concept of a speech act as an event that occurs at a point in time implies that the content of that speech act (i.e., its meaning) is fixed at the time of the speech act itself. Because a speech act is a public action that often draws on conventions to convey meaning, its content should be assessed in terms of its original context (including linguistic, historical, and textual contexts).[26] Additionally, although a given action is fixed at a point in time, it may have continuing ramifications. This ongoing significance is not part of the original speech act. Consequently, the activity of determining a text's meaning ("interpretation") is distinct from the activity of determining its significance, i.e., applying it to the interpreter's situation ("construction"). Speech-act theory thus provides helpful support for originalism's interpretation-construction distinction and fixation thesis.[27]

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text's meaning and using speech-act theory in conjunction with hermeneutics, and also responding to scholars like Gadamer); Kevin J. Vanhoozer, *Lost in Interpretation?: Truth, Scripture, and Hermeneutics*, 48 J. EVANGELICAL THEOLOGICAL SOC'Y 89, 90–92, 96–97 (2005) [hereinafter Vanhoozer, *Lost in Interpretation?*] (asserting belief in the fixed meaning of the Biblical text, the knowability of Biblical truth, and the difference between a text's truth and various interpretative traditions respecting the text).

[25] *See* André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and the Promise of Our American Constitution*, 26 WM. & MARY BILL RTS. J. 101, 144, 155 n.371, 180 n.547 (2017) (asserting belief in multiple modalities of constitutional interpretation and arguing that courts choose between the competing modalities based on which argument is more persuasive); FRANCIS J. MOOTZ III, GETTING OVER THE ORIGINALIST FIXATION, IN THE NATURE OF LEGAL INTERPRETATION: WHAT JURISTS CAN LEARN ABOUT LEGAL INTERPRETATION FROM LINGUISTICS AND PHILOSOPHY 161–63 (Brian G. Slocum ed., 2017) (asserting that the Constitution does not "have an essential and unvarying meaning" because interpretation cannot be divorced from application and a neutral interpretation is impossible).

[26] *See* JOHN R. SEARLE, SPEECH ACTS 16, 18 (1969) (asserting that speakers perform speech acts according to certain rules, and that this practice allows the interpreter to determine the speech act's meaning based on the speaker's literal words and the context surrounding the speech act).

[27] *See* Lawrence B. Solum, *Legal Theory Lexicon 21: Speech Acts*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2004/02/legal_theory_le_4.html

I. ORIGINALISM

It may be helpful to begin with a brief summary of originalism. Originalism is not strictly a single theory but is instead a family of theories.[28] Proponents differ on various points, but originalists are united in their subscription to two basic theses.[29] First, the "fixation thesis" proposes that "[t]he object of constitutional interpretation is the communicative content of the constitutional text as that content was fixed when each provision was framed and/or ratified."[30] Second, the "constraint principle" posits that "[c]onstitutional practice . . . should be constrained by the original meaning" of the Constitution, or at least "consistent with the original meaning."[31] This Article will focus primarily on debates related to the fixation thesis, since, as noted above, the normative arguments for and against the constraint principle have little in common with their biblical counterparts.

The New Originalism adds further precision to originalist theory through two additional doctrines: the public meaning thesis and the interpretation-construction distinction.[32] The public meaning thesis clarifies that the "meaning" originalists should seek to determine is the "original public meaning of the text" rather than "the subjective intentions" of the framers or ratifiers of the Constitution.[33] Textualism is a corollary of the public meaning thesis: because interpreters ought to seek the objective, publicly available communicative content of constitutional provisions, the text itself is the best evidence for meaning, and we ought not to base our interpretation of a provision on extrinsic

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(July 4, 2021) (affirming that speech act theorists recognize that language can be used to perform actions and asserting that "the question of meaning depends on the context of utterance"); VANHOOZER, *supra* note 2, at 259–60 (positing that, while meaning is fixed at the time the author speaks or writes the words, significance is derived by the interpreter when he applies the fixed meaning to his own context).

[28] Solum, *Originalism*, *supra* note 1.

[29] *See* Solum, *supra* note 2, at 4 (noting that almost every originalist thinker holds to the fixation thesis and the constraint thesis).

[30] Lawrence B. Solum, *Originalism, Hermeneutics, and the Fixation Thesis*, *in* THE NATURE OF LEGAL INTERPRETATION 130, 135 (Brian G. Slocum ed. 2017). Note that the fixation thesis is *not* a claim that constitutional doctrine or practice is fixed at the time constitutional provisions were enacted; only constitutional *meaning*, the communicative content, is fixed. *Id.* at 136.

[31] Lawrence B. Solum, *Legal Theory Lexicon 071: The New Originalism*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2013/02/legal-theory-lexicon-071-the-new-originalism.html (June 5, 2022).

[32] *See* Solum, *supra* note 2, at 4 (noting that originalists who hold to the public meaning thesis, the interpretation-construction distinction, the fixation thesis, and the textual constraint thesis are known as New Originalists).

[33] Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 415 (2013).

evidence of legislative intent.[34] Methodologically, the communicative content of various provisions is interpreted using evidence pertaining to the ordinary use of terms (e.g. dictionaries and corpus linguistics analysis), but at least some proponents also recognize the possibility that technical legal terms are used in some instances.[35] Moreover, meaning need not be limited to the "thin" textual meaning stated by dictionary definitions of each word; communicative content includes contextual enrichment, studied through the discipline of "pragmatics."[36] Because the New Originalism undertakes a factual inquiry to determine objective public meaning "rather than a *counter*factual reconstruction of the subjective intentions of an individual or group," it avoids many of criticisms leveled against original intent originalism related to the impossibility of accessing the secret thoughts of individuals long dead or the problem of collective intent.[37]

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[34] *See* SCALIA, *supra* note 4, at 16–17, 24–25 (suggesting that interpreters should seek the objective meaning of a legal text regardless of legislative intent and that words have a limited range of meaning that constrains the interpretation). Randy Barnett likens the search for original meaning to the determination of contractual meaning through the doctrine of objective consent, namely the idea that a contractual promise must be interpreted in the manner in which it "would be understood by a reasonable person in the relevant community of discourse" rather than based on "the subjective mental state of the promisor." Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999). Note, however, that the intent of the ratifiers or statements from the founding generation may hold relevance to some originalists, as they could serve "as circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener." *Id.* at 622.

[35] *See* Barnett, *supra* note 34, at 621 (explaining that originalists use dictionary definitions, common contemporary meanings, and logical inferences from the structure and general purposes of the text as tools to aid in interpretation); Solum, *Originalist Methodology*, *supra* note 18, at 269, 270, 271–72 (showing that some originalists recognize that certain technical legal terms and definitions have been historically developed).

[36] *See* Solum, *Originalist Methodology*, *supra* note 18, at 269, 272 (asserting that the bare semantic meaning of words is not the complete understanding because the full communicative meaning is derived from context); *cf.* Scott Soames, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, in PHILOSOPHICAL ESSAYS 403, 403–04 (2009) (arguing that the law "often includes information that goes beyond the semantic contents of the sentences involved"). *See generally* Paul Grice, *Presupposition and Conversational Implicature*, *in* RADICAL PRAGMATICS 183, 183–98 (Peter Cole ed., 1981) (discussing the role of conversational implicature and presuppositions in discerning full and true meaning); H. P. Grice, *Utterer's Meaning, Sentence-Meaning and Word-Meaning*, 4 FOUNDS. LANGUAGE 225, 225 (1968) (discussing the role of implicature in conveying meaning).

[37] Barnett, *supra* note 33, at 415; *see id.* at 415–16 (asserting that since New Originalism is an empirical endeavor it can appeal to evidence to resolve conflicts over objective meaning and that this practice avoids many of the criticisms leveled against original intent originalists on the grounds that it is impossible to discern intent).

Second, the New Originalism clarifies the scope of its claims via the "interpretation-construction distinction."[38] While meaning (accessed by interpretation) is fixed at the time the constitutional provisions were enacted, application or legal effect (determined through construction) may legitimately change over time.[39] Specifically, "[i]nterpretation is an empirical inquiry" into "[t]he communicative content of a text" (using grammar and syntax, textual and historical context, etc.).[40] But "construction" is the process of giving legal effect to that communicative content.[41] Because interpretation seeks to determine an empirical fact, "[i]nterpretations are either true or false in theory—although in practice there may be some cases in which we lack sufficient evidence to show that a particular interpretation is true or false."[42] Constructions are not true or false in the same way as interpretations.[43]

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[38] *Id.* at 419. *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION 5 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION] (explaining that drawing distinctions between constitutional interpretation and construction can help clarify the specific function and limitations of originalism within constitutional theory); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 1–4 (1999) (arguing that constitutional meaning can be partially discovered by interpretive methods, but that application to particular circumstances "must be constructed from the political melding of the document with external interests and principles"); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 56 (1839) ("Construction is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text.").

[39] *See* Barnett, *supra* note 33, at 418–20 (asserting that, while the Constitution's meaning is fixed, legitimate changes in application will happen over time).

[40] Solum, *supra* note 30, at 134.

[41] *Id.*; Solum, *Originalist Methodology*, *supra* note 18, at 271, 272. Originalists may vary in their beliefs on when and whether construction is needed, depending on whether the interpretation is obvious or difficult. *Compare* Solum, *supra* note 30, at 134 (indicating that even when interpretation is easy, such as in determining the meaning of the constitutional requirement of two senators per state, construction is nonetheless needed, although "the construction (legal effect) to be given to the text seems obvious and intuitive"), *with* Barnett, *supra* note 33, at 419 (reasoning that "construction is needed precisely when . . . *communicative meaning is not sufficiently determinate to dictate a unique application,*" not when the language is clear), *and* WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 38, at 7 (indicating that the "precondition [of constitutional construction] is that parts of the constitutional text have no discoverable meaning," and positing that only some texts may require "something beyond interpretation").

[42] Solum, *supra* note 30, at 134.

[43] *See id.* (asserting that constructions are not empirical facts but are subjective and "justified by normative considerations"). *See generally* Lawrence B. Solum, *Legal Theory Lexicon 063: Interpretation and Construction*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2008/04/legal-theory-le.html (Apr. 10, 2022) [hereinafter Solum, *Interpretation and Construction*] (positing that "there is a difference between the inquiry into the linguistic meaning of a legal text and the creation or application of subsidiary rules that translate the semantic content into legal content"). Thus,

The fixation thesis relates to the communicative content of the Constitution, *but not its legal effect*; thus, the fixation thesis applies only to this first step (interpretation), not to the activity of construction.[44] Construction is not an empirical inquiry and is not necessarily fixed at the time of enactment; "[c]onstructions are justified by normative considerations," which may be drawn from political morality or from legal norms. [45] Construction must nevertheless be consistent with the original meaning of the text.[46] But, while the fixation thesis applies only to the communicative content of the text, the constraint principle applies to both the communicative content of the text (the goal of interpretation) and the legal effect of the text (the goal of construction).[47]

Finally, it is worth noting that the New Originalists often express the aims and scope of their project with more modesty than former originalists may have done, perhaps in part because many of the New Originalists do not justify their methodology based on a desire for judicial restraint.[48] Judicial restraint is best understood as a desire for judicial "deference to legislative majorities," namely the idea that judges should generally refrain as much as possible from exercising the power of judicial review to strike down legislative action.[49] Judicial restraint is sometimes

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unlike interpretations which can be true or false because they are representative of the text's objective original meaning, constructions cannot be true or false because they are subjective applications of rules that are translated into legal content.

[44] The express and implied public meaning of the Constitution is fixed, and judges may not change its original meaning, but judges may construe the Constitution's legal effect as applied to the case before them. *Cf.* Barnett, *supra* note 33, at 419 ("When original meaning runs out, constitutional 'interpretation,' strictly speaking, is over, and some new *non*interpretive activity must supplement the information revealed by interpretation.").

[45] Solum, *supra* note 30, at 134–35.

[46] *See* Barnett, *supra* note 33, at 419–20 (noting that, despite the Constitution's open-endedness, a construction is improper if it contradicts what the Constitution says); *see also* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 430 (1985) ("[L]inguistically articulated rules . . . exclud[e] wrong answers rather than point[] to right ones . . . . The language of a clause . . . establishes a boundary, or a frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes within the frame, it does tell us when we have gone outside it." (footnote omitted)).

[47] *See* Solum, *supra* note 30, at 132–33, 135–37 (explaining that while the constraint principle applies to both the communicative content and the legal effect of the text, the fixation thesis is a claim only about the meaning of the communicative content—not the legal application).

[48] *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 38, at 4 ("I do not rely on traditional originalist arguments in favor of judicial restraint. Judicial restraint is an inadequate basis for justifying an originalist jurisprudence.").

[49] Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 751 (2011).

used as a normative justification for originalism,[50] but it is not a necessary aspect of the theory.[51] In contrast, judicial *constraint* is one of the central tenets of originalism and continues to be espoused by the New Originalists.[52] Judicial constraint is the idea that the Constitution "narrow[s] the discretion of judges," because all judicial decisions must be consistent with the original meaning of the Constitution's text.[53]

For the New Originalists, the amount of constraint provided by a particular textual provision depends on the degree of underdeterminacy in that provision.[54] For instance, some provisions are framed as clear-cut rules (e.g., two senators per state) that provide a high degree of constraint, while other provisions may employ "open textured" or "vague" language (e.g., prohibition of "unreasonable searches and seizures" or "cruel and unusual punishments") that provide less constraint.[55] Most of the New Originalists acknowledge that, although the communicative content of the Constitution is *fixed*, it is not fully *determinable* in the sense of providing absolute certainty about our interpretations and not fully *determinate* in the sense of resolving every question of constitutional law.[56] The answers

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[50] *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 602 (2004) (explaining that originalism satisfies a commitment to judicial restraint). *See generally* SCALIA, *supra* note 4, at 10–14 (suggesting that a failure to adhere to the original meaning of texts has "appreciably eroded" the doctrine of stare decisis); ROBERT H. BORK, THE TEMPTING OF AMERICA 159 (1990) ("[I]t should be said that those who adhere to a philosophy of original understanding are more likely to respect precedent than those who do not.").

[51] *See* Colby, *supra* note 49, at 724–25 (suggesting that judicial restraint may be a consequence of originalism, but it is not necessary for every situation).

[52] *See id.* at 751 ("[A]lthough originalism in its New incarnation no longer emphasizes judicial *restraint* . . . it continues to a substantial degree to emphasize judicial *constraint* . . . .").

[53] *Id.*; *see also* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 524–26 (2013) (arguing that judicial constraint, at a minimum, "limits the range of possible constructions to those that are consistent with the constitutional text . . . .").

[54] *See* Solum, *supra* note 30, at 144 (arguing that underdeterminacy is supported by some new originalists); Solum, *supra* note 53, at 525–26 (explaining that the degree of constitutional constraint is a complex scalar impacted by both the degree of determinacy of a given text and the degree to which officials are, in practice, bound by the communicative content of the constitutional text).

[55] U.S. CONST. art. I, § 3; *id.* amends. IV, VIII; *see* Lawrence Solum, *Legal Theory Lexicon 051: Vagueness and Ambiguity*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/interpretation/ (Jan. 23, 2022) ("[W]hen a text is vague, it is usually the case that interpretation cannot resolve the vagueness.").

[56] *See, e.g.*, Lawrence Solum, *Legal Theory Lexicon: The New Originalism*, LEGAL THEORY BLOG (June 5, 2022), https://lsolum.typepad.com/legaltheory/2022/06/legal-theory-lexicon-the-new-originalism.html (explaining that, although originalists believe that the constitutional text is fixed, some new originalists believe the text is "not fully determinate"); Solum, *supra* note 30, at 144 ("The fixation thesis claims that the communicative content of

to some of our questions about constitutional meaning may ultimately be uncertain. Moreover, "the New Originalism frankly acknowledges that the text of 'this Constitution' does not provide definitive answers to all cases and controversies . . . . [T]he Framers and ratifiers of the Constitution . . . delegated [some] matters to future decisionmakers."[57] Failure to appreciate the more modest claims of the New Originalism and to understand that there are various normative justifications for originalism (not merely a desire for judicial restraint) has sometimes led to seemingly misplaced criticism of originalists.[58] Originalism is a methodology; it does not contain its own inherent normative justifications.[59] Proponents may disagree about *why* we should be originalists while agreeing that originalism is the best approach to constitutional law.

I. SPEECH-ACT THEORY

I now turn to a brief summary of J. L. Austin's speech-act theory.Thereafter, I will show how Vanhoozer employs Austin's insights in support of his biblical hermeneutic and explore the ramifications for constitutional interpretation. I will then explain how speech-act theory

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the constitutional text is *fixed*, but it does not claim that this content is fully *determinate*."); *see also id.* at 153 (noting that "[n]othing much hangs on the question whether we can be certain about the original meaning" of constitutional provisions). I will, however, argue that the text is determinate in the sense of having a definite meaning, even where that meaning does not resolve every aspect of constitutional law (i.e., it may be underdeterminate) or is not fully determinable in practice. *See generally* Lawrence Solum, *Legal Theory Lexicon: Indeterminacy, Determinacy, and Underdeterminacy*, LEGAL THEORY BLOG (Mar. 4, 2018), http://lsolum.typepad.com/legaltheory/2018/03/legal-theory-lexicon-indeterminacy-determinacy-and-underdeterminacy.html [hereinafter Solum, *Indeterminacy, Determinacy, and Underdeterminacy*] (distinguishing between "indeterminacy," i.e., "the claim that the law does not constrain judicial decisions," and "underdeterminacy," the claim that in some cases "the outcome . . . can vary within limits that are defined by the legal materials").

[57] Barnett, *supra* note 33, at 419.

[58] *See, e.g.*, André LeDuc, *Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism*, 16 U.N.H. L. REV. 51, 103 (2017) ("Originalists who distinguish constitutional construction from interpretation must (and do) offer an account for when construction is permitted. When they offer this account, however, they compromise the originalist agenda of restricting judicial discretion and the role of judgment."(footnote omitted)); Robert W. Bennett, *Are We All Living Constitutionalists Now?*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE, 165, 166–69 (2011) (asserting that Solum's acknowledgment of the existence of "construction zone[s]" and a possible "national emergency exception" to the application of originalist principles "creates an obvious tension in his defense of originalism"); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 598–99 (2008) (positing that because originalism is unable to uncover "a single publicly shared understanding" of the meaning of "rights-bearing provisions," originalism "falters in interpreting the very provisions that are the primary target of [its] constraining promise").

[59] *See* Solum, *Originalist Methodology*, *supra* note 18, at 269–70 (defining originalism as "a family of contemporary theories of constitutional interpretation and construction that share two core ideas," namely fixation and constraint).

undergirds Vanhoozer's meaning-significance distinction, which in turn provides support for the interpretation-construction distinction and the fixation thesis.

J. L. Austin's fundamental insight is that we use words to perform a variety of functions, not merely to make true or false statements that assert propositional content; we do things with words.[60] Austin distinguishes three aspects of utterances: locutions, illocutions, and perlocutions.[61] To "say something" is to perform "a locutionary act"; a locution is a "full unit[] of speech."[62] An "illocution" describes the precise "way [in which] we are using [speech] on this occasion."[63] While locution describes the sense and reference of an utterance, illocution describes the force of an utterance (e.g., an order or a question).[64] Finally, a perlocution deals with the "consequential effects" of an utterance.[65]

Several aspects of Austin's speech-act theory have ramifications for hermeneutics. First, communicative content is thicker than linguistic meaning and is determined at least in part by conventions and shared expectations.[66] Second, a communicative event is a fixed, past occurrence.[67] Third, the perlocutions, or results, of an utterance may continue far beyond the initial speech act.[68]

A. "Thick" Communicative Content

Austin's analysis reveals that the meaning of an utterance must be understood not merely in terms of the semantic content of the words comprising the utterance (the locution), but also in terms of the utterance's illocutionary force.[69] Illocutionary force is determined largely

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[60] *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 133–47 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975) (explaining that linguistic acts do things or make things happen).

[61] *Id.* at 94–95, 98–108.

[62] *Id.* at 94.

[63] *Id.* at 99–100.

[64] *Id.* at 100.

[65] *Id.* at 101 (explaining that "[s]aying something" is bound to affect the "feelings, thoughts or actions of the audience, or of the speaker, or of other persons" and that speech acts are often "done with the design, intention, or purpose of producing" such results). Vanhoozer adds a fourth dimension to a speech act, which he labels "the interlocutionary" dimension. *See* VANHOOZER, *supra* note 2, at 219 (describing the interlocutionary dimension of speech as "the covenant of discourse" because discourse is "a means of personal communication and communion").

[66] *See infra* Section II.A.

[67] *See infra* Section II.B.

[68] *See infra* Section II.C.

[69] *Cf.* VANHOOZER, *supra* note 2, at 240 ("Meaning is more than vocabulary and syntax . . . though it cannot be grasped apart from them . . . .").

by context.[70] Furthermore, illocutionary acts are often inherently conventional.[71] In other words, speech acts frequently accomplish their intended illocutionary effect by means of an existing conventional procedure that is appropriately invoked in the particular circumstances.[72] Thus, words may be used to accomplish a great variety of actions, including forming contracts ("I promise"), marrying ("I do") or bequeathing ("I, John Doe, being of sound mind and body, do declare this to be my Last Will and Testament. . . ."). But where there is no accepted convention for *these* words spoken in *this* context to accomplish *this* purpose, the words may fail to achieve their communicative aim.[73]

Vanhoozer helpfully elaborates on Austin's insight in the context of biblical interpretation. He points out that meaning is a matter of illocutions; thus, an illocution has been successful if "*understanding*" is achieved.[74] Significantly, communicative content is thicker than mere linguistic meaning of individual words (i.e., the locution), but it is also thinner than all the extended effects that a particular communication may have (i.e., the perlocution).[75] Communicative content includes the

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[70] *See* AUSTIN, *supra* note 60, at 99 (implying that illocutionary sense may only be determined by understanding how a locution is being used on a particular occasion).

[71] *Id.* at 121.

[72] *See id.* at 14–15 (positing that illocutionary effect may *only* be achieved by invoking conventions that are already in place). Austin's view appears to overlook the fact that some communicative acts may successfully achieve their desired illocutionary force the very first time they are used in a particular way, even if there is not a *prior* convention in place. *See, e.g.*, Richard E. Grandy & Richard Warner, *Paul Grice*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2022), https://plato.stanford.edu/entries/grice/ (implying that another car flashing its headlights at an intersection at night would give a driver a cue that his own headlights were off, even absent a convention for such communication); *see also* H. P. Grice, *Meaning*, 66 PHIL. REV. 377, 387 (1957) ("Explicitly formulated linguistic (or quasi-linguistic) intentions are no doubt comparatively rare. In their absence we would seem to rely on very much the same kinds of criteria as we do in the case of nonlinguistic intentions where there is a general usage. An utterer is held to intend to convey what is normally conveyed (or normally intended to be conveyed), and we require a good reason for accepting that a particular use diverges from the general usage . . . .").

[73] *See* AUSTIN, *supra* note 60, at 14–15 (discussing "the doctrine of *the things that can be and go wrong* on the occasion of such utterances"); *id.* at 102–03 (distinguishing between "effects" that are inherent to the utterance itself when performed in the proper context, which are part of the speech act's illocution, with "mere conventional consequences" that are produced by the utterances, i.e., further effects brought about by a speech-act, which fall into the class of perlocutions).

[74] VANHOOZER, *supra* note 2, at 243 ("As Searle rightly puts it: '*The characteristic intended effect of meaning is understanding*.'" (quoting SEARLE, *supra* note 26, at 47)).

[75] *See* Solum, *supra* note 53, at 474 (defining communicative content as "[t]he contextually enriched semantic content of a text or utterance–also referred to as 'linguistic meaning' or 'meaning'"). *See generally* VANHOOZER, *supra* note 2, at 285, 305 (explaining that thin descriptions omit "the broader context" and "suffer from a poverty of meaning" and that thick descriptions require "an account of what the author is doing" in "the narrative context[]").

"meaning," what may be grasped by interpretation, but it does not include the applications or effects of the utterance.[76] Moreover, Vanhoozer concurs with Austin that communicative intent is manifested by means of "recognizable linguistic conventions."[77]

This insight is significant for constitutional law and biblical studies because it implies that the meaning of words is partly the function of their context; this includes both textual and situational context. Scott Soames has unpacked this idea and its implications for constitutional interpretation in some detail.[78] He notes that, as a result of contextual enrichment, "interpretation" is sometimes thicker than previously thought.[79] Indeed, a misunderstanding of the role of constitutional enrichment sometimes causes interpreters to mislabel interpretation as construction.[80] This mistake is significant where the distinction between interpretation and construction differentiates a realm governed by the fixation thesis from the "construction zone."[81]

In sum, meaning is a function of an utterance's "illocution" and includes contextual enrichment.[82] Meaning is communicated at least in

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[76] *See, e.g.*, VANHOOZER, *supra* note 2, at 243 ("For Searle, however, meaning is a matter specifically of illocutionary, not perlocutionary, effects. If I make a statement, I succeed in communicating if I achieve an illocutionary effect (viz., the hearer understands my utterance as a statement). My success in transmitting my intended meaning does not mean that a listener has to agree with me.").

[77] *Id.*

[78] *See generally* Scott Soames, *Toward A Theory of Legal Interpretation*, 6 N.Y.U. J.L. & LIBERTY 231, 231–32, 36 (2011) (arguing that constitutional interpretation should not rely upon original meaning nor original intent but on the original content asserted in the text that is adopted by lawmakers whose work and use of language, carried out in their official capacities, also help inform and determine the law); Scott Soames, Language, Meaning, and Assertion: A Primer for Originalists, *in* Originalism Boot Camp 239, 247 (2017) (unpublished manuscript) (on file with Georgetown University Law Center) (arguing that interpretation should look to what was being originally asserted based on the semantic meaning of the words used in the text and the original context in which they occurred).

[79] *See, e.g.*, Soames, *supra* note 78, at 248 (arguing that a proper interpretation of the Compact Clause, based on the text's original assertion, applies to those agreements or compacts "*that diminish[] federal supremacy*").

[80] *See id.* (arguing that constitutional interpretation is sometimes confused with constitutional construction because of a misunderstanding of the relationship between a text's linguistic meaning and a text's assertion).

[81] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 12 (2015) (arguing that determining constitutional content requires moving beyond interpretation into "the construction zone").

[82] *See supra* notes 70–71 and accompanying text (explaining that an illocution often follows convention and that its effect is primarily determined by context).

part by means of convention.[83] Meaning does not include a text's effects or applications.[84]

A. A Communicative Event is Fixed in the Past

Second, Austin's focus on utterances as actions means that an utterance is fixed at a particular point in time.[85] In the case of written words, a text is "a medium of illocutionary acts."[86] Thus, communication through a text is "the action that puts a language system into motion at a particular point in time by realizing certain possibilities offered by" the system of signs that comprise a language.[87] In other words, communication through a text invokes a particular linguistic system to communicate conventional semantic meaning.[88]

This insight has at least three implications for hermeneutics. First, the focus on an utterance as an event supports the fixation thesis.[89] Once completed, an event cannot be retroactively altered.[90] The meaning of a communicative act is fixed at the time the act is completed.[91] Second, because performing a speech act (or writing a text) is a public act that often relies on conventions to convey meaning, "[u]nderstanding an author's intention is not a matter of recovering psychic phenomena but of reconstructing a public performance in terms that makes its nature as an intended action clear."[92] Thus, in support of public meaning originalism (against original intent originalism), the relevant "meaning" or "intention" to seek in a text is not the "hidden mental state[]" of the author but the

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[83] *See supra* notes 72–74 and accompanying text (explaining that when convention fails, communication may also fail).

[84] *See supra* note 76 and accompanying text (explaining that communicative content provides the meaning of a text but not necessarily its applications or effects).

[85] *See* AUSTIN, *supra* note 60, at 139 (indicating that, in determining meaning, "what we have to study is *not* the sentence but the issuing of an utterance in a speech situation").

[86] Vanhoozer, *Discourse on Matter*, *supra* note 24, at 21.

[87] VANHOOZER, *supra* note 2, at 222.

[88] *See id.* (explaining that the field of communication studies has resulted in two main approaches, "communication as the transmission of messages" and "communication as the textual and cultural production of meaning through sign systems," and indicating that both approaches are required when analyzing communicative action).

[89] *See, e.g.*, Solum, *supra* note 81, at 17–18 (arguing that the communicative content of an utterance is time-bound, because it is "a function of the meaning at the time the communication was produced" and impacted by its context).

[90] *See* VANHOOZER, *supra* note 2, at 259 (arguing that meaning is rooted in past action, which is irreversible and unchangeable).

[91] *See id.* ("Textual meaning does not change because it is tied to what an author intended, and did, in the past.").

[92] *Id.* at 252; *see also* SEARLE, *supra* note 26, at 16 (arguing that speaking is a performance or production that abides by a certain set of rules).

publicly accessible meaning available via the text itself.[93] Finally, because "understanding relies on shared contexts,"[94] characterizing an utterance or the enactment of a text as a past event means that the *original* context will be the relevant context for determining the meaning of that past event.[95] This original context includes both its historical context and its linguistic context.[96]

The concept of "genre" is one way in which texts employ contextual conventions to convey meaning.[97] Through genre, a speech act invokes a particular set of conventions and expectations.[98] Scripture is not merely a string of propositions; rather, it employs various methods of conveying meaning.[99] One does not properly understand Scripture unless one begins to grasp the varying conventions and techniques used to communicate in the context of prophecy, law, psalm, etc.[100] Additionally, certain genres are actually intended to speak far beyond their original context.[101] Vanhoozer discusses the concept of Scripture as "canon," namely the idea that, as a divinely inspired text, Scripture was intended to speak beyond the narrow

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[93] VANHOOZER, *supra* note 2, at 252; *see* Vanhoozer, *Discourse on Matter*, *supra* note 24, at 21 (clarifying that the author's intention is not necessary to understand the meaning of the text but is necessary "in giving a description" of the author's "speech act"); *see also* Barnett, *supra* note 33, at 415 (arguing that New Originalism's goal is to discover the public meaning of the text in its original context rather than the original intent).

[94] VANHOOZER, *supra* note 2, at 251.

[95] *See id.* at 210 (indicating that, to resolve uncertainty regarding "which language game is being played" and "what rules are in force," one must "locat[e] the speech act in a particular context").

[96] *See id.* at 250 (defining context as "the various factors" that must be considered "to understand the author's intention").

[97] *See id.* at 346–37 (explaining that genre is more than just a tool for classifying literature; it is also part of how the reader understands a text).

[98] *See id.* at 338 (describing genres as "communicative *practices* rather than as isolated communicative acts"); *see also* John O. McGinnis & Michael B. Rappaport, Defending Original Methods, *in* Originalism Boot Camp 121–23, 131, 134–36, 138 (May 21–26, 2017) (unpublished manuscript) (on file with the Georgetown University Law Center) (arguing that the Constitution must be understood based on its genre as "law" and interpreted in accordance with the conventions that would have been in place at the time of its enactment).

[99] *See* Vanhoozer, *Lost in Interpretation?*, *supra* note 24, at 100 (cautioning that if the Bible is treated merely as a series of propositional truths, its poetic and affective elements are obscured and, consequently, some portion of its ultimate meaning is lost).

[100] *See* VANHOOZER, *supra* note 2, at 245 ("Textual meaning is in large part a matter of the literary conventions that an author intentionally invokes and puts to work."); Vanhoozer, *Lost in Interpretation?*, *supra* note 24, at 100 (arguing that a view of Scripture that limits it to propositional truths neglects its other aspects, typified through genre).

[101] *See* VANHOOZER, *supra* note 2, at 340 (explaining that genre can have "a historical context that conditions but does not determine it"); *id.* at 347 (discussing how the rules inherent in a genre communicate meaning to readers across different times and contexts, connecting them to the author's intent).

original context in which it was written.[102] Like the Bible, the Constitution was designed to speak to generations far beyond its own immediate context.[103] Consequently, it may function in future circumstances in ways that the writer never could have foreseen, in at least two senses.

First, application of the Constitution may vary over time.[104] The Constitution does not, could not, and was not intended to, flesh out all the details of future application.[105] A finite text drafted by authors with limited knowledge of the situations in which the text would be applied could never address the infinite number of contingencies necessary to spell out the precise application in various circumstances.[106] Correctly understanding the genre thus requires the decisionmaker to acknowledge that application may not be spelled out in the text itself, and may not even be stable over time. The text may be applied to new circumstances in ways that are consistent with its original meaning, even if those applications could not have been foreseen by the original author.[107] Interpretation does not change over time (because meaning is fixed); but construction may often change over time (because application is varied and depends on changing circumstances).[108]

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[102] *See id.* at 245, 282 (discussing how textual contexts, such as the canonical context, allow the reader to move from the original meaning of the text to its contemporary application).

[103] *See* THE FEDERALIST NO. 34, at 163 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (arguing that, in the context of the government's power to raise revenues, the Constitution must be drafted in a way that is not "framed upon a calculation of existing exigencies," but instead gives it the "CAPACITY to provide for future contingencies, as they may happen" and for future generations to adapt its provisions).

[104] *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (explaining that the language used by the Framers of the Constitution makes it clear that they did not enumerate all of its applications but left many to be decided later).

[105] *See id.* (explaining that "we must never forget that it is a *constitution* we are expounding," which "requires[] that only its great outlines should be marked").

[106] Note that in the context of Biblical interpretation, some interpreters could conclude that the meaning of a divinely inspired text is *not* time-bound in the sense postulated by the fixation thesis. Because an omniscient God would be aware of future circumstances, including linguistic drift, it is conceivable that divine authorship could be taken to imply that particular passages might have meanings that would only unfold at a later time and would have been incomprehensible to their human authors. Because this is not an area of crossover between biblical and constitutional interpretation (as no constitutional interpreters posit an omniscient author), I do not interact with this view here.

[107] *See* Solum, *Originalism*, *supra* note 1 (explaining that although originalists believe in a fixed linguistic meaning of the constitutional text, but that many originalists also assert that construction, or application, is a separate activity that takes place when the text's meaning "runs out").

[108] *See* Solum, *Interpretation and Construction*, *supra* note 43 (defining interpretation as the "activity of discerning the linguistic meaning in context" while defining construction as the "activity of determining the legal effect" of the text).

Second, the Constitution, as a document intended to speak beyond its immediate circumstances, may employ language that is underdeterminate in the sense of being vague or open-textured.[109] Rather than specifically laying out the terms on which a decision will be made, a text may allow space where the meaning of the text itself is "fuzzy." [110] Legal theorists distinguish between different types of binding norms enacted into law, including "rules," "standards," and "principles."[111] Rather than delineating detailed prescriptive rules in every case, lawmakers may delegate some decisions to future generations by employing standards, principles, or silences.[112] These different types of norms provide decisionmakers with various amounts of discretion.[113] Although a bright-line rule tends to be "constraining and rigid," a standard "provide[s] a greater range of choice or discretion" by "defin[ing] a set of mandatory considerations," and a principle leaves yet more room for discretion because it "provides mandatory considerations for judges" while "leaving open the possibility that other unspecified considerations may be relevant to the decision."[114] Where the language employed is truly open-textured, interpreters are not adding to the meaning of the text by acknowledging its open-endedness; "[t]he latent potential of a text is really

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[109] Language is vague if it admits of borderline cases (e.g., words like "tall" or "beautiful"). Solum, *supra* note 55. Language is open-textured if application of a given term is sometimes unclear in a way that allows for interpretive discretion. *See* Jake Wade Nowlin, *Constitutional Violations by the United States Supreme Court: Analytical Foundations*, 2005 U. ILL. L. REV. 1123, 1150 (2005) (explaining H.L.A. Hart's insight that "the language of a rule read in light of its context will often provide a 'settled core' of meaning as well as an 'open texture' of interpretive discretion"). *See generally* H.L.A. HART, THE CONCEPT OF LAW 127–28, 129, 130–31, 135–36 (3d ed. 2012) (arguing that, because the circumstances of life are so varied and human ability to anticipate all outcomes is so limited, the law should be underdetermined to allow for applications that vary with circumstances); Friedrich Waismann, *Proceedings of the Aristotelian Society, Supplementary Volumes*, 19 ANALYSIS & METAPHYSICS 119, 121–23, 125–26, 133 (1945) (arguing that concepts like open-texture are part how we verify the meaning of language).

[110] *Cf.* Barnett, *supra* note 33, at 419 (indicating that the Fourth Amendment's use of the word "reasonable" and the Eighth Amendment's use of the term "cruel" are vague).

[111] *See* Lawrence B. Solum, *Legal Theory Lexicon 026: Rules, Standards, Principles, Catalogs, and Discretion*, LEGAL THEORY BLOG, http://lsolum.typepad.com/legal_theory_lexicon/2004/03/legal_theory_le_3.html (Aug. 7, 2021) (explaining that rules provide the most constraint, standards provide a moderate amount of constraint, and principles provide the least amount of constraint).

[112] *See* Jack M. Balkin, *Nine Perspectives on* Living Originalism, 2012 U. ILL. L. REV. 815, 829 (2008) (arguing that constitutions are framed with constraints such as principles, standards, or silences, and that these tools allow later generations to implement the meaning of the text across varying circumstances).

[113] *See* Solum, *supra* note 111 (explaining how rules, standards, and principles can be applied to achieve various policy goals, such as legal predictability, flexibility, or fairness).

[114] *Id.*

there . . . ."[115] In these cases, the underdeterminacy is intentional and, in fact, "is a definite feature of the meaning of the text."[116] Consequently, accurate interpretation sometimes requires an acknowledgment that a text's meaning itself may be open-ended.

Thus, recognizing the distinctive generic rules governing a constitution that is designed to last and to apply in changing times and shifting contexts sheds new light on our interpretive project. Specifically, a correct interpretation of the original meaning may require an acknowledgment that application was intended to change over time.[117] That application is not itself part of the original meaning, but the fixed meaning often allows room for changing application.[118] Additionally, meaning itself is sometimes intentionally underdeterminate, leaving room for the discretion of future decisionmakers.[119]

In sum, a communicative event occurs in a certain context in the past.[120] Because it is a past event, its meaning is fixed and must be determined based on its original, publicly accessible context, including the conventions of that time and place.[121] One specific set of conventions that the Constitution invokes is genre: because it is a constitution (rather than a statutory code, narrative, or poem), we can expect the Constitution to

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[115] VANHOOZER, *supra* note 2, at 313; *see id.* ("[T]he literal sense . . . may, at times, be indeterminate or open-ended."). Vanhoozer does not appear to be using the term "indeterminate" in the technical sense used by legal theorists to convey the idea that a text provides no constraint, but rather to mean that a text may be "underdeterminate," i.e., that some aspects of meaning may not be resolved by the text. *Cf.* Solum, *Indeterminacy, Determinacy, and Underdeterminacy*, *supra* note 56 (explaining the difference between indeterminacy, determinacy, and underdeterminacy).

[116] VANHOOZER, *supra* note 2, at 313–14.

[117] *See* Barnett, *supra* note 33, at 419–20 ("[T]he New Originalism frankly acknowledges that the text of 'this Constitution' does not provide definitive answers to all cases and controversies . . . . [The Founders] locked some things into their text, and delegated other matters to future decisionmakers."); Solum, *supra* note 31 (explaining that the idea of constitutional construction allows for the fixed meaning of the text to be applied in varying circumstances).

[118] *See* Solum, *Interpretation and* Construction, *supra* note 43 (explaining that when the meaning of the constitution is intentionally vague, construction steps in to apply the constitutional provision in varying situations).

[119] *See* Solum, *supra* note 31 ("The constitutional text is not fully determinate for various reasons, especially because some constitutional provisions are vague or open-textured.").

[120] *See* VANHOOZER, *supra* note 2, at 225, 226 (arguing that communicative acts are anchored in their historical context).

[121] *See* Solum, *supra* note 31 (discussing the New Originalist's Original "Public Meaning Thesis," which argues that the meaning is fixed in the text but is discovered by understanding the broader public understanding at the time of the framing).

follow certain conventions.[122] Constitutions are meant to continue to apply to future generations, across widely divergent and unforeseen circumstances.[123] Thus, although the Constitution has fixed, determinate meaning, its application likely will vary over time; moreover, its meaning may contain vagueness or open-endedness intended to carve out a role for discretion of future decisionmakers.

B. Extended Reach of Perlocutions

Finally, unlike illocutions, which are part of the speech event, perlocutions may continue far beyond the original utterance. Thus, Austin seeks to "draw a line between an action we do (here an illocution) and its consequences" (i.e., its perlocutions).[124] In order to be successful, illocutions do need to produce a certain kind of effect, which Austin labels "uptake."[125] Uptake is generally achieved via understanding.[126] For example, an illocutionary "warning" is not performed unless the intended audience "hears what I say and takes what I say in a certain sense."[127] In contrast, perlocutions describe what we would generally think of as the effects or results of an utterance, namely "consequences in the sense of bringing about . . . changes in the natural course of events."[128] Thus, in order for my illocution to be effective, the audience must *understand* that I am warning them; in order for my perlocution to be effective, the

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[122] *See* McGinnis & Rappaport, *supra* note 98, at 122–23 (arguing that the Constitution was written "in the language of the law" and, therefore, "[l]egal interpretive rules are part of that language and are needed to understand it"). *See generally* VANHOOZER, *supra* note 2, at 336–37 (explaining the role of genre in understanding the meaning of a text). For Vanhoozer, genre is "a crucial interpretive concept that is vital to correct reasoning about literary acts, and thus vital to hermeneutical rationality . . . . A 'genre' (from the latin *genus*, 'kind') is a species of literature."*Id.* at 336.

[123] *See* THE FEDERALIST, *supra* note 103, at 163 ("[W]e must bear in mind, that we are not to confine our view to the present period, but to look forward to remote futurity."); D.C. v. Heller, 554 U.S. 570, 582 (2008) ("Just as the First Amendment protects modern forms of communications . . . , and the Fourth Amendment applies to modern forms of search . . . , the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." (citations omitted)). Further, the Constitution expressly allows future legislators to address present day application stating that "Congress . . . shall propose Amendments to this Constitution . . . ." U.S. CONST. art. V.

[124] AUSTIN, *supra* note 60, at 111; *see also* VANHOOZER, *supra* note 2, at 251 ("Consequences are not intrinsic, but extrinsic, to actions. Consequences have to do with ulterior, perlocutionary purposes.").

[125] *See* AUSTIN, *supra* note 60, at 116–17 (arguing that uptake essentially "amounts to bringing about the understanding of the meaning and of the force of the locution").

[126] *See* VANHOOZER, *supra* note 2, at 243 ("*The characteristic intended effect of meaning is understanding*." (quoting SEARLE, *supra* note 26, at 47)).

[127] AUSTIN, *supra* note 60, at 116.

[128] *Id.* at 117.

audience must actually *be alerted*.[129] Further, it is my hope in issuing the warning that the utterance will have the further "perlocutionary sequel" of *alarming* the audience so that they take action.[130]

"This 'action' model of meaning provides the best account of both the possibility of stable meaning and of the transformative capacity of texts."[131] Meaning is stable, but it may produce real, perlocutionary effects in the world.[132] Moreover, this model accounts for the fact that "[n]ot all effects are under an agent's control."[133] It is the perlocutionary force that enables a text to have "a relevance that goes beyond what the agent could have foreseen."[134] This crucial distinction between the completed communicative act and its continuing perlocutionary effects will undergird the distinction between "meaning" and "significance" and, relatedly, provide further theoretical justification for the interpretation-construction distinction posited by the New Originalists.[135]

II. MEANING-SIGNIFICANCE DISTINCTION

Vanhoozer uses the principles of speech act theory described thus far to undergird a distinction between "meaning" and "significance," which he borrows from E.D. Hirsch, Jr., and adapts. I will show, first, how speech-act theory provides a solid foundation for the meaning-significance distinction and, second, how this distinction is closely related to, and supports, the interpretation-construction distinction posited by the New Originalism. Finally, I will explain how these concepts justify the idea that original meaning is fixed at the time the Constitution was enacted.

Vanhoozer distinguishes between meaning, the communicative content that is intrinsic to the text, and significance, the ongoing relevance and impact of the text.[136] He roots this distinction in speech-act theory by distinguishing the action that occurred in the past from the ongoing

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[129] *See id.* at 118 (labeling this perlocutionary effect "the achievement of a perlocutionary object").

[130] *See id.* ("[T]he act of warning may achieve its perlocutionary object of alerting and also have the perlocutionary sequel of alarming . . . .").

[131] VANHOOZER, *supra* note 2, at 218.

[132] *See id.* at 226 (noting that a text may generate perlocutions long after its initial occurrence).

[133] *Id.* at 221.

[134] *Id.*

[135] *Cf.* Lawrence B. Solum, *Legal Theory Lexicon 088: The Construction Zone*, LEGAL THEORY BLOG, https://lsolum.typepad.com/legal_theory_lexicon/2019/02/legal-theory-lexicon-088-the-construction-zone.html (Dec. 20, 2020) (indicating that the purpose of interpretation is to uncover a text's meaning, while the purpose of construction is to determine a text's significance).

[136] *See* VANHOOZER, *supra* note 2, at 261, 262 (articulating the distinction between a completed action and the consequences stemming from it).

results that continue into the present.[137] "The distinction between meaning and significance is, at root, a corollary of the belief in the reality of the past. . . . [O]ne cannot change the past simply by interpreting it differently."[138]

A. Meaning

Meaning is fixed because it is inherent to the text, which is the medium of a past action.[139] As discussed above, a speech act, whether a spoken utterance or an utterance mediated by a text, occurs at a point in time, in a particular context.[140] Locutions and illocutions are "intrinsic to the action," which is a completed communicative event that occurred in the past.[141] Indeed,

> past communicative action[s], like other acts done in the past, are fixed not only in writing but in history. It follows from [Vanhoozer's] action model that the text, like other past human actions, has determinate meaning and that it is what it is independently of our theories about and interpretations of it. It follows that just as we can falsely ascribe an action to an agent, so it is possible to misinterpret a text.[142]

Because a text is the medium of a communicative act that occurred in the past, belief in the reality of the past requires a distinction between what is inherent to that past action and its continuing results in the present.[143] Thus, "meaning is a matter of illocutions, while significance concerns perlocutions."[144]

This action model also results in an objective view of meaning (i.e., public meaning rather than private, subjective meaning).[145] Although

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[137] *See id.* at 226 (noting that a text comprises both a completed project, replete with meaning, and a projectile, carrying the potential to affect future readers).

[138] *Id.* at 263.

[139] *See id.* at 225 (reasoning that the determinate meaning of the text is as tied to the moment of the writing as the words themselves).

[140] *See* Solum, *supra* note 27 (demonstrating that context affects the meaning of different speech acts).

[141] *See* VANHOOZER, supra note 2, at 255 (contrasting illocutions with the consequences of a speech act, which are not inherent parts of the action).

[142] *Id.* at 225.

[143] *See id.* at 263 (explaining the distinction between the meaning of the text in the past and the significance of the text in the present; this distinction functions as a "criterion for discriminating 'what it meant' to the author from 'what it means' to the reader," which allows one to understand the text as having a fixed meaning while still accommodating various interpretations of its significance today).

[144] *Id.* at 261 ("Illocutionary intent is . . . constitutive of communicative action and of meaning in a way that perlocutionary intent is not."). Note that Vanhoozer would prefer "to speak of meaning in terms of the author's intended meaning and of significance in terms of the author's *extended* meaning," but I will continue to employ the terms "meaning" and "significance," because they are simpler and clearer. *Id.* at 262.

[145] *See id.* at 225, 246 (explaining that a text should be understand through its communicative activity, not the subjective intent of the author).

Vanhoozer speaks of meaning in terms of authorial intent, it is important to note that he does not use this term to describe "an affair of consciousness"; rather, he explains that "the proper ground for textual meaning is found in the communicative activity, not the subjectivity, of the author."[146] When Vanhoozer speaks of the author's "intent," then, he does not refer to "[w]hat an author planned to write," but rather to what was actually done in writing the text, formulating his account "in terms of action rather than psychology."[147] Because texts are the medium for past actions, they are interpreted in part by considering past linguistic conventions and communicative context.[148] Thus, meaning is "publicly accessible."[149] The parallel with public meaning originalism is striking: "For public meaning originalism, the relevant context of constitutional communication is the publicly accessible context—that is, those features of the context of framing and ratification that were accessible to the public at the time each portion of the constitutional text was framed and ratified."[150] Speech-act theory thus provides support for public meaning originalism's thesis that the relevant context for determining a text's meaning is the publicly accessible context because a speech act is an action done in public, to foster communication between persons, not an internal subjective act.[151]

Thus, "meaning" refers to the locutions and illocutions of a text or utterance, i.e., both the semantic meaning of the words comprising the text or utterance and their force or directedness.[152] References to "purpose" or "intent" get at the function the words are performing in their context, based on cues taken from the text itself as well as historical context and linguistic conventions, not hidden subjective intentions.[153]

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[146] *Id.* at 225.

[147] *Id.* at 246; *see also id.* at 262 (stating that "[i]ntention is enacted and embodied in the text").

[148] *See id.* at 250–51 (explaining that a reader must consider the linguistic conventions and communicative context that existed at the time the author wrote the text in order to understand the author's intention).

[149] *Id.* at 225 (indicating that communicative action, from which meaning is discerned, is publicly accessible).

[150] Solum, *Originalist Methodology*, *supra* note 18, at 291.

[151] *See* VANHOOZER, *supra* note 2, at 5, 230 (explaining that speech is an action done in public and that the analysis of public speech, rather than subjective intuition, is the only true way to determine an author's intent).

[152] *Id.* at 310–11, 402.

[153] *See id.* at 246, 250, 285 (arguing that an author's intent or purpose must be understood through the lens of the text's historical context and contemporaneous linguistic conventions).

Meaning is a function of the speech-act event, fixed in the past, and does not include the text's extended application.[154]

B. Significance

In contrast to locutions and illocutions, perlocutions (or consequences) are not intrinsic to a speech act and, thus, are not fixed at the time of the original action.[155] "Unlike meaning, the significance of a text can change, for significance pertains to the relation between the text's determinate meaning and a larger context . . . ."[156] A text, like an action, may have "a relevance that goes beyond what the agent could have foreseen."[157] As discussed above, certain documents, like a constitution or the Bible, are specifically intended "to have applications in situations that [the authors] knew to be beyond their explicit knowledge . . . ." [158] Thus, an acknowledgment of changing applications as the text encounters new situations is actually a *necessary aspect* of understanding the text correctly.[159]

If one does not recognize that a constitution must be applied to situations beyond the framers' original circumstances, in ways the framers may not have foreseen, one has not correctly understood the document's meaning.[160] Yet those applications themselves are not part of the meaning, since they are not part of the completed speech act.[161] Since the Constitution is our law, originalists claim that ongoing applications should be *consistent* with the Constitution's original meaning (the constraint principle), but this assertion does not imply that every possible

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[154] *See id.* at 225, 240, 429 (explaining that the meaning of a text is fixed in the past and is independent of our present subjective interpretations).

[155] *See id.* at 255 (explaining that perlocutions, or consequences, are not part of the internal structure of a speech act); *id.* at 251 ("Consequences are not intrinsic, but extrinsic, to actions. Consequences have to do with ulterior, perlocutionary purposes. As such, they fall outside the purview of intended action.").

[156] *Id.* at 259.

[157] *Id.* at 221.

[158] *Id.* at 264.

[159] *See* Barnett, *supra* note 34, at 645, 647 (explaining that although the original meaning may not apply to every scenario, it should be used as a framework to approach new scenarios).

[160] *See* McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is a *constitution* we are expounding."); *id.* (explaining that a constitution should not have "the prolixity of a legal code," but that "[i]ts nature . . . requires[] that only its great outlines should be marked . . .").

[161] *See* VANHOOZER, *supra* note 2, at 157 (explaining that application involves understanding the meaning of a text, and is therefore external to that meaning); *see also id.* at 262, 368 (contrasting the application of a text with its communicative act).

application is bound up in the text itself or derivable from the text.[162] Austin's distinction between a completed act and its ongoing consequences helpfully clarifies that a text's illocution (meaning) is fixed and bounded, while its perlocutions (significance) may be ongoing and fluid.[163]

C. Implications of the Meaning-Significance Distinction

This distinction between meaning and significance is vital because otherwise there is no method for distinguishing "the aim of the text" from the reader's "own aims and interests."[164] Indeed, without distinguishing between the text's meaning and the reader's application of the text, interpreters can never really get beyond themselves: "Bereft of intrinsic meaning, a text becomes a screen on which readers project their own images or a surface that reflects the interpreter's own face."[165]

Thus, there are two tasks for the reader: the "communicative" task, in which the reader seeks "to understand what the author means," and the "strategic" task, in which the reader seeks "to relate that meaning to what we know, believe, seek to know, or might believe."[166] Moreover, the second, strategic task "depends on the successful completion of the first." [167] "[O]ne can only relate textual meaning to non-communicative purposes after one has first understood the communicative act for what it is."[168]

Notably, these two tasks (the "communicative" task to retrieve the text's "meaning," and the "strategic" task to discover the text's "significance") map precisely onto the two tasks identified by the New Originalists in the context of constitutional law: interpretation and construction.[169] Interpretation is an attempt to access the text's original meaning, namely its communicative content (in the "thick" sense that

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[162] *See generally* Barnett, *supra* note 34, at 645–46, 647 (positing that a text's applications should be consistent with its original meaning, although the original meaning may too ambiguous specifically determine each application).

[163] *See* AUSTIN, *supra* note 60, at 111–14, 117–18 (distinguishing between illocutions, which are fixed at the time of the speech act, and perlocutions, which are ongoing consequences).

[164] VANHOOZER, *supra* note 2, at 263.

[165] *Id.*

[166] *Id.* at 260 (quoting WENDELL V. HARRIS, INTERPRETIVE ACTS 169 (1988)).

[167] VANHOOZER, *supra* note 2, at 260.

[168] *Id.*

[169] VANHOOZER, *supra* note 22, at 260 (citing HARRIS, *supra* note 166); *see* Solum, *Originalist Methodology*, *supra* note 18, at 269–70 (explaining that interpretation is an attempt to access a text's original meaning); Barnett, *supra* note 34, at 645, 647 (explaining that construction involves applying the original meaning of a text to contemporary scenarios).

includes contextual enrichment and pragmatics).[170] Construction is application, taking that original meaning and bringing it to bear in particular circumstances, some of which may not have been foreseen or foreseeable at the time the text was enacted.[171] Application is bounded by the text's original meaning, but it is not the same as original meaning, and meaning may be (and often is) "underdeterminate" of application in various circumstances.[172] Far from being a challenge to originalist theory, the underdeterminacy of the constitutional text is precisely what allows it to enter new contexts and have enduring relevance despite the fact that its meaning was fixed long ago.[173]

Finally, it should be clear from the preceding discussion that the meaning-significance distinction provides helpful theoretical support for the fixation thesis. Because meaning is an aspect of a past speech act, it is necessarily fixed and determinate, and indeed exists "independently of our theories about and interpretations of it."[174] To deny that meaning is fixed is essentially a denial "of the reality of the past."[175] Moreover, because meaning has determinate content, interpretations "can . . . be correct or incorrect."[176] It is possible to "misinterpret," or come to false

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[170] *See* Solum, *Originalist Methodology*, *supra* note 18, at 269–72 (explaining that originalists seek to understand a text's original meaning, which is also called its communicative context); Lawrence B. Solum, Draft, *The Constraint Principle: Original Meaning and Constitutional Practice*, 9 (Apr. 3, 2019), https://ssrn.com/abstract=2940215 [hereinafter Solum, *The Constraint Principle*].

[171] *See* Barnett, *supra* note 34, at 645–47 (explaining that the original meaning of the Constitution may not always provide a clear rule of law, so interpreters must apply constitutional construction within the bounds established by the text's original meaning).

[172] *Id.*

[173] *See id.* at 645–48 (explaining that the original meaning of a text can be "underdeterminate," so one must engage in construction to apply the meaning to contemporary situations). André LeDuc claims that the interpretation-construction distinction is problematic for originalists because it causes them to "compromise the originalist agenda of restricting judicial discretion and the role of judgment." LeDuc, *supra* note 11, at 103. But, as noted above, the goal of judicial restraint is not inherent to originalism and is not shared by all originalists. *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 38, at 4 (explaining that, although some originalists favor judicial restraint, Whittington does not). Moreover, a better description of the interpretation-construction distinction is that it allows for *bounded* judicial discretion. The text's original meaning, accessed through interpretation, sets "bounds," outside of which construction is not permitted to stray. Barnett, *supra* note 34, at 645–46. Judges may still exercise judgment, and indeed, are required to do so. But only the interpretation-construction distinction, grounded in respect for the original meaning of the text, can actually provide interpreters with any *criteria* by which to judge. Rather than undermining the role of judgment, originalism is instead the necessary precondition for exercising informed judgment. This issue will be fleshed out further in the section on multiple modalities below.

[174] VANHOOZER, *supra* note 2, at 225.

[175] *See id.* at 263 ("[T]he author's authority partakes of the authority . . . of the *reality* of the past, which is in turn the authority of truth . . . .").

[176] *Id.* at 301.

conclusions about meaning.[177] Finally, locating meaning in a past communicative event establishes that the relevant context for determining *meaning* (as opposed to significance) is the past.[178] We understand what a constitutional provision or biblical passage means by considering its original context, textually, culturally, and linguistically.[179] Gaining a proper understanding of the text's meaning is a necessary precondition to properly applying that meaning to new situations.[180]

Speech-act theory provides a fresh set of arguments by which originalists may respond to critics who deny the fixation thesis and the interpretation-construction distinction. I will examine two such nonoriginalist positions and consider some possible originalist responses in light of the hermeneutical insights provided by speech-act theory. First, I will address André LeDuc's criticism of originalism based on a "multiple-modalities" view of constitutional decision-making.[181] Second, I will consider Francis J. Mootz III's claim that meaning changes over time because it "always is the result of interpretive activity, and is never a historical fact that exists independent of an interpreter."[182]

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[177] *See id.* at 225 (explaining that a reader can draw incorrect conclusions about the meaning of a text). Note that misinterpretation is distinct from coming to the "wrong" application of a text, i.e. an application that is inconsistent with its original meaning. *Wrong*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/wrong (last visited Aug. 15, 2022). To misinterpret is to make an error about a factual matter related to the text's meaning; to misapply is to erroneously or willfully make a mistaken judgment about how that meaning bears on a present situation. *Misinterpret*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/misinterpret (last visited Aug. 15, 2022); *Misapply*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/misapply (last visited Aug. 15, 2022).

[178] *See* VANHOOZER, *supra* note 2, at 225, 240, 250–51 (explaining that, to understand the meaning of a text, one must adopt the mindset of the author by considering the linguistic conventions and communicative context that existed at the time the author wrote the text).

[179] *Cf.* Solum, *Originalist Methodology*, *supra* note 18, at 269–70, 279, 281, 284 (explaining that we should understand the Constitution and other texts by looking to their original meaning and by analyzing the context, linguistics, and culture at the time each text was written).

[180] *See* Barnett, *supra* note 34, at 645, 647 (explaining that when an interpreter applies the original meaning of a text to a particular circumstance, he must ensure that the application is consistent with the original meaning of the text); *see also* Solum, *Originalist Methodology*, *supra* note 18, at 278, 294 (explaining that one must interpret a constitutional text before applying it, and that the application cannot conflict with the original meaning of the text).

[181] Solum, *The Constraint Principle*, *supra* note 170, at 106; *see* LeDuc, *supra* note 11, at 115 (explaining that the best alternative to the originalist interpretation of the Constitution is a modal view that dispenses with what he sees as the "reductive, formalistic, linguistic description of practical reasoning" that originalists assume or defend in constitutional decision-making).

[182] MOOTZ, *supra* note 25, at 160.

III. LEDUC: MULTIPLE MODALITIES

André LeDuc rejects both the fixation thesis and the interpretation-construction distinction articulated by the New Originalists.[183] Specifically, LeDuc rejects the logical privilege that originalists assign to interpretation (i.e. that interpretation must precede and delineate the boundaries for construction)[184] because he rejects the notion of any "objective meaning of the Constitution."[185] Constitutional decision-making instead should take into account multiple incommensurable modes of analysis.[186] When those arguments support contradictory results, the decisionmaker must choose between them using the faculty of judgment. Analysis of his position is especially interesting for our purposes because he uses speech-act theory in his *rejection* of the interpretation-construction distinction and the fixation thesis.[187] LeDuc asserts that the Constitution itself and subsequent constitutional decisions by courts have a performative aspect that has been overlooked by originalists and that a proper understanding of this performative function shifts the focus away from interpretation, toward action.[188] For LeDuc, the real constraint on

[183] LeDuc sees himself as *outside* the debate over originalism because of his denial of objective constitutional meaning and describes the debate as "pathological." *See* André LeDuc, *Making the Premises About Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111, 114–15, 119, 122, 147, 180, 229–30 (2016) [hereinafter LeDuc, *Making the Premises About Constitutional Meaning Express*] (explaining that the originalist belief in an objective meaning of the Constitution is untenable); LeDuc, *Striding out of Babel*, *supra* note 25, at 101, 106–07, 109, 112, 131, 141, 151, 182, 184–85 (criticizing the originalist debate over the objective meaning of the Constitution and calling the debate between originalists "pathological"). I do not here take a position on whether LeDuc offers a criticism of originalism that is so fresh and different from those posited by other critics that he stands outside the existing debate, but I simply engage with LeDuc as a non-originalist, since he rejects central facets of originalism.

[184] *See* LeDuc, *supra* note 11, at 68–69 (explaining that there are issues with originalists' views of interpretation and construction); *see also id.* at 70 (denying the proposition "that the meaning of the text is invariant"); *id.* at 77 ("Constitutional rules . . . can be applied without first interpreting them."); *id.* at 87 (challenging "[t]he claim that interpretation is prior to constitutional decision").

[185] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 226.

[186] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 148 (explaining that the modalities of the constitution are immeasurable).

[187] *See* André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. STATE. L. REV. 131, at 158–63 (arguing that originalists focus on the semantic meaning of the law and thus often overlook the importance of the performative role of law); *see also* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 180 (explaining that Solum's fixation theory is wrong because he does not account for the performative role of constitutional text).

[188] *See* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 158 (explaining that the originalism debate focuses on the truth or falsehood of constitutional interpretations, overlooking the performative role of the Constitution).

constitutional decision-making is not the text's original meaning (since none exists) but rather our constitutional practice.[189] This practice contains multiple legitimate but incommensurable modes of constitutional argument, and the decisionmaker must choose between various arguments and results using the faculty of judgment.[190]

A. Performative Role

Foundational to LeDuc's rejection of originalists' account of constitutional law is his belief in the performative role of the Constitution itself and judicial pronouncements about the Constitution, which he grounds in Austin's speech-act theory.[191] LeDuc asserts that a proper understanding of the Constitution as one or more speech acts implies that there is no place in constitutional reasoning for claims about the meaning of the Constitution, because the Constitution is not properly understood in terms of true or false interpretations.[192] For LeDuc, "the most salient feature of [authoritative sentences about constitutional law] is what they are doing, not what the statements are saying."[193] Consequently, he rejects the idea that truth or falsity is a proper criterion for judging "our practice of constitutional reasoning and argument."[194] When the Supreme Court makes assertions that are part of its holding, "[s]aying makes them so."[195] Thus, assessing the holding on the basis of whether it is consistent with the Constitution's original meaning is a "misguided mission"; indeed,

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[189] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 164, 166–67 (explaining that engaging in the practice of constitutional decision-making is more important than understanding the Constitution's original meaning).

[190] *See id.* at 163–66 (explaining that judgment is important in constitutional adjudication because the Constitution is open to many interpretations between which a decisionmaker must choose).

[191] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 167–68, 174 (criticizing originalists for their failure to recognize the performative role of constitutional text and promoting Austin's recognition of the performative role of the Constitution).

[192] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 148 ("When we recognize the performative character of the constitutional text and constitutional decision, then we can recognize that we should examine and assess such expressions not principally for their truth but for their felicity and effectiveness as performative texts.").

[193] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 204. As I will discuss below, this seems to be a false dichotomy and overlooks the fact that text normally do *by* saying. LeDuc, *Striding out of Babel*, *supra* note 25, at 148.

[194] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 205–06; *see* LeDuc, *Striding Out of Babel*, *supra* note 25, at 131–33 ("In place of the . . . models that assert that propositions of constitutional law have truth conditions based upon the Constitution, [scholar Philip] Bobbitt would substitute a description of practice, finding legitimacy in those practices, not in the words.").

[195] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 206.

"[t]here is no objective meaning of the Constitution that can be compared with the applications . . . ."[196] In other words, LeDuc reads Austin as describing a class of speech acts, namely performatives, which are not evaluated based on their truth or falsity but rather on their felicity or infelicity.[197] Because the Constitution itself and subsequent constitutional decisions are performatives, he concludes, we should not analyze constitutional decisions based on their "truth," i.e., conformity to objective meaning.[198] Such an approach would be fruitless because constitutional pronouncements are not propositional statements but performatives.[199]

B. Constitutional Practice

Rather than assessing constitutional arguments or decisions on the basis of any independent standard of truth or conformity to original meaning, then, LeDuc asserts that law is constituted by our practices.[200] LeDuc labels his position an "anti-representational, anti-foundational position" because he claims "that constitutional law does not have an existence outside of, or independent of, our practices."[201] He claims that the normative aspect of originalism (describing how judges *should* interpret the Constitution and *should* decide cases) is a flawed project because "there is no Archimedean stance from which we can assess constitutional argument and decision."[202] Because there is no objective stance outside our constitutional practice from which we can make a

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[196] *Id.* at 226.

[197] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 147–48 (contending that "the Constitution, and the courts applying the Constitution, do not state propositions of constitutional law that are true or false"; instead, the constitutional text and the opinions of the courts are performative utterances that ought to be evaluated instead for how effective and felicitous they are).

[198] *Id.*; *see Truth*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/truth (last visited Aug. 24, 2022) (defining truth as "fidelity to an original or to a standard").

[199] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 147–48 (arguing that because constitutional texts and decisions are performatives, the search for truth and falsehood is futile).

[200] *See* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 138, 139–40 ("[our] practices constitute the American Constitution . . . . They are the reasoned, argumentative activity or practice in which we engage.").

[201] *Id.* at 140; *see also id.* at 134–35, 139–40 (explaining that the anti-representationalist, who views language as a tool to manipulate the world, recognizes propositions of constitutional law as true only once they are accepted in constitutional practice).

[202] *See* LeDuc, *supra* note 11, at 60–61 (arguing that originalism's mode of seeking to discover and apply constitutional meaning is a futile endeavor because foundational assumptions are not shared between interpreters and there is no objective, neutral position from which to assess various constitutional interpretations or applications).

normative assessment, "[t]heory must begin with description. There is no authoritative, normative stance that stands both within our practice of constitutional argument and decision, as well as outside and above that practice."[203]

For LeDuc, the practice of the Supreme Court, including arguments made by practitioners and the Court's decisions applying constitutional law, is part of the performative role of the Constitution itself and is what determines the boundaries of constitutional law.[204] "[C]onstitutional law is an activity, not an abstract thing," so the legitimacy of constitutional decisions derives not from consistency with a "true" interpretation of the Constitution's text but from our constitutional practice.[205] Indeed, constitutional law is bound up with our constitutional practice and is not "independent of how we talk about and act with respect to it."[206]

In sum, LeDuc posits that meaning is not inherent to the constitutional text. Instead, "texts acquire their meaning and force in a complex, intellectual social practice. . . ."[207] As a result, constitutional decisions are not to be judged for their truth or falsity based on conformity with an objective meaning of the Constitution, since none exists.[208] The felicity of constitutional decisions derives rather from the arguments and modes of decision-making that are an accepted and conventional part of our constitutional practice.[209] LeDuc thus rejects the interpretation-

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[203] *Id.* at 118; *see also id.* ("We need an adequate descriptive account because the practice of constitutional argument and decision is groundless . . . ."); LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 184–85 ("Solum's account fails to acknowledge the fundamental conflict between his normative account of constitutional law and the actual practice of constitutional argument and decision."); *cf.* André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate About Originalism*, 42 OHIO N.U. L. REV. 613, 633–34 (2016) [hereinafter LeDuc, *Paradoxes*] (arguing that positivism likewise fails as an accurate description of constitutional practice due to its unreliable foundation). *But see* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) (arguing that originalism is in fact the theory that best describes our constitutional practice).

[204] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 184–85 ("[T]he embedding of authoritative statements of constitutional law in our practice of making constitutional arguments . . . and the decision of constitutional cases gives . . . a pragmatic dimension that is independent of . . . linguistic meaning.").

[205] LeDuc, *Striding Out of Babel*, *supra* note 25, at 131–33.

[206] *See id.* at 134–35 (discussing constitutional scholars who dismiss the concept of objective constitutional meaning and maintain that constitutional interpretation is a social practice).

[207] *Id.* at 136.

[208] *Id.* at 184.

[209] *See id.* at 143 (indicating that, because our constitutional "practice is itself foundational, the bedrock of our constitutional law," any evaluation of the merits of a constitutional decision must stem from practice).

construction distinction.[210] For LeDuc, meaning is derived from practice, i.e., from constitutional adjudication on the ground, as the Constitution is applied by the Court in discrete cases.[211] Thus, meaning is not prior to significance; interpretation is not prior to construction.[212]

C. Multiple Modes of Argumentation Comprise Constitutional Practice

LeDuc describes this constitutional practice, which determines the bounds of our constitutional law, as containing multiple co-equal modes of constitutional analysis.[213] In his analysis, LeDuc draws on and adapts the multiple modalities theory of Philip Bobbitt.[214] LeDuc rejects the idea posited by originalists that original meaning should stand over and constrain decision-making.[215]

As discussed above, one of the core tenets of originalism is the constraint principle.[216] Although the Constitution "does not provide definitive answers to all cases and controversies,"[217] and constructions

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[210] *See id.* at 121 ("The distinction between constitutional interpretation and constitutional construction has failed to move the debate forward or convince originalism's critics.").

[211] *See* LeDuc, *supra* note 11, at 69–71 (discussing how originalists believe meaning comes from interpretation but fail to consider how constitutional practice impacts meaning too); *see also* LeDuc, *Striding Out of Babel*, *supra* note 25, at 136 ("[T]exts acquire their meaning and force in a complex, intellectual social practice.").

[212] *See* LeDuc, *supra* note 11, at 87 ("The claim that interpretation is prior to constitutional decision is not uncontroversial and is likely mistaken. . . . [O]riginalism's commitment to the logical priority of interpretation may be challenged."). Yet, LeDuc does not appear able to completely cast off the logical priority of interpretation, as he seeks to replace it with a similar concept of "grasping" the Constitution's meaning. *See id.* at 88 (speculating that "[p]erhaps the judge must simply grasp the constitutional rule" in order to apply it). However, this idea of "grasping" constitutional rules does not play a significant role in his constitutional hermeneutic.

[213] *See* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 140 ("Constitutional argument consists of six modes argument, none of which can invariably trump any of the others . . . .").

[214] *Compare* PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982) (introducing Bobbitt's theory of five modes of argument), *and* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 187, at 11–13 (reciting his modes again and adding a sixth), *with* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 140 (accepting Bobbitt's six modes of argument but indicating that there are additional modes that Bobbitt has missed). Stephen Griffin and Richard Fallon, Jr., articulate variations on this theory. *Cf.* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753–54 (1994) (advocating "pluralism" in constitutional interpretation); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1240 (1987) (proposing a "constructivist coherence theory").

[215] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 194 ("[S]uch arguments are not the exclusive type of arguments that our constitutional practice permits."); *see also id.* at 225–26 (advocating for alternative arguments to balance out original meaning rationales in assessing constitutional meaning).

[216] Solum, *supra* note 31.

[217] Barnett, *supra* note 33, at 419.

may be "justified by normative considerations" rather than textual considerations alone,[218] originalists argue that a court's decisions applying the Constitution must at least be consistent with the text's original meaning.[219] Thus, for many of the New Originalists, the Constitution's text need not be the sole criterion considered; other modes of reasoning may be used (e.g. considerations of administrability or justice), especially where the Constitution's text does not clearly dictate a given result.[220] But the original meaning trumps any other mode of reasoning.

Because LeDuc grounds constitutional legitimacy in the constitutional practice that exists, he rejects the priority that originalists give to interpretation of the Constitution's original meaning.[221] He explains that many types of constitutional arguments are made before the Court and are accepted as legitimate.[222] Since practice is determinative, all of these modes of argumentation are proper.[223] Moreover, no mode of constitutional argument is "privileged in relation to the other modes."[224] The judge considers all of the arguments and makes a decision, but she need not be bound by an assessment of original meaning. Judges may consider (and

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[218] Solum, *supra* note 30, at 134.

[219] *See* Barnett, *supra* note 33, at 419–20 ("[A] construction is *improper* if it contradicts or undercuts what this Constitution *does* say.").

[220] Note that there is some variation among originalists as to the scope of the constraint principle. A "maximalist" version of originalism might not accept that other arguments may be considered in addition to arguments from the original meaning of the Constitution's text. *See* Solum, *The Constraint Principle*, *supra* note 170, at 21 (stating thata maximalist approach would "eliminate[] the foundational role of anything other than the communicative content of the constitutional text in the determination of the legal content of constitutional doctrine"). But virtually all originalists can agree that, at a minimum, decisions must be "consistent" with the Constitution's original meaning. *Id.* at 3. LeDuc rejects even this "least common denominator" version, namely "constraint as consistency." *Id.* at 4; *see also* LeDuc, *supra* note 11, at 58 (criticizing firm adherence to an original meaning of the constitution as "mechanical" and lauding the "much more open-ended" approach of those who actively look beyond the text's original meaning). While I will argue from the perspective of "constraint as consistency," because it is an ecumenical proposition with which all originalists can agree, I note that any arguments LeDuc makes against constraint as consistency would also apply to originalist positions that support an even greater degree of constraint.

[221] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 194 (arguing for other ways to interpret the Constitution, beyond original meaning).

[222] *See id.* ("[T]he broad array of types of argument actually employed in our constitutional decisional practice are, to a greater or lesser degree, persuasive or compelling.").

[223] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 131 (stating that there are many proper types of argument in practice, none of which are superior to another); *see also* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 143–44 ("Legitimacy is the legal feature that marks an argument or a decision as [properly] falling within our constitutional law practice.").

[224] LeDuc, *Striding Out of Babel*, *supra* note 25, at 131–32.

decide cases based upon) historical, ethical, and prudential arguments, among others, even when these are inconsistent with the text.[225] LeDuc explains, "the judge's task in deciding a case is not one of interpretation. Her task is to get to the best result."[226] Note that, while the original meaning of the Constitution does not constrain judges in LeDuc's view, convention serves as a kind of constraint by determining what types of arguments and analysis are acceptable.[227]

LeDuc clearly rejects the constraint principle as articulated by originalists, but this line of reasoning is also a tacit rejection of both the fixation thesis and the interpretation-construction distinction.[228] First, by locating the meaning of the Constitution in evolving constitutional practice, LeDuc rejects the fixation thesis.[229] Indeed, by asserting that multiple incommensurable modes of constitutional argument constitute the evolving social practice that is our constitutional law, he is claiming that the Constitution's meaning itself is fluid.[230] LeDuc explains that

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[225] *See* LeDuc, *supra* note 11, at 57–58 ("[C]ritics [of originalism] describe constitutional reasoning and argument as ranging . . . beyond the premises derived directly from the constitutional text. Their model of reasoning is much more open-ended."); *see also* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 120–21, 209, 211 (discussing how political and ethical choices may be necessary for interpretation and that other sources of meaning beyond the constitutional text may be utilized).

[226] LeDuc, *Paradoxes*, *supra* note 203, at 685.

[227] *See* LeDuc, *supra* note 11, at 60 ("[A]rgument is constrained by convention . . . ."). Although LeDuc distances himself from Stanley Fish and the Critical Legal Scholars, *see* LeDuc, *Striding Out of Babel*, *supra* note 25, at 134–35 (explaining how Critical Legal Studies theorists often "deny that there is objective truth in the law" and "instead assert that law may be reduced to an expression of economic and political power"), his denial of objective meaning and his assertion that constitutional practice determines meaning seem to align more closely with Fish's proposition that the interpretive community governs interpretation than with Austin's speech-act theory, *cf.* VANHOOZER, *supra* note 2, at 24 (discussing Stanley Fish's hermeneutical approach that removes authority from the text and places it in the interpretive community). *See generally* STANLEY FISH, IS THERE A TEXT IN THIS CLASS? 1, 4, 16–17 (1980) (arguing that interpretation is foundational for the reader, author, and the text itself).

[228] *See* LeDuc, *supra* note 11, at 108–09 (rejecting Scalia's claim that the Court's decisions have been constrained in any real way); *see* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 179–80 (decrying Solum's fixation thesis as implausible). As noted earlier, an extended discussion of the constraint principle is outside the scope of this paper, since the normative arguments for following the original meaning of the Constitution have little in common with biblical hermeneutics. *See generally* LeDuc, *supra* note 11, at 81–82 (discussing the interpretation-construction distinction).

[229] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 136 ("[T]exts acquire their meaning and force in a complex, intellectual social practice . . . .").

[230] *See* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 140–42 ("Constitutional law is . . . an ordered, evolving set of social practices composed of arguments and agreements. . . . Propositions of constitutional law do not have truth conditions and are not rendered true by their correspondence with facts about the world. How useful the concept of truth is in this context is an open question.").

"truth, if a useful notion at all, turns on how our practice of law treats such constitutional or legal claims. To the extent that propositions of law are affirmed by the relevant constitutional community, they are true."[231] Consequently, "[t]here is no objective Constitution to which judges may turn to find answers to the constitutional controversies with which they are confronted."[232] Instead, "propositions of constitutional law are true or false . . . by virtue of their place in the practice of constitutional discourse."[233] These statements indicate that, for LeDuc, constitutional meaning is fluid, evolving along with our practice of constitutional argumentation and decision.[234] His view is thus a rejection of the fixation thesis.

Likewise, because LeDuc asserts that any other mode of argument could legitimately trump textual interpretation in a given decision, he rejects any logical priority given to interpretation over construction.[235] In fact, LeDuc claims that interpretation itself is unnecessary: "Constitutional rules . . . can be applied without first interpreting them."[236] Where there is no objective meaning to access, interpretation is not a necessary part of a decisionmaker's role. Indeed, because a text's meaning *is* its application, there can be no distinction between interpretation (drawing out the text's meaning) and construction (determining its application).[237]

D. The Role of Judgment

Finally, LeDuc posits that, although these modes of reasoning are incommensurable and may reach inconsistent results, decisionmakers must choose among the various arguments and outcomes using the faculty of judgment.[238] He criticizes originalists for prioritizing the text rather

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[231] *Id.* at 140.

[232] *Id.* at 190.

[233] *Id.* at 194.

[234] *See id.* at 141–42 (explaining that constitutional law is evolving and stating that conflict arising from the modes of argument is resolved by the consensus of the community).

[235] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 121, 131, 133 (arguing there is no mode of argument that is superior to another and that the attempt to draw a distinction between interpretation and construction has failed).

[236] LeDuc, *supra* note 11, at 77; *see also id.* at 77–78 (noting that a principle may require interpretation before being applied, but a rule does not).

[237] *See id.* at 81 ("The distinction is untenable because the need for interpretation or construction is not determined by the nature of the language of the constitutional text.").

[238] *See* André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. PUB. POL'Y 99, 141–42 (2014) (explaining Bobbitt's belief that conscience allows for the assessment of practical, moral, and other considerations to resolve conflict over constitutional argument). Note that originalists agree that constitutional decision-making requires the exercise of judgment, but they assert that

than the exercise of judgment, explaining, "Constitutional decision likely does not begin with linguistic meaning or interpretation, but with judgment and consideration of the relevant constitutional or other legal arguments that bear on decision."[239] Indeed, even "where the text is clear," it does not necessarily determine the outcome; "judgment is always both necessary and proper, regardless of whether a case is easy or hard."[240] LeDuc does not specifically articulate what criteria should be used to make this judgment and indeed implies that none can be articulated. He explains, "[i]n the end, the Court must make a judgment as to which of the competing modes of argument is most persuasive in the case at hand."[241] LeDuc cites with apparent approval Bobbitt's "invocation of conscience as the means to resolve conflicting modes of constitutional argument."[242] Decision-making based on conscience permits a judge to take into account "prudential and other practical considerations as well as moral options and the choice among them."[243] Indeed, "[c]onscience is the human faculty that permits us to choose our lives and to imbue those choices with value and dignity. . . . It cannot be replaced by an algorithm or decisional calculus."[244]

Thus, for LeDuc, although there are no articulable criteria on the basis of which decisionmakers may choose between the various modes of reasoning when they collide, decisionmakers should exercise the faculty of judgment based on the persuasiveness of the arguments and based on conscience.[245]

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the criteria on which judges must base their judgments is consistency with the original meaning of the Constitution. *See* SCALIA, *supra* note 4, at 45 (discussing how courts "must follow the trajectory of" constitutional provisions when they employ judgment). At least some originalists would also be willing to consider other modes of reasoning where the text is not itself outcome-determinative. *See supra* note 219 and accompanying text (explaining that courts may use various modes of construction as long as the construction is not a direct contradiction of what the Constitution explicitly states).

[239] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 140.

[240] LeDuc, *Striding Out of Babel*, *supra* note 25, at 124.

[241] *Id.* at 144; *see* LeDuc, *The Anti-Foundational Challenge*, *supra* note 187, at 176 (acknowledging that Bobbit's account "offers no analysis of how a choice can or should be made" when modes collide); *cf.* Baude, *supra* note 203, at 2406–07 (arguing that, for those holding a multiple modalities view, the lack of a legal meta-rule to decide between the incommensurable modes requires that contested issues be decided on "nonlegal terms").

[242] LeDuc, *supra* note 238, at 141.

[243] *Id.*

[244] *Id.*

[245] *See id.* (presenting Bobbitt's view of conscience as a faculty of judgment).

IV. ORIGINALIST RESPONSE

Far from undermining originalism, as LeDuc claims, speech-act theory provides powerful arguments in support of originalism to answer LeDuc's criticisms. Specifically, the role of a speech act as a performative does not obviate the need for interpretation, as LeDuc claims.[246] Instead, Austin's analysis shows that the distinction between "constatives," i.e., true or false utterances, and "performatives" ultimately breaks down.[247] What is being done by a performative can only be properly understood through an interpretation of its meaning.[248] Second, because the enactment of a text is a speech act, it is a completed past event with determinate meaning. LeDuc inappropriately conflates the original speech act (enacting the Constitution) with subsequent speech acts (constitutional decisions) and thus misunderstands the performative act being accomplished by the Supreme Court's holdings.[249] Third, the role of judgment is still critical, both in interpretation and in construction. Moreover, originalism provides the criteria on which to make judgments (namely, consistency with the text), which LeDuc's theory fails to provide.[250]

A. Performatives/Constatives

First, although the Constitution and subsequent decisions interpreting the Constitution are in fact performatives, the correctness of decisions should nonetheless be assessed in terms of consistency with the original meaning of the Constitution. LeDuc criticizes originalists for treating "the constitutional text and the texts of authoritative constitutional opinions as constatives" rather than performatives and thereby improperly focusing on a determination of objective meaning, as though interpretation and constitutional decision-making could be analyzed as either true or false.[251] Although he purports to base these

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[246] *See* discussion *infra* Section IV.A; LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 162 (admitting that the notion of speaking timelessly to the ages is not necessarily an "impossible performative project" but rather, an "ambitious" one).

[247] AUSTIN, *supra* note 60, at 3, 133; *see id.* at 4–5, 134–47 (analyzing the differences between constatives and performatives and ultimately concluding that there is no necessary conflict between the two).

[248] *See* discussion *infra* Section IV.A.

[249] *See* discussion *infra* Section IV.B.

[250] *See* discussion *infra* Section IV.C.

[251] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 154–55; *see also id.* at 115 ("The protagonists [in the debate over originalism] generally agree that there is an objective meaning of the Constitution to be determined by interpretation . . . . [T]hese positions cannot be sustained.").

claims on Austin's analysis, he overstates Austin's point. Austin does begin with the premise that some utterances ("constatives") appear merely to state something true or false while other utterances ("performative[s]") "are not 'true or false'" in the same way.[252] When we use this latter category of utterances, we *do* something by saying something.[253] However, as Austin progresses through his analysis, he ultimately concludes that the distinction between performatives and constatives breaks down, explaining that performatives in fact have features that are very similar to the truth-aptness of constatives.[254] Thus, "the supposed constative utterance [is assimilated] to the performative,"[255] and "the performative is not altogether so obviously distinct from the constative . . . ."[256] Austin also points out that "the requirement of conforming or bearing some relation to the facts . . . seems to characterize performatives . . . ."[257] He concludes that "considerations of the type of truth and falsity may infect performatives (or some performatives)."[258] Thus, under Austin's analysis, the Supreme Court's holdings *are* properly understood in terms of truth-aptness, or at least something like it, notwithstanding their performative character.

In short, LeDuc's claim that because the Constitution and subsequent constitutional decisions are performatives in an Austinian sense they have no truth condition is not supported by Austin's analysis.[259]

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[252] *See* AUSTIN, *supra* note 6060, at 3, 5–6 (introducing constatives and performatives in the context of their truthfulness).

[253] *Id.* at 5–6.

[254] *Id.* at 52.

[255] *Id.*

[256] *Id.* at 67; *see also id.* at 133 (questioning whether the distinction between constatives and performatives can survive, and suggesting that saying something is both an act of doing and of saying because utterances are both a locutionary act and an illocutionary act); *id.* at 146 (suggesting that perhaps the "extreme marginal cases . . . gave rise to the idea of two distinct utterances"); *id.* at 150 ("What will *not* survive . . . is the notion of the purity of performatives: this was essentially based upon a belief in the dichotomy of performatives and constatives, which we see has to be abandoned in favour of more general *families* of related and overlapping speech acts . . . .").

[257] *Id.* at 91.

[258] *Id.* at 55; *see also id.* at 140–41 (explaining that "a similar objective assessment of the accomplished utterance" arises in the case of performatives).

[259] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 166 (acknowledging that "it is not inherent in the concept of a performative that it be without conceptual content"). However, his concession does not carry much weight because he posits that in the context of constitutional argument, this conceptual content "does not play a performative role . . . ." *Id.* He goes on to state that the content of these propositions of constitutional law is relevant for lawyers and professors who make statements *about* constitutional law, but he denies that this conceptual content plays a significant role in "authoritative statements of constitutional law" themselves, because of the performative role of such statements. *Id.* at 167. LeDuc errs because he improperly

Performatives, like other types of speech acts, may be assessed for their truth or falsity.[260] Moreover, the performative aspect of the Constitution does not set it apart, because *all* utterances are speech acts; we *always* "do" something by saying something.[261] But this last point is important: we do something *by* saying something. Far from negating the need for interpretation, an acknowledgment of the fact that by speaking we perform illocutionary acts calls for an analysis of the meaning of the

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conflates the original speech act (enacting the Constitution) with subsequent speech acts (authoritative pronouncements by the Court), as I will discuss below.

[260] *Id.* at 166. Nevertheless, even if LeDuc is correct that a holding by the Supreme Court itself does not have truth content, the underlying assertion that is *being held* does have truth content. *Id.* Most people probably would agree that readers of a court opinion may assess the Court's statements about what the Constitution's text actually says or what prior court opinions held in terms of their truth or falsity. It would be *false* to say that the Constitution prescribes three senators for the state of New York—even if the Supreme Court is the speaker. I will call the content of such a statement *X*. *X* is a proposition such as, "the Constitution prescribes three senators per state," or, "the Constitution prohibits cruel and unusual punishment." But, while *X* may be true or false, what about the statement *we hold that X*? How does one analyze a holding in terms of truth or falsity, especially if it is based on false statements of the law or facts? One possible response is to say that *we hold that X* has no truth-aptness. This appears to be LeDuc's position. *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 147–48 (indicating that, as performatives, such statements should be "examine[d] and assess[ed] . . . not principally for their truth but for their felicity and effectiveness as performative texts"). An alternative position is that these statements do have truth-aptness, but that they are always true. *We hold that X* is always true, because the Court *does in fact* hold that *X* (regardless of whether *X* itself is true or false).

However, that this discussion about whether the holding is best assessed in terms of its truth/falsity or its felicity/infelicity is not as consequential as might first appear. Even if the holding has no truth-aptness, it may still be criticized on the basis of its infelicity. In such a case, originalism would be a theory about felicity rather than about truth, but the tenets of originalism still stand. Originalism's claim would proceed along the following lines: Courts should make decisions that are consistent with the original meaning of the Constitution, because decisions that are inconsistent with the original meaning are infelicitous.

To reiterate, for purposes of our discussion, what is important is recognizing that the question of whether the Court's holding—we hold that *X*—has truth-aptness is an entirely separate question from whether *X* itself has truth-aptness, or whether *X* itself is true or false. In the next section, I will focus on the fact that notwithstanding a court's performative statement, *we hold that X*, critics may still assess whether *X* itself is true or false and may criticize the Court's decision for being inconsistent with *X* (regardless of whether that inconsistency makes the holding *false* or *infelicitous*).

Finally, the question of whether *X* is true or false is also separate from whether a holding is effective or ineffective as a performative. In other words, it is possible to argue that, where *X* is false, *we hold that X* cannot enact *X* into law, because the Court would be stepping outside its constitutional authority to enact a holding inconsistent with the original meaning of the Constitution. Such a view is neither prohibited nor required by originalism, since originalism is a normative theory about how courts *should* decide cases, not a theory about what happens when courts do not decide cases as they should. Many thanks to Lawrence Solum for helping me develop these insights in a personal conversation.

[261] *See* AUSTIN, *supra* note 60, at 134 ("[T]o state is every bit as much to perform an illocutionary act as, say, to warn or to pronounce.").

utterance (in its "thick" sense) to determine exactly *what* we have done *by* saying.

B. Meaning Inheres in the Completed Past Event

Second, a speech act is a completed past event. A proper understanding of this point undermines LeDuc's assertion that subsequent constitutional practice determines the meaning of the Constitution.[262] The implications of a speech act as a past event were fleshed out in detail above and will not be exhaustively repeated here.[263] I noted that when a speaker makes an utterance, she performs both a locutionary act and an illocutionary act.[264] Thus, the full communicative content of the utterance is a function of both linguistic meaning and context, which includes conventions and shared expectations.[265] But because the communicative event is fixed in the past, the relevant context for determining meaning is the original context in which the utterance was spoken. A text is "a medium of illocutionary acts"[266] that "puts a language system into motion at a particular point in time . . . ."[267] Consequently, understanding of what was done by the illocutionary act is achieved only by analyzing the words in their original context.[268] Because the enactment of the Constitution was a past speech act, the provisions of the Constitution can only be rightly understood based on their original context, and their communicative content is not altered by subsequent events.[269]

LeDuc acknowledges that the Constitution is a speech act (using the term "performative") and even concedes that it has conceptual content, but he posits that that conceptual content "does not play a performative role in constitutional argument."[270] For LeDuc, the performative nature of subsequent constitutional pronouncements undermines any role that the

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[262] *See* LeDuc, *supra* note 11, at 109 ("[I]t does not appear that in the evolution of constitutional doctrine that [*sic*] rules have . . . made [the Court] decide the case differently than it otherwise would have done.").

[263] *See supra* text accompanying notes 95–97.

[264] *See* AUSTIN, *supra* note 60, at 98 ("To perform a locutionary act is in general, we say and *eo ipso* to perform an illocutionary act . . . .").

[265] *See* VANHOOZER, *supra* note 2, at 243 (stating that linguistic conventions change based on the speaker's recognizable circumstances).

[266] Vanhoozer, *Discourse on Matter*, *supra* note 24, at 21.

[267] VANHOOZER, *supra* note 22, at 222.

[268] AUSTIN, *supra* note 60, at 100 ("[W]e have been realizing more and more clearly that the occasion of an utterance matters seriously . . . .").

[269] *See* VANHOOZER, *supra* note 22, at 225 (indicating that a text that was communicated in the past is fixed in history and has a determinate meaning).

[270] See LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 151, 166.

conceptual content of the original constitutional text would play in defining meaning.[271] In this regard, he "distinguish[es] authoritative statements of constitutional law [e.g., Supreme Court holdings] from statements about constitutional law [e.g., what is found in a hornbook]."[272] Statements by academics or others *about* constitutional law may be assessed for their truth value based on the conceptual content of the Constitution.[273] Portions of the Court's opinion that are not part of the holding (e.g. background material) probably fit into this category as well, but this concession has little significance, both because the number of statements LeDuc would place in this category is very small,[274] and because on all accounts statements that are not part of the Court's holding are not part of the law.[275]

But, while statements *about* constitutional law may have truth-aptness, for LeDuc, binding statements *of* constitutional law have no truth-aptness.[276] He reasons that, because the Court has the final say over constitutional interpretation, its pronouncements are performatives that have the effect of law, and "[s]aying makes them so."[277] Consequently, LeDuc concludes, they are not properly assessed for their truth content; they have the force of law, and there is no higher or objective ground from which to challenge them.[278]

Once again, speech-act theory, properly understood, provides a helpful originalist response to LeDuc's position. While perhaps initially plausible, LeDuc's analysis ultimately fails because of its conflation of two separate speech acts. The enactment of the Constitution is one speech act, which

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[271] *See id.* at 165–66 (proposing that a performative "role" by the constitutional text would disparage its true "conceptual or propositional content").

[272] *Id.* at 167.

[273] *See id.* at 166–67 ("[C]onceptual, propositional content—hornbook law—is important and cannot be ignored in an account of our constitutional law.").

[274] LeDuc appears to allow little space for statements within court decisions that are not part of the holding, as he seems to claim that even inferential steps are part of a holding and do not "have nontrivial truth conditions." *Id.* at 205–06.

[275] *See* Lawrence B. Solum, *Legal Theory Lexicon 005: Holdings*, LEGAL THEORY LEXICON, http://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_le_2.html (Mar. 14, 2021) (presenting various theories about what precisely constitutes the holding of a court opinion). I will not take a position here on how to distinguish a holding from dicta, but I merely note that wherever the line may be, it is this line between holding and dicta that determines which portions of the Court's opinion are binding law.

[276] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 167–168 (explaining that the Court's statement of constitutional law is true in and of itself, absent external facts or circumstances, similar to a statute which is true simply by reason of its existence).

[277] *Id.* at 168.

[278] *Id.* ("[S]tatements made about constitutional law and decision lack the performative dimension I have described.").

makes the Constitution our law.[279] A subsequent Supreme Court holding is a second speech act, which interprets that provision and binds the parties in the case at hand.[280] Because LeDuc merges these two speech acts, he mistakes procedural infallibility for substantive infallibility and mischaracterizes the act that is performed by subsequent Supreme Court holdings.[281]

Based on the fact that the Supreme Court is the final arbiter in constitutional disputes, LeDuc concludes that there is no ground for challenging the Court's interpretations.[282] However, this line of reasoning improperly conflates procedural and substantive infallibility. Because the Supreme Court is the court of last resort, it is the highest court of appeals for issues of constitutional law; consequently, its holdings finally determine the outcome of a particular case and establish binding precedent to be applied by lower courts in the future.[283] Thus, the Court is "procedurally infallible" in the sense that there is no higher court with authority to say that the Supreme Court is incorrect.[284] It is fallacious, however, to argue that this procedural infallibility implies substantive infallibility.[285] Merely because there is no court with authority to hold that the Supreme Court is incorrect does not mean that the Supreme Court is always correct. Such an argument confuses "the obvious practical consequences of a no appeal rule" with "the nature of legal interpretation of rules."[286] The Supreme Court finally determines the outcome of a case, but the Court cannot alter the original meaning of the Constitution.[287]

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[279] *See* VANHOOZER, *supra* note 2, at 216–17 (expanding upon the idea that a written text is a speech act).

[280] *See* Solum, *supra* note 275 (offering court holdings as an example of speech acts).275

[281] *Compare* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 206 (explaining that the court's holdings about the meaning of the constitution, by definition, *are* the meaning of the constitution), *with* Nowlin, *supra* note 109, at 1147 (emphasizing that, although the Court has procedural finality, its holdings can yield an incorrect interpretation of the Constitution).

[282] *See* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 206 ("If we look at statements of and about the law and reasoning about those statements in the context of our practice of constitutional adjudication, we find that, to a significant degree, what a court says about the constitutional law makes it so.").

[283] *See* Solum, *supra* note 275 (discussing the doctrine of precedent and the Supreme Court's binding authority over other courts).

[284] Nowlin, *supra* note 109, at 1146.

[285] *See id.* at 1147, 1151 ("[T]he mere fact that there is no official appeal from the Supreme Court about the meaning of the Constitution does not mean that the Court may not get the meaning of the Constitution wrong.").

[286] *Id.* at 1150.

[287] *See id.* at 1159 (expanding upon the idea that it is a misconception that the finality of the Court means that it can alter the meaning of the Constitution through its decisions).

Under our constitutional framework, the highest court of the land has the authority "to say what the law is."[288] The Supreme Court is thus the ultimate arbiter, like the umpire in a baseball game, who determines how the rules of the game apply in discrete circumstances.[289] But the fact that the umpire's determination ultimately decides the result of a given action in a game does not mean that there are no binding rules or that the umpire could not make a faulty call – even if there is no procedural mechanism for appealing the umpire's decision.[290] Like an umpire, the Supreme Court makes the final decision. But like an umpire, the Supreme Court could be wrong. The question of *finality* is thus separate from the question of whether the decision was *correct*.[291]

Analyzing the respective roles of the two speech acts involved helps to clarify this distinction. LeDuc rightly notes that as a result of various Supreme Court decisions, "the law may be different from what it had been before the decision."[292] Yet this is a claim about the binding and precedential role of Supreme Court decisions, not a claim about the meaning of the Constitution.[293] LeDuc improperly concludes that by binding the parties and creating precedent, these decisions could thereby alter the original meaning of the Constitution.[294] We may agree with LeDuc that the Court's holdings are speech acts that "make[] it so" in the sense of binding the parties to the case and binding lower courts in their subsequent decision-making.[295] But this point is separate from the question of how to understand the meaning of the earlier speech acts that implemented the Constitution itself. The enactment of a constitutional

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[288] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[289] *See* Nowlin, *supra* note 109, at 1145–46 (stating that the Supreme Court has the final say regarding constitutional interpretation, and only it can overrule its own authority).

[290] *See id.* at 1150 (explaining that the substantive "rules of the game remain the rules" even if there is no procedural appeal from the umpire as to the meaning and application of the rules).

[291] *See id.* at 1151 (claiming that the concept of "procedural-as-substantive infallibility" does not protect the Supreme Court from criticism when its decisions violate the Constitution).

[292] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 226; *see also id.* at 220–21.

[293] *See id.* at 225–26 (arguing that the Court's decisions are binding law, but they cannot be analyzed through the lens of the original meaning of the Constitution).

[294] *See id.* at 228 ("If we instead understand the meaning of our statements of constitutional law to consist in what we may do with those statements inferentially—and couple that understanding with our practice of practical constitutional inference—then we are more likely to appreciate that there is no benchmark of meaning that can adequately and independently constrain our constitutional decisional practice apart from that practice itself.").

[295] *See id.* at 206 (asserting that a more senior court may overrule a speech act and make it false).

provision constitutes a completed speech act with a stable meaning that precedes and is independent of any subsequent speech acts.[296] Indeed, "the reality and determinacy of textual meaning follow[] from the nature of a text as a [completed] communicative act."[297] Enacting the Constitution put in place a set of laws and structural provisions to constitute the government of the United States; these provisions have determinate meaning.[298] Subsequent Supreme Court pronouncements may change the law, but they do not change the original meaning of the Constitution.[299] Because LeDuc conflates the original speech act by which the Constitution was created with subsequent interpretive speech acts, he misunderstands just what is being performed by the Supreme Court when it issues a holding. The Court is interpreting the Constitution and binding the parties in the suit, *not* creating new meaning for the Constitution itself.[300] Consequently, the Court's opinions are not substantively infallible, although they are unappealable.[301]

Three additional arguments support my claim that subsequent Supreme Court holdings cannot alter the original, completed speech acts that implemented the Constitution. First, the idea of a binding, external law that is prior to the Court's own interpretation is more consistent with the "'internal point of view' of persons operating from within the legal system" than the idea that the Constitution is merely what judges say it is.[302] Judges themselves see the law as binding and normative, and they strive to get the law right (and criticize other judges for getting it wrong).[303]

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[296] *See* VANHOOZER, *supra* note 2, at 259 (arguing that speech acts remain unchanged through the history of their interpretation because textual meaning is tied to what an author intended and did in the past); *see also* Nowlin, *supra* note 109, at 1149 (arguing that "the Constitution is not simply what the Supreme Court says it is" because "the Constitution *predates* the Court and *created* it as an institution").

[297] VANHOOZER, *supra* note 2, at 228.

[298] *See id.* at 225 (acknowledging that past human actions have determinate meaning).

[299] *See* Nowlin, *supra* note 109, at 1149 ("[T]he Constitution is not simply what the Supreme Court says it is because the Supreme Court did not exist until established by Article III of the Constitution; it could be abolished by constitutional amendment; and it exercises the power of judicial review in part on the basis of the Supremacy Clause and other constitutional provisions.").

[300] *See id.* at 1151 (indicating that the constitution of the United States does not provide that the law is "whatever the [Supreme Court] thinks fit").

[301] *See id.* at 1146.

[302] Nowlin, *supra* note 109, at 1150 (quoting HART, *supra* note 109, at 137–38).

[303] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 631–46 (1992) (Scalia, J., dissenting) (criticizing the majority's reading of the Establishment Clause as repugnant to its true meaning).

Second, and relatedly, sometimes the Supreme Court changes course on the ground that its own prior decisions did not accurately capture the meaning of the constitutional text.[304] Although the Court's holdings have binding precedential effect over lower courts, the Supreme Court is not bound by its own interpretations and, on several notable occasions, has reversed course after making a particular pronouncement.[305] In other words, the Court has changed its mind about the meaning of the Constitution and the effects that flow from that meaning and has changed course as a result.[306] But if "saying makes it so"[307] in the sense of melding the meaning of a constitutional provision with the Court's subsequent pronouncements in interpreting it, such reversals make no sense. A change of interpretive direction by the highest interpreter of the Constitution makes sense only if the Constitution itself continues to exist as an independent entity with independent, ascertainable meaning. Only an objective Constitution that exists outside the Court's own jurisprudence provides any ground from which the Court can assess whether its doctrine accurately reflects the Constitution's meaning.[308]

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[304] *See* Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 152–55 (citing ninety Supreme Court cases that the Court overruled).

[305] *Compare, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 548–49, 552 (1896) (declaring that equality of treatment is accorded when both races are provided substantially equal facilities, even if the facilities are separated), *with* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954) (overturning the "separate but equal" doctrine set forth in *Plessy*). Although *Brown* was not an explicitly originalist decision, for a plausible argument that Brown is consistent with the Fourteenth Amendment's original meaning, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 951 (1995).

[306] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008). Although the Court did not explicitly overrule precedent in *Heller*, it did change course from the only prior precedent on point, United States v. Miller, 307 U.S. 174, 178 (1939), and did so on originalist grounds.

[307] LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 226.

[308] *See also* Nowlin, *supra* note 109, at 1148–49 (claiming that the view that the Constitution has meaning independent of jurisprudence is the better understanding of the legal process). Presumably, LeDuc would counter this line of reasoning by pointing out that arguments from other modes (e.g., prudential considerations) could cause the Court to change course. While this is certainly true, it is beside the point. First, where the Court in fact changes its position based on a revised understanding of the Constitution's meaning, *see, e.g.,* Brown v. Bd. of Educ., 347 U.S. at 494–95 (finding that the "separate but equal" doctrine was inconsistent with the Fourteenth Amendment), an argument that *at other times* the Court may decide on the basis of other, non-interpretive arguments does not undermine the force of this argument that changing course *because of the Constitution's meaning* would not make sense apart from a belief in objective meaning. Second, LeDuc claims that the Constitution "acquire[s] [its] *meaning* and force" through our constitutional practice, that the *meaning* of the original speech act of the Constitution is determined by subsequent pronouncements of the Court. *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 136

Finally, LeDuc himself acknowledges that we may criticize the Court's decisions and argue that they should have come out differently.[309] While originalists might disagree with LeDuc about the types of arguments that should be used in assessing whether a particular decision was correct, we may agree with him that outside observers may opine that the Court was *wrong*. But such a statement implies that there is a real Constitution that exists independently of the Court's interpretations. If the Court's say-so were really the end of the matter, arguing that a decision should have come out differently would be incoherent.[310] We must simply assert with Voltaire's philosopher, Pangloss, that "'all that is is for the best. . . . It is impossible that things should be other than they are; for everything is right.'"[311] We live in "'the best of possible worlds . . . .'"[312]

It is the existence of two distinct speech acts that enables us simultaneously to affirm that the Court's speech act authoritatively interpreted the Constitution and was a binding pronouncement of law while still acknowledging that it wrongly interpreted the Constitution

(emphasis added). Although LeDuc would not use these terms (since he denies the priority of interpretation), this is a claim that the locutionary content of the Constitution may be altered through subsequent actions. An acknowledgment that the Court may, in practice, make pronouncements based on considerations other than the Constitution's text does not explain how those subsequent pronouncements could have the effect of altering the meaning of the original speech act. By improperly conflating the two speech acts, LeDuc fails to see the independent role of the original speech acts enacting the Constitution.

Note that these first two arguments stem from the *practice* of the Supreme Court itself. Although LeDuc criticizes originalists for making normative claims as though there were an objective stance outside of constitutional practice, *see* LeDuc, *Making the Premises About Constitutional Meaning Express*, *supra* note 183, at 226 (stating that "[t]here is no objective meaning of the Constitution that can be compared with the applications . . . ."), he should be willing to consider arguments that are based on the practice of the Supreme Court, since the Court's practice is his measuring rod for proper constitutional decision making.

[309] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 143–44 (acknowledging that those who dislike the Court's decisions could reject them on prudential grounds, not merely originalist grounds).

[310] *Cf.* VANHOOZER, *supra* note 2, at 85 ("If there is no stable ground of meaning (no hermeneutical realism), then there is ultimately nothing that stands over against our interpretations to challenge and correct them. If the distinction between text and commentary is undone, then the image in the mirror of the text becomes blurry indeed. In that case, it is impossible to say whether we are seeing an author's intended message, an objective meaning, or merely our own reflections."). Even if LeDuc is correct that constitutional decisions are best assessed in terms of their felicity or infelicity rather than truth or falsity, this point stands. If there are objective grounds for criticizing the Court's decision for being wrong in the sense that it is *infelicitous* (rather than wrong in the sense that it is *false*), meaning still inheres outside the decisions of the Court itself.

[311] VOLTAIRE, CANDIDE 11 (Stanley Appelbaum ed., Dover Thrift Editions 1991).

[312] *Id.* at 13.

itself.[313] In one sense, saying *does* make it so when the speaker is the Supreme Court. The Court does determine the law that binds the parties to the suit and lower courts. In this procedural sense, the Court defines the outlines of our constitutional law. But subsequent saying cannot alter the original saying or doing of the Constitution.[314] The Constitution is a separate speech act that precedes, and is independent of, subsequent pronouncements about the Constitution.[315] Consequently, we may still properly assess whether the Court "got it right" when we consider the Court's interpretation of the Constitution's original meaning.[316] Because it conflates these two speech acts, LeDuc's argument that the performative role of Court pronouncements undermines the notion of an objective meaning of the Constitution is ultimately unpersuasive.

C. The Role of Judgment

LeDuc acknowledges that the various modes of constitutional argument are incommensurable and may dictate different results.[317] Nevertheless, he resolves this issue by observing that decisionmakers must "make a judgment as to which of the competing modes of argument is most persuasive in the case at hand."[318] Although there is no "algorithm or decisional calculus" on which to base this judgment,[319] judges may rely on conscience and the persuasiveness of the various arguments to choose between diverse outcomes.[320]

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[313] *See* Nowlin, *supra* note 109, at 1156 (noting that the very act of writing a judicial dissent asserts that the meaning of the Constitution is independent of the Court's interpretation).

[314] *See id.* at 1146 (clarifying that the Court has only procedural infallibility because the Court can be mistaken about the meaning of the Constitution even though the Court is immune from official challenge).

[315] *See id.* at 1149 ("[An] objection to the procedural-as-substantive conception of judicial infallibility is simply that the Constitution predates the Court."). Indeed, the Constitution necessarily precedes the Supreme Court, since it was the authority of the Constitution that established the Supreme Court. *See id. (*asserting that Article III of the Constitution established the Supreme Court and, with other constitutional provisions, gave the Court the power of judicial review).

[316] *See id.* at 1157 (stating that the Court can mistakenly rule against the fundamental meaning of the Constitution).

[317] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 143–44 (explaining that a protagonist in a debate can defend a decision with structural arguments while acknowledging that historical and textual arguments go against it).

[318] *Id.* at 144.

[319] LeDuc, *The Relationship of Constitutional Law to Philosophy*, *supra* note 238, at 141.

[320] *See id.* (citing Bobbitt who proposes conscience as a faculty of judgment to reach constitutional decisions (citing BOBBITT, *supra* note 214, at 163–64)).

We have seen that LeDuc collapses interpretation and construction into one event.[321] This move is consistent with his assertion, discussed above, that the meaning of the constitutional text is determined by our practice.[322] But another reason he provides in support of his rejection of the interpretation-construction distinction is that it "leaves no room for the exercise of judgment."[323] I will argue that, on the contrary, originalism does allow a role for judgment and actually offers a more coherent account of judgment than LeDuc's because it provides criteria on which to base judgment.

First, originalism does carve out space for judgment, both in interpretation and construction. In the context of interpretation, judgment is required in making inferences about the text's meaning based on its words, structure, and context.[324] The criteria by which interpreters must judge are based on which interpretation best accounts for "why a text is the way it is rather than another way."[325] Interpretations must be historically plausible, comprehensive (in the sense of making sense of the whole text), and coherent.[326] Although originalists need not posit that every last detail about a text's meaning can be decisively understood, they may assert that interpreters exercise their capacity of judgment in choosing the best interpretation they can based on the available information.[327] For originalists, the best interpretation is the one that accords most coherently with the text and its context.[328]

Constitutional decisionmakers also exercise judgment in construction. Once the meaning of a provision is determined, it may be

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[321] *See* LeDuc, *Competing Accounts of Interpretation*, *supra* note 11, at 86 ("The claim that interpretation is prior to constitutional decision is not uncontroversial and is likely mistaken.").

[322] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 136 (asserting that law acquires meaning through intellectual social practice)

[323] *See id.* at 124 (arguing that judgment is always necessary, regardless of whether a case is easy or hard).

[324] *See* VANHOOZER, *supra* note 2, at 333–34 (asserting that an interpreter must draw inferences to reach the best explanation regarding the meaning of a text).

[325] *Id.* at 334.

[326] *See id.* (arguing that, rather than "proving" authorial intent, the role of an interpreter is to provide the most compelling account of "why a text is the way it is rather than another way"); *cf. id.* at 377 ("Right reading . . . is ultimately a matter of cultivating good judgment, of knowing what to do when."). These criteria make sense because a text is the medium of a speech act. Something was done in enacting the text, and we exercise judgment in making interpretive decisions about what was done.To determine what was done, we must consider the original context of the action. *See id.* at 334 (stating that "the best interpretation must be one that describes what this author living in this culture could have done").

[327] *Id.* at 334, 377. *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 165–66 (asserting that some originalists suggest judgment plays a significant role in interpretation).

[328] *See* LeDuc, *Striding Out of Babel*, *supra* note 25.

applied under a model of "creative obedience."[329] The Constitution's text, even when rightly understood, does not necessarily dictate a specific outcome for each case. As discussed above, the concept of textual genre is illuminating, because the Constitution is not even supposed to prescribe a particular result in every case.[330] The Constitution does not have "the prolixity of a legal code"; it simply does not resolve every issue that will arise.[331] The application of the Constitution may (must!) change over time, and these changing applications require the exercise of judgment on the part of decisionmakers. But far from undermining original meaning, allowing space for such judgment coheres with the text's original meaning. Originalists posit that both interpretive judgments and applications must be consistent with the text's original meaning, while acknowledging that not all the answers are spelled out for judges; consequently, creativity and wisdom are required.[332]

Second, this account of the role that judgment plays is superior to LeDuc's account because it provides criteria on which to base judgments.[333] LeDuc's multiple modalities view is pluralistic in the sense that it does not strive for any right answer or correct interpretation; he is content to settle for inconsistent interpretations with no criteria to decide between them.[334] But, such "pluralism" in interpretation ultimately "encourages egocentric readings insofar as it makes 'whatever seems good in your own eyes' into a legitimate hermeneutic principle."[335] LeDuc references conscience as "the means to resolve conflicting modes of constitutional argument,"[336] but at root, the multiple modalities view never allows interpreters to decide based on anything other than their own subjective preferences. Where all accepted interpretations are equally valid, the interpreter may simply choose the one that he likes best. Moreover, pluralism encourages indifference because "if one interpretation is really as good as another, readers are not necessarily

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[329] *See* VANHOOZER, *supra* note 2, at 395 (explaining that "creative obedience" must conform to the decided meaning of the text).

[330] *See supra* notes 105–09 and accompanying text.

[331] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[332] *See supra* pp. 49–51.

[333] *See infra* pp. 51–52.

[334] *See* LeDuc, *supra* note 11, at 60–61 (arguing that there is no neutral criteria for selecting between the multiple modalities of interpretation).

[335] VANHOOZER, supra note 2, at 418. Vanhoozer distinguishes "pluralism" from "plurality." Multiple interpreters can provide unique perspectives on the meaning of a text and will help to draw out its meaning more fully, so "plurality" supports the interpretive project. However, "[p]luralism is an ideology that sees mutually inconsistent interpretations as a good thing" and ultimately undermines the interpretive project. *See id.*

[336] LeDuc, *supra* note 238, at 141.

motivated to 'consider well.' The conflict of interpretations seems less troubling to the pluralist, and there is less motive (or hope) either to arbitrate or to resolve it."[337] Because LeDuc provides no criteria for choosing between various options, the judgments he calls for are, of necessity, utterly subjective. As a result, the decisionmaker is unable to decide based on anything other than himself and indeed may be indifferent to the project of ever interpreting rightly.[338]

In contrast, originalists may acknowledge the role of judgment but need not ground judgment in arbitrary subjectivity. Interpretive judgments are made based on criteria such as historical plausibility, comprehensiveness, and coherence.[339] Judgments made in the context of construction must promote applications that accord with and effectuate the original meaning of the text.[340] This originalist account thus acknowledges the role of judgment while also providing criteria on which decisionmakers may judge.[341] For this reason, it is superior to LeDuc's account because it provides a mechanism for decision-making based on something other than subjective preferences.

In conclusion, LeDuc rightly observes that the Constitution and court pronouncements are speech acts with a performative aspect.[342] However, far from undermining the fixation thesis or the interpretation-construction distinction, speech-act theory provides powerful support for these principles. Because an utterance (or the enactment of a text) is a completed event that occurred in the past, the meaning of that act in terms of its locutions and illocutions is not altered by subsequent events.[343] Moreover, utterances have perlocutions, namely, "consequential effects" that are produced by a speech act but are external to the utterance

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[337] VANHOOZER, *supra* note 2, at 418.

[338] *See id.* at 376 ("[O]nly the interpretive realist can truly respect the text as a genuine other. To say . . . that the text is the product of a community's reading conventions ultimately fails to safeguard textual otherness."); LeDuc, *Striding Out of Babel*, *supra* note 25, at 163 (expressing his indifference by asserting that the debate over originalism is pathological and laying out a therapeutic approach to end the debate).

[339] *See* VANHOOZER, *supra* note 2, at 334 (illustrating how these criteria provide direction and boundaries for originalists in their textual interpretation).

[340] As mentioned above, some originalists would also allow room for other considerations in the construction phase, as long as the decision is ultimately consistent with the text's original meaning. *See supra* note 220 and accompanying text.

[341] *See* VANHOOZER, *supra* note 22, at 334–35 (identifying criteria that, though not absolute, guide the originalist in evaluating constitutional meaning).

[342] *See* LeDuc, *Striding Out of Babel*, *supra* note 25, at 147 ("[T]he constitutional text and the opinions of the courts are most fundamentally performative utterances, like the statements made in entering into marriage, in wagering, and in entering into contracts.").

[343] *See* VANHOOZER, *supra* note 2, at 262 (stating that the enactment of an author or speaker's intention is "meaning accomplished," which is distinct from any application of that meaning to future contexts).

itself.[344] By glossing over the distinction between illocution and perlocution, LeDuc misses the fact that interpretation and application (construction) are two different activities, and a judge must always engage in both.[345] Indeed, understanding speech acts always requires interpretation, even in the case of performatives. Moreover, interpretation and construction both require the exercise of judgment, but this judgment is not exercised in a void. Decisionmakers exercise judgment to interpret and apply the Constitution in ways consistent with the meaning of the original speech act.

V. MOOTZ: MEANING AT THE FUSION OF HORIZONS

Francis J. Mootz III holds that the interpreter always participates in making meaning.[346] Thus, "[m]eaning always is the result of interpretive activity and is never a historical fact that exists independent of an interpreter."[347] Meaning occurs at the "fusion of horizons" of the reader and the text.[348] Based on his understanding of the nature of meaning, Mootz rejects both the fixation thesis and the interpretation-construction distinction.[349] Because interpreters actually participate in making meaning, meaning is not fixed when a text is written but is continually forged anew as various interpreters read and understand the text.[350] Moreover, because meaning is not separable from the activity of the interpreter himself, there is no distinct interpretive activity that occurs prior to construction, whereby the decisionmaker can access an objective meaning of the text apart from his own situation.[351] All interpretation is application.

Mootz bases his view on the hermeneutic of Hans-Georg Gadamer.[352] Gadamer's *Truth and Method* seeks to investigate "the phenomenon of

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[344] *See* AUSTIN, *supra* note 60, at 101 (defining a perlocution as the feelings, thoughts, or actions of the audience, speaker, or other persons resulting from a speech act regardless of the speaker's intention).

[345] *See* LeDuc, *supra* note 11, at 69–70 (seeing the semantic meaning as an aspect of the text's performative nature rather than defining interpretation as a distinct activity to access the meaning of the text).

[346] MOOTZ, *supra* note 25, at 160.

[347] *Id.*

[348] *Id.* at 161.

[349] *Id.* at 159, 167–68.

[350] *See id.* at 160 (reasoning that meaning is a function of the reader's perception and only arises when the reader is engaging the text).

[351] *See id.* at 180–81 (noting that any attempt to produce an objective, universal meaning of the text would result in a "fictitious construction of a meaning").

[352] *See id.* at 161 (articulating Gadamer's approach that meaning arises from the interplay between text and reader and does not inhere in the text alone). Note that Mootz's reading of Gadamer is contested. Gadamer certainly asserts that during the process of

understanding," especially in light of "the historicity of our being," namely the fact that we as interpreters are always situated and can never fully step outside ourselves.[353] Gadamer concludes that, because readers always bring themselves to the table, "*all such understanding is ultimately self-understanding*."[354] Indeed, "a person reading a text is himself part of the meaning he apprehends."[355] As a result, "[t]he real meaning of a text . . . does not depend on the contingencies of the author and his original audience"; rather meaning "is always co-determined also by the historical situation of the interpreter . . . ."[356] We understand meaning "in a *different* way [than the author], *if we understand at all*."[357]

Gadamer is combating "the naive assumption of historicism" that we could somehow bridge the distance between ourselves and the text by "transpos[ing] ourselves" into the thinking of another time and thereby achieve objectivity.[358] Gadamer points out that stepping outside ourselves is impossible.[359] "Real historical thinking must take account of [our] own historicity."[360] We must recognize our prejudices, but we cannot ultimately be completely rid of them.[361]

Yet, for Gadamer, not all prejudices are negative.[362] Gadamer classes tradition as a legitimate form of prejudice that is not antithetical to

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interpretation, the reader's horizon fuses with that of the text, but Gadamer may be read as making an epistemological claim rather than an ontological claim. In other words, rather than claiming that objective meaning does not exist, he could be claiming that, in practice, our understanding of original meaning is always flawed and may change over time, because we can never escape our own horizon, i.e., our own perspective and situation. *See* Solum, *supra* note 3030, at 147–49.

353 *See* HANS-GEORG GADAMER, TRUTH AND METHOD xxi, 159 (Joel Weinsheimer & Donald G. Marshall trans., Continuum Publ'g Grp. rev. 2d ed. 2004) (1975); *see also id.* at 225 (indicating that it is impossible for finite human nature to transcend the fact that we are tied to one time and place, with the result that we are unable to "have a truly historical viewpoint on everything").

354 *Id.* at 251.

355 *Id.* at 335.

356 *Id.* at 296.

357 *Id.*

358 *Id.* at 297 (characterizing this approach as naive because interpreters can never really step outside ourselves).

359 *See id.* at 301 ("The very idea of a situation means that we are not standing outside it and hence are unable to have any objective knowledge of it. We always find ourselves within a situation, and throwing light on it is a task that is never entirely finished.").

360 *Id.* at 299.

361 *See id.* at 298–99 (noting that readers must recognize their prejudices and allow them to be challenged by the text, rather than attempting to set them aside, which would be futile); *id.* at 354 ("A person who does not admit that he is dominated by prejudices will fail to see what manifests itself by their light."); *id.* at 351 ("The truly experienced person is one who has taken [the nature of human finitude] to heart . . . .").

362 *See id.* at 295 (distinguishing "productive prejudices that enable understanding from the prejudices that hinder it and lead to misunderstanding").

reason.[363] In fact, tradition turns out to be the key to bridging the gap between the horizon (cultural-historical standpoint) of the text and the horizon of the reader.[364] Consequently, the distance between the text and the reader is actually "a positive and productive condition enabling understanding" because it is "not a yawning abyss but is filled with the continuity of custom and tradition."[365]

Consequently, the reader may reach a genuine understanding of the text's meaning; but this is not a meaning that is objective or external to the reader herself. Instead, understanding takes place where the horizon of the reader, mediated by the bridge of tradition, fuses with the text.[366] As a result, "[u]nderstanding . . . is always application," because it always involves uniting the text with the interpreter's present situation.[367] Meaning is thus open-ended because of the multiplicity of interpreters and the flow of tradition; there is not "any single interpretation that is correct 'in itself' . . . ."[368]

Mootz employs Gadamer's hermeneutic to level several challenges against originalism. First, he posits that the fixation thesis is false because it denies the historical situatedness of the interpreter. Based on Gadamer's insights, Mootz claims that "there is no meaning of the text that exists independent of the interpreter's hermeneutical activity."[369] Consequently, "[t]he fixation thesis is a theory of textual meaning that

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[363] *See id.* at 293, 298.

[364] *See id.* at 305 (explaining that the reader's present horizon can only be formed by understanding tradition, as the present horizon fuses with the past horizon of the text).

[365] GADAMER, *supra* note 353353, at 297; *see id.* at 213 ("[T]his distance is also proximity."); *see also id.* at 291 (indicating that understanding is less a subjective act than "*participating in an event of tradition*, a process of transmission in which past and present are constantly mediated").

[366] *Cf.* VANHOOZER, *supra* note 2, at 106 (summarizing Gadamer's position that "[t]he reader, far from being a detached observer, occupies a standpoint that limits and conditions what can be known . . . within a history that is itself the result of previous interpretations. . . . One's horizon is linked to one's prejudices, to one's habits of looking at the world in particular ways. Readers . . . always come to texts with a certain 'preunderstanding.' . . . [T]he text also has a horizon, for it too reflects the prejudices of its historical situation. Interpretation, then, is like a dialogue in which the reader exposes himself or herself to the effects of the text, while the text is exposed to the reader's interests and prejudices. . . . Understanding is a matter of 'fusing' the horizons of the text and reader").

[367] GADAMER, *supra* note 353353, at 308; *see also id.* at 307–08, 310 (showing that application is always required to bridge the gap between text and meaning; for example, only by determining the present application of the law in a concrete situation can one really understand it. Thus, to interpret means to concretize the law in each specific case).

[368] *Id.* at 398; *see also id.* at 468 (referencing "the absolute openness of the event of meaning" in which readers and tradition can freely come together to ascertain the text's meaning); *cf.* VANHOOZER, *supra* note 2, at 106 ("If understanding is a fusion of horizons, it follows that a text does not have a single correct interpretation, for each reader brings a different horizon to the text.").

[369] MOOTZ, *supra* note 25, at 161.

contradicts the way in which texts have meaning for us."[370] A text does not "have an essential and unvarying meaning."[371] Moreover, for Mootz, because there is no objective textual meaning, any claim that legal practice "'simply follows the original meaning' of [the] law amounts to a 'legally untenable fiction.'"[372] Thus, originalists, like Gadamer's naively historicist interlocutors, falsely presume that they can step outside their own historical situatedness and understand history "as a closed event."[373]

Second, Mootz denies the interpretation-construction distinction. Based on Gadamer's "fusion of horizons," Mootz concludes that "textual meaning can never exist outside of a context—that is to say, outside of an application of the text."[374] If meaning does not exist outside application, there can be no interpretive activity to retrieve meaning that is separate from and precedes the activity of bringing the text to bear on the interpreter's present situation.[375] In other words, there is no interpretation-construction distinction.

Finally, Mootz proposes that originalists improperly denigrate the role of tradition in interpretation. He explains,

> The normative content of a statute or constitution is revealed only when the horizon of a situated interpreter confronts the effective-history of the legal text. Thus, an "originalist" methodology is inappropriate: the text as written in the past no longer exists but rather is part of a legal tradition that is linked to the present.[376]

Thus, Mootz believes that originalism's focus on the original context overlooks the long tradition that links that context to the present.

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[370] *Id.* at 160.

[371] *Id.* at 161.

[372] Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127, 139 (1994) (quoting GADAMER, *supra* note 353, at 323).

[373] *See* Francis J. Mootz, III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 YALE J.L. & HUMANS. 311, 379–80 (1999) (arguing that when originalists try to understand moments in time as isolated incidents, they ignore their own prejudices).

[374] Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115, 133 (1994) (citing David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, *in* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE 173, 174, 184 (1992)).

[375] Mootz, *supra* note 374, at 133 ("A contemporary interpreter seeking to understand the author's intent embedded in a written [sic] text is not seeking to apprehend a brute fact sealed in the past; instead, the interpreter reanimates the toxt [sic] within her own contoxt [sic] of concerns and questions.").

[376] Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 541 (1988); cf. Ian Crosby, Note, *Worlds in Stone: Gadamer, Heidegger, and Originalism*, 76 TEX. L. REV. 849, 856 (1998) ("[Under] Gadamerian hermeneutics . . . [i]nterpretation is constrained both by the tradition of the interpreter and by the text itself.").

In sum, Mootz uses Gadamer's philosophical arguments to levy an attack on both the fixation thesis and the interpretation-construction distinction.[377] Because meaning occurs at the fusion of horizons of text and reader, meaning is not fixed but malleable. Furthermore, the interpreter always brings himself and his own concerns to the text, so interpretation *is* application. There can be no separate, objective interpretation that precedes construction or application in a given case. Finally, Mootz posits, by failing to acknowledge their own situatedness, originalists wrongly assume that they can access an objective, original meaning that does not exist.[378] They should instead acknowledge their own situatedness within a tradition of interpretation and learn to value that interpretation as part of the text's meaning.[379]

VI. ORIGINALIST RESPONSE

Gadamer's (and Mootz's) observations call for interpretive humility. The interpreter is historically situated and always comes to the task of interpretation with her own aims and preconceived ideas. However, originalists can agree with Mootz that the interpreter always comes to the text with her own horizon without denying that the text is a genuine "other," capable of being objectively understood. Speech-act theory's emphasis on a completed, historical action in the past by another person or persons supports this originalist belief in objective meaning external to the interpreter. Originalism espouses a version of "[*h*]*ermeneutical realism*," namely "the position that . . . meaning [is] prior to and

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[377] MOOTZ, *supra* note 25, at 159, 179.

[378] *See id.* at 160 (implying that proponents of the fixation thesis delude themselves by believing in an unchanging meaning of the text, when all textual interpretation is derived in part from the interpreter's subjective perception).

[379] As noted earlier, Mootz's reading of Gadamer is disputed. *See generally* Solum, *supra* note 3030, at 147–49 (positing an alternative understanding of Gadamer which does not undermine the fixation thesis). Gadamer's notion of "fusion" could be framed in a way that is helpful to originalism. Gadamer posits that tradition is what links us to the meaning of the text. Thus, through tradition, there is a continuity between reader and text that would not otherwise exist, making access to the original meaning more feasible. Additionally, although Gadamer seems to express skepticism about our ability to fully or objectively understand a text, the meaning-significance distinction could be seen to resolve these concerns because the "understanding" Gadamer seeks is really appropriation of a text's significance. Drawing a dividing line between the two activities of interpretation and construction may resolve Gadamer's concerns about objectivity by acknowledging that interpreters cannot (and should not) be objective in their application of the text, but that interpreters nevertheless can truly access the text's (objective) meaning. My thanks to Lawrence Solum for these insights in a personal conversation. Finally, the fact that Gadamer seems to acknowledge at least some degree of objectivity in meaning may be seen as evidence challenging Mootz's reading of Gadamer. Gadamer does not state that there are no grounds from which to criticize a tradition's interpretation of a text, but "appears still to be able to appeal to the text as over against the conversation about it." Vanhoozer, *Discourse on Matter*, *supra* note 866924, at 16.

independent of the process of interpretation."[380] This view is bound up with the meaning-significance distinction, i.e., the distinction between a text's communicative content and its effects. I will argue that hermeneutical realism provides a better account of meaning than that proposed by Gadamer and Mootz, because it better accounts for the situatedness of *both* interpreter and author, as they meet in the shared context of the text, without denying an important role for tradition.

Thus, while we should acknowledge, with Gadamer and Mootz, the difficulties in reaching true understanding regarding the meaning of a text, these difficulties are epistemological rather than ontological. An approach calling for interpretive humility recognizes that there are barriers (sometimes insuperable barriers) to achieving genuine understanding, and that these barriers generally become greater with increased time and distance from the writing of a text. However, the difficulties in achieving true understanding do not imply that there is no objective meaning conveyed by a text. Rather than accepting Gadamer's hermeneutical idealism, we should embrace an ontology of hermeneutical realism, acknowledging that meaning genuinely exists and is external to the interpreter, while locating the difficulties in determining meaning in the epistemological realm. In other words, the barriers to grasping another's meaning are not primarily ontological but epistemological, relating to communication and the process of how we come to know rather than the nature of knowing itself. Interpretive humility is thus an epistemological position that acknowledges the difficulties of achieving genuine understanding while allowing room for an ontology of meaning that recognizes that there is a "there" there.

Although I will not address this debate over epistemological versus ontological barriers to meaning in detail, I do note that hermeneutical realism (combined with interpretive humility) better fits our everyday experience of meaning and communication. We intuitively know that it is possible both to understand and to misunderstand. We are frequently successful in achieving understanding in the context of everyday communications, even if that understanding is always imperfect. This experience of successful communication should make us wary of claims that all genuine understanding of another's meaning is ontologically impossible. Moreover, even our experiences of *miscommunication* support a thesis that communicative difficulties are epistemological rather than ontological. Misunderstanding itself is a coherent concept only if there is an objective meaning to understand. By acknowledging that sometimes

[380] VANHOOZER, *supra* note 2, at 48.

our communications have misfired, we inherently concede the possibility of right understanding and successful communication. We can only "get it wrong" if there was a "right" meaning that we missed.[381]

I will argue that hermeneutical realism, combined with interpretive humility, best accounts for the horizons of both interpreter and author, as they meet in the shared context of the text. I will then explain how this view leaves room for tradition to play an important role in interpretation.

A. Interpreter's Horizon

Gadamer and Mootz correctly observe that the reader can never really escape himself. This situatedness calls for interpretive humility and creative fidelity.[382] First, genuine understanding, though possible, will never be perfect.[383] Originalists may agree with Gadamer that we come to the text as inevitably subjective or biased interpreters, and thus we should be modest in our claims to conclusively determine and exhaust the text's "'plain' meaning."[384] "[T]ry as we might, we cannot quite get out of our own skins. Despite our best interpretive efforts, something of our own, and of our age, will remain in our experience of all literature."[385]

Yet, as discussed above, an assertion that no objective meaning exists seems to be an overstatement. Speech-act theory reminds us that we

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[381] Additionally, it is difficult to separate *hermeneutical* idealism from idealism in general. If genuine understanding is impossible, and objective meaning external to oneself does not exist, it may be difficult to separate the ontological difficulties of knowing another's meaning from the ontological difficulties of knowing *anything* that is other, i.e., external to myself. While hermeneutical idealists do attempt to draw this line, the metaphysics that would motivate idealism with respect to meaning seems also to support idealism with respect to other facts in the world. *See, e.g.*, MOOTZ, *supra* note 25, at 165 ("There are no objective facts about the past that exist in the present, independent of our motivated inquiries. Rather, history is our mode of being; as finite beings we can never rise out of our historical situation."). *But see id.* at 169 ("Originalists do not recover an original public meaning in the same way that we might investigate on which date Lee surrendered to Grant. The 'communicative content' of a text is not an empirical fact . . . ."). The burden is on those espousing hermeneutical idealism view to draw a coherent line that would allow them to recognize the existence of objective facts in the world while denying the "fact" of meaning. My thanks to Lawrence Solum for helping me clarify the issues related to ontological versus epistemological difficulties with communication. My discussion here has relied heavily on his insights.

[382] *See* VANHOOZER, *supra* note 2, at 389 (indicating that "good reading . . .is a matter of *creative* fidelity to the text"); *id.* at 458 (arguing that adequate interpretation is possible; nevertheless, our knowledge of textual meaning is never absolute; thus, humility is called for)).

[383] *See id.* at 458 (asserting that interpreters cannot achieve an absolute comprehension of the text).

[384] *Id.*

[385] *Id.* at 388–89.

successfully communicate, via language, every day.[386] Although our communication sometimes fails to bring about its intended object, our words frequently actually do accomplish things in the world. Despite the increased "distance" between today's interpreter and the individuals drafting the Constitution or writing Scripture many years ago, our experience of successful communication here and now should lead to at least a presumption that understanding is possible. The increased distance will make successful interpretation more difficult, but "imagination and training" can assist in the enterprise of seeking genuine understanding.[387] Every reader who has ever been *changed* or brought to think in a new way by a text should be able to acknowledge that, although we do not *lose* ourselves in our interpretation, we do encounter something *other* than ourselves. Thus, accessing original meaning is possible, but interpretation calls for humility.

Second, our situatedness can actually be a productive element in our encounter with a text, especially when we consider its application. The Constitution (like the Bible) was meant to speak to many situations, not merely that of the original authors. Although hermeneutical realism calls for belief in determinate meaning based on the completed speech act that occurred in the past, the *consequences* of a given speech act are not determinate.[388] Indeed, "the meaning of a text is unchanging," but the significance of a text is "inexhaustible, for the text, though 'fixed' in itself, can enter new situations."[389] Belief in a stable meaning means that there is "*illocutionary* continuity"; but the *perlocutions* are not trapped in the past.[390] It is, in fact, the reader's new situation that prevents a text from being enclosed within its own time.[391]

As discussed above, successful communicative acts may produce two kinds of results. A successful illocution achieves *understanding*, while a

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386 *Cf. id.* at 202 (questioning whether "deconstruction adequately account[s] for what is, after all, an everyday occurrence, namely, communication").

387 *See id.* at 333 (quoting MEIR STERNBERG, THE POETICS OF BIBLICAL NARRATIVE 10 (1985)) (explaining that separation by time and culture does not mean that we cannot "learn the rules" applicable to a given communication). Indeed, the successful study of Biblical Hebrew testifies to the possibility of achieving some knowledge of a situation different than our own: "[I]s the language any more or less of a historical datum to be reconstructed than the artistic conventions, the reality-model, the value system?" STERNBERG, *supra*, at 10.

388 *See* VANHOOZER, *supra* note 2, at 301 ("[T]he intended results of a communicative action are determinate in a way that its consequences are not.").

389 *Id.* at 77.

390 *See id.* at 391 ("A text remains what it is, but it can affect and relate to others in different ways.").

391 *See id.* at 389 (asserting that ignoring the reader's situation may "enclose" the work within its own time).

successful perlocution produces "some further effect on the reader."[392] A faithful interpretation should grasp the illocution that is actually in the text, based on the textual and historical context. Indeed, "a faithful interpretation must reflect the same matter, force, and direction that characterized the original communicative action."[393] But perlocutions are not bound up with the text in the same way, because they are neither unchanging nor intrinsic to the text. Nevertheless, at least where the constraint principle is accepted, a faithful construction is not "arbitrarily related to [the] illocutionary act," but must be consistent with the text in the sense of "proceed[ing] from the illocution. . . ."[394] In this way, the "text remains what it is, but it can affect and relate to others in different ways."[395] Both interpretation and construction are thus related to the text and must be consistent with the text, but the perlocutions, or applications, of the text may change as the text is brought to bear on different circumstances. It is these new situations into which the text is carried, i.e., the interpreter's horizon, that allows the (fixed, determinate) text to have continuing significance in divergent circumstances.

Recognition of the interpreter's situatedness should indeed lead to interpretive humility. Yet, as is especially apparent in the case of constitutional adjudication, the interpreter's situatedness is also a necessary and productive element of bringing the text to bear in new contexts. The Constitution was designed to apply in changing and unforeseeable circumstances. The situatedness of interpreters should not undermine our confidence in an objective meaning of the Constitution, but rather should prompt decisionmakers to seek to apply the Constitution to new situations in a way that is faithful to the original meaning. The meaning-significance distinction clarifies these two aspects of a decisionmaker's role.[396] While the meaning of the text (i.e. the text's locution and illocution) is an aspect of a past action and thus is stable and unchanging, the significance of the text (its perlocutionary effect) is not determinate but requires creative fidelity to the text's original meaning as interpreters apply the text to new situations.

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[392] *Id.* at 391.

[393] *Id.*

[394] *Id.* at 410.

[395] *Id.* at 391.

[396] *See id.* at 263 (indicating that the distinction between meaning and significance is "a corollary of the belief in the reality of the past" and is the basis for distinguishing between "what [a text] meant" to the author and "what it means" to the reader).

B. Author's Horizon

Gadamer's "fusion" of horizons fails to account adequately for the "otherness" of the text, grounded in the historical act of the authors and interpreted in light of their historical horizon. Mootz concurs with Gadamer that there is no objective meaning of a text external to the interpreter's experience of it.[397] In fact, although Gadamer and Mootz criticize their opponents (historicists and originalists, respectively) for denying the situatedness of the interpreter, their own view overlooks the genuine situatedness of the text (derived from the author's horizon). If meaning occurs only at the fusion of horizons, there is really no objective text outside ourselves, so there is nothing that can change us (in a literary encounter) or bind us (as law).

If interpreter and text are both part of the process of making meaning, there is no objective "other" that can influence us as readers and interpreters. Because Gadamer views "the text as a well of *possible* meaning from which diverse readers draw different interpretations. . . . [T]he text has a sense potential, but actual meaning is the result of an encounter with the reader."[398] But where the interpreter himself forges meaning, there is no interpretive "check," no basis from which to say that one interpretation is right and another interpretation is wrong. There is no way to distinguish between exegesis and eisegesis.[399] The failure to believe in genuine otherness of a text means that "interpretation tell[s] us only about readers," and interpreters can never "get beyond themselves."[400]

Vanhoozer posits that Gadamer's error stems from his privileging the autonomous text to the exclusion of the author.[401] Although Vanhoozer rejects the notion of accessing authorial intent in the sense of knowing the

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[397] *See* MOOTZ, *supra* note 25, at 161 (acknowledging that meaning cannot be separated from a reader's subjective perspective).

[398] VANHOOZER, *supra* note 2, at 106.

[399] *See id.* at 263 ("Without this basic distinction between meaning and significance, subsequent distinctions—between exegesis and eisegesis, understanding and overstanding, commentary and criticism—will be difficult, if not impossible, to maintain. Without some such criterion for discriminating 'what it meant' to the author from 'what it means' to the reader, interpreters risk confusing the aim of the text with their own aims and interests. . . . Bereft of intrinsic meaning, a text becomes a screen on which readers project their own images or a surface that reflects the interpreter's own face.").

[400] *Id.* at 382–83; *see id.* at 383 ("The task of an ethics of interpretation . . . is to guard the otherness of the text: to preserve its ability to say something to and affect the reader, thus creating the possibility of self-transcendence."); *id.* at 384 ("If meaning is the product of our interpretive aims and procedures, then the text is only an alter ego of the reader.").

[401] *See id.* at 106–07 (critiquing Gadamer's view that meaning is found in the act of reading, rather than in the text, because, according to Gadamer, the author's intention is unavailable).

private thoughts of the author, he points out that meaning is the result of authorial action: "[*M*]*eaning is something that authors do, in public, by means of words*. To be precise, authors put linguistic conventions into motion in order to perform a variety of acts."[402] Far from being autonomous and free-floating, then, "[a] text is . . . a means and medium of authorial action."[403] Moreover, "[i]t is this reference to the author's act and intention that renders interpretation determinate."[404] Because meaning is located in the past speech act of the author (and is thus external to the reader), it is objective: "[M]eaning is independent of our attempts to interpret it."[405] In sum, based on the objective past action of the author, hermeneutical realists assert "that there is something prior to interpretation, something 'there' in the text, which can be known and to which the interpreter is accountable."[406]

Although Gadamer acknowledges the horizon of the text, he fails to account sufficiently for the historical action of the author, and thus ultimately fails to provide any interpretive constraint on the encounter between text and reader.[407] Because Gadamer fails to ground the text's meaning in authorial action, he provides "no reliable means for discriminating between valid and invalid interpretations . . . ."[408] Thus, the notion of an "autonomous" text is actually a fallacy. If the author does not determine meaning, the reader does. Where the author is disregarded, the text "ultimately succumb[s] to the arbitrary, to the whims of the reader."[409] The unfortunate result for literary readers is that they can never meet anything other than themselves in a text, never actually be changed by a text.[410] But in the context of constitutional interpretation,

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[402] *Id.* at 5. As noted earlier, this fact is the basis for invoking linguistic conventions and historical understandings at the time the text was written in order to understand it correctly. *See supra* notes 146–156 and accompanying text.

[403] *Id.* at 5.

[404] *Id.*; *see also id.* at 203 ("[W]ith the notion of meaning as a form of action, the author returns, not in his or her Cartesian guise as an all-determining self-conscious subject, but as a communicative agent. Meaning, I contend, has less to do with the play of linguistic elements in an impersonal sign system than with the responsibility of communicative agents in inter-subjective social situations.").

[405] *Id.* at 10; *see id.* at 77 (stating that meaning is unchanging and "fixed" to what the author originally intended).

[406] *Id.* at 26.

[407] *See id.* at 106–07 (critiquing Gadamer for failing to provide for a standard of correct interpretation).

[408] *Id.* at 77.

[409] *Id.* at 109.

[410] *See id.* at 110 (questioning whether "readers [can] see only themselves" in the text or whether there can be shared meaning). The fact that many readers of literature find that they are indeed changed by their encounter with a text may serve as evidence that there *is*

this view is even more problematic. The Constitution purports to be our law, the binding rule that governs our country and guides the decisions of judges and political actors. But if its meaning is indeterminate, if there is no way to distinguish correct interpretations from incorrect interpretations, in what sense do we actually have a governing law?

Finally, Gadamer and Mootz's fusion of the horizons may not "'enclose' [the text] within its own epoch," but it does "enclose the meaning within the single epoch of the present . . . ."[411] Appreciation of the otherness of the text, grounded in the historical situation of its author(s), accounts better for both horizons. Rather than collapsing one horizon into the other through fusion, recognition of the situatedness of both the author and the reader allows a meeting of the horizons without losing one or the other.[412]

C. Text: Shared Context

Although tradition is one important "mediator" between author and interpreter, as will be discussed below, Gadamer and Mootz fail to account for the "shared situation" of the text itself, which provides crucial support for the proposition that meaning may truly be grasped by the interpreter. Meaning is determinate because it is grounded in the action of a historical actor. But meaning is accessible because author and reader meet in the shared context of the text.

Indeed, meaning is "linguistically mediated" and "must . . . be inferred from the text."[413] Thus, each text itself serves as its own interpretive context, with its "own set[] of constitutive rules."[414] One way that readers learn about the meaning of a text is through its form and the contextual clues provided by the text itself, which produces a (limited) shared situation with the author.

Moreover, genre serves as a crucial bridge between the author and the interpreter, because genre creates a set of literary expectations for the text. As discussed above, a correct understanding of a text's genre is essential in order to grasp the text's meaning properly:

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an objective meaning, outside ourselves, which we may come to know when we encounter a text.

[411] VANHOOZER, *supra* note 2, at 389–90; *see* MOOTZ, *supra* note 25, at 161 ("[N]o text can have an essential and unvarying meaning because it is appropriated continually by historically situated readers."); *cf.* MIKHAIL BAKHTIN, SPEECH GENRES AND OTHER LATE ESSAYS 4 (Caryl Emerson & Michael Holquist eds., Vern W. McGee trans., Univ. of Texas Press 1986) (indicating that focusing solely on the author or original reader "enclose[s] [the text] within the epoch").

[412] VANHOOZER, *supra* note 22, at 389.

[413] *Id.* at 78.

[414] *Id.* at 245; *see id.* at 5 ("[I]nterpreters testify to what acts an author performed in inscribing just these words (content) in just this way (form) on just this occasion (context).").

> The concept of genre . . . describes the illocutionary act *at the level of the whole*, placing the parts within an overall unity that serves a meaningful purpose. It follows that genre is the key to interpreting communicative action. It is not enough to know the meaning of words; one must have some sense of the illocutionary point of the whole utterance.[415]

It is this shared context of the text, especially as understood through the conventions and expectations invoked by use of a particular genre, that enables genuine communication between author and reader. Thus, although

> the author and reader do not always share the same situation . . . . the world of the text is indeed a shared world. The context that authors share with readers is a literary context: to be precise, a generic context [that] comprises specific rules and conventions for discussing, describing, and discerning certain aspects of the real world. The author engages the reader and reality not in spite of but thanks to the mediation of the text, together with its distinctive mode of viewing the world.[416]

In sum, tradition is not the only bridge over the yawning abyss separating the reader from original meaning. Although a reader cannot access an author's hidden, subjective intentions, the reader can meet the author in the shared world of the text. An essential part of the interpretive process is engaging the context of particular speech acts. In constitutional interpretation, this will involve historical analysis but will also require interpreting various provisions in light of the whole text and understanding the unique generic considerations that come into play when interpreting a constitution.[417] As I will flesh out below, the possibility of genuine understanding via the shared context of the text does not undermine the significance of tradition, but it does create an opportunity for the interpreter to appeal to objective textual meaning as a check on tradition when tradition "gets it wrong."

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[415] *Id.* at 341; *see also id.* at 342 ("[T]he concept of genre coordinates three related aspects of communicative action: the enactment of the author's intent, the engagement with the world, and the encounter with the addressee. Genre is a way of engaging with reality and with others through words.").

[416] *Id.* at 345–46.

[417] A constitution is a governing document providing a structure for government and binding decisionmakers and government actors, but a constitution does not lay out the details of application in every situation. *See* Barnett, *supra* note 33, at 419 (stating that the Constitution binds government actors but does not provide answers for every possible scenario).

D. Role of Tradition

While tradition does not play the authoritative role that Gadamer and Mootz ascribe to it, tradition is nevertheless a helpful aid in interpretation and plays an important precedential role, especially in construction. First, tradition does not play an authoritative role in interpretation. Because Gadamer views tradition as the only bridge across the yawning abyss that connects the reader with the text, there do not appear to be any grounds on which a reader, as an inheritor of an interpretive tradition, may appeal to the text over and against that interpretive tradition.[418] In the context of Biblical interpretation, Vanhoozer explains how biblical commentaries serve an important function in helping readers to understand the text's meaning, but the distinction between commentary and text must be preserved.[419] Specifically, distinguishing meaning from significance undergirds the distinction between exegesis and eisegesis and serves as the touchstone for determining which interpretations are valid and which are invalid.[420] But where tradition is melded with the meaning of the text itself, there is no way to step outside that tradition to make a claim that it interprets the text wrongly.

Second, demarcating the respective realms of meaning and significance actually creates a better basis from which to apply the text creatively to changing circumstances. Although a stable core of fixed meaning is marked off, which the interpreter is bound to respect, he is nevertheless free to apply that meaning in new and fresh ways. Thus, charting out a new course in terms of the Constitution's application can be consistent with an originalist hermeneutic because originalists acknowledge that new application does not alter the meaning of the text itself. In contrast, where meaning and significance are melded into one through the interpretive tradition of past applications, the text itself is no more nor less authoritative than subsequent constructions. Inability to separate the *binding* meaning of the text from the *non-binding* previous traditional applications may make it more difficult to adapt the fixed meaning creatively to new situations, because the tradition is just as binding as the text itself. In sum, unlike Gadamer and Mootz's hermeneutic, originalists' meaning-significance distinction provides a

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[418] *See* Vanhoozer, *Discourse on Matter*, *supra* note 24, at 16. The fact that "Gadamer appears still to be able to appeal to the text as over against the conversation about it," may constitute some support for Solum's contention that Mootz is misreading Gadamer when he claims that Gadamer does not believe in objective meaning. *See id.* (finding that Gadamer does not abandon a standard of proper understanding by valuing the conversation between text and reader).

[419] VANHOOZER, *supra* note 22, at 85, 284–85.

[420] *Id.*

basis from which to step outside tradition to determine that a precedential interpretation was incorrect, and it also provides better grounds for implementing new applications of a text in the event of altered circumstances.

Third, tradition may still play an important role. The difficulty of interpretation and the distance between text and reader call for interpretive humility. But there is safety in numbers. Combining one's efforts with the interpretive work of others who have gone before is more likely to produce a correct result than starting anew with every interpretation of a text.[421] In the context of legal precedent, where interpretive tradition creates stability and bolsters the rule of law, decisionmakers may have additional normative reasons to follow precedent.[422] Further, although we need not accept Gadamer's "yawning abyss," the notion of tradition as one bridge between reader and text is nonetheless helpful.[423] Other interpreters have gone before us, and some of them were closer in time to the original speech act than we are. Such interpretations may serve as valuable aids in understanding the text's original meaning.

Finally, belief in accessible, objective meaning actually provides better support for utilizing tradition in the process of interpretation and application than does Gadamer's fusion of horizons. If the author's objective meaning is inaccessible to interpreters, there is little reason to hope that tradition itself is accessible. How may we understand the subsequent writings of other interpreters if meaning itself is unknowable?[424] Gadamer seems to base his belief that tradition is accessible on the idea that we are somehow inherently part of tradition and it is part of us.[425] But this view still seems to require that we are capable of genuinely grasping the meanings and prejudices of others, even if that grasping is unconscious. If there is no objective meaning outside ourselves, or at least none that is accessible to interpreters, it is difficult

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[421] *Cf.* Vanhoozer, *Lost in Interpretation?*, *supra* note 24, at 111 ("It takes many interpreters and interpretative traditions fully to appreciate and understand the divine discourse.").

[422] *See* Solum, *The Constraint Principle*, *supra* note 170, at 67. Originalists disagree about how much deference should be shown to precedent, especially where that precedent does not appear to accord fully with the text's original meaning.

[423] *Cf.* GADAMER, *supra* note 353, at 297 (stating that tradition and custom bridge the distance between reader and text).

[424] *See* Vanhoozer, *Discourse on Matter*, *supra* note 24, at 20 ("Those who doubt that the author's discourse can be recovered must explain how, if we cannot access *that* past meaning, we are able to say how texts have been understood in the past by others.").

[425] *See generally* GADAMER, *supra* note 353, at 295–96 (explaining that the reader is able to understand the text because the reader and the text are bound together by tradition).

to explain how even tradition could be an influential force in shaping the beliefs and prejudices of an interpreter.

In sum, Mootz's view that stable, fixed meaning does not exist because an interpreter is always a co-participant in making meaning ultimately fails to explain the way that understanding works. An interpreter *does* always bring himself to the table, but this fact actually supports the project of interpretation and application. A proper appreciation for the horizon of the author means that the interpreter cannot alter the meaning of the original speech act, which is a fixed, past event. The interpreter does his best to grasp the meaning of a text and must do so with humility. But the fact that the reader brings himself to the table is actually beneficial to the interpretive project, because it means that he can carry the text into new situations and find fresh significance for that stable meaning. The meaning-significance distinction demarcates the area that is fixed and unchanging, determined by the author and inscribed in the text (meaning), from the changing and malleable application of that meaning in new contexts (significance). Such a view need not denigrate the role of tradition. Tradition is a valuable aid in interpretation and (in the context of legal precedent) supports stability and the rule of law in application.

Originalists need not shy away from the claim that there is a fixed, objective meaning that we aim to uncover in interpretation. Originalists would do well to pursue their project with humility, knowing that interpretation is difficult and meaning is not always clear. But, unlike its competitors, originalism provides both reason for confidence that we can determine and follow the law laid down by the Constitution and legitimate freedom to apply that law in new ways to changing situations.

VII. FURTHER RESEARCH

Speech-act theory has proved to be fertile ground for interdisciplinary dialogue between biblical studies and constitutional interpretation. More work could be done on this front. Specifically, both Austin and Vanhoozer tend to approach speech-act theory on the assumption that there is one actor or one author. Further research could consider how to apply the principles of speech-act theory to situations of collective authorship. Indeed, while the idea of "collective intent" seems implausible (indeed, this is one of the main criticisms leveled against "original intent originalism"),[426] "collective action" is a far more credible phenomenon. Vanhoozer's work on convention and genre could be a helpful place to

[426] *See* Barnett, *supra* note 33, at 412 (questioning the modern interpreter's capacity to identify individual Framers' intentions on any given issue and whether modern people should be bound by those intentions).

begin analyzing collective speech acts, since these concepts highlight a set of rules understood and followed by multiple actors to convey meaning. Specifically, convention plays a role in meaning because "[l]anguage is a rule-governed form of behavior," and communication "puts a language system into motion at a particular point in time by certain possibilities offered by" the system of signs that comprise a language.[427] In other words, invocation of a system of signs at a particular point in time is the way that an author conveys conventional semantic meaning. Moreover, using a particular genre allows an author or authors to invoke a specific set of conventions and expectations that are already in place.[428] These observations about collective expectations and conventions could serve as the starting point for further work considering how a group of drafters or ratifiers of the Constitution could act collectively to bring about meaning through a set of linguistic and generic conventions.

Additionally, biblical and constitutional interpreters may be able to engage in fruitful dialogue about methodology: given the fact that meaning is communicated via speech acts that occurred in the past, and we are sometimes distanced from those acts by time and culture, how do we best access that meaning? Speech act theory itself provides little more than broad brushstrokes in answering these questions. Nonetheless, there is significant overlap between the methods pursued by biblical scholars and the corpus linguistics work engaged in by constitutional scholars. Further interaction between these disciplines could produce greater effectiveness on both sides.

CONCLUSION

In conclusion, speech-act theory provides a basis for belief in objective, fixed meaning, because it grounds meaning in past communicative action. Meaning is objective because it is determined not by hidden intentions but by public actions. Moreover, meaning is fixed because the original textual and historical contexts of the speech act (not the interpreter's context) are the relevant cues for determining meaning. But, although meaning is fixed and determinate, a text may have ramifications continuing far beyond the author's own time. Indeed, in the case of the Constitution, which was intended to govern generations far into the future, a proper understanding of the text's genre mandates a

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427 *See* VANHOOZER, *supra* note 2, at 244, 222 (stating that linguistic conventions help readers understand the meaning of texts).

428 *See id.* at 338 (explaining that readers must learn the rules of a literary genre like an individual would learn the rules of a game).

recognition that it will apply in diverse circumstances, sometimes in varying ways.

The distinction between meaning and significance allows us to account for the fact that interpreters always bring themselves to the text while still appreciating the otherness of historical actors. Consequently, we may affirm that meaning is fixed and external to ourselves. Moreover, this distinction supports the New Originalists' claim that judges engage in two different activities: interpretation, which attempts to access the text's original, fixed meaning, and construction, which seeks to apply the text to new and varying circumstances. Originalists need not concede that meaning does not exist or that it is unknowable but should proceed with humility and confidence as they continue to apply the unchanging Constitution to new circumstances.

UNITED STATES TERRITORIES AT THE FOUNDING

Anthony M. Ciolli[*]

ABSTRACT

In their recent article, Delegation at the Founding*, Professors Julian Davis Mortenson and Nicholas Bagley make the novel claim that the United States Constitution had been originally understood by the Founders to not contain a nondelegation doctrine.*[1] *I express no opinion on that broader thesis, although others have seriously questioned their surprising conclusion.*[2] *I write this short Article, however, to respond to their assertion that Congress, by enacting the Northwest Ordinance and similar organic acts for the earliest United States territories, somehow "delegated the entirety of its police power over federal lands to federal officers and judges."*[3]

As I am about to illustrate, Mortenson and Bagley arrive at this conclusion based on a gross misinterpretation of the status of United States territories within the American system of government and the nature of the authority Congress exercises over them. The relationship between Congress and the territories is not an exercise of its legislative powers under Article I but rather is sui generis.

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I. THE TERRITORIAL CLAUSE

The power of Congress to administer the territories of the United States stems from the Territorial Clause found in Article IV, Section 3, Clause 2 of the United States Constitution.[4] The Territorial Clause reads, in its entirety, "[t]he Congress shall have Power to dispose of and make

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[1] Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 277 (2021).

[2] *See, e.g.*, Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 88–90 (2020) (arguing that Mortenson and Bagley base their conclusions on incorrect historical claims).

[3] Mortenson & Bagley, *supra* note 1, at 334.

[4] U.S. CONST. art. IV, § 3, cl. 2.

all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[5] Professors Mortenson and Bagley, in their article, *Delegation at the Founding*, seem to view this language as simply establishing another enumerated power of Congress, no different than the enumerated powers set forth in Article I.[6] But it is inappropriate to view the Territorial Clause—or any other constitutional provision for that matter—in complete isolation, standing alone, and completely divorced from any surrounding context.[7] The Founders did not draft the United States Constitution as an unstructured hodgepodge or mishmash of random and unconnected clauses. Rather, they chose a deliberate organizational structure with Article I establishing the structure and powers of Congress,[8] Article II and Article III doing the same, respectively, with the Executive and Judicial Branches,[9] and Article IV outlining the relationship between the various states as well as between each state and the federal government.[10]

It is no accident that the Founders included the Territorial Clause in Article IV, which pertains to the states, rather than among the enumerated powers of Congress in Article I.[11] As Mortenson and Bagley correctly recognize by noting that the First Congress "inherited" the Northwest Ordinance, United States territories existed prior to the drafting and ratification of the United States Constitution and the Territorial Clause.[12] In fact, their existence is inextricably intertwined with America's first constitution: the Articles of Confederation.[13]

Even before the signing of the Declaration of Independence, the Second Continental Congress established a committee to develop a new form of government for the original Thirteen Colonies.[14] That process culminated in the Continental Congress approving the Articles of Confederation on November 15, 1777,[15] and referring them to the Thirteen

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[5] *Id.*

[6] Mortenson & Bagley, *supra* note 1, at 336.

[7] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167–68 (2012).

[8] U.S. CONST. art. I.

[9] *Id.* arts. II, III.

[10] *Id.* art. IV.

[11] Eric Biber, *The Property Clause, Article IV, and Constitutional Structure*, 71 EMORY L.J. 739, 755–56 (2022).

[12] Mortenson & Bagley, *supra* note 1, at 334–35.

[13] *See infra* pp. 2–6.

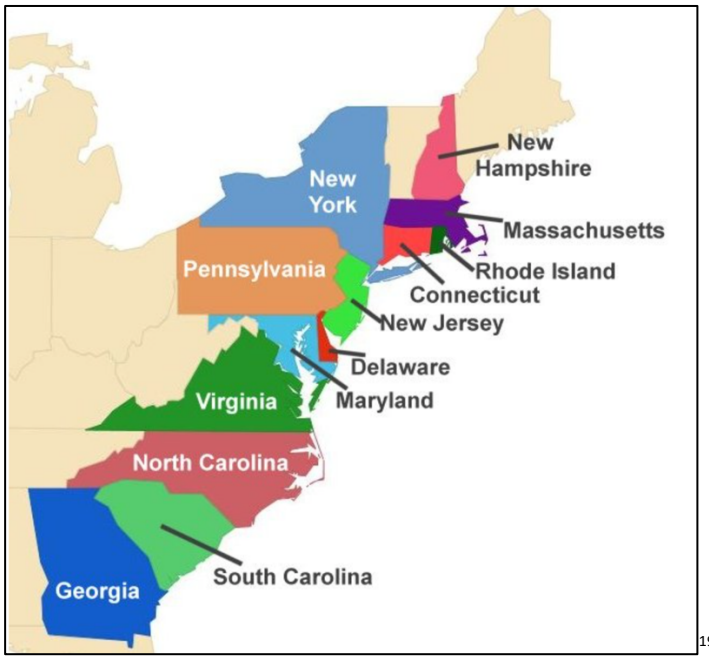
[14] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 67 (Jonathan Elliot ed., 2d ed., Philadelphia 1836).

[15] 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 906–07 (Worthington Chauncey Ford ed., 1907).

Colonies for their ratification.[16] Yet the Articles of Confederation did not become operative until nearly four years later, on March 1, 1781.[17]

Why this four-year delay? It was not due to any objectionable provision in the Articles of Confederation or the ongoing American Revolution. Rather, the Articles of Confederation were effectively held hostage due to disputes over western lands that were not part of any colony's recognized borders.[18]

When we think of the original thirteen colonies or thirteen states, something like this map is what typically comes to mind:



[19]

But that is not what the thirteen colonies looked like during the four-year period between approval of the Articles of Confederation by the Continental Congress and their ratification. The original map of the thirteen colonies looked similar to this:

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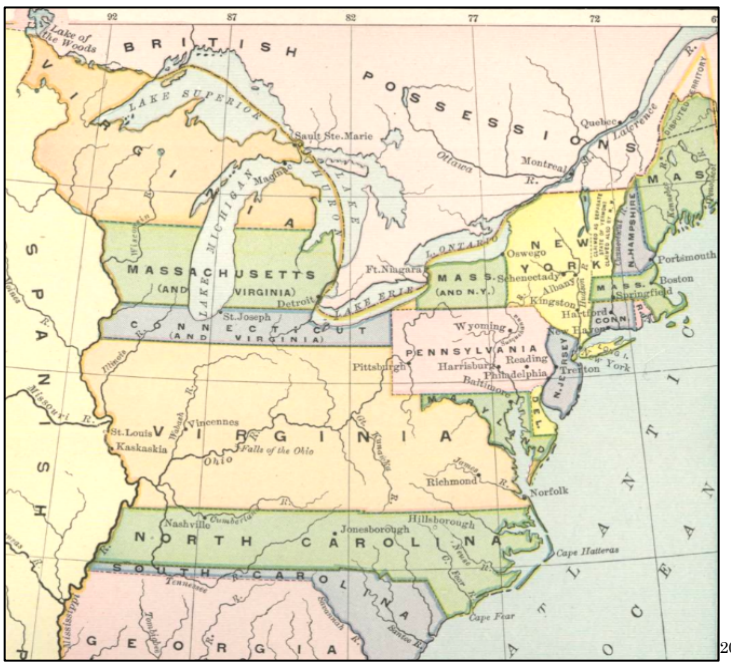
[16] *See* William F. Swindler, *Our First Constitution: The Articles of Confederation*, 67 A.B.A. J. 166, 169 (1981) (Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, South Carolina, Virginia, Delaware, Georgia, New Jersey, North Carolina, Maryland).

[17] *Id.* at 166.

[18] Merrill Jensen, *The Creation of the National Domain, 1781–1784*, 26 MISS. VALLEY HIST. REV. 323, 323–24 (1939).

[19] Illustration of Thirteen Colonies, *in Colonial America: The Thirteen Colonies*, DUCKSTERS, https://www.ducksters.com/history/colonial_america/thirteen_colonies.php (last visited Oct. 14, 2022).



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Thus, there was a very real concern that even after ratifying the Articles of Confederation, the new states would compete to acquire new lands for themselves.[21]

The four-year delay in ratifying the Articles of Confederation stemmed from Maryland—one of the few colonies that did not engage in this expansion[22]—steadfastly refusing to ratify the document unless other states dropped their claims to these new lands.[23] While other states did so, Virginia held out, and Maryland stuck to its position.[24] Ultimately, Virginia agreed to give up its land claims in 1781 and ceded the disputed lands to Congress contingent only on Maryland ratifying the Articles of

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[20] Map of the United States in 1783, *in* ALBERT BUSHNELL HART, EPOCH MAPS ILLUSTRATING AMERICAN HISTORY (4th rev. ed. 1910).

[21] *See* Biber, *supra* note 11, at 756–58, 758 n.78 (describing the anticipation of land disputes between the states arising from overlapping land grants issued to the Thirteen Colonies by the British government).

[22] *See id.* (explaining Maryland's concerns about other states competing for western lands).

[23] Jensen, *supra* note 18, at 323–24.

[24] *Id.*

Confederation,[25] which it did.[26] This agreement leading to the ratification of the Articles of Confederation enabled the passage of the Northwest Ordinance several years later.[27]

Mortenson and Bagley correctly note that the Northwest Ordinance provided for a territorial government and allowed the governor and judges who administered that government to create laws.[28] It is this latter provision that they purport constituted the unrestricted delegation of the entirety of Congress's "police power over federal lands to federal officers and judges" without any "determinate standards."[29] They fail to note, however, that the Northwest Ordinance contained an extraordinarily comprehensive list of actions that the territorial government could *not* take.[30] But, most importantly, they misapprehend the very nature of the Northwest Ordinance. The Confederation Congress directed in the text of the Northwest Ordinance itself that it "shall be considered as *Articles of compact* between the Original States and the people and States in the said territory, and *forever remain unalterable, unless by common consent*."[31] It should then come as no surprise that the First Congress reenacted the Northwest Ordinance verbatim with only the most minor changes.[32]

Why describe the Northwest Ordinance as "articles of compact" between the original states and the territory which would "forever remain unalterable, unless by common consent"?[33] The Northwest Ordinance did not merely establish a territorial government—it provided for the territory to be subdivided into "not less than three, nor more than five States," and that such states "shall be admitted" to the Union upon reaching 60,000 free inhabitants "on an equal footing with the original States, in all respects whatever."[34] It is this provision—the clear and mandatory path to achieving statehood on an equal basis with the original thirteen states—that makes the Northwest Ordinance such an important document to the point where even to this day it is included in the preface

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[25] 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 564, 566 (William Waller Hening ed., 1822).

[26] Jensen, *supra* note 18, at 324.

[27] After Maryland's ratification, the Articles of Confederation went into effect in 1781. 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 213–14 (Gaillard Hunt ed., 1912). Then in 1787, the Confederation Congress passed the Northwest Ordinance. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 334 (Roscoe R. Hill ed., 1936).

[28] Mortenson & Bagley, *supra* note 1, at 303–04, 334.

[29] *Id.* at 334–35.

[30] 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 27, at 340–41, 343.

[31] *Id.* at 339–40 (emphasis added).

[32] Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 286 & n.17 (2016).

[33] Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789).

[34] *Id.* at 53.

to the United States Code[35] along with the Declaration of Independence[36] and the United States Constitution.[37]

With this context, it is clear why the Founders did not include the Territorial Clause in Article I but instead as Article IV, Section 3, Clause 2 of the Constitution[38] immediately following the Admissions Clause located in Article IV, Section 3, Clause 1.[39] The powers Congress exercises when acting under the Territorial Clause are not the same as the "legislative powers" set forth in Article I—if that were the case, the Founders would have included the Territorial Clause in Article I, just as they did the Seat of Government Clause.[40] Rather, the Founders contemplated that the nature of Congress's role was akin to that of a trustee: establishing the building blocks of local governments in otherwise uninhabited or sparsely inhabited areas to prepare for eventual admission as a state on an equal basis with the existing states.[41]

This is further demonstrated by contrasting the language in the Territorial Clause with the language of the Seat of Government Clause in Article I—while the Seat of Government Clause grants Congress the enumerated power to "exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia,[42] the Territorial Clause uses narrower language, only permitting Congress to "make all needful Rules and Regulations."[43] The use of the word "needful" to modify the phrase "Rules and Regulations" necessarily indicates that this power is limited and that the ability of Congress to legislate for a territory cannot be

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[35] ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, *reprinted in* 1 U.S.C. LVII (2018 ed.).

[36] THE DECLARATION OF INDEPENDENCE, *reprinted in* 1 U.S.C. XLVII (2018 ed.).

[37] U.S. CONST., *reprinted in* 1 U.S.C. LXI (2018 ed.).

[38] U.S. CONST. art. IV, § 3, cl. 2.

[39] *Id.* cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

[40] *Id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *Id.* art. I, § 8, cl. 17 ("To exercise exclusive Legislation in all Cases whatsoever, over such District. . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.").

[41] *See* BILL HOWELL, THE FORGOTTEN LINCHPIN IN THE CASE FOR STATEHOOD EQUALITY: AN ANALYSIS OF THE NORTHWEST ORDINANCE OF 1787 WITH RESPECT TO FEDERALLY CONTROLLED LANDS 12–14 (2d ed. 2019) (explaining that Congress viewed its governance of each territory as a temporary measure until a local government could secure private property rights in the territory).

[42] U.S. CONST. art. I, § 8, cl. 17.

[43] *Id.* art. IV, § 3, cl. 2.

unrestricted.[44] Samuel Johnson's *A Dictionary of the English Language*, which is "generally seen as the most authoritative founding era dictionary,"[45] defines "needful" as "[n]ecessary; indispensably requisite,"[46] and its corollary, "necessary," as "[n]eedful; indispensably requisite."[47]

Thus, at the time of the Founding, the words "needful" and "necessary" were effectively used as synonyms. In the context of the Constitution's Necessary and Proper Clause, the United States Supreme Court has long construed the word "necessary" in the Constitution as effectively requiring that "the end be legitimate" and "be within the scope of the constitution."[48] This is consistent with the contemporaneous observations of Alexander Hamilton, who wrote,

> a criterion of what is constitutional, and of what is not so . . . is the *end*, to which the measure relates as a *mean*. If the end be clearly comprehended within any of the specified powers, [and] if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution—it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: *Does the proposed measure abridge a pre-existing right of any State, or of any individual?* If it does not, there is a strong presumption in favour of its constitutionality.[49]

That the First Congress enacted the Northwest Ordinance in virtually the same form as the Confederation Congress[50] should therefore come as no surprise and says absolutely nothing about how the Founders viewed delegation of the enumerated powers in Article I. The Northwest Ordinance established a pre-existing right of the individuals who resided in the Northwest Territory that predated the United States Constitution in the form of "articles of compact" providing for government under specified terms.[51] Itguaranteed a path to statehood if certain actions

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[44] For this reason, it is not appropriate to analogize the powers of Congress under the Territorial Clause to its powers under the Seat of Government Clause, for the latter expressly provides that Congress may "exercise exclusive Legislation in *all cases whatsoever*" over the District of Columbia, without providing that such legislation be needful or otherwise limited in scope. *Id.* art. I, § 8, cl. 17 (emphasis added).

[45] Jeffrey M. Schmitt, *Limiting the Property Clause*, 20 NEV. L.J. 145, 151–52 (2019) (citing Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 359 (2014)).

[46] *Needful*, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792).

[47] *Id.* (defining *necessary*).

[48] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 418, 420–21 (1819).

[49] Alexander Hamilton, An Opinion on the Constitutionality of an Act to Establish a Bank, *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 107 (Harold C. Syrett & Jacob E. Cooke eds., 1965) (emphasis added).

[50] Steinglass, *supra* note 32.

[51] Northwest Ordinance, ch. 8, 1 Stat. 50, 52 (1789).

occurred[52] and that such compact would "forever remain unalterable, unless by common consent."[53] Had the First Congress repudiated the Northwest Ordinance—as Mortenson and Bagley imply it would have if it believed that delegation was "anathema to the new Constitution"[54]—that itself would have been unconstitutional for the reasons set forth by Hamilton.[55]

Last, but certainly not least, Mortenson and Bagley are incorrect that "the Article IV territorial authority is assigned to Congress alone."[56] The plain text of the Territorial Clause is that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[57] It does not say that the power of Congress is exclusive or that there are other entities within the government that cannot exercise such powers as well. As noted above, the Seat of Government Clause expressly assigns Congress the power to "exercise exclusive Legislation in all Cases whatsoever" for the District of Columbia.[58] Article I also gives Congress the "exclusive" power over copyrights and patents,[59] grants it the power to establish "uniform" immigration and bankruptcy laws,[60] and expressly prohibits states from entering into treaties, coining money, granting letters of marque, laying duties on imports or exports, engaging in war, and so forth.[61] Had the Founders intended for Congress to exercise *exclusive* authority—as opposed to concurrent authority with a territorial government—to establish rules and regulations for a territory, it could have easily done so, whether through positive language as found in the Seat of Government Clause or by negative language withholding the power from territorial governments.[62]

That the Founders did not vest Congress with exclusive authority to make needful rules and regulations for the territories is powerful evidence that they simply did not view this as a power solely and exclusively vested in Congress. On the contrary, interpreting the Territorial Clause to make this an *exclusive* power would undermine the very purpose of granting this power to Congress in the first place: To prepare the territories for eventual admission as new states coequal to the original states under the procedure

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52 *See id.* at 53 (discussing the various conditions required to establish statehood).

53 *Id.* at 52.

54 Mortenson & Bagley, *supra* note 1, at 335.

55 Hamilton, *supra* note 49.

56 Mortenson & Bagley, *supra* note 1, at 336.

57 U.S. CONST. art. IV, § 3, cl. 2.

58 *Id.* art. I, § 8, cl. 17.

59 *Id.* cl. 8.

60 *Id.* cl. 4.

61 *Id.* art. I, § 10.

62 *See generally id.* art. I, § 8, cl. 17 (enabling Congress to exercise exclusive authority over the District of Columbia).

set forth in the Admissions Clause.[63] How could residents of an area such as the Northwest Territory—vast and sparsely populated, with virtually all American citizens residing in the area emigrating from the states[64]—ever imagine to achieve coequal statehood without the capacity for some sort of self-government independent of Congress? It is this that makes Congress's power under the Territorial Clause wholly distinct and incomparable to its legislative powers under Article I—the Founders gave Congress the power to make needful rules and regulations for the territories *for the purpose of giving them up*.[65] In contrast, none of the enumerated powers of Congress under Article I are of such a temporary nature; they are of the sort that, absent constitutional amendment, will be exercised by Congress in perpetuity.[66]

II. THE NATURE OF CONGRESSIONAL POWER OVER THE TERRITORIES

For the reasons given above, the powers Congress exercises under the Territorial Clause are not legislative powers like those in Article I. Even if that were not the case, Mortenson and Bagley's invocation of the territories to support their thesis fails for another, and perhaps more fundamental, reason. They describe Congress as not just delegating its purported "police power over federal lands" but doing so "to federal officers and judges."[67] But as will be explained, officials that administer a territory—even if appointed by the President or other federal actor—are not federal officers but territorial officers.[68]

Mortenson and Bagley themselves do not deny that it is extraordinarily well established in American jurisprudence "that territories do not exercise . . . the legislative or executive power of the

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[63] *See generally id.* art. IV, § 3, cl. 1 (establishing that new states may be admitted into the Union with the consent of the Legislature of the State and Congress).

[64] *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 450 (2002) (noting the migration of citizens from the original states); Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, 26–27 (2013) (discussing the sparsely populated Northwest territory).

[65] *See* Cesar A. Lopez-Morales, *Making the Constitutional Case for Decolonization: Reclaiming the Original Meaning of the Territory Clause*, 53 COLUM. HUM. RTS. L. REV. 772, 796–97 (2022) (asserting that Congress was given the power to govern the territories as "states-in-waiting" rather than permanent possessions).

[66] *See* U.S. CONST. art. I, § 8 (discussing the enumerated powers of Congress without any language suggesting a temporary or transitory nature); *see generally id.* art. V (discussing the Constitutional amendment process).

[67] Mortenson & Bagley, *supra* note 1, at 334.

[68] *See* Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761, 783 (2019) (describing those appointed to territorial governance by the President as territorial officials).

United States."[69] Nevertheless, they wave away all judicial precedents standing for this proposition on the grounds that this is "without support in the Founding Era materials."[70] They maintain that "[h]ad the Founders collectively believed (or even if they had reasoned their way to the view) that the nondelegation doctrine had less purchase when it came to territorial legislation, surely someone, somewhere, would have said as much," and "[t]o our knowledge, however, no one ever did."[71] According to them, the only authority to support the proposition that territorial officials do not exercise the power of the United States comes from "Supreme Court case law that came a century or more after the Founding" that "didn't spring from a careful review of Founding Era evidence."[72]

Although not identified by name, Mortenson and Bagley are clearly referring to a series of early twentieth-century decisions collectively known as the *Insular Cases*.[73] In those cases, the Supreme Court of the United States relied on now-discredited theories of racial inequality and the white man's burden to interpret the Territorial Clause of the United States Constitution as permitting Congress to treat the "savages,"[74] "half-civilized,"[75] "ignorant and lawless"[76] "alien races"[77] inhabiting America's territories in the Caribbean Sea and the Pacific Ocean differently than white Americans in the states and mainland territories.[78] To do so, the United States Supreme Court invented the doctrine of territorial

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[69] *See, e.g.*, Mortenson & Bagley, *supra* note 1, at 336 (alterations in original) (quoting Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1544 (2020)); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1658–59 (2020) (discussing how Congress created local offices to exercise the powers of local government, not federal power).

[70] Mortenson & Bagley, *supra* note 1, at 336.

[71] *Id.* at 336–37.

[72] *Id.*

[73] *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 809 & nn.46–47 (2005) (discussing the Supreme Court cases considered to be the *Insular Cases*).

[74] *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 279–80 (1901) (arguing that the "savage[]" children should not be citizens of the United States).

[75] *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1, 138 (1901) (arguing that the Constitution was never intended to apply to the "half-civilized").

[76] *See, e.g.*, Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899) (discussing how the Court considered the territories "ignorant and lawless" and desired to exercise swift justice against them).

[77] *See, e.g.*, *Downes*, 182 U.S. at 287 (arguing that "alien races" may be governed more harshly).

[78] *See id.* (asserting that the Constitution does not prohibit governance of the territories under principles contrary to Anglo-Saxon views of government and justice).

incorporation to draw distinctions between "incorporated" and "unincorporated" territories.[79]

Mortenson and Bagley are unquestionably correct that the *Insular Cases* lack any legitimate textual, historical, or jurisprudential basis for their reasoning.[80] Rather, it is almost universally accepted that the *Insular Cases* were based on naked racism which has since been disavowed by nearly every corner of the legal profession to the extent that it has been said that the *Insular Cases* "have nary a friend in the world."[81] But there is one thing that Mortenson and Bagley overlook: the idea that territorial officials do not exercise the power of the United States did not originate with the *Insular Cases*[82] and is one of the very few concepts mentioned in the *Insular Cases* that actually *does* have support in Founding Era materials.[83] In fact, the Supreme Court of the United States considered the question a mere fifteen years after ratification of the Constitution.[84]

The Northwest Ordinance established a territorial government for the Northwest Territory.[85] As Mortenson and Bagley acknowledge, the territorial government included territorial courts consisting of territorial judges appointed by federal authorities—the Confederation Congress under the Articles of Confederation and the President after ratification of

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[79] Anthony Ciolli, *The Power of United States Territories to Tax Interstate and Foreign Commerce: Why the Commerce and Import-Export Clauses Do Not Apply*, 63 TAX LAW. 1223, 1225 (2010).

> The concept of incorporation was first proposed by Justice Edward White in his concurring opinion in *Downes v. Bidwell* and later adopted by a majority of the Supreme Court in *Dorr v. United States*, [and] is [premised] on the idea that . . . the United States Constitution would only apply in full force in a territorial possession if Congress had somehow expressed an intent to incorporate the territory into the United States and to provide its inhabitants with all of the rights guaranteed by the Constitution.

Id.

[80] *See* Mortenson & Bagley, *supra* note 1, at 337 (discussing how the *Insular Cases* don't have historical basis for their reasoning). As one scholar succinctly explained, "[f]rom the standpoint of an originalist . . . *[t]he Insular Cases* are, as Judge Torruella has aptly put it, 'a strict constructionist's worst nightmare.' From the standpoint of one who views the Constitution in more functional or normative terms . . . *[t]he Insular Cases* look even worse." Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1177 (2009) (footnote omitted).

[81] Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536–37 (2008).

[82] *See, e.g.*, Clarke v. Bazadone, 5 U.S. (1 Cranch) 212, 214 (1803) (discussing the territorial court's inability to appeal, 100 years before the *Insular Cases*, because territorial courts were not considered inferior courts that exercised the power of the United States).

[83] *Compare id.* (discussing the territorial courts' inability to appeal decisions), *with* Downes v. Bidwell, 182 U.S. 244, 259 (1901) (stating that territorial officials do not necessarily exercise the power of the United States).

[84] *See generally* U.S. CONST. (ratified in 1787); *Clarke*, 5 U.S. at 214 (decided in 1803).

[85] Northwest Ordinance, ch. 8, 1 Stat. 50, 51 (1789).

the Constitution.[86] What the Northwest Ordinance did not do, however, was establish separate federal courts in the Northwest Territory as Congress had done in the states through the Judiciary Act of 1789.[87] Unlike the thirteen states, where federal courts existed alongside state courts,[88] the only courts in the Northwest Territory were the territorial courts.[89] Moreover, neither the Northwest Ordinance, the Judiciary Act, nor any other act of Congress granted the Supreme Court of the United States—or any of the federal courts established by the Judiciary Act—appellate jurisdiction to review decisions of the courts of the Northwest Territory.[90]

In its 1803 term—a mere three weeks before issuing its seminal opinion in *Marbury v. Madison*—the United States Supreme Court considered the nature of territorial institutions in *Clarke v. Bazadone*.[91] That case arose from a judgment issued by a Northwest Territory court against Clarke in favor of Bazadone for $12,200 damages and $95.30 in costs.[92] Despite there being no statutory authorization for an appeal from the courts of the Northwest Territory to the Supreme Court, Clarke contended that Article III of the United States Constitution entitled him to take an appeal as of right.[93]

Clarke's argument in support of jurisdiction was straightforward and largely mirrors the reasoning seemingly endorsed by Mortenson and Bagley.[94] Article III, Section 1 of the United States Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[95] Article III, Section 2 then provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising

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[86] Mortenson & Bagley, *supra* note 1, at 334–35.

[87] James T. Campbell, *Island Judges*, 129 YALE L.J. 1888, 1903–04 (2019) (discussing how Congress did not establish federal courts in the Northwest Territory).

[88] *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (establishing thirteen federal district courts).

[89] *See* Campbell, *supra* note 87, at 1903–04 (discussing how the Judiciary Act of 1789 did not establish federal courts in the Northwest Territory).

[90] *See* Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631, 1633 n.12 (2019) (asserting that there was no system to appeal decisions from territorial courts until 1805).

[91] Clarke v. Bazadone, 5 U.S. (1 Cranch) 212, 214 (1803); *see generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the influential principle of judicial review).

[92] *Clarke*, 5 U.S. (1 Cranch) at 212.

[93] *Id.* at 212–13.

[94] *Compare id.* at 214 (holding that the Supreme Court's appellate jurisdiction arises from the Constitution), *with* Mortenson & Bagley, *supra* note 1, at 278, 334 (arguing against the idea that the Constitution was intended to have a nondelegation doctrine through reasoning that the Northwest Ordinance delegated police powers to federal officers and judges).

[95] U.S. CONST. art. III, § 1.

under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and that in such cases "[t]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[96]

Clarke correctly noted that Congress had established the courts of the Northwest Territory through an act of Congress: the Northwest Ordinance.[97] According to Clarke, this made the courts of the Northwest Territories "inferior courts as congress shall, from time to time, ordain and establish" pursuant to Section 1 of Article III.[98] Because the Northwest Territory court exercised jurisdiction over the lawsuit pursuant to jurisdiction granted by Congress through the Northwest Ordinance—again, an act of Congress—Clarke argued that the case arose under "the laws of the United States" under Section 2 of Article III.[99] He then argued that Section 2 of Article III gave the Supreme Court appellate jurisdiction over the territorial court unless Congress proactively created an exception as his appeal was from an inferior court exercising the judicial power of the United States under the laws of the United States.[100]

The Supreme Court rejected this argument and dismissed his petition for lack of jurisdiction without any noted dissent.[101] It did not issue a lengthy opinion explaining its decision, as it would in *Marbury*.[102] Rather, the Supreme Court rejected Clarke's argument in a single sentence:

> The court quashed the writ of error,
>
> > On the ground that the act of congress had not authorized an appeal or writ of error, from the general court of the North-western Territory, and therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case.[103]

Given the nature of Clarke's argument, it would have been impossible for the Supreme Court to reach this decision without deciding that (1) the courts of the Northwest Territory did not exercise the judicial power of the United States; and/or (2) the Northwest Ordinance was not a law of the United States. This is particularly true given that the same Justices

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96 *Id.* §2, cls. 1–2.

97 *See Clarke*, 5 U.S. (1 Cranch) at 212 (referencing the Northwest Ordinance as the ordinance of the old congress).

98 *Id.* at 213 (referencing U.S. CONST. art. III, §1).

99 *Id.*

100 *Id.*

101 *Id.* at 214.

102 *See generally id.* at 212–14 (three-page opinion); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (twenty-seven page opinion).

103 *Clarke*, 5 U.S. (1 Cranch) at 214.

would issue *Marbury* several days later with the pivotal holding that Congress lacks the authority to modify the constitutional jurisdiction of the Supreme Court as set forth in Article III.[104] Moreover, all seven Supreme Court Justices serving at the time—including Chief Justice John Marshall—were actively involved in the American Revolution and early American government in some aspect and certainly familiar with the original intent of the pertinent constitutional provisions.[105]

The immediate response of Congress to the *Clarke* decision provides further support. A few mere months after the Supreme Court issued *Clarke*, a committee of the House of Representatives considered legislation to explicitly grant the Supreme Court appellate jurisdiction over the courts of the Northwest Territory.[106] But "[t]he committee recommended against the reform, reasoning that the purpose of the Court's appellate jurisdiction was to bring 'uniformity of decision' to parts of the country that were 'subject to the same laws and usages.'"[107] In other words, "[w]hile appellate jurisdiction made sense within the United States, it did not make sense in the territories, which by hypothesis were subject to laws and usages that differed from those in the rest of the country."[108] The entire basis of the congressional committee's decision was that the rights established in the Northwest Ordinance were not federal rights but territorial rights, and thus it would be inappropriate to grant the Supreme Court jurisdiction to review the decisions of territorial courts adjudicating territorial rights under the Northwest Ordinance.[109]

To the extent any doubt remains as to the reasoning for the holding in *Clarke*, it is dissipated by another decision of the Marshall Court. After

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[104] *Marbury*, 5 U.S. (1 Cranch) at 174, 176; *see* 5 U.S. (1 Cranch) (1803) (reporting the sitting justices at the time *Marbury* and *Clarke* were decided); ANNE ASHMORE, DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: UNITED STATES REPORTS VOLUMES 1–107 (1791–1882), 4 (2018), https://www.supremecourt.gov/opinions/datesofdecisions.pdf.

[105] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (acknowledging the Supreme Court Justices' familiarity with the original intent of the Constitution); Scott Douglas Gerber, *The Supreme Court Before John Marshall*, 14 U. ST. THOMAS L.J. 27, 32 (2018) (stating the criteria employed to choose Supreme Court Justices at that time which included involvement in the American Revolution); Christian Ketter, *Chief Justice Marshall's Judicial Statesmanship Amid* In re Burr*: A Pragmatic Political Balancing Against President Jefferson Over Treason*, 53 J. MARSHALL L. REV. 789, 811–12 (2020) (showing Marshall's involvement in the Revolutionary War and early American government).

[106] *See* William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 39, 75–76 (1962) (stating that a congressional committee convened in December 1803 to discuss changing the Court's jurisdiction over the Northwest Territory).

[107] James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United State*s, 118 HARV. L. REV. 643, 709 (2004) (quoting 14 ANNALS OF CONG. 1578 (1804)).

[108] *Id.*

[109] *Id.* at 709–11.

acquiring the territory of Florida, Congress, as it did with the Northwest Territory, did not create a separate federal court system for the territory but again only established territorial courts, which were vested with jurisdiction to enforce federal law as well as territorial law.[110] However, Congress provided that the judges of the territorial courts of Florida would only serve for four-year terms.[111]

In *American Insurance Co. v. Canter*, decided in 1828, the United States Supreme Court considered a challenge to the constitutionality of territorial courts.[112] The case stemmed from a territorial court of Florida located in Key West exercising admiralty jurisdiction to order a marshal's sale of 356 bales of cotton recovered in a shipwreck.[113] The insurance company, however, filed a lawsuit in the United States District Court of South Carolina for possession of the cotton bales, arguing that the sale by the territorial court was void and a nullity because the United States Constitution only permitted Article III courts to exercise admiralty jurisdiction.[114] The insurance company argued that, although the territorial court exercised the judicial power of the United States, it was not an Article III court because the judges served four-year terms rather than for life during good behavior, and therefore, Congress unconstitutionally vested Article III powers in a non-Article III court.[115]

The Supreme Court rejected this argument and made explicit the implicit reasoning of the earlier *Clarke* case.[116] The Supreme Court agreed that the Florida courts were not Article III courts in that the judges held their offices for only four years.[117] Nevertheless, the Supreme Court held that the territorial courts were not exercising the judicial power of the United States even though they had been created by Congress and were tasked with adjudicating claims arising under federal law.[118] As Chief Justice Marshall wrote,

> We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that "the Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour." The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power

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110 Blume & Brown, *supra* note 106, at 70.

111 *Id.* at 82.

112 26 U.S. (1 Pet.) 511, 541–42 (1828).

113 *Id.* at 541.

114 *Id.*

115 *Id.* at 546.

116 *See id.* at 546 (holding that the territorial court's award of restitution ought to be affirmed); Clarke v. Bazadone, 5 U.S. (1 Cranch) 212, 214 (1803) (dismissing Clarke's petition for lack of jurisdiction).

117 *Canter*, 26 U.S. (1 Pet.) at 546.

118 *Id.*

> conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.[119]

In effect, the Founders intended for the United States Constitution to confer two hats upon Congress with respect to the territories. When enacting generally applicable legislation for the entire United States, Congress sits as the national legislature and is creating laws of the United States.[120] However, when it passes a law directed toward a territory and not the whole nation—as it did with the Northwest Ordinance or the organic act for the Florida Territory—it sits as the equivalent of a state government and is able to enact laws that would not be possible if enacted as national legislation.[121]

A state government is free to organize its state courts as it wishes;[122] in fact, even today, most states do not give life tenure to their judges.[123] While Congress, when creating a federal court under Article III for purposes of adjudicating federal law, generally, is required to provide life tenure, it need not do so when creating a territorial court.[124] Rather, Congress could provide for a four-year term for the judges serving on the territorial courts of Florida, just as the state of Connecticut could provide for a four-year term for the judges serving on its state courts.[125] In effect, the Supreme Court in *Canter* interpreted the Territorial Clause to divorce

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[119] *Id.*

[120] *See* U.S. CONST. art. 1, § 8, cl. 18 ("To make all 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.").

[121] *See Clarke*, 5 U.S. (1 Cranch) at 214 (showing that the Northwest Ordinance provides laws copied from state laws); *Canter,* 26 U.S. (1 Pet.) at 546 (recognizing that Congress acts as an equivalent of state government).

[122] William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1531 (2020).

[123] *Id.* at 1523.

[124] *Id.* at 1529–30; Pfander, *supra* note 107, at 646.

[125] Baude, *supra* note 122, at 1530; *see* Jon C. Blue, *Judicial Tenure in Connecticut: How It Was Gained and How It Was Lost – 1818-1863*, 20 QLR 125, 127 (2000) (noting that Connecticut amended its state's constitution regarding the tenure of judges).

the territories from the structural provisions of the federal government.[126] Just as the states are not required by Article III to give life tenure to state judges,[127] neither Congress nor a territorial legislature is required to give life tenure to territorial judges.[128]

This interpretation is further supported by one aspect of the Northwest Ordinance that Mortenson and Bagley consider surprising: Congress permitted the judges of the Northwest Territory to exercise legislative functions rather than limiting them only to traditional judicial functions such as adjudicating cases.[129] But while this may be unusual in the context of Article III courts, it is quite common for state courts to exercise powers that go beyond resolving cases and controversies.[130] Even to this day, state supreme courts exercise what the United States Supreme Court has recognized as a quintessential legislative power: licensing attorneys and regulating the legal profession.[131] That Congress, in enacting the Northwest Ordinance, vested legislative powers to territorial judges that it could not vest to federal judges under Article III is powerful evidence that Congress did not establish the Northwest Ordinance as a law of the United States and that territorial judges and other territorial officials do not exercise the power of the United States.

CONCLUSION

The relationship between the United States and its territories is a complex one. The present constitutional status of the territories—established more than a century ago by the racist *Insular Cases* but persisting to this day—is rightly criticized for having no anchor in the plain text of the Constitution or the intent of the Founders. The nature of the power Congress and territorial officials exercise under the Territorial Clause is not an invention of the *Insular Cases* but predates even the ratification of the United States Constitution and is readily ascertainable from Founding Era materials.

Simply put, the Founders did not view the powers of the Territorial Clause as simply another enumerated power of Congress no different than those set forth in Article I. Rather, it is sui generis. The power to make needful rules and regulations for the territories is a temporary, transitory power: It is the power to organize those lands which, to that point, were unorganized so that they may achieve statehood on a coequal basis as the

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126 *Canter*, 26 U.S. (1 Pet.) at 545–46.

127 Baude, *supra* note 122, at 1523.

128 Pfander, *supra* note 107, at 651.

129 Mortenson & Bagley, *supra* note 1, at 335.

130 *See* Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836–38 (2001) (showing how state courts are not bound by Article III and go outside of its confines in various ways).

131 *See* Sup. Ct. of Va. v. Consumers Union, 446 U.S. 719, 731 (1980) (recognizing how state supreme courts may exercise their powers in a legislative capacity).

original states.[132] While the *Insular Cases* cast that purpose aside, as Mortenson and Bagley recognize, "[i]t's anachronistic to project those later views onto the Founders" since "[t]he Supreme Court's conclusion didn't spring from a careful review of Founding Era evidence."[133] In fact, one much overlooked aspect of the *Insular Cases* is that, despite their faults—and there certainly are many—the Supreme Court acknowledged that territorial status is a temporary status that would not remain indefinitely, with even the insular territories inhabited by "alien races" eventually exiting that status, although more likely through independence than statehood.[134]

Again, I do not intend to dispute the main thrust of Mortenson and Bagley's thesis, although their misinterpretation of the Territorial Clause and the status of the territories as understood at the Founding may certainly call their larger conclusion into further question. But whatever the intent of the Founders may have been with respect to delegation of the legislative powers of Congress under Article I to administrative agencies or other actors, that Congress exercised its powers under the Territorial Clause to establish territorial governments and permit those territorial governments to enact and enforce territorial law says absolutely nothing. Territorial governments were not established by Congress in the same way that Congress created the Environmental Protection Agency to regulate waste or the Federal Trade Commission to enforce antitrust law.[135] They were created not with the intent to assert or implement a power of Congress but to remove Congress from the equation entirely by transitioning the territory to statehood.

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[132] *See supra* notes 64–66 and accompanying text.

[133] *See supra* notes 73–84 and accompanying text; Mortenson & Bagley, *supra* note 1, at 337.

[134] Burnett, *supra* note 73, at 802; *see* Lopez-Morales, *supra* note 65, at 800–01 (explaining that "even a decade after" the *Insular Cases* decision "the Supreme Court continued to highlight the temporary nature of the territorial status"); Downes v. Bidwell, 182 U.S. 244, 286–87 (1901) (stating that the insular territories are inhabited by "alien races"); *see also* Román & Simmons, *supra* note 64, at 450 ("However, the territorial condition was considered transitory and temporary.").

[135] *Compare* Lopez-Morales, *supra* note 65, at 800 (noting Congress's role in creating territorial governments), *with* Christopher D. Ahlers, *Presidential Authority Over EPA Rulemaking Under the Clean Air Act*, 44 ENV'T L. 31, 47, 52 (2014) (implicating Congress's power in creating the Environmental Protection Agency through a concurrent resolution with President Nixon), *and* William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 611 (1982) (noting how Congress created the Federal Trade Commission, an administrative agency, to enforce antitrust laws).

JESUS'S OBJECTIONS DURING HIS PRELIMINARY EXAMINATION AND MODERN NOTIONS OF DUE PROCESS

Melvin L. Otey[*]

ABSTRACT

The trials of Jesus of Nazareth are among the most famous legal proceedings in the world and among the most influential on Western culture. Notably, most scholars emphasize various aspects of the Sanhedrin and Roman proceedings to the neglect of the preliminary hearing that occurred first. Among other outstanding aspects of that hearing, Jesus registered clear objections to being questioned by the high priest and assaulted by the high priest's officer. This Article examines those protestations in the larger context of Jesus's silence during his ensuing trials and proposes that these ancient objections still resonate with modern conceptions of due process.

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INTRODUCTION

Jesus of Nazareth was executed two thousand years ago as an outlaw and enemy of Rome at the instigation of the Jewish leaders and under the authority of Pontius Pilate, governor of Judea.[1] Although there are no audio or video records associated with the ancient proceedings, the trials of this poor, ancient Near Eastern rabbi remain the most well-known and influential in the world's history.[2] As former Israeli Supreme Court Justice Haim Cohn asserted,

> No trial in the history of mankind has had such momentous consequences. None has given rise to such far-reaching, authoritative, and persistent assertions of a grave miscarriage of justice. None has had

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[1] WARREN CARTER, PONTIUS PILATE: PORTRAITS OF A ROMAN GOVERNOR 1 (2003) ("[Pilate] was the Roman governor of the province of Judea between 26 and 37 C.E. who used his life-and-death power as governor to execute Jesus of Nazareth in Jerusalem around the year 30 C.E."); T.A. Burkill, *The Trial of Jesus*, 12 VIGILIAE CHRISTIANAE 1, 17 (1958) ("We are thus led to the conclusion that Jesus was handed over to the procurator after the matutinal meeting of the [S]anhedrin, that he was prosecuted on the basis of a political charge or charges, and that he was condemned to death by the procurator as a dangerous aspirant to royal power."); *see also* William A. Herin, *The Trial of Jesus*, 7 UNIV. FLA. L. REV. 47, 47, 57 (1954) ("When noonday of Friday, the 7th of April, A.D. 33, . . . had come and gone, Jesus had been crucified."); *Matthew* 27:2, 24–26 (showing that Pilate, the governor, delivered the judgment to crucify Jesus); *John* 18:35 (English Standard) ("Pilate answered, 'Am I a Jew? Your own nation and the chief priests have delivered you over to me. What have you done?'").

[2] *See* Hala Khoury-Bisharat & Rinat Kitai-Sangero, *The Silence of Jesus and Its Significance for the Accused*, 55 TULSA L. REV. 443, 444 (2020) ("Jesus'[s] trial is probably the most famous trial in history."); Jonathan K. Van Patten, *The Trial of Jesus*, 65 S.D. L. REV. 285, 288 (2020) ("The trial of Jesus is a fascinating story, with undeniably historic consequences. It has shaped our history, for good *and* ill, like no other trial."); Jiří Bílý, *Jesus of Nazareth - The Most Infamous Trial*, 4 J. ON EUR. HIST. L. 92, 92 (2013) ("Few if any court cases from antiquity are as well-known."); Laurna L. Berg, *The Illegalities of Jesus' Religious and Civil Trials*, 161 BIBLIOTHECA SACRA 330, 330 (2004) (describing the legal proceeding against Jesus as "one of the most infamous trials in the history of humankind"); Edith Z. Friedler, *The Trial of Jesus as a Conflict of Laws?*, 32 IRISH JURIST 398, 399 (1997) ("The trial of Jesus is an event which has had a decisive impact upon the destiny of a particular people as well as all of humanity."); United States v. Offutt, 145 F. Supp. 111, 114–15 (D.D.C. 1956) (referring to Jesus's Roman trial before Pontius Pilate as one of "the great trials of history").

> repercussions which have lost nothing of their impact or actuality even after the lapse of almost two millennia.[3]

Jesus's Jewish and Roman trials are primarily familiar and relevant in Western culture because of their religious significance. The most extensive historical records of the proceedings are in the New Testament, where the four canonical Gospels—*Matthew*, *Mark*, *Luke*, and *John*—discuss the hearings in varying detail.[4] In the immediate context of each document, the proceedings are the conduit that leads to Jesus's crucifixion.[5] Moreover, the trials are a critical hinge in the Bible's grand narrative. According to Christian readings of Old Testament texts, Jesus was purposed to die on behalf of humanity centuries before his birth, and according to New Testament texts, his trials were the legal mechanism by which his atoning death was accomplished.[6] Jesus's life and trials, then, have had profound theological and religious ramifications for billions of Christian believers over the centuries, and this partly explains their endurance in the collective Western conscience.

While religious interest in the trials persists because of their prominence in sacred Christian texts, their importance is not restricted to the realms of personal and communal faith.[7] In fact, it is far broader. In discussing the Roman trial, David Lloyd Dusenbury observed that "[t]he drama of Pilate and Jesus is thus not only a religious memory. Pilate's crucifixion of an innocent man, held by Christians to be the God-man, is a secular tragedy without which no convincing record can be written of . . . 'the form of Western history.'"[8] If Dusenbury is correct, then it is

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[3] HAIM COHN, THE TRIAL AND DEATH OF JESUS, at xi (1971).

[4] *Compare John* 18:12–14, 19–24, 28–19:16 (describing the pre-trial proceeding Jesus faced before Annas, the former high priest, and explaining the events that unfolded during the trial with Pilate), *with Matthew* 26:57–68, 27:1–2, 11–26 (describing only Jesus's trials before the Great Sanhedrin and Pilate in various detail), *Mark* 14:53–65, 15:1–15 (similar), *and Luke* 22:66–23:25 (similar).

[5] *Matthew* 26:57–68, 27:1–44; *Mark* 14:53–65, 15:1–32; *Luke* 22:66–27:25; *John* 18:12–14, 19–24, 28–19:27.

[6] *See* Berg, *supra* note 2 (describing how the Old Testament's prophesies were fulfilled through Jesus); *Hebrews* 10:5–10 (quoting *Psalm* 40:6–8) (explaining how Jesus fulfilled the Old Testament sacrificial requirements by giving his body as a sacrifice); *see also, e.g.*, WILLIAM L. LANE, THE GOSPEL ACCORDING TO MARK: THE ENGLISH TEXT WITH INTRODUCTION, EXPOSITION AND NOTES 562 (1974) ("In Christian perspective the cross of Christ is the focal point of the Gospel. Here God dealt definitively with the problem of human rebellion and made provision for the salvation of men. The unique character of Jesus'[s] sufferings lies in the fact that he went to the cross in fulfilment of his mission to bear the burden of the divine judgment upon sin." (citation omitted)).

[7] *See* DAVID LLOYD DUSENBURY, THE INNOCENCE OF PONTIUS PILATE: HOW THE ROMAN TRIAL OF JESUS SHAPED HISTORY, at xix (2021) (explaining that the trial of Jesus has influenced Europe and the Americas both legally and politically).

[8] *Id*. (quoting Michel Foucault, Lecture at the College De France (Mar. 22, 1978), *in* SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE, 1977–1978, at 285, 293 (Michel Senellart et al. eds., Graham Burchell trans., Picador 2009) (2004)).

understandable that interest in the proceedings still endures after two millennia among many who do not accept the Bible as a compendium of inspired writings. For instance, as one trial court explained,

> The birth, life, mission, crucifixion and resurrection of Jesus have provided, over the centuries, the inspiration for some of the greatest works of imagination, philosophy and religion that the Western mind has produced. It is almost inconceivable to think of how impoverished our pictorial, choral, and architectural collections would become were those towering works, which owe their spiritual genesis to the figure of Jesus, to be suddenly removed.[9]

Given the steep impact of Jesus's trials on the Western conscience and culture, modern scholars—especially legal scholars—should not overlook the importance of these ancient proceedings, as some may be inclined to do, merely because of their strong religious context. Among other things, Jesus's trials are relevant to modern American notions of justice and due process.[10]

In discussing the trials, many biblical scholars analyze the historicity of the Gospel accounts, revisit controversies surrounding details of the described proceedings, assess the relative culpability of the parties involved, or explicate the theological import of the events.[11] Meanwhile, both biblical and legal scholars often emphasize perceived procedural abnormalities as poignant examples of the hazards of harried and unfair

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[9] Leeds Music Ltd. v. Robin, 358 F. Supp. 650, 659 (S.D. Ohio 1973).

[10] *See* Mark Osler, *Christ, Christians and Capital Punishment*, 59 BAYLOR L. REV. 1, 3 (2007) ("One reason we have much to learn from the criminal process afforded Christ is that it bears so many similarities to the criminal process employed in the United States today."); James B. Johnston, *The Bridge Connecting Pontius Pilate's Sentencing of Jesus to the New Jersey Death Penalty Study Commission's Concerns over Executing the Innocent: When Human Beings with Inherently Human Flaws Determine Guilt or Innocence, and Life or Death*, RUTGERS J.L. & RELIGION, Spring 2009, at 1, 3, https://lawandreligion.com/sites/law-religion/files/Bridge-Connecting-Johnston.pdf ("The arrest, trial, appeal and sentencing of Jesus is instructive for 21[st] Century capital punishment jurisprudence for a variety of reasons."); Herin, *supra* note 1, at 48 ("The procedure of trial was somewhat similar to ours."); Charles A. Hawley, *The Trial of Jesus*, 4 KY. L.J. 25, 25 (1916) (noting it is appropriate to analyze Jesus's trial legally because he was tried under Jewish law, "which to this day gives character to the jurisprudence of the world," as well as under Roman law, "which still forms an important part of the body of our modern law").

[11] *See, e.g.*, Frank J. Matera, *The Trial of Jesus: Problems and Proposals*, 45 INTERPRETATION: J. BIBLE & THEOLOGY 5, 9 (1991) ("The Gospel accounts of the trials of Jesus raise a number of questions. How many trials took place? Why was Jesus brought to trial? Who was responsible for the condemnation of Jesus? As important as these questions are, they cannot be resolved until a more fundamental issue is discussed: the relationship of the different Gospel accounts among one another.").

adjudicative processes.[12] Each of these lines of inquiry is notoriously complex. As one scholar explains,

> The trial of Jesus of Nazareth has been and remains one of the most difficult areas of New Testament research. Not only must investigators be familiar with the text of the New Testament, but they must also acquaint themselves with a host of historical and juridical questions, for example, the rules and procedures of Jewish and Roman trials and the authority of the Jews at the time of Jesus'[s] trial to inflict the death penalty. Moreover, the historical investigation about the trial of Jesus of Nazareth has important theological and ecumenical ramifications since it involves the questions *why* Jesus was put to death and *who* was responsible for his death.[13]

These deliberations are important, and numerous articles and books have been written—and will undoubtedly continue to be written—regarding such matters.[14]

This discussion does not wade into the sometimes-complex critical waters surrounding Jesus's trials. Instead, it highlights an aspect of the proceedings that has been largely overlooked by both biblical and legal scholars. Some have emphasized Jesus's relative silence during his trials as well as his claims to divine sonship, but little attention has been given to the significance of his objections during his hearing before Annas, the

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[12] *See*, *e.g.*, Luis Kutner, *Jesus Before the Sanhedrin*, 69 U. DET. MERCY L. REV. 1, 1–11 (1991) (discussing significant ways the Great Sanhedrin departed from established Jewish law, procedure, and tradition in Jesus's trial); Herin, *supra* note 1, at 47–57 (comparing the Hebrew law against the events that transpired at the trial of Jesus); People v. McLaughlin, 35 N.Y.S. 73, 74–75 (Sup. Ct. 1895) ("From the irregular and disorderly trial of Jesus down to the present time[,] history in almost every generation affords instances of trials conducted without due calmness and attention, in which sometimes the innocent and sometimes the guilty were convicted; but invariably in either case with the like effect in the end, that the conviction was generally deemed unjust, and proved more demoralizing and detrimental to social order than acquittal would have been. It is a maxim of manliness and healthy human nature, as old as the human race, that one who cannot be convicted by fair play should not be convicted at all.").

[13] Matera, *supra* note 11, at 5.

[14] Many scholars have debated various aspects of the historicity of the Gospels, *see, e.g.*, CRAIG BLOMBERG, THE HISTORICAL RELIABILITY OF THE GOSPELS (2d ed. 2007) (using history to support the accuracy of the Gospel stories); F.F. BRUCE, THE NEW TESTAMENT DOCUMENTS: ARE THEY RELIABLE? (William B. Eerdmans Publ'g Co. & InterVarsity Press 6th ed. 1981) (1943) (similar), but the Gospel accounts of the legal proceedings against Jesus are the only extant records, *see* Van Patten, *supra* note 2, at 285–86 (explaining that "[t]here is no contemporaneous account of what happened" at Jesus's trials, which is problematic from a lawyer's perspective). The trial narratives—like other ancient accounts—are properly subject to critical examination, but the trials of Jesus have captured the attention of both legal and biblical scholars for centuries despite the myriad of critical issues. *See* Khoury-Bisharat & Kitai-Sangero, *supra* note 2 (describing the trial of Jesus as "the most famous trial in history"). This Article proceeds with the understanding that the historical debates have diminished neither the prominence of the trials in the collective American conscience nor their influence on American legal traditions.

former high priest and chief Jewish power broker in the early first century AD. This Article focuses on the instances in which Jesus broke his silence for a reason other than controversies directly or indirectly relating to his identity. Part I surveys Jesus's Jewish and Roman trials in order to demonstrate his general posture of silence. Part II discusses the preliminary hearing in which Jesus twice protested his mistreatment. Part III demonstrates ways in which these objections resonate with and affirm the ancient pedigree of certain modern American conceptions of due process.

I. JESUS'S POSTURE OF SILENCE DURING HIS TRIALS

The gravity of Jesus's procedural objections at the onset of his legal proceedings can only be fully appreciated when contrasted with his economy of speech thereafter. In the hours before his execution, Jesus was subjected to an array of formal and informal hearings.[15] Sequentially, he appeared before Annas, the former high priest and leader of the Great Sanhedrin; Caiaphas, the incumbent high priest, and the Great Sanhedrin, the high court of Israel; Pontius Pilate, the Roman governor of Judea; Herod Antipas, a provincial official of Rome; and then Pontius Pilate once again.[16] In light of this confluence of legal systems, William A. Herin opined that "[t]wo of the most enlightened systems of law that ever existed were prostituted to bring about the destruction of the most innocent man who ever lived."[17] According to the Gospel narratives, after his initial protests before Annas, Jesus only deviated from his subsequent posture of silence before the juridical powers of his day to address his stature as Christ and his unique relationship with God.[18] Each hearing is summarized briefly below except the inquisition by Annas, which is discussed *infra* in Sections II–III.

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[15] *See Matthew* 26:57–68, 27:1–2, 11–26 (recounting Jesus's encounter before the Council and describing his adjudication before Pilate); *Mark* 14:53–65, 15:1–15 (similar); *Luke* 22:63–23:25 (similar); *John* 18:12–14, 19–24, 28–19:16 (detailing the informal hearing with Annas and explaining the events that transpired before Pilate).

[16] Chronologically, Jesus was first taken to Annas after being arrested. *John* 18:12–13. From Annas, Jesus was transported to Caiaphas and the Great Sanhedrin. *John* 18:24. After the Great Sanhedrin found Jesus guilty of blasphemy, *Mark* 14:63, Jesus was brought to Pilate, *Luke* 23:1–5, who sent Jesus to Herod, *Luke* 23:6–7. Herod, after finding no guilt, sent him back to Pilate, where he was sentenced to be crucified. *Luke* 23:11, 13–25. *See also* R.T. FRANCE, THE GOSPEL OF MARK: A COMMENTARY ON THE GREEK TEXT 591 (2002) (explaining the sequence of events that led to Jesus's crucifixion); NORVAL GELDENHUYS, COMMENTARY ON THE GOSPEL OF LUKE 586 (1951) (listing the trials Jesus faced).

[17] Herin, *supra* note 1, at 57.

[18] *Matthew* 26:63–64, 27:11; *Mark* 14:61–62, 15:2; *Luke* 22:67–70, 23:3; *John* 18:33–37.

A. Jesus's Silence Before the Great Sanhedrin

Following his arrest by a band of armed Roman soldiers and Jewish officers,[19] and after a hearing at Annas's residence,[20] Jesus was delivered to an assembly of Jewish leaders at Caiaphas's home.[21] Next to the Roman governor, Caiaphas, as the serving high priest, was the most powerful official in Judea; he was directly responsible to the Romans for the conduct of his countrymen.[22] Those assembled with him included a contingent of the leading priests, the elders, and the scribes.[23] Elders were senior leaders in the Jewish synagogues,[24] and the scribes were experts in the Hebrew scriptures.[25] The group that received Jesus, then, was composed of many of the most powerful men in Israel, and they are generally believed to have been members of the "Great Sanhedrin."[26]

While each larger city in Israel tended to have its own council—or "Lesser Sanhedrin"—to resolve local disputes and controversies, the Great Sanhedrin at Jerusalem was the supreme court of the Jews.[27] It was led

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[19] *Matthew* 26:47–56; *Mark* 14:43–50; *Luke* 22:47–53; *John* 18:1–12.

[20] *See John* 18:12–14, 19–23 (noting that Jesus was taken to Annas and then delivered to Caiaphas).

[21] *Matthew* 26:57; *Mark* 14:53; *John* 18:24. Biblical scholars debate whether Jesus's appearance before the Sanhedrin was a formal trial, *see, e.g.*, EVERETT F. HARRISON, A SHORT LIFE OF CHRIST 209 (1968) (raising and dismissing some scholars' contentions that the trial before the Great Sanhedrin was merely an interrogation), and resolution of this question strongly influences one's conclusions about the legality of the procedures described in the Gospels. Because the larger discussion of ostensible procedural violations is not in view here, there is no need to substantively engage this debate. However, it is worth noting that while the Roman trial was ultimately necessary to impose the death penalty, *see* Hawley, *supra* note 10, at 31 (asserting that capital punishment could only be executed with Roman authority), agreement within the Great Sanhedrin was the essential concern for Jews, and the Sanhedrin proceedings may well have been dispositive for them, *see* FRANCE, *supra* note 16, at 603 ("In Jewish eyes . . . what happened in the High Priest's house might be regarded as the 'real' trial of Jesus . . . ."); JOEL B. GREEN, THE GOSPEL OF LUKE 798 (1997) ("[T]he Jewish authorities exercise[d] a political leadership that is religiously legitimated . . . .").

[22] *See* STEVE A. RUSH, CSI: GETHSEMANE TO GOLGOTHA 53 (2005) ("[Caiaphas] was the second most powerful dignitary in Judea under Pontius Pilate."); F.F. BRUCE, THE GOSPEL OF JOHN: INTRODUCTION, EXPOSITION AND NOTES 347 (1983) (describing "the reigning high priest as leader of the nation and president of the supreme court").

[23] *Mark* 14:53.

[24] D. Lake, *Elder in the NT*, *in* 2 THE ZONDERVAN PICTORIAL ENCYCLOPEDIA OF THE BIBLE 266, 266–67 (Merrill C. Tenney & Steven Barabas eds., 1976).

[25] D.A. Hagner, *Scribes*, *in* 4 THE INTERNATIONAL STANDARD BIBLE ENCYCLOPEDIA 359, 359–61 (Geoffrey W. Bromiley et al. eds., Williams B. Eerdmans Publ'g Co. 1988) (1915) (describing the scribes as "scholars, teachers, and guardians of orthodoxy/orthopraxy" (citations omitted)).

[26] *See* Kutner, *supra* note 12, at 3, 5–6 (explaining that Jesus was taken to the Great Sanhedrin, which had "the extensive state, religious, and legal powers . . . parallel to the Areopagus of Athens or the Senate of Rome").

[27] *See* SAMUEL MENDELSOHN, THE CRIMINAL JURISPRUDENCE OF THE JEWS 88 (1991) ("The Lesser [Sanhedrin] consisted of twenty-three members, and was established, in Palestine, in every city or town having a male population of not less than one hundred and

by the high priest and included leading members of the prominent Jewish political parties—the Pharisees and the Sadducees.[28] According to Walter M. Chandler, this body "possessed all the powers and attributes of a national parliament and a supreme court of judicature. It corresponded to the Areopagus of Athens and to the senate of Rome. It took cognizance of the misconduct of priests and kings."[29] According to Jewish scholar Samuel Mendelsohn, "[i]ts authority was supreme in all matters: civil and political, social, religious[,] and criminal."[30] Following Jesus's arrest and appearance before Annas, Jesus appeared before this august body.[31]

The proceedings before the Jerusalem Sanhedrin were bifurcated.[32] On the night of Jesus's arrest, a parade of witnesses initially made accusations against him, but their testimonies were false, inconsistent,

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twenty souls, and, in other countries inhabited by Jews, in each district or province . . . . Its jurisdiction extended over capital as well as over civil matters. The Great [Sanhedrin] consisted of seventy-one members. This was the highest court in Judea, and was akin to the Senate of the Roman Republic."); HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 74–80 (1952) (indicating there was a Greater Sanhedrin, made up of seventy-one members, and a Lesser Sanhedrin, made up of twenty-three members); *see also* 2 CRAIG S. KEENER, THE GOSPEL OF JOHN: A COMMENTARY 1074 (2003) ("The Jerusalem Sanhedrin was in a sense the municipal aristocracy of Jerusalem; but just as the Roman senate wielded power far beyond Rome because of Rome's power, Jerusalem's Sanhedrin wielded some influence in national affairs, to the degree that Roman prefects and Herodian princes allowed.").

[28] *See* KEENER, *supra* note 27, at 1075 ("Our first-century sources, the [New Testament] and Josephus, include Sadducees and other groups in the Sanhedrin, under high-priestly control."); WILLIAM NEIL, THE ACTS OF THE APOSTLES 87 (1973) (describing the Sadducees as "the aristocratic priestly party to which most of the ruling class in Jerusalem belonged" and the Pharisees as "the larger and more acceptable lay party in the Jewish community"); *Acts* 23:6–8 (noting the division of the Great Sanhedrin into Sadducees and Pharisees); Steven H. Hobbs, *The Lawyer's Duties of Confidentiality and Avoidance of Harm to Others: Lessons from Sunday School*, 66 FORDHAM L. REV. 1431, 1448 (1998) ("[M]any [Pharisees] were chosen to serve on the Sanhedrin Council . . . . The Pharisees combined forces with the Sadducees . . . .").

[29] 1 WALTER M. CHANDLER, THE TRIAL OF JESUS FROM A LAWYER'S STANDPOINT: THE HEBREW TRIAL 120 (1925).

[30] MENDELSOHN, *supra* note 27, at 88–89.

[31] *See* FRANCE, *supra* note 16, at 591 (describing Jesus first being arrested, then being taken to Annas, and then being presented to the Great Sanhedrin before finally being taken to Pilate); *see also Matthew* 26:57 (describing how Jesus was led to elders after he was arrested); *Mark* 14:53 (same); *John* 18:12–14, 24 (recounting how Jesus was arrested, then taken to Annas, and then taken before Caiaphas, the high priest); George A. Barton, *On the Trial of Jesus Before the Sanhedrin*, 41 J. BIBLICAL LITERATURE 205, 207 (1922) ("If this was not a meeting of the Sanhedrin, it was certainly a meeting of the persons of whom the Sanhedrin was normally composed. When assembled, these people proceeded to examine witnesses against Jesus.").

[32] *See* Barton, *supra* note 31, at 206 ("One must, therefore, believe that there were two hearings before the Sanhedrin, as the Gospel of Mark states, and that the first of them was held during the night."); STEPHEN J. HARTDEGEN, A CHRONOLOGICAL HARMONY OF THE GOSPELS 177 n.292 (3d ed. 1942) ("Jesus came before the Sanhedrin twice: first at night, then in the morning." (citations omitted)).

and, consequently, insufficient to establish any criminal culpability.[33] When two witnesses finally agreed in accusing Jesus of claiming the ability "to destroy the temple of God[] and to rebuild it in three days," the details of their allegations did not agree.[34] Jesus never replied to the various charges, perhaps because there was no practical need to respond where the witness testimony was inadequate as a matter of law.[35] It is also possible that Jesus's quiet temperament was a form of protest against the haphazard and harried proceedings against him. In either case, as New Testament scholar R.T. France theorized, his refusal to engage his accusers "may have seemed contemptuous[] and certainly did not make it any easier for the hearing to reach its desired end."[36]

A seemingly incredulous Caiaphas challenged Jesus concerning his continued silence: "Have you no answer to make? What is it that these men testify against you?"[37] Yet Jesus remained mute.[38] He did not speak until the high priest demanded that he state whether he was "the Christ, the Son of God."[39] When Jesus answered affirmatively, Caiaphas announced that, in his estimation, there was no need to continue searching for competent evidence, and he invited members of the Sanhedrin to convict Jesus by "[tearing] his garments and [saying], 'What further witnesses do we need? You have heard his blasphemy. What is your decision?'"[40] At this point, council members spat upon and beat

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[33] *See Mark* 14:55–59 (noting the inconsistent and false nature of the testimony brough forth against Jesus); *Matthew* 26:59–60 (recounting that the Great Sanhedrin tried to find false testimony that would justify the death penalty in Jesus's case); *see also* Herin, *supra* note 1, at 50 ("The witnesses not being in accord on the charge, Jesus was entitled to an acquittal, without being questioned as to his defense or compelled to testify against Himself."). *See generally John* 18:28 (stating that the Sanhedrin trial ended in the early morning hours).

[34] *Matthew* 26:60–61 (English Standard); *see also Mark* 14:57–59 (discussing the false testimony about Jesus destroying the temple in three days and the disharmony between the allegations).

[35] *Mathew* 26:62–63; *Mark* 14:60–61; *see* FRANCIS J. MOLONEY, THE GOSPEL OF MARK: A COMMENTARY 304 (2002) ("There is no call for him to respond to false and contradictory testimony, and thus he remains silent.").

[36] FRANCE, *supra* note 16, at 608.

[37] *Matthew* 26:62 (English Standard); *Mark* 14:60 (English Standard).

[38] *Matthew* 26:62–63; *Mark* 14:60–61.

[39] *Matthew* 26:63–64 (English Standard)*; see also Mark* 14:61–62 (English Standard) (noting Jesus remained silent until the high priest asked, "Are you the Christ, the Son of the Blessed?"); FRANCE, *supra* note 16, at 611 ("[I]n contrast with Jesus'[s] previous silence, he now seems eager to explain how he understands his status and mission.").

[40] *Mark* 14:63–64 (English Standard); *see also Matthew* 26:65–66 (English Standard) ("Then the high priest tore his robes and said, 'He has uttered blasphemy. What further witnesses do we need? You have now heard his blasphemy. What is your judgment?'"); MOLONEY, *supra* note 35, at 305 (suggesting the first question indicates Caiaphas was "circumventing due process").

Jesus, and the Supreme Court of Israel condemned him to death for blasphemy.[41]

While the evidence was presented and the verdict was reached during the nocturnal proceedings, the chief priests consulted with the Sanhedrin again at daybreak the next morning.[42] During this second session—which possibly occurred at a different location than the first—Jesus was again called to affirm his identity as the Christ and Son of God.[43] When he did so, he was transported from the council and delivered to the residence of Pontius Pilate, the Roman governor of Judea, even though no substantive evaluation of his claim to divine sonship was pursued.[44]

Jesus did not contest the charges before the Sanhedrin. Whether his silence was a form of protest or an intentional defense strategy, he did not even attempt to refute his accusers when he was specifically invited to do so. According to the biblical data, he only spoke during two appearances before the supreme court of the Jews to affirm his special relationship with God.

B. Jesus's Silence Before Pontius Pilate

After the conclusion of the Sanhedrin proceedings on the morning after Jesus's arrest, members of the council bound him and delivered him to the praetorium—the residence and headquarters of the Roman governor, Pontius Pilate.[45] By virtue of his office, Pilate "would [have] exercise[d] military, financial, and judicial functions."[46] As Mark Black explains,

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[41] *Matthew* 26:65–68; *Mark* 14:63–65. *See generally, e.g.*, *Leviticus* 24:10–16 (making blasphemy a capital offense under Hebrew law).

[42] *See Mark* 15:1 (English Standard) (stating the Sanhedrin met to consult with one another "as soon as it was morning"); *Matthew* 27:1–2 (similar); Barton, *supra* note 31, at 210 ("At all events there seems to be the best authority for saying that the assembly on the morning of Friday was the second session at which the Sanhedrin passed upon the condemnation of Jesus.").

[43] *Luke* 22:66–71; Hawley, *supra* note 10, at 30; PAUL WINTER, ON THE TRIAL OF JESUS 28 (T.A. Burkill & Geza Vermes eds., 2d ed. 1974) ("The statement in [Mark 15:1a] could be understood in the sense that the morning session was held in a different place from that in which the narrative of [Mark 14:53–72] is set, namely, where [Luke 22:66] puts it.").

[44] *Matthew* 27:1–2; *Mark* 15:1; *Luke* 23:1; *John* 18:28–29; Bílý, *supra* note 2, at 94 ("No examination was made of the merits of Jesus'[s] claim to Messiahship.").

[45] *Matthew* 27:1–2; *Mark* 15:1; *Luke* 23:1; *John* 18:28–29; B. Vanelderen, *Praetorium*, *in* 3 THE INTERNATIONAL STANDARD BIBLE ENCYCLOPEDIA 929, 929 (Geoffrey W. Bromiley et al. eds., William B. Eerdmans Publ'g Co. 1986) (1915) ("The term praetorium (a Latin loanword in Greek) originally designated the commander's (praetor's) tent in camp and later was applied to the official residence of the Roman governors in various cities in the provinces."); BRUCE, *supra* note 22, at 348 ("The term 'praetorium' denotes the headquarters of a Roman military governor (as the governor of Judaea was).").

[46] R. Larry Overstreet, *Roman Law and the Trial of Christ*, 135 BIBLIOTHECA SACRA 323, 327 (1978).

> In general, the authority of the procurator in Judea was equal to that of the proconsul or legate in his province. Each held the *imperium* (authority, power) in his district. This authority was final by virtue of the fact that it was given him directly by the emperor. Therefore, each provincial governor, whether proconsul, legate, or procurator, had the total power of administration, jurisdiction, defense, and maintenance of public order in his province. Subsequently, any matter which fell outside the jurisdiction of the local magistrates of a town became subject to the judgment of the governor himself.[47]

Pilate's authority in Judea, then, would only have been surpassed by the authority of the Roman emperor.[48]

Upon receiving the Jewish delegation, Pilate inquired, "What accusation do you bring against this man?"[49] According to *John*, the Jewish leaders initially offered a generalized attack on Jesus's character rather than a specific charge of criminality: "If this man were not doing evil, we would not have delivered him over to you."[50] This reply by Jesus's accusers suggests they "assumed that Pilate would cooperate and simply execute this man without further delay or due process of law, because their response is defens[iv]e and has overtones of irritation."[51] The Jews were typically permitted authority in routine matters and concerns pertaining to their religion.[52] As a consequence of this relaxed policy

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[47] Mark Black, *Paul and Roman Law in Acts*, 24 RESTORATION Q. 209, 211 (1981) (footnotes omitted).

[48] *See* KAZUHIKO YAMAZAKI-RANSOM, THE ROMAN EMPIRE IN LUKE'S NARRATIVE 74 (2010) (explaining the hierarchy of the rulers described in the Gospel of Luke); Herin, *supra* note 1, at 52 ("From [Pontius Pilate's] judgement[s] there was no appeal except to the emperor.").

[49] *John* 18:29 (English Standard).

[50] *John* 18:30 (English Standard); *see also* KEENER, *supra* note 27, at 1096 ("Despite their inability to testify to any evil he has spoken . . . his opposition will accuse him to Pilate as an 'evildoer' . . . ." (quoting *John* 18:30)).

[51] BEN WITHERINGTON, III, JOHN'S WISDOM: A COMMENTARY ON THE FOURTH GOSPEL 289 (1995); *see also* COLIN G. KRUSE, 4 JOHN: AN INTRODUCTION AND COMMENTARY 416 (Eckhard J. Schnabel & Nicholas Perrin eds., 2d ed. 2017) ("Apparently, [Jewish leaders] expected Pilate to confirm their decision about Jesus (that he was a criminal) without their advancing any specific charges, and so they answered Pilate in this insolent way."); Johnston, *supra* note 10, at 13 ("The Sanhedrin is trying to convince Pilate at this stage of Jesus'[s] trial to rubber stamp their view that he is a criminal and thus must be punished.").

[52] *See* Friedler, *supra* note 2, at 405 (noting it was "Roman policy [to] allow[] the acquired provinces to continue their legal traditions[] and[,] wherever possible[,] to allow these provinces to resolve their internal problems[,] including their legal matters[,] according to their own laws"); Francis Lyall, *Roman Law in the Writings of Paul—Aliens and Citizens*, 48 EVANGELICAL Q. 3, 12 (1976) ("The Romans did . . . reserve the right to impose capital punishment, as in the case of Christ, but the day to day administration was none of their concern."); LANE, *supra* note 6, at 547 ("[T]he Romans permitted even the subject territories to retain their own legislation, administration of justice, and local government, and there is considerable evidence that Jewish authorities in Judea were allowed a great measure of self-government. The Sanhedrin exercised not only civil jurisdiction according to Jewish law but

regarding local disputes, the governor was seemingly unaware of the extent of the prior proceedings and invited the leaders to judge Jesus according to Jewish law.[53] While the original indictment was vague, the Jewish leaders made their intentions plain at this point by objecting to further proceedings of their own because they did not have the authority to impose the penalty they sought—death.[54] The governor's cooperation was necessary to impose capital punishment with the imprimatur of state sanction and without the potential for harsh Roman reprisal.[55]

The authorities subsequently made an allegation that demanded Pilate's attention as a Roman official.[56] They accused Jesus, saying, "We

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also a certain degree of criminal jurisdiction."); Overstreet, *supra* note 46, at 325 ("Roman law allowed the local law of each province to be exercised without much interference.").

[53] *See John* 18:31 (English Standard) ("Pilate said to them, 'Take him yourself and judge him by your own law.'"); Johnston, *supra* note 10, at 14 (stating that Pilate was "apparently unaware that Jesus had already had a trial"); WILLIAM HENDRIKSEN, NEW TESTAMENT COMMENTARY: EXPOSITION OF THE GOSPEL ACCORDING TO JOHN 405 (3d prtg. 1967) ("Pilate was not yet aware of the fact that the Jewish leaders were determined on *the death* of Jesus. Thinking that they intended to inflict a lesser punishment, he is at a loss to understand why they should bother *him* with this prisoner.").

[54] *See John* 18:31 (English Standard) ("The Jews said to him, 'It is not lawful for us to put anyone to death.'"); HENDRIKSEN, *supra* note 53, at 406 ("By means of this answer they showed what kind of punishment they desired to inflict, nothing less than *capital* punishment.").

[55] *See* WITHERINGTON, *supra* note 51, at 280 ("Pilate as the prefect of a Roman province possessed what was called the full *imperium*, which included criminal, jurisdictional, and military authority, and the power to levy taxes. His jurisdiction was directly from the emperor and could not be delegated in capital cases."); Barton, *supra* note 31, at 211 ("The Sanhedrin had been deprived of the power of administering the death penalty. That was in the hands of the Roman officials."); Hawley, *supra* note 10, at 31 ("While the Roman emperor permitted the Jewish laws and their administration, and in minor cases their execution[,] to remain in the Jewish courts, he took from them the power of life and death. It is doubtful if they could pronounce [a] sentence of death; certainly no such sentence could be executed without Roman authority."); Herin, *supra* note 1, at 52 ("The Roman army of occupation, however, alone had power to pronounce a death sentence. The Sanhedrin merely had authority to make an accusation before the Roman magistrate, who had the sole power to determine the matter."); Bílý, *supra* note 2 ("His preaching so embarrassed the religious establishment of the day that its members decided that Jesus must die. Yet, they wanted his execution to appear to be legal."); LANE, *supra* note 6, at 547 ("The 'right of the sword' was reserved to the Roman magistrate as sole bearer of the full imperial authority (*imperium*). This was one of the most carefully guarded prerogatives of the Roman government and permitted no concessions."); JO-ANN A. BRYANT, JOHN 259 (2011) (inferring through a limited number of historical events that Rome would reprise the high priest for ordering the death penalty); *see also John* 19:10 (English Standard) (noting Pilate asked Jesus, "Do you not know that I have the authority to release you and to crucify you?").

[56] *See* FRANCE, *supra* note 16, at 624–25 (noting that a claim of being King of the Jews "under the Roman occupation would naturally be seen as treasonable, placing Jesus within the category of nationalist leaders who, following Judas of Galilee, rejected Roman rule as incompatible with the status of the people of God"); Friedler, *supra* note 2, at 419 ("It has been generally accepted that the change [in accusations] was contrived because this was the only means to get Pilate interested in this proceeding. For with this change, it now

found this man misleading our nation and forbidding us to give tribute to Caesar, and saying that he himself is Christ, a king."[57] This charge—positioning Jesus as a rival to the Roman emperor and a danger to the state—was tantamount to an accusation of treason.[58] The Jewish proceedings had focused on religious matters and culminated in a blasphemy conviction, but the charges levied before Pilate were framed in a decidedly political manner.[59] According to first-century Jewish historian Josephus, a man named Judas of Galilee had previously sparked a revolt among the Jews by claiming that payment of Roman taxes was akin to slavery and that the Jews should demand their freedom.[60] This earned a swift and bloody response from Roman authorities,[61] and Pilate would

became an offence against Rome and not simply a quarrel between Jews."); LANE, *supra* note 6, at 547–48 ("Since blasphemy was not one of the crimes for which Roman law provided punishment, and was a subject which did not concern the Roman judge, this charge played no part in the trial which followed. The incendiary charge of high treason, which the Roman court could not possibly dismiss, was substituted in its place.").

[57] *Luke* 23:1–2 (English Standard); *see also* GREEN, *supra* note 21, at 799–800 (asserting that "[g]rammatical and co-textual evidence" suggests this is a single legal charge encompassing two factual allegations).

[58] *See John* 19:12 (English Standard) ("From then on Pilate sought to release him, but the Jews cried out, 'If you release this man, you are not Caesar's friend. Everyone who makes himself a king opposes Caesar.'"); Hawley, *supra* note 10, at 31 ("When they brought Jesus before Pilate their accusation was not of the blasphemy for which they had convicted him. They accused him before Pilate of a political offense,—of treason against the Roman state."); Herin, *supra* note 1, at 53 ("Seeing that Pilate would consider only a violation of Roman law, the priests brought forth an entirely new charge, that of treason against Caesar."); Barton, *supra* note 31, at 211 (explaining that messianism was "ordinarily understood" by Rome to be revolutionary); Friedler, *supra* note 2, at 409 ("[T]he payment of tribute was a normal obligation of all subject peoples in the Roman empire, and . . . refus[al] to pay it was abnormal and signified rebellion . . . .").

[59] *See* Friedler, *supra* note 2, at 419 ("It is immediately evident that the substance of the charges was changed. In the first trial, the charge involved blasphemy, a religious offence; at this proceeding, Jesus is charged with seeking to be the King of the Jews, insurrection, a political offence."); FRANCE, *supra* note 16, at 624 ("True, the terms of his claim had been theological rather than overtly political, but they provided ample basis for a charge that he was claiming royal authority among his own people . . . ."); LANE, *supra* note 6, at 547 n.6 ("The fact that Jesus was delivered to Pilate, not as a blasphemer . . . but as 'King of the Jews,' is sufficient proof that the accusation against him had been formulated in terms of another law, and specifically one which proceeded with particular severity against *political* crimes."); ROBERT H. STEIN, 24 LUKE 573 (1992) ("The charges brought by the Sanhedrin against Jesus were transferred from the religious grounds, for which Jesus was condemned, to political ones, for which Pilate might condemn him.").

[60] JOSEPHUS, *Antiquities of the Jews*, *in* THE WORKS OF JOSEPHUS: COMPLETE AND UNABRIDGED 27, 476–77 (William Whiston trans., Hendrickson Publishers new updated ed. 1987) (1736) (93) [hereinafter JOSEPHUS, *Antiquities of the Jews*]; JOSEPHUS, *Wars of the Jews*, *in* THE WORKS OF JOSEPHUS: COMPLETE AND UNABRIDGED, *supra*, at 543, 604–05 (75) [hereinafter JOSEPHUS, *Wars of the Jews*].

[61] JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 476 ("[T]he nation was infected with [Judas of Galilee's] doctrine to an incredible degree; one violent war came upon us after another, and we lost our friends . . . . [A] famine also coming upon us[] reduced us to the last

have wanted to avoid another uprising of that kind under his administration.

To Pilate's amazement, Jesus did not speak despite this grave charge.[62] According to William L. Lane, "Such silence was wholly unusual in the forum[] and demonstrated a presence and a dignity which puzzled the prefect."[63] Another New Testament scholar claimed that Jesus's "fundamental silence" was all the more puzzling because defendants normally strove to exonerate themselves because they were not represented by counsel.[64] The governor proceeded to review the matter *de novo* and personally queried Jesus about his alleged status as "King of the Jews."[65] Pilate was unconcerned about the religious dimensions of the Jews' dispute.[66] He intended to make a strictly political inquiry, but, in the context of the Gospel narratives, his question was equivalent to asking Jesus whether he was the "Christ" or "Messiah" as Caiaphas had asked in the preceding Sanhedrin trial.[67] Jesus finally broke his silence to respond

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degree of despair, as did also the taking and demolishing of cities; nay, the sedition at last increased so high, that the very temple of God was burnt down by [Judas's] enemy's fire.").

[62] *Matthew* 27:14 (English Standard) ("But he gave him no answer, not even to a single charge, so that the governor was greatly amazed."); *Mark* 15:3–5 (English Standard) ("And the chief priests accused him of many things. And Pilate again asked him, 'Have you no answer to make? See how many charges they bring against you.' But Jesus made no further answer, so that Pilate was amazed.").

[63] LANE, *supra* note 6, at 551.

[64] WITHERINGTON, *supra* note 51, at 290.

[65] *Matthew* 27:11 (English Standard); *Mark* 15:2 (English Standard); *Luke* 23:3 (English Standard); *John* 18:33 (English Standard). *See generally, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n.31 (1984) ("'[*D*]*e novo*' review . . . [is when] a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff."); *Hearing De Novo*, BLACK'S LAW DICTIONARY (11th ed. 2019) (definition "hearing de novo" as "[a] reviewing court's decision of a matter anew, giving no deference to a lower court's findings").

[66] As recorded in the Gospels, at no point during Jesus's trial did Pilate probe the blasphemy charges the Sanhedrin levied against him or seek to settle the Jews' religious grievances with Jesus. *Matthew* 27:1–2, 11–26; *Mark* 15:1–15; *Luke* 23:1–25; *John* 18:28–19:16; *see also* Overstreet, *supra* note 46, at 332 (discussing how Pilate's political concerns were paramount at Jesus's trial); HELEN K. BOND, PONTIUS PILATE IN HISTORY AND INTERPRETATION 106 (1998) ("The Roman governor is not interested in the religious meaning of messiahship but only in any political repercussions such a claim might have. His question therefore focuses on the political implications of the Jewish charge, in an attempt to gauge how far [Jesus] might present a threat to Roman stability in the province."); *cf.* Reimund Bieringer, *"My Kingship Is Not of This World" (John 18,36): The Kingship of Jesus and Politics*, *in* THE MYRIAD CHRIST: PLURALITY AND THE QUEST FOR UNITY IN CONTEMPORARY CHRISTOLOGY 159, 171 (Terrence Merrigan & Jacques Haers eds., 2000) ("For a brief moment it seems as if Pilate was going to understand that Jesus claims a [kingship] different from that of the Jews. But, as the inscription 'King of the Jews' which Pilate has put on the cross demonstrates, Pilate ultimately remains closed to the religious dimension of Jesus'[s] person and message." (citation omitted)).

[67] *See Mark* 15:32 (English Standard) (recounting how the chief priests equated the titles "Christ" and "King of Israel"); *Luke* 23:2 (English Standard) (relating that Jesus's

to this inquiry, engaged the governor on the nature of his sovereignty, and stated that he was, indeed, a king, but that his kingdom was not earthly.[68]

Pilate was satisfied that Jesus had not violated Roman law, but he directed that Jesus be flogged or scourged.[69] He subsequently tried to persuade the Jewish leaders to accept this as adequate punishment.[70] Despite the severity of a Roman flogging,[71] the accusers would not relent.[72] They demanded crucifixion because Jesus "made himself the Son of God,"

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accusers treated the terms "Christ" and "king" interchangeably); Friedler, *supra* note 2, at 409–11 (discussing the relationship between "king" and "Messiah" in Jewish thought and observing that "[t]he idea of a King-Messiah" was commonplace in Jewish society by the time of Herod the Great's reign); LANE, *supra* note 6, at 550 ("The designation 'king of the Jews' is a secularized form of 'Messiah' which permitted Jesus'[s] messianic claim to be transposed into a political key inviting the decisive intervention of Pilate."). *See generally supra* notes 37–39 and accompanying text.

[68] *John* 18:36 (English Standard) ("Jesus answered, 'My kingdom is not of this world. If my kingdom were of this world, my servants would have been fighting, that I might not be delivered over to the Jews. But my kingdom is not from the world.'"); *see also* KRUSE, *supra* note 51, at 418 ("Most interpreters recognize that Jesus'[s] statement 'My kingdom is not of this world' implies that his sovereignty, his kingly authority, is not of a worldly political nature but rather derives from God."); LANE, *supra* note 6, at 551 ("Jesus was the king of the Jews by virtue of his messiahship, but the implications in the secular designation were false. Therefore, he responded affirmatively to Pilate's question whether he was the king of the Jews, but with a reservation which hinted that his own conception of kingship did not correspond to that implied in the question.").

[69] *Luke* 23:4 (English Standard) ("Then Pilate said to the chief priests and the crowds, 'I find no guilt in this man.'"); *John* 18:38 (English Standard) ("After [Pilate] had said this, he went back outside to the Jews and told them, 'I find no guilt in him.[']"), 19:1 (English Standard) ("Then Pilate took Jesus and flogged him."); *see also John* 19:6 (English Standard) ("Pilate said to them, 'Take him yourselves and crucify him, for I find no guilt in him.'").

[70] *See John* 19:1–12 (discussing how Pilate stated that he found no guilt in Jesus and sought to release him); GELDENHUYS, *supra* note 16, at 599 (stating that Pilate had Jesus scourged to appease the Jews so that he could then release Jesus).

[71] "'To flog' refers to a lesser, disciplinary action, offered here as an alternative to capital punishment — not because Jesus has been found guilty of any charge but in order for Pilate to win and/or maintain favor with the Jewish people and their leaders in Jerusalem." GREEN, *supra* note 21, at 809 (footnote omitted). Flogging, or scourging, was sometimes used as a form of torture when examining witnesses. *See, e.g.*, *Acts* 22:22–29 (English Standard) ("[T]he tribune ordered [Paul] to be brought into the barracks, saying that he should be examined by flogging, to find out why they were shouting against him like this."). For a description of Roman scourging, see JOSEPHUS, *Wars of the Jews*, *supra* note 60, at 636, 742, which explains that this punishment sometimes involved whipping a subject until his "inward parts appeared naked" and "till his bones were laid bare," and LANE, *supra* note 6, at 557, which describes how Roman flogging was so severe that those condemned to be flogged often died as a result.

[72] *See John* 19:1–6 (English Standard) ("When the chief priests and the officers saw [Jesus after he had been flogged], they cried out, 'Crucify him, crucify him!'"); *Matthew* 27:20 (English Standard) ("Now the chief priests and the elders persuaded the crowd to ask for Barabbas and destroy Jesus."); *Mark* 15:11 (English Standard) ("[T]he chief priests stirred up the crowd to have him release for them Barabbas instead."); *Luke* 23:5 (English Standard) ("But they were urgent, saying, 'He stirs up the people, teaching throughout all Judea, from Galilee even to this place.'").

so Pilate attempted to examine Jesus further.[73] However, as R.T. France observes, "Before the Sanhedrin Jesus had remained irritatingly silent[] but had eventually been provoked into a clear declaration of who he was. Before Pilate he ha[d] even less to say."[74] Pilate was vexed that Jesus would not even respond to an inquiry regarding his provenance,[75] and he challenged Jesus, saying, "You will not speak to me? Do you not know that I have authority to release you and authority to crucify you?"[76] In response to these questions, Jesus indicated that Pilate's authority was derivative and that those who delivered him to Pilate were even more culpable than Pilate.[77]

Ultimately, the governor announced that there was insufficient evidence for a conviction.[78] Despite Pilate's conclusion that acquittal was warranted, he sentenced Jesus to death upon the insistence of his accusers and the masses.[79] In fact, Jesus's accusers threatened to imperil Pilate's political future—and potentially his life—in order to secure his compliance.[80] According to *John*, "[T]he Jews cried out, 'If you release this man, you are not Caesar's friend. Everyone who makes himself a king opposes Caesar.'"[81] In effect, if Pilate would not condemn Jesus as a traitor to Rome, then the Jewish leaders would charge Pilate with being a traitor himself.[82]

Though Jesus mounted no defense, he was factually innocent and should have been released. However, as *Luke* explains,

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[73] *John* 19:7–11 (English Standard).

[74] FRANCE, *supra* note 16, at 625.

[75] *See John* 19:8–11 (recounting how Pilate's fear led him to press Jesus for information regarding his identity); KRUSE, *supra* note 51, at 422 ("Pilate interpreted Jesus'[s] silence as a challenge to his authority.").

[76] *John* 19:10 (English Standard). *See generally* Overstreet, *supra* note 46, at 328 ("[T]he Roman governor had absolute legal authority to deal with noncitizens, such as Christ, and to prescribe the death penalty, without fear of having his authority challenged.").

[77] *John* 19:11 (English Standard) ("Jesus answered him, 'You would have no authority over me at all unless it had been given you from above. Therefore he who delivered me over to you has the greater sin.'").

[78] *Luke* 23:4, 13–15; *John* 18:38; LEON MORRIS, THE GOSPEL ACCORDING TO JOHN: THE ENGLISH TEXT WITH INTRODUCTION, EXPOSITION AND NOTES 771–72 (1971) ("Pilate has learned what he wants to know. Jesus is no revolutionary. He represents no danger to the state. He may safely be released, and indeed He ought in common justice to be released.").

[79] *Matthew* 27:15–26; *Mark* 15:6–15; *Luke* 23:13–25; *John* 19:6, 12–16; LANE, *supra* note 6, at 556 ("On the ground of political expediency Pilate decided that he had no choice but to yield to the determined will of the now fanatical mob.").

[80] *See John* 19:12 (recounting how the Jews insinuated Pilate would be Caesar's enemy if he released Jesus); Johnston, *supra* note 10, at 17 (stating that the label of traitor could complicate Pilate's relationship with Rome, possibly even resulting in Roman officials executing Pilate for treason); LANE, *supra* note 6, at 556 & n.34 (discussing how Pilate could not politically afford a charge of treason because Tiberius had executed Pilate's patron Sejanus, thereby placing Pilate in a delicate political position).

[81] *John* 19:12 (English Standard).

[82] Johnston, *supra* note 10, at 17.

> [T]hey were urgent, demanding with loud cries that he should be crucified. And their voices prevailed. So Pilate decided that their demand should be granted. He released the man who had been thrown into prison for insurrection and murder, for whom they asked, but he delivered Jesus over to their will.[83]

According to the New Testament, then, Jesus was crucified as an enemy of Rome because of instigation from Jewish authorities even though there was insufficient evidence that he violated Roman law.[84] This basic context is corroborated by non-Christian sources. For instance, the Roman historian Tacitus confirmed that Pilate was the Roman authority responsible for Jesus's crucifixion,[85] and Josephus affirmed the basic Jewish political background.[86]

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[83] *Luke* 23:23–25 (English Standard); *see also* MARIANNE MEYE THOMPSON, JOHN: A COMMENTARY 376 (2015) ("At the end of it all, [Pilate] bows to the Jewish threat that, were he to release Jesus, he would be no friend of Caesar.").

[84] *See* Overstreet, *supra* note 46, at 329 (discussing how Christ was prosecuted and executed in the Roman style as an enemy of Rome); GELDENHUYS, *supra* note 16, at 597 ("According to Roman law, Pilate ought at once to have commanded Jesus'[s] release. However, the agitation by the Jews causes him to waver and from now on 'he was calculating between policy and justice' until he utterly trampled on the law and yielded to the will of the Jews." (citation omitted) (quoting G. CAMPBELL MORGAN, THE GOSPEL ACCORDING TO LUKE 260 (1931))). Crucifixion was a particularly cruel method of capital punishment in the ancient world, often reserved for rebellious foreigners, perpetrators of high crimes, and traitors. *See* Johnston, *supra* note 10, at 4 (describing crucifixion as "one of the most agonizingly painful [methods of execution] used by the Roman Empire in that era"); LANE, *supra* note 6, at 561 ("Death by crucifixion was one of the cruelest and most degrading forms of punishment ever conceived by human perversity, even in the eyes of the pagan world."); CARTER, *supra* note 1, at 146 ("[Crucifixion] was reserved by Rome for non-citizens, foreigners, those of little status (like slaves), those who posed a political or social threat, violent criminals, the non-elite. Roman citizens who committed treason (and so were not worthy to be citizens) could be crucified."); JOHN GRANGER COOK, CRUCIFIXION IN THE MEDITERRANEAN WORLD 216–17 (2014) (listing reasons for crucifixion, including rebellion, martial disobedience, and murder). For descriptions of its implementation, see JOSEPHUS, *Wars of the Jews*, *supra* note 60, at 720(describing how Titus used crucifixion to terrify and demoralize Jewish rebels); MARTIN HENGEL, CRUCIFIXION: IN THE ANCIENT WORLD AND THE FOLLY OF THE MESSAGE OF THE CROSS 22–38 (John Bowden trans., Fortress Press 1977) (1976) (discussing the history and practice of crucifixion, particularly by the Romans); GREEN, *supra* note 21, at 810 (explaining how crucifixion was a prolonged, multi-day form of torture and execution used primarily on those deemed enemies of the Roman government).

[85] TACITUS, THE ANNALS 325 (A.J. Woodman trans., Hackett Publ'g Co. 2004) (c. 116) ("The source of the name [Christian] was Christus, on whom, during the command of Tiberius, reprisal had been inflicted by the procurator Pontius Pilatus."); *see also* DUSENBURY, *supra* note 7, at xviii ("When a line from the early second century's hardest-headed annalist, Tacitus—who loathed Christians—supports the earliest Christian testimonies, it constitutes a datum.").

[86] *See* JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 480 ("Now, there was about this time Jesus, a wise man, if it be lawful to call him a man, for he was a doer of wonderful works—a teacher of such men as receive the truth with pleasure. He drew over to him both many of the Jews, and many of the Gentiles. He was [the] Christ; . . . and when Pilate, at the suggestion of the principal men amongst us, had condemned him to the cross,

Jesus never presented a defense during his Roman trial. Instead, he allowed his accusers' charges to stand unanswered. However, he did not stand mute because of impotence or timidity. When the Roman governor, the person who ultimately sentenced Jesus to death, questioned him about his status as "King of the Jews"—or "Christ"—Jesus responded. In his estimation, most of what was being said by his accusers, and even by Pilate, did not merit his engagement, but when the question of his relationship with God arose, he broke his silence, just as he had previously done during his Jewish trial.

C. Jesus's Silence Before Herod Antipas

Between Jesus's initial appearance at the praetorium and his eventual execution, an interlocutory hearing occurred before Herod Antipas, the son of Herod the Great.[87] Herod Antipas was tetrarch—a kind of provincial ruler—of Galilee,[88] the region where Jesus was raised and concentrated much of his ministry.[89] When Jesus's accusers persisted despite Pilate's announcement that there was insufficient proof of criminal culpability, the governor sent Jesus to Herod, who was presumably in Jerusalem because of the Jewish Passover and had long wanted to see Jesus.[90] Pilate seemingly hoped Herod could either provide

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those that loved him at the first did not forsake him, for he appeared to them alive again the third day, as the divine prophets had foretold these and ten thousand other wonderful things concerning him; and the tribe of Christians, so named from him, are not extinct at this day." (alteration in original) (footnotes omitted)).

[87] *Luke* 23:7–11, 15; JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 473.

[88] *Luke* 3:1 (English Standard) ("In the fifteenth year of the reign of Tiberius Caesar, Pontius Pilate [was] governor of Judea, and Herod [was] tetrarch of Galilee, and his brother Philip [was] tetrarch of the region of Ituraea and Trachonitis, and Lysanias [was] tetrarch of Abilene . . . ."), 23:7 (English Standard) ("When Pilate heard this, he asked whether the man [Jesus] was a Galilean. And when he learned that he belonged to Herod's jurisdiction, he sent him over to Herod, who was himself in Jerusalem at that time."); *see* JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 473 (explaining that Caesar divided Herod the Great's lands between his three sons: Archelaus, Philip, and Antipas).

[89] *See, e.g.*, *Matthew* 4:12–17 (recounting how Jesus began his ministry in Galilee after John the Baptist's arrest); *Mark* 1:14–15, 35–39 (English Standard) (describing how Christ began preaching and casting out demons "throughout all Galilee"); *Luke* 4:14–16 (English Standard) ("And Jesus returned in the power of the Spirit to Galilee, and a report about him went out through all the surrounding country. And he taught in their synagogues, being glorified by all. And he came to Nazareth, where he had been brought up. And as was his custom, he went to the synagogue on the Sabbath day, and he stood up to read.").

[90] *Luke* 23:4–12; GELDENHUYS, *supra* note 16, at 593 ("Herod, especially since he was the ruler over the districts where Jesus had mostly appeared in public, had often heard of His miracles and exceptional personality, and had already for some considerable time longed to see Him."); LEON MORRIS, LUKE: AN INTRODUCTION AND COMMENTARY 350 (rev. ed. 1988) ("A trial was usually carried out in the Roman Empire in the province where the offence was committed, though it could be referred to the province to which the accused belonged. Pilate could thus have gone on with the trial, but it was a gracious compliment to Herod to refer the matter to him and it was technically possible because as a Galilean Jesus *belonged to*

salient insight to resolve the matter or take the matter out of his hands altogether.[91]

Luke contains the lone account of this appearance and states that Herod questioned Jesus at length while "[t]he chief priests and the scribes stood by, vehemently accusing him," but Jesus never answered.[92] Jesus's silence on this occasion is "startling" when compared to "analogous scenes in Greco-Roman and Jewish literature."[93] According to Edith Z. Friedler, "[i]t is not clear from the gospel whether Herod did not reach a decision or decided that he technically had no jurisdiction at the time since he was a visitor in Jerusalem."[94] In either case, Jesus quietly bore further abuse at Herod's hand, and nothing of legal consequence was accomplished.[95] The tetrarch returned him to Pilate—who went on to have Jesus crucified—without ascribing any criminal culpability.[96]

D. Observations

Jesus's silence before his accusers has sometimes been noted by courts and legal scholars.[97] According to some courts, for instance, his

Herod's jurisdiction. Herod had probably come up to Jerusalem to observe the Passover, a tactic he would expect would please his subjects. He was thus available.").

[91] Van Patten, *supra* note 2, at 305 ("[Pilate] jumped at the opportunity to pass the buck and move this difficult case on to someone else."); GREEN, *supra* note 21, at 804 ("Unable to find reason to condemn Jesus himself, Pilate sends him to Herod for further examination, perhaps thinking that the tetrarch of Galilee will have insight in a case involving a Galilean." (citation omitted) (citing *Acts* 25:23–27)). A later Roman governor, Porcius Festus, similarly appealed to Herod Agrippa for help in understanding Jewish accusations against the apostle Paul regarding matters of religion and the identity of Jesus of Nazareth. *See Acts* 25:13–22 (recounting how Festus, perplexed by the high priests' religious accusations against Paul, sent Paul to Agrippa after Paul appealed to Caesar).

[92] *Luke* 23:8–10 (English Standard).

[93] GREEN, *supra* note 21, at 803–05 ("In Greco-Roman literature, philosophers brought before tyrants exercise self-control and showcase their teaching, just as in the [Septuagint] prophets brought before kings deliver divine oracle of judgment against the ruler.").

[94] Friedler, *supra* note 2, at 417.

[95] *See Luke* 23:11 (English Standard) ("And Herod with his soldiers treated [Jesus] with contempt and mocked him. Then, arraying him in splendid clothing, he sent him back to Pilate."); Van Patten, *supra* note 2, at 306 (referring to the meeting with Herod Antipas as "almost a comic interlude—a side show in the Passion narrative").

[96] *Luke* 23:11, 13–26, 32–33, 44–46; *see* Overstreet, *supra* note 46, at 330 ("Herod's refusal to try Jesus indicates that in his opinion Jesus was innocent . . . ."); GELDENHUYS, *supra* note 16, at 594 ("Herod sends Him back to Pilate without making the slightest attempt to investigate His case judicially."); *see also Matthew* 27:24–39, 45–50 (recounting how Jesus was crucified after Pilate's sentence); *Mark* 15:13–24, 33–37 (same); *John* 19:15–19, 28–30 (same).

[97] *See, e.g.*, United States v. Offutt, 145 F. Supp. 111, 115 (D.D.C. 1956) ("Jesus of Nazareth stood mute before Pilate, in spite of insults and scourgings. When He saw that Pilate feared the Emperor and was determined to please the people who cried for crucifixion, Jesus kept silent, and His silence redounds to His glory."); Khoury-Bisharat & Kitai-Sangero, *supra* note 2, at 444–45 (explaining that Jesus's silence is significant for criminal proceedings as it demonstrates how silence is compatible with innocence).

example confirms that declining to speak is not indicative of guilt and illustrates the need to recognize that a suspect has no obligation to affirm or deny allegations.[98] Hala Khoury-Bisharat and Rinat Kitai-Sangero were correct, though, in observing that Jesus did not stand completely mute; rather, "[his] silence was selective."[99]For instance, "he remained silent during various parts of his trial but responded to questions concerning his identity."[100] However, this common observation is incomplete because Jesus also spoke to protest the proceedings against him.[101]

While his later comments in response to questions concerning his identity are primarily of theological consequence,[102] Jesus's first statements in the hearing before Annas relate to Jesus's perceptions about matters of justice and procedural fairness.[103] Some propose that Jesus's relative silence—declining to explain his actions and thoughts, not attempting to persuade the judges of his innocence, and not examining witnesses or presenting evidence—was a display of passivity.[104] This is an understandable conclusion to reach if one considers only the trials before

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[98] People v. Simmons, 172 P.2d 18, 26 (Cal. 1946) (en banc) (citing Jesus's conduct during his trial as evidence that "silence or an equivocal reply is not always indicative of a consciousness of guilt"); State v. Hogan, 252 S.W. 387, 388 (Mo. 1923) (stating that Jesus's trial is evidence of a "higher sanction" for the innocent remaining silent).

[99] Khoury-Bisharat & Kitai-Sangero, *supra* note 2, at 444–45.

[100] *Id.* at 445.

[101] *See John* 18:19–24 (recounting how Jesus told the chief priests to ask their own witnesses for information on what he taught); Van Patten, *supra* note 2, at 298–99 ("[Jesus's] first line of defense was very modest: make the accusers state the case, with evidence. In this respect, Jesus was observing traditional legal roles. . . . Otherwise, the information gathering is a fishing expedition, an inquiry in search of a crime.").

[102] *See Matthew* 26:57–64 (describing how Jesus spoke to confirm his identity as the Son of God when questioned by the high priest); *John* 18:33–37 (recounting how, when Pilate questioned Jesus regarding his kingship, Jesus responded with the theological assertion that he is king of a nontemporal kingdom); GREEN, *supra* note 21, at 792 ("The question to which Pilate is steered [by the priests] concerns Jesus'[s] kingship . . . . This is not mere political maneuvering on the part of the chief priests and their allies, however; in their own hearing they had put to Jesus the question whether he was the Messiah, the Son of God, and in this way they provide indirect testimony to what Luke's audience already knows. This is that Jesus is more than a prophet. He is the regal prophet, the Messiah, the Son of God." (citation omitted)).

[103] *See John* 18:19–24 (describing how Jesus objected to the chief priests' questions and to being struck by one of the chief priests' officers); Van Patten, *supra* note 2, at 298–99 (explaining that Jesus's objections were designed to force the chief priests to follow the procedural rules and produce evidence).

[104] Khoury-Bisharat & Kitai-Sangero, *supra* note 2, at 454 (describing Jesus's silence as "a clear expression of . . . passivity"); GREEN, *supra* note 21, at 790–91 (noting that after speaking up in his hearings before the Sanhedrin and Pontius Pilate, Jesus "falls silent and is a passive participant in his own trial and sentencing").

the Sanhedrin and Roman officials.[105] However, this conclusion must be modified in light of Jesus's statements during his appearance before Annas.

II. JESUS'S PRELIMINARY HEARING BEFORE ANNAS

Jesus's trials before the Sanhedrin and Pontius Pilate understandably dominate the attention of biblical and legal scholars,[106] but Jesus was examined first of all by Annas, a high priestly predecessor to Caiaphas and former leader of the supreme court of the Jews, the Great Sanhedrin.[107] This proceeding, like the appearance before Herod Antipas, is only recounted in one of the Gospels. *John* alone discusses it and describes the hearing as follows:

> So the band of soldiers and their captain and the officers of the Jews arrested Jesus and bound him. First they led him to Annas, for he was the father-in-law of Caiaphas, who was high priest that year. It was Caiaphas who had advised the Jews that it would be expedient that one man should die for the people.
>
> . . . .
>
> The high priest then questioned Jesus about his disciples and his teaching. Jesus answered him, "I have spoken openly to the world. I have always taught in synagogues and in the temple, where all Jews come together. I have said nothing in secret. Why do you ask me? Ask

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[105] Khoury-Bisharat and Kitai-Sangero emphasize the silence of Jesus, and they briefly discuss his appearance before Annas, but they make no observations regarding the significance of the statements Jesus made during that appearance. Khoury-Bisharat & Kitai-Sangero, *supra* note 2, at 444, 451–52.

[106] *Id.* at 444 (discussing how the focus of most scholarship is on the Jewish priests and Pilate and not Jesus's silence); *see also, e.g.*, Herin, *supra* note 1, at 49–52 (detailing the trial of Jesus before the Sanhedrin without mentioning his appearance before Annas); Friedler, *supra* note 2, at 412–23 (discussing at length the trial before the Sanhedrin and Pilate without mentioning Jesus's initial encounter with Annas); MORRIS, *supra* note 90, at 345–48 (dividing Jesus's trial into two phases—a Jewish phase and a Roman phase—and making only a singular, passing reference to Annas's interrogation of Jesus); GREEN, *supra* note 21, at 790–96 (describing Jesus's appearance before the Sanhedrin without referencing Annas's interrogation of Jesus).

[107] Shlomo C. Pill, *Freedom to Sin: A Jewish Jurisprudence of Religious Free Exercise*, 34 REGENT U. L. REV. 1, 16 (2021) ("Mishnaic and Talmudic sources describe a hierarchical rabbinic court system of local and regional courts, or *battei din*, with a supreme legislative court called the *Sanhedrin* with final universal authority over the *halakhic* system." (footnote omitted)); SHAILER MATHEWS, NEW TESTAMENT TIMES IN PALESTINE: 175 B.C.–135 A.D., at 170 (new rev. ed. 1933) ("[The Sanhedrin was] the supreme court for all cases of importance—civil, criminal, and religious—under the Mosaic law."); HELEN K. BOND, CAIAPHAS: FRIEND OF ROME AND JUDGE OF JESUS? 42 (2004) (describing how Caiaphas rose to power after Gratus removed Annas and several of Annas's immediate successors). By virtue of his office as high priest, Annas had been the de facto head of the Sanhedrin. *See* GELDENHUYS, *supra* note 16, at 589 ("The Sanhedrin, or Jewish Council at Jerusalem, consisted of seventy members plus the chairman (the high priest)[] and exercised the supreme authority over the ordinary as well as the religious life of the Jewish people (though at the time in subordination to the Roman authorities).").

> those who have heard me what I said to them; they know what I said." When he had said these things, one of the officers standing by struck Jesus with his hand, saying, "Is that how you answer the high priest?" Jesus answered him, "If what I said is wrong, bear witness about the wrong; but if what I said is right, why do you strike me?" Annas then sent him bound to Caiaphas the high priest.[108]

Although this hearing was not a formal trial, it was significant because of Annas's standing as "the High Priest *par excellence* of his time."[109] In light of Annas's influence, *John*'s assertion that Jesus was first taken to him because he was Caiaphas's father-in-law may be more of a reference to Annas's standing as head of the high-priestly family than to mere kinship.[110]

Annas was one of the most powerful and well-known Jewish figures of his time.[111] He had served as high priest but had been deposed by Pilate's predecessor.[112] Under Jewish law, though, the high priest was supposed to serve until his death, so Annas remained prominent in Jewish affairs despite his removal.[113] He is commonly understood to have been

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[108] *John* 18:12–14, 19–24 (English Standard). Note that the account of this hearing is intertwined with John's account of Peter denying Jesus. *John* 18:15–18, 25–27.

[109] NEIL, *supra* note 28, at 89; *see also* MORRIS, *supra* note 78, at 755 (referring to Annas as "in strictness still the legitimate high priest according to Jewish law").

[110] *See* Paul Gaechter, *The Hatred of the House of Annas*, 8 THEOLOGICAL STUD. 3, 11 (1947) (declaring that the relationship between Annas and Caiaphas "was of account only insofar as Annas, in affairs common to him and Caiaphas, was the nobler of the two, to whom special honor had to be paid"); MORRIS, *supra* note 78, at 749 ("There is little doubt but that through these changes [i.e., the ascension of Annas's sons and son-in-law to the office of high priest] the astute old man at the head of the family exercised a good deal of authority. He was in all probability the real power in the land, whatever the legal technicalities."); BROOKE FOSS WESTCOTT, THE GOSPEL ACCORDING TO ST. JOHN 255 (James Clark & Co. authorized version 1958) (1881) ("The relationship of Caiaphas to Annas is not mentioned by any writer except St John, and yet this relationship alone explains how Caiaphas was able to retain his office by the side of Annas and his sons.").

[111] JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 538 (stating that Annas "increased in glory every day, and this to a great degree, and had obtained the favor and esteem of the citizens in a signal manner; for he was a great hoarder up of money"); WESTCOTT, *supra* note 110, at 254 (calling Annas "one of the most remarkable figures in the Jewish history of the time"); RODNEY A. WHITACRE, JOHN 429 (Grant R. Osborne et al. eds., 1999) (describing Annas as "probably the most respected and powerful of the Jewish authorities at that time"); Helen K. Bond, *At the Court of the High Priest: History and Theology in* John *18:13–24*, *in* 2 JOHN, JESUS, AND HISTORY: ASPECTS OF THE HISTORICITY IN THE FOURTH GOSPEL 313, 319 (Paul N. Anderson et al. eds., 2009) (describing Annas as "the most famous high priest of the first century"); R.C.H. LENSKI, THE INTERPRETATION OF ST. JOHN'S GOSPEL 1191 (1942) ("[Annas] was most certainly a man of tremendous influence among the Sadducees and in the Sanhedrin.").

[112] JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 478.

[113] KRUSE, *supra* note 51, at 409 ("While the Romans appointed and replaced the high priests, the Jewish people regarded high priesthood as a life office. . . . Annas continued to be regarded as high priest well after his official term of office, and continued to function *de facto* as high priest and was regarded as such by many Jews.").

the true and constant power broker behind the high priest's office,[114] and his influence is evinced, in part, by the fact that he was succeeded by five of his sons and Caiaphas, his son-in-law.[115] Annas, then, was the entrenched patriarch of the high-priestly family and a sort of high priest emeritus when the recently-arrested Jesus arrived at his home.[116]

A. Historical Inattention to Jesus's Objections

While Jesus seems to have displayed a quiet acquiescence during most of his proceedings, his appearance before Annas is a notable exception.[117] Few, if any, scholars have acknowledged the profound difference in his disposition on that occasion. Some articles do not even mention it.[118] There are potential reasons that scholars are less apt to discuss this hearing and, consequently, the statements Jesus made during it. For instance, there is comparatively little discussion of it in the New Testament. *Matthew*, *Mark*, and *Luke* describe the trial before the Sanhedrin, and all four Gospels relate details of Jesus's appearance before Pilate, but only *John* offers an account of the pre-trial inquisition before

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[114] GREEN, *supra* note 21, at 169 (asserting that Annas had a "near-dynastic control of the office"); KRUSE, *supra* note 51, at 409 (noting that Annas served as "de facto" high priest even after his removal); WITHERINGTON, *supra* note 51, at 287 (stating that Annas "may be thought of as the power behind the authority of Caiaphas"); D.A. CARSON, THE GOSPEL ACCORDING TO JOHN 581 (1991) (surmising that Annas "was to some extent the power behind Caiaphas"); NEIL, *supra* note 28, at 89 ("Throughout the period of the Gospels and Acts Annas was the power behind the throne.").

[115] JOSEPHUS, *Antiquities of the Jews*, *supra* note 60, at 537; WITHERINGTON, *supra* note 51, at 287 (explaining that Annas's power rested on his five sons and son-in-law, Caiaphas, who all served as high priest).

[116] *See* John E. Richards, *The Illegality of the Trial of Jesus*, *in* THE TRIAL OF JESUS 9, 25 (1915) ("Annas was the 'boss' of Jerusalem and of the Sanhedrin . . . ."); BEAUFORD H. BRYANT & MARK S. KRAUSE, COLLEGE PRESS NIV COMMENTARY: JOHN 355 (Jack Cottrell & Tony Ash eds., 1998) ("[A] living former high priest must have maintained considerable influence, just as Americans still address former Chief Executives as 'Mr. President.'"); Gaechter, *supra* note 110 (discussing the "all-surpassing influence and authority of Annas, to whose will all the members of his family bowed"). After his deposition, Annas is referred to as "high priest." *Luke* 3:1–2 (English Standard) (noting that John the Baptist began his ministry "during the high priesthood of Annas and Caiaphas"); *Acts* 4:6 (English Standard) (designating Annas as "the high priest").The relative standing of Annas and Caiaphas is likely reflected in the fact that Annas is called "high priest" and named first in each reference even though Caiaphas was formally in office. *See* CARSON, *supra* note 114 ("Annas was thus the patriarch of a high priestly family, and doubtless many still considered him the 'real' high priest even though Caiaphas was the high priest by Roman lights.").

[117] *See* Van Patten, *supra* note 2, at 299 ("[Jesus's answer to Annas] was a highly coherent response and the first indication of a strategy.").

[118] *See, e.g.*, Haim H. Cohn, *Reflections on the Trial and Death of Jesus*, 2 ISR. L. REV. 332, 334–35, 343–58 (1967) (describing the proceedings surrounding Jesus's trial, his interrogation, his alleged blasphemy, and his statements regarding his identity without mentioning his procedural objections to Annas); Herin, *supra* note 1, at 49–52 (recounting the trial of Jesus without mentioning his appearance or objections before Annas).

Annas.[119] Perhaps this hearing—and the significance of Jesus's reported statements during the hearing—are overlooked in part because they are simply less prominent in the New Testament.

Scholars, especially legal scholars, may tend to overlook Jesus's statements before Annas because they primarily focus on perceived procedural irregularities.[120] Scholars compare and contrast the first-century Gospel accounts with Hebrew procedural regulations described in the *Mishnah*—a late-second-century collection of Jewish oral traditions—and emphasize matters like the timing and venue of the various hearings, the propriety of questions put to Jesus, and the examination of witnesses.[121] While *Mishnaic* records do not date to the time of Jesus's trials—and, consequently, may not be entirely reflective of norms and expectations in first-century Judea—it is natural to evaluate the Gospel narratives in light of the procedures described in them.[122]

In addition to being less prominent in the New Testament than the accounts of the trials before the Sanhedrin and Roman officials and possibly less intriguing for scholars attracted to ostensibly clear procedural violations, the account of Jesus's appearance before Annas is also challenging for legal scholars. Mark Osler called *John*'s account of the hearing "somewhat hard to follow."[123] According to Walter M. Chandler, "[t]hat Jesus was privately examined before His regular trial by the Sanhedrin is quite clear. But whether this preliminary examination took place before Annas or Caiaphas is not certainly known."[124] Charles A. Hawley also found it "difficult to clear up the obscurity of the narrative as to what took place, and whether it was before Annas or Caiaphas, or both."[125]

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[119] *Compare John* 18:19–24 (recounting Annas's pre-trial inquisition of Jesus before his hearing before Caiaphas), *with Matthew* 26:57–68, 27:1–2 (presenting an account of Jesus's Jewish trial without any reference to the hearing before Annas), *Mark* 14:53–65, 15:1 (same), *and Luke* 22:52, 66–23:1 (same).

[120] *See, e.g.*, FRANCE, *supra* note 16, at 601 (noting that the question of whether the Sanhedrin proceedings were a legal trial "has been exhaustingly discussed"); State v. Bowling, 753 S.E.2d 27, 50 (W. Va. 2013) (per curiam) (Ketchum, J., dissenting) (analogizing multiple entries of inadmissible evidence to the Jewish authorities' trial of Jesus).

[121] *See* FRANCE, *supra* note 16, at 601 (addressing several ways the timing and venue of Jesus's trials ran afoul of the *Mishnah*'s requirements); Richards, *supra* note 116, at 25–26 (stating that Jesus declined to answer Annas's questions because "his rights as a Hebrew citizen under the Jewish law" protected him against self-incrimination and allowed him to demand production of witnesses).

[122] For a detailed discussion on how the *Mishnah* may have applied in first-century Jewish criminal proceedings, see generally H. Danby, *The Bearing of the Rabbinical Criminal Code on the Jewish Trial Narratives in the Gospels*, 21 J. THEOLOGICAL STUD. 51, 53–60, 64–70, 72–76 (1929).

[123] Osler, *supra* note 10, at 14.

[124] CHANDLER, *supra* note 29, at 239.

[125] Hawley, *supra* note 10, at 28; *see also* COHN, *supra* note 3, at 94 (affirming that the identity of Jesus's interrogator on this occasion is uncertain).

With respect to the coherence of the passage, legal scholars have likely been somewhat dissuaded by the same difficulties that trouble Bible scholars, who have observed that the precise identity of Jesus's high-priestly inquisitor is the foremost difficulty historically associated with this passage.[126] J.N. Sanders and B.N. Mastin synthesize the problem: "The main awkwardness in the narrative is said to be the fact that in verse 13 Jesus is taken to Annas, but that verses 15, 19, and 22, with their references to the Highpriest [sic], presuppose that he was then in fact appearing before Caiaphas."[127] While the high priest's identity in *John* 18 has been subject to some debate,[128] and some legal scholars identify Caiaphas as Jesus's inquisitor for the examination described in the chapter,[129] most Bible scholars agree that Annas was the high priest who questioned Jesus in *John* 18:19.[130] The discussion here accepts this consensus and advances the legal discussion of Jesus's trials by considering the modern implications of his objections during the hearing before the powerful Annas.[131]

B. The Nature of the Hearing Before Annas

In assessing the import of Jesus's statements during the hearing immediately following his arrest, one should understand the basic nature

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[126] *See, e.g.*, CARSON, *supra* note 114, at 580–81 (addressing the confusion between Annas and Caiaphas created by the four Gospel accounts of Jesus's trial); C.K. BARRETT, THE GOSPEL ACCORDING TO ST. JOHN: AN INTRODUCTION WITH COMMENTARY AND NOTES ON THE GREEK TEXT 523 (2d ed. 1978) ("[G]reat difficulties appear at once. The most notable is the impossibility of combining the statements made about the high priest . . . [.]"); Bond, *supra* note 111, at 318 ("The problems regarding the identity of 'the high priest' in John 18:19–24 are well known."); WINTER, *supra* note 43, at 47 (discussing the distinction in the book of John between Annas and Caiaphas).

[127] J.N. SANDERS & B.A. MASTIN, A COMMENTARY ON THE GOSPEL ACCORDING TO ST. JOHN 389 (1968).

[128] *See, e.g.*, MORRIS, *supra* note 78, at 754 (acknowledging that some scholars "feel that this examination was in fact conducted by Caiaphas and not Annas").

[129] *See, e.g.*, MAX RADIN, THE TRIAL OF JESUS OF NAZARETH 146 (1931) ("Caiaphas examines Jesus personally and asks him about his disciples and his doctrines."); Kutner, *supra* note 12, at 5, 8 (suggesting that Caiaphas questioned Jesus because Caiaphas was the high priest and the interrogation occurred at his palace).

[130] *See* J. RAMSEY MICHAELS, THE GOSPEL OF JOHN 902 (2010) ("[T]his is the view of virtually all modern commentators."); *see also, e.g.*, MORRIS, *supra* note 78, at 754–55 ("The natural force of the present arrangement of the text is that Jesus was brought before Annas first, and that he remained there until that worthy sent Him on to Caiaphas." (citations omitted)); LENSKI, *supra* note 111, at 1197 ("Jesus, having been brought for the first [interrogation] to Annas, is now examined by Annas and after this is sent to Caiaphas by Annas. 'The high priest' who interrogates Jesus is thus Annas." (citation omitted)); CARSON, *supra* note 114 ("Thus the 'high priest' who questions Jesus in [verse] 19 is Annas."); HERMAN N. RIDDERBOS, THE GOSPEL OF JOHN: A THEOLOGICAL COMMENTARY 578–79, 582 (John Vriend trans., William B. Eerdmans Publ'g Co. 1997) (1987) ("Jesus has been taken to Annas for questioning."); BRYANT & KRAUSE, *supra* note 116 ("The first 'high priest' to question Jesus is obviously Annas, who sends him to Caiaphas afterward." (citations omitted)).

[131] *See infra* Part III.

of the proceeding.[132] Some legal scholars, including Osler, equate it with an initial appearance or arraignment in the modern American system.[133] While Osler is correct in noting that the hearing is precedent to a formal trial, it more resembles a modern preliminary hearing than an initial appearance or arraignment.[134] The primary purpose of an initial appearance is to abolish unlawful detention and advise defendants of both the allegations against them and their respective rights as accused persons.[135] An arraignment involves advising formally charged defendants in open court of the charges previously filed against them and subsequently asking them to plead guilty or not guilty.[136] The hearing

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[132] While this informal hearing had an investigative thrust, it was essentially judicial. *See* RIDDERBOS, *supra* note 130, at 579 ("The interrogation by Annas does not have the character of an official trial . . . it is rather a preliminary examination . . . undertaken at Annas's own initiative."). As a former high priest, Annas was the former leader of Israel's supreme court and an authoritative judicial figure. *John* 18:22; CARSON, *supra* note 114, at 580–81 (observing that (1) the Sanhedrin was the highest Jewish court, (2) the high priest "presided over" the Sanhedrin, (3) the Romans deposed of Annas as the high priest, and (4) Annas held significant sway over Jewish affairs after he was deposed).

[133] *E.g.*, Osler, *supra* note 10, at 14–15; Johnston, *supra* note 10, at 10.

[134] *Compare* FED. R. CRIM. P. 5(d) (requiring federal judges to advise felony defendants of the charges against them and of their rights as criminal defendants in an initial appearance), *and* FED. R. CRIM. P. 10(a) (requiring federal judges to inform defendants of the indictments against them and to ask for their pleas), *with* FED. R. CRIM. P. 5.1(e)–(f) ("At a preliminary hearing, the defendant may cross-examine adverse witnesses and may introduce evidence but may not object to evidence . . . . If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate judge must promptly require the defendant to appear for further proceedings. . . . If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant."), *and Preliminary Hearing*, OFFS. U.S. ATT'YS, https://www.justice.gov/usao/justice-101/preliminary-hearing (last visited Oct. 12, 2022) ("The preliminary hearing is like a mini-trial. The prosecution will call witnesses and introduce evidence, and the defense can cross-examine the witnesses. . . . If the judge concludes there is probable cause to believe the crime was committed by the defendant, a trial will soon be scheduled. However, if the judge does not . . . they will dismiss the charges.").

[135] *See* United States v. Carignan, 342 U.S. 36, 44–45 (1951) (observing that the purpose of promptly arraigning inmates is to prevent unlawful detentions and abuses of power); Upshaw v. United States, 335 U.S. 410, 412 (1948) ("'[T]he plain purpose of the requirement that prisoners should promptly be taken before committing magistrates was to check resort by officers to 'secret interrogation of persons accused of crime.'" (quoting McNabb v. United States, 318 U.S. 332, 344 (1943))); State v. Anderson, 4 P.3d 369, 381 (Ariz. 2000) (en banc) ("The purpose of the initial appearance is to advise the defendant of the charges against him and to inform him of his right to counsel and to remain silent.").

[136] FED. R. CRIM. P. 10(a); Caldwell v. United States, 160 F.2d 371, 372 (8th Cir. 1947) ("An arraignment consists of calling a defendant to the bar, reading the indictment to him or informing him of the charge against him, demanding of him whether he is guilty or not guilty, and entering his plea."); *see also* Crain v. United States, 162 U.S. 625, 637–38 (1896) (showing consensus from Sir Edward Coke, Sir Matthew Hale, and Sir William Blackstone that an arraignment consists of presentment in court, informing the defendant of the indictment, and requesting the defendant's plea), *overruled by* Garland v. Washington, 232

before Annas is readily distinguishable from both initial appearances and arraignments because no charges were announced against Jesus,[137] no rights were explained, and Jesus was not "essentially asked to enter a plea," as Osler suggests.[138]

Ancient Jewish audiences likely did not read the interrogation account while parsing between the equivalents of initial appearances, arraignments, and preliminary hearings. For modern readers, though, the distinction is helpful in assessing whether the questioning seems more or less appropriate and anticipating Jesus's procedural expectations. The parallels are not perfect, but this appearance was more akin to a modern preliminary hearing. The primary purpose of preliminary hearings is to permit an objective determination by a judicial official of whether a prosecutor has a sufficient quantum of evidence—enough to demonstrate probable cause to believe the accused person committed an alleged felony before charges are formally filed.[139] These hearings are only necessary when an officer arrests someone for a serious offense without an indictment or prior judicial approval.[140]

U.S. 642, 646–47 (1914); Richardson v. State, 508 S.W.2d 380, 381 (Tex. Crim. App. 1974) ("The purpose of arraignment is to determine the identity and the plea of the person charged."); People v. Carter, 53 Cal. Rptr. 660, 661 (Dist. Ct. App. 1966) ("The purpose of the arraignment is to inform the accused of the charge and give her an opportunity to plead to it either by plea or demurrer, or move to set it aside.").

137 Bílý, *supra* note 2, at 93 ("At the time of Jesus'[s] arrest, there was no charge against him. The priests and the Sanhedrin, the Jewish high court, began looking for witnesses only after he was in custody."); *see also Matthew* 26:59–60 (English Standard) ("Now the chief priests and the whole council were seeking false testimony against Jesus, that they might put him to death, but they found none . . . .").

138 Osler, *supra* note 10, at 14. Osler describes the proceeding this way:

> Jesus, upon His arrest, was not directly taken to Caiaphas, who was the high priest (at least according to the Gospel of John). Rather, He was taken first to an official named Annas, who conducted something which sounds strikingly like an initial appearance or arraignment. A primary purpose of an arraignment, of course, is to make the defendant aware of the charges and enter a plea on those charges.

Id. (footnotes omitted).

139 18 U.S.C. § 3060(a) ("[A] preliminary examination shall be held . . . to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it."); Westerman v. Cary, 892 P.2d 1067, 1075 (Wash. 1994) (en banc) ("The primary purposes of the preliminary appearance are a judicial determination of probable cause and judicial review of the conditions of release."); United States v. Conway, 415 F.2d 158, 160 (3d Cir. 1969) ("[T]he purpose of a preliminary hearing is to afford an arrested person a prompt determination as to whether there is probable cause to hold him for grand jury action.").

140 § 3060(e) ("No preliminary examination . . . shall be required to be accorded to an arrested person . . . if at any time subsequent to the initial appearance of such person before a judge or magistrate judge and prior to the date fixed for a preliminary examination . . . an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.").

Jesus had not been formally charged when he appeared before Annas, but Jewish leaders had dispatched soldiers for the express purpose of arresting him.[141] From a strictly modern perspective, this examination probably should not have been necessary because there was either a sufficient quantum of evidence for Jewish officials to authorize Jesus's arrest and trial or there was not.[142] If there was not, then Jewish officials never should have ordered his arrest, and it was improper to subject him to questioning before Annas.[143] If the Sanhedrin had already determined that there was sufficient evidence, then a preliminary examination was completely superfluous.[144]

This hearing did not proceed in the way modern observers would expect a preliminary hearing—or any lawful judicial hearing—to unfold because such proceedings are not intended to be occasions to scrutinize the accused person.[145] Instead, preliminary hearings are supposed to be

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[141] *See John* 18:1–12 (describing the crowd that came to arrest Jesus before his trial); *see also* Mark 14:1–2 (English Standard) (stating the motives of those arresting Jesus were "to arrest him by stealth and [to] kill him").

[142] Under modern constitutional criminal procedure, law enforcement is required to demonstrate probable cause that a defendant committed a crime before law enforcement may arrest him/her, *see, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("[W]e confirm today what our prior cases have intimated: the standard of probable cause 'applie[s] to all arrests . . . .'" (second alteration in original) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))); Beck v. Ohio, 379 U.S. 89, 91 (1964) (detailing what probable cause is and how it serves as the constitutional standard for lawful arrests), which is the same quantum of evidence required to withstand a preliminary hearing, FED. R. CRIM. P. 5.1(e)–(f). Therefore, if the Jewish authorities had probable cause to arrest Jesus, they also had a sufficient quantum of evidence to proceed to trial, seemingly rendering this inquiry needless. *Compare* CHANDLER, *supra* note 29, at 242 ("[P]reliminary examinations of accused persons were not allowed by Hebrew law."), *with* 18 U.S.C. § 3060(a) ("[A] preliminary examination shall be held . . . to determine whether there is probable-cause to believe that an offense has been committed and that the arrested person has committed it.").

[143] *See* Hawley, *supra* note 10, at 27, 28 (stating Jesus's arrest was illegal because of a lack of witnesses, lack of a formal accusation, and lack of a warrant); Bílý, *supra* note 2, at 93 ("Did Jesus'[s] arrest result from concordant testimony before a court by two witnesses regarding a specific crime? For the arrest to be legal, it should have."); *cf. Beck*, 379 U.S. at 91 (highlighting the American requirement of probable cause for a lawful arrest).

[144] As the U.S. Department of Justice explains, "*The prosecutor* must show that enough evidence exists to charge the defendant"; the prosecution bears the burden of proving there is probable cause, not the defendant. OFF. U.S. ATT'YS, *supra* note 134 (emphasis added). However, under Federal Rules of Criminal Procedure, prosecutors may bypass the preliminary hearing entirely by obtaining a grand jury indictment or an information from a magistrate that formally charges the defendant. FED. R. CRIM. P. 5.1(a); *see also* Barber v. United States, 142 F.2d 805, 807 (4th Cir. 1944) ("The only purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury; and, after a bill of indictment has been found, there is no occasion for such hearing."). *See generally* FED. R. CRIM. P. 7 (setting the procedure for an indictment and an information).

[145] *See, e.g.*, United States v. Coley, 441 F.2d 1299, 1301 (5th Cir. 1971) ("The purpose of such a hearing is to ascertain whether or not there is probable cause to warrant detention of the accused pending a grand jury hearing.").

occasions for openly weighing the strength of the accusers' evidence under scrutiny from the accused.[146] The accused, though, has no burden of proof and no obligation to speak.[147] In fact, the unofficial-but-understood secondary purpose of preliminary hearings is to permit accused persons an opportunity to discover something of the nature and strength of the prosecution's evidence.[148]

The hearing before Annas was not intended to ensure that Jesus's arrest and continued detention were just or to ensure that he understood the proceedings and his rights. Rather, it was an occasion to preview—or develop—the case against Jesus because no formal charge had been propounded.[149] Professor Jonathan K. Van Patten's assessment is likely correct:

> The first stage of the inquiry appeared to have been information gathering. We are not in the modern era of informers and secret police who have assembled a file on a suspect before there is any arrest. Annas was attempting to figure out who Jesus was and what he was doing that had drawn so much attention. This was a threat assessment.[150]

The parallels are imperfect, but this resembles a preliminary hearing more than an initial appearance or arraignment because the purpose seems to have been an assessment of the evidence and viable charges against Jesus.

C. The Context of Jesus's Objections

Instead of receiving evidence against Jesus or explaining the evidence already collected against him, Annas attempted to interrogate Jesus. *John* says, "The high priest then questioned Jesus about his disciples and his teaching."[151] In the United States, the Fifth Amendment

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[146] *See, e.g.*, FED. R. CRIM. P. 5.1(e)–(f) (allowing defendants to cross-examine the prosecution's witnesses and allowing magistrate judges to discharge defendants when there is no probable cause during a preliminary hearing).

[147] *See* U.S. CONST. amend. V (safeguarding defendants' rights to avoid testifying against themselves); FED. R. CRIM. P. 5.1(e)–(f) (granting defendants the right to cross-examine the government's witnesses and introduce evidence, but not requiring either); Sessions v. Wilson, 372 F.2d 366, 368 (9th Cir. 1966) (presupposing a criminal defendant's right to remain silent in a preliminary hearing).

[148] Blue v. United States, 342 F.2d 894, 901 (D.C. Cir. 1964) ("It has generally been thought that the purpose of a preliminary hearing is to afford the accused (1) an opportunity to establish that there is no probable cause for his continued detention and thereby to regain his liberty and, possibly, escape prosecution, and (2) *a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him*." (emphasis added)).

[149] *See John* 18:19–24 (observing how Annas questioned Jesus before sending him to Caiaphas for the actual trial); Van Patten, *supra* note 2, at 299 (describing Annas's questioning of Jesus without stating any charges as a "fishing expedition" to find a crime Jesus may have committed).

[150] Van Patten, *supra* note 2, at 298.

[151] *John* 18:19 (English Standard).

of the Constitution protects accused persons against compulsory self-incrimination,[152] so judges do not typically question defendants regarding their conduct, crimes, and associates unless their cases are being resolved via plea agreement.[153] Although first-century Jews did not have the Fifth Amendment, there is a venerable and ancient ethic in Hebrew criminal jurisprudence against compelling—or even permitting—self-incrimination.[154] Samuel Mendelsohn explains,

> Not only is self-condemnation never extorted from the defendant by means of torture, but no attempt is ever made to lead him on to self-incrimination. Moreover, a voluntary confession on his part is not admitted in evidence, and therefore not competent to convict him, unless a legal number of witnesses minutely corroborate his self-accusation.[155]

It is not altogether certain that the Hebrew prohibition on self-incrimination was in force as early as the first century, but Jewish law definitely provided that a person could not be convicted and punished without incriminating testimony from two or three witnesses.[156] The burden of proving that Jesus had committed a crime was squarely upon the Jewish authorities, yet Annas did not pursue the testimony of even one witness.[157]

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[152] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

[153] *See* Alvarez-Perdomo v. State, 425 P.3d 221, 226 (Alaska Ct. App. 2018) ("If the defendant then refuses to explicitly waive [the] right to testify, the trial judge cannot order the defendant to take the stand. Rather, the judge should order the trial to proceed without the defendant's testimony."), *rev'd on other grounds*, Alvarez-Perdomo v. State, 454 P.3d 998 (Alaska 2019); United States v. Frazier, 403 F.3d 1102, 1109 (8th Cir. 2005) ("The core protection afforded by the Fifth Amendment is a prohibition on compelling a criminal defendant to testify against himself."); People v. Cole, 84 N.W.2d 711, 717–18 (Mich. 1957) (observing that even when a defendant waives his right to remain silent and a judge may properly question the defendant as a witness, judges "should avoid any invasion of the prosecutor's role"); FED. R. CRIM. P. 11 (requiring a judge to address a defendant prior to the entry of a guilty plea).

[154] *See* 3 MAIMONIDES, THE CODE OF MAIMONIDES (MISHNEH TORAH): BOOK FOURTEEN THE BOOK OF JUDGES 52–53 (Julian Obermann et al. eds., Abraham M. Hershman trans., Yale Univ. Press 1949) (c. 1178) ("To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree."); MENDELSOHN, *supra* note 27, at 133 (observing that under Jewish law, "no attempt is ever made to lead [a defendant] on to self incrimination").

[155] MENDELSOHN, *supra* note 27, at 133.

[156] *Deuteronomy* 19:15 (English Standard) ("A single witness shall not suffice against a person for any crime . . . . Only on the evidence of two witnesses or of three witnesses shall a charge be established."), 17:6 (requiring at least two witnesses to secure a capital conviction).

[157] *See John* 18:19–21 (recounting how Jesus reminded Annas of his duty to find witnesses rather than question the accused); *Deuteronomy* 17:2–6 (promulgating the Jewish legal requirement that leaders must diligently investigate wrongdoing and use at least two

1. Jesus's Objection to Being Questioned

Jesus perceived the impropriety of Annas interrogating him "about his disciples and his teaching," and he objected.[158] In the first of his two recorded statements during the hearing, Jesus said to Annas, "I have spoken openly to the world. I have always taught in synagogues and in the temple, where all Jews come together. I have said nothing in secret. Why do you ask me? Ask those who have heard me what I said to them; they know what I said."[159] In contrast to the silence Jesus maintained in subsequent proceedings, Raymond Brown characterizes Jesus's conduct before Annas as "self-assurance before authority."[160] Jesus's response was a direct challenge to the powerful patriarch, demanding that he follow proper legal procedure and meet the affirmative burden of demonstrating Jesus's guilt.[161]

In essence, Jesus protested by saying that witnesses were readily available to testify regarding his ministry and provide incriminating evidence if he had, in fact, broken any laws. He had taught consistently and publicly in, among other places, Jerusalem, where the Jewish temple was located and the inquisition was occurring.[162] Jesus invited Annas to consult some of the many witnesses who could describe the content and manner of Jesus's teaching as well as the character and conduct of his disciples.[163] The information would presumably have been the same whether it was provided by Jesus or those who heard Jesus, but the

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witnesses to prove the occurrence of a capital offense); Hawley, *supra* note 10, at 26 ("[Under the Jewish law,] [t]he accused was presumed to be innocent until proved guilty."); *see also* CHANDLER, *supra* note 29, at 314–15 (highlighting the requirement that Jewish authorities had to use evidence to establish a *prima facie* case against Jesus before he could be adjudicated guilty).

158 *John* 18:19–21 (English Standard) (recounting how Jesus did not answer Annas's improper questions and instead urged Annas to question the witnesses who heard his teachings).

159 *John* 18:20–21 (English Standard).

160 RAYMOND E. BROWN, THE GOSPEL ACCORDING TO JOHN (XIII–XXI), at 826 (1970).

161 *See* KRUSE, *supra* note 51, at 411–12 ("Jesus refused to be cowed by Annas's interrogation. . . . [I]n official proceedings at least, it was not the accused who was interrogated, but the witnesses for and against the accused. Jesus'[s] response, then, appears to have been a rebuke to Annas, for which he had no answer."). However influential Annas may have been, he was not the official high priest, and the Sanhedrin assembled with Caiaphas; therefore, Jesus's appearance before him was not the initiation of Jesus's formal trial. MORRIS, *supra* note 78, at 758 ("The appearance before Annas was a preliminary inquiry after which more formal (though still not strictly legal) proceedings were taken before the Sanhedrin.").

162 *John* 18:20–21, 7:14, 25–31 (highlighting Jesus's open teaching in Jerusalem, including in the temple); *see also* MORRIS, *supra* note 78, at 756 ("He had not taught in secret. There was no reason accordingly for addressing questions to Him. The right way to go about things, now that an arrest ha[d] taken place and the law set in motion, was to bring out the witnesses and let them tell their story.").

163 *See John* 18:20–21 (highlighting how Jesus reminded Annas of the many witnesses who saw his ministry and could testify about it).

process mattered to him.[164] New Testament scholar Craig Keener suggests that Jesus's "appeal to the public character of [his] teaching, and lack of opposition at that point, would count as a strong argument against the subversiveness of [his] speech—as well as an indictment of those now requiring a hasty, secret hearing."[165]

Jesus did not object to appearing before Annas even though Annas was not the sitting high priest and Jesus had been ushered before him in the middle of the night.[166] To the extent that he could have made a viable jurisdictional objection, Jesus seemingly waived it. Furthermore, he did not object to Annas seeking evidence regarding his teaching ministry and his followers.[167] However, Jesus expected Annas to procure and present any evidence in the appropriate manner. In discussing Jesus's objection to Annas's questions, Leon Morris explains,

> He is not simply refraining from any attempt to help the high priest or to let him know what [h]e stood for. His point is that the high priest is not proceeding in the correct legal form. It was his duty to bring forth his witnesses (and in Jewish law witnesses for the defence should be called first). Jesus is saying that that should not be at all difficult.[168]

Some suggest that Jesus's first objection was akin to asserting his right to remain silent.[169] Osler, for instance, wrote, "The words of Jesus at His arraignment have the same effect as asserting the Fifth Amendment—they amount to a refusal to admit guilt and a demand that the authorities produce their own evidence."[170] However, this assessment slightly misses the mark. Jesus was demanding what he believed was a fairer process rather than invoking a right to silence.[171] His statement is

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[164] *See* RIDDERBOS, *supra* note 130, at 583 (describing how Jesus's intentional response to Annas was strategically crafted to expose the farcical trial he underwent); THOMPSON, *supra* note 83, at 369 ("[Even t]hose who [did] not believe in him or accept his words [would] be able to recount his claims and teachings, even if they ha[d] found them 'hard' or unacceptable. Jesus'[s] words and signs are matters of public record.").

[165] KEENER, *supra* note 27, at 1095 (citations omitted).

[166] *See John* 18:13, 19–24 (providing the entire account of Jesus's hearing before Annas and not including any account of Jesus objecting to his appearance before Annas).

[167] *See id.* (providing the entire account of Jesus's hearing before Annas and not including any account of Jesus objecting to the subject matter of Annas's questions).

[168] MORRIS, *supra* note 78, at 756.

[169] *E.g.*, HENDRIKSEN, *supra* note 53, at 397 ("[Jesus's objection] is as if today someone under investigation would answer: 'I decline to be a witness against myself, and I demand that [you] produce honest witnesses as the law requires.'").

[170] Osler, *supra* note 10, at 14.

[171] *See* MORRIS, *supra* note 78, at 755–56 (highlighting that Jesus's demand that Annas produce witnesses was to ensure the trial proceeded in "correct legal form"); *cf.* BROWN, *supra* note 160 ("Jesus is demanding a trial with witnesses—a good indication that the hearing before Annas was not a formal trial.").

akin to a declination to speak because insufficient evidence had been presented to even merit a response.[172]

2. Jesus's Objection to Being Struck

Jesus's demand for fair process was met with a violent reprisal, and this precipitated his second statement. When Jesus rebuked Annas, "one of the officers standing by struck Jesus with his hand, saying, 'Is that how you answer the high priest?'"[173] This response recognizes Annas's lofty and enduring status and implies that Jesus was guilty of contempt of court. Jesus then confronted the officer, saying, "If what I said is wrong, bear witness about the wrong; but if what I said is right, why do you strike me?"[174] As William Hendriksen reflects, "One is especially impressed with the dignity and majesty of this reply."[175] Jesus was patient and measured in his response. However, rather than the passivity that some perceive in the subsequent trials before the Sanhedrin and Pilate, Jesus's retort to the officer evinces palpable indignation and penetrating analysis.

This objection is significant for at least three reasons. First, Jesus's reply underscored that his objection to Annas was correct: the high priest was wrong for asking him to testify before adducing any evidence of his criminal culpability.[176] For Jesus, this was "a question of truth and justice" in his final confrontation with Judaism as personified in the person of the high priest.[177] Second, Jesus was maintaining his innocence.[178] He had not disrespected Annas. To the extent that Annas was responsible for adjudicating Jesus's culpability, Jesus had merely insisted upon fair and proper process. This officer was concerned with protecting the high-priestly institution, but he apparently had no concern about the propriety of the legal proceedings over which Annas was presiding. As Craig Keener

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[172] Orlo J. Price, *Jesus' Arrest and Trial*, 36 BIBLICAL WORLD 345, 351 (1910) (arguing that Jesus had no obligation to answer Annas as no evidence or charge had been presented against him and that, in light of the inappropriate manner in which Annas questioned Jesus, his response reflected grace and dignity).

[173] *John* 18:22 (English Standard). Though John does not clearly implicate Annas in this battery, *John* 18:22–23, one can speculate that Annas may have even directed—or at least expected—a violent response by his officer, *see John* 18:22–24 (making no mention of Annas ever rebuking the officer who had struck Jesus); *Acts* 23:1–2 (noting that Annas ordered that Paul be struck on the mouth when Paul appeared before the Sanhedrin).

[174] *John* 18:23 (English Standard).

[175] HENDRIKSEN, *supra* note 53, at 398.

[176] *See* BARNABAS LINDARS, THE GOSPEL OF JOHN 550–51 (1972) ("Jesus'[s] response to this attack amount[ed] to a reassertion of his claim in verse 21. It was no evasion, for he is willing to have witnesses called.").

[177] RIDDERBOS, *supra* note 130, at 583.

[178] Letter from Saint Cyprian to Cornelius, *in* 51 THE FATHERS OF THE CHURCH: A NEW TRANSLATION 171, 176 (Rose Bernard Donna trans., 1964); Letter from Saint Cyprian to Florentius Puppian, *in* 51 THE FATHERS OF THE CHURCH: A NEW TRANSLATION, *supra*, at 223, 225.

opines, "Jesus appears more careful to observe Jewish legal procedure than his interrogators do."[179]

Third, more than merely reaffirming his challenge to the unfair process followed by Annas, Jesus's reply to the officer was an objection to unjustified violence by an official actor.[180] In discussing the significance of the officer's actions, C.K. Barrett remarks, "The truth is always objectionable to those who are concerned to establish a case at all costs. It is easier and more effective to answer it with blows than with arguments."[181] In Jesus's estimation, there was a proper method for redressing concerns about a suspect's lack of respect for official authority, and striking the suspect, even if he spoke impudently, was decidedly improper.[182] He stressed that even if his comments to Annas were wrong—or if the officer sincerely believed they were wrong—the officer should have offered evidence disproving Jesus's assertion.[183] After all, Jesus's reply did not involve any threat of violence, and the potential for him to successfully attack Annas or someone else was negligible because the officer was present and Jesus was still bound.[184]

3. Observations

Jesus's statements during Annas's examination were not passive at all; he did not "essentially stand[] mute" during his preliminary hearing, as Osler suggests.[185] Quite the opposite is true. In order to appreciate the gravity of his objections, one must carefully observe the context in which the protests were made. Jesus rarely broke his silence during the

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[179] KEENER, *supra* note 27, at 1096.

[180] *See* BRUCE, *supra* note 22 (noting that Jesus's response was a protest against the illegality of being struck); SANDERS & MASTIN, *supra* note 127, at 393 ("Jesus is undeterred by violence.").

[181] BARRETT, *supra* note 126, at 441.

[182] *See* KRUSE, *supra* note 51, at 412 ("The slap in the face was intended to humiliate Jesus. But once again, Jesus refused to be cowed . . . [.] Jesus challenged the legality of the action of Annas's official in striking him."); MORRIS, *supra* note 78, at 757 ("Jesus brings out the wrongness of this action by inviting the man to bear witness of any evil that He has spoken. That is surely the proper course of action."); THOMPSON, *supra* note 83, at 370 ("Jesus appeals for a right or just judgment of his words and deeds." (citation omitted)).

[183] *John* 18:23; *see also* FRANCIS J. MOLONEY, 4 THE GOSPEL OF JOHN 488–89 (Daniel J. Harrington ed., 1998) ("If the slap is punishment for blasphemous speech, then witnesses must be brought; but if Jesus is proclaiming what is right . . . then the officer stands condemned by his action."); MICHAELS, *supra* note 130, at 907–08 ("The issue is not whether something he has said is insulting or blasphemous, but whether or not it is true. If it is true, it is not blasphemy, and if it is false, it should be labeled as such, and testimony brought to the contrary. The reader cannot help but notice that Jesus has said nothing even remotely insulting to the Chief Priest, nor does the Chief Priest act as if he had. The slap in the face is an egregious overreaction.").

[184] *See John* 18:12, 24 (stating that Jesus was bound); BRYANT & KRAUSE, *supra* note 116, at 359 ("We should remember that Jesus still has his hands tied behind his back[] and poses no physical threat to anyone.").

[185] Osler, *supra* note 10, at 14.

proceedings against him, even though he seemingly suspected they were fraught with irregularities. When he spoke, though, he said a great deal in only a few words. With his objections, Jesus implied that, when bringing suspected criminals to justice, process always matters. By verbally resisting, "Jesus is asking for a fair trial, while his opponents are already unmasked as those who, unable to win their case by fair means, are perfectly happy to resort to foul [ones]."[186]

In American jurisprudence, and historically in most societies, it is important to identify and punish the right people, but it is also necessary to achieve these ends "the right way."[187] In the quest to bring suspected criminals to justice, good processes generally lead to consistently good and trustworthy outcomes.[188] Conversely, though, flawed or corrupt procedures eventually lead to bad, even tragic, outcomes.[189] While factually guilty people might be identified and punished in a corrupt process, communities do not tend to trust or accept the outcomes when they know the process is flawed.[190]

III. JESUS'S OBJECTIONS AND DUE PROCESS IN THE UNITED STATES

Although Jesus's trials and execution occurred two thousand years ago, it is important for modern legal scholars to continue reflecting upon them, because the same phenomena that influenced those proceedings

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[186] CARSON, *supra* note 114, at 584.

[187] *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."); *id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). Regarding other societies throughout history, see, for example, *John* 7:40–52, in which Nicodemus, a ruler among the Jews, remarked that the Jewish legal system carried an expectation of fair process. Concerning Jesus, he asked rhetorically, "Does our law judge a man without first giving him a hearing and learning what he does?" *John* 7:51 (English Standard).

[188] *See*, *e.g.*, JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 9 (2020) (linking public trust in courts to the courts' "faithful[] perform[ance] of [their] duties; adher[ence] to ethical standards; and effective[] carrying out [of] internal oversight, review, and governance responsibilities").

[189] *See*, *e.g.*, Brandon L. Garrett, *The Banality of Wrongful Executions*, 112 MICH. L. REV. 979, 981 (2014) (observing how bad processes can lead to "miscarriages of justice," such as the execution of innocent individuals, and attributing such wrongful convictions to faulty systems and not only "a few bad actors").

[190] *See*, *e.g.*, James Podgers, *Time Out for Executions*, A.B.A. J., Apr. 1997, at 26, 26 (observing a growing movement calling for a moratorium on the death penalty due to "concerns about the process followed in imposing the death penalty").

sometimes infect modern processes.[191] As one scholar notes, "If the trial of Jesus was illegal in its detailed aspects, it was but one of many others which have been held of equal gravity and with like penalty—death—since; and it may be added the same errors in law and judgment are the almost daily creatures even of this day of enlightenment and progress."[192]

The impact of Jesus's legal proceedings cannot be explained solely by his claims to deity because such claims are recorded in other places in the Gospels that are far less prominent in the collective consciousness and popular culture.[193] In addition to the religious implications of the trial records, there are definite and profound legal, political, and social implications.[194] The outstanding thing about Jesus's claims in the trial narratives is that they occur in a context of clear injustice. This is why law courts and legal scholars have invoked memories of Jesus's trials in shaping Western conceptions of due process. It has seldom been noted heretofore that Jesus broke his silence during his first hearing in order to raise procedural objection, but those protests should resonate with all who value the rule of law and due process.

A. Regarding Contemporaneous Objections

During Jesus's trials, he did not directly respond to the charges levied against him, and this was considered a viable defense strategy in ancient times.[195] At least one American court has cited his example as illustrative of the proposition that it is improper to infer guilt when a suspect is silent

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[191] *See*, *e.g.*, CTR. FOR PROSECUTOR INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 3–5 (2013), http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf (showing that prosecutorial misconduct, including admitting false testimony and finding the innocent guilty, continues to be a widespread modern problem).

[192] S. Srinivasa Aiyar, *The Legality of the Trial of Jesus*, *in* THE TRIAL OF JESUS, *supra* note 116, at 53, 54.

[193] *E.g.*, *John* 8:58 (English Standard) ("Jesus said to them, 'Truly, truly, I say to you, before Abraham was, "I am."'"), 10:30 (English Standard) ("I and the Father are one."), 14:9 (English Standard) ("Jesus said to [Philip], . . . ['Whoever has seen me has seen the Father.'").

[194] DUSENBURY, *supra* note 7 ("[T]he drama of Pilate and Jesus as a legal fact has decisively shaped, and still subtly shapes, the legal and political cultures of Europe and the Americas. If Jesus had not been tried by Pilate, and if the Pilate trial had not been lavishly narrated in the four canonical gospels, then the political history of Europe and the Americas would be unrecognizable.").

[195] *See* William Sanger Campbell, *Engagement, Disengagement and Obstruction: Jesus' Defense Strategies in Mark's Trial and Execution Scenes (14.53–64; 15.1–39)*, 26 J. STUDY NEW TESTAMENT 283, 286 (2004) ("Silence was an uncommon but legitimate defense tactic in antiquity."); 2 PHILOSTRATUS, THE LIFE OF APOLLONIUS OF TYANA 275 (F.C. Conybeare trans., MacMillan Co. 1912) (c. 220) ("I am sure that silence constitutes a fourth excellence much required in a law-court.").

under questioning.[196] Whether in day-to-day life or in legal trials, some allegations do not deserve a reply. Perhaps they are obviously incredible or patently absurd. In those instances, silence can be a profound communicative act because one can tacitly signal a comment's or claim's lack of merit by simply declining to address it.[197]

While one can say a great deal through silence in certain contexts, it is generally best to protest openly when the fundamental fairness of legal proceedings is at stake.[198] Jesus's example of objecting during his hearing before Annas is an encouragement to insist on fair and just processes, and it illustrates the importance of raising contemporaneous objections to improper legal procedures. Though he adopted a posture of silence during his formal trials and may not have expected—or even desired—to avoid crucifixion, two things merited his direct engagement. First, when called upon to do so, Jesus more-or-less-forthrightly answered questions about his identity and special relationship with God.[199] Second, he objected when his rights to fair process were violated during his hearing with Annas.[200] He stood alone beforethe most powerful Jewish man in Judea at the time, and he clearly and firmly protested even though no one was willing to listen.[201]

Jesus's objections were intended to alert Annas and the officer in a timely manner that they were mishandling Jesus's case so that they had an opportunity to make the appropriate corrections. With both objections, Jesus not only announced the error but also proposed the proper course. First, he implied that it was improper for Annas to question him directly about the subject matter that would potentially give rise to the eventual charges, and he directed Annas to pursue the evidence from eyewitnesses.[202] Then, when one of the officers struck Jesus, he responded

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[196] *E.g.*, State v. Hogan, 252 S.W. 387, 388 (Mo. 1923) (pointing to Jesus's silence in his trial as "higher sanction than mere judicial precedent" for the right to remain silent (citing *Matthew* 26:59–63, 27:11–14)).

[197] *See* Khoury-Bisharat & Kitai-Sangero, *supra* note 2, at 445 ("[I]nnocent defendants may have good reasons to remain silent and silence is compatible with innocence. . . . A central possible explanation for Jesus'[s] silence may be the unfair nature of the proceedings held against him.").

[198] *See* Mary C. Szto, *Lawyers as Hired Doves: Lessons from the Sermon on the Mount*, 31 CUMB. L. REV. 27, 42 (2000) ("When justice and truth are at stake, and not mere personal vengeance, God's people may and should speak out."); GUY N. WOODS, A COMMENTARY ON THE GOSPEL ACCORDING TO JOHN 380 (1989) ("Illegal and unjust actions are to be protested; it is not right to remain silent at miscarriages of justice whether we, or others, are the objects of them.").

[199] *See Matthew* 26:64 (responding to the high priest about his true identity); *Mark* 14:62 (same); *Luke* 23:3 (responding to Pilate about his true identity); *John* 18:33–38 (same).

[200] *John* 18:19–24.

[201] *See* SANDERS & MASTIN, *supra* note 127, at 393 ("[John] selects an incident that reveals Jesus dealing boldly with his enemies, and in so doing indicates the significance of what took place.").

[202] *John* 18:20–21.

by telling the officer that the officer should have addressed any error Jesus made without violence.[203]

By raising timely objections, Jesus displayed the assertiveness of a modern litigator. He did not make belated or nebulous allusions to mistreatment. He was precise and definite regarding the reason for his protest, and he called for a cessation of further unfair processes. There is no indication in *John* that either Annas or the officer was interested in correcting his error, but Jesus's contemporaneous and clear complaints deprived them of any argument that their violations of his rights were perpetrated ignorantly or negligently.

The modern requirement of contemporaneous trial objections is designed to function in much the same way as Jesus used objections two millennia ago. Objections that are not raised in a timely manner are generally considered waived today,[204] and this policy incentivizes parties to alert trial courts to potential errors when the courts have an opportunity to correct the errors and minimize any consequential prejudice.[205] A direct response by Jesus to Annas's questions might not have made a conviction more likely, but Jesus resisted the high priest's effort to prematurely shift the burden of proof and elicit evidence from him directly. Similarly, when modern litigators object at trial, they "are not solely attempting to prevent the admission of unfavorable evidence [to] the jury, which many lawyers rightfully assume is a typical juror's perception, but rather lawyers are attempting to prevent the admission of inadmissible evidence."[206]

B. Regarding Compulsory Self-Incrimination

Jesus's objection to Annas is consistent with the modern Western preference for accusatorial rather than inquisitorial adjudicative

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[203] *John* 18:23.

[204] *E.g.*, Puckett v. United States, 556 U.S. 129, 134 (2009) ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited."); Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

[205] *E.g.*, Gen. Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1152 (7th Cir. 1978) ("[O]bjections are required so that the trial judge can correct any errors."); Marts v. State, 968 S.W.2d 41, 44 (Ark. 1998); Wohlwend v. Edwards, 796 N.E.2d 781, 784 (Ind. Ct. App. 2003) ("The purpose of requiring a trial objection is so that any error might be corrected by the trial court at that time."); *In re* Marriage of Bradley, 899 P.2d 471, 478 (Kan. 1995) ("The purpose of requiring parties to object in the trial court is to provide the trial court with an opportunity to correct defects in its findings or, if necessary, change its mind about the outcome before the case is appealed.").

[206] Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trial*s, 29 PEPP. L. REV. 243, 246 (2002).

processes.[207] Even though there was seemingly little evidence justifying Jesus's arrest, he never complained that he should not have been taken into custody. If Jesus anticipated his trials and viewed them as part and parcel of his role as the Christ, then he probably was not motivated by a desire to end the hearings. It is also possible that he did not specifically protest the arrest because there was no mechanism for truncating the criminal process once he was summoned before the Sanhedrin. Under those circumstances, an objection to the arrest itself would have been futile.

Jesus did, however, raise an immediate objection when Annas attempted to examine him directly. His response—"Why do you ask me? Ask those who have heard me what I said to them; they know what I said"—was not an attempt at evasion or resistance to the procurement and presentation of inculpatory evidence; rather, it was a clear protest of Annas's methods.[208] By directing Annas to question witnesses, Jesus may have been suggesting that the substance of the evidence would have been the same whether it came from Jesus directly or indirectly through those who heard him. However, the manner of obtaining the evidence mattered. Compelling Jesus to testify against himself in an effort to justify killing him was more characteristic of despotic power than fundamental fairness. Although there is no record of Annas explicitly threatening Jesus, the environment resembled circumstances that modern courts find inherently coercive—where Jesus was taken by an armed band, bound, removed from

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[207] *Cf.* Arizona v. Fulminante, 499 U.S. 279, 293–94 (1991) (White, J., dissenting) ("[P]ermitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an inquisitorial system of criminal justice."); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) ("The privilege against self-incrimination . . . . reflects many of our fundamental values and most noble aspirations [including] our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt [and] our preference for an accusatorial rather than an inquisitorial system of criminal justice . . . ."); Rogers v. Richmond, 365 U.S. 534, 540–41 (1961) ("Our decisions under [the Due Process Clause of the Fourteenth Amendment] have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.").

[208] *John* 18:21 (English Standard); *see* MORRIS, *supra* note 78, at 755–56 ("From our standpoint we might perhaps incline to regard [Jesus's] answer as very uncooperative. It is not that. He is not simply refraining from any attempt to help the high priest or to let him know what He stood for. His point is that the high priest is not proceeding in the correct legal form.").

his companions and the public eye, taken to Annas in the middle of the night, and questioned in the presence of at least one officer.[209]

As the Supreme Court of the United States observes, "[V]oluntary confession[s] of guilt [are] among the most effectual proofs in the law[] and constitute[] the strongest evidence against the party making [them]."[210] Yet, the right to freedom from compulsory self-incrimination has long been fundamental to Anglo-American conceptions of ordered liberty and due process, and it is codified in the Fifth Amendment.[211] As the Court explained long ago,

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.[212]

The gravity of this protection in Western culture is due, in some part, to Jesus's objection when Annas questioned him. For instance, a young Puritan named John Lilburne invoked this example in protesting the injustice of compulsory self-incrimination in the late 1630s, and Lilburne's example was pivotal in gaining recognition of the protection under English common law.[213]

The modern insistence upon an accusatorial process grew out of early colonial experiences similar to the ones protested by Lilburne.[214] In

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[209] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."); United States v. Ambrose, 668 F.3d 943, 956 (7th Cir. 2012) (explaining that factors indicative of whether a person is in custody for *Miranda* purposes include, among other things, whether the encounter occurred in a public place, whether the interviewee was moved to another area, and whether there was a threatening presence of several officers and a display of weapons or physical force); State v. Dobbs, 945 N.W.2d 609, 627 (Wis. 2020) (affirming that handcuffing is a relevant factor in determining whether a person being questioned is in custody for *Miranda* purposes); Commonwealth v. Hunter, 690 N.E.2d 815, 821 n.3 (Mass. 1998) (explaining that late-night/early-morning interrogations are considered coercive but are not absolutely prohibited).

[210] Hopt v. Utah, 110 U.S. 574, 585 (1884).

[211] U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."); *see* Asherman v. Meachum, 957 F.2d 978, 989–91 (2d Cir. 1992) (Cardamone, J., dissenting) (describing the development of the accusatorial tradition and the right against self-incrimination in England and America).

[212] Boyd v. United States, 116 U.S. 616, 631–32 (1886).

[213] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 271–73, 275–77, 307 (1968).

[214] *See* Brown v. Walker, 161 U.S. 591, 596 (1896) ("The maxim *nemo tenetur seipsum accusare* [no man is bound to accuse himself] had its origin in a protest against the

American jurisprudence, the privilege against self-incrimination is an established "exception to the general principle that the Government has the right to everyone's testimony,"[215] and the exception has long been justified as "resting on the law of nature."[216] Few today may realize, though, that Jesus's first recorded words at the initiation of the legal hearings that led to his execution are part of the ethical stream that culminated in the modern preference for accusatorial rather than inquisitorial systems and part of the background that gave rise to the Fifth Amendment.[217] In effect, he insisted that it was fundamentally unfair to introduce compelled admissions by the accused in order to secure conviction and punishment, and his view was later applied by the Supreme Court to the several states via the Fourteenth Amendment's Due Process Clause.[218]

C. Regarding Unnecessary Uses of Force

Jesus's rebuke of the officer who struck him resonates with modern protestations against police brutality, which is an enduring concern in American culture.[219] In their zeal to redress suspected wrongdoing or perceived lack of respect for institutional authorities, people tasked with enforcing the law are sometimes overzealous and emboldened to mete out

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inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England."); *Asherman*, 957 F.2d at 990 (Cardamone, J., dissenting) ("The growing use of the accusatorial system in England must be contrasted with the oppressive power of the inquisitional system on the Continent in the same century.").

[215] Garner v. United States, 424 U.S. 648, 658 n.11 (1976).

[216] Bram v. United States, 168 U.S. 532, 545 (1897).

[217] *See Asherman*, 957 F.2d at 990 (Cardamone, J., dissenting) (pointing to Lilburne's reliance on Jesus's example as a step in the development of the Anglo-American accusatorial system).

[218] *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936) (characterizing convictions based on confessions extorted from the defendants by brutality and violence as "a wrong so fundamental" that it made their criminal trial "a mere pretense of a trial and rendered the conviction and sentence wholly void").

[219] *See* Cara E. Trombadore, *Police Officer Sexual Misconduct: An Urgent Call to Action in a Context Disproportionately Threatening Women of Color*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 153 (2016) (documenting the widespread problem of sexual violence by police against black women); Mia Carpiniello, Note, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion"* Terry *Stops*, 6 MICH. J. RACE & L. 355, 361–62 (2001) ("Minority suspicion of police enforcement is rooted in history. While recent incidents of police brutality toward communities of color have confirmed existing minority suspicions about racially biased law enforcement, these suspicions are not new."); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1387 (2000) ("[P]olice brutality and its disproportionate impact on minority groups and the poor threatens the stability of our society and the legitimacy of our justice system.").

punishment on their own initiatives.[220] The officer's action in striking Jesus reminds modern readers of coercive and unjust "third-degree" approaches to interrogations that were once widespread in the United States.[221] In a culture that is heavily influenced by Christian ideals,[222] it is particularly noteworthy that Jesus, who largely stood silent as he was ushered to the cross through the legal systems of his day, firmly objected to such abuse.

Jesus was apparently willing to accept some interference with his liberty interests by the officer if the officer saw or believed that he saw Jesus violate the law. This is consistent with the American ethic that police officers who reasonably suspect that criminal activity may be afoot are permitted to briefly detain suspected individuals for investigation.[223] However, Jesus contended that he had done nothing wrong and that the officer had not witnessed anything that could have reasonably supported a suspicion that Jesus had violated the law.[224] Prior to being battered, Jesus had not resisted a lawful exercise of the officer's authority, and he

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[220] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004) ("The truth, however, is that the same organizational culture that produces extraordinary heroism also facilitates shocking misconduct, sometimes by the very same actors. One need look no further than the popular press to see that . . . the NYPD is continually dogged by allegations of misconduct and brutality. . . . It is hard to think of a big city police department that has not been investigated by multiple commissions and task forces for charges of corruption, brutality, or other serious unlawful acts.").

[221] NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153 (1931) ("The Wickersham Report") ("The third degree—the inflicting of pain, physical or mental, to extract confessions or statements—is widespread throughout the country. . . . Physical brutality is extensively practiced. The methods are various. They range from beating to harsher forms of torture. The commoner forms are beating with the fists or with some implement, especially the rubber hose, that inflicts pain but is not likely to leave permanent visible scars.").

[222] *See*, *e.g.*, GEORGE M. MARSDEN, RELIGION AND AMERICAN CULTURE 5 (1990) ("[M]ainstream Protestants . . . were for a long time the insiders with disproportional influence in shaping American culture.").

[223] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

[224] *See John* 18:23 (showing Jesus objecting that he has done nothing wrong to the court officer).

posed no threat to others.[225] Hence, there was no justification for the officer to strike him.[226]

Furthermore, if Jesus had actually broken the law by showing contempt for the court, he protested that the lawful course for redressing his supposed crime did not include police violence.[227] People sometimes violate laws, and there is a need for enforcement, but those who enforce the laws are also subject to them.[228] Jesus's objection highlighted the irony of officials breaking the law while zealously trying to enforce it. Enforcement officers are neither juries nor judges, and they ought not to act as ultimate factfinders or dispensers of punishment. Even if they see, or believe they see, someone acting illegally or manifesting a lack of respect for authority, it is wrong to use violence as an ostensible corrective without appropriate justification.

CONCLUSION

The trials of Jesus, "the darkest chapter in the history of judicial administration,"[229] continue to influence Western culture and criminal procedure in the United States.[230] In reflecting on Jesus's conduct during the hearings, scholars and courts typically emphasize his remarkable silence. In the trial before the Sanhedrin, Caiaphas specifically asked Jesus about his failure to answer the allegations raised against him by various witnesses, and Jesus still did not answer.[231] Later, Pilate marveled that Jesus never responded to the charges levied against him by Jewish leaders.[232] On the occasions when he broke his silence, he spoke almost exclusively to affirm his identity and his special relationship with

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[225] *See John* 18:19–24 (recording Jesus's respectful, non-violent response after he was wrongfully accused and physically assaulted during his questioning by the high priest).

[226] *Cf.* Holland v. Harrington, 268 F.3d 1179, 1193 (10th Cir. 2001) ("Where a person has submitted to the officers' show of force without resistance, and where an officer has no reasonable cause to believe that person poses a danger to the officer or to others, it may be excessive and unreasonable to continue to aim a loaded firearm directly at that person . . . . Pointing a firearm directly at a child calls for even greater sensitivity.").

[227] *See John* 18:23 (English Standard) ("Jesus answered him, 'If what I said is wrong, bear witness about the wrong; but if what I said was right, why do you strike me?'").

[228] *See*, *e.g.*, *Romans* 2:3 (English Standard) ("Do you suppose, O man—you who judge those who practice such things and yet do them yourself—that you will escape the judgment of God?"). Indeed, Jesus reserved some of his harshest condemnation for the scribes and Pharisees because they enforce the law but do not follow it themselves. *See Matthew* 23:2 (English Standard) ("The scribes and the Pharisees sit on Moses' seat, so do and observe whatever they tell you, but not the works they do. For they preach, but do not practice.").

[229] Herin, *supra* note 1, at 57.

[230] DUSENBURY, *supra* note 7 ("[T]he drama of Pilate and Jesus has decisively shaped, and still subtly shapes, the legal and political cultures of Europe and the Americas.").

[231] *Matthew* 26:62–63; *Mark* 14:60–61.

[232] *Matthew* 27:13–14; *Mark* 15:3–5.

God.[233] These statements have understandably been of primary importance to Christian believers and biblical scholars since the first century,[234] and they account in large measure for the enduring fascination with the trial narratives.[235]

In light of Jesus's general posture of silence, though, greater attention should be given to the legal objections recorded in *John* during his appearance before Annas. As New Testament scholar Raymond E. Brown observes, "[o]nly in *John* does Jesus answer the indignities" inflicted upon him during his legal proceedings.[236] His responses during that hearing did not concern his identity. They were declarations of resistance to his enemies' efforts to execute him using unfair procedures, and they resonate with objections sometimes raised by defendants in the American criminal justice system.[237] Among other things, Jesus's protestations illustrate the enduring merits and propriety of making contemporaneous objections so that tribunals have an opportunity to correct their mistakes and remedy the fundamental unfairness of both compulsory self-incrimination and unnecessary uses of force by law-enforcement officers.

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[233] *See Matthew* 26:63–64 (recounting Jesus's affirmation of his status as the Son of God); *Mark* 14:61–62 (same); *Luke* 23:3 (affirming that he is the King of the Jews); *John* 18:33–37 (affirming that he is the King of the Jews and his Kingdom is not of this world).

[234] *See*, *e.g.*, *1 Timothy* 6:13–14 (demonstrating the importance of Jesus's confession before Pontius Pilate to Paul and the first generation of Christian believers); DAVID W. CHAPMAN & ECKHARD J. SCHNABEL, THE TRIAL AND CRUCIFIXION OF JESUS: TEXTS AND COMMENTARY 98–99 (2015) (examining the extensive scholarly analysis that exists about Jesus's claim at his trial that he is the Son of God); DAVID R. CATCHPOLE, THE TRIAL OF JESUS: A STUDY IN THE GOSPELS AND JEWISH HISTORIOGRAPHY FROM 1770 TO THE PRESENT DAY, at xi–xii (1971) (surveying Jewish scholarship about the trial of Jesus over the last two centuries and, in particular, its focus on the meaning of the titles "Messiah" and "Son of God" claimed by Jesus in the Gospel accounts of his trial).

[235] *See* S.G.F. BRANDON, THE TRIAL OF JESUS OF NAZARETH 5–7 (1968) ("It is obvious that in a series of studies of Historic Trials the trial of Jesus of Nazareth must be included. Indeed, it would be difficult to resist its claim to be the most important trial in history, in view of the immensity and profundity of its consequences. If it were possible to assess the influence of Christianity on human culture and civilization, that would be the measure of the historic importance of the trial of Jesus. . . . The trial of Jesus was an historical event . . . . But it is invested also with a religious significance, since the chief character has been regarded as a divine being, in fact as the Son of God. . . . The problem of the trial of Jesus is profoundly important, and it is fascinating; but it is not easy of solution. . . . For the strange paradox of Christianity is that its founder, though regarded as the Son of God, was executed by the Romans for sedition against their government in Judea.").

[236] BROWN, *supra* note 160, at 827 (emphasis added).

[237] *See* Campbell, *supra* note 195, at 284 ("[Jesus] employs several defense strategies during the judicial proceedings in which he becomes embroiled, namely, engagement, disengagement and obstruction."); *see also*, *e.g.*, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 1, 6–7 (2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf (documenting a record number of cases in which defendants were exonerated after they appealed to contest official misconduct and/or assert their innocence).

ROADMAP FOR A CONVENTION OF THE STATES

The Honorable Kevin M. Smith[*]

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INTRODUCTION

"*The tree of liberty must be refreshed from time to time with the blood of patriots [and] tyrants.*"

— Thomas Jefferson[1]

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[1] Letter from Thomas Jefferson to William Stephens Smith (Nov. 13, 1787), *in* 5 THE WORKS OF THOMAS JEFFERSON 360, 362 (Paul Leicester Ford ed., 1904) (emphasis added).

The wounds of the revolution were raw and barely healed when Thomas Jefferson wrote those words in 1787.[2] The following year, the states ratified the Constitution that resulted from the Constitutional Convention, which was originally tasked with amending the Articles of Confederation.[3] Fast forward almost 250 years. Today, the threat to our liberty is not England or a foreign power. It is our own political leaders and judges, the ones we elected to office or who were appointed to their positions for life.

Some claim Congress and the president (including all previous administrations) have exceeded their enumerated powers as defined in the Constitution.[4] Namely, Congress passes bills claiming they are "necessary and proper" to enumerated powers or uses its Tax-and-Spend Power to force States to impose federal mandates on citizens, and presidents affirm these actions by either not vetoing or by signing the bills.[5] With each decade, the federal reach expands into areas theretofore

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[2] *Id.* at 360, 362; *see, e.g.*, Forrest R. Black, *The Termination of Hostilities*, 62 AM. L. REV. 248, 248–49 (1928) ("The Revolutionary War was terminated by the Treaty of Paris, September 3, 1783 . . . .").

[3] *E.g.*, George Gordon Battle, *The Ratification of the Constitution*, 64 U.S. L. REV. 576, 578–79 (1930) (detailing that the Constitution was ratified on June 21, 1788); Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 863–66 (2020) (noting how the Philadelphia Convention's original purpose was to revise the Articles of Confederation, not create the Constitution).

[4] *See, e.g.*, Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 WAKE FOREST L. REV. 141, 177 (2002) (stating that Congress frequently exceeds its enumerated powers through the conditions it imposes on the receipt of federal funds); Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 979 (2011) (noting States claimed Congress exceeded its enumerated powers by imposing an individual mandate for health insurance); Joel Griffith, *3 Ways Trump Is Overstepping His Bounds Amid Pandemic*, HERITAGE FOUND. (Oct. 22, 2020), https://www.heritage.org/the-constitution/commentary/3-ways-trump-overstepping-his-bounds-amid-pandemic (claiming President Trump exceeded his enumerated powers); *see also* William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510 (2008) (explaining the difficulty in determining whether a president has exceeded his authority and how public expectations of expanded executive power correlates with a president's expanding power).

[5] *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1500A(a), 124 Stat. 119, 244 (2010) (codified as amended at 26 U.S.C. § 5000A) (creating an individual mandate to purchase and maintain healthcare); *Obama Signs Historic Health Care Legislation*, NPR (Mar. 23, 2010, 10:57 AM), https://www.npr.org/2010/03/23/125058400/obama-signs-historic-health-care-legislation (covering President Obama's signing of the law which required individuals to purchase and maintain healthcare); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 547, 558 (2012) (opinion of Roberts, C.J.) ("The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. . . . [It] contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an 'integral part of a comprehensive scheme of economic regulation' . . . ." (quoting Brief for Petitioners (Minimum Coverage Provision) at 24, *Sebelius*, 567 U.S. 519 (No. 11-398))); Act of July 17, 1984, Pub. L. No. 98-363, 98 Stat. 435, 437–39

untouched.[6] Further, federal judges, appointed to serve as long as they want with little accountability, uphold such actions.[7] Our elected leaders also lack the will or desire to limit spending.[8] Indeed, they propose spending for "bridges to nowhere"[9] and other frivolous programs as rewards for financial support of their reelection campaigns.[10] One need merely consider the seemingly exponential increase in deficit spending and our total national debt as proof that elected leaders are out of control. In 1981, our national debt was approximately $998 billion; in 1991, $3.6 trillion; in 2001, $5.8 trillion; in 2011, $14.7 trillion; and in 2021, $29.6 trillion.[11] This debt is staggering in its amount and annual increases. At

(codified as amended at 23 U.S.C. § 158) (conditioning the receipt of federal funds on States implementing a minimum drinking age of twenty-one); Steven R. Weisman, *Reagan Signs Law Linking Federal Aid to Drinking Age*, N.Y. TIMES, July 18, 1984, at A15, https://www.nytimes.com/1984/07/18/us/reagan-signs-law-linking-federal-aid-to-drinking-age.html (covering President Reagan's signing of the law requiring States to implement a national minimum drinking age of twenty-one to receive federal funding); South Dakota v. Dole, 483 U.S. 203, 206 (1987) ("[Regarding 23 U.S.C. § 158], Congress has acted indirectly under its spending power to encourage uniformity in the States' drinking age.").

[6] *See, e.g.*, Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2113, 2116, 2124–31 (2019) (detailing the expansion of the federal judiciary into areas of law previously under state courts' jurisdiction); *infra* Section I (detailing the expansion of the legislative and executive branches into areas of law previously regulated by the States through the Commerce Power and the Tax-and-Spend Power).

[7] *E.g.*, *Sebelius*, 567 U.S. at 574 (upholding the individual mandate of the Affordable Care Act as a valid use of the Tax-and-Spend power); *Dole*, 483 U.S. at 212 (upholding legislation designed to compel a national minimum drinking age as a valid use of the spending power); *see* U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behavior . . . ."); Paula Abrams, *Spare the Rod and Spoil the Judge? Discipline of Federal Judges and the Separation of Powers*, 41 DEPAUL L. REV. 59, 59–60, 75 (questioning the limited accountability of federal judges, who essentially enjoy a "life tenure subject to impeachment").

[8] *See, e.g.*, S. REP. NO. 104-5, at 3 (1995) (noting Congress's habit of excessive spending despite its financially devastating effects).

[9] *E.g.*, Jessica Wehrman & Ryan Kelly, *Lawmakers Happily Embrace Return of Earmarks to Highway Bill*, ROLL CALL (May 14, 2021, 7:00 AM), https://rollcall.com/2021/05/14/lawmakers-happily-embrace-return-of-earmarks-to-highway-bill/ (recounting an Alaskan representative's proposal for the infamous "Bridge to Nowhere," which would have spent 557 million dollars of federal funds to build a bridge from Ketchikan, Alaska, to Gravina Island, Alaska).

[10] *See* Matthew D. Dickerson, *Earmarks Represent Corruption, Waste, and the Swamp. The Ban on Them Should Stay in Place.*, HERITAGE FOUND. (Mar. 19, 2021), https://www.heritage.org/budget-and-spending/commentary/earmarks-represent-corruption-waste-and-the-swamp-the-ban-them (identifying several corrupt practices that are utilized by special interest groups to secure earmarks, including the making of campaign contributions to members of Congress).

[11] Kimberly Amadeo, *U.S. National Debt by Year*, BALANCE, https://www.thebalance.com/national-debt-by-year-compared-to-gdp-and-major-events-3306287 (Oct. 4, 2022).

some point, it will come due, and the fear is that debt payments will burden our children's and our children's children's future opportunities.[12]

To rein in the brigands in Washington, D.C., and on the Supreme Court, advocates for a bloodless coup propose a Convention of the States ("Convention") to discuss amendments that "impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress."[13] For those unfamiliar with a Convention, it is a gathering where state delegates consider and propose amendments to the United States Constitution.[14] After a Convention has been seated, any resulting amendments must be presented to the States for ratification.[15] If three-fourths of the States ratify the amendments, they become part of the Constitution.[16]

A few years ago, I published an article critical of a Convention.[17] My two objections were that (1) today's delegates will not have the same intellectual excellence or life experiences as the Founders and will be incapable of proposing changes on par with the Founding Fathers' Constitution, and (2) the risk of a runaway Convention altering the Constitution to our detriment is greater than it sticking to a limited mandate.[18] Since then, I still see more risk than reward. However, the reasons for calling a Convention have not abated, and it appears that unless our political leaders get the wake-up call that only a Convention can deliver, the bridge to nowhere may lead us off a cliff of doom.

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[12] *See, e.g.*, Luke Repici, *Taxation Without Gestation: The Constitutionality of Our $13+ Trillion National Debt*, 2 CHARLOTTE L. REV. 445, 474, 476 (2010) ("[The national] debt burden will significantly limit rising and future generations' abilities to allocate their own resources as they see fit."); Neil H. Buchanan, *What Do We Owe Future Generations?*, 77 GEO. WASH. L. REV. 1237, 1265–67 (2009) (describing the debate concerning the impact of deficits and fiscal policy on the welfare of future generations); Daniel Shaviro, *The Long-Term U.S. Fiscal Gap: Is the Main Problem Generational Inequity?*, 77 GEO. WASH. L. REV. 1298, 1356–57 (2009) (noting the unsustainable nature of the United States budget and its anticipated disproportionate effect on future generations).

[13] *Application for a Convention of the States Under Article V of the Constitution of the United States*, CONVENTION STATES ACTION, https://conventionofstates.com/files/model-convention-of-states-application/download (last visited Oct. 6, 2022); *see* Alexa Scherzinger, *McClain to Introduce Convention of States Resolution*, ADVERTISER-TRIB. (Jun. 2, 2021, 7:00 AM), https://advertiser-tribune.com/news/323858/mcclain-to-introduce-convention-of-states-resolution/ (detailing activity taken to initiate a Convention intended to limit the power of the federal government).

[14] *E.g.*, RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION, at viii–ix (1988).

[15] U.S. CONST. art. V; CAPLAN, *supra* note 14, at ix (highlighting how the proposed amendments may be ratified by either the state legislatures or "specially held state conventions").

[16] U.S. CONST. art. V; CAPLAN, *supra* note 14, at ix.

[17] Kevin M. Smith, *A Case Against a Convention of the States*, 80 ALB. L. REV. 1523 (2017).

[18] *Id.* at 1527, 1533, 1535.

This Article discusses why we need a Convention, what amendments the States' resolutions should expressly authorize to prevent the Convention from degrading our freedoms and liberties, and what procedural safeguards the resolutions should include to ensure Congress does not interfere with the process. But first, what caused this mess?

I. THE ROOTS OF UNFETTERED FEDERAL POWER

To understand why many good, patriotic Americans want to change our Constitution, it is critical to understand what happened to move us down this precarious path. The Constitution is, by its nature, a limiting document.[19] Prior to the Civil War Amendments,[20] we were a republic of independent States.[21] Each State was responsible for regulating the health and welfare of its citizens,[22] while the federal government, via the Constitution, was responsible and empowered to deal with matters of common interest such as national defense, treaty power, and interstate commerce between the several states.[23] Moreover, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [were] reserved to the States respectively, or to the people."[24] The Constitution, by its nature and explicit intent, restrained the federal government's power and jurisdiction to prevent it from interfering with the States' management of local interests and the citizens' unalienable rights.[25]

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[19] *See, e.g.*, *Intro.6.2.4 Individual Rights and the Constitution*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.6-2-4/ALDE_00000033/ (last visited Oct. 6, 2022) ("[T]he Constitution limits and diffuses powers of the federal and state governments to check government power, [and] it also expressly protects certain rights and liberties for individuals from government interference.").

[20] *See generally, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (referring to the Thirteenth, Fourteenth, and Fifteenth Amendments as the "Civil War Amendments").

[21] *See* Bellia & Clark, *supra* note 3, at 938–40 (explaining that, under the Constitution, States were equal sovereigns and immune from direct federal regulation, but noting that immunity from federal regulation was, in part, surrendered when the Civil War Amendments were adopted).

[22] *See* W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC'Y 359, 381–83 (1900) (noting that, prior to the Civil War Amendments, Supreme Court holdings considered the power to regulate health and welfare through the police power something reserved to the States); Hayward D. Reynolds, *Deconstructing State Action: The Politics of State Action*, 20 OHIO N.U. L. REV. 847, 850 (1994) (highlighting the argument that the Civil War Amendments created a federal police power that encroached on the States' traditional right to regulate citizens).

[23] *See* U.S. CONST. art. I, § 8 (enumerating powers of Congress, including matters of national defense and commerce between the states); *id.* art. II, § 2 (giving the president the power to make treaties).

[24] U.S. CONST. amend. X.

[25] *E.g.*, CONST. ANNOTATED, *supra* note 19.

A. Marbury v. Madison

The first degradation of the Constitution's protections against a behemoth federal government seemed to be a restraint on Congress's legislative powers, which appeared to be a good thing. In *Marbury v. Madison*, the Supreme Court considered whether Congress had the power to expand the Court's powers beyond Article III's provisions.[26] Specifically, the question was whether Congress could legislatively empower the Court to order the executive branch to deliver the prior administration's appointments absent such a power within Article III itself.[27] The Court found that Congress did not have such power.[28] More importantly, the Court held that it had the power of judicial review of *all* legislative and executive actions, effectively designating itself as the final arbiter on the legality of actions of the other two branches of the federal government.[29]

As to the long-term consequences of *Marbury*, the Court misused its power of judicial review to expand and restrict legislative intent, create rights the Founding Fathers never intended the Constitution to protect, and expand and restrict other explicit unalienable rights.[30] Ironically, the most impactful consequence of *Marbury* was not these obvious usurpations but how this awesome power compelled a president to force the Court to approve his and his party's previously unconstitutional

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[26] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173, 176–78 (1803).

[27] *See id.* at 173, 176 ("[I]t only remains to be enquired[] [w]hether [the writ of mandamus] can issue from this [C]ourt. . . . The authority, therefore, given to the [S]upreme [C]ourt, by the act establishing judicial courts of the United States, to issue writs of mandamus to public officers, appears to not be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised. The question[] [is] whether an act[] repugnant to the constitution[] can become the law of the land . . . ."); U.S. CONST. art. III, § 2 (defining the original and appellate jurisdiction of the Supreme Court).

[28] *Marbury*, 5 U.S. (1 Cranch) at 176.

[29] *Id.* at 177–78; *see, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[The *Marbury*] decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . . .").

[30] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012) (opinion of Roberts, C.J.) (noting the Court's obligaton to interpret statutes as constitutional, wherever possible, to avoid striking them down); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discovering a constitutional right to privacy within the "penumbras[] formed by emanations" of other explicitly granted rights); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (asserting the Constitution protects "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2285 (2022); Town of Greece v. Galloway, 572 U.S. 565, 604–06 (2014) (Thomas, J., concurring) (noting how the Court's modern Establishment Clause jurisprudence, which applies the First Amendment's prohibition on the establishment of a religion against the States, is wayward and too expansive because a historical analysis of the First Amendment indicates the Founding Fathers' intent to enforce its dictates only against the federal government and not the States).

enactments,[31] which set America up for the constitutional crisis that Convention of the States advocates are trying to solve today.[32]

B. *President Franklin Delano Roosevelt and the Judicial Procedures Reform Bill of 1937*

Possibly the most misused enumerated power is the power to regulate interstate commerce.[33] Article I, Section 8, Clause 3 of the Constitution empowers Congress "[t]o regulate Commerce . . . among the several States,"[34] which is commonly understood as concerning *inter*state commerce (commerce between the states) and not *intra*state commerce (commerce wholly within a particular state).[35] For the first 149 years after the Constitution's ratification, there was a clear understanding of what "commerce" and "among the several States" meant.[36] Thomas Jefferson observed that "[a]griculture, manufactures, commerce, and navigation, the four pillars of our prosperity, are the most thriving when left most free to individual enterprise."[37] Commerce occurred only when agricultural or manufactured products were bought and sold.[38] Commerce was not

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[31] *See infra* notes 45–56 and accompanying text (discussing President Franklin D. Roosevelt's "court packing plan" as a response to the Court's unfavorable use of judicial review).

[32] *See* Mike Harper, *Clear and Present Constitutional Crisis*, CONVENTION STATES ACTION (Aug. 16, 2021), https://conventionofstates.com/news/clear-and-present-constitutional-crisis (attributing a modern "[c]onstitutional [c]risis" to the executive branch's disregard of our nation's foundational law); Edward Douglas Thompson, *FDR's Court-Packing Scheme: Mission Accomplished*, CONVENTION STATES ACTION (Sept. 20, 2020), https://conventionofstates.com/news/fdr-s-court-packing-scheme-mission-accomplished (discussing how Franklin Roosevelt's court-packing plan paved the way for the judicial abuse and disregard for the Constitution, which currently drives the desire for a modern Constitutional Convention).

[33] *See, e.g.*, Fred'k. H. Cooke, *The Use and the Abuse of the Commerce Clause*, 10 MICH. L. REV. 93, 107 (1912) ("[The Commerce Clause's] actual application has been largely useless and superfluous, even mischievous."); Vanue B. Lacour, *The Misunderstanding and Misuse of the Commerce Clause*, 30 S.U. L. REV. 187, 188–89, 202, 206, 260 (2003) (detailing the divergence of the Court's interpretation of the Commerce Clause from the original meaning); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388, 1454–55 (1987) (arguing that the Supreme Court's interpretation of the Commerce Clause is far broader than was intended by the drafters).

[34] U.S. CONST. art. I, § 8, cl. 3.

[35] *See* Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695, 702–05, 702 n.53 (1996) (describing how the Founding Fathers understood commerce to mean the interchange of goods between states).

[36] *See generally* Battle, *supra* note 3 (detailing that the Constitution was ratified on June 21, 1788); LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 811–12 (3d ed. 2000) (noting how the Court abruptly changed its Commerce Clause jurisprudence in its decision in *NLRB v. Jones & Laughlin Steep Corp.* in 1937).

[37] Thomas Jefferson, First Annual Message (Dec. 8, 1801), *in* 9 THE WORKS OF THOMAS JEFFERSON, *supra* note 1, at 321, 339.

[38] *See* Berger, *supra* note 35, at 702–03 (arguing that the Founders' understanding of commerce required the exchange or trade of goods).

considered interstate, or "among the several States," unless the items were sold to entities in other states.[39] Indeed, not until *Gibbons v. Ogden* in 1824 did the Supreme Court expand the common meaning of interstate commerce to encompass more than the sale of goods across state lines.[40] There, it added transportation across state lines to the definition.[41] This minor expansion makes sense because it involves the means necessary to engage in interstate commerce.[42] Even still, the scope of the Commerce Power at the time of *Gibbons* only included the ability to regulate conduct that was both interstate and connected to the sale of goods (unlike farmed or manufactured products that were merely transported out of the state but not subject to a sale or transaction).[43]

This classical definition of interstate commerce, along with the transportation expansion, was largely undisturbed until the Great Depression and the Presidency of Franklin Delano Roosevelt.[44] Roosevelt

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[39] *Id.* at 702–04 (describing that the Founders understood "among the states" to mean, at its fundamental level, between states).

[40] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824).

[41] *See id.* ("The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'").

[42] *See id.* at 229 (Jackson, J., concurring) ("I do not regard [navigation] as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it . . . .").

[43] *Id.* at 189–90 (majority opinion) (defining "commerce" as "commercial intercourse"); *cf.* THE FEDERALIST NO. 34, at 165 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (noting that agriculture and manufacture are concerns of the States).

[44] *Compare Gibbons*, 22 U.S. (9 Wheat.) at 189–90, 194 (reasoning that commerce must involve the interaction of States, rather than purely intrastate activities), United States v. Dewitt, 76 U.S. (9 Wall.) 41, 45 (1869) (holding that the federal government cannot regulate solely intrastate commerce), United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895) ("Commerce succeeds to manufacture, and is not a part of it. . . . Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact an article is manufactured for export to another State does not itself make it an article of interstate commerce . . . ."), The Lottery Case, 188 U.S. 321, 346, 354 (1903) ("It is not intended to say that these words comprehend . . . commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."), Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding that a regulation of purely intrastate matter was an unconstitutional use of the Commerce Clause), *and* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935) (holding that intrastate activities which only indirectly impact interstate interests cannot be regulated by use of the Commerce Clause), *with* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–38 (1937) ("[The Commerce Power] is plenary and may be exerted to protect interstate commerce 'no matter what the source of the dangers which threaten it.' Although activities may be intrastate in character when separately considered, if they have such a close and substantial relationship to interstate commerce that their control is essential or appropriate to protect

believed in government intervention in economic matters, especially at the lowest points of the Great Depression.[45] His Democrat-controlled Congress was at his beck and call, sending multiple unconstitutional bills to Roosevelt's office for signature.[46] These were popular initiatives notwithstanding their unconstitutionality.[47] For example, according to historian William Leuchtenburg, "[i]n 1933 workers and businessmen marched in spectacular parades to demonstrate their support for the National Recovery Administration (NRA), Roosevelt's agency for industrial mobilization, symbolized by its emblem, the blue eagle. Farmers were grateful for government subsidies dispensed by the newly created Agricultural Adjustment Administration (AAA)."[48] These were followed by a "cavalcade of [other] alphabet agencies," all claiming they were necessary and proper exercises of the Commerce Clause power.[49] Leuchtenburg also notes, "In a second burst of legislation in 1935, Roosevelt had introduced the welfare state to the nation with the Social

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that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." (citations omitted) (quoting The Second Employers' Liability Cases, 223 U.S. 1, 51 (1912))).

[45] *See* H.R. DOC. NO. 540, at 225–28 (1952) (recording Franklin Roosevelt's belief in the use of government power to intervene during the "critical days" of the Great Depression); SUSAN E. HAMEN, THE NEW DEAL 7–8, 29–32 (2011) (discussing governmental economic interventions taken under Roosevelt's direction).

[46] *See, e.g.*, Kimberly Amadeo, *New Deal Summary, Programs, Policies, and Its Success*, BALANCE, https://www.thebalancemoney.com/fdr-and-the-new-deal-programs-timeline-did-it-work-3305598 (Mar. 29, 2022) (naming the Agricultural Adjustment Act and the National Industrial Recovery Act as enactments passed under Franklin Roosevelt's administration); *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 549–51 (holding the National Industrial Recovery Act as an unconstitutional use of federal power); United States v. Butler, 297 U.S. 1, 74–75, 78 (1936) (holding the Agricultural Adjustment Act to be an unconstitutional exercise of federal power); *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm (last visited Oct. 7, 2022) (indicating a majority Democratic split in the 73rd and 74th United States Senate); *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES OFF. HISTORIAN & OFF. ART & ARCHIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Oct. 7, 2022) (indicating a majority Democratic split in the 73rd and 74th United States House of Representatives).

[47] *See* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/ (noting how Roosevelt's New Deal initiatives contributed to his popularity despite some acts later being held unconstitutional).

[48] *Id.*

[49] *Id.*; *see* PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 129–31 (1972) ("[Roosevelt's national] legislation rested upon vague constitutional theories and imprecise legal foundations. Such framers [of the legislation] turned to the alternate set of broad commerce clause and taxing power precedents . . . . If no other constitutional base could be contrived, the World War I-spawned 'doctrine of emergency powers' was thrown in as an excuse for constitutional experimentation."). *See generally* U.S. CONST. art. I, § 8, cls. 3, 18 (providing Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers," which includes the Commerce Power).

Security Act, legislating old-age pensions and unemployment insurance."[50] Unfortunately for Roosevelt, the Supreme Court's four solidly conservative justices—Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter—had no intention of departing from the classical definition of commerce, and they secured the support of a swing vote, Owen Roberts.[51] Prior to 1937, this majority struck down many of Roosevelt's economic recovery programs as unconstitutional exercises of federal power.[52]

Roosevelt responded by proposing the Judicial Procedures Reform Bill of 1937, which provided a mechanism to potentially appoint six additional justices and thus negate the majority's hold on the Court.[53] The

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[50] Leuchtenburg, *supra* note 47.

[51] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 297–310 (1936) ("[T]he effect of the labor provisions of the [Bituminous Coal Conservation Act of 1935] . . . primarily falls upon production and not upon commerce; and confirms the further resulting conclusions that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce."); *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Oct. 7, 2022) (confirming that Justices Butler, McReynolds, Sutherland, Van Devanter, and Roberts were on the Court in 1936 when *Carter* was decided); Leuchtenburg, *supra* note 47 (noting that Roberts's swing vote, combined with the votes of the Four Horsemen, created a conservative majority).

[52] *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1561–64 (1996) (noting the Supreme Court's tendency to strike down New Deal programs between 1935 and 1937).

[53] The Bill's text, in pertinent part, provided:

> (a) [W]hen any judge of a court of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years and has held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and within six months thereafter has neither resigned nor retired, the President, for each such judge who has not so resigned or retired, shall nominate and, by and with the advice and consent of the Senate, shall appoint one additional judge to the court to which the former is commissioned . . . .
>
> (b) The number of judges of any court shall be permanently increased by the number appointed thereto under the provisions of subsection (a) of this section. . . . [No judge shall] be so appointed if such appointment would result in (1) more than fifteen members of the Supreme Court of the United States . . . .

S. 1392, 75th Cong. § 1(a)–(b) (1937).

The Supreme Court in 1937, as now, was comprised of nine justices. *See The Court as an Institution,* SUP. CT. U.S., https://www.supremecourt.gov/about/institution.aspx (last visited Oct. 7, 2022) (noting the Court has had nine members since 1869). Thus, under the Bill's scheme, Roosevelt could have added up to six justices and not violated the fifteen-justice cap. *See* S. 1392(b). He would have been able to do so almost immediately (if not for the Bill's six-month waiting period) as six justices were over the age of seventy in 1937, each with over ten years of experience as a federal judge. *See* S. 1392(a); *Louis D. Brandeis, 1916–1939*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/louis-d-brandeis-1916-1939/ (last visited Oct. 7, 2022) (noting that Justice Brandeis was born in 1856, meaning he was eighty-one in 1937, and that he joined the Court in 1916); *Willis Van Devanter, 1911–1937*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-

Bill is commonly referred to as the "court-packing plan."[54] Shortly after this proposal, it became evident that the "Four Horsemen," as the press referred to the four conservative justices, had lost their swing vote; the Court changed its course, even sustaining the National Labor Relations Act and the Social Security statute.[55] Moreover, three of the Four Horsemen either died or retired within three years of the court-packing plan's proposal, and Roosevelt appointed three justices that he thought would affirm his programs, which they did.[56]

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justices/willis-van-devanter-1911-1937/ (last visited Oct. 7, 2022) (noting that Justice Van Devanter was born in 1859, meaning he was seventy-eight in 1937, and that he joined the Court in 1910); *Charles Evans Hughes, 1930–1941*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/chief-justices/charles-evans-hughes-1930-1941/ (last visited Oct. 7, 2022) (noting that Chief Justice Hughes was born in 1862, meaning he was seventy-five in 1937, and that he served as associate justice from 1910 to 1916 and as chief justice from 1930 to 1941); *James Clark McReynolds, 1914–1941*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/james-clark-mcreynolds-1914-1941/ (last visited Oct. 7, 2022) (noting that Justice McReynolds was born in 1862, meaning he was seventy-five in 1937, and that he joined the Court in 1914); *George Sutherland, 1922–1938*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/george-sutherland-1922-1938/ (last visited Oct. 7, 2022) (noting that Justice Sutherland was born in 1862, meaning he was seventy-five in 1937, and that he joined the Court in 1922); *Pierce Butler, 1923–1939*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/associate-justices/pierce-butler-1923-1939/ (last visited Oct. 7, 2022) (noting that Justice Pierce was born in 1866, meaning he was seventy-one in 1937, and that he joined the Court in 1922). As such, the Bill paved the way for Roosevelt to secure a liberal-leaning majority. *See* Shepherd, *supra* note 52, at 1562–63 (explaining how the conservative majority on the Supreme Court treated New Deal legislation and noting that Roosevelt's court-packing plan was intended to overcome this majority); Lesley Kennedy, *This Is How FDR Tried to Pack the Supreme Court*, HISTORY, https://www.history.com/news/franklin-roosevelt-tried-packing-supreme-court (Sept. 18, 2020) (explaining that Roosevelt proposed the Judicial Procedures Reform Bill of 1937 to alter the Court's composition and secure favorable rulings).

[54] Kennedy, *supra* note 53.

[55] *See* Leuchtenburg, *supra* note 47 (noting the common use of "the Four Horsemen" as a nickname for the four conservative justices and pointing out that Justice Roberts, who had voted with the Four Horsemen starting in 1935, began voting against them in 1937); Shepherd, *supra* note 52, at 1563 (showing that Justice Roberts swung to cast his vote with the liberal justices again in 1937 and noting the Court's subsequent upholding of the National Labor Relations Act and Social Security Law). However, Roosevelt's court-packing plan was not necessarily the cause of the Supreme Court's shift as Roberts's switch to the liberal side of the court began before Roosevelt's plan was proposed. *See id.* (explaining the timeline of the infamous "Switch in Time that Saved Nine").

[56] *See* Josiah M. Daniel, III, *"What I Said Was 'Here Is Where I Cash In'": The Instrumental Role of Congressman Hatton Sumners in the Resolution of the 1937 Court-Packing Crisis*, 54 UNIV. ILL. CHI. JOHN MARSHALL L. REV. 379, 423 tbl.1 (2021) (showing the retirements of Justices Van Devanter and Sutherland and the death of Justice Butler occurred within three years of February 1937 and the subsequent appointments of Justices Hugo Black, Stanley Reed, and Frank Murphy, respectively); Barry Cushman, *Court-Packing and Compromise*, 29 CONST. COMMENT. 1, 12–15, 28 n.146 (2013) (recounting how President Roosevelt wanted to compose the Court in a way that ensured liberal interpretation of the Constitution, which he believed would result in more New Deal programs being upheld, and listing New Deal initiatives upheld by the Supreme Court after 1937).

This culminated in 1942 in *Wickard v. Filburn*, when the Court considered whether the Agricultural Adjustment Act of 1938's (AAA) restriction of privately farmed and used wheat was a legitimate use of the Commerce Clause power.[57] Filburn farmed twenty-three acres of wheat and exceeded the AAA's allotment.[58] He argued that wheat grown for personal use as feed for livestock and food for his family was not interstate commerce.[59] The Court held that because the impact of self-use farmers, viewed in the aggregate, substantially affected costs and therefore impacted interstate commerce, the AAA was a legitimate use of the Commerce Clause power.[60]

Wickard and its "substantial effect" provision opened the floodgates to Commerce Clause legislation.[61] From 1937 to 1995, the Court did not invalidate a single legislative enactment enacted pursuant to the Commerce Clause.[62] Subsequent cases held as long as legislation contained sufficient findings that the underlying activity "substantially affected" interstate commerce, the Court would uphold the legislation, and

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[57] Wickard v. Filburn, 317 U.S. 111, 113–14, 119–20 (1942).

[58] *Id.* at 114–15 (stating that Filburn sowed twenty-three acres of wheat, which exceeded his 11.1-acre allotment, and harvested 239 bushels from his excess acreage).

[59] Brief for the Appellee on Re-Argument at 3–15, *Wickard*, 317 U.S. 111 (No. 59) ("[T]he indisputable facts remain that a vast amount of the frozen 1941 (and 1942) harvest[] was raised and was needed for feed, seed and food on the farms where it was produced; that none of it can plausibly be considered available for market; and that by depriving the farmers of the use of their own product, compelling them to go into the market and purchase what they need for their own consumption, is an unwarranted regulation of production; deprives the producer of his right to use and enjoy the fruits of his labor; and is violative of the Constitution. . . . [N]either intrastate nor interstate commerce, nor a commingling of the two, is here concerned. The wheat that the farmer may consume on his own farm as feed, seed or food at no time moves into commerce between the States nor into intrastate channels—because it is never marketed."); *see also Wickard*, 317 U.S. at 114, 119 (observing that although the "intended disposition of the crop here involved [was] not . . . expressly stated," by and large, Filburn used the wheat for various purposes on his farm and that Filburn argued the AAA was an unconstitutional "regulation of production and consumption").

[60] *Wickard*, 317 U.S. at 127–29.

[61] *See id.* at 128–29 (discussing the "substantial effect" consumption of homegrown wheat could have on commerce); Diane McGimsey, Comment, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1690–91 (2002) (explaining how the Court's holding in *Wickard* set a low bar for determining if an activity had a substantial effect on commerce); Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 82–84 (1999) (noting how a great many statutes were upheld under the Commerce Clause in the years after *Wickard*).

[62] *See* TRIBE, *supra* note 36, at 811–17 (discussing the Court's expansion of the Commerce Power between 1937 and 1995, resulting in its inability to strike down legislation under the Commerce Clause); Nelson & Pushaw, *supra* note 61, at 83–86 ("In the half-century following *Wickard*, every one of the vast number of statutes enacted under the Commerce Clause survived judicial review.").

all such enactments apparently did.[63] However, in *United States v. Lopez*, the Court more narrowly construed the term "interstate commerce," as well as activities that substantially affected commerce.[64]

In *Lopez*, the Court considered whether the Gun-Free School Zones Act of 1990 was a legitimate exercise of the Commerce Clause power.[65] The Act barred the possession of firearms within a school zone.[66] In support of the Act, the Government argued that possessing a firearm in a school zone could negatively impact economic behavior.[67] The Court disagreed and struck down the Act as an impermissible exercise of the Commerce Clause power.[68]

Does the Court's backtracking on the Commerce Clause indicate that restraining this particular power is no longer necessary? No. For proof, consider a much more recent legislative scheme intended to pull a huge sector of the economy—healthcare—under the jurisdiction of the federal government.[69] In *National Federation of Independent Business v. Sebelius*, the Court considered whether certain provisions of the Patient Protection and Affordable Care Act of 2010 (ACA) were constitutional exercises of federal power.[70] Evaluating the ACA's merits, the Court first considered whether the individual mandate was a legitimate exercise of the

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[63] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59, 261–62 (1964) ("Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect on that commerce. . . . The only questions [for the Court] are: (1) whether Congress had a rational basis for finding that [the local activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."); Katzenbach v. McClung, 379 U.S. 294, 304–05 (1964) (upholding the Civil Rights Act of 1964 as a valid use of the Commerce Clause because Congress's determination that racial discrimination in the restaurant industry substantially affected interstate commerce "had a rational basis").

[64] *See* United States v. Lopez, 514 U.S. 549, 561, 567–68 (1995) (stating that regulation of firearm possession in school zones could not be upheld under the Commerce Clause because it was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce," thereby declining to expand the Court's "great deference to congressional action" any further).

[65] *Id.* at 551.

[66] *Id.*

[67] *Id.* at 563–64.

[68] *Id.* at 551–52, 561, 564, 567–68.

[69] *See* Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FIU L. REV. 29, 32–33 (2010) (discussing the government's attempt to bring healthcare under its control by passing the Patient Protection and Affordable Care Act); *Healthcare Sector*, INVESTOPEDIA, https://www.investopedia.com/terms/h/health_care_sector.asp (Oct. 31, 2021) (describing the healthcare industry in America as "one of the largest and most complex in the U.S. economy"). To examine the federal government's forays into healthcare, see generally Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[70] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530–32 (2012).

Commerce Clause power.[71] Chief Justice Roberts criticized Congress's liberal exercise of this power and went so far as to state that the ACA's individual mandate might be an unconstitutional exercise of this power.[72] Regarding the ACA's individual mandate, which imposed a penalty on Americans who did not have health insurance,[73] the Chief Justice observed that "Congress has never attempted to rely on [the Commerce] [P]ower to compel individuals not engaged in commerce to purchase an unwanted product."[74] He then went through mental gymnastics by opining that it was the Court's "duty" to find a way to "construe a statute to save it, if fairly possible."[75] Thus, he, along with Justices Ginsburg, Breyer, Sotomayor, and Kagan, renamed the mandate a "tax" and thereby upheld the ACA as a legitimate exercise of the Congress's power to tax and spend for the general welfare,[76] which leads to another often-abused enumerated power: the tax-and-spend power.

C. *Unemployment Insurance, Seat Belts, and Motorcycle Helmets, Oh My!*

Article I, Section 8 of the United States Constitution provides, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[77] This is commonly known as the "tax-and-spend power."[78] Congress lacks the power to directly regulate

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[71] *Id.* at 547. *See generally id.* at 585–87 (discussing whether the ACA's Medicaid expansion was a valid use of Congress's spending power).

[72] *See id.* at 552–55 (opinion of Roberts, C.J.) (highlighting the logical extremes of Congress's argument that it could compel commerce under the Commerce Power and opining it "[was] not the Country the Framers of our Constitution envisioned"); *id.* at 574–75 (stating that the ACA could not stand under the Commerce Clause).

[73] Patient Protection and Affordable Care Act § 1500A(b)(1) (creating an individual mandate to purchase and maintain healthcare with a penalty for non-compliance). Several years later, the ACA was amended to essentially eliminate the penalty by reducing it to zero dollars. *See* Act of Dec. 22, 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A(c)).

[74] *Sebelius*, 567 U.S. at 549 (opinion of Roberts, C.J.). Justices Scalia, Kennedy, Thomas, and Alito agreed the individual mandate was not a valid exercise of the Commerce Clause power, but they did not join Chief Justice Roberts's opinion. *See id.* at 646–47, 650–60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

[75] *Id.* at 574 (opinion of Roberts, C.J.).

[76] *Id.* (majority opinion).

[77] U.S. CONST. art. I, § 8, cl. 1.

[78] *E.g.*, *Sebelius*, 567 U.S. at 648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); Mario Loyola, *Trojan Horse: Federal Manipulation of State Government and the Supreme Court's Emerging Doctrine of Federalism*, 16 TEX. REV. L. & POL. 113, 132 (2011); *see also* Patrick T. Gillen, *A* Winn *for Originalism Puts Establishment Clause Reform Within Reach*, 21 WM. & MARY BILL RTS. J. 1107, 1122 (2013) ("tax and spend power"); United States v. Butler, 297 U.S. 1, 75 (1936) ("taxing and spending power"); Valley Forge Christian Coll.

health and welfare within a state (unless the regulation is necessary and proper under the enumerated powers, such as Richard Nixon's 55-mile-per-hour speed limit that was allegedly "necessary and proper" under the Commerce Clause as it was intended to preserve gas in response to the OPEC embargo).[79] For example, Congress cannot mandate that drivers wear seatbelts or even motorcycle helmets, nor can it impose national unemployment insurance premiums on incomes.[80] However, it may withhold millions of dollars in federal funds (pursuant to the tax-and-spend power) from States that refuse to enact laws it finds to be beneficial to citizens within those states.[81] For example, States could receive a portion of $500,000,000 in federal funds if they enacted mandatory

v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 479 (1982) ("power to tax and spend").

[79] Bond v. United States, 572 U.S. 844, 854 (2014) (noting that the federal government possesses limited and enumerated powers while the States alone possess the police power); Nevada v. Skinner, 884 F.2d 445, 450–52 (9th Cir. 1989) (upholding the 55-mile-per-hour limit under the Commerce Clause because it "[was] rationally related to the Congressional goals . . . underl[ying] the Highway Act," which "f[e]ll within the purview of the Commerce Clause").

[80] *See* Snyder Mines, Inc. v. Indus. Comm'n, 217 P.2d 560, 565 (Utah 1950) ("[T]his court announced that the unemployment compensation law was enacted under and as an exercise of the police power of the state and that its purpose is remedial to protect the health, morals, and welfare of the people by providing a cushion against the shocks and rigors of unemployment. . . . [*U*]*nlike the federal government, the states under their police powers can impose and collect contributions*." (emphasis added) (citing Singer Sewing Mach. Co. v. Indus. Comm'n, 134 P.2d 479 (Utah 1943))); *cf., e.g.*, *Bond*, 572 U.S. at 854 ("The States have broad authority to enact legislation for the public good—what we have often called a 'police power.' The Federal Government, by contrast, has no such authority and 'can exercise only the powers granted to it' . . . ." (citations omitted) (first quoting United States v. Lopez, 514 U.S. 549, 567 (1995); and then quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819))); State v. Hartog, 440 N.W.2d 852, 859–60 (Iowa 1989) ("We hold that passage of [Iowa's mandatory seatbelt law] was a proper exercise of the state's police power . . . ."); State v. Folda, 885 P.2d 426, 427–28 (Mont. 1994) ("An individual's ability or privilege to operate a motor vehicle on public roads is '[a]lways subject to reasonable regulation by the state in the valid exercise of its police power.'" (alteration in original) (quoting State v. Skurdal, 767 P.2d 304, 307 (1988))); People v. Kohrig, 498 N.E.2d 1158, 1163 (Ill. 1986) (collecting cases from multiple jurisdictions which hold that "motorcycle-helmet laws are a valid exercise of the State's police power"); Love v. Bell, 465 P.2d 118, 122 (Colo. 1970) (en banc) ("[T]he helmet requirement represents a valid exercise of the police power of the state.").

[81] VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER 1, 3–4 (2021).

seatbelt laws.[82] When such strings are attached, States may feel pressure to agree to the conditions to secure federal funds.[83]

What is the net effect of the aforementioned expansions of federal powers? Laws and regulations have proliferated so much that one would be hard pressed to *not* be in violation of some federal law at one point or another, especially business owners engaged in any of the four pillars of economic activity: agriculture, manufacturing, commerce, and navigation.[84] Adam Millsap, a contributor at *Forbes*, notes,

> From 1970 to 2017, the number of words in the Code of Federal Regulations (CFR) nearly tripled from 35 million to over 103 million. This increase in regulation reduced economic growth and lowered

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[82] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Pub. L. No. 109-59, § 2005(a), 119 Stat. 1144, 1524–27 (2010) (codified as amended at 23 U.S.C. § 406) (repealed 2012); *see* Sarah Harney, *Big Bucks to Buckle Up*, GOVERNING (Sept. 3, 2010), https://www.governing.com/archive/big-bucks-buckle-up.html (explaining that States would receive a portion of $500 million in federal funding for enacting mandatory seatbelt laws under the 2010 law).

[83] *See Seat Belt Laws by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/seat-belt-laws-by-state (last visited Oct. 9, 2022) (stating that failing to wear a seat belt is illegal in every state except one); *With Eye on Federal Monies, More States Adopting Primary Seat Belt Laws*, INS. J. (Mar. 9, 2006), https://www.insurancejournal.com/news/national/2006/03/09/66257.htm (discussing how Mississippi passed a seatbelt law, at least in part, because Congress offered an incentive). The Supreme Court has noted that such pressure, if sufficiently coercive, can render conditional grants unconstitutional. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that federal conditional grants do not exceed the limits of the Spending Power when "the enactment of such laws remains the prerogative of the States not merely in theory but in fact"); *Sebelius*, 567 U.S. at 581–82, 588 (plurality opinion) (holding that the Medicaid expansion provision of the ACA violated the Constitution because "the financial 'inducement' Congress ha[d] chosen [was] much more than 'relatively mild encouragement'—it [was] a gun to the head" because "[t]he threatened loss of over [ten] percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion"); *id.* at 681, 689 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (agreeing that the Medicaid expansion violated the "anticoercion rule" and noting seven justices agreed it was not a constitutional exercise of the tax-and-spend power).

[84] *See* Adam Uzialko, *Surprising Laws That May Apply to Your Small Business*, BUS. NEWS DAILY, https://www.businessnewsdaily.com/11106-surprising-laws-business.html (June 29, 2022) (providing examples of federal laws that business owners must be careful to avoid violating); Jefferson, *supra* note 37 (observing that agriculture, manufacturing, commerce, and navigation are "the four pillars of our prosperity"); John Kiriakou, *Three Felonies a Day*, INST. FOR POL'Y STUD. (June 10, 2015), https://ips-dc.org/three-felonies-day/ ("Harvard University professor Harvey Silverglate estimates that daily life in the United States is so over-criminalized, the average American professional commits about three felonies a day."); Ilya Somin, *Why the Rule of Law Suffers When We Have Too Many Laws*, WASH. POST: THE VOLOKH CONSPIRACY (Oct. 2, 2017, 10:25 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/01/why-the-rule-of-law-suffers-when-we-have-too-many-laws/ (noting that most, if not all, Americans unknowingly commit crimes).

> Americans' incomes, and now new evidence shows that regulation has especially harmful effects on the country's low-income residents.[85]

How do we stop the bureaucratic behemoth from crushing American innovation and entrepreneurism? Will Congress and presidents wake up and realize what they are doing to "the People" and scale back on federal government encroachments? When such a tack means *not* doing what big-money donors demand them to do,[86] doubtful. Thus, calling an Article V Convention of the States may be our only hope.

II. PROCESS FOR CALLING A CONVENTION OF THE STATES

There are two ways to amend the Constitution:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.[87]

There have been calls for amendments under Article V's congressional power.[88] From 1789 to January 3, 2019, Congress proposed approximately

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[85] Adam A. Milsap, *How Too Much Regulation Hurts America's Poor*, FORBES (July 23, 2019, 8:47 AM), https://www.forbes.com/sites/adammillsap/2019/07/23/how-too-much-regulation-hurts-americas-poor/?sh=2c6f1e81271f.

[86] *See Influence of Big Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money (last visited Oct. 9, 2022) (discussing how big money "drown[s] out the voices of ordinary Americans" and creates an aura of impropriety because politicians receive tens of millions of dollars from Super PACs and "dark money groups"); *see also* Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won with It in 2020.*, N.Y. TIMES (Jan. 29, 2022), https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html (discussing how dark money in political funding infests both sides of the political aisle and is "reshaping American politics"); Scott Bland & Maggie Severns, *Documents Reveal Massive 'Dark-Money' Group Boosted Democrats in 2018*, POLITICO (Nov. 19, 2019, 7:06 PM), https://www.politico.com/news/2019/11/19/dark-money-democrats-midterm-071725 (discussing how large donations can be used to pressure politicians towards particular stances on policy issues).

[87] U.S. CONST. art. V.

[88] *See Measures Proposed to Amend the Constitution*, U.S. SENATE, https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.htm (last visited Aug. 6, 2022) (noting there have been many attempts to amend the Constitution).

11,848 amendments to the Constitution.[89] Brenda Erickson of the National Conference of State Legislatures observes, "To date, Congress has submitted [thirty-three] amendment proposals to the states, [twenty-seven] of which were ratified."[90] While the Twenty-Seventh Amendment prevents Congress from granting itself a raise to take effect in the current session,[91] and the Twenty-First Amendment repealed the Eighteenth Amendment's prohibition of alcohol,[92] other successful amendments did not curtail federal power—rather, they expanded it and congressional power specifically.[93] This is the inherent flaw in waiting for Congress to propose and pass amendments to the States. Congress seems unwilling, as a collective body, to restrain itself. Hence, Convention supporters are convinced that the only way to rein in federal powers is for the States to apply for a Convention and have any resulting amendments submitted to the States for ratification.[94]

There has never been an Article V Convention to propose amendments.[95] The closest we had to an Article V Convention was the original Constitutional Convention in 1787, which was convened by the founding States as a result of regional conventions and growing

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[89] *Id.*

[90] Brenda Erickson, *Amending the U.S. Constitution*, NAT'L CONF. STATE LEGISLATURES (Aug. 2017), https://www.ncsl.org/research/about-state-legislatures/amending-the-u-s-constitution.aspx.

[91] U.S. CONST. amend. XXVII; Erickson, *supra* note 90.

[92] U.S. CONST. amend. XXI.

[93] *See, e.g.*, U.S. CONST. amend. XIV (including the Due Process Clause, the Privileges and Immunities Clause, and the Equal Protection Clause and giving Congress the power to enforce them); *id.* amend. XVI (giving Congress the power to tax income); s*ee also* Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111, 132 n.80 (1993) (noting that the latter seventeen amendments, unlike the Bill of Rights, do not place substantive limits on governmental action).

[94] *See, e.g.*, Jakob Fay, *Prof. Rob Natelson Exposes Origins of Anti-Convention Talking Points*, CONVENTION STATES ACTION (Apr. 29, 2022), https://conventionofstates.com/news/prof-rob-natelson-exposes-origins-of-anti-convention-talking-points ("Whether they realize it or not, those who wish to restrain the federal government and yet oppose Article V[] have already accepted the premises of their political opponents. By using arguments contrived by corrupt politicians, they do a favor for those very politicians who care only to protect their own best interests. The Swamp wants us to believe that a convention would be a threat to our liberties because, in reality, a convention would actually be a threat to the Swamp itself."); CONVENTION STATES ACTION, https://conventionofstates.com (Mar. 29, 2022) (advocating for a Convention to limit federal power); *Application for a Convention of the States Under Article V of the Constitution of the United States*, AM. LEGIS. EXCH. COUNCIL, https://alec.org/model-policy/article-v-convention-of-the-states/ (Sept. 4, 2015) (providing a model application for the calling of a Convention of the States to limit the federal government); *see also* Greg Abbott, *The Myths and Realities of Article V*, 21 TEX. REV. L. & POL. 1, 3–5, 8–10 (2016) (insisting States should "play the primary role" in the amendment process and that "untrustworthy federal officials" will not provide solutions to a wayward federal government).

[95] Erickson, *supra* note 90.

dissatisfaction with the inherent weaknesses of the Articles of Confederation.[96] The principal weakness of the Articles of Confederation was the lack of centralized power to compel the States to assist the national government in addressing issues of common concern such as treaties with foreign powers, raising revenue, and national defense.[97] All the States but Rhode Island sent delegates to the first and only Convention.[98] While its original purpose was to strengthen the Articles, it ended up proposing its replacement, the United States Constitution,[99] which was ratified on June 21, 1788.[100]

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[96] *See Creating the United States: Road to the Constitution*, LIBR. CONG., https://www.loc.gov/exhibits/creating-the-united-states/road-to-the-constitution.html#skip_menu (last visited Oct. 10, 2022) ("Once peace removed the rationale of wartime necessity the weaknesses of the 1777 Articles of Confederation became increasingly apparent. . . . Nationalists, led by James Madison, George Washington, Alexander Hamilton, John Jay, and James Wilson, almost immediately began working towards strengthening the federal government. They turned a series of regional commercial conferences into a national convention at Philadelphia in 1787."); *see also* Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 HARV. J.L. & PUB. POL'Y 61, 63–80 (2017) (explaining the history, methodology, and charge of the Constitutional Convention and how the Annapolis Convention, which was only attended by five States, was a causal force in its calling); *The Constitution: How Did It Happen?*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/constitution/how-did-it-happen (last visited Oct. 9, 2022) ("[A] Grand Convention of state delegates . . . work[ed] on revising the Articles of Confederation.").

[97] *See* James E. Hickey, Jr., *Localism, History and the Articles of Confederation: Some Observations About the Beginning of U.S. Federalism*, 9 IUS GENTIUM 5, 12 (2003) ("Most analyses of the Articles of Confederation stress the weaknesses that compelled adoption of the United States Constitution to cure. Those weaknesses were: 1) no central government authority to act directly on individuals and the states; 2) no central government authority to enforce treaties and central government laws; 3) no amendment of the Articles of Confederation without the unanimous consent of the states; 4) no proportional representation of the population in the central government; 5) no power in the central government to tax; 6) no power in the central government to print money; 7) no central government authority to regulate trade among the states; and 8) no central government courts or executive."); Printz v. United States, 521 U.S. 898, 945 (1997) (Stevens, J., dissenting) ("Under the Articles of Confederation the National Government had the power to issue commands to the several sovereign States, but it had no authority to govern individuals directly. Thus, it raised an army and financed its operations by issuing requisitions to the constituent members of the Confederacy [i.e., the States], rather than by creating federal agencies to draft soldiers or to impose taxes. That method of governing proved to be unacceptable, not because it demeaned the sovereign character of the several States, but rather because it was cumbersome and inefficient.").

[98] Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1712 (2012).

[99] *See id.* at 1711 (explaining how the Convention proposed the Constitution, followed by the Constitution's ratification); LIBR. CONG., *supra* note 96 (explaining that the deficiencies in the Articles of Confederation led to the creation of the Constitution).

[100] *See, e.g.*, Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001) ("On June 21, 1788, New Hampshire became the ninth state to ratify the Constitution."); *U.S. Constitution Ratified*, HISTORY, https://www.

Therein lies the dilemma. Americans are frustrated with a federal government grabbing more power over time,[101] and they cannot rely on Congress to consider their proposals to curtail federal power.[102] Those who want to retain aspects of the Founding Fathers' Constitution—namely, its limits on federal power (if all three branches of the government respect its original language) and its reiterations of the foundational, unalienable rights (i.e., the Bill of Rights)[103]—have legitimate fears that a Convention, not properly restrained, might replace the Constitution instead of merely adding amendments to curtail federal power (just as the prior Convention abandoned the Articles of Confederation).[104] We are damned if we do and damned if we do not.

III. TODAY'S RESOLUTION FOR CALLING A CONVENTION OF THE STATES

"Our convention would only allow the states to discuss amendments that[] 'limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials.'"[105] This is the general language today's advocates of a Convention endorse, with some

history.com/this-day-in-history/u-s-constitution-ratified (June 16, 2022) ("June 21, 1788: New Hampshire becomes the ninth and last necessary state to ratify the Constitution of the United States, thereby making the document the law of the land.").

[101] *See* Art Swift, *Majority in U.S. Say Federal Government Has Too Much Power*, GALLUP (Oct. 5, 2017), https://news.gallup.com/poll/220199/majority-say-federal-government-power.aspx (finding that 55% of Americans were of the opinion that the federal government was too powerful); Steven Webster, *Angry Americans: How Political Rage Helps Campaigns but Hurts Democracy*, CONVERSATION (Sept. 10, 2020, 7:48 AM), https://theconversation.com/angry-americans-how-political-rage-helps-campaigns-but-hurts-democracy-145819 (discussing how Americans' frustration with the federal government has caused trust in the government to decline for sixty years); Frank Newport, *Americans' Views on Federalism as States Take on More Power*, GALLUP (July 15, 2022), https://news.gallup.com/opinion/polling-matters/394823/americans-views-federalism-states-power.aspx (noting that, compared to 56% of Americans in 1936, 37% of Americans preferred a concentration of power in the federal government in 2016).

[102] *See* Jeffrey H. Anderson, *A Limited Government Amendment*, 5 NAT'L AFFS. 105, 105–06, 115–16, 119 (2010) (noting the expansion of federal power over time and that the responsibility to diminish such power lies with American citizens).

[103] *See* Michael J. Douma, *How the First Ten Amendments Became the Bill of Rights*, 15 GEO. J.L. & PUB. POL'Y 593, 594 (2017) (expressing that the founding generation, from 1787–1791, understood the need for a Bill of Rights). *See generally infra* text accompanying notes 111–116 (listing several passages of the Constitution that limit the power of the legislature, the executive, and the judiciary).

[104] *See* Michael B. Rappaport, *Reforming Article V: The Problems Created by the National Convention Amendment Method and How to Fix Them*, 96 VA. L. REV. 1509, 1512, 1528–30 (2010) (noting how the Philadelphia Convention went beyond the initial intent of amending the Articles of Confederation, recognizing that constitutional amendments restricting congressional or federal power do not typically succeed because of Congress's self interest in maintaining its power, and stating that a constitutional convention could turn into a runaway convention which would create undesirable consequences).

[105] *What's a Convention of States Anyway?*, CONVENTION STATES ACTION, https://conventionofstates.com (last visited July 21, 2022).

variation from State to State.[106] Even so, the three primary objectives of "limit[ing] the power and jurisdiction of the federal government, impos[ing] fiscal restraints, and plac[ing] term limits on federal officials" are reflected in most state legislatures' resolutions.[107] Indeed, a valid convention under Article V should address these objectives. My own state of Kansas recently attempted to pass such a resolution. It reads,

> The legislature of the state of Kansas hereby applies to the Congress of the United States, under the provisions of Article V of the Constitution of the United States, for the calling of a convention of the states limited to proposing amendments to the Constitution of the United States that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government and limit the terms of office for officials of the federal government and members of the Congress of the United States.[108]

The Kansas House of Representatives failed to obtain the required two-thirds majority with just seventy-six "yeas" and forty-six "nays."[109] This resolution is consistent with the national organization's stated objectives, which are consistent with the resolutions either already passed or being considered by other States.[110]

IV. WHAT IS WRONG WITH THE CURRENT RESOLUTIONS?

What is wrong with the current Convention resolutions? To answer this question, one must first understand what the United States Constitution is:

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[106] *See, e.g.*, S. Res. 736, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014) ("Georgia hereby applies . . . for the calling of a convention of the states limited to proposing amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress."); S.J. Res. 4, 2016 Leg., Reg. Sess. (Okla. 2016) ("A Joint Resolution making two separate applications . . . to call a convention of the states under Article V of the United States Constitution for the purpose of proposing amendments to the United States Constitution related to balancing the federal budget, imposing fiscal restraints on the federal government, limiting the power and jurisdiction of the federal government and limiting the terms of office for its officials and for members of Congress . . . .").

[107] CONVENTION STATES ACTION, *supra* note 105; *Progress Map: States That Have Passed the Convention of the States Article V Application*, CONVENTION STATES ACTION [hereinafter *Progress Maps*], https://conventionofstates.com/states-that-have-passed-the-convention-of-states-article-v-application (last visited July 23, 2022) (showing that nineteen States have passed a Convention of States resolution).

[108] H.R. Con. Res. 5027, 89th Leg., Reg. Sess. (Kan. 2022).

[109] *HCR 5027*, KAN. LEGISLATURE, http://kslegislature.org/li/b2021_22/measures/vote_view/je_20220309112241_486856/ (last visited July 21, 2022).

[110] *See* sources cited *supra* note 106; *Progress Maps*, *supra* note 107 (stating that nineteen States have passed a resolution calling for an Article V Convention of States with language that the convention will "limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials" and that other States are currently considering such a resolution).

> A chief aim of the Constitution as drafted by the Convention was to create a government with enough power to act on a national level, but without so much power that fundamental rights would be at risk. One way that this was accomplished was to separate the power of government into three branches, and then to include checks and balances on those powers to assure that no one branch of government gained supremacy.[111]

In addition to checks and balances provided by three branches of government,[112] Article I, Section 8 enumerates the limited powers of the federal legislative branch;[113] Article II, Section 2 enumerates the executive branch's power;[114] and Article III, Section 2 defines the scope of the judicial branch's power.[115] Moreover, Amendments One through Nine define the unalienable rights of the people that the federal government cannot infringe upon, and the Tenth Amendment reserves to the States all powers not given to the federal government through the Constitution.[116] In summation, the Constitution's purpose is to (1) define the jurisdiction of the federal government and (2) limit its power.

Thus, when considering the prong of the resolution that calls for "limit[ing] the power and jurisdiction of the federal government," it seems to be an explicit mandate to rewrite the Constitution from top to bottom via the amendment process.[117] There is no limit to how far the Convention may take this mandate.

Those who claim that the fear of a runaway convention under the current resolution's provisions is unfounded (excluding the fiscal restraint and term limits provisions, which are specific) [118] either have not studied what the Constitution is or have not considered what their mandate demands. As the late Justice Antonin Scalia said, "A constitutional convention is a horrible idea. This is not a good century to write a

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[111] *The Constitution*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Oct. 8, 2022).

[112] *See* U.S. CONST. arts. I–III (creating the legislative branch in Article I, the executive branch in Article II, and the judicial branch in Article III, while enumerating certain powers and limitations of each); 16A AM. JUR. 2D *Constitutional Law* § 235, Westlaw (database updated Aug. 2022) (noting that reserving limited, distinct authority to each branch prevents a potentially dangerous "accumulation of all powers . . . in the same hands").

[113] U.S. CONST. art. I, § 8.

[114] *Id.* art. II, § 2.

[115] *Id.* art. III, § 2.

[116] *Id.* amends. I–X; *see* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (stating that the Bill of Rights exists to protect the fundamental rights of the people from government interference); United States v. Darby, 312 U.S. 100, 123–24 (1941) (noting that the Tenth Amendment serves as a perfunctory reminder that powers not given to the federal government are reserved to the States).

[117] CONVENTION STATES ACTION, *supra* note 105.

[118] *See Progress Maps*, *supra* note 107 (stating the language of the current general resolution).

constitution." [119] Convention proponents respond to this quote by claiming that the Convention will merely propose amendments while a constitutional convention must be called to rewrite the Constitution.[120] This is semantics. One amendment could be worded to negate all federal power, negate jurisdiction of any or all branches of government, or even eliminate any or all of the first ten amendments, which have proven time and again to be necessary for preserving citizens' unalienable rights.[121] A limiting amendment may be more expansive than the status quo.

Distinguishing between an Article V Convention and a constitutional convention ignores the peril of unleashing a contemporary bunch of zealots, left- or right-wing, to amend the Constitution to their hearts' content. Indeed, three former Supreme Court Justices called for the elimination or restraint of the Second Amendment's right to keep and bear arms![122] The fact is that amendments can negate, expand, or restrict any right or enumerated power depending on the goals of the Convention's delegates.[123] While a number, and perhaps even a majority, of the delegates may be grounded in the same moral and religious beliefs as the Founders, in a post-modern world where moral relativism seems to dominate the American psyche and soul,[124] it is impossible to conceive of

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[119] Kim Wehle, *It's Very Difficult to Change the Constitution—On Purpose*, HILL (Nov. 5, 2018, 11:30 AM), https://thehill.com/opinion/immigration/414897-its-very-difficult-to-change-the-constitution-on-purpose/; Kevin Mooney, *Supreme Court Justice Scalia: Constitution, Not Bill of Rights, Makes Us Free*, DAILY SIGNAL (May 11, 2015), https://www.dailysignal.com/2015/05/11/supreme-court-justice-scalia-constitution-not-bill-of-rights-makes-us-free/.

[120] *See* Abbott, *supra* note 94, at 35–40 (arguing that the Founders intended for an Article V convention to be limited to certain topics).

[121] Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 ARIZ. L. REV. 717, 726–27, 730–31 (1981) (arguing that the Founders intended for all parts of the Constitution to be subject to amendment and even an amendment abolishing the Senate would be held valid under a holistic constitutional interpretation); *see, e.g.*, Kent v. Dulles, 357 U.S. 116 (1958) (right to travel); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (expressive association); Texas v. Johnson, 491 U.S. 397 (1989) (symbolic speech); Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (free press); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (just compensation for takings); District of Columbia v. Heller, 554 U.S. 570 (2008) (bear arms).

[122] *See* McDonald v. City of Chicago, 561 U.S. 742, 911 (2010) (Stevens, J., dissenting) (arguing that the Second Amendment should be restricted and not incorporated against the States); *id.* at 922 (Breyer, J., dissenting) (stating, alongside former Justice Ginsburg, that the Second Amendment should not be incorporated against the States).

[123] *See* Linder, *supra* note 121, at 723, 732 (asserting that the "will of the people cannot be bound," and, therefore, the "law will eventually come to reflect the will of the people" as "constitutional decisionmaking always involves choices among ultimate values and goals").

[124] *See* William Lyons, *Why Postmodernism Is Poisoning American Politics Today*, KNOX NEWS. (May 11, 2022, 6:01 AM), https://www.knoxnews.com/story/opinion/2022/05/11/democracy-america-postmodernism-poisoning-politics-today/9716898002/ (noting that postmodernism is prevalent in today's society); *Americans Are Most Likely to Base Truth on Feelings*, BARNA (Feb. 12, 2002), https://www.barna.com/research/americans-are-most-

a scenario where almost all will. Why did Justice Scalia, an avowed textualist who applied the law consistently with the original public meaning of the Constitution in almost all of his opinions and resisted the expansion of federal powers,[125] believe that a constitutional convention was a horrible idea? Perhaps it was because the men and women who would represent the states could stray from the Founders' intentions.

Sadly, it seems the only way to assuage Convention proponents is to have faith that current and future politicians will respect the purpose of a limited, republican government. However, as we see increasing deficits, an exponentially growing national debt, and the claws of federal government digging deeper into people's personal, financial, professional, and even spiritual lives,[126] it is clear that we cannot sit back and do nothing.

So, what is the solution? It is a Convention called to draft very specific and limited amendments to restrain the most egregious encroachments on Americans' freedoms and liberties with safeguards to prevent it from exceeding the people's mandate. This begins with revising the resolution to specifically address the Convention's goal to restrict federal powers.

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likely-to-base-truth-on-feelings/ (indicating that 75% of people between the ages of eighteen and thirty-five and 60% of people aged thirty-six and older embrace the concept of moral relativism); David L. Holmes, *The Founding Fathers, Deism, and Christianity*, ENCYC. BRITANNICA (Dec. 21, 2006), https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214 (stating that most Founding Fathers were Christian); *Faith on the Hill*, PEW RSCH. CTR. (Jan. 4, 2021), https://www.pewresearch.org/religion/2021/01/04/faith-on-the-hill-2021/ (reporting that 88% of Congresspeople and 65% of the general public are Christian).

[125] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1382 (1999) (discussing Scalia's dedication to a textualist and originalist judicial philosophy); Noel J. Francisco, *Justice Scalia: Constitutional Conservative*, 84 U. CHI. L. REV. 2169, 2169–70 (2017) (stating that Scalia believed in a separation of powers, which reduced the possibility of expanding federal power).

[126] *See* Amadeo, *supra* note 11 (demonstrating an overall increase in national deficit since 1929); Graph of U.S. National Debt over the Last 100 Years, *in Understanding the National Debt*, FISCALDATA.TREASURY.GOV, https://fiscaldata.treasury.gov/americas-finance-guide/national-debt/ (last visited Oct. 10, 2022) (indicating that the national debt has an exponential growth rate); DIANE KATZ, FEDERALISM IN CRISIS: URGENT ACTION REQUIRED TO PRESERVE SELF-GOVERNMENT 16 (2021) ("The number and scope of private-sector mandates have grown without restraint for decades . . . ."), https://www.heritage.org/conservatism/report/federalism-crisis-urgent-action-required-preserve-self-government.

V. FIXES FOR VAGUENESS—FEDERAL POWERS THAT NEED TO BE STRICTLY DEFINED AND RESTRAINED

A. A Balanced Budget Amendment Is a Terrific Idea!

Our representatives in Washington, D.C., are spending money like drunken sailors.[127] Or, as Ronald Reagan put it, "[W]e could compare the big spenders in Congress with a drunken sailor out on a spree—but that would really be unfair to the sailor, because at least he's spending his own money."[128] The year Reagan was elected, the federal debt was $908 billion with a debt-to-gross-domestic-product (GDP) ratio of 32%.[129] By the end of 2021, the debt had increased exponentially to more than $29 *trillion* with a debt-to-GDP ratio of 124%.[130]

Measured against the size of the economy, the debt was around 61% of the GDP before the Great Recession of 2007–2009[131] and had risen to nearly 107% of the GDP right before the COVID-19 Pandemic.[132] By the end of the 2020 fiscal year, the debt was around 129% of the GDP.[133] While the debt-to-GDP ratio has moderately improved,[134] barring change in tax or spending policy, it will likely rise to levels never before seen in U.S. history. (The record—prior to the COVID-19 Pandemic—was set in 1946, after World War II, at 119% of the GDP.)[135]

To add to Ronald Reagan's observation, a drunken sailor also stops spending money when his wallet is empty. Perhaps a better analogy is that we are on the path of a runaway freight train pulling radioactive materials and poison gas without brakes or a conductor. A balanced-budget amendment may be the only way to stop the train before it runs

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127 *See* Amadeo, *supra* note 11 (highlighting the increase in government spending over the years).

128 Ronald Reagan, President, Remarks to the Students and Faculty at St. John's University in New York, New York (Mar. 28, 1985), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN 1985, at 356, 358 (1988).

129 Amadeo, *supra* note 11; *see, e.g.*, *The Reagan Presidency*, RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, https://www.reaganlibrary.gov/reagans/reagan-administration/reagan-presidency (last visited Oct. 10, 2022) ("Ronald Reagan was elected President of the United States on November 4, 1980.").

130 Amadeo, *supra* note 11.

131 *Id.*; Anne Field, *What Caused the Great Recession? Understanding the Key Factors That Led to One of the Worst Economic Downturns in US History*, BUS. INSIDER, https://www.businessinsider.com/personal-finance/what-caused-the-great-recession (Aug. 8, 2022, 3:56 PM) (indicating that the Great Recession lasted from 2007 to 2009).

132 *See* Amadeo, *supra* note 11 (stating that the debt-to-GDP ratio was 107% in 2019); Proclamation No. 9994, 3 C.F.R. 56 (2021) (declaring a pandemic in March 2020).

133 Amadeo, *supra* note 11.

134 *Id.* (reporting debt-to-GDP ratios of 124% and 123% in 2021 and 2022, respectively).

135 *Id.*; Matt Phillips, *The Long Story of U.S. Debt, from 1790 to 2011, in 1 Little Chart*, ATLANTIC (Nov. 13, 2012), https://www.theatlantic.com/business/archive/2012/11/the-long-story-of-us-debt-from-1790-to-2011-in-1-little-chart/265185/.

off the track and takes out anyone and everything in its path.[136] The fiscal-restraint- or balanced-budget-amendment prong of the current resolution is, therefore, a terrific idea.

B. *An Amendment Defining Commerce and Interstate Commerce*

As previously stated, the terms "commerce" and "interstate commerce" have been twisted, manipulated, and expanded to the point where there is no practical limit to what Congress can do, and there is little that the Supreme Court will do to stop it.[137] Hence, the resolution should include an amendment that expressly defines these terms to mean what the Founders and even the Supreme Court in *Gibbons v. Ogden* defined them to mean: commerce is the sale or purchase of goods,[138] and interstate commerce is the sale or purchase of goods across state lines.[139] All commerce that is not across state lines, regardless of its "substantial economic effect," is not interstate commerce.[140] This definition excludes all agriculture and manufactured goods that never leave their states, and it allows businesses within the states to carry on their *intrastate* business

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[136] *See* Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1106–07 (noting that supporters of a balanced-budget amendment believe in balancing the federal budget and thereby limiting spending through "[a] constitutional precommitment to balanced budgets"); *Balanced Budget Amendment: Pros and Cons*, PETER G. PETERSON FOUND., https://www.pgpf.org/budget-basics/balanced-budget-amendment-pros-and-cons (last visited Oct. 10, 2022) (explaining that a balanced-budget amendment will make annual budget deficits unconstitutional); Theodore P. Seto, *Drafting a Federal Budget Amendment That Does What It Is Supposed to Do (and No More)*, 106 YALE L.J. 1449, 1458, 1460, 1463 (1997) (naming three goals of a balanced-budget amendment, which include avoiding national bankruptcy, being fair to future generations, and remaining economically prudent).

[137] *See* Jason J. Heinen, *How the Constitution Draws A "Line in the Sand" for the Extent of Federal Control over Non-Navigable Waterways*, 5 LIBERTY U. L. REV. 115, 118, 120, 122–23, 129, 137 (2010) (explaining the immense expansion of federal power under the Commerce Clause); *supra* notes 36–43 and accompanying text (discussing how the term "commerce" was defined conservatively at the time of the founding); *supra* notes 57–63 and accompanying text (discussing the change in Commerce Clause jurisprudence since the Supreme Court's decision in *Wickard v. Filburn*).

[138] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (defining commerce as buying and selling or the interchange of commodities); *see* Berger, *supra* note 35, at 702–03 (explaining that the Founders understood commerce to mean trade and the interchange of goods between states).

[139] *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 194–95 (noting that interstate commerce must involve traffic that crosses a state's boundary line); Berger, *supra* note 35, at 703–04 (explaining that the Commerce Clause regulates trade crossing state lines).

[140] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1448 (1987) (critiquing the Supreme Court's conflation of intrastate transactions with instrumentalities of interstate commerce); *Gibbons*, 22 U.S. (9 Wheat.) at 194–95 (explaining commerce which does not affect or extend to another state cannot be regulated by the federal government as interstate commerce). *But see* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding Congress can regulate an activity under its interstate Commerce Power "even if [the] activity be local and though it may not be regarded as commerce").

without federal-government interference or subjection to federal tariff or taxation hurdles.[141]

C. *An Amendment Eliminating the Power to Tax and Spend for the General Welfare*

The federal government should not have the power to blackmail state legislatures into imposing health and welfare conditions as conditions precedent to recapturing their citizens' tax dollars from the federal coffers. Redistributing revenues to States must be limited to those necessary for other enumerated powers.[142] These existing expansive powers include the power to do the following:

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
>
> To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
>
> To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
>
> To establish Post Offices and post Roads;
>
> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
>
> To constitute Tribunals inferior to the supreme Court;

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[141] *See* United States v. Lopez, 514 U.S. 549, 585–86, 591 (1994) (Thomas, J., concurring) (explaining that the Founders' understanding of commerce did not include agriculture and manufacturing); United States v. E.C. Knight Co., 156 U.S. 1, 13–15 (1895) (noting that the wholly intrastate production of goods is not regulable under the Commerce Clause); Kidd v. Pearson, 128 U.S. 1, 21 (1888) ("If it be held that the term ['commerce'] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future . . . . [t]he result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry."); United States v. Butler, 297 U.S. 1, 69 (1936) ("The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible. 'Congress is not empowered to tax for those purposes which are within the exclusive province of the States.'" (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 199)); Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 140 (1868) (holding that the Import-Export Clause only applies to foreign goods and not goods from other states, meaning States can impose uniform taxes on sales within their boundaries regardless of the state of origin of the goods and the merchant, and that Congress may only "interpose, by the exercise of [the Commerce Clause] power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another").

[142] *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6 n.3 (1988) (explaining that James Madison interpreted the Spending Clause "to authorize Congress to spend only for those purposes that fell within [certain other enumerated powers]").

> To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And
>
> To make all 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.[143]

Representative government exists in part to distribute funds for States to spend on health and welfare issues. People elect representatives and senators to ensure their representation in Congress.[144] Therefore, distribution of funds from the federal pocketbook should have no strings attached, and the resolution should include an amendment that eliminates the power to tax and spend for the general welfare. This leads to perhaps the most important amendment that, had the Founding Fathers' vision of republican government been honored, would have negated the need for a Convention in the first place.

D. *Repeal the Seventeenth Amendment!*

The United States is not a pure democracy—it is a republic.[145] This means that there is not one sovereign government but fifty-one: a federal

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[143] U.S. CONST. art. I, § 8, cls. 3–18.

[144] *See id.* art. I, §§ 1–2 (establishing that the U.S. House of Representatives is composed of members chosen from each state); *id.* amend. XVII (showing that the U.S. Senate is composed of members chosen from each state).

[145] *E.g.*, Todd Zywicki, *Repeal the 17th Amendment and Restore the Founders' Design*, J. FEDERALIST SOC'Y PRAC. GRPS., Sept. 2011, at 88, 88.

government that legislates and governs matters of common concern to the States and fifty sovereign States authorized to legislate and regulate the health and welfare of their citizens.[146] In this vein, the Tenth Amendment reserves to the States all powers not delegated by the Constitution to the federal government.[147] The Founders knew what would happen if individual states were engulfed into the federal government collective: the federal government would assert its oversized power resulting from a larger population over smaller, less populous states.[148] To prevent this engulfment, there are two houses in Congress: the House of Representatives, which provides for representation of the people by increasing the number of representatives in more populous states (a total of 435 people proportionally distributed based on population),[149] and a Senate, which consists of two senators from each state (currently a total of 100 people) who were originally supposed to be selected by their respective state legislatures.[150]

The Founders were brilliant. This scheme disincentivized senators from voting for measures that clashed with States' rights.[151] If a senator voted or threatened to vote against his State's instructions or interests, his State's legislature, while lacking the ability to immediately recall and

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[146] *See* Alden v. Maine, 527 U.S. 706, 714–15 (1999) (explaining that the Founders designed the American system of government to retain State sovereignty); THE FEDERALIST NO. 17, *supra* note 43, at 80–81 (Alexander Hamilton) (distinguishing between powers allotted to the national government for common concerns and powers allotted to the States for local concerns); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 205 (1824) (stating that States have the power to provide for citizens' health); Stone v. Mississippi, 101 U.S. 814, 817–18 (1879) (stating that a State's police power includes the power to protect public health and morals).

[147] U.S. CONST. amend. X.

[148] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 511–12 (1997) (explaining that the Founders understood the States' need for protection from federal encroachment); THE FEDERALIST NO. 10, *supra* note 43, at 45 (James Madison) (describing that factions exist, so successful government must prevent the majority from oppressing the minority).

[149] U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2 (explaining that representation in the House of Representatives is based on population, so more populous states have more representatives); *House of Representatives*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/House_of_Representatives_vrd.htm (last visited July 16, 2022) (stating that there are 435 voting members of the House of Representatives).

[150] U.S. CONST. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . ."), *amended by* U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . ."); *Senators*, U.S. SENATE, https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm (last visited July 16, 2022) (stating that there are currently 100 senators in the Senate).

[151] *See* Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 172–73 (1997) (explaining the checks on senators, like forced resignations and refusal to reelect, that discouraged voting against state interests).

replace him, could refuse to reelect him, and some senators chose to resign instead.[152]

The Seventeenth Amendment changed this provision by stripping state legislatures of the ability to appoint, instruct, and refuse to reelect senators: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote."[153] Hence, after the ratification of the Seventeenth Amendment, senators were elected in the same way as representatives, which made it impossible for state legislatures to not reelect senators when they voted for legislative enactments contrary to States' instructions or interests.[154] To make matters worse, senators serve six-year terms, so the people are stuck with senators three times longer than representatives and two years longer than the president.[155]

The original purpose of the Senate was to give the States veto power over laws that encroached on States' rights with the specters of non-reelection and forced resignation hanging over senators' heads when they considered voting against their States' interests.[156] This balance of power was eliminated by the Seventeenth Amendment and must be restored if we are to have any hope of scaling back federal powers. Repealing the Seventeenth Amendment will restore our republic and diminish the threat of "tyranny of the majority."[157]

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[152] *See id.* (explaining that States could control wayward senators by refusing to reelect them or forcing their resignations); Bybee, *supra* note 148, at 519, 526–27, 530 (describing how States could influence senators to follow instructions with the pressure of resignation or refusal to reelect).

[153] U.S. CONST. amend. XVII.

[154] *See* Bybee, *supra* note 148, at 535–36, 557 (explaining that state legislatures lost considerable control over senators on the passage of the Seventeenth Amendment); Zywicki, *supra* note 151, at 175 (stating that senators were not accountable to state legislatures after the passage of the Seventeenth Amendment); U.S. CONST. art. I, § 2, cl. 1 (noting that state representatives are elected by the people of the state).

[155] U.S. CONST. amend. XVII (stating that senators' terms last six years); *see id.* art. I, § 2, cl. 1 (stating that Representatives in the House serve two-year terms); *id.* art. II, § 1, cl. 1 (stating that presidents' terms last four years).

[156] *See* THE FEDERALIST NO. 62, *supra* note 43, at 320 (James Madison) (stating that the purpose of the state selection of senators was to secure state power and protect the federal system by providing a check on federal power); *see also* Zywicki, *supra* note 151, at 172–73 (explaining that the Senate was designed to give States a voice in the federal government and that States could protect their rights through the instruction of senators and the looming threats of forced resignation or refusal to reelect); Bybee, *supra* note 148, at 516 (explaining that the Senate gave States a negative veto to protect against encroachment of the federal government).

[157] *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 239–41 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. Chi. Press 2000) (1992) (1835) (using the phrase "tyranny of the majority" to explain how the will of the majority can oppress the minority).

E. *Congress Should Have the Same Power to Check the Court as the Court Has to Check Congress and the President Has to Check Congress*

The first impact of *Marbury v. Madison*, negating an unconstitutional exercise of power by Congress,[158] was valid and necessary. However, the final impact, giving the Court the final say on the constitutionality of legislative and executive powers,[159] was the catalyst for many of the problems we face with an encroaching federal government. Once the Court deems a law unconstitutional, the ability to scale back such decisions is very limited.[160] While Congress may enact legislation in response to the Court's decisions on statutory interpretation, reversing constitutional decisions requires either a constitutional amendment or a new Supreme Court ruling.[161] When a constitutional amendment is necessary, the Court's decision is final because Congress's exercise of its Article V amendment authority often fails.[162] Most concerning is the fact that Supreme Court Justices are appointed for as long as they choose to remain on the Court.[163] The people cannot vote them out of office.[164] Congress may impeach them, but no Supreme Court Justice has ever been removed from

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[158] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 176–77, 180 (1803).

[159] *Id.* at 166, 177–78, 180 (claiming that the essence of the Court's duty is to resolve conflicts between laws and the Constitution); *see* John DiPippa, Marbury v. Madison*: A Sovereign People Governed by Law*, ARK. LAW., Summer 2003, at 8–9 (explaining that *Marbury v. Madison* gave the judiciary the final say on the constitutionality of executive powers and legislative actions).

[160] *See* Jeffrey S. Sutton, *The Role of History in Judging Disputes About the Meaning of the Constitution*, 41 TEX. TECH L. REV. 1173, 1177–79 (2009) (explaining that the Supreme Court's constitutional decisions are the most difficult to change); Michael Paisner, Note, Boerne *Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 539–41 (2005) (describing Congress's intention to correct the Court's constitutional decision in *Employment Division v. Smith* by passing RFRA and the Court's subsequent use of its power to decide constitutional issues by striking down RFRA in *City of Boerne v. Flores*).

[161] *The Court and Constitutional Interpretation*, SUP. CT. U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited July 21, 2022); *see* Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1099 (1993) (noting the ease with which Congress enacted statutes overturning "sixteen Supreme Court decisions interpreting civil rights statutes").

[162] *See* Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 427–29 (1983) (explaining that Congress's proposed amendments rarely receive sufficient votes to be sent to the States).

[163] *See* U.S. CONST. art. III, § 1 (stating that Supreme Court Justices serve during good behavior); Abrams, *supra* note 7, at 75 (noting that "good behavior" describes a "life tenure subject to impeachment").

[164] *See* U.S. CONST. art. III, § 1 (explaining that Supreme Court Justices serve during good behavior); *id.* art. II, § 2, cl. 2 (providing for presidential appointment of Supreme Court Justices); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 809 (2006) ("[T]he only democratic control over the Supreme Court beyond the selection and removal of its members is the very remote possibility that its decisions will be overturned by constitutional amendment.").

the bench via the impeachment process,[165] although Abe Fortas resigned in 1969 over the threat of impeachment.[166]

The Convention should include in its mandate an amendment that empowers Congress to reverse Supreme Court decisions with a super-majority vote of both houses, such vote being the final word on whatever issue is addressed by the Court's opinion and resulting vote. This will restore the balance of power contemplated by the Founders. Each branch will have the ability to check the others, and the final word will be given by representatives elected by the people and not appointed for life. Moreover, this amendment should address the Court's power to determine whether an emergency exists justifying emergency spending that results in a deficit. Only Congress should have the authority to define "emergency" and set budgets for federal spending.

F. *Term Limits*

Our Founding Fathers envisioned a government composed of "citizen legislators" who serve their country for a time after building successful careers and then return to the private sector to live under the laws they made while serving.[167] As Benjamin Franklin put it, "In free governments, the rulers are the servants, and the people their superiors . . . . For the

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[165] *See* J. Stephen Clark, *Senators Can't Be Choosers: Moratoriums on Supreme Court Nominations and the Separation of Powers*, 106 KY. L.J. 337, 362 (2017) (explaining that the Founders understood the impeachment clauses in the Constitution to apply to Supreme Court Justices as well as the president); THE FEDERALIST NO. 79, *supra* note 43, at 409–10 (Alexander Hamilton) (stating that the House and Senate's powers of impeachment apply to Supreme Court Justices); Calabresi & Lindgren, *supra* note 164, at 810 ("In 217 years of American constitutional history, not a single Justice has ever been successfully impeached and removed from office by the Senate.").

[166] Elizabeth Nix, *Has a U.S. Supreme Court Justice Ever Been Impeached?*, HISTORY, https://www.history.com/news/has-a-u-s-supreme-court-justice-ever-been-impeached (Apr. 7, 2022).

[167] *See* Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 630–31 (1996) (describing the idea of a citizen legislator as an ordinary citizen who leaves the private sector for a few years to serve in Congress before returning to his ordinary life); Bybee, *supra* note 148, at 532–34 (describing various Founders' statements that senators should serve for limited durations); Paul Jacob, *From the Voters with Care*, *in* THE POLITICS AND LAW OF TERM LIMITS 27, 34–35 (Edward H. Crane & Roger Pilon eds., 1994) (identifying the wishes of various Founders, including Thomas Jefferson and James Madison, for those holding public office to be subject to term limits, making them citizen legislators).

former, therefore, to return among the latter, was not to *degrade*, but to *promote*, them."[168] We are far removed from this ideal.[169]

Consider three of the most prominent politicians in the United States today. Most of President Joe Biden's private-sector experience consists of his time practicing law after graduating from law school in 1968.[170] He was elected to the Senate in 1972.[171] He served in the Senate for thirty-six consecutive years until he became vice president to President Barack Obama in 2009.[172] He served in that capacity through January 2017.[173] He became president in 2021.[174] Thus, Biden has been an elected politician for almost forty-six of his fifty-four years following law school graduation.[175] Moreover, Biden worked as a public defender following law school.[176] He has been a public servant—totally dependent on government largesse—for the majority of his career.[177] President Biden was born November 20, 1942, and is eighty years old at the time of publication.[178]

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[168] Statement of Benjamin Franklin, Debates in the Federal Convention (July 26, 1787), *in* 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 368, 369 (Jonathan Elliot ed., Philadelphia 1891) (emphasis added).

[169] *See* Bybee, *supra* note 148, at 534–35 (explaining that there was high turnover in the early Senate because senators did not consider political office as a career).

[170] Brian Duignan, *Joe Biden*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Joe-Biden (July 21, 2022) (noting Biden practiced law after graduating from law school in 1968 and began serving in politics in 1970).

[171] *Id.*

[172] *Joe Biden*, BIOGRAPHY, https://www.biography.com/us-president/joe-biden (May 3, 2021) (explaining that Biden's Senate career ended in 2009 when he became vice president); *Longest-Serving Senators*, U.S. SENATE (Aug. 25, 2022), https://www.senate.gov/senators/longest_serving_senators.htm (showing Joe Biden served over thirty-six consecutive years in the Senate, beginning in January 1973 and ending in January 2009).

[173] *Presidents, Vice Presidents, & Coinciding Sessions of Congress*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, https://history.house.gov/Institution/Presidents-Coinciding/Presidents-Coinciding/ (last visited Aug. 18, 2022).

[174] Duignan, *supra* note 170.

[175] *See Joe Biden*, BALLOTPEDIA, https://ballotpedia.org/Joe_Biden (last visited Aug. 14, 2022) (illustrating that Biden graduated law school fifty-four years ago and has served as an elected politician for nearly forty-six of those years).

[176] Steven Levingston, *Joe Biden: Life Before the Presidency*, MILLER CTR., https://millercenter.org/joe-biden-life-presidency (last visited July 24, 2022).

[177] *See id.* (explaining that Biden created the Biden Foundation and the Biden Cancer Initiative after leaving the Vice Presidency in 2017 before suspending operations in 2019 to run for president); Henry J. Gomez, *Joe Biden's Time as a Public Defender Was a Brief Line on His Resume. Now It's a Virtue Signal for His Campaign*, BUZZFEED NEWS (July 25, 2019, 9:29 AM), https://www.buzzfeednews.com/article/henrygomez/joe-biden-public-defender (explaining that Biden started work as a public defender January 1, 1969); JULES WITCOVER, JOE BIDEN: A LIFE OF TRIAL AND REDEMPTION 51–56 (2019) (explaining the work Biden did before being elected to the Senate).

[178] Levingston, *supra* note 176.

Nancy Pelosi is a U.S. Representative from California.[179] She is also Speaker of the House of Representatives.[180] Speaker Pelosi graduated with an undergraduate degree from Trinity College in 1962, and she has never held a job in the private sector.[181] She was involved in California politics for years before her run for Congress in 1987, the year she was first elected.[182] She has served in Congress continuously since 1987, going on eighteen terms, or thirty-five years, so far.[183] Speaker Pelosi was born on March 26, 1940, and is eighty-two years old at the time of publication.[184]

Mitch McConnell is a U.S. Senator from Kentucky.[185] He has made a career of public service in various capacities: intern for Senator John Sherman Cooper on Capitol Hill, chief legislative assistant to Senator Marlow Cook, Deputy Assistant Attorney General to President Gerald Ford, and judge-executive of Jefferson County, Kentucky, between 1978 and 1985, when he began his Senate term.[186] He has served as senator for thirty-seven consecutive years.[187] He has been Senate Majority Leader and has continuously served as Republican Leader of the Senate since

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[179] *Nancy Pelosi*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Nancy-Pelosi (Aug. 2, 2022); *Full Biography*, CONGRESSWOMAN NANCY PELOSI, https://pelosi.house.gov/biography-0 (last visited Aug. 13, 2022).

[180] ENCYC. BRITANNICA, *supra* note 179; CONGRESSWOMAN NANCY PELOSI, *supra* note 179.

[181] *See* ENCYC. BRITANNICA, *supra* note 179 (stating that Nancy Pelosi graduated from Trinity College in 1962); Molly Ball, *Nancy Pelosi Doesn't Care What You Think of Her. And She Isn't Going Anywhere*, TIME (Sept. 17, 2018), https://time.com/magazine/us/5388333/september-17th-2018-vol-192-no-11-u-s/ (explaining that Pelosi was a stay-at-home mom before getting involved in politics and eventually running for office in 1987); *Nancy Pelosi: How She Rose to the Top – and Stayed There*, BBC (Aug. 2, 2022), https://www.bbc.com/news/world-us-canada-55518870 (mentioning that Pelosi became involved in politics beginning in 1976); *Nancy Pelosi*, BALLOTPEDIA, https://ballotpedia.org/Nancy_Pelosi (last visited Aug. 13, 2022) (noting Pelosi's years volunteering with the Democratic Party before being elected in a special election in 1987).

[182] *See* Ball, *supra* note 181 (noting Pelosi became involved in politics after receiving a call from Joseph Alioto in 1975); BBC, *supra* note 181 (explaining that Pelosi comes from a political family and first became involved in politics in 1976); BALLOTPEDIA, *supra* note 181 (stating that she was the chair of the California State Democratic Party from 1981–1983 and the finance chairman of the Democratic Senatorial Campaign Committee before being elected to the House in 1987).

[183] Patrizia Rizzo, *How Long Has Nancy Pelosi Been in Office?*, U.S. SUN, https://www.the-sun.com/news/2107627/house-speaker-nancy-pelosi-government-career-california/ (Jan. 26, 2022, 11:14 AM); *Representative Nancy Pelosi*, CONGRESS.GOV, https://www.congress.gov/member/nancy- pelosi/P000197?q=%7B%22sponsorship%22%3A%22sponsored%22%7D (last visited Aug. 18, 2022).

[184] ENCYC. BRITANNICA, *supra* note 179.

[185] *Mitch McConnell*, BALLOTPEDIA, https://ballotpedia.org/Mitch_McConnell (last visited Aug. 12, 2022).

[186] *Biography*, U.S. SENATOR MITCH MCCONNELL, https://www.mcconnell.senate.gov/public/index.cfm/biography (last visited July 11, 2022).

[187] *Longest-Serving Senators*, U.S. SENATE, https://www.senate.gov/senators/longest_serving_senators.htm (Aug. 25, 2022).

2007.[188] Senator McConnell was born on February 20, 1942, and is eighty years old at the time of publication.[189]

The lengths of service for the above seem extreme, especially considering that it is highly unlikely any of these people will ever return to work in the private sector given that they are already octogenarians.[190] Yet such extreme lengths of service are not the exception for modern politicians but the rule. Consider the top five lengths of service for Senators:

1. Robert C. Byrd (D-WV) 51 years, 5 months, 26 days
2. Daniel K. Inouye (D-HI) 49 years, 11 months, 15 days
3. Strom Thurmond (D-SC) 47 years, 5 months, 8 days
4. Patrick J. Leahy (D-VT) 47 years, 7 months, 22 days
5. Edward M. Kennedy (D-MA) 46 years, 9 months, 19 days[191]

The U.S. House of Representatives is similar:

1. John Dingell, Jr. (D-MI) 59.06 years
2. Jamie L. Whitten (D-MS) 53.17 years
3. John Conyers, Jr. (D-MI) 52.92 years
4. Carl Vinson (D-GA) 50.17 years
5. Emanuel Celler (D-NY) 49.84 years[192]

The term "career politician" seems more appropriate than "citizen legislator."

Opponents of term limits argue that the more seniority a representative or senator has, the more advantages he has in negotiating legislation to benefit his constituents.[193] They also argue that the best way to work up to a leadership position is through seniority. The more

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[188] *See* Chelsey Parrott-Sheffer, *Mitch McConnell*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Mitch-McConnell (Sept. 1, 2022) (stating that McConnell has served consecutively as Republican majority or minority leader since 2007); *Complete List of Majority and Minority Leaders*, U.S. SENATE, https://www.senate.gov/senators/majority-minority-leaders.htm (last visited Aug. 23, 2022) (listing McConnell as majority or minority leader from the 110th Congress through the 117th Congress).

[189] Parrot-Sheffer, *supra* note 188.

[190] *See generally* Roxanne Roberts, *This Senate Is the Oldest in American History. Should We Do Anything About It?*, WASH. POST (June 2, 2021, 6:00 AM), https://www.washingtonpost.com/lifestyle/2021/06/02/senate-age-term-limits (discussing the advanced ages of many senators).

[191] U.S. SENATE, *supra* note 187. Senator Leahy is the only one still serving. *Id.*

[192] *Members with 40 Years or More House Service*, U.S. HOUSE REPRESENTATIVES: HIST., ART & ARCHIVES, https://history.house.gov/Institution/Seniority/40-Years/ (Mar. 21, 2022).

[193] *See, e.g.*, ORRIN HATCH, CONGRESSIONAL TERM LIMITS, S. REP. NO. 104-158, at 7–11, 20–21, 23 (1995) (documenting statements from Senators Hatch, Biden, and Leahy opposing or expressing serious concern over a term-limit amendment to the Constitution because it would destroy the seniority system which allows states, especially small ones, to benefit from the advantages of senior Congressmen, including power, influence, and track record).

seniority one has, the more leadership roles one earns.[194] The more leadership roles a person has, the more he can impact legislation.[195] Again, longer service means better deals for constituents.[196]

However, with term limits, such roles would likely go to representatives and senators with more qualifications and thus be based on merit—not service length.[197] Smarter and more capable people would fill leadership roles instead of those more entrenched in a system that rewards corruption and abuse.[198] More importantly, term limits are needed to remind legislators of the Founding Fathers' belief in the concept

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[194] *See id.* at 10 (documenting Senator Hatch's statement that the seniority system "provid[es] a clear basis for leadership selection"); James K. Pollock, Jr., *Seniority Rule in Congress*, 222 N. AM. REV. 235, 235–36 (1926) (noting that both parties generally make important committee assignments based on seniority); Garrett, *supra* note 167, at 662–64 (explaining that the seniority system is entrenched in both houses of Congress as "the over-riding consideration in the appointment of committees and congressional leaders").

[195] *See* Rebecca S. Natow, *The Importance of Congressional Leadership for Higher Education Policy*, ROCKEFELLER INST. GOV'T (Jan. 4, 2021), https://rockinst.org/blog/the-importance-of-congressional-leadership-for-higher-education-policy (discussing the powers and importance of congressional leadership in policy decisions); *cf.* Christopher R. Berry & Anthony Fowler, *Cardinals or Clerics? Congressional Committees and the Distribution of Pork*, 60 AM. J. POL. SCI. 692, 693, 705 (2016) (finding that chairs and ranking members of congressional appropriation committees secure more money for their constituencies than non-leadership members).

[196] *See* Natow, *supra* note 195 (noting that congressional leaders carry great influence in the Senate); Casey Burgat, *Five Reasons to Oppose Congressional Term Limits*, BROOKINGS (Jan. 18, 2018), https://www.brookings.edu/blog/fixgov/2018/01/18/five-reasons-to-oppose-congressional-term-limits/ (arguing that constituents lose the expertise and experience of their congressmen if term limits are imposed).

[197] *Frequently Asked Questions*, Answer to *Will Congressional Term Limits Hurt My State?*, U.S. TERM LIMITS, https://www.termlimits.com/frequently-asked-questions (last visited Aug. 8, 2022); *see* DAN GREENBERG, HERITAGE FOUND., BACKGROUNDER NO. 994, TERM LIMITS: THE ONLY WAY TO CLEAN UP CONGRESS 9–10 (1994) (noting that term limits would make leadership positions merit based rather than seniority based).

[198] *See* GREENBERG, *supra* note 197 (noting that term limits would cause leadership positions to be assigned by merit and provide less opportunity for abuse of power). While corruption may not be overtly seen in Congress, there are many indicators of corrupt practices. *See, e.g.*, Alan J. Ziobrowski et al., *Abnormal Returns from the Common Stock Investments of the U.S. Senate*, 39 J. FIN. & QUANTITATIVE ANALYSIS 661, 675 (2004) (finding that senators outperform the stock market by large margins); Lynn Stuart Parramore, *Alexandria Ocasio-Cortez Is Right About Corruption in Congress*, NBC NEWS (Mar. 4, 2019, 9:02 AM), https://www.nbcnews.com/think/opinion/alexandria-ocasio-cortez-right-about-corruption-congress-ncna975906 (reporting that Senators outperform Warren Buffett in their investments); Jon Thurber, *Bobby Baker, Protege of Lyndon Johnson Felled by Influence-Peddling Scandal, Dies at 89*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/local/obituaries/bobby-baker-protege-of-lyndon-johnson-felled-by-influence-peddling-scandal-dies-at-89/2017/11/17/ffb7ce04-cc06-11e7-b0cf-7689a9f2d84e_story.html (recounting (1) how a staffer for Senate leadership, who later became then-Senator Lyndon Johnson's aide, would take advantage of some legislators' vices, such as cash or alcohol, in brokering agreements for pet legislative projects, (2) how senators would accept gifts from patrons who had "special axes to grind," and (3) how senators would use their positions to gain loans or credit they probably could not otherwise obtain).

of citizen legislators: "[W]hen politicians know they must return to ordinary society and live under the laws passed while they were in government, at least some of them will think more carefully about the long-term effects of the programs they support."[199]

Consider just a few of the laws Congress has passed that representatives and senators have been (and in some cases still are) exempt from:

- In 1938, when the Fair Labor Standards Act established the minimum wage, the forty-hour workweek, and time and a half for overtime, Congress was exempted.[200] As a result, for decades, congressional employees were left without the protections afforded to Americans working in private industry.[201]
- Congress exempted itself from compliance with the Civil Rights Act of 1964, which outlawed discrimination based on "race, color, religion, sex or national origin."[202]
- Congress doubled down on discrimination exemption by exempting itself from the Civil Rights Act of 1991.[203]
- At least in application, Congress exempted itself from some provisions of the Affordable Care Act.[204]

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[199] Lawrence W. Reed, *Why Term Limits?*, FOUND. ECON. EDUC. (May 1, 2001), https://fee.org/articles/why-term-limits/ (summarizing Benjamin Franklin's perspective on the citizen legislator); *see supra* note 167 and accompanying text; *see also, e.g.*, Statement of George Mason, Debates in the Federal Convention (July 26, 1787), *in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, *supra* note 168, at 368, 368–69 (stating that government officials ought to return to citizen life "in order that they may feel and respect those rights and interests which are again to be personally valuable to them" while proposing a singular, seven-year term limit on the Presidency).

[200] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 3, 6–7, 52 Stat. 1060, 1060, 1062–63 (current version at 29 U.S.C. §§ 203, 206–207) (excluding originally "the United States or any State or political subdivision of a State" from the definition of "employer").

[201] *See* Congressional Accountability Act of 1995, Pub. L. No. 104-1, §§ 102(a)(1), 203(a)(1), 109 Stat. 3, 5, 10 (current version at 2 U.S.C. §§ 1301(a)(1), 1313(a)(1)) (making the Fair Labor Standards Act of 1938 applicable to the legislative branch of the Federal Government more than fifty years after its original passage).

[202] Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 703(a), 78 Stat. 241, 253–55 (codified as amended in 42 U.S.C. §§ 2000e(b), 2000e-2(a)) (excluding branches of the United States government from its definition of "employer" under the Act).

[203] Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 101(c), 102, 105 Stat. 1071, 1072–73 (codified as amended at 42 U.S.C. §§ 1981(c),1981a(b)(1)) (exempting government entities from liability for punitive damages in cases of intentional employment discrimination).

[204] *See* Michael F. Cannon, *Congress Is Getting a Special Exemption from Obamacare—and No, It's Not Legal*, FORBES (Apr. 15, 2016, 12:26 PM), https://www.forbes.com/sites/michaelcannon/2016/04/15/congress-is-getting-a-special-exemption-from-obamacare-and-no-its-not-legal/?sh=514fe3377823 (alleging that federal administrative workers gave Congress an exemption from ObamaCare); 42 U.S.C.

- Finally, while a person would ordinarily face prison time for violating the Security and Exchange Commission's rules against insider trading,[205] members of Congress are mostly free to buy and sell stocks based on their knowledge that laws will be passed that increase or decrease stock prices.[206]

Thus, the concern of some Founding Fathers that professional politicians would remain in office as long as they profited from their public service and never return to the private sector where they would be subject to their own laws is valid.[207] The list of politicians who entered office as middle-class Americans and left office worth tens of millions of dollars is too numerous to exhaustively list here.[208] The only way to reset our governing

§ 18032(d)(3)(D) (stating that members of Congress and congressional staff are only eligible for plans created under the Act); Gregory Korte, *Why Congress Is (or Isn't) Exempt from Obamacare*, USA TODAY, https://www.usatoday.com/story/news/politics/2013/09/27/is-congress-exempt-from-obamacare/2883635 (Sept. 27, 2013, 6:44 PM) (noting that congressional personnel have access to a subsidy that offsets the cost of purchasing health insurance under the Affordable Care Act).

[205] *See* 17 C.F.R. § 240.10b-5 to 240.10b5-1 (2021) (prohibiting insider trading); 15 U.S.C. § 78ff(a) (authorizing criminal penalties for natural persons up to $5,000,000 or twenty years in prison for violating securities laws); *Insider Trading*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/what-is-insider-trading/ (Jan. 22, 2022) (naming one of the penalties for insider trading as twenty years of imprisonment).

[206] *See* Rey Mashayekhi, *Blind Trusts, Inside Information, and the 'Mosaic Theory': Why Charging Members of Congress with Insider Trading is So Fraught*, FORTUNE (Apr. 23, 2020, 8:30 AM), https://fortune.com/2020/04/23/congress-senators-insider-trading-stocks-kelly-loeffler-richard-burr-stock-act-laws-blind-trusts-mosaic-theory/ (noting that the applicability of federal securities laws to Congress had been a "legal gray area" prior to the STOCK Act); Robert Anello, *How Senators May Have Avoided Insider Trading Charges*, FORBES (May 26, 2020, 9:28 PM), https://www.forbes.com/sites/insider/2020/05/26/how-senators-may-have-avoided-insider-trading-charges/?sh=d74bd827ba60 (noting that no member of Congress has ever been prosecuted under the STOCK Act); Danielle Caputo et al., *Part 2 – The STOCK Act: The Failed Effort to Stop Insider Trading in Congress*, CAMPAIGN LEGAL CTR. (Feb. 18, 2022), https://campaignlegal.org/update/part-2-stock-act-failed-effort-stop-insider-trading-congress (noting how the STOCK Act suffers from a lack of enforcement).

[207] *See* Bybee, *supra* note 148, at 532–34 (discussing the Founding Fathers' general support for regular rotation of legislators); *see also, e.g.*, Reed, *supra* note 199 (quoting Benjamin Franklin's opinion that a government official's return to "the people" constituted a promotion, not a degradation).

[208] *See, e.g.*, Sarah Rosier, *Changes in Net Worth of U.S. Senators and Representatives (Personal Gain Index)*, BALLOTPEDIA (July 24, 2014), https://ballotpedia.org/Changes_in_Net_Worth_of_U.S._Senators_and_Representatives_(Personal_Gain_Index) (calculating that freshmen members of the 112th Congress saw their net worth go up by an average of fifty percent over three years); Karl Evers-Hillstrom, *Majority of Lawmakers in 116th Congress Are Millionaires*, OPENSECRETS (Apr. 23, 2020, 9:14 AM), https://www.opensecrets.org/news/2020/04/majority-of-lawmakers-millionaires (noting that Representative Collin Peterson's net worth grew from $125,500 to $4.2 million, Representative Judy Chu's net worth grew from less than six figures to $7.1 million, Senator Roy Blunt's net worth grew from $602,000 to $10.7 million, and that more than half of all members of Congress are millionaires).

bodies to reflect the people's interests and not their own is to impose term limits on national office-holders. It is good enough for the president,[209] so why not Congress? The number of terms that is ideal is up for debate,[210] but the only body willing to consider this issue and put it before the people via a constitutional amendment would be a Convention. Suffice it to say, we cannot count on Congress to limit its ability to profit from decades of congressional service.

To summarize, resolutions of the States should expressly state *what* amendments the Convention will debate and consider and not permit the Convention to gut the checks and balances already contained within the Constitution. These amendments should be limited to:

1. *A balanced-budget amendment;*
2. *An amendment defining commerce and interstate commerce;*
3. *An amendment eliminating the power to tax and spend for the general welfare;*
4. *An amendment repealing the Seventeenth Amendment (the most important);*
5. *An amendment giving Congress power to check the Supreme Court via super-majority votes in both houses; and*
6. *An amendment setting term limits in both houses of Congress.*

VI. PROCEDURAL SAFEGUARDS ON THE CONVENTION—WAYS TO PRESERVE ITS INTEGRITY AND PREVENT CONGRESS FROM MEDDLING

Now that we have considered how to restrain the Convention to specific amendments and thereby prevent a runaway Convention, we must consider how to ensure that the purpose of the Convention—to rein in a runaway federal government—is preserved. To start, let us consider the pertinent part of Article V: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[211]

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[209] *See* U.S. CONST. amend. XXII, §1 (placing term limits on the office of the president); *see also* Gideon Maltz, *The Case for Presidential Term Limits*, 18 J. DEMOCRACY 128, 131 (2007) (discussing how an alternation of power avoids a monarchy and prevents a president from becoming dangerously powerful).

[210] *See, e.g.*, Mark P. Petracca, *In Defense of Congressional Term Limits*, 3 DIGEST: NAT'L ITALIAN AM. BAR ASS'N L.J. 75, 83–84 (1994–1995) (suggesting a two-term limit for the Senate and a four-term limit for the House of Representatives); Ashley Oravetz, Comment, *Congressional Term Limits: The Right Idea, the Wrong Numbers. A Proposal in Favor of Increased Term Limits for Congress*, 46 U. DAYTON L. REV. 55, 70 (2020) (suggesting a three-term limit for the Senate and a five-term limit for the House, although implicitly accepting the possibility of congressional victories via write-in campaigns); John David Rausch, Jr., *When a Popular Idea Meets Congress: The History of the Term Limit Debate in Congress*, 1 POL. BUREAUCRACY & JUST. 34, 34 (2009) (chronicling term-limit proposals by members of Congress over the years).

[211] U.S. CONST. art. V.

What is most curious about the Convention option in Article V is that it lacks direction for the resulting Convention; there are no procedural rules or even a mode of determining such rules.[212] Will the number of delegates sent to the Convention be proportionate to population? If so, we will have the same problem our Founders sought to prevent by implementing equal state representation in the Senate and election of the president via the Electoral College, which was and is essential to prevent "tyranny by majority."[213] What constitutes a quorum? Must all States' delegates be present for votes on amendments? May the Convention vote on proposed amendments without at least one delegate of each State present? What if some States include in their resolutions provisions that recall delegates if the Convention discusses amendments that even the bottomless "jurisdiction and power" provision does not cover? There is nothing in Article V to dissolve the Convention if the number of participating States drops below two-thirds of the States, so we could end up with proposed amendments that were not passed by a Convention representing two-thirds of the States.

All of these considerations, seriously considered, might not compel staunch supporters of the Convention movement to rethink their positions. However, there is one that should.

The national resolution and the several States' resulting resolutions are silent on all of the above procedural safeguards.[214] Hence, in the event the current resolutions are passed by two-thirds of the States, the plain

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[212] *Id.*

[213] While the phrase "tyranny by majority" appears to have never been used by the Founders in connection directly with the electoral college or equal representation in the Senate, the Founders' intention that the raw, democratic will of the populace be tempered with the representation of individual States is evident. *See, e.g.*, THE FEDERALIST NO. 39, *supra* note 43, at 197 (James Madison) (noting that the ratio of electoral college votes per state represents the States partially as equals and partly by population); THE FEDERALIST NO. 60, *supra* note 43, at 311 (Alexander Hamilton) (arguing that the varied modes of selection for the House of Representatives, the Senate, and the presidency hedge against government partiality since there is "little probability of a common interest"); Amanda Onion, *How the Great Compromise and the Electoral College Affects Politics Today*, HISTORY, https://www.history.com/news/how-the-great-compromise-affects-politics-today (Mar. 21, 2019) (describing how the Founders created the Senate to prevent the more populous states from dominating over less populous states); Debates in the Federal Convention (July 18, 1787), *in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, *supra* note 168, at 362, 365–67 (recording the discussions of various Framers during the Constitutional Convention who, while considering the mode for electing the President, were concerned that larger States would dominate over smaller ones if there was an election by the people).

[214] *See* CONVENTION STATES ACTIONS, *supra* note 13 (providing a national model resolution); *Model Article V Term Limits Convention Application*, U.S. TERM LIMITS, https://www.termlimits.com/model-article-v-term-limits-convention-application (last visited Aug. 4, 2022) (similar); *see also, e.g.*, H. 3205, 2021–2022 Gen. Assemb., 124th Sess. (S.C. 2022) (providing the text of the South Carolina convention petition); Legis. Res. 14, 107th Leg., 2d Session (W. Va. 2022) (providing the text of the West Virginia convention petition).

language of Article V seems to imply that Congress will set such parameters. Consider again the pertinent part: "The Congress . . . on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . ."[215] Hence, although two-thirds of the States apply to Congress for a Convention, it is Congress that calls "a Convention for proposing Amendments."[216] Consequently, Congress will set all procedures for the resulting Convention.[217]

If Congress considers the current bare-bones resolutions, Congress will have a mandate to:

- Determine whether delegates are proportional to population (similar to how congressional representatives are apportioned) or per state (such as senators, an equal number for eachregardless of population or size).
- Allow votes and debate on amendments without delegates from all states present.
- Determine what constitutes a quorum, which could result in debates and votes on amendments without input from all state delegates. (Assuming Congress would not dare consider a majority of a quorum, which could be less than the majority of all delegates, sufficient to pass a proposed amendment.)
- Permit the Convention to continue if States withdraw support to below two-thirds of States *after* Congress calls a Convention and it begins deliberations.
- Decide whether the Convention may consider issues not stated in the resolutions or define what the resolutions' provisions mean.

Although any involvement of Congress in the Convention process will anger Convention proponents given their motivations, namely, Congress's unwillingness to propose limiting amendments itself,[218] failure of the

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[215] U.S. CONST. art. V.

[216] *Id.*

[217] While this is a subject of some debate, Congress has historically interpreted calling a convention to encompass setting procedures. *See* THOMAS H. NEALE, CONG. RSCH. SERV., R42589, THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 19 (2016) (noting that Congress has considered bills that would set procedures for a convention). *But see Five Myths About an Article V Convention of States*, CONVENTION STATES ACTION (July 17, 2017), https://conventionofstates.com/news/five-myths-about-an-article-v-convention-of-states (claiming that certain basic procedures are established by historical precedent, but the delegates decide "the more detailed, parliamentary rules" at the convention).

[218] *See, e.g.*, Article V Patriot, *Rick Roberts: Term Limits Is the Only Way To Regain Control of the Federal Government*, CONVENTION STATES ACTION (Jan. 19, 2021), https://conventionofstates.com/news/rick-roberts-term-limits-is-the-only-way-to-regain-control-of-the-federal-government ("Congress will never vote to term limit itself. That's why . . . we need to call the first-ever Article V Convention of States."); *Frequently Asked Questions*, Answer to *Will Congress Ever Impose Term Limits on Itself?*, U.S. TERM LIMITS, https://

resolution to include these parameters will likely lead to Congress setting them.[219] Failure of the Convention to follow Congress's procedures could lead to judicial interference.[220] One motivation of Convention proponents for calling a Convention is concerns regarding judicial power,[221] believing that such interference will lead to devastating consequences including civil unrest of a kind not seen since the Boston Tea Party.

Imagine a Convention convened to rein in Congress which is itself reined in by Congress and the Supreme Court. The people will not be happy, to say the least.

The resolutions passed by the several States must include all the procedures enumerated above so Congress cannot interfere with the Convention's mission to rein in all branches of the federal government. Such procedural safeguards should include the following:

- The Convention must have equal participation and representation from all states. As with the Senate, each state shall have two delegates appointed by the State's legislature for a total of 100 delegates.
- Each resulting amendment must receive a majority vote of all delegates (no less than fifty-one) to pass. Only upon receiving a majority will an amendment be presented to Congress and then to the States for ratification.

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www.termlimits.com/frequently-asked-questions (last visited Aug. 8, 2022) (likening Congress passing term limits on itself to turkeys voting for Thanksgiving and noting that it is through Article V that States can get around this problem). Many of the amendments Congress proposed that the States have ratified explicitly expand Congressional authority. *See* U.S. CONST. amend. XIII, § 2 ("The Congress shall have power to . . . ."); *id.* amend. XIV, § 5 (same); *id.* amend. XV, § 2 (same); *id.* amend. XVI (same); *id.* amend. XVIII, § 2 (similar); *id.* amend. XIX (similar); *id.* amend. XXIII, § 2 (same); *id.* amend. XXIV, § 2 (same); *id.* amend. XXVI, § 2 (same). Looking further to the amendments Congress has proposed but that have not been ratified, only one can truly be characterized as limiting Congressional power—an 1861 proposition that would have prohibited future constitutional amendments from giving Congress the power to interfere with slavery in any state in which it was lawful. *See Intro.3.2 Proposed Amendments Not Ratified by the States*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/intro.3-2/ALDE_00000026 (last visited Oct. 11, 2022) (listing the amendments that were submitted to the States but never ratified).

[219] *See* NEALE, *supra* note 217, at 19 (noting that Congress has considered bills for convention procedures in the past).

[220] This would not be the first time that litigation ensued over constitutional amendment issues, underscoring concerns of judicial involvement. *See, e.g.*, Idaho v. Freeman, 529 F. Supp. 1107, 1116, 1121, 1123, 1146, 1152 (D. Idaho 1981) (holding that Idaho's attempt to rescind its ratification of the Equal Rights Amendment was justiciable and that Congress could not change the period for ratification of an amendment at a later time), *vacated as moot,* Nat'l Org. for Women, Inc. v. Idaho, 459 U.S. 809 (1982).

[221] *See The Government Follows a 3000-Page Constitution*, CONVENTION STATES ACTION (July 17, 2017), https://conventionofstates.com/news/the-government-follows-a-3000-page-constitution (expressing support for using a convention to "establish new limits on the Supreme Court"); Jeffrey Brown, *The Supreme Court Has Limits?*, CONVENTION STATES ACTION (Jan. 12, 2022), https://conventionofstates.com/news/the-supreme-court-has-limits (calling for a convention to provide a check on the Supreme Court's power).

- Each proposed amendment shall receive its own vote and be presented separately to Congress for presentation to the States for ratification.
- If a sufficient number of petitioning States recall their delegates to reduce the number of participating petitioning States to under two-thirds, the Convention shall cease deliberations and the Convention be dissolved.
- Delegates must vote "yea" or "nay" on all final amendment votes. They may not abstain. Any delegate that abstains from an amendment's final vote shall be immediately disqualified as a delegate and his or her State shall appoint a replacement forthwith. All Convention deliberations shall cease until said replacement is appointed and seated at the Convention.
- The Convention shall continue deliberations until it considers and votes on all amendments proposed by the resolution.
- The Convention may not consider amendments not expressly proposed by the resolution. Any delegate that proposes such amendments shall be immediately disqualified as a delegate and his or her State shall appoint a replacement forthwith. All Convention deliberations shall cease until said replacement is appointed and seated at the Convention.

CONCLUSION

America is at a crossroads. To this point in our history, we rebelled against the usurpations of King George III and the British Parliament, which included taxation without representation,[222] stripping us of our right to keep and bear arms,[223] and a litany of due process of law

[222] *See* THE DECLARATION OF INDEPENDENCE, para. 17 (U.S. 1776) (including "imposing Taxes on us without our consent" as grounds for declaring American independence from England); Resolutions of the Stamp Act Congress (Oct. 19, 1765), *in* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1775, at 313, 314 (William MacDonald ed., London, MacMillan & Co. 1899) (naming taxation without representation as a grievance held with Britain); Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 777–78 (2001) (noting how the Declaration of Independence was designed to prevent tyranny by the King through Parliament's legislation).

[223] For example, the Declaration on Taking Arms detailed the account of British soldiers killing many colonists in unprovoked attacks during their occupation of Concord. The British then deceived the people of the town by asking the townspeople to deposit their arms for a later return in order to quell the hostility. When the townspeople had done so, the British immediately forfeited all the weapons and detained every person in the town except for a few who managed to escape. This was one of many reasons the Second Continental Congress called for the taking of arms against Great Britain, a year before the Declaration of Independence. Declaration on Taking Arms, *reprinted in* 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 150–51, 154–55 (Worthington Chauncey Ford ed., 1775). *See generally* U.S. CONST. amend. II (protecting the right to keep and bear arms).

violations;[224] we sacrificed more than 600,000 American lives in the Civil War to extend the Bill of Rights to enslaved blacks;[225] we fought against fascism and tyranny in two world wars;[226] and we engaged in self-reflection of our faults and past sins on multiple occasions, culminating in constitutional amendments, statutory enactments, and Supreme Court decisions that extended the American dream to those not previously blessed with the bounty of this great nation.[227] Even with our flaws, mistakes, and sins, the foundational pillars that undergird our constitutional system are key to its survival. Our republican form of government, wherein each State regulates the health and welfare of its citizens and the federal government regulates those issues common to all

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[224] *See, e.g.*, THE DECLARATION OF INDEPENDENCE para. 15, 18, 19 (U.S. 1776) (listing mock trials for British soldiers, deprivation of trial by jury, and extradition to England for trial as causes for declaring the States independent from Great Britain); Larson, *supra* note 222 (noting how the Declaration of Independence was designed to prevent tyranny by the king through Parliament's legislation).

[225] Bob Zeller, *How Many Died in the American Civil War?*, HISTORY (Jan. 6, 2022), https://www.history.com/news/american-civil-war-deaths (estimating Civil War deaths at around 650,000 and 850,000); *see also* Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* 2 ABRAHAM LINCOLN: COMPLETE WORKS COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS 656, 657 (John G. Nicolay & John Hay eds., 1894) ("All knew that [slavery] was somehow the cause of the war."); U.S. CONST. amends. XIII–XV (abolishing slavery and protecting the rights of all Americans regardless of race); Jonathan Kieffer, Comment, *A Line in the Sand: Difficulties in Discerning the Limits of Congressional Power as Illustrated by the Religious Freedom Restoration Act*, 44 U. KAN. L. REV. 601, 610–11 (noting that these the Thirteenth, Fourteenth, and Fifteenth Amendments formed the Civil War Amendments).

[226] *The Great Crusade: World War I and the Legacy of the American Revolution*, AM. REVOLUTION INST., https://www.americanrevolutioninstitute.org/exhibition/the-great-crusade (last visited Aug. 6, 2022) ("The United States entered World War I to defend freedom and democracy against tyranny and oppression, inspired by the ideals of the American Revolution and the memory of the Revolutionary War."); Franklin Delano Roosevelt, Fireside Chat on the State of the War (July 28, 1943), *in* NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT 1932–1945, at 369, 369–71 (B.D. Zevin ed., 1946) (discussing America's fight against fascism and tyranny during World War II).

[227] *See generally* Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963), *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 217 (James Melvin Washington ed., 1986) (reflecting that African Americans were, at that time, still "on a lonely island of poverty in the midst of a vast ocean of material prosperity," but recognizing that the Constitution and the Declaration of Independence guaranteed all men "the unalienable rights of life, liberty and the pursuit of happiness"); U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV, §1 (ensuring the right to due process and equal protection of laws for all citizens); *id.* amend. XV (enabling all citizens to vote); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C. §§ 2000a–2000h-6) (enforcing the constitutional right to vote, empowering federal district courts "to provide injunctive relief against discrimination in public accommodations," and protecting constitutional rights in public education); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that "separate but equal" race-segregated public schools were "inherently unequal" and in violation of the Fourteenth Amendment).

States,[228] is key, as is separation of powers where each branch of government sticks to its duties and checks the others. The original model of the Constitution enshrined these pillars.[229] But, over time, Congress, the president, and the courts have chipped away at protections meant to limit federal power and jurisdiction and ensure local control of most matters, as well as prevent more populous states from dominating the less populous.[230]

While Article V of the Constitution provides for an amendment process to address these problems,[231] Congress is unwilling to propose amendments that limit its or other federal branches' control over the peoples' lives. We need a Convention of the States to consider:

1. *A balanced-budget amendment;*
2. *An amendment defining commerce and interstate commerce;*
3. *An amendment eliminating the power to tax and spend for the general welfare;*
4. *An amendment repealing the Seventeenth Amendment (the most important);*
5. *An amendment giving Congress power to check the Supreme Court via super-majority votes in both houses; and*
6. *An amendment setting term limits in both houses of Congress.*

Moreover, resolutions from all States calling for a Convention must include procedural safeguards to prevent Congress from interfering with the Convention's essential, constitutional duty. The alternatives are to (1) wait for Congress to propose limits to its power and authority, or (2) do nothing. Either is unacceptable if we hope to leave the American dream to our posterity.

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[228] *See* Kurt T. Lash, *The Inescapable Federalism of the Ninth Amendment*, 93 IOWA L. REV. 801, 827–28 (2008) (explaining how, under the Articles of Confederation, States retained power to govern their respective local affairs, and that when the Constitution was proposed, States were assured they would "retain a substantial degree of their sovereign independence"); THE FEDERALIST NO. 17, *supra* note 43, at 80–82 (Alexander Hamilton) (noting that the powers necessary for "[c]ommerce, finance, negotiation, and war" should be governed by the national government, whereas the "ordinary administration of criminal and civil justice" belongs to state governments). *See generally* U.S. CONST. art. I, § 8 (enumerating specific powers for the federal government that are of common concern to the States, such as the power to regulate commerce with foreign nations and the power to coin money); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Atl. Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914) (noting that States have the power "to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community").

[229] *See* U.S. CONST. art. I, § 1 (vesting all legislative power in Congress); *id.* art. II, § 1 (vesting all executive power in the President); *id.* art. III, § 1 (vesting all judicial power in the Supreme Court and other Federal courts); *supra* notes 22–23 and accompanying text.

[230] *See* discussion *supra* Parts I, V.D.

[231] U.S. CONST. art. V.

I'M NOT ADOPTED, I'M DONATED: THE UNEQUAL PROTECTION FOR FAMILIES WHO USE ARTIFICIAL REPRODUCTIVE TECHNOLOGIES

ABSTRACT

Artificial Reproductive Technology has rapidly grown into a multi-billion dollar industry since its first success story in the late 1900s. For the most part, the United States federal government has kept the industry at arm's length and allowed it to be self-governed. Gamete banks and fertility clinics that run the industry have mainly prioritized anonymity rights for donors and intended parents, leaving the produced children in the dark about their biological origins. Looking specifically at the Ninth Circuit, this has led to unequal protections between adopted and donated children regarding their legal right to access the information of their biological parents. Not knowing one's biological information can have many negative consequences, but specifically, it can put children at a medical disadvantage. The lack of awareness about one's own medical history can put donated children at risk of not being able to adequately prevent or diagnose genetic health conditions. This Note advocates that anonymity and access to medical information can simultaneously be protected. The rights of a child should not differ just because they were "bought" into the world through Artificial Reproductive Technologies.

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INTRODUCTION

> As reproductive technologies push the envelope of possibilities, they will create children—and mistakes—that demand restitution. . . . In the end, of course, the market will still win. We will continue to buy, sell, and modify our children, generating substantial profits in the process. But this market will not reign forever unfettered. Instead, the pulling and hauling of politics will create—must create—a regulatory framework in which the business of babies can proceed.[1]

At only age eighteen, a young boy named Tyler underwent heart surgery to treat "a rare aortic heart defect that could have killed him at any moment."[2] Tyler inherited his disease from his father, a sperm donor.[3] Luckily, Tyler's family decided to track down his biological father, and they learned about his paternal family health history before the disease caused a fatal health issue.[4] Tyler's biological father ("John") conceived twenty-four children through sperm donation, all of whom had a 50% chance of carrying the genetic disease.[5] John himself almost died at age 43 when his own aorta ruptured.[6] Tyler's mother, who was the recipient of John's sperm, questioned why she was never notified about John's condition and her son's high health risk that could prove fatal.[7] The answer was a simple one. Even if the genetic condition was known, neither Tyler's father nor the fertility clinic was legally required to update the recipient families about the newly discovered health risk.[8]

Tyler is one of many individuals produced through Artificial Reproductive Technology ("ART").[9] As with other fast-growing industries, U.S. law has not kept up to protect against the consequences that come

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[1] DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION, at xix (2006).

[2] Susan Donaldson James, *Sperm Donor's 24 Kids Never Told About Fatal Illness*, ABC NEWS (July 20, 2011, 11:01 AM), https://abcnews.go.com/Health/sperm-donors-24-children-told-fatal-illness-medical/story?id=14115344.

[3] *Id.*

[4] *See id.* (reporting that Tyler's paternal grandmother and uncles were also discovered to have the genetic disorder).

[5] *Id.*

[6] *Id.*

[7] *See id.* ("Tyler had a time bomb ticking in his chest . . . . It didn't occur to anyone to tell us.").

[8] *Id.*; *see* Vardit Ravitsky, *Conceived and Deceived: The Medical Interests of Donor-Conceived Individuals*, 42 HASTINGS CTR. REP. 17, 19 (2012), http://www.lecre.umontreal.ca/wp-content/uploads/2014/09/conceived-and-deceived_ravitsky_hcr__2012.pdf (noting that testing for all genetic conditions is impractical).

[9] James, *supra* note 2; *see* CTRS. FOR DISEASE CONTROL & PREVENTION, ART SUCCESS RATES (2022), https://www.cdc.gov/art/artdata/index.html (discussing how the use of ART "has more than doubled over the past decade").

with this ever-expanding technology.[10] This Note advocates for states to adopt laws designed to protect children produced through ART by providing them with access to their biological donor's medical history. States ought to adopt such laws in order to promote equality in the court systems for children in homes where one or both parents are not biologically related to them. This Note argues that regardless of whether a child is adopted or produced through ART, both should have the same level of access to the information of their biological parents.

Section I of this Note explains the background behind ART and the rising issues with it. It gives context as to (1) what ART is and how it is controlled, (2) why people choose it, (3) what issues surround it, and (4) why children of ART are disadvantaged by the current ART industry. Looking specifically at the Ninth Circuit,[11] Section II examines the current laws of the states, exhibits the divide between adopted children and ART children, and demonstrates how ART-produced children can be more limited in discovering the medical history of their biological parent based on which state they are born in. Finally, Section III discusses how a legal standard for ART-conceived children can be established to (1) preserve anonymity of the donor and (2) increase an ART child's ability to have access to their biological donor's medical history. These two factors can be met by following a combination of laws already in place in the Ninth Circuit.

I. ART VERSUS ADOPTION: THE STRUGGLE TO HAVE A CHILD

For an industry so large, it is shocking that there is currently no universally adopted definition of ART.[12] Sectors have been left to define their own version of what ART encompasses.[13] For the purposes of this Note, ART includes the treatments which involve the handling of sperm, ovum, or embryos with the intent of increasing the chances of reproduction.[14] Additionally, "gametes" shall mean both the reproductive sperm of males and the reproductive ovum (egg) of females.[15]

Before ART, the main option for infertile individuals to acquire a child was through adoption. For many couples, adoption was their last

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[10] Jillian Casey et al. eds., Annual Review Article, *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 83–84 (2016).

[11] Excluding the U.S. territories of Guam and Northern Mariana Islands.

[12] CTRS. FOR DISEASE CONTROL & PREVENTION, WHAT IS ASSISTED REPRODUCTIVE TECHNOLOGY (2019), https://www.cdc.gov/art/whatis.html (stating that various characterizations have been used for ART).

[13] *See id.* (discussing the CDC's method for defining ART).

[14] Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DEPAUL L. REV. 825, 833 (1999) (listing ART procedures including artificial insemination and in-vitro fertilization.).

[15] *Gamete*, CAMBRIDGE ENGLISH DICTIONARY (2022).

resource if all other methods of conceiving a biological child were exhausted.[16] Adoption took a large hit, however, when birth control became available to the public in 1960 and abortion became legal after the 1973 case of *Roe v. Wade*.[17] From 1970 to 1975, the number of unrelated adoptions (adopting parents that have no blood ties to the child) fell from more than 89,000 to 50,000.[18] Women who conceived, but didn't want to have an abortion, were more likely to keep the baby "in part because the ease of abortion meant that proceeding with an unwanted pregnancy had become a conscious, public choice."[19] There was a sense of obligation to care for the baby after the mother made the conscious decision to go to term rather than abort the child.[20] These factors caused adoption agencies to stop accepting applications requesting a specific type of child, and the waiting time became anywhere from three to five years.[21] As adoption availability decreased, however, reproductive technologies began to grow and become available to the public.[22] The first baby produced by in-vitro fertilization ("IVF") was born in 1978[23] and the ART industry has only grown since then.[24] The Centers for Disease Control and Prevention ("CDC") reported that, in the United States, 2.1% of all children born in 2019 were conceived through ART.[25] In just a forty-year period since the first IVF birth, it was estimated that over eight million children globally have been born as a result of reproductive technologies.[26]

The main difference between adoption and ART is the "product" being obtained.[27] ART only offers the *potential* of a child, while adoption involves children already in existence.[28] Additionally, ART is distinct from adoption as "[a]doption is a solution that solves the problem of a deserving

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[16] SPAR, *supra* note 1, at 160.

[17] *Id.* at 172–73; Roe v. Wade, 410 U.S. 113, 154 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. ___ (2022).

[18] SPAR, *supra* note 1, at 173.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* at 174; Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 405–06 (2004).

[23] Susan Scutti, *At Least 8 Million IVF Babies Born in 40 Years Since Historic First*, CNN (July 3, 2018, 6:04 AM), https://www.cnn.com/2018/07/03/health/worldwide-ivf-babies-born-study/index.html.

[24] *See* Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal, and Social Implications*, 4 LAWS 352, 354 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4572724/ (describing ART as a multi-billion-dollar industry).

[25] CTRS. FOR DISEASE CONTROL & PREVENTION, STATE-SPECIFIC ART SURVEILLANCE (2021), https://www.cdc.gov/art/state-specific-surveillance/index.html. The percentage from the CDC included all children born in the 50 states, District of Columbia, and Puerto Rico. *Id*.

[26] Scutti, *supra* note 23.

[27] SPAR, *supra* note 1, at 160.

[28] *Id.* at 160–61.

child in need of parents and a family, rather than the inverse of finding a child for a family."[29] ART does not involve the physical aspect of reproduction.[30] As artificial insemination and IVF have removed the physical requirement for producing a new life, they have opened the door for the use of donated gametes and even the buying of gestational (surrogacy) services.[31] Unfortunately, a majority of states are silent as to whether the transfer of gametes qualifies as an adoption or "a transfer of property interests."[32] This uncertainty of the law can leave both donors and prospective parents uncertain about the conclusiveness of their agreement.[33]

A. The Split Between Adoption and Contract Law

In an attempt to regulate the ever-growing market of ART, the Committee of the American Society for Reproductive Medicine ("ASRM") and the Practice Committed for the Society for Assisted Reproductive Technology ("SAR") created "guidelines" regarding gamete and embryo donations.[34] Additionally, the Food and Drug Administration ("FDA") required all establishments working with human reproductive tissue to obtain the medical history of donors and test for a limited number of infectious diseases *before* the donation can be acquired or used.[35] However, testing is limited and not all genetic conditions can be tested for.[36] In the case of Tyler, his donor parent had a very rare aortic heart disease, a genetic condition not covered under FDA screening requirements.[37] Even more limiting is the fact that the FDA only requires the records of donors to be retained for ten years after administration or donation.[38] In the

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[29] Lynne Marie Kohm, *What's My Place in This World? A Response to Professor Ellen Waldman's* What Do We Tell the Children?, 35 CAP. U. L. REV. 563, 565 (2006).

[30] Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 838 (2000).

[31] *Id.*

[32] Alexia M. Baiman, *Cryopreserved Embryos as America's Prospective Adoptees: Are Couples Truly "Adopting" or Merely Transferring Property Rights?*, 16 WM. & MARY J. WOMEN & L. 133, 134 (2009); *see also* Garrison, *supra* note 30, at 838–39 (stating there is a lack of legal guidance and arguing that the slow response to create legislation is partially due to how fast the "methods" of producing life have advanced).

[33] Baiman, *supra* note 32, at 134–35.

[34] Am. Soc'y for Reprod. Med., *Guidance Regarding Gamete and Embryo Donation*, 115 FERTILITY & STERILITY 1395, 1395–1410 (2021), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/practice-guidelines/for-non-members/recs_for_gamete_and_embryo_donation.pdf.

[35] U.S. FOOD & DRUG ADMIN., WHAT YOU SHOULD KNOW – REPRODUCTIVE TISSUE DONATION (2010), https://www.fda.gov/vaccines-blood-biologics/safety-availability-biologics/what-you-should-know-reproductive-tissue-donation.

[36] Ravitsky, *supra* note 8, at 19.

[37] James, *supra* note 2; U.S. FOOD & DRUG ADMIN., *supra* note 35.

[38] U.S. FOOD & DRUG ADMIN., DONOR ELIGIBILITY FINAL RULE AND GUIDANCE QUESTIONS AND ANSWERS (2018), https://www.fda.gov/vaccines-blood-biologics/tissue-tissue-products/donor-eligibility-final-rule-and-guidance-questions-and-answers.

context of an ART-conceived child seeking to obtain medical history, this is a very small window of opportunity.[39] Because of the limited requirements expected by the FDA, and because the "guidelines" provided by ASRM and SAR are only voluntary, gamete banks and fertility clinics are allowed to set their own standards, which vary greatly.[40] Without guidelines or state regulations, ART facilities are free to maximize the output of the donations and create a wide range of children conceived by one person.[41] One news story stated that a sperm donor produced upwards of 150 children.[42] Stories such as this have caused many to push for legal change surrounding ART banks and clinics.[43]

B. Lack of Communication

A recurring issue concerning ART banks and clinics is following up with donors to learn of medical issues arising after the donation.[44] Donors are typically young and may not demonstrate any symptoms of underlying conditions until later in life, after they have donated.[45] Sometimes, an ART-conceived child will discover they have a genetic condition before the donor parent does.[46] Even if the information of the child's condition is relayed back to the clinic or gamete bank, notifying the donor of the possible risk or preventing the donor from further reproduction can prove impossible if the records were destroyed.[47] This lack of ability to communicate between the parties can be dangerous to both donor and child.[48] The extent of potential consequences could be greater than

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[39] Ravitsky, *supra* note 8, at 19.

[40] *Id.*

[41] Aliya Shain, *A Veil of Anonymity: Preserving Anonymous Sperm Donation While Affording Children Access to Donor-Identifying Information*, 19 CUNY L. REV. 313, 316–17 (2016).

[42] Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES (Sept. 5, 2011) https://www.nytimes.com/2011/09/06/health/06donor.html?sq=sperm%20donor&st=cse&scp=1&pagewanted=all.

[43] Shain, *supra* note 41, at 318.

[44] *See, e.g.*, Ravitsky, *supra* note 8, at 20 (discussing the negative consequences that arise from the inability to follow up with a donor's evolving medical history).

[45] *Id.*

[46] *See id.* (discussing how a sperm bank was unable to contact donor after discovering he passed down a rare genetic condition to five children).

[47] *See id.* (discussing an incident where a family was deprived of the opportunity to have their children screened for colon cancer because donor records were destroyed).

[48] Barbara Pinto, *When Anonymous Egg Donors Have Genetic Diseases*, ABC NEWS (Mar. 28, 2008, 8:36 AM), http://abcnews.go.com/Health/story?id=4544449&page=1 (reporting that the children produced through the donated gametes of a woman who died of a rare cancer were unable to be found as the records were destroyed); *see generally* Denise Grady, *Sperm Donor Seen as Source of Disease in 5 Children*, N.Y. TIMES (May 19, 2006), https://www.nytimes.com/2006/05/19/health/sperm-donor-seen-as-source-of-disease-in-5-children.html (reporting that a sperm donor likely passed a genetic disease to five children).

anticipated, given that there is no federal limit on how many times an individual's gametes can be used to produce a child.[49] Even if records were to be kept for a longer period of time, the flow of medical information between the donor and donor-conceived child still has to overcome the heavily guarded right of anonymity.[50]

C. Why Donations Are Anonymous

About a century ago, the field of ART began to include sperm donation.[51] Anonymity was born from emotional struggles: a combination of infertility, the desire to start a family, and the grief that flowed from raising a child that the couple did not conceive together.[52] Men felt ashamed, and there was a desire to conceal their impotence and the fact that another man was needed in order for his wife to produce a child in the marriage.[53]

Today, the argument for anonymity no longer focuses on shame but rather a desire to protect the parties from undesirable contact.[54] For donors, anonymity reinforces the notion that sperm donors have no status and no obligations as a parent, and they are spared from being contacted by the produced children or the recipient family.[55] As the Northwest Cryobank argued, "'there is a human being on the other side of the gift who may have a partner, parents, job and children of his own' and uninvited contact 'could jeopardize these relationships and families.'"[56] This anonymity creates a transactional incentive with no responsibility.[57]

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[49] *See* Mroz, *supra* note 42 (reporting that the U.S. does not have a limit on how many children a sperm donor can father like some other countries do).

[50] Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 929 (2009).

[51] SUSAN LEWIS COOPER & ELLEN SARASOHN GLAZER, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL & ETHICAL CONSIDERATIONS 151, 154 (1998).

[52] *Id.* at 154–55, 342.

[53] *Id.*

[54] *Id.* at 342; *see* Shain, *supra* note 41, at 319 (discussing the anxiety sperm donors feel about offspring seeking a relationship).

[55] Shain, *supra* note 41, at 318; *see Woman Uses DNA Test, Finds Sperm Donor — and Pays a "Devastating" Price*, CBS NEWS (Jan. 31, 2019, 7:37 AM), https://www.cbsnews.com/news/woman-finds-sperm-donor-after-using-dna-test-raising-questions-about-donor-anonymity/ (reporting that a gamete bank sent a sperm recipient a cease and desist letter after she contacted an immediate relative of the anonymous donor that she found through a genetic testing website). *But see* Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN, https://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/index.html (reporting that a couple successfully sued for child support from the sperm donor because the parties engaged in a private contract without the assistance of a physician) (Jan. 24, 2014, 2:33 AM).

[56] *Woman Uses DNA Test, Finds Sperm Donor — and Pays a "Devastating" Price*, *supra* note 55.

[57] Shain, *supra* note 41, at 318.

It is argued that this anonymity is what promotes an adequate supply of gamete donations that is needed for the ART industry.[58]

Anonymity further protects individuals on the other side of the donation process. Anonymity helps shield the new legal parents from donors who might try to fight for custody of the donor-conceived child.[59] Even with waived parental rights, if the donor knows the recipient family and if their donation produced a child, there is a potential for a lawsuit, which is a consequence that recipient families would rather avoid.[60]

Finally, it is argued that anonymity helps foster better relationships between the child's legal family, especially if they are atypical.[61] Many couples would not consider asking an individual they know to help them in their goal of producing a child.[62] Anonymity is viewed as the easiest way to avoid "social and emotional complications" that could arise if the parties were acquainted with each other.[63] There is the fear and worry that the donor-conceived child will be confused or that the donor parent, if known to the child, might make the intended parent feel less like the real father/mother.[64] Today, parenting norms have drastically shifted.[65] While having a child was once desired predominantly by married heterosexual couples, ART has expanded the choice to same-sex, co-parents, transgender, and single-by-choice parents.[66] The traditional standard of having a mother and a father in the home is no longer the only desired option for a family. Some individuals would rather raise the child by themselves, or some may want their child raised by two mothers and no father.[67] ART has helped in the expansion of these choices. Gays, lesbians, transgenders, and even single mothers often use ART methods to start a family, and this can be frustrated if the child ends up finding the biological

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[58] *Id.* at 318–19.

[59] *Id.* at 320; *see* Erica Tempesta, *Lesbian Couple Open Up About Their Landmark Legal Battle with Gay Sperm Donor Who SUED Them for Custody of Their Youngest Daughter After He 'Changed His Mind' About Being a Dad*, DAILY MAIL (Aug. 25, 2021, 3:03 PM), https://www.dailymail.co.uk/femail/article-9926413/Lesbians-discuss-SUED-custody-gay-sperm-donor.html (reporting that a sperm donor, who was known to the intended parents—made visits before and after the child was born—and subsequently sued for custody of the child).

[60] *See* Dennis Hevesi, *Judge Rejects Sperm Donor's Claim for Custody*, N.Y. TIMES (Apr. 16, 1993), https://www.nytimes.com/1993/04/16/nyregion/judge-rejects-sperm-donor-s-claim-for-custody.html (reporting that a sperm donor, who relinquished his parental rights, sued the recipient couple for legal access to the child).

[61] Shain, *supra* note 41, at 322.

[62] COOPER & GLAZER, *supra* note 51, at 175.

[63] *Id.*

[64] *Id.* at 175–76.

[65] Garrison, *supra* note 30, at 839.

[66] *Id.*; MARY ANN MASON & TOM EKMAN, BABIES OF TECHNOLOGY: ASSISTED REPRODUCTION AND THE RIGHTS OF THE CHILD 160–62 (2017).

[67] Garrison, *supra* note 30, at 839.

parent.[68] The idea is that, in a way, a child knowing the donor parent increases the chances of the child viewing the donor parent as their father or mother, thereby demoting the legal family's parental status.[69] As familial and societal norms change, ART seems to bring with it many new legal issues that challenge traditional norms.[70] Specifically, the mental repercussions are also becoming an issue in the ART industry.

D. Psychological Issues

Today, most babies in the world are born naturally, without any invasive reproductive assistance.[71] Many of these children know that their existence, even if it was from a one-night stand, probably came about because their biological parents were intimate at some point; they know that they are meant to exist.[72] Children born from donated gametes will come to face the fact that one or both of their biological parents did not want them in their life.[73] Adopted children often struggle with feelings of rejection, and it is possible that donated children will struggle with these same emotions.[74] With donated children, typically one parent in the home *is* their biological parent, but since they have been "adopted" before birth, the temptation not to tell the child of their origin is tempting.[75] Donated children may also struggle with feelings of betrayal if they are told the truth of their heritage too late.[76] Assuming the child does learn about their origins, the knowledge that their beginning involved a "test tube" instead of a human relationship can further erode their sense of uniqueness and individuality.[77] As one author put it, "[h]er existence may feel like a *cosmic accident*, like she was not truly meant to exist. Thus, children born via embryo creation may have a more difficult time developing a sense of

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[68] Shain, *supra* note 41, at 322.

[69] *Id.* at 322–23.

[70] *See* Nara Schoenberg, *In a First for Illinois, Transgender Man Who Gave Birth Will Be Listed as the Father on his Baby's Birth Certificate*, CHI. TRIB. (Jan. 14, 2020, 11:20 AM), https://www.chicagotribune.com/lifestyles/ct-life-first-transgender-birth-certificate-tt-01132020-20200114-qfbbf3dvufhppid5shjru6l5xu-story.html (reporting that a transgender man, who conceived through ART—gave birth to a baby girl—and was allowed to be labelled as the father on the child's birth certificate).

[71] *See* CTRS. FOR DISEASE CONTROL & PREVENTION, STATE-SPECIFIC ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE (2021), https://www.cdc.gov/art/state-specific-surveillance/index.html (reporting that only 2.1% of infants born in the US were conceived using ART).

[72] COOPER & GLAZER, *supra* note 51, at 328.

[73] *Id.*

[74] *Id.*

[75] *See id.* at 329 (discussing the challenges in deciding whether to disclose the method of pregnancy).

[76] *See id.* (discussing the feelings of adoptees who learned about their adoption later in life).

[77] *Id.* at 328.

identity and a conviction that they have a place in the world."[78] The psychological issues of ART are great and often revolve around the conflicting rights between parent, donor, and child.

E. Rights of the Child

As the battle for parental rights rages on, what has happened to the rights of the child? In 1989, the U.N. *Convention on the Rights of the Child* argued that a child has the right to know their biological parents as it is a significant element in one's identity.[79] Though this principle has been implemented by most European countries, it has not been established in the United States.[80] The probability that a donor child in the U.S. even knowing they were conceived through a donation could be as low as twenty to fifty percent.[81] However, with the varying new family arrangements, a child who is not told may naturally discern that they are missing a biological parent.[82] A child with two mothers, two fathers, or a transgender parent will ultimately be confronted with the reality that they must have come into existence through nontraditional means.

As a growing number of countries have banned anonymous donations, fears have been raised about the effect these bans would have on the industry.[83] But fears that a ban on anonymity would discourage donors seem to be refuted in countries such as Great Britain, where sperm donation has actually increased since the 2005 ban on anonymity.[84] Much debate now has turned to focus on the child's "moral right to know [one's] genetic origins."[85] Putting morality aside, there is also the scientific debate of having the right to know one's own health history.[86] Family medical history can help determine an individual's risk for certain diseases or medical conditions and gives the individual the ability to make informed decisions regarding their health.[87] As one author put it, "[i]t can be all too

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[78] *Id.*

[79] U.N. Convention on the Rights of the Child, art. 7.1, Nov. 20, 1989, 1577 U.N.T.S. 3, 47.

[80] MASON & EKMAN, *supra* note 66, at 60.

[81] *Id.*

[82] *Id.* at 67.

[83] *Id.* at 64–65.

[84] *Id.* at 65.

[85] Inmaculada de Melo-Martín, *The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins?*, 44 HASTINGS CTR. REP. 28, 28–29 (2014). Aliya Shain, a donor-conceived child, stated, "[i]nformation related to medical history and genetic disposition should never be sealed from donor-conceived children." Shain, *supra* note 41, at 313, 335.

[86] Melo-Martín, *supra* note 85, at 30.

[87] *Id.* In 2013, actress Angelina Jolie underwent a double mastectomy after her doctors informed her that she had an 87% risk of developing breast cancer based in part on her family's medical history. Ed Payne, *Angelina Jolie Undergoes Double Mastectomy*, CNN (May 16, 2013, 8:09 AM), https://www.cnn.com/2013/05/14/showbiz/angelina-jolie-double-mastectomy/index.html.

easy to lose sight of the fact that the child resulting from a much-wanted pregnancy might struggle all her life with the absence of information on half of her genetic origins."[88] Doctors and health facilities often, if not always, ask for a person's family medical history to help them diagnose and understand the individual's symptoms better.[89] Donor children are thus "clearly harmed" by their lack of access to medical history.[90]

II. ART, ADOPTION, AND PARENTAL LAWS IN THE NINTH CIRCUIT

> It is difficult to conceive of a child as commerce. . . . Who, after all, could put a price on a child? Who could imagine selling one? Across the world, baby-selling is strictly prohibited, defined as a crime more egregious, more unthinkable, than slavery. And yet every day, in nearly every country, infants and children are indeed being sold.[91]

ART has opened the door for prospective parents to acquire their desired child through the purchase of gametes, surrogates, and genetic manipulation; and though adoptive children are never "sold," there is a "cost" to adopting a child that can go well into five-digit numbers.[92] There is no doubt that there is a market for babies, and the ART industry has grown with technological advances to meet these demands in the reproductive industry.[93] Individuals have shown they will go to great lengths to get the exact child they want.[94]

The U.S. government has historically avoided intervening in fast-growing, high-technological sectors, such as the mobile phone and internet industries.[95] ART, being a fast-growing high-technological industry, also has ethical and religious ties, which has further driven the U.S. government away from taking action to regulate it.[96] The U.S. has long been divided on the issue of abortion, and politicians are wary of pushing any policy related to the matter.[97] IVF—a sub-category of ART—does involve the disposal of embryos which, again, politicians tend to avoid

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88 Ravitsky, *supra* note 8, at 18. "This absence, imposed by social arrangements that fail to acknowledge the consequences of gamete donation, can become a psychological and medical black hole for offspring." *Id*.

89 *See* DEP'T OF HEALTH & HUM. SERVS., HELP ME UNDERSTAND GENETICS: INHERITING GENETIC CONDITIONS (2022), https://medlineplus.gov/genetics/understanding/inheritance/familyhistory/ (explaining why medical professionals collect family health history).

90 Ravitsky, *supra* note 8.

91 SPAR, *supra* note 1, at x.

92 *Id.* at x–xi.

93 *Id.* at xi.

94 *Id.* In 2002, a British couple flew to the U.S. to conceive a child with specific blood cells in order to save their living toddler who was terminal. *Id*.

95 *Id*. at 228.

96 *Id*.

97 *Id*.

when making national legislation.[98] What federal legislation has passed concerning artificial reproduction has mainly involved the prohibition of certain practices, such as reproductive cloning and cytoplasmic transfers.[99]

In most states, gamete donations for assisted reproduction are governed by the agreed upon contracts between the intended parent and the medical facilities.[100] Adoption on the other hand is firmly founded in family law and the protections it provides.[101] Most states have legislation for the latter but have left the former to be disputed through individual case law.[102]

A. States with ART Legislation

In the Ninth Circuit, two states have passed legislation to specifically protect the rights of children produced through ART: Washington[103] and California.[104] In 2018, Washington state began passing statutes specifically directed at the ART industry.[105] Unlike some foreign nations that banned anonymity altogether, Washington passed statutes incorporating children born from ART but tried to balance both the need for information and the desire for anonymity.[106] In Washington, a child produced through reproductive assistance may reach out and request contact with their biological parent once they turn eighteen.[107] If contact is refused, the biological parent must provide a current update of their medical history, which is to be released to the child.[108] "Although the law gives donors the option of vetoing disclosure of their identities, it guarantees that offspring will be able to access their medical histories in

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[98] *Id.*

[99] *Id.* "[C]ytoplasmic transfer, is an experimental fertility technique that involves injecting a small amount of ooplasm from eggs of fertile women into eggs of women whose fertility is compromised." *Ooplasmic/Cytoplasmic Transfer*, CTR. FOR GENETICS & SOC'Y, https://www.geneticsandsociety.org/internal-content/ooplasmiccytoplasmic-transfer (last visited July 23, 2022).

[100] *See* Sabatello, *supra* note 24, at 353 (discussing the lack of regulation in the U.S. concerning gamete donation in both federal and state jurisdictions; it would naturally follow that individual contracts govern the practice).

[101] *See* Lori L. Klockau, *A Primer on Adoption Law*, 31 FAM. ADVOC. 16, 16–17 (2009) (analyzing a variety of adoption related laws).

[102] *Compare id.* at 16–21 (discussing adoption statutes in states), *with* Jenna Casolo et al. eds., Annual Review Article, *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 318–23 (2019) (listing approaches taken by various courts to decide cases regarding the disposition of frozen embryos in the absence of legislation).

[103] Uniform Parentage Act, ch. 6, § 805, 2018 Wash. Sess. Laws 158, 190.

[104] Parentage Act, ch. 876, 2018 Cal. Legis. Serv. 1, 2 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[105] § 805, 2018 Wash. Sess. Laws.

[106] Shain, *supra* note 41, at 333.

[107] WASH. REV. CODE ANN. § 26.26A.820(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[108] *Id.* § 26.26A.820(2).

every case."[109] Additionally, Washington requires gamete banks or fertility clinics to collect records of the donor's medical history and must disclose this information if an individual validly requests it under the statute.[110] The statutes give gamete banks and fertility clinics more responsibility because they now have a duty to maintain the donor's medical history and identifying information so that there is a way to contact or locate the donors.[111]

Washington's new ART model goes beyond mere donor information when it comes to children produced through ART. It settles the long-debated dispute about what constitutes a donor, and thus, whether a donor has parental rights.[112] The Act is unique as it does more than establish legal parentage; it maintains a child's right to medical information about their biological parents.[113]

Similarly, California established legislation targeted at children conceived by ART.[114] Children who reach the age of eighteen can now obtain access to non-identifying medical information of the donor parent.[115] Like Washington, California also provides that the donor be contacted when such a request is made by the child, or by the legal parents or guardians if the child is a minor.[116] Additionally, it requires gamete banks to collect and retain medical and identifying information.[117]

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[109] Emily Shenk, *Sperm-Donor Children Face Challenges in Learning Their Medical History*, WASH. POST (Sept. 26, 2011), https://www.washingtonpost.com/national/health-science/sperm-donor-children-face-challenges-in-learning-their-medical-history/2011/07/01/gIQAX9hwzK_story.html.

[110] WASH. REV. CODE ANN. §§ 26.26A.810, 26.26A.820 (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[111] *Id.* § 26.26A.825.

[112] *See id.* § 26.26A.610 (explaining that a donor which intends to be the parent of a child is a parent of that child); *id.* § 26.26A.010 (defining donor as an individual who provides gametes for ART with or without compensation but does not intend to be a parent).

[113] *See id.* § 26.26A.020 (stating that the chapter applies to decisions and determinations regarding who a child's parents are); *id.* §§ 26.26A.800–26.26A.825 (listing the information required from a donor).

[114] CAL. FAM. CODE §§ 7600–71 (West, Westlaw through Ch. 250 of 2022 Reg. Sess.).

[115] CAL. HEALTH & SAFETY CODE § 1644.3 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[116] WASH. REV. CODE ANN. § 26.26A.820(2) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.); CAL. HEALTH & SAFETY CODE §§ 1644.3(a), (c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[117] CAL. HEALTH & SAFETY CODE § 1644.1 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

TABLE 1
ART Law Comparison

	WASHINGTON	**CALIFORNIA**
"Donor" Definition	"[A]n individual who provides gametes intended for use in assisted reproduction,"[118] regardless of whether the individual received compensation for the donation; Donor status regarding surrogacy is not covered under this section (RCW 26.26A.700 through 26.26A.785 covers surrogacy); and Individuals who provide gamete intended for assisted reproduction, but are an intended parent, are not donors.[119] An "intended parent," is an individual "who manifests an intent to be legally bound as a parent of a child conceived by assisted reproduction" regardless of whether they are married or	"[A]n individual, living or deceased, from whom tissue is removed."[121]

[118] WASH. REV. CODE ANN. § 26.26A.010(9) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[119] WASH. REV. CODE ANN. § 26.26A.010(9) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[121] CAL. HEALTH & SAFETY CODE § 1635(b) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

	not.[120]	
"Assisted Reproduction" Definition	"[A] method of causing pregnancy other than sexual intercourse."[122]	No definition.
"Gamete" Definition	"Sperm, egg, or any part of a sperm or egg."[123]	"[S]perm, oocytes, or embryos."[124]
"Identifying Information" Definition	The donor's: Full name; Date of birth; Permanent address; and Current address (if different from permanent address).[125]	The donor's: Full name; Date of birth; Permanent address; and Other contact information given to, or retained by, the gamete bank.[126]
"Medical History" Definition	A donor's: Present/Past illnesses; and "Social, genetic, and family history pertaining to the health	A donor's: Present/Past illnesses; and "[S]ocial, genetic, and family history of the

[120] WASH. REV. CODE ANN. § 26.26A.010(13) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[122] WASH. REV. CODE ANN. § 26.26A.010(4) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[123] WASH. REV. CODE ANN. § 26.26A.010(10) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[124] *See* CAL. HEALTH & SAFETY CODE § 1635(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.) (defining a gamete bank as an entity that "collects, processes, stores, or distributes" gametes, which includes "sperm, oocytes, or embryos").

[125] WASH. REV. CODE ANN. §§ 26.26A.800(1)(a)–(c) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[126] CAL. HEALTH & SAFETY CODE § 1644(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

	of the donor."[127]	donor."[128]
Testing	Required to maintain records of testing and comply/report according to state law.[129]	Requires gamete banks to test for infectious diseases such as HIV, hepatitis, syphilis, and human T-lymphotropic virus and provides detailed guidelines about exceptions to testing and how gametes may be used if tested positive.[130]
Anonymity of the Donor	Bank or clinic collecting gametes must provide donor with choice to remain anonymous or have their identity revealed once child is eighteen years of age and a request has been made.[131]	Donor must sign a declaration, which must be attested to by a notary or witness, choosing either to remain anonymous or allow the release of their identity on request once the child is eighteen years old.[132]
Withdrawal of Declaration to Remain Anonymous	Allowed if donor signs declaration permitting their identification to be revealed on request when child is eighteen	Allowed if donor signs declaration permitting their identification to be revealed on request when child is eighteen

[127] WASH. REV. CODE ANN. §§ 26.26A.800(2)(a)–(c) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[128] CAL. HEALTH & SAFETY CODE § 1644(d) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[129] WASH. REV. CODE ANN. § 26.26A.825(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[130] CAL. HEALTH & SAFETY CODE § 1644.5(a) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[131] WASH. REV. CODE ANN. § 26.26A.815(2) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[132] CAL. HEALTH & SAFETY CODE § 1644.2(b) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

	years of age.[133]	years of age.[134]
Requesting Identifying Information of Anonymous Donor	Bank/Clinic must make a good faith effort to contact donor and notify them of the request; upon which donor may choose to either remain anonymous or allow the release of identifying information.[135]	Bank/Clinic must make a good faith effort to contact donor and notify them of the request; upon which donor may choose to either remain anonymous or allow the release of identifying information.[136]
Requesting Medical Information about Donor	May request access to non-identifying medical information about the donor and the bank/clinic must make a good faith effort to provide this information.[137]	Upon request, gamete bank must provide non-identifying medical information that was acquired from the donor.[138]
Collection of Information	Bank/Clinic must collect identifying and medical information from the donor at the time of donation.[139]	Gamete bank must collect identifying and medical information. from the donor at the time of donation.[140]

[133] *See* WASH. REV. CODE ANN. § 26.26A.815(2)–(3) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (allowing donors the option to withdraw anonymity and consent to release identifying information, but not vice versa).

[134] CAL. HEALTH & SAFETY CODE § 1644.2(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[135] WASH. REV. CODE ANN. § 26.26A.820(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[136] CAL. HEALTH & SAFETY CODE § 1644.3(a) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[137] WASH. REV. CODE ANN. § 26.26A.820(2) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[138] CAL. HEALTH & SAFETY CODE § 1644.3(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[139] WASH. REV. CODE ANN. § 26.26A.810(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[140] CAL. HEALTH & SAFETY CODE § 1644.2(a)(3) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

Record Keeping	Bank/Clinic must "maintain identifying information and medical history about each gamete donor" and keep records of screening/testing of gametes in accordance with state and federal law.[141]	Gamete bank must "[m]aintain identifying information and medical information about each gamete donor," and keep records of screening/testing of gametes in accordance with state and federal law.[142]

For the most part, California and Washington's ART laws are very similar, especially in regard to granting donor-conceived children access to non-identifying medical information about their donor parent.[143] Washington has gone to extra lengths to define important terms such as "assisted reproduction," "donor," and "intended parent."[144] Only donors are granted the option of anonymity rights and only intended parents are granted legal parental rights.[145] By clearly defining the categories of parties, it further establishes the rights of all involved and creates consistency under the law.

Unlike Washington, California created a lengthy provision in its legislation which requires donors to be tested for certain infectious diseases.[146] While Washington relies on state and federal legislation to determine what donors are screened for, California takes a more proactive role in regulating its gamete banks.[147] The statute provides the guidelines gamete banks must abide by and gives guidance as to how a donation can

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[141] WASH. REV. CODE ANN. § 26.26A.825(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[142] CAL. HEALTH & SAFETY CODE § 1644.2(a)(3) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[143] WASH. REV. CODE ANN. § 26.26A.820(2) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.); CAL. HEALTH & SAFETY CODE § 1644.3(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[144] WASH. REV. CODE ANN. §§ 26.26A.010(4), (9), (13) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.).

[145] WASH. REV. CODE ANN. §§ 26.26A.605, .610, .815 (West, Westlaw through 2022 Reg. Sess. Wash. Leg.).

[146] CAL. HEALTH & SAFETY CODE § 1644.5 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

[147] WASH. REV. CODE ANN. § 26.26A.825(1) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.); CAL. HEALTH & SAFETY CODE § 1644.5 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.).

proceed after screening.[148] The goal is to provide an additional barrier of protection for both the recipient of the donation and the donor-conceived child.[149]

The brilliance behind both California and Washington's ART laws is that, instead of using the majority approach, which presumes a donor's "right to anonymity" unless they waive it, this new model establishes a child's right to "donor-identifying information" *unless* the donor signs a declaration for nondisclosure.[150] By putting a small hurdle in front of the donor to acquire anonymity, these laws help protect the rights of the donated child before they are even conceived.[151] Instead of presuming all donors do not want their identity revealed, the donors can make that decision for themselves at the time of donation.[152] Subsequently, donors can change their minds and waive their anonymity, but both states do not allow a donor to go back once they have agreed to release their identity to the donor-conceived child, even if that child has not reached adulthood yet.[153] Although donors still carry all the "decision-making power" in regard to identifying information, children now have access to their donor's medical history regardless of whether the donor chose to remain anonymous.[154]

B. Information Rights of Adopted Children

Although the other states in the Ninth Circuit have not adopted any legislation specifically concerning ART, most have passed legislation permitting the release of medical history of biological parents but only specifically to adopted children.

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[148] *See* CAL. HEALTH & SAFETY CODE § 1644.5 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.) (stating that even if a donor tests positive for an infectious disease, the gametes may still be donated if all party are fully informed and give consent).

[149] *See* Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 295–96 (1997) (identifying a need for in vitro fertilization consumer protection).

[150] Shain, *supra* note 41, at 333–34.

[151] *Id.* at 334.

[152] *Id.*

[153] *See* WASH. REV. CODE ANN. §§ 26.26A.815(2)–(3) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (allowing Washington donors the option to withdraw anonymity and consent to releasing identifying information, but not vice versa); CAL. HEALTH & SAFETY CODE §§ 1644.2(b)–(c) (West, Westlaw though Ch. 46 of 2022 Reg. Sess.) (permitting California donors to withdraw anonymity and consent to releasing identifying information, but not vice versa).

[154] Shain, *supra* note 41, at 334; *see* WASH. REV. CODE ANN. § 26.26A.820(2) (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (stating that in Washington, "[r]egardless whether a donor signed a declaration" for anonymity, the gamete bank or clinic must provide the child with "access to nonidentifying medical history of the donor"); CAL. HEALTH & SAFETY CODE § 1644.3(c) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.) (stating that in California, a gamete bank must provide the child with "access to nonidentifying medical information provided by the donor" regardless of donor's decision to remain anonymous or not).

Alaska requires the state register to provide the biological parent's and their blood relative's medical history, but only if it is available.[155] However, Alaska is very descriptive in the information adopted children are allowed to access. If the information is available, an adopted child can receive information regarding their biological parents' ethnicity, age, physical description, level of education, medical history of biological (including history of the parents' blood relatives), and even their religion.[156]

Arizona is unique in that it *requires* the collection of the birth parent's health and genetic history prior to adoption.[157] Unlike any of the other states in the Ninth Circuit, Arizona law dictates that the records of the biological parent's health and genetic history must be mandatorily kept for ninety-nine years.[158]

Hawaii's laws stipulate that adoption facilities fill out, when possible, the medical history of the birth parents and submit them as records to the department of health to be provided when lawfully requested.[159] The form includes any "information relating to the adopted child's potential genetic or other inheritable diseases or afflictions."[160]

Idaho requires a thorough investigation into the social, medical, and genetic history of the adoptive child's birth parents.[161] This copy is provided to potential parents before adoption.[162]

Montana, in addition to providing medical history, also provides prospective adoptive parents with social histories, including tribal affiliation.[163]

Nevada is more descriptive in that it requires adopting agencies to give adoptive parents all medical; sociological; and behavioral, emotional, or psychological reports of the child prior to adoption.[164]

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155 ALASKA STAT. ANN. § 18.50.510 (West, Westlaw through July 1, 2022 of 2022 Reg. Sess. of 32d Leg.).

156 *Id.*

157 ARIZ. REV. STAT. ANN. § 8-129 (West, Westlaw through legis. effective July 6, 2022 of Second Reg. Sess. of Fifty-Fifth Leg.).

158 *Id.*

159 HAW. REV. STAT. ANN. § 578-14.5 (LexisNexis, LEXIS through Act 113 of 2022 Leg. Sess.).

160 *Id.*

161 IDAHO CODE § 16-1506(4) (LexisNexis, LEXIS through all legis. from 2022 Reg. Sess.) (labeling information as nonidentifying).

162 *Id.*

163 MONT. CODE ANN. §§ 42-3-101, 42-6-102 (West, Westlaw through the 2021 Sess. of the Mont. Leg.).

164 NEV. REV. STAT. ANN. § 127.152 (LexisNexis, LEXIS through end of legis. from the 81st Reg. Sess. (2021) and 33d Spec. Sess. (2021)).

Finally, Oregon suggests, but does not require, genetic, social and health history to be provided.[165]

Though these state laws differ in their application and breadth, the goal is for adoptive children to have a legal right to access their medical history when it is obtainable.[166] Children of ART, however, are not considered adopted children under these laws.[167] As ART grows and more children are born under these alternative methods, the question must be asked whether children are legally allowed to be discriminated against based on how their parents chose to conceive them.

III. ACHIEVING EQUALITY

A. Our Future Is ART

ART is here to stay. The changing demographics, morals, and technological advances in the United States point to the growth of ART supply and demand, not the diminishment of it.[168] In her book, *The Baby Business*, Debora Spar argued there are four options to handling reproductive technologies: ban the practice of ART entirely; leave it alone and let the market control; take it off the market entirely and let government control it; or regulate the industry.[169] Arguably, the United States is too late to ban the ART industry completely as the demand for it "is simply too high and the technologies too good."[170] Individuals have shown that the desire to have a child is so strong "that many people will do literally anything to fulfill it."[171] To leave the industry alone, as we do

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[165] *See* OR. REV. STAT. ANN. § 109.500 (West, Westlaw through Ch. 2 enacted in 2022 Reg. Sess. of 81st Leg. Assemb.) (stating social history "may be provided" rather than *shall* be provided).

[166] *See, e.g.*, ALASKA STAT. ANN. § 18.50.510 (West, Westlaw through July 1, 2022 of the 2022 Reg. Sess. of the 32d Leg.) (detailing the extensive types of information to be provided if available); IDAHO CODE § 16-1506(4) (LexisNexis, LEXIS through all legis. from the 2022 Reg. Sess.) (requiring a social investigation and labeling information as "nonidentifying"); NEV. REV. STAT. ANN. § 127.152 (LexisNexis, LEXIS through the end of legis. from the 81st Reg. Sess. (2021) and 33d Spec. Sess. (2021)) (providing medical and sociological history possessed by the agency).

[167] *See* Suzie Faloon, *What Goes on the Birth Certificate When a Sperm Donor is Used?*, OUR EVERYDAY LIFE, https://oureverydaylife.com/birth-certificate-sperm-donor-used-4571333.html (last visited Aug. 2, 2022) (stating that the birth certificates of ART-conceived children do not reflect as such and are merely registered as a "live birth"); ALASKA STAT. ANN. § 18.50.950 (West, Westlaw through July 1, 2022 of 2022 Reg. Sess. of 32d Leg.).

[168] SPAR, *supra* note 1, at 223.

[169] *Id.* at 223–24.

[170] *Id.* at 224.

[171] *Id.* at xi; *see* Heather Hollingsworth, *Woman Set to Die for Killing Woman, Cutting Baby from Womb*, ABC NEWS (Jan. 11, 2021, 6:43 PM), https://abcnews.go.com/US/wireStory/woman-set-die-killing-woman-cutting-baby-womb-75179198 (reporting that a women stole an unborn child and tried to pass it off as her own child). In 2002, a woman struggling with infertility went to Beirut for a cytoplasmic transfer, an illegal procedure in the United States. SPAR, *supra* note 1, at xi–xii.

now, means that the issues produced by ART will not be resolved unless the industry changes its practices without incentives and at its own personal cost. Taking it off the market and having governmental control, like over organ transplants, is also not likely as the supply and demand of gametes is readily available and functioning well.[172] If neither the market nor the government having full control over ART is sufficient, the most practical solution is regulation.[173]

B. Balancing Anonymity with Access to Medical History

Anonymity and an increase in access to medical information are not mutually exclusive protections. It is conceivable to maintain both. Traditionally, adoption and much of family law are dictated by the states.[174] As the medical issues of ART spill into family law, regulations should be adopted to create consistency and equal protection amongst all children. This legal protection should strive to consider the rapid advancements of ART.[175] Setting clear definitions for the law, not only provides consistency, but also safeguards against future ethical complications such as the buying and selling of embryos.[176]

Four steps should be adopted to promote access to medical history information for donor-conceived children. First, a universal definition of the elements and procedures of ART needs to be adopted.[177] Even the CDC states that no definition of ART is universally known, and therefore, the CDC created its own definition.[178] Washington state provides a good example for comprehensive definitions, such as what is a donor versus an

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[172] SPAR, *supra* note 1, at 224.

[173] *Id.*

[174] Linda D. Elrod, *The Federalization of Family Law*, A.B.A. (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/#:~:text=Historically%2C%20family%20law%20has%20been%20a%20matter%20of,rights.%20State%20courts%20generally%20decide%20family%20law%20cases.

[175] Havins & Dalessio, *supra* note 14, at 865.

[176] *See id.* at 865–66 (identifying the need for a consistent definition and the existence of ethical issues).

[177] *Id.* at 865.

[178] CTRS. FOR DISEASE CONTROL & PREVENTION, WHAT IS ASSISTED REPRODUCTIVE TECHNOLOGY? (2019), https://www.cdc.gov/art/whatis.html. The CDC defines ART as

> [A]ll fertility treatments in which either eggs or embryos are handled. In general, ART procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved.

Id.

intended parent, as well as the types of ART provided under the statute.[179] Having a comprehensive and collective vocabulary will help to create a level of understanding and make sure laws are not ambiguous.

Second, fertility clinics need to be required to collect and maintain medical history information for longer periods of time. The FDA, or better yet, the states, should require records to be kept for at least ninety-nine years instead of ten-year periods so ART-conceived children can gain access during their natural life.[180] Additionally, just because some ART-conceived children may not be interested in their medical history does not mean their own children will be the same. It may be more beneficial for records to be stored indefinitely, or for a full record to be sent to the donor child (or their descendants) when files are to be destroyed due to expiration of time. This way, any descendants may also have access if a medical question arises.

Third, to maintain donor anonymity, a third-party is needed to communicate medical information between donor and donor children. Fertility clinics are ideal to be this third party as, even with today's laws, they already have donor medical records at their disposal.[181] Like in Washington state, a level of responsibility for gamete banks and fertility clinics is necessary for the equal protection of all children produced through ART.[182] Third-party entities such as gamete banks and fertility clinics maintaining this information is key to preserving both anonymity and access to current health information. It allows the donor to reveal new medical developments to a third-party rather than to the donated party. Accordingly, follow-up information could be established, giving the donor a simple way to update their contact and medical history with the clinic or bank to which they donated. A simple online fillable form would be satisfactory. Vice versa, an ART-conceived child should be able to notify the bank/clinic of any revealed genetic conditions in order for the donor

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[179] *See* WASH. REV. CODE ANN. § 26.26A.010 (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (separating artificial reproductive technologies and surrogacy into different sections of the statute). Questions also include whether a child produced from surrogacy is different from ovum or sperm donation and whether they are to be treated either similarly or differently under the law. *See* CAL. HEALTH & SAFETY CODE § 1644.5 (West, Westlaw through Ch. 46 of 2022 Reg. Sess.) (listing only sperm donations in the statute and no ovum donations).

[180] Ravitsky, *supra* note 8, at 19–20; U.S. FOOD & DRUG ADMIN., DONOR ELIGIBILITY FINAL RULE AND GUIDANCE QUESTIONS AND ANSWERS (2018), https://www.fda.gov/vaccines-blood-biologics/tissue-tissue-products/donor-eligibility-final-rule-and-guidance-questions-and-answers.

[181] Maya Sabatello, *Disclosure of Gamete Donation in the United States*, 11 IND. HEALTH L. REV. 29, 72 (2014). Though, without expanding the time required to keep medical records, this becomes moot. Both requirements are needed to effectively make fertility clinics a reliable third-party informer.

[182] *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.825 (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (requiring gamete banks and fertility clinics to maintain identifying information, medical history, and testing records of donors).

and any other children produced by the donor to be notified. This required flow of information maintains autonomy while providing the best medical knowledge of all parties involved. Donor, child, and parents alike can obtain information through the fertility clinic whilst protecting their identities from each other, if they so desire.

Finally, as shown in Washington and California,[183] anonymity should not be the default status. Instead, donors should be required to request anonymity. By making this choice at the time of donation, each party's intent is clear to the others, and all can plan and move forward accordingly. Anonymity should not be freely given. It should be a conscious decision as it will affect the future of the donor-conceived child.

CONCLUSION

"Whoever saves one life saves the world entire."[184] Imagine two children before a court of law asking to know their origin, where they came from, and what genetics they carry. The court tells one child it will do everything in its power to provide answers to those questions. The court tells the other child, "Sorry, we can't help you." The second child protests and asks why the court is favoring the other child. The court replies, "It's because the first child was adopted, while you are donated." Donated children are created in a test tube and are only in existence because of the contract their biological and intended parents signed. Adopted children didn't ask to be given away from their biological parents; but a donated child's biological parent(s) were compensated for them to be given away.[185] In adoption, the law looks out for the best interests of the child.[186] With ART, the law looks out for the best interests of the parents.[187]

Narelle Grech, an Australian, donor-conceived woman, fought for fifteen years to know who her biological father was.[188] After years of lobbying and struggling for change, Narelle eventually succeeded in

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[183] *See* WASH. REV. CODE ANN. § 26.26A.815 (West, Westlaw through 2022 Reg. Sess. of Wash. Leg.) (requiring the donor to declare disclosure or non-disclosure of identity); CAL. HEALTH & SAFETY CODE § 1644.2(b) (West, Westlaw through Ch. 46 of 2022 Reg. Sess.) (requiring the donor to declare disclosure or non-disclosure of identity).

[184] SCHINDLER'S LIST (*Universal Pictures 1993).*

[185] *Sperm Donor, Surrogacy, and Co-Parenting Laws in the United States*, COPARENTS, https://www.coparents.com/blog/guides/sperm-donor-surrogacy-and-co-parenting-laws-in-the-united-states/#:~:text=But%20sperm%20and%20egg%20donors%E2%80%99%20compensation%20is%20not,for%20a%20sperm%20donation%2C%20receive%20more%20generous%20compensations (last visited Aug. 1, 2022).

[186] U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE: DETERMINING THE BEST INTERESTS OF THE CHILD (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.

[187] Sonia Allan, *Donor Identification: Victorian Legislation Gives Rights to All Donor-Conceived People*, 98 FAM. MATTERS 43, 44 (2016).

[188] *Id.* at 43.

finding her donor father.[189] Six weeks after this reunion, she succumbed to cancer.[190] Three years after her death, the Victorian Parliament passed "Narelle's Law," which granted a donor child's right to access their donor's information.[191]

Is the excuse of anonymity still worth upholding when human lives are at stake? Or is it worth upholding even though society has the resources to save lives and protect anonymity? Although a market exists for babies,[192] our nation's children, whether adopted or donated, should not be bound to suffer because of contracts they didn't sign. Children grow into adults. We can either fight to protect them now or deal with the heartache and lawsuits brought by them in the future.

Logan A. Easley[*]

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[189] Jessica Longbottom, *Sperm Donor Laws: Man Tracked Down by Dying Daughter Backs Changes to Anonymity Rules*, ABC NEWS (Nov. 27, 2015, 7:10 AM), https://www.abc.net.au/news/2015-11-27/donor-dad-tracked-down-by-dying-daughter-backs-id-law-changes/6981982.

[190] *Id*.

[191] Allan, *supra* note 187, at 43.

[192] SPAR, *supra* note 1, at 223.

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UNNECESSARY AND IMPROPER: WHY IT IS TIME FOR UCMJ JURISDICTION OVER RETIREES TO ETS*

ABSTRACT

The military justice system is still more focused on the needs of the military than it is on the requirements of justice. Under the Uniform Code of Military Justice ("UCMJ") Article 2, military retirees—even decades removed from service—are subject to court-martial jurisdiction until they die. As the Supreme Court has recognized, the unique character and mission of the military require a system of justice that otherwise would be constitutionally impermissible. But there is no compelling reason to apply the UCMJ to anyone other than active service members. Nor is it constitutional to do so.

The government has no compelling interest in keeping retirees subject to military jurisdiction for life. And doing so is prohibited under the Makes Rules Clause and the Fifth Amendment. But military retirees have been prosecuted under the UCMJ—and thus denied the constitutional protections of a civilian court—for non-military crimes committed long after retirement. Likewise, retirees live under the perpetual threat of military prosecution for otherwise constitutionally protected conduct, such as consensual sex or political speech. Constitutional considerations aside, prosecuting military retirees is unnecessary to good order and discipline—the very core of the UCMJ. Recent conflicting decisions from a U.S. district court and the Court of Appeals for the Armed Forces make this an issue ripe for review. This Note is the first comprehensive academic criticism to combine both constitutional and public-policy arguments against UCMJ jurisdiction over retirees. As such, it offers points of consideration for both jurists and policymakers as they continue to interact with this issue in the near future. The Supreme Court should address the question and hold military jurisdiction over retirees unconstitutional. Alternatively, Congress should repeal the relevant provisions, limiting the UCMJ to active service members. Whether via judicial decision or legislative action, it is time to retire UCMJ jurisdiction over retirees.

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* "ETS"—one of many three-letter acronyms in the U.S. military—stands for "expiration of term of service." A Soldier's ETS date is the day his enlistment ends and he separates from the Army. ETS may be used in verb form. "To ETS" means to separate from and leave the military. Here, the term ETS indicates the need for UCMJ jurisdiction over retirees to end permanently.

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INTRODUCTION

Imagine you have served your country honorably for over two decades as an active-duty U.S. Army officer, retiring as a Lieutenant Colonel at age forty-three. Almost twenty years later, after a successful second career, you decide to run for governor of your state. You are doing well in general-election opinion polls against the incumbent governor, who is mired by allegations of mismanagement and sexual misconduct. Your opponent has never served in the military. He has a history of criticizing aspects of military culture, and he has condemned former service members for recently speaking out against the current presidential administration. By virtue of his previous tenure in Congress, your opponent has powerful connections with the Department of Defense and the White House, which is currently occupied by his longtime political ally.

During the campaign, you bring attention to your opponent's lack of military experience and use some uncouth words to criticize his attitude toward the military. In one of your tamer accusations, you call him a "pathetic coward, who—like our current Chicken-in-Chief—only criticizes our military out of his own feeling of inadequacy for never having served himself." You also point out the many sexual misconduct allegations against him, saying he is "too cowardly to serve his country as a Soldier and too busy soliciting sexual favors to serve the people of this state in political office."

With only three weeks to go until election day and the numbers appearing in your favor, suddenly—out of the blue—you are served with a notification that you are being recalled to active duty to face a general court-martial under Article 88 (Contempt toward officials), Article 133 (Conduct unbecoming an officer and a gentleman), and Article 134

(General Article) of the UCMJ. The notice explains that the charges are in connection with you "us[ing] contemptuous words against the President . . . [and] the Governor," as well as an extramarital affair—which occurred after you left the military and over which you and your wife have long since reconciled.[1] The notice also reminds you that, under 10 U.S.C. § 802(a)(4), the charges and jurisdiction are proper because you remain subject to the UCMJ as a "[r]etired member[] of a regular component of the armed forces who [is] entitled to pay."[2] While you strongly suspect the charges are politically motivated and believe you will prevail in court, the charges have already been publicized and are driving down your poll numbers in the final stretch of the gubernatorial election. If this situation sounds absurd and unjust, it is.

Although the foregoing scenario is intentionally hyperbolic, it serves to illustrate the injustice of the status quo. This hypothetical injustice is only one of many that can affect military retirees because "military law governs their behavior until they die."[3] Military retirees—even decades removed from service and inactive in the public square—can be court-martialed for both unique military offenses which would otherwise be constitutionally protected and for everyday crimes squarely within the jurisdiction of local law enforcement. For example, under current law, a ninety-year-old Korean War veteran who retired from the Army over fifty years ago could be hauled before a military tribunal—and thus denied the constitutional protections of a civilian court—for shoplifting a candy bar from his local (off-base) supermarket.[4] Likewise, a Marine Corps veteran of the war in Afghanistan—having recently completed twenty years of service and transferred to inactive status in the Fleet Marine Corps Reserve (FMCR)[5]—could be court-martialed and sent to military prison

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1 10 U.S.C. § 888.

2 10 U.S.C. § 802(a)(4).

3 Hannah Martins Miller, Note, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers*, 73 VAND. L. REV. 1209, 1229 (2020).

4 Oral Argument at 35:25, Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022) (No. 21-5012), https://www.cadc.uscourts.gov/recordings/recordings2021.nsf/CBC74C3CE3BB833885258757600543100/$file/21-5012.mp3; *Del Toro*, 45 F.4th at 101 (Tatel, J., concurring in part and dissenting in part).

5 The Fleet Marine Corps Reserve ("FMCR") and Fleet Reserve ("FR") are little known entities that are different from the Marine Corps Reserve ("USMCR") and Navy Reserve ("USNR"), which are the actual reserve components of their respective military branches. Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 324 (D.D.C. 2020). The FR and FMCR, by contrast, are not reserve components at all. They are retirement "purgatory"—unique to the Department of the Navy—where active-duty Sailors and Marines who complete over twenty years of service go until they are eligible for official retirement at thirty years. *Id.* at 324–25; COMPTROLLER GEN., THE 20-YEAR MILITARY RETIREMENT SYSTEM NEEDS REFORM 2 (1978). FR and FMCR members are functionally identical to retired Soldiers and Airmen—they do not wear military uniforms, have no military duties, and

for expressing his antipathy towards President Biden following the botched withdrawal from Afghanistan.[6] The status quo is unacceptable.

This Note is the first comprehensive academic criticism—following the conflicting opinions in *Larrabee v. Braithwaite*[7] and *United States v. Begani*[8]—of court-martial jurisdiction over military retirees. It is also the first academic article to incorporate both constitutional and public-policy arguments against UCMJ jurisdiction over retirees considering recent cases and renewed discussions over the issue.

Retired[9] members of the United States Armed Forces should not be subject to the UCMJ because it is unconstitutional under the Constitution's Make Rules Clause and the Fifth Amendment's equal protection component. Further, it is unnecessary to enforce good order and discipline in the military and an improper infringement of the individual liberties of America's bravest citizens.

The introduction of this Note sets the stage for some of the consequences that can result from the status quo. Part I provides background information and historical context as to who has traditionally been subject to military jurisdiction in the United States and why. Part IIA argues that Article I, Section 8, Clause 14 of the United States Constitution (the "Make Rules Clause")—which gives Congress the "Power To . . . make Rules for the Government and Regulation of the land and naval Forces"—does not extend to military retirees because they are no longer members of "the land and naval forces."[10] Part IIB argues that subjecting active-component retirees and members of the Fleet Reserve ("FR") or Fleet Marine Corps Reserve ("FMCR") to the UCMJ—but not *reserve*-component[11] service members or retirees—is a violation of the

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cannot give or receive military orders. *Braithwaite*, 502 F. Supp. 3d at 324–25. However, FR and FMCR members do receive "retirement" or "retainer" pay and are subject to recall to active duty (although this is highly unlikely). *Id.* at 324, 329–30.

6 Oral Argument at 35:36, *Del Toro*, 45 F.4th 81 (No. 21-5012).

7 502 F. Supp. 3d at 332–33 (holding that expansion of the UCMJ over the Navy Fleet Reserves is unconstitutional).

8 81 M.J. 275 (C.A.A.F. 2021) (holding that members of the Navy Fleet Reserve are subject to court-martial under the UCMJ).

9 Although this Note discusses several military statuses, the terms *retired service member* or *retiree* (for general purposes of arguing against court-martial jurisdiction) are meant to encompass all those listed in UCMJ Article 2, subsections (a)(4)–(6): "(4) Retired members of a regular component of the armed forces who are entitled to pay. (5) Retired members of a reserve component who are receiving hospitalization from an armed force. (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve." 10 U.S.C. § 802(a)(4)–(6).

10 U.S. CONST. art. I, § 8, cls. 1, 14.

11 As defined in 10 U.S.C. §§ 802(a) and 10101, reserve-component service members include current members of the Army, Navy, Marine Corps, and Air Force Reserves, as well as members of the Army and Air National Guards. Reserve-component retirees include those retired from any of these U.S. military reserve components, generally after at least twenty years of service.

Fifth Amendment's equal protection component.[12] Finally, Part IIC moves beyond constitutional concerns to argue that subjecting retirees to military jurisdiction is an improper infringement of their liberty and not necessary for maintaining good order and discipline in the armed forces. This Note concludes with an exhortation to Congress and the Supreme Court to rectify the situation by repealing or invalidating UCMJ Articles 2(a)(4)–(6), 10 U.S.C. § 802(a)(4)–(6).

I. WHO HAS TRADITIONALLY BEEN SUBJECT TO MILITARY JURISDICTION?

"Tradition and experience taught the Framers that the necessities of military discipline require a system of jurisprudence separate from civilian society."[13] Thus, in 1775, Congress adopted the *American Articles of War*—written by John Adams and based on British codes of military law—which remained in force until 1917, when they "were significantly modified . . . to deal with [the] mass army of citizen-soldiers" raised for World War I.[14] The Framers explicitly granted Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces" in Article I, § 8 of the Constitution.[15] The same criticisms that led to modification of the Articles of War in 1917—namely "that punishments were disproportionate to the crimes and that military authorities had too much discretion"—finally led Congress to replace them with the Uniform Code of Military Justice in 1950.[16]

At common law, court-martial jurisdiction extended only to active-duty soldiers who committed military offenses.[17] Likewise—although they also applied to "suttlers and retailers to a camp" and those "serving with the armies of the United States in the field"[18]—"[t]he original Articles of War in the United States included primarily violations of military law such as desertion, mutiny, cowardice, and insubordination."[19] "It was not until the Civil War that Congress extended court-martial jurisdiction to include any traditionally civilian offenses."[20] Acquiescing to Congress's expansion of military jurisdiction, the Supreme Court's decision in 1881

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12 U.S. CONST. amend. V. Reservists and Guardsmen fall under the UCMJ only when conducting active operations or inactive duty training. 10 U.S.C. § 802(d). They are not subject to the UCMJ for military or nonmilitary offenses committed while going about their lives outside of drill, annual training, or active-duty service. *Id.* § 802(a)(1)–(3).

13 David F. Forte, *Military Regulations*, HERITAGE GUIDE CONST.,https://www.heritage.org/constitution/#!/articles/1/essays/54/military-regulations (last visited July 13, 2022).

14 *Id.*

15 U.S. CONST. art. I, § 8, cl. 14.

16 Forte, *supra* note 13.

17 Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 329 (D.D.C. 2020).

18 2 JOURNALS OF THE CONTINENTAL CONGRESS 373, 375 (John Dunlap ed., 1878).

19 *Braithwaite*, 502 F. Supp. 3d at 329.

20 *Id.*

meant that "an officer who receives retirement pay in connection with past service [is] subject to court-martial jurisdiction."[21] Despite continued expansion of court-martial jurisdiction throughout the first half of the twentieth century—and the codification of retiree jurisdiction in UCMJ Articles 2(a)(4)–(6)— "application of the UCMJ to non-active duty service members was originally contentious."[22]

Only five years after the UCMJ was enacted to reform and recodify military law, the Supreme Court held in *Toth v. Quarles* that the UCMJ did not "extend[] to civilian ex-soldiers who had severed all relationship with the military and its institutions."[23] There, military authorities arrested an honorably discharged Air Force veteran living in Pennsylvania—who no longer had a "relationship of any kind with the military"—and flew him to Korea to face court-martial for a murder allegedly committed during his time in the Air Force.[24] The Supreme Court explained that the Make Rules Clause "restrict[s] court-martial jurisdiction to persons who are actually members or part of the armed forces" and that construing the Clause any more broadly "necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[25] The Court went on to say that, because former service members could be tried under other federal laws, "[t]here can be no valid argument, therefore, that civilian ex-servicemen must be tried by court-martial or not tried at all."[26] Finally, the Court in *Toth* argued that military courts should be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[27] Because good order and discipline "will not be improved by court-martialing rather than trying by jury" a person separated from active "service for months, years or perhaps decades," the Court found "no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."[28]

Shortly after its landmark decision in *Toth*, the Supreme Court likewise held, in *Reid v. Covert*, that court-martialing civilians—even

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[21] Pavan S. Krishnamurthy & Javier Perez, *Contemptuous Speech: Rethinking the Balance Between Good Order and Discipline and the Free Speech Rights of Retired Military Officers*, 12 HARV. NAT'L SEC. J. 288, 314 (2021); United States v. Tyler, 105 U.S. 244, 245–46 (1881) (holding that officers retiring from active service are still in the military service of the government).

[22] Krishnamurthy & Perez, *supra* note 21.

[23] 350 U.S. 11, 14 (1955).

[24] *Id.* at 13.

[25] *Id.* at 15.

[26] *Id.* at 21.

[27] *Id.* at 22.

[28] *Id.* at 22–23.

dependents of service members for crimes committed on overseas military bases—is unconstitutional under the Make Rules Clause because "[t]he term 'land and naval Forces' refers to persons who are *members* of the armed services and not to their civilian . . . dependents."[29] The Court elaborated that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important[ly], acts as a deprivation of . . . treasured constitutional protections."[30] Although it did not "precisely define the boundary between 'civilians' and members of the 'land and naval Forces'" in *Reid* (nor has it done so since), the Supreme Court firmly stated that

> a latitudinarian interpretation of [the Make Rules Clause] would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority. The Constitution does *not* say that Congress can regulate "the land and naval Forces *and* all other persons whose regulation might have some relationship to maintenance of the land and naval Forces."[31]

The Supreme Court expanded its holdings in *Reid* and limited UCMJ jurisdiction even further in *Grisham v. Hagan*[32] and *McElroy v. U.S. ex rel. Guagliardo*.[33] In *Grisham*, the Supreme Court held that UCMJ jurisdiction over civilian Department of Defense employees is unconstitutional under Article III, the Fifth Amendment, and the Sixth Amendment.[34] The Court explained in *Grisham* that despite the government's "voluminous historical materials" attempting to distinguish civilian employees from civilian dependents, there are no "valid distinctions between the two classes of persons" and court-martial jurisdiction over both groups is equally unconstitutional.[35] Likewise, the Court acknowledged in *Guagliardo* that "there are materials supporting the trial of sutlers and other civilians by courts-martial" but dismissed them as "'too episodic, too meager, to form a solid basis in history . . . for constitutional adjudication.'"[36] Thus, in both cases, the Supreme Court strengthened its holding in *Reid* and set firm limits on UCMJ jurisdiction over those not actively and officially serving *in* the military.

Rounding out the line of seminal cases on UCMJ jurisdiction is *Solorio v. United States*, in which the Court overruled its previous holding

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29 Reid v. Covert, 354 U.S. 1, 19–20 (1957) (plurality opinion) (emphasis added).

30 *Id.* at 21.

31 *Id.* at 22, 30 (emphasis added).

32 361 U.S. 278, 280 (1960).

33 361 U.S. 281, 283–84 (1960).

34 *Grisham*, 361 U.S. at 280.

35 *Id.*

36 *Guagliardo*, 361 U.S. at 284 (quoting *Reid*, 354 U.S. at 64 (Frankfurter, J., concurring)).

in *O'Callahan v. Parker*[37] to hold that court-martial jurisdiction does not depend on the military service connection of the offense but on "the military status of the accused."[38] Acknowledging the "doubts there might be about the extent of Congress' power under [the Make Rules Clause]"—and that the eighteenth-century British Parliament and American Congress were both "chary in granting jurisdiction to courts-martial"[39]—the Supreme Court nevertheless clarified that "[t]he test for jurisdiction . . .is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'"[40]

As the cases above illustrate, the Supreme Court has addressed court-martial jurisdiction—under both the UCMJ and its predecessors—several times. Despite attempts by Congress and the armed forces to expand military jurisdiction, the Court has repeatedly pushed back to confirm that the Constitution only allows military jurisdiction over persons actually *in*—as opposed to *affiliated with* or *formerly* in—"the land and naval Forces."[41] But do active-duty military retirees remain *in* the United States Armed Forces for purposes of the Make Rules Clause? Is it constitutional to subject them to court-martial jurisdiction, especially when reserve-component retirees (and even *currently* serving reservists and Guardsmen) are not subject to the UCMJ? The Supreme Court has never said.[42] Although several lower courts have upheld the UCMJ's

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[37] Solorio v. United States, 483 U.S. 435, 440–41 (1987); *see generally* O'Callahan v. Parker, 395 U.S. 258 (1969).

[38] *Id.* at 435–36, 439–41.

[39] *Id.* at 441, 446.

[40] *Id.* at 439 (quoting Kinsella v. Singleton, 361 U.S. 234, 240–41 (1960)).

[41] Grisham v. Hagan, 361 U.S. 278, 280 (1960); U.S. CONST. art. I, § 8, cl. 14. Although this former Army officer enjoys a good tongue-in-cheek argument for the unconstitutionality of the U.S. Air Force, this Note assumes that active-duty Airmen are also fairly construed as members of "the land and naval forces."

[42] Larrabee v. Del Toro, 45 F.4th 81, 89 (D.C. Cir. 2022) ("Neither the Supreme Court nor this court has spoken directly to the constitutional question of whether Fleet Marine Reservists specifically, or inactive-duty retirees more generally, may be court-martialed."). *Cf.* Dan Maurer, Larrabee *at the District Court: Misunderstanding Military Criminal Law by the Article III Judiciary is Far from Retired*, ILL. L. REV. ONLINE 23, 46 (2021) (arguing that the Supreme Court should take up *Del Toro* to decide if retirees fit within the plain meaning of the Make Rules Clause); Krishnamurthy & Perez, *supra* note 21, at 322 (arguing that the Supreme Court should take up *Del Toro* and "afford retired officers fuller protection under the First Amendment").

assertion of jurisdiction over active-duty retirees—and the quasi-retired members of the Fleet Reserve[43]—other courts and scholars disagree.[44]

II. MILITARY RETIREES SHOULD NOT BE SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE BECAUSE IT IS UNCONSTITUTIONAL AND UNNECESSARY.

Retired members of the United States Armed Forces should not be subjected to the UCMJ because doing so is unconstitutional under the Constitution's Make Rules Clause and the Fifth Amendment's equal protection component. Further, it is unnecessary to enforce good order and discipline in the military and an improper infringement of the individual liberties of those who have already sacrificed life, limb, and liberty in long service to their country.

A. Subjecting Retirees to the UCMJ Is Unconstitutional Under the Make Rules Clause.

The Uniform Code of Military Justice derives its constitutional authority from Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[45] The Supreme Court has repeatedly held that the Constitution allows court-martial jurisdiction to apply only to *members* of the armed services—i.e., those with a *current*

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[43] *See Del Toro*, 45 F.4th at 101 (holding that the application of the UCMJ to a member of the FMCR is constitutional); United States v. Overton, 24 M.J. 309, 311 (C.M.A. 1987) (holding application of UCMJ to members of Fleet Marine Corps Reserve constitutional); United States v. Larrabee, No. 201700075, 2017 WL 5712245, at *1 (N-M. Ct. Crim. App. 2017) (citing United States v. Dinger, 76 M.J. 552, 553 (N-M. Ct. Crim. App. Nov. 28, 2017)) (rejecting the argument that UCMJ Article 2(a)(6), as applied to crimes committed by an FMCR member after leaving active service, is unconstitutional); United States v. Begani, 81 M.J. 273, 275–76 (C.A.A.F. 2021) (holding that FMCR members are part of the "land and naval forces" and that court-martial jurisdiction over them is constitutional under both the Make Rules Clause and the Fifth Amendment's equal protection component).

[44] *See Del Toro*, 45 F.4th at 101–04 (Tatel, J., concurring in part and dissenting in part) (arguing that court-martial jurisdiction over FMCR members and retirees is unconstitutional under the Make Rules Clause); Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 333 (D.D.C. 2020) (holding court-martial jurisdiction over FMCR unconstitutional); Krishnamurthy & Perez, *supra* note 21, at 324 ("[M]any argue that at the point of retirement or separation, UCMJ applicability should halt with respect to most or all of its hundred-plus provisions."); Steve Vladeck, *The Supreme Court and Military Jurisdiction Over Retired Servicemembers*, LAWFARE BLOG (Feb. 12, 2019, 7:00 AM), https://www.lawfareblog.com/supreme-court-and-military-jurisdiction-over-retired-servicemembers (arguing that the Constitution does not abide application of military jurisdiction to retirees and calling for Supreme Court to so hold); Brief of National Institute of Military Justice as Amici Curiae in Support of Plaintiff-Appellee at 3, *Del Toro*, 45 F.4th at 98 (No. 21-5012) [hereinafter *Brief*] (arguing retirees are not in the military for purposes of court-martial jurisdiction because they have no legal duty to obey military orders).

[45] U.S. CONST. art. 1, § 8, cl. 14.

military status.[46] *Retired* service members should no longer be considered members of the armed services and thus should not be subject to the UCMJ (at least for crimes committed after leaving military service) under the Make Rules Clause. While common sense might seem to indicate that a person retired from a certain profession is automatically no longer a member of that profession, the question of retirees' military status has proven more difficult.

Courts upholding the constitutionality of court-martial jurisdiction over retirees consistently cite two primary factors which they believe give retirees current military status and thus justify such jurisdiction: retirees' continued receipt of pay and their ability to be recalled to active-duty service.[47] Neither of these factors is sufficient to confer upon retirees—often physically disabled and decades removed from service—a military status justifying the imposition of military discipline. It is even more dubious to argue that active-duty retirees and Fleet Reservists are "required to maintain military readiness."[48] Rather, the test for status in the armed forces should be whether a person "had a legal duty to obey military orders at the time of his [crime], thereby placing him 'in' the land and naval forces."[49]

In the recent case of *Larrabee v. Braithwaite*, the U.S. District Court for the District of Columbia—despite being recently reversed on appeal—"launched what might prove to be a seminal attack on military justice jurisdiction."[50] In *Braithwaite,* the district court held that "[b]ecause the Supreme Court has consistently emphasized that court-martial jurisdiction should be narrowly circumscribed, . . . Congress's present exercise of court-martial jurisdiction over all members of the Fleet Marine Corps Reserve is unconstitutional."[51] The case involved a constitutional challenge to the court-martial conviction of a former Marine Corps staff

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[46] *See supra* pp. 220–22 (discussing Supreme Court cases restricting UCMJ jurisdiction). Congress asserts or implies jurisdiction over retirees not just in 10 U.S.C. § 802(a)(4)–(6), but elsewhere as well. For example, in 10 U.S.C. § 7075, Congress defines "[t]he Regular Army" to include "retired . . . members of the Regular Army." Of course, if the Constitution does not allow military jurisdiction over retirees, Congress's own definitions and assertions to the contrary mean very little. U.S. CONST. art. 1, § 8, cl. 14. *See also Del Toro*, 45 F.4th 81 at 88–89 ("Because of the constitutional interests at stake, we do not defer to Congress' judgments about the classes of persons who are within the 'land and naval Forces,' and thus subject to court-martial jurisdiction.").

[47] *Braithwaite*, 502 F. Supp. 3d at 329; *see also Begani*, 81 M.J. at 278–79 (holding that neither pay nor military recall can subject a person to UCMJ jurisdiction).

[48] *Begani*, 81 M.J. at 278.

[49] *Brief*, *supra* note 44.

[50] Jacob R. Weaver, *The Prosecution of Military Retirees Under the Uniform Code of Military Justice*, FEDERALIST SOC'Y (Feb. 4, 2021), https://fedsoc.org/commentary/fedsoc-blog/the-prosecution-of-military-retirees-under-the-uniform-code-of-military-justice. *See Braithwaite*, 502 F. Supp. 3d at 324 (discussing whether the expansion of court-martial jurisdiction over the Fleet Marine Corps Reserves is unconstitutional).

[51] *Braithwaite*, 502 F. Supp. 3d at 333.

sergeant—who had retired from the Marine Corps and transferred to the Fleet Marine Corps Reserve several months prior—for sexually assaulting a fellow employee at an off-base bar in Japan.[52] The court explained that "military retirees' receipt of retainer pay does *not* suffice to subject them to court-martial jurisdiction," nor does "the possibility of recall to active-duty service."[53]

The "longstanding, but largely inaccurate, assumption that this retainer pay represents reduced compensation for current part-time services"—an assumption based on a one hundred forty-year-old case[54]—was repudiated by the Supreme Court in *Barker v. Kansas*, where it held that "military retirement benefits are to be considered deferred pay for past services" rather than "current compensation for reduced current services."[55] Thus, receipt of military retirement benefits is not enough to subject a class of individuals to the UCMJ.[56] Further, by tying retired service members to the military through their pensions, the government "forces a cruel decision": either sever all connection with the military and receive no retirement benefits, or accept a pension and give up constitutional liberties for life.[57]

Likewise, the court noted that "military retirees are highly unlikely to be recalled"—even though they theoretically could be in some future geopolitical catastrophe—because, since at least the Vietnam War, the reserve components, rather than the retired lists, have been the sole mechanism for augmenting the active-duty force.[58] The court concluded that the "anachronistic" idea of retirees being subject to active-duty recall is not enough to deem them members of the "land and naval Forces" under the Make Rules Clause.[59] Finally, the court noted that "the ultimate question [was] whether the Government . . . adequately demonstrated that court-martial jurisdiction over military retirees is necessary to maintain good order and discipline."[60] The district court's bombshell holdings in *Larrabee* were "nothing short of attention-grabbing."[61]

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[52] *Id.* at 325.

[53] *Id.* at 329–31.

[54] *Id.* at 330 (referencing the Supreme Court's holding in United States v. Tyler, 105 U.S. 244 (1881)).

[55] 503 U.S. 594, 605 (1992).

[56] *Braithwaite*, 502 F. Supp. 3d at 330; *see* Reid v. Covert, 354 U.S. 1, 22–23 (1957) (plurality opinion) (rejecting the argument that civilian dependents receiving military benefits were part of the "land and naval forces" and thus subject to UCMJ).

[57] *See* Krishnamurthy & Perez, *supra* note 21, at 322–23 (discussing the choice that retirees must make between free speech or financial entitlements).

[58] *Braithwaite*, 502 F. Supp. 3d at 331.

[59] *Id.* (quoting Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiff's Motion for Judgment on the Pleadings at 25, *Braithwaite*, 502 F. Supp. 3d 322 (No. 1:19-cv-654 (RJL))); U.S. CONST. art. I, § 8, cl. 14.

[60] *Braithwaite*, 502 F. Supp. 3d at 331.

[61] Maurer, *supra* note 42, at 24.

The government appealed *Larrabee* to the Court of Appeals for the D.C. Circuit, which heard oral arguments on the case in October 2021.[62] The appellate judges appeared skeptical at times of the government's points during oral argument—and repeatedly mentioned *Toth* and *Solorio* as controlling cases that appear to favor a narrow construal of court-martial jurisdiction[63]—but the D.C. Circuit nevertheless recently ruled 2–1 for the government.[64] Although the circuit court agreed with Larrabee that Congress can only "extend court-martial jurisdiction over a person if he has a formal relationship with the military that includes a duty to obey military orders," it held that members of the FMCR are still "subject to ongoing military duties" and thus constitutionally subject to the UCMJ.[65] In his dissent, Judge Tatel agreed with the majority's test for military status but disagreed with its conclusion.[66] He argued that applying the UCMJ to FMCR members and "roughly two million military retirees" is a "dramatic expansion of court-martial jurisdiction . . . beyond what the Constitution allows and case law supports."[67] After pointing out that "[t]he Constitution guarantees the right to juries not once, not twice, but four times" (while having "nothing [specific] at all to say about court-martial jurisdiction"), Judge Tatel persuasively argued that simply being subject to future service does not give one military duties prior to receiving the "recall order summoning him from civilian life to take up arms" again.[68] The D.C. Circuit's split decision in *Larrabee* represents the first instance, since the establishment of the UCMJ, of an Article III court of appeals considering whether military retirees may be court-martialed.[69] Although the D.C. Circuit reversed the district court's decision, in light of the test it adopted, its failure to address public policy or equal protection considerations, and Judge Tatel's strident dissent, there remains much ambiguity and disagreement about how to analyze a retiree's status under the UCMJ. For example, the Court of Appeals for the Armed Forces' recent ruling in *United States v. Begani* focused heavily on equal protection considerations, something not addressed by the D.C. Circuit.[70]

In *Begani*, the court likewise held that an FMCR member *was* subject to court-martial jurisdiction under the Make Rules Clause but also that the exercise of military jurisdiction over him did not violate equal

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62 Larrabee v. Del Toro, 45 F.4th 81 (D.C. Cir. 2022).

63 Oral Argument at 3:00–9:59, *Del Toro*, 45 F.4th 81 (No. 21-5012), https://www.cadc.uscourts.gov/recordings/recordings2021.nsf/CBC74C3CE3BB833885258777600543100/$file/21-5012.mp3.

64 *Del Toro*, 45 F.4th at 83.

65 *Id.* at 84, 101.

66 *Id.* at 101.

67 *Id.* at 101–02.

68 *Id.* at 101–04.

69 *Id.* at 96.

70 81 M.J. 273, 275 (C.A.A.F. 2021).

protection.[71] There, another retired Marine—and current member of the FMCR—in Japan was arrested for attempted sexual solicitation of a minor.[72] Although the court in *Begani* agreed that the test for UCMJ jurisdiction is the military status of the accused, it reasoned that Fleet Reservists and retirees are not like veterans who have "'severed all relationship' with the military"[73] because they "are still paid, subject to recall, and required to maintain military readiness."[74]

Both the *Begani* and *Larrabee* district court decisions are wrong—although the latter much less so. The *Begani* court merely rehashes the arguments refuted above about retainer pay and potential for recall justifying the lifelong imposition of military discipline on retirees. In citing various administrative requirements for FMCR members (i.e., keeping their home address updated), the court attempts to argue that they are required to maintain military readiness, which thereby establishes their current military status.[75] But this paints a false picture. Fleet Reservists do not take physical fitness tests or drug tests, undergo medical examinations, or regularly conduct any military training.[76] Certain minor "regulatory" requirements or administrative "obligations"—as Judge Tatel argued—are not military *order*s and do not keep a member ready for active duty in any meaningful sense.[77] On the other hand, reserve-component Soldiers, Sailors, Airmen, and Marines are subject to all these military readiness requirements and more.[78] Why then are they *not* subject to the UCMJ (except when actually conducting training or operations) but retirees are? In short, *Begani's* attempts to establish military status via pay and the potential for recall fall short. After all, how can someone unable to give or receive military orders be *in* the military?

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[71] *Id.*

[72] *Id.*

[73] *Id.* at 278 (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 14 (1955)).

[74] *Id.*

[75] *Id.* at 278–79.

[76] *See generally* U.S. DEP'T OF DEF., 7000.14-R, FINANCIAL MANAGEMENT REGULATION (2022) (detailing general features of Fleet Reserve membership). "Members of the Fleet Marine Corps Reserve . . . are ineligible for promotion, lack authority to issue binding orders, . . . need not participate in military activities, need not maintain any level of physical fitness, and may not serve on or refer charges to court-martials." Larrabee v. Del Toro, 45 F.4th 81, 102–03 (D.C. Cir. 2022) (Tatel, J., concurring in part and dissenting in part).

[77] Oral Argument at 10:45–18:00, *Del Toro*, 45 F.4th 81 (No. 21-5012), https://www.cadc.uscourts.gov/recordings/recordings2021.nsf/CBC74C3CE3BB8338852587 7600543100/$file/21-5012.mp3; *see also id.* at 102–03 (Tatel, J., concurring in part and dissenting in part).

[78] *See* 10 U.S.C. § 10147 (describing training requirements for the Ready Reserve); MARYGAIL K. BRAUNER ET AL., MEDICAL READINESS OF THE RESERVE COMPONENT, at xii–xiv (2012) (explaining medical and dental readiness requirements).

Although the district court in *Larrabee* reached the right result, it missed the mark when it designated "good order and discipline" rather than the military status of the accused as "the ultimate question."[79] Although the court did "an admirable job of dismantling the government's argument [regarding retirement pay and possible recall]," it "could also have taken the opportunity to explain what [it] meant by 'good order and discipline' and why conduct by a retiree like Larrabee bore no rational relationship to its meaning."[80] The need to maintain "good order and discipline" in an effective fighting force is relevant to the reasons justifying military jurisdiction, but it is no better a test than the receipt of pay or potential for recall.

Instead, the district court should have clarified that the test for military status—in keeping with the spirit of *Solorio*—is whether a person "had a legal duty to obey military orders at the time of his [offense], thereby placing him 'in' the land and naval forces."[81] Therefore, it follows that a retiree subject to no military orders aside from the single potential "order" to return to active service (the same "order" the 17 million civilian members of the selective service are subject to if drafted) is not currently in the armed forces. Being subject to military orders in the past does not make one subject to them in the present (*Toth*), nor does the potential to be subject to them in the future (or the UCMJ could apply to every civilian subject to a military draft).[82] Merely because retirees were once in the armed forces—and *could* be again—does not make them in the armed forces in perpetuity. This test was proposed and discussed in depth by Larrabee's attorney on appeal at the D.C. Circuit.[83] Although the circuit court recently adopted this very test, it missed the mark in its application of the test to retirees and FMCR members. A potential recall order is unique, functioning only "as a gateway to military status. The possibility of such an order certainly means that the military status of members of

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[79] *Brief*, *supra* note 44, at 2–4; *cf.* Maurer, *supra* note 42, at 23–24 (arguing that *Larrabee* was a "misreading" despite its "correct (or at least fair) outcome").

[80] Maurer, *supra* note 42, at 44.

[81] *Brief*, *supra* note 44, at 3.

[82] The majority in *Larrabee v. Del Toro* cursorily dismissed the analogy of retirees and selective service registrants being subject to the same potential recall "order" because the latter has *zero* relationship with the military until drafted. 45 F.4th at 98. For two judges on the D.C. Circuit, remaining tenuously connected to the military, even by a thread, and being theoretically subject to a recall "order," are enough to subject a person to court-martial jurisdiction. *Id.* at 98–99 ("We fail to see why a servicemember who must obey one order is less a part of the 'land and Naval forces' than his peer who must obey two.").

[83] *See* Oral Argument at 38:00–42:45, *Del Toro*, 45 F.4th 81 (No. 21-5012), https://www.cadc.uscourts.gov/recordings/recordings2021.nsf/CBC74C3CE3BB833885258 77600543100/$file/21-5012.mp3 (discussing when a military retiree should be subject to military jurisdiction).

the Fleet Marine Corps Reserve *could* change, but not that they are currently part of the armed forces."[84]

In sum, subjecting retirees to the UCMJ is unconstitutional because they are not *in* "the land and naval Forces" under Article 1, Section 8, Clause 14 of the Constitution.[85] Because their military status places them outside this class of people, it is unjust and unconstitutional to prosecute retirees in perpetuity—especially for non-military offenses committed after retirement—in military tribunals, which "have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[86]

B. Subjecting Retirees to the UCMJ Is Unconstitutional Under the Fifth Amendment's Equal Protection Component.

Even *if* retired service members are considered part of "the land and naval Forces," subjecting them to the UCMJ is still an unconstitutional violation of equal protection.[87] It is a violation of a person's due process rights under the Fifth Amendment for the Federal Government to deny him the equal protection of the laws.[88] The government must treat similar people in a similar manner and is prohibited from constructing "arbitrary classifications."[89] As the court in *Begani* concedes, "[t]he initial question then, is whether the groups are similarly situated, that is, are they 'in all *relevant* respects alike.'"[90]

Because active-component retirees (and Fleet Reservists) are "in all *relevant* respects"[91] like reserve-component service members and retirees who are not subject to the UCMJ, it is a violation of equal protection to assert military jurisdiction over them. Reserve-component service members receive regular pay and benefits, are *much* more likely than active-duty retirees to be called to active duty, generally engage in military training for over two months each year, and—unlike active-duty retirees—must *actually* maintain high levels of military readiness (e.g., regular physical fitness tests, drug tests, medical examinations, firearms

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84 *Del Toro*, 45 F.4th at 103 (Tatel, J., concurring in part and dissenting in part).

85 U.S. CONST. art. I, § 8, cl. 14.

86 Toth v. Quarles, 350 U.S. 11, 17 (1955).

87 U.S.CONST. art. I, § 8, cl. 14.

88 *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (discussing equal protection and due process in the context of racial segregation).

89 Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598, 601 (2008).

90 United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021) (emphasis added) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

91 *Hahn*, 505 U.S. at 10 (emphasis added); *see supra* notes 9–12 and accompanying text.

qualifications, etc.).[92] Why then are they not subject to the UCMJ, but active-duty retirees are? If anything, it should be the other way around.

Likewise, retired reservists under age sixty (so-called "gray-area retirees") almost universally "choose" to remain affiliated with their branch of service—and thus remain subject to recall—until they reach full retirement to receive cost-of-living and time-in-service adjustments to their future pensions.[93] Thus, they too are receiving a type of "retainer pay."[94] Further, gray-area retirees can be recalled to active duty in case of emergency, maintain their military rank and title, remain eligible for government insurance benefits, keep base access and commissary privileges, and are subject to administrative regulations governing wear of the uniform, updating of personal information, and the like.[95] If this treatment of reserve-component retirees sounds familiar, it is because it is exactly the same as active-component retirees. In all *relevant* respects, reserve-component retirees and active-component retirees are similarly situated. There is no unarbitrary reason for applying the UCMJ to one but not the other.

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[92] *See* Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 332 (D.D.C. 2020) ("Because military retirees are much less likely to be recalled to active-duty service than Reservists are, the distinction in whether these two similar groups are subject to court-martial jurisdiction seems arbitrary at best. Indeed, under the current regime, a retired member of the Army and an inactive member of the Army Reserve who get into a bar brawl would face two entirely different systems of justice: the Army retiree could be hauled before a court-martial and tried by a military judge and active military officers, whereas the Army Reservist would be entitled to indictment by a grand jury and trial by a civilian jury of his peers overseen by an impartial judge."); BRAUNER ET AL., *supra* note 78, at 1; LAWRENCE KAPP & BARBARA SALAZAR TORREON, CONG. RSCH. SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 1–3 (2021) (explaining duties within the different categories of reservists); Larrabee v. Del Toro, 45 F.4th 81, 103 (D.C. Cir. 2022) (Tatel, J., concurring in part and dissenting in part) ("[A]lthough the Marine Corps requires all 'active and reserve component' members to be vaccinated against COVID-19 . . . it has not extended this requirement to members of the Fleet Marine Corps Reserve.").

[93] *See* 10 U.S.C. § 12735 (describing reserve retiree "inactive status list"); Am. Mil. Retirees Ass'n, *Leave the Gray Area: Guard and Reserve Retirement*, MILITARY.COM, https://www.military.com/benefits/veteran-benefits/leave-the-gray-area-guard-and-reserve-retirement.html (last visited Oct. 16, 2022) (describing the time after a Guard or Reserve member's career but before collecting a pension).

[94] *See generally* 10 U.S.C. § 12731 (describing reserve-component retired pay requirements).

[95] *See, e.g.*, 10 U.S.C. § 688 (describing when a retiree may be ordered to active duty); 10 U.S.C. §§ 771–72 (describing who is authorized to wear a military uniform); 10 U.S.C. § 1063 (describing requirements for commissary store access); 10 U.S.C. § 1076e (describing qualifications for TRICARE Retired Reserve coverage); 10 U.S.C. § 10205 (describing notice requirements for change of address, marital status, etc.); 10 U.S.C. § 12771 (describing process for grade on transfer); 10 U.S.C. § 12307 (describing sections which dictate that a retiree may be ordered to active duty).

To be sure, the *Begani* court rightly points out that "in both of our wars with Iraq, retired personnel of all services were actually recalled."[96] Likewise, the court fairly noted that recent active-component retirees—"who have trained and extensively served" and are "more familiar with the current systems"—are "arguably much more useful" in time of war "than those who have not served or have served far less time."[97] Was it, therefore, reasonable for the court to state that active-component and reserve-component retirees "are not similarly situated, and so it does not violate equal protection to subject one and not the other to the UCMJ?"[98] Absolutely not.

The *Begani* court strikes a somewhat derogatory tone towards the military reserve components and cherry-picks its sample populations—pitting Fleet Marine Corps Reservists fresh out of active duty against retired reservists who "served only a few years on continuous active duty and then served part-time."[99] This paints a false picture of the modern role of the U.S. military's reserve components. At the height of the Iraq War, over half the combat troops in Iraq were Army National Guard Soldiers.[100] In other words, hundreds of thousands of reserve-component service members were called to war, compared to less than two thousand active-*and* reserve-component retirees.[101] Since 9/11, the role of U.S. military reserve forces has shifted dramatically from that of a strategic reserve—employed only irregularly in emergency situations—to that of an operational reserve—extensively trained, integrated with the active components, and regularly deployed overseas.[102] Virtually all reserve-component service members retiring today have "extensively served" and

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[96] United States v. Begani, 81 M.J. 273, 279 (C.A.A.F. 2021) (quoting United States v. Dinger, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017)).

[97] *Id.* at 281.

[98] *Id.*

[99] *Id.* at 280.

[100] *See* Sharon Otterman, *Iraq: U.S. Deployments at the War's Height*, COUNCIL FOREIGN RELS. (Feb. 3, 2005, 12:13 PM), https://www.cfr.org/backgrounder/iraq-us-deployments-wars-height (stating that 340,000 U.S. troops were stationed in Iraq when Baghdad fell, 218,931 of whom were Army Reserve and National Guard troops).

[101] Susan Kreimer, *Retired Soldiers Heed Call to Return to Duty in Iraq, Afghanistan*, AARP BULL. (Nov. 9, 2010), https://www.aarp.org/personal-growth/transitions/info-11-2010/retired_soldiers_heed_call_to_return_to_duty.html; *see* Stephen M. Duncan, *Homeland Security and the Reconstruction of U.S. Reserve Forces*, *in* TRANSFORMING THE RESERVE COMPONENT: FOUR ESSAYS 7, 10 (2005) ("[A] GAO report noted that over 335,000 Reservists had been involuntarily called to active duty since September 11, 2001, and that 'the pace of Reserve operations is expected to remain high' in what was described as an 'indefinite Global War on Terrorism overseas.'").

[102] Hans Binnendijk & Gina Cordero, *Transforming the Reserve Component*, *in* TRANSFORMING THE RESERVE COMPONENT: FOUR ESSAYS, *supra* note 101, at 3 ("Reserves are no longer just weekend warriors. They are fighting and dying overseas. The scale of the mobilization is primarily the result of Operation *Iraqi Freedom*.").

are eminently "familiar with the current systems."[103] Many have several years of combat experience in Iraq and Afghanistan.[104] Reserve-component retirees' behavior affects "good order and discipline" just as much as active-component retirees'—and *current* reservists' behavior affects it even more. Likewise, today's retired reservists have an equally strong military status as active-duty retirees. *Begani* gives no legitimate reason to justify the unequal application of the UCMJ to these similarly situated groups.[105]

In attempting to link military status with temporal proximity to military service, the *Begani* court also creates a false dichotomy. First, it completely ignores currently serving reservists and the fact that they are not generally subject to the UCMJ, comparing active-component retirees solely to reserve-component retirees.[106] Obviously, current reserve-component service members are much "closer" to active-duty service than even recently retired active-duty service members. Whereas there are usually tens of thousands of reserve-component service members on active duty, the number of recalled retirees on active duty is generally limited to a *maximum* of one thousand—except in times of national emergency.[107] While active-component retirees might "be brought up to speed much more quickly"[108] than recalled reserve-component retirees, there is no contest between them and currently serving reservists—who are *already* up to speed. Given the geopolitical environment and operational tempo since 9/11, reserve-component members have been and continue to be ready to fight and win our nation's wars at a moment's notice.[109]

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[103] *Begani*, 81 M.J. at 281.

[104] *See* MICHAEL WATERHOUSE & JOANNE O'BRYANT, CONG. RSCH. SERV., RS22541, NATIONAL GUARD PERSONNEL AND DEPLOYMENTS FACT SHEET 3–5 (2008) (providing statistics about reserve-component service members who served in Iraq and Afghanistan).

[105] *See Begani*, 81 M.J. at 280–81 (discussing whether the equal protection component of the Fifth Amendment is violated by subjecting members of the Fleet Reserve, but not retired reservists, to military jurisdiction).

[106] *Id.*

[107] 10 U.S.C. §§ 688, 688a.

[108] *Begani*, 81 M.J. at 281.

[109] Duncan, *supra* note 101, at 10 (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-1031, MILITARY PERSONNEL: DOD NEEDS TO ADDRESS LONG-TERM RESERVE FORCE AVAILABILITY AND RELATED MOBILIZATION AND DEMOBILIZATION ISSUES 1 (2004)) ("[A] GAO report noted that over 335,000 Reservists had been involuntarily called to active duty since September 11, 2001, and that 'the pace of Reserve operations is expected to remain high' in what was described as an 'indefinite Global War on Terrorism overseas.'"); Jim Greenhill, *Lengyel: National Guard at Highest State of Readiness Ever*, AIR NAT'L GUARD (Mar. 28, 2019), https://www.ang.af.mil/Media/Article-Display/Article/1801779/lengyel-national-guard-at-highest-state-of-readiness-ever/ ("Readiness is the National Guard's No. 1 priority, the chief of the National Guard Bureau told lawmakers . . . . 'This readiness requires the National Guard to be deployable, sustainable, and interoperable with our active components.'").

Second, a reserve-component retiree might be only a few years removed from service and could have served the last several years of his career deployed overseas in operational environments. If proximity of time to active service and usefulness in case of recall are the issues to consider for equal protection—as the *Begani* court seems to think—there is no justification whatsoever for treating the sixty-five-year-old active-component retiree, who retired in 1997 and never deployed, differently than the forty-two-year-old reserve-component retiree who retired in 2020 after four twelve-month combat tours in the Middle East. Why should the former be subject to the UCMJ but not the latter? Again, if anything, it should be the other way around.[110]

Although equal protection was not at issue in *Larrabee*, the district court's hypothetical therein illustrated it best.

> Because military retirees are much less likely to be recalled to active-duty service than Reservists are, the distinction [between] these two similar groups . . . seems arbitrary at best. Indeed, under the current regime, a retired member of the Army and an inactive member of the Army Reserve who get into a bar brawl would face two entirely different systems of justice: the Army retiree could be hauled before a court-martial . . . whereas the Army Reservist would be entitled to indictment by a grand jury and trial by a civilian jury of his peers overseen by an impartial judge. Please![111]

This hypothetical illustrates the absurdly dissimilar treatment of similarly situated groups.

A second hypothetical provides further illustration. Article 88 of the UCMJ criminalizes the use of "contemptuous words against the President."[112] But, of course, Article 88—like the rest of the UCMJ—applies to active-duty retirees but not reserve-component retirees or active-duty veterans.

> What difference is there between a contemptuous statement made by a veteran who served nineteen years and achieved the rank of Lieutenant Colonel [or served one more year in, and retired from, a reserve component] and the same statement made by a retired officer of equal rank who served one additional year and thus qualifies for [active-duty] retirement pay?[113]

There is no difference. These two individuals (assuming their military statuses were even known) would be viewed the same, and their opinions

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[110] Of course, it does not follow that Congress should simply subject reserve-component service members and retirees to the UCMJ to rectify the equal protection issue. Congress cannot do this. *See supra* Part IIA. And Congress should not do this. *See infra* Part IIC.

[111] Larrabee v. Braithwaite, 502 F. Supp. 3d 322, 332 (D.D.C. 2020).

[112] 10 U.S.C. § 888.

[113] Krishnamurthy & Perez, *supra* note 21, at 327; 10 U.S.C. § 888.

given equal weight by civilians and service members alike.[114] "[W]hatever threat to good order that exists is equal between the two."[115] The potential for one to be prosecuted, but not the other, highlights the unequal treatment inherent in the status quo.[116]

In sum, whether or not active-component retirees, Fleet Reservists, reserve-component retirees, and/or reserve-component service members are properly considered part of the "land and naval Forces" under the Make Rules Clause, treating these groups differently for purposes of the UCMJ—when they are similar in all *relevant* respects—is a violation of equal protection under the Fifth Amendment.[117]

C. Subjecting Retirees to the UCMJ Improperly Infringes on Their Rights and Is Unnecessary to Good Order and Discipline.

Putting constitutional arguments aside, retirees should not be subject to the UCMJ because it is an unnecessary infringement of their civil liberties. There are at least three practical reasons why retirees should not be subject to the UCMJ, regardless of the constitutionality of doing so.

First, as discussed at length in Part IIB, retirees are much more removed from active service and much less likely to be recalled for war than currently serving reservists. This argument goes not only to the constitutional argument about equal protection but also to a more practical argument about necessity. Congress has deemed it unnecessary to apply the UCMJ to a thirty-year-old currently-serving U.S. Army Reserve captain who has active-duty training and experience, maintains a high level of physical readiness, and could be activated at any time for a number of ongoing missions.[118] How, then, does it make any sense to apply the UCMJ to a seventy-year-old retired colonel who has not served in over twenty years and likely could not even be recalled into a *military* role?[119] It does not.

While military status is the constitutional test for UCMJ jurisdiction, the effects on good order and discipline remain relevant.[120] There is a good

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114 Krishnamurthy & Perez, *supra* note 21, at 327.

115 *Id.*

116 *Id.*

117 U.S. CONST. art. I, § 8, cl. 14; *see* Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (stating that the unequal treatment of people who are similar in all relevant respects is a violation of equal protection).

118 *See* 10 U.S.C. § 802 (describing which service members are subject to the UCMJ).

119 *See* U.S. DEP'T OF DEF., MANAGEMENT OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS (2016) (emphasis added) ("Category III retirees [including all those over 60 years old] generally should be deployed to *civilian* defense jobs upon mobilization.").

120 *See* Larrabee v. Del Toro, 45 F.4th 81, 102–03 (D.C. Cir. 2022) (Tatel, J., concurring in part and dissenting in part) (arguing "that the need for military order and discipline is what justifies subjecting military personnel to courts-martial" and that, because it exempts

argument to be made that reserve-component service members should be subject to the UCMJ 24/7 because their bad actions can reflect poorly on the military, affect discipline and morale in their units, and contribute to a decline in overall military readiness. Not so with retirees. Even the criminal actions of a recent retiree, whose military status is widely known, merely create bad press. They do not affect the good order and discipline of a current unit. Nor do they affect military readiness. This is even more so for retirees further removed from active service and outside the public eye. There is no reason whatsoever to use precious military resources to court-martial the seventy-two-year-old Vietnam War veteran with post-traumatic stress disorder for crimes like shoplifting or disorderly conduct. The military should confine court-martial jurisdiction to those necessary to maintain an effective fighting force—i.e., those actually still *in* the armed forces.

Second, in addition to being unnecessary to good order and discipline, subjecting retirees to the UCMJ is an improper restraint on their civil liberties. Despite undergoing "more than seventy years of steady 'civilianization,'"[121] the military justice system is still more concerned with *military* than it is with *justice*—and rightfully so! Indeed, the Supreme Court noted almost fifty years ago that "the different character of the military community and of the military mission requires a different application of [constitutional] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[122] But why should a Soldier who already gave up many of his natural and constitutional liberties for twenty years to serve his country be forced to continue doing so until he dies? He should not.[123] The limitations on constitutional rights in the name of military necessity, efficiency, and discipline are accepted by every American who volunteers to serve in the military. But those who have risked life and limb in the cause of liberty—and especially those who have retired after doing so for over twenty years—are the Americans most deserving of that liberty. To deny a retired military service member the full protections guaranteed under the Constitution by subjecting him to court-martial jurisdiction in perpetuity is the height of cruel irony.

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the FMCR from its strict COVID-19 vaccination policy, "[t]he military obviously considers [fleet reservists] to lie outside the 'force' where 'good order and discipline' are essential").

[121] Maurer, *supra* note 42, at 23.

[122] Parker v. Levy, 417 U.S. 733, 758 (1974).

[123] *Cf.* Krishnamurthy & Perez, *supra* note 21, at 328 (arguing against UCMJ application to retirees, specifically portions limiting "fundamentally important constitutional right[s] well after a retiree's active service commitment ends").

Not only are there fewer procedural due process protections under the UCMJ,[124] but entire classes of otherwise innocuous and constitutionally-protected conduct are also criminalized.[125] For example, a retired officer can be court-martialed for exercising her First Amendment rights to free speech if she "uses contemptuous words against the President, Vice President, Congress, . . . or the Governor or legislature of any State."[126] She could also be court-martialed for an extramarital affair or other private conduct punishable under Article 133 or 134 as "conduct unbecoming an officer" or "conduct of a nature to bring discredit upon the armed forces."[127]

To be sure, actual courts-martial of retirees are rare.[128] But this is cold comfort to those living in the UCMJ's shadow for the second half of their lives because "the *threat* of a court-martial is very real."[129] As the

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[124] *See* Toth v. Quarles, 350 U.S. 11, 15, 17–19 (1955) (describing the lack of constitutional safeguards in military tribunals); Reid v. Covert, 354 U.S. 1, 21–22 (1957) (plurality opinion) (describing how the enlargement of military jurisdiction is an encroachment on the civilian system).

[125] *See, e.g.*, U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES (2019) (listing the elements for punishing extramarital sex in the military); U.S. DEP'T OF DEF., INSTR.1326.06, HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (2009) (describing First Amendment restrictions on the right to join demonstrations, publish personal writing, and distribute literature in the military); 10 U.S.C. § 899 (explaining disciplinary measures for cowardly conduct); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L. J. 193, 194 (1972) (discussing the token representative jury system afforded by military trials).

[126] 10 U.S.C. § 888; *see* Krishnamurthy & Perez, *supra* note 21, at 318 ("[R]etirees must select their words delicately when engaging in their constitutional right of free speech against elected officials; a single statement could find them standing trial in a court-martial.").

[127] 10 U.S.C. §§ 933–34.

[128] Gina Harkins, *New 'Bombshell' Legal Opinion Says Military Retirees Can't Be Court-Martialed,* MILITARY.COM (Aug. 9, 2019), https://www.military.com/daily-news/2019/08/09/new-bombshell-legal-opinion-says-military-retirees-cant-be-court-martialed.html. Indeed, each of the military branches places some restrictions on the court-martial of retirees. For example, Army Regulation 27–10 limits the court-martial of retirees to "extraordinary circumstances" and requires coordination with the Army's Office of the Judge Advocate General. U.S. DEP'T OF ARMY, REG. 27–10, MILITARY JUSTICE (2020); *see also* U.S. DEP'T OF NAVY, JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (2012) (requiring the Secretary of the Navy's approval to court-martial retired Sailors and Marines); U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (2003) (requiring Secretary of the Air Force approval to court-martial retired Airmen in some circumstances). But these self-imposed administrative rules can be rescinded at any time and still give great discretion to military and civilian officials outside the Judicial Branch. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 44 (1983) (applying an arbitrary-and-capricious test when an agency rescinds regulations). They are a far cry from the permanence and protection offered by a constitutional decision or congressional decree.

[129] Harkins, *supra* note 128 (emphasis added); *see* Chrissy Clark, *Active Duty, Retired Naval Intelligence Members Told They Cannot 'Disrespect' Biden Over Afghanistan Debacle*, DAILY WIRE (Aug. 27, 2021), https://www.dailywire.com/news/exclusive-active-duty-retired-

(admittedly hyperbolic) hypothetical in this Note's introduction illustrates, even the threat of court-martial can powerfully chill free speech and be used for improper purposes. And such concerns are not merely hypothetical. In the hyper-partisan political environment of the last decade, retired military officers have faced tough choices—and sometimes tough scrutiny—over their legitimate criticisms of presidents from both parties.[130] As D.C. Circuit Judge Tatel recently acknowledged, "[t]he 200-plus retired generals and admirals who spoke out against President Trump and the 120-plus now speaking out against President Biden could [certainly] be court-martialed."[131] And just last year, following the Biden administration's much-criticized handling of the withdrawal from Afghanistan, the United States Navy felt it necessary "to remind . . .military retirees of their responsibilities and obligations under Article 88 of the [UCMJ]" and reiterate that "military retirees are prohibited from disrespecting senior government leadership."[132] Given that retired officers who have served in Afghanistan likely have the most credibility on the issue, one can understand why some might want to "remind"—or *threaten*—them to keep quiet as the Taliban cemented power and hundreds of Americans remained trapped in Afghanistan. Chilling.[133]

Third, an expansive UCMJ is ironically contributing to the detrimental dilution of the military justice system. The last several decades have seen pushes to remove commanders' authority and discretion under the UCMJ, to institute special procedures for certain types of offenses, and to generally increase the number of procedural protections for defendants while reducing the severity of punishments.[134] These developments are part of "the trend toward a 'civilianization' of military justice, in matters substantive and procedural, that began in earnest with the enactment of the UCMJ in 1950."[135] This trend is

naval-intelligence-members-told-they-cannot-disrespect-biden-over-afghanistan-debacle (referencing an email from the Office of Naval Intelligence which reminded service members of their obligation not to criticize the President under the Uniform Code of Military Justice).

[130] *See* Miller, *supra* note 3, at 1209, 1211 (describing how retired U.S. generals and military personnel have endorsed political candidates and the consequences therefrom).

[131] Larrabee v. Del Toro, 45 F.4th 81, 103 (D.C. Cir. 2022) (Tatel, J., concurring in part and dissenting in part).

[132] Clark, *supra* note 129.

[133] Even more recently, a retired three-star general was disciplined and placed under investigation by the Army for mild criticisms of First Lady Jill Biden on Twitter. Shauneen Miranda, *A Three-Star General Was Suspended by the Army After Appearing to Mock Jill Biden*, NPR (July 10, 2022, 1:14 PM), https://www.npr.org/2022/07/10/1110736363/three-star-general-gary-volesky-suspended-jill-biden-tweet-abortion.

[134] Eugene R. Fidell & Stephen I. Vladeck, *Second-Class Justice in the Military*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/military-justice-congress.html; Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 87–90, 92–94 (1970).

[135] Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 674 (2021).

troubling. As we move beyond the focus on counterterrorism and counterinsurgency to address growing near-peer threats in China and Russia, the martial culture of America's armed forces must remain strong. General William Tecumseh Sherman's words remain as true today as they were in 1879.

> [I]t [would] be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject [civilian principles and procedures] . . . . The object of military law is to govern armies . . . of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.[136]

The primary object of the military justice system is to catalyze victory.[137] Surely, treating Soldiers fairly is part of this, as doling out punishment in an arbitrary or discriminatory manner would only harm the morale and unit cohesion necessary for victory. But treating Soldiers harshly—especially when they are disobedient, disloyal, or cowardly during war—is also part of catalyzing victory. As the Supreme Court has noted, "[m]ilitary law is, in many respects, harsh law which . . . emphasizes the iron hand of discipline more than it does the even scales of justice."[138] Substantive and procedural rights must come second in the military, where "by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual."[139]

The United States military is, by design, a thoroughly undemocratic institution in the service of a thoroughly democratic nation.[140] Thus, one can forgive the military justice system's schizophrenia in attempting to choose between the equally laudable goals of realizing victory over our nation's enemies and realizing justice for our nation's sons and daughters who choose to serve. Nevertheless, the purpose of the United States military is to fight and win our nation's wars.[141] This purpose must come first. Central to this purpose is the ability to compel obedience to orders despite physical danger or moral reservation. "Every enactment, every change of rules which impairs the principle [of obedience] weakens the army, impairs its values, and defeats the very object of its existence."[142]

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[136] *Id.* at 691–92 (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 87–88 (1993)).

[137] *See* Toth v. Quarles, 350 U.S. 11, 17 (1955) (stating that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise").

[138] Reid v. Covert, 354 U.S. 1, 38 (1957) (plurality opinion).

[139] *Id.* at 39.

[140] *See In re* Grimley, 137 U.S. 147, 153 (1890) ("An army is not a deliberative body. It is the executive arm. Its law is that of obedience.").

[141] *Toth*, 350 U.S. at 17 ("Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.").

[142] Maurer, *supra* note 135, at 706–07 (quoting THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 87–88 (1993)).

If this all seems somewhat distasteful, that is because it is. And, given the ever-widening gap between America's civilian and warrior classes in the era of our all-volunteer military, it comes as no surprise that there has been increasing pushback against the harsher and more alien aspects of military culture, including methods of military justice.[143] Civilians and policymakers understandably wince at notions of being prosecuted for adultery or free speech, executed for cowardice, or imprisoned without a trial by jury.[144] Therefore, if the military justice system is to maintain its unique and necessary character, it must be narrowly tailored and applied. Subjecting too wide a population to this stringent and extra-constitutional form of justice will only become more and more unacceptable to Congress, the courts, and the civilian population as time goes on. Narrowing the scope and application of the UCMJ—such as by removing retirees from military jurisdiction—will make reinvigorating the UCMJ more politically palatable because its provisions will only affect those for whom they are absolutely necessary. By limiting the UCMJ to those in actual, *active* service, many of the calls to weaken and water it down will be at least partly neutralized. While this Note does not call for a return to *O'Callahan's* service-connection requirement,[145] it does call for a narrow military-status test and a narrow interpretation of "land and naval Forces" in the Make Rules Clause.[146]

In short, since the implementation of the UCMJ over seventy years ago, military justice has become broader in scope and weaker in force. This is the wrong direction. The United States needs a robust UCMJ, applied only to those actively serving—and limited to military offenses whenever possible—not a feeble UCMJ, widely applicable in scope but really nothing more than an inferior imitator of the civilian justice system. A "harsh" system—"emphasiz[ing] the iron hand of discipline" and applying only to our active warriors—both preserves the martial culture and lethality of our armed forces and protects the rights of citizens not in active service.[147]

In sum, even if subjecting retirees to the UCMJ were constitutional under the Make Rules Clause and Fifth Amendment, it would still make no sense to do so. It is unnecessary given the structure of America's

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[143] *See id.* at 706 (describing how criticisms of military justice extend as far back as Sir William Blackstone).

[144] *See, e.g.,* MANUAL FOR COURTS-MARTIAL UNITED STATES, *supra* note 125 (listing the elements for punishing extramarital sex in the military); HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, *supra* note 125 (describing First Amendment restrictions on the right to join demonstrations, publish personal writing, and distribute literature in the military); 10 U.S.C. § 899 (explaining disciplinary measures for cowardly conduct); Remcho, *supra* note 125, at 194 (discussing the token representative jury system afforded by military trials).

[145] O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969).

[146] U.S. CONST. art. I, § 8, cl. 14.

[147] Reid v. Covert, 354 U.S. 1, 38 (1957) (plurality opinion).

military as well as the size and efficacy of our reserve forces. It is also an improper, perpetual infringement of the civil liberties of those who have sacrificed the most to defend those liberties for the rest of the population. Finally, subjecting those not actively serving to the rigors of military discipline only empowers those who—well-intentioned or not—have been inappropriately "de-militarizing" the military justice system for the last half century.[148]

CONCLUSION

In conclusion, subjecting military retirees to court-martial jurisdiction is unconstitutional under both the Make Rules Clause and the Fifth Amendment's equal protection component. It also unnecessarily infringes on the rights and liberties of retired service members with no real benefit to good order and discipline or military readiness.

Although the D.C. Circuit reversed the district court's decision in *Del Toro*, the Supreme Court should resolve the uncertainties remaining from both of the *Larrabee* decisions and the Court of Appeals for the Armed Forces' decision in *Begani*. More importantly, the Supreme Court should address the issue of military jurisdiction over retirees to guide the lower courts and restore the sacred right to jury trial for millions of America's most distinguished citizens. To do so, the Supreme Court need only follow its controlling decisions in *Toth, Guagliardo*, *Reid*, and *Solorio* to their logical conclusions to hold that—because they are not members of the "land and naval Forces"[149]—military retirees cannot be subjected to court-martial jurisdiction under the Constitution. In the alternative, Congress could—and should—repeal UCMJ Articles 2(a)(4)–(6) to remove retirees from military jurisdiction.[150] Whether the change comes from the Judicial Branch or the Legislative Branch, one thing is certain: It is time to retire UCMJ jurisdiction over retirees.

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148 Maurer, *supra* note 42, at 23.

149 U.S. CONST. art. I, § 8, cl. 14.

150 *Cf.* Larrabee v. Del Toro, 45 F.4th 81, 99–100 (D.C. Cir. 2022) ("[T]he question of whether subjecting [military retirees] to court-martial jurisdiction is wise or foolish is for the political branches to decide.").

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