REGENT UNIVERSITY LAW REVIEW

ARTICLES

NOTES

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Volume 36 **2023–2024** **Number 2**

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Volume 36 **2023–2024** **Number 2**

CONTENTS

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IS A VICTIM'S FEAR OF BODILY HARM REQUIRED? A RECOMMENDED INTERPRETATION OF "INTIMIDATION" UNDER VIRGINIA'S SEXUAL ASSAULT STATUTES

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Emma E.C. Postel[**]

"Of all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person."[1]

[*] Judge, Fourth Judicial Circuit of Virginia, 2014–present, and Adjunct Professor, William & Mary School of Law and Regent University School of Law. The views advanced in this Article represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B) (permitting judges to "speak, write, lecture, teach," and otherwise participate in extrajudicial efforts to improve the legal system). These views therefore should not be mistaken for the official views of the Norfolk Circuit Court or this author's opinion as a circuit court judge in the context of any specific undecided case.

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[1] STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 274 (1998).

INTRODUCTION

Sexual assault injects violence into the most intimate of personal relations, involving appalling criminal behavior that almost always traumatizes assault victims.[2] Under Virginia law, sexual assault traditionally required that the act both be against the victim's will and involve force.[3] Additionally, demonstrating that the forceful act was against the victim's will was very difficult, as the prosecutor was required to prove, beyond a reasonable doubt, that the sexual assault victim

[2] As used in this Article, "sexual assault" includes all nonconsensual sexual offenses, including those acts defined in Virginia's rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery statutes. *See* VA. CODE ANN. §§ 18.2-61, -67.1 to -67.4 (LexisNexis, LEXIS through 2023 Spec. Sess. I). This Article does not encompass sexual assault in the context of victims who are under the age of thirteen, mentally incapacitated, or physically helpless, which is addressed by separate sections of the *Code of Virginia*. *See* VA. CODE ANN. § 18.2-61(A)(ii)–(iii) (LexisNexis, LEXIS through 2023 Spec. Sess. I).

[3] *See infra* Part I.A.

"reasonably resisted" the defendant's advances.[4] Recognizing the need to better protect victims' rights, the 1981 Virginia General Assembly enacted a comprehensive set of sexual assault statutes modeled after similar legislation in other jurisdictions.[5] Among other things, the legislature added a provision stating that victims are not required to cry out or physically resist the assault and replaced the requirement to prove "force" with a requirement to demonstrate "force, threat, or intimidation."[6] Although the legislative intent clearly was to significantly broaden the scope of conduct that fell within the definition of sexual assault, the outer limits of the new statutory language were unclear—a common occurrence with a new law.[7]

At the time this sexual assault reform effort took place, Virginia's definitions of "force" and "threat" were relatively well understood based on prior caselaw; however, there was no clearly recognized definition of "intimidation."[8] Shortly after the 1981 changes to sexual assault law, the Supreme Court of Virginia decided *Sutton v. Commonwealth*, in which it defined "intimidation" in the context of the newly adopted statutes.[9] Relying in large part on a dictionary definition, the court held that intimidation required that the victim fear bodily harm during the assault.[10] The court went further, however, pointing out that intimidation can result from the defendant imposing psychological pressure on a vulnerable and susceptible victim.[11] Unfortunately, it was not clear whether the court's imposition-of-psychological-pressure language was intended to clarify one possible way of inducing the victim's fear of bodily harm or, rather, to identify a separate path—independent of the victim's fear of bodily harm—to satisfy the intimidation requirement.[12]

Subsequent decisions by the Court of Appeals of Virginia were inconsistent, some citing *Sutton* for the proposition that intimidation always requires that the sexual assault victim fear bodily harm and others relying on *Sutton* for the proposition that the defendant's imposition of psychological pressure on a victim alone can evidence intimidation.[13] Additionally, courts sometimes found that intimidation existed when the defendant was in a parental or *in loco parentis* role, while others found

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[4] *See infra* Parts I.A, I.B.

[5] *See infra* Parts II.A, II.B.

[6] *See infra* Parts II.A, II.B.

[7] *See infra* Part II.B.

[8] *See infra* Part III.

[9] 324 S.E.2d 665, 669, 671–72 (Va. 1985); *see also infra* Part II.B.3 (further discussing the impact of *Sutton*).

[10] *See infra* Part II.B.3.

[11] *See infra* Part II.B.3.

[12] *See infra* Part III.

[13] *See infra* Part III.

intimidation when there was an imbalanced power dynamic between the defendant and the victim or when the victim had a more generalized fear during the sexual assault.[14] As the body of caselaw following *Sutton* grew, so did the inconsistencies in courts' analyses of bodily harm and psychological pressure.[15] There currently appears to be a trend toward recognizing that, under certain circumstances, the requisite intimidation can arise without a fear of bodily harm; however, the cases that expressly required such a fear have not been reversed.[16] Additional clarity is required to provide both consistency of decisions and a sense of predictability to sexual assault prosecutions.[17]

A broad interpretation of intimidation is required to encompass the full range of circumstances that lead to sexual assault.[18] This is consistent with the interpretation of sexual assault statutes in other jurisdictions, some of which expressly recognize various forms of assaultive coercive actions, including extortion, public humiliation, and threats of false accusations.[19] Interpreting intimidation in a way that encompasses *any* act that coerces a victim to engage in unwanted sexual activity, i.e., that criminalizes all nonconsensual sexual activity, is necessary to properly define the relevant behavior while precluding the need to articulate every possible coercive scenario.[20] In light of the current Virginia caselaw and to provide judges the necessary discretion to identify all forms of criminally coercive behavior when presented with an alleged sexual assault scenario, intimidation should be defined as "putting a victim in fear of bodily harm—or imposing psychological pressure on a victim who, under the circumstances, is vulnerable and susceptible to such pressure—by exercising such domination and control as to overcome the mind and overbear the will of the victim."[21]

Part I provides a brief historical overview of the *actus reus* requirement in Virginia's sexual assault statutes, including the broadening of the covered criminal behavior in the early 1980s.[22] Part II reviews the inconsistent interpretations of intimidation stemming from *Sutton* and discusses possible ways to reconcile the divergent approaches.[23] Finally, Part III reviews how several other jurisdictions have properly structured their sexual assault statutes to encompass

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[14] *See infra* Parts II.C.2, II.C.3, II.C.4.

[15] *See infra* Part II.C.

[16] *See infra* Part II.C.5.

[17] *See infra* notes 132–33 and accompanying text.

[18] *See infra* Part III.A.

[19] *See infra* Part III.A.

[20] *See infra* notes 247–55 and accompanying text.

[21] *See infra* Part III.C.

[22] *See infra* Part II.

[23] *See infra* Part II.

nonconsensual behavior and ultimately recommends the adoption of an intimidation interpretation that embraces assaultive actions that *either* induce a fear of bodily harm or impose psychological pressure on a vulnerable victim.[24]

I. THE *ACTUS REUS* OF SEXUAL ASSAULT UNDER VIRGINIA LAW

A. Historical Perspective of Sexual Assault in Virginia

Defining sexual assault[25] as nonconsensual may appear obvious to a modern audience, but consent originally was not considered a requirement for lawful sexual relations.[26] In early America, the use of force during sexual intercourse was, unfortunately, considered the natural and expected course of conduct.[27]

> By seeing men and women as desiring opposite ends (he sexual relations, she chastity), men could claim that forceful persuasion was justified. Thus, the line between forceful persuasion that led to consent, and rape—an act against a woman's will—was unclear in both representation and practice. Men's sexual pursuit of women through a variety of less than virtuous means of manipulation and coercion raised the specter that women's resistance to men's sexual overtures was not an honest representation of women's true sexual desires.[28]

Hence, as early sexual assault law evolved, the additional requirement of non-consent was necessary to separate non-criminal sexual activity involving "forceful persuasion" from criminal rape.[29]

Additionally, until the 1960s, all non-marital sex was criminal, so the elements of force and non-consent distinguished adultery and fornication from rape, an aggravated form of sexual assault.[30] With the eventual decriminalization of consensual extramarital sex—or non-enforcement of statutes criminalizing it—and the retention of the force element in the

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[24] *See infra* Part III.

[25] In contrast, the development of sodomy law did not revolve around consent, instead reflecting changes in cultural norms and attitudes. *See* George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, GAY & LESBIAN ARCHIVES PAC. NW. (Feb. 2, 2005), https://bit.ly/3TMcUnA (last visited Mar. 21, 2024). This Article does not address these changes but rather focuses on the development of consent within sexual assault law.

[26] SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 20 (2006); *see also id.* at 19 ("At its most basic level, men's social superiority [in colonial America] included an expected controlling role in sexual relations.").

[27] *See id.* at 20–21.

[28] *Id.* at 21.

[29] *Id.* Notably, "Such understandings of aggressive sexual relations blurred the distinction between voluntary and coercive sex." *Id.* at 20.

[30] Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 261 (2018).

crime of rape, there emerged a gap in criminal sexual assault law: nonconsensual sexual activity without the imposition of force.[31]

Incorporating the victim's lack of consent into sexual assault law is a more recent development often associated with the women's rights movement of the 1970s.[32] Rather than understanding sexual assault to be "the result of the uncontrollable sexual drive of oversexed men," such criminal behavior was recognized by the movement as a weapon and tool used by men to control women.[33] For instance, historically, a husband could not be prosecuted for raping his wife.[34] This standard likely came from English common law, which suggested that the rite of marriage included a wife's general consent, i.e., obligation, to engage in sexual intercourse with her husband.[35] Other scholars have suggested that the inability of a husband to criminally rape his wife evolved from the understanding that rape was defined as *unlawful* sexual intercourse, whereas sexual intercourse within a marriage was considered by definition to be lawful.[36]

Even after non-consent was more explicitly required for illegal sexual activity—often by including the phrase "against [her] will" in sexual assault statutes—courts analyzing such nonconsensual language frequently undercut the larger purpose behind the requirement of consent by, for example, linking consent to a lack of physical resistance or inferring consent from a promiscuous history.[37]

Within the last fifty years, Virginia sexual assault law has been substantially updated and revised in response to the justice system's failure to satisfactorily deter and prosecute perpetrators of sexual

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[31] *Id.* (arguing the element of force was used to distinguish rape from fornication and adultery, rather than to address social harms from unwanted sex; and this usually limited the application of contemporary rape laws to instances of unwanted sexual intercourse "accompanied by weapons and violence"); *see also* Bailey v. Commonwealth, 82 Va. 107, 111–12 (1886) (holding that exceptions to the force requirement in Virginia are allowed only in exceedingly narrow circumstances).

[32] H. Lane Kneedler, *Sexual Assault Law Reform in Virginia–A Legislative History*, 68 VA. L. REV. 459, 461 (1982).

[33] TRAINING AND TECH. ASSIST. CTR., OFF. FOR VICTIMS OF CRIME, SUMMARY OF THE HISTORY OF RAPE CRISIS CENTERS 2, https://bit.ly/3TyqRVM (last visited Mar. 13, 2024).

[34] *E.g.*, 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (London, Sollom Emlyn, 1736) ("But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.").

[35] *See, e.g.*, ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 202–03 (3d ed. 1982).

[36] *See id.* at 203.

[37] Kneedler, *supra* note 32, at 464. As Professor Kneedler noted, "Sexual assault cases often present difficult factual questions because conduct that may be desirable to the victim under some circumstances is criminal when performed by force." *Id.* at 474.

assault.[38] Before the statutory amendments discussed *infra*, rape was defined in Virginia as a situation in which a man would "carnally know a female . . . against her will, by force."[39] In 1978, the Virginia State Crime Commission established the "Task Force on Criminal Sexual Assault,"[40] with the intent of drafting revised sexual assault statutes that would both encourage more victims to come forward to report sexual assault and provide prosecutors a greater chance of a successful prosecution.[41] In response, the Task Force identified two consequences of the original law that had developed into strong deterrents to victims' willingness to report and prosecutorial success: (1) the notion that a victim's sexual history was probative of consent and (2) the requirement that prosecutors prove beyond a reasonable doubt that a victim displayed sufficient resistance to the sexual assault.[42]

Historically, a victim's sexual history was considered relevant and admissible evidence to support a defendant's argument that the victim had consented to sexual activity.[43] The flawed logic was as follows: If the victim was sexually active before the alleged assault, it suggested a

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[38] *See id.* at 466–70, 482–83 (discussing legislative changes reducing the admissibility of a victim's past conduct, among other changes to Virginia sexual assault laws).

[39] VA. CODE ANN. § 18.2-61 (1975) (amended 1981, 1982, and 1986). This definition was consistent with the traditional English common law definition of rape, which "was defined as 'carnal knowledge of a woman forcibly and against her will.' Most jurisdictions in the United States originally adopted this definition of rape to include the force requirement." John F. Decker & Peter G. Baroni, *Criminal Law: "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083 (2011) (quotation omitted); *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *210. "Carnal knowledge" is defined as "[s]exual intercourse, [especially] with an underage female." *Carnal Knowledge*, BLACK'S LAW DICTIONARY (11th ed. 2019). As the commentary to *Black's Law Dictionary* definition points out, "[t]he ancient term for the act itself was 'carnal knowledge' and this is found in some of the recent cases and statutes." *Id.* (quoting PERKINS & BOYCE, *supra* note 35, at 201). As the Supreme Court of Virginia noted in *Sutton v. Commonwealth* when referring to the 1981 change in wording in Virginia's rape statute, "[i]n substituting the words 'sexual intercourse' for 'carnally know' the General Assembly made no change in meaning." 324 S.E.2d 665, 669 (Va. 1985).

[40] The Task Force on Criminal Sexual Assault was the outgrowth of "a seven-year 'grass roots' citizens law reform effort," which "began with a citizens' group, the Virginia Committee on Sexual Assault Reform (VCOSAR), in the early 1970's . . . ." Kneedler, *supra* note 32, at 459. For additional information about the task force and other events that led to the 1981 Virginia sexual assault statutory overhaul, as well as subsequent efforts to end sexual and domestic violence in Virginia, see generally Virginia Sexual & Domestic Violence Action Alliance, *1981–2011: Celebrating Thirty Years of Progress*, 5 REVOLUTION 1, (2011–2012), https://bit.ly/43goXMU.

[41] *See* Kneedler, *supra* note 32, at 474.

[42] *Id.* at 464.

[43] *Id.* at 485. Additionally, "Virginia courts permitted the prosecution to offer evidence of the victim's past sexual conduct. The prosecution was permitted, for example, to show that, at the time of the alleged offense, the victim was a virgin engaged to be married. Such evidence was held relevant to demonstrate that the sexual intercourse was by force and therefore nonconsensual." *Id.* at 488.

tendency for promiscuity, making it more likely that she had consented to the alleged assault at issue.[44] For example, evidence of a victim's prior sexual relations with the defendant could be introduced to show consent, and a third party could testify as to the victim's general "reputation for chastity"—or lack thereof—in the community.[45] As a result, victims were often unwilling to report an assault when they expected that this kind of "evidence" would be allowed in court.[46] Potential restrictions on the admissibility of evidence regarding a victim's prior sexual conduct were highly contentious, pitting defendants' Sixth and Fourteenth Amendment rights to present evidence to defend themselves and to confront and cross-examine witnesses against concern for victims' trauma and reluctance to prosecute.[47] The Task Force ultimately recommended eliminating reputational evidence for chastity and substantially limiting evidence of specific past sexual acts,[48] making the Commonwealth one of the last states to adopt a "rape shield law."[49]

With respect to the statutory requirement of force before 1981 in Virginia, a victim was required to prove that she had displayed "reasonable resistance" *in addition* to non-consent.[50] Although this

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[44] *Id.* at 486–87 ("Such reputation evidence was admissible, however, to support a defense of consent. This rule assumed that a sexually active victim casually selects sexual partners, and, therefore, that such a victim is more likely than a sexually inactive victim to have consented to the act in question.").

[45] *Id.* at 488, 491, 492 n.125. Additionally, *specific* sexual acts with third persons could be admissible "to show something other than the victim's general propensity for sexual activity," such as "an alternative explanation for certain physical evidence, such as the presence of semen or the victim's pregnancy." *Id.* at 488.

[46] *Id.* at 485 ("Moreover, because the admission of evidence of past sexual conduct publicly reveals intimate and perhaps embarrassing or humiliating details of the victim's personal life, evidentiary rules that admit such evidence contribute to the reluctance of victims to report sexual assaults and to assist in their prosecution.").

[47] *Id.* ("Perhaps the most important and controversial provisions of Virginia's new sexual assault law are those that restrict the admissibility of evidence relating to the victim's past sexual conduct.").

[48] *Id.* at 492–94. The new statutory scheme narrowed the admissibility of prior sexual conduct evidence to four categories: (1) rebuttal explanations for physical evidence offered by the prosecution; (2) evidence of sexual contact between the victim and accused, near the time of the charged offense, and tending to show lack of force; (3) rebuttal evidence of the victim's prior sexual conduct; or (4) evidence showing a motive for fabricating the charges. *Id.* at 493–94.

[49] When Virginia adopted its rape shield law in 1981, "forty-six states and Congress ha[d] enacted 'rape shield' statutes." *Id.* at 488. "The first rape shield statute was passed in Michigan in 1974 and by 1976 over half of the states had enacted some form of a rape shield statute." Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485, 488 (1997).

[50] Kneedler, *supra* note 32, at 475–76 (noting that courts required such resistance as "an outward, objective manifestation of nonconsent [sic]"). "In some jurisdictions, convictions would not stand unless the victim resisted 'to the utmost.'" *Id.* at 476. By contrast, Virginia has required reasonable resistance for more than 100 years. *Id.* at 476–77.

requirement was not explicitly written into the law, defense attorneys often were able to successfully argue that the statutory language "against her will, by force" required the victim affirmatively to resist the assault.[51] Reasonable resistance was very difficult for prosecutors to prove because providing evidence of resistance sufficient to satisfy the beyond-a-reasonable-doubt standard was nearly impossible if the woman had no physical injuries or witnesses to the assault.[52] As a result, victims who opted not to resist—perhaps out of fear, coercion, manipulation, or some other nefarious influence—often felt that they had no means of proving that they were raped and, therefore, no chance of having the defendant convicted of rape.[53]

To address these issues, the Task Force proposed eliminating the "against her will" language from the statute and adding a declaration that "[e]vidence that the complaining witness cried out or physically resisted the accused shall not be required to show lack of consent in order to convict the accused of an offense."[54] The General Assembly did not entirely follow the Task Force's proposals, instead choosing to retain the "against her will" language[55] and to add a modified form of the declaration; in addition to the declaration language recommended by the Task Force, the final statutory text also pointed out that "the absence of such resistance may be considered when relevant to show that the act alleged was not against

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[51] VA. CODE ANN. § 18.2-61 (1975) (amended 1981, 1982, and 1986); *see also* Kneedler, *supra* note 32, at 476 ("The victim's resistance became, in effect, a separate legal element of the offense that the prosecution was required to establish beyond a reasonable doubt."). According to Professor Kneedler, "This in turn encouraged defense attorneys to focus on this one aspect of the offense, thereby often placing much more emphasis on the victim's conduct than on the defendant's." H. Lane Kneedler, *Sexual Assault Law Reform in Virginia: An Overview*, 58 U. VA. NEWSL. 19, 19–20 (1982).

[52] Kneedler, *supra* note 32, at 483–84.

[53] *See id.* at 482–83.

[54] *Id.* at 484 (citing S. 258, 1981 Gen. Assemb., Reg. Sess. (Va. 1980)). While the bill contains language similar to Professor Kneedler's quote, the cited version of Senate Bill 258, and the final statutory language, frame the issue in slightly different terms, eliminating the need for the prosecution to prove the victim "cried out or physically resisted the accused in order to convict the accused of an offense . . . but the absence of such resistance may be considered when relevant to show that the act alleged was not against the [victim's] will . . . ." S. 258, 1981 Gen. Assemb., Reg. Sess. (Va. 1980); VA. CODE ANN. § 18.2-67.6 (LexisNexis, LEXIS through 2023 Spec. Sess. I) (current statute containing identical language). In any case, the proposed language was, in part, to overcome the myth that chastity was "of sufficient importance that women would resist or cry out in the face of any threat or overwhelming force." Kneedler, *supra* note 32, at 475–76.

[55] In 1986, the Virginia General Assembly removed any reference to a rape victim's gender by incorporating the term "complaining witness," to recognize that rape victims could be female or male. 1986 Va. Acts 1007, ch. 516 (codified at VA. CODE ANN. § 18.2-61 (1986)). The gender-neutral language remains. *Compare* VA. CODE ANN. § 18.2-61 (1982) (amended 1986) (describing rape in terms of "sexual intercourse with a female"), *with* VA. CODE ANN. § 18.2-61 (LexisNexis, LEXIS through 2023 Spec. Sess. I) (describing rape in terms of "sexual intercourse with a complaining witness").

the will of the [victim]."[56] Arguably, the most significant change, at least for purposes of this Article, was to the requirement of consent or, more specifically, how a court might discern the victim's non-consent, which is discussed *infra*.[57]

B. The Expansion of Non-Consent: From "Force" to "Force, Threat, or Intimidation"

The 1981 Virginia General Assembly, confronted with dramatically increasing rates of sexual assault both nationally and in Virginia,[58] was pressured to reform Virginia's sexual assault statutes to encourage more victims to report criminally assaultive acts and to provide them more protections if they did.[59] In response, the legislature made significant revisions to Virginia law, with one of the most consequential changes focusing on the *actus reus*[60] that would evidence a lack of consent in sexual assault cases.[61] The General Assembly replaced "against her will, by *force*" in the statutory language with "against her will, by *force, threat, or*

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[56] 1981 Va. Acts 518, 521 (codified at VA. CODE ANN. § 18.2-67.6 (1982)). Despite the arguments supporting deletion of the "against her will" language, *see supra* notes 50–53 and accompanying text, "[o]pponents of the Task Force bills took the position that elimination of the reasonable resistance requirement was unnecessary because, as a practical matter, the victim's testimony that she did not consent to the act satisfied the prosecution's burden of proof on the element of 'against her will,'" Kneedler, *supra* note 32, at 484. These opponents failed to appreciate that "both as a matter of practice and according to the language of even the most recent Virginia cases, more was required than that the victim merely had indicated her lack of consent." *Id.* Further, evidence suggests rape is one of the most underreported crimes. *Id.* at 463 (noting a survey of Chicago households in the 1960s showed a rape incidence rate 350% higher than the official occurrence rate).

[57] *See infra* Part II.B.

[58] FBI statistics counted 82,088 rape attempts and occurrences in the United States in 1980, 1,458 of which were committed in Virginia, and representing a 94% rise over the prior decade. Kneedler, *supra* note 32, at 461–62 nn.8–9 (citing FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—CRIME IN THE UNITED STATES 1980, at 15 (1980)).

[59] *See* Kneedler, *supra* note 32, at 461 (noting 1970s reform efforts focused on reducing victim-borne burdens to encourage victim testimony).

[60] "Actus reus" is "[t]he wrongful deed that comprises the physical components of a crime," *Actus Reus*, BLACK'S LAW DICTIONARY (11th ed. 2019), whereas "mens rea" is "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime," *Mens Rea*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Cf.* Hong, *supra* note 30, at 272 ("In any given criminal offense, the legislature defines the mental state, known as mens rea, as what a defendant must have when engaging in the prohibited conduct—known as the actus reus.").

[61] *See supra* notes 54–56 and accompanying text.

intimidation," consciously expanding the category of prohibited conduct that could lead to a victim's submission to unwanted sexual activity.[62]

As a result, prosecutors who previously lacked an avenue of legal relief for victims who were coerced, without force, into nonconsensual sexual activity now had the tools necessary to bring charges against defendants who previously would have evaded accountability.[63] However, as is often the case when a new law is passed, a lack of caselaw focused specifically on interpreting the revised terminology—most notably the addition of "intimidation"—led to confusing and conflicting precedents.[64] Understanding how Virginia courts have previously treated the terms force, threat, and intimidation is integral to formulating a recommended interpretation of intimidation moving forward.

1. Force

The inclusion of force is perhaps the longest-recognized aspect of sexual assault.[65] As discussed *supra*, a degree of forcefulness was originally considered a normal and common component of sexual relations.[66] This changed when the American colonies adopted English law,[67] in which a person was guilty of rape if he "carnally kn[e]w a female . . . against her will, *by force*."[68] Courts were then faced with deciding what qualified as "force" in the context of sexual assault.[69] In 1886, the Supreme

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[62] *Compare* VA. CODE ANN. § 18.2-61 (1975) (amended 1981, 1982, and 1986) ("[A]gainst her will, by force . . . ."), *with* VA. CODE ANN. § 18.2-61 (Supp. 1981) (amended 1982 and 1986) ("[A]gainst her will, by force, threat or intimidation . . . ."); *see* Hong, *supra* note 30, at 274 (arguing statutes defining rape by force do not capture most unwanted sex because they do not identify unwanted sex as the social harm to be addressed). "The social harm of rape was either the wounded honor of a male relative of a rape victim or the act of [extramarital] sex. The Roman Empire recognized rape as a crime, but [only as] a salve to the wounded honor of the victim's [male relatives]." *Id.* The Virginia statutes for rape, forcible sodomy, object sexual penetration, aggravated sexual battery, sexual battery, and sexual abuse of animals all incorporate the expanded "force, threat, or intimidation" language. VA. CODE ANN. §§ 18.2-61, -67.1 to -67.4, -361.01 (LexisNexis, LEXIS through 2023 Spec. Sess. I).

[63] *See, e.g.*, Kneedler, *supra* note 32, at 470–71 (noting that the new laws (1) limit admissibility of past sexual conduct evidence, (2) seek to limit resistance requirements, (3) protect physically and mentally incapacitated victims, and (4) create new provisions to cover sexual battery, aggravated sexual battery, and object sexual penetration).

[64] *See infra* Part III.

[65] *See infra* Part II.A.

[66] *See supra* notes 27–28 and accompanying text.

[67] *See id.*

[68] *See* Kneedler, *supra* note 32, at 474 n.39, 475 (quoting VA. CODE ANN. § 18.2-61 (Repl. Vol. 1975)) (alterations in original). When referencing the change in statutory language after the Virginia legislature expanded the definition of sexual assault in 1981, the Supreme Court of Virginia in *Sutton v. Commonwealth* opined that carnal knowledge and sexual intercourse are synonymous. 324 S.E.2d 665, 669 (Va. 1985).

[69] *See infra* notes 70–73 and accompanying text.

Court of Virginia held that "[w]henever there is a carnal connection, and no consent in fact . . . there is evidently, in the wrongful act itself, all the force which the law demands as an element of the crime."[70] In other words, sexual assault by force could be inferred from a victim's lack of consent rather than only from the defendant's physical aggression.[71] The court also emphasized that if force had been used during rape, it did not have to be violent physical force to constitute a crime.[72] This understanding of the relationship between force and consent continued into modern-day law.[73]

When opining about the required *actus reus* after the Virginia legislature expanded the definition of sexual assault in 1981, the Supreme Court of Virginia in *Sutton v. Commonwealth* cited its 1980 discussion of force in the context of rape: "[T]o sustain a conviction of forcible rape, there must be evidence of some array or show of force sufficient to overcome resistance."[74] In short, the 1981 expansion of Virginia's sexual assault definition did not alter the established definition of force.

2. Threat

Shortly after Virginia expanded the breadth of its criminal sexual assault law, the Supreme Court of Virginia expressly defined "threat" as an "expression of an intention to do bodily harm."[75] The court subsequently held that a threat is "an overt expression, by words or conduct, of a present intention to commit an immediate act of violence or force against the victim."[76]

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[70] Bailey v. Commonwealth, 82 Va. 107, 111 (1886).

[71] *See* Jones v. Commonwealth, 252 S.E.2d 370, 372 (Va. 1979) ("To determine whether the element of force has been proved in the crime[] [of rape] . . . , the inquiry is whether the act or acts were effected with or without the victim's consent.").

[72] *Bailey*, 82 Va. at 112 ("[T]hough a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she does not resist, he is guilty of rape by having the unlawful intercourse.").

[73] *See, e.g.,* Gonzales v. Commonwealth, 611 S.E.2d 616, 620 (Va. Ct. App. 2005) ("Thus, if the victim did not consent . . . the use of force is shown by the act of non-consensual intercourse itself."); Wactor v. Commonwealth, 564 S.E.2d 160, 163 & n.1 (Va. Ct. App. 2002) ("Before 1981, crimes of sexual assault required a showing of force. Threats or intimidation of the victim were not legally relevant in establishing the crime of rape. By adding threat or intimidation as means sufficient to prove sexual assault crimes in 1981, the legislature intended to expand, rather than restrict, the parameters of the crimes. The Virginia Supreme Court's definition of the requisite force to accomplish sexual assault remained and remains unchanged.").

[74] Snyder v. Commonwealth, 263 S.E.2d 55, 57 (Va. 1980), *cited in* Sutton v. Commonwealth, 324 S.E.2d 665, 669 (Va. 1985).

[75] *Sutton*, 324 S.E.2d at 669–70.

[76] Bivins v. Commonwealth, 454 S.E.2d 741, 742–43 (Va. Ct. App. 1995); *see also* Sabol v. Commonwealth, 553 S.E.2d 533, 537 (Va. Ct. App. 2001) (defining "threat" in the context of sexual assault).

Unlike the comparatively expansive catalog of caselaw analyzing the use of "force" in the context of sexual assault, Virginia courts have had fewer occasions to delve into an analysis focusing specifically on the use of "threat" in sexual assault cases. Instead, Virginia courts appear to have adopted a definition of "threat" similar to that applied in other areas of Virginia criminal law.[77] Specifically, the Supreme Court of Virginia has held that, in sexual assault cases, "threat means expression of an intention to do bodily harm."[78] Additionally, "force" and "threat of force" are often presented simultaneously, and courts thus have analyzed them together.[79] But whether alone or in conjunction with force, threat—like force—is expressly tied to the sexual assault victim's bodily harm.

3. Intimidation

Contrary to courts' treatment of "force" and "threat," analyzing and defining the contours of "intimidation" have given courts the most

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[77] *See, e.g.*, Perkins v. Commonwealth, 402 S.E.2d 229, 234 (Va. Ct. App. 1991) (defining "threat" in the context of threatening to bomb a building and stating, "[a] threat, in the criminal context, is recognized to be a communication avowing an intent to injure another's person or property. The communication, taken in its particular context, must reasonably cause the receiver to believe that the speaker will act according to his expression of intent"). Of note, the court in *Bivins* went on to rely in part on the *Sutton* definition of intimidation. *Bivins*, 454 S.E.2d at 742 (citing *Sutton*, 324 S.E.2d at 669–70).

[78] *Sutton*, 324 S.E.2d at 670. Although the *Sutton* court defined intimidation when interpreting Virginia's rape statute, the Supreme Court of Virginia subsequently made it clear that the definition applies to all of Virginia's sexual assault statutes. *Id.* at 670; *see* Bower v. Commonwealth (*Bower I*), 551 S.E.2d 1, 4 (Va. Ct. App. 2001).

[79] In *Breeden v. Commonwealth*, the Court of Appeals of Virginia illustrated the analytical interchange between "force" and "threat of force" by stating the following:

> In this case, the evidence amply supports a finding that [the defendant] used a combination of *threats* and *force* to intimidate the complaining witness and overcome her will. When [the victim] returned to her house at night, [the defendant] was there with a gun and held it the entire time. He used physical *force* against her, including pushing her, hitting her face, and kicking her buttocks, and repeatedly *threatened* to kill himself.

596 S.E.2d 563, 568 (Va. Ct. App. 2004) (emphasis added) (footnote omitted). The court also exhibited this interchange in *Sabol v. Commonwealth* through the following analysis:

> However, no evidence of *force* was presented in relation to the May 1990 incident . . . . No evidence suggests appellant expressly *threatened* [the victim] with bodily harm. [The defendant] did threaten, apparently years earlier, to have her prosecuted for theft. However, nothing in the record suggests this threat was a threat to do bodily harm or that [the victim] perceived it as a threat to her physically.

553 S.E.2d at 536–37 (emphasis added).

difficulty.[80] As discussed in more detail *infra*, the emphasis on "fear of bodily harm"—in the context of intimidation accompanying sexual assault—arises from caselaw, as opposed to Virginia statutory language.[81] The seminal case is *Sutton v. Commonwealth*,[82] in which the Supreme Court of Virginia interpreted the then-newly revised Virginia rape statute:

> If any person has sexual intercourse with a female or causes a female to engage in sexual intercourse with any person and such act is accomplished . . . against her will, by force, threat or intimidation . . . he or she shall, in the discretion of the court or jury, be punished with confinement in the penitentiary for life or for any term not less than five years.[83]

In reviewing the revision of Virginia's sexual assault statutes, specifically in the context of a rape charge, the *Sutton* court opined that, by replacing "force" with "force, threat or intimidation," "[i]t is apparent that the legislative intent . . . was to expand the parameters of rape."[84] The court then recited the definition of "intimidation" from *Black's Law Dictionary*, which provided, in relevant part, that "[t]o take, or attempt to take, 'by intimidation' means willfully to take, or attempt to take, by putting in fear of bodily harm."[85] Relying on this definition, the court went on to define "intimidation" in the context of the revised statute:[86]

> Intimidation, as used in the statute, means putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will. Intimidation may be caused

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[80] *Compare supra* note 71 (indicating that a showing of force requires an inquiry into whether the victim first offered consent), *and supra* notes 75–76 (indicating that a showing of threat requires the expression of a present intention to commit a violent or forceful act against the victim), *with infra* notes 90–93 (describing inconsistent interpretations of "intimidation").

[81] *See infra* notes 85–87, 104–107 and accompanying text.

[82] 324 S.E.2d at 669, 671–72.

[83] *Id.* (quoting VA. CODE ANN. § 18.2-61 (1982) (1982 Repl. Vol.)). The Supreme Court of Virginia has observed that "the term 'intimidation' is consistently used throughout the various statutes dealing with crimes of sexual assault," so the *Sutton* court's discussion of intimidation in the context of rape applies to all Virginia sexual assault statutes. *See* Commonwealth v. Bower (*Bower II*), 563 S.E.2d 736, 737 (Va. 2002).

[84] *Sutton*, 324 S.E.2d at 669.

[85] *Id.* (quoting *Intimidation*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

[86] *See id.* at 669–71. The *Sutton* court focused on intimidation because that was the only basis of rape found by the trial court, i.e., there was no proof of force or threat. *See id.* at 669.

> by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure.[87]

Despite appearing clear on its face, the *Sutton* court's definition of intimidation has been subject to disparate interpretations by Virginia appellate courts in sexual assault cases.[88]

II. INCONSISTENT INTERPRETATIONS OF INTIMIDATION[89]

Two primary viewpoints have been taken by Virginia appellate courts when applying the *Sutton* court's definition of intimidation in the context of sexual assault. One approach is that the second sentence supplements and clarifies the first sentence: that the requisite fear of bodily harm may stem from the imposition of psychological pressure.[90] The other view is that the second sentence sets forth an independent basis for establishing intimidation: that imposing psychological pressure—even without a concomitant fear of bodily injury—can constitute intimidation.[91] Stated differently, some courts have cited *Sutton* for the proposition that "intimidation *requires* 'putting a victim in fear of bodily harm,'"[92] while other courts have, at least implicitly, found intimidation without the victim having feared bodily harm.[93] This dichotomy is best illustrated by

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[87] *Id.* at 670. Consistent with the nomenclature used by the *Sutton* court, this Article refers to victims using feminine pronouns—although the authors recognize that men also can be victims of sexual assault—and presents a recommended interpretation of "intimidation" in gender-neutral terms. *See supra* note 55.

[88] *See infra* Parts II.A, II.B.

[89] This Article was inspired by Commonwealth v. Wallace, No. CR22-1374, 2023 Va. Cir. LEXIS 210 (Va. Cir. Ct. Oct. 18, 2023), decided by one of the authors, the Honorable David W. Lannetti of the Norfolk Circuit Court. As such, a great deal of Parts III and IV of this Article are pulled directly from the facts and analysis in that opinion. For simplicity, citations herein to the *Wallace* opinion largely have been omitted.

[90] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195, 196, 198 (2012) (discussing the "Associated-Words Canon" and noting that "[a]ssociated words bear on one another's meaning (*noscitur a sociis*)"); *see also* Mohajer v. Commonwealth, 579 S.E.2d 359, 364–65 (Va. Ct. App. 2003) (holding that the imposition of psychological pressure on a vulnerable victim created the victim's fear of bodily harm necessary to constitute a finding of intimidation).

[91] *See* SCALIA & GARNER, *supra* note 90, at 174 (defining the "Surplusage Canon" as "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*)"); *see also* Clark v. Commonwealth, 517 S.E.2d 260, 261–62 (Va. Ct. App. 1999) (holding that the imposition of psychological pressure is independently sufficient to constitute a finding of intimidation).

[92] Sabol v. Commonwealth, 553 S.E.2d 533, 537–38 (Va. Ct. App. 2001) (emphasis added) (quoting *Sutton*, 324 S.E.2d at 670) (finding that, because the victim did not fear bodily harm, there was no intimidation). "Fear of bodily harm" has since been interpreted to include fear arising solely from the act of the sexual assault for purposes of finding intimidation. *See* Commonwealth v. Bower (*Bower II*), 563 S.E.2d 736, 738–39 (Va. 2002).

[93] *See* Benyo v. Commonwealth, 568 S.E.2d 371, 373 (Va. Ct. App. 2002) (finding that, even assuming that the victim did not fear bodily harm, intimidation was present).

comparing two opinions from the Court of Appeals of Virginia: *Sabol v. Commonwealth* and *Benyo v. Commonwealth*.[94]

A. Requiring a "Fear of Bodily Harm" for Intimidation

In *Sabol v. Commonwealth*, the Court of Appeals of Virginia in 2001 held that a victim's fear of bodily injury is always required for a finding of intimidation in a Virginia sexual assault case.[95] The victim, L.D., lived with her mother and Sabol, an individual whom L.D. regarded as her "adopted father," from age three until her mid-twenties.[96] In 1988, when L.D. was twenty years old, she withdrew $700 from her mother's bank account without permission.[97] Sabol confronted her about the withdrawal and threatened to have her criminally prosecuted if she did not comply with his demand for sexual intercourse, a threat that L.D. took seriously.[98] L.D. testified about an incident that occurred in May 1990 when Sabol instructed her to "take care of him."[99] When L.D. stated that "she didn't want to," Sabol threatened to revoke her family car privileges and withhold money from her.[100] L.D. went into the bedroom under her own power and lay on the bed, whereupon Sabol had sexual intercourse with her.[101] At some point in the fall of 1990, Sabol called L.D. into the house and instructed her to, once again, "take care of him."[102] L.D. attempted to resist, but Sabol pushed her down the hallway, leading her into the bedroom, where Sabol had sexual intercourse with her.[103]

Testifying about the May 1990 incident, L.D. stated that she went into the bedroom because she "felt like [she] had to."[104] She explained that during "my whole life[, Sabol] has controlled me. I've never had to work. I never had to do anything. I didn't have to care for myself. My parents took care of it for me."[105] Relying on *Sutton*, the court reversed Sabol's rape by intimidation conviction because "the victim never testified she feared

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[94] *See infra* Parts II.A, II.B.
[95] *See* 553 S.E.2d at 537–38.
[96] *Id.* at 535.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 535–36.
[101] *Id.* at 536.
[102] *Id.* at 535.
[103] *Id.*
[104] *Id.* at 535–36.
[105] *Id.* at 536.

bodily harm if she refused [Sabol's] demands."[106] Instead, the court found that her fear of losing the lifestyle to which she had become accustomed was insufficient for the court to find that she had been intimidated under Virginia's rape law.[107]

B. Finding Intimidation Without a "Fear of Bodily Harm"

By contrast, a year later, the same court decided *Benyo v. Commonwealth*, in which it implicitly held that a victim's fear of bodily injury is not always required to demonstrate intimidation accompanying a sexual crime.[108] There, Benyo began grooming his stepdaughter, H., when she was thirteen.[109] His sexual interactions with H. began with massages, progressed to forcible sodomy, and culminated in rape on multiple occasions.[110] In analyzing Benyo's actions to overcome H.'s resistance, the court described how Benyo would "put a guilt trip" on H. by describing the consequences to the family should H. reveal the sexual abuse, like his loss of job and the family's loss of financial stability.[111] Benyo described the psychological pressure he applied as follows: "[H.] didn't want her mom to find out because she knew her mom was very happy having me as a husband[,] and she didn't want to ruin that[,] and her [biological] father was cold to her."[112] Benyo continued to escalate the psychological pressure on H. by threatening to commit suicide if she stopped having sex with him, going as far as having her assist him in picking out his funeral clothes and showing her the pills that he would consume to commit suicide.[113] Benyo also wrote H. letters, including one stating that their relationship needed to continue or he would admit his actions to a doctor, which would inevitably lead to Benyo's incarceration and the breakdown of his marriage to H.'s mother.[114]

The *Benyo* court concluded that the suicide threats and letters scared H. such that she did not feel able to say no or run away.[115] H. feared that

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[106] *Id.* at 537–38 (citing Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985)). The court found that the force used to push L.D. down the hallway was sufficient to support rape by force for the fall 1990 incident. *Id.* at 537. Because similar force was not used during the May 1990 incident, the court was required to resolve whether L.D. had been intimidated or threatened. *Id.*

[107] *Id.* at 538.

[108] *See* 568 S.E.2d 371, 373–74 (Va. Ct. App. 2002) (indicating that such intimidation may be demonstrated via instances of "emotional domination").

[109] *See id.* at 371, 373.

[110] *Id.* at 371–72.

[111] *Id.* at 372–73.

[112] *Id.* at 372.

[113] *Id.*

[114] *Id.* at 372–73.

[115] *Id.* at 373–74.

her family would have no money, her mother would be upset, and it would be her fault that Benyo killed himself.[116] However, the court did not find that H. was in fear of bodily harm; instead, it opined that "[a]ssuming, without deciding, that the evidence does not prove H. feared bodily harm, we note that, as a matter of law[,] proof of psychological pressure and 'emotional domination [may be] sufficient to constitute intimidation.'"[117] The court affirmed the trial court's finding of rape by intimidation based on "the imposition of psychological pressure on one who, under the circumstances, [was] vulnerable and susceptible to such pressure."[118] Benyo's emotional domination over H.—and H.'s submission to Benyo's ongoing sexual assault—stemmed from her belief that she was unable to leave in order to escape the problems caused by his actions and, therefore, constituted the requisite intimidation.[119]

Of note, *Benyo* relied on *Clark v. Commonwealth*, a 1999 Court of Appeals of Virginia decision, for the proposition that intimidation can arise solely from psychological pressure and emotional domination, i.e., without fear of bodily injury.[120] In *Clark*, Clark's abuse of his daughter began when she was five years old.[121] Due to the daughter's age when the abuse began and the frequency of the abuse, the daughter was unaware of the impropriety of the actions until she attended a sex education class at school.[122] Even after learning of the illegality of the conduct, the daughter allowed the sexual abuse to continue because (1) she did not believe she could confront her father due to his poor health, and he had been her primary caretaker for many years; (2) her mother was "unreliable" and "rarely accessible to her"; and (3) she thought other family members would "reject her if she accused her ailing father."[123] Although Clark argued that the paternal relationship alone was insufficient to prove intimidation, the court opined that it was a highly relevant factor that the jury could properly consider.[124] "The paternal bond, along with the victim's age and relative isolation from others, impeded her ability to resist her father."[125] The court further opined that

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[116] *Id.*

[117] *Id.* at 373 (quoting Clark v. Commonwealth, 517 S.E.2d 260, 262 (Va. Ct. App. 1999) (alteration in original)).

[118] *Id.* at 373–74 (quoting Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985)).

[119] *See id.* at 373–74.

[120] *Id.* at 373.

[121] *Clark*, 517 S.E.2d at 261.

[122] *Id.* at 262.

[123] *Id.*

[124] *Id.* Of note, both *Benyo* and *Clark* involved sexual assault intimidation where the defendant was *in loco parentis* over the victim. *See infra* note 151 and accompanying text.

[125] *Clark*, 517 S.E.2d at 262.

the victim "was vulnerable and susceptible to pressure from her father."[126] The court ultimately found that these circumstances supported a finding of intimidation,[127] although it neither relied on *nor even mentioned* a fear of bodily harm by the victim nor referred in any way to *Sabol*.[128]

C. Attempting to Reconcile Virginia Sexual Assault Caselaw

The holdings of *Sabol* and *Benyo* represent contradictory interpretations of the Supreme Court of Virginia's definition of intimidation in *Sutton*.[129] *Sabol* stands for the proposition that, according to *Sutton*, a victim must fear bodily harm to be intimidated into nonconsensual sexual activity under Virginia's sexual assault law.[130] *Benyo*, on the other hand, stands for the proposition that, under *Sutton*, psychological pressure or emotional domination over a victim—even without an accompanying fear of bodily harm—is sufficient to prove that the victim was intimidated to submit to sexual activity.[131] Therefore,

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[126] *Id.*

[127] *Id.* The *Clark* court found sufficient evidence to establish force as well. *Id.* at 261–62.

[128] *Id.* at 261–62. *But see* Sabol v. Commonwealth, 553 S.E.2d 533, 537–38 (Va. Ct. App. 2001) (holding that putting a victim in fear of bodily harm is required to constitute intimidation in the context of rape). The *Clark* court quoted the *Sutton* intimidation definitional language, opining that the defendant exercised "such domination and control of her as to overcome her mind and overbear her will," but it inexplicably omitted the lead-in language, i.e., "putting a victim in fear of bodily harm." *Clark*, 517 S.E.2d at 262 (quoting Sutton v. Commonwealth, 324 S.E.2d 665, 670 (1985)). It juxtaposed this with *Sutton*'s follow-on language, i.e., that "[i]ntimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure," creating a revised definition of intimidation devoid of any reference to bodily injury. *Id.* (quoting *Sutton*, 324 S.E.2d at 670). In addition to *Benyo*, two unpublished Court of Appeals of Virginia cases cited *Clark* for the proposition that a court could find intimidation without the victim fearing bodily harm. *See* Montague v. Commonwealth, No. 2236-03-1, 2004 WL 2434264, at *2 (Va. Ct. App. Nov. 2, 2004) ("In order to prove a defendant intimidated a victim into submitting to a sex act, the evidence must show either that the defendant caused the victim to fear bodily harm if he failed to comply, or that under the circumstances, the defendant imposed such a degree of psychological or emotional pressure on a vulnerable and susceptible victim, as to cause the victim to submit to the defendant's advances."); Stoudt v. Commonwealth, No. 2386-98-4, 2000 WL 156917, at *2 (Va. Ct. App. Feb. 15, 2000) (affirming the two-prong test established in *Clark* for satisfying a finding of intimidation: "[(1)] that the defendant caused his victim to fear some bodily harm if he or she failed to comply with the defendant, or [(2)] that, under the circumstances, the defendant imposed such a degree of psychological or emotional pressure on a vulnerable and susceptible victim, as to cause that person to submit to the defendant's advances").

[129] *Compare supra* Part II.A (illustrating an instance in which a finding of intimidation also required a finding of a victim's fear of bodily harm), *with supra* Part II.B (illustrating an instance in which a finding of intimidation was made irrespective of the victim's lack of a fear of bodily harm).

[130] *See Sabol*, 553 S.E.2d at 536–38.

[131] *See* Benyo v. Commonwealth, 568 S.E.2d 371, 373–74 (Va. Ct. App. 2002).

judges and lawyers lack clear guidance regarding how to interpret intimidation.[132] Further, inconsistent interpretations of the law remove the predictability and uniformity that are fundamental to American justice.[133]

As an initial matter in attempting to reconcile *Sabol* and *Benyo*, although the *Sabol* court cited *Sutton* for the proposition that intimidation *requires* a finding that the victim feared bodily harm, nowhere in *Sutton* itself does the Supreme Court of Virginia explicitly state that such a fear is a prerequisite to a finding of intimidation.[134] Further, as pointed out

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[132] The relevant Virginia Model Jury Instruction fails to provide additional clarity, apparently adopting the *Benyo* interpretation of *Sutton* and citing, *inter alia*, *Sutton* and *Sabol* but not *Benyo*:

> Intimidation [1] means putting a victim in fear of bodily harm by exercising such domination and control of the victim as to overcome his or her mind and overbear his or her will and [2] may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure. Sutton v. Commonwealth, 324 S.E.2d 665, 669–70 (Va. 1985); *see also* Sabol v. Commonwealth, 553 S.E.2d 533, 536–37 (Va. Ct. App. 2001); Myers v. Commonwealth, 400 S.E.2d 803, 805 (Va. Ct. App. 1991).

1 VIRGINIA MODEL JURY INSTRUCTIONS–CRIM. NO. 44.600 prac. cmt. (SUP. CT. OF VA. MODEL JURY INSTRUCTIONS COMM. 2023–2024). Virginia's model jury instructions are prepared by "a committee of judges and attorneys" who "work[] diligently to produce model instructions that accurately represent the established case and statutory law of the Commonwealth." *Id.*, foreword.

[133] *See* Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 51 (2015) ("Predictability is a defining feature of the rule of law. Achieving predictability of outcomes within a jurisdiction and uniformity in the law across jurisdictions helps assure consistency in judicial decisions, giving people a greater sense of certainty in the way courts will resolve disputes. In this way, predictability lends strength and legitimacy to a rule-of-law system."). "As a practical matter, a state legislature must clearly define a crime by using elements, which enumerate the discrete conduct (actus reus) and mental state (mens rea) that an actor must engage in to be prosecuted." Hong, *supra* note 30, at 261. Admittedly, this needs to be tempered with incorporating terminology that has the flexibility to evolve with the changing social climate. *See id.* at 262 ("When thinking about criminal law, many think of non-vagueness and nonretroactivity as bedrock principles. However, it is actually the criminal law's evolution that has given it the most legitimacy.").

[134] The Supreme Court of Virginia in *Sutton* treated a fear of bodily harm as a possible source of intimidation, rather than a required element. *See generally Sutton*, 324 S.E.2d at 669–70 (explaining that a finding of intimidation may be found without a separate finding of threat, which would entail the presence of fear of bodily harm). Of note, however, the Court of Appeals of Virginia followed the *Sabol* court's interpretation of *Sutton* years before *Sabol* in Bivins v. Commonwealth, 454 S.E.2d 741, 743 (Va. Ct. App. 1995). There, the court, citing *Sutton*, defined intimidation for purposes of a robbery charge: "Intimidation results when the words or conduct of the accused exercise such dominion and control over the victim as to overcome the victim's mind and overbear the victim's will, placing the victim in fear of bodily harm." *Id.* at 742 (without mentioning *Sutton*'s reference to "the imposition of psychological pressure"). The *Bivins* court, like the *Sutton* court, relied in part on the *Black's Law Dictionary* definition of "intimidation," which still included "fear of bodily harm" language. *Id.* (quoting *Intimidation,* BLACK'S LAW DICTIONARY (6th ed. 1990)). The court ultimately

above, the genesis of the "fear of bodily harm" language comes from the *Sutton* court's adoption of the 1979 *Black's Law* definition of "intimidation,"[135] a definition that is much broader and no longer includes any reference to bodily harm in more recent editions.[136] *Sabol* essentially reduces the *Sutton* intimidation analysis to a single-element test—requiring that the victim have a specific fear of bodily harm even if there is clear evidence of significant non-physical coercion by the defendant—which arguably makes *Sutton*'s "imposition of psychological pressure" language superfluous.[137]

1. A Possible Evolution of the Judicial Interpretation of Intimidation

One possible way to reconcile *Sabol* and *Benyo* is to conclude that the Court of Appeals of Virginia reconsidered its interpretation of intimidation during the ten months between the two decisions despite the fact that the *Benyo* court did not expressly reverse *Sabol*.[138] Of note, however, the *Benyo* court did not discuss or even refer to *Sabol*, and it does not appear that any Virginia appellate decision has recognized the inconsistency of these two decisions regarding the interpretation of intimidation under *Sutton*.[139] Of significant note, the Supreme Court of Virginia decided another case, *Commonwealth v. Bower* (*Bower II*),[140]

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found that the victim was not intimidated because any fear of bodily harm arose after, and not before, the sudden taking of a cash register drawer from the victim. *Id.* at 743. The *Sabol* court subsequently would cite to *Bivins* in support of its interpretation of intimidation. *See Sabol*, 553 S.E.2d at 537.

[135] *See supra* note 85 and accompanying text.

[136] *Compare Intimidation*, BLACK'S LAW DICTIONARY (5th ed. 1979) (requiring "putting [one] in fear of bodily harm"), *with Intimidation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (requiring "[u]nlawful coercion").

[137] *See* Hodges v. Commonwealth, 609 S.E.2d 61, 65 (Va. Ct. App. 2005) (quoting Garrison v. First Fed. Sav. & Loan Ass'n of S.C., 402 S.E.2d 25, 28 (Va. 1991) ("No part of an act should be treated as meaningless unless absolutely necessary.").

[138] In fact, the *Benyo* court did not cite or otherwise reference *Sabol* in its decision. *See generally* Benyo v. Commonwealth, 568 S.E.2d 371 (Va. Ct. App. 2002).

[139] A search of the Westlaw and Lexis+ electronic databases as of November 15, 2023, yields no Virginia appellate decisions that contain both "Sabol" and "Benyo." Further, the subsequent history modules of those databases, which are designed to identify subsequent cases that, *inter alia*, negatively treat or distinguish a given case, do not identify the inconsistent interpretations. Although Westlaw identifies *Sabol* as distinguishing *Sutton*—under "Negative Treatment"—it does not similarly identify *Benyo* or any other case. *See* Sutton v. Commonwealth, Nos. 831787, 831788, 1985 WL _____ (Jan. 18, 1985), 324 S.E.2d 665 (Va, 1985) (last visited Jan. 13, 2024). And the only negative subsequent history of *Sutton* in Lexis+ is a cautionary note related to a case in which the Supreme Court of Virginia affirmed a trial court's decision not to use a jury instruction derived from language in *Sutton*. *See* Sutton v. Commonwealth, Nos. 831787, 831788, 1985 Va. LEXIS 159, 324 S.E.2d 665 (Jan. 8, 1985) (referencing Zektaw v. Commonwealth, 633 S.E.2d 93, 97 (Va. 2008), *rev'd on other grounds*, 677 S.E.2d 49 (2009)) (last visited Jan. 13, 2024).

[140] 563 S.E.2d 736 (Va. 2002).

after *Sabol* and before *Benyo*, which at least partly may be responsible for the transformed interpretation.[141]

In 2001, the Court of Appeals of Virginia found in *Bower v. Commonwealth* (*Bower I*) that there was no intimidation to support animate object sexual penetration when the victim, the defendant's thirteen-year-old daughter, did not fear bodily harm.[142] The court held that the combination of the defendant's greater size and the parental relationship between the defendant and the victim were insufficient to establish that the victim had been intimidated.[143] However, the Supreme Court of Virginia in *Bower II* reversed the decision, finding that the facts supported intimidation.[144] Of significant note, the Supreme Court—while referencing the *Sutton* definition of intimidation—implicitly recognized that intimidation can be demonstrated without a fear of bodily injury when it summarized the lower court's decision without questioning it: "The [C]ourt [of Appeals] held that, in this case, nothing in Bower's conduct 'would place his daughter in fear of bodily harm' and that the evidence would *not even support a finding under a 'lower standard' that the victim's will was overborne by psychological domination and control*."[145] The Court of Appeals had defined this "lower standard" of intimidation as "simply showing 'domination and control of [the victim] as to overcome her mind and overbear her will.'"[146]

The *Benyo* court cited, among other cases, the Supreme Court's decision in *Bower II* and ultimately came to a similar conclusion, holding that "[t]he Supreme Court has defined intimidation, in part, as resulting from 'the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure.'"[147] As a result, it held that "as a matter of law, proof of psychological pressure and 'emotional domination [may be] sufficient to constitute intimidation.'"[148] Hence, without any reference to *Sabol*, the *Benyo* court came to a different

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[141] *See infra* notes 142–149 and accompanying text.

[142] 551 S.E.2d 1, 3–6 (Va. Ct. App. 2001), *rev'd on other grounds*, 563 S.E.2d 736 (Va. 2002).

[143] *Bower I*, 551 S.E.2d at 6.

[144] *Bower II*, 563 S.E.2d at 738–39.

[145] *Id.* at 737 (emphasis added) (quoting *Bower I*, 551 S.E.2d at 4).

[146] *Bower I*, 551 S.E.2d at 4 (quoting Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985)); *see also id.* at 5 ("While the daughter testified she was afraid to tell anyone about the incident, she did not testify that Bower accomplished the act because she was in fear of bodily harm from him *or* that she was emotionally dominated by him." (emphasis added)).

[147] Benyo v. Commonwealth, 568 S.E.2d 371, 373 (Va. Ct. App. 2002) (quoting *Sutton*, 324 S.E.2d at 670). The *Benyo* court relied on *Sutton*, *Bower II*, and *Clark* to support this holding. *Id.*

[148] *Id.* (alteration in original) (quoting Clark v. Commonwealth, 517 S.E.2d 260, 261–62 (Va. Ct. App. 1999)).

conclusion than the *Sabol* court regarding the requirement that the victim fear bodily harm, partly in reliance on *Bower II*.[149]

2. Intimidation When the Defendant Is in *Loco Parentis*

Courts routinely consider the power dynamic inherent in the parent-child relationship when deciding whether a sexual assault victim was intimidated by her father, or someone filling that role, into submitting to nonconsensual sexual behavior.[150] For instance, "Appellate courts in Virginia have consistently found sufficient evidence of intimidation where the defendant stood in the role of father figure over the victim."[151]

For example, in *Bower II*, discussed *supra*, the Supreme Court reversed the Court of Appeals' holding that the defendant had not intimidated his daughter because their "good relationship" evidenced that he did not exercise "emotional domination" over her: "[T]he 'good relationship' between [the defendant] and his daughter . . . could lead the child to submit to the overtures of the parent because a 'good relationship' between parent and child can include the child's general obedience to the parent's direction."[152] It is unclear, however, whether the justification for such a finding is that a familial relationship involves an implied threat of future bodily injury should the victim not submit to unwanted sex or that the "imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure" is sufficient for intimidation, independent of any fear of bodily injury.[153]

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[149] *See id*. at 373–74 (noting that "[t]he Supreme Court has defined intimidation, in part, as resulting from 'the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure'" and concluding that "[t]hese circumstances support a finding that Benyo's calculated course of psychological pressure and emotional domination, particularly the important relationship H. believed she and her mother had with Benyo, '[led H.] to submit to the overtures of [Benyo]'" (first quoting *Sutton*, 324 S.E.2d at 670; then quoting *Bower II*, 563 S.E.2d at 738)).

[150] *See infra* notes 151–153 and accompanying text.

[151] Johnson v. Commonwealth, No. 0639-22-4, 2023 WL 2575532, at *4–5 (Va. Ct. App. Mar. 21, 2023) (discussing Bondi v. Commonwealth, 824 S.E.2d 512 (Va. Ct. App. 2019)); Cairns v. Commonwealth, 579 S.E.2d 340 (Va. Ct. App. 2003); *Benyo*, 568 S.E.2d 371; *Bower II*, 563 S.E.2d at 736, 738 (opining that "the parent-child relationship" is "relevant to a determination of intimidation" based on the parent exercising "emotional dominance" over the child); *Clark*, 517 S.E.2d at 260.

[152] *Bower II*, 563 S.E.2d at 738 (relying on Bailey v. Commonwealth, 82 Va. 107 (1886)).

[153] Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985). *Compare Bower II,* 563 S.E.2d at 738 ("Matters such as the victim's age, the relative size of the defendant and victim, the familial relationship between the defendant and victim, and the vulnerable position of the victim . . . are relevant matters to be considered with other testimony when determining *whether the victim was put in fear of bodily harm*." (emphasis added)), *and Sutton*, 324 S.E.2d at 670 (opining that where the sexual contact "was induced *through fear of a person* whom the victim was accustomed to obey, such as a person standing *in loco parentis*," intimidation is likely present (emphasis added)), *with Johnson*, 2023 WL 2575532, at *5 ("It

3. Intimidation Resulting from the Defendant's Position of Authority

A sexual assault victim is particularly vulnerable to intimidation when the defendant is in a position of authority based on the defendant's "opportunity to assert his dominant status over the victim."[154] The Court of Appeals of Virginia has recognized the compelling effect of this power-imbalance dynamic between a defendant and his sexual assault victim in non-familial settings in *Mohajer v. Commonwealth*[155] and *Bondi v. Commonwealth*.[156]

In *Mohajer*, the court ruled that the victim was sexually assaulted by intimidation in a massage parlor by the defendant masseur.[157] When the defendant entered the massage room, the victim—who previously had not had a professional massage—was lying on the table with only a towel wrapped around her.[158] After falsely representing that he was a police officer, the defendant proceeded to sexually assault the victim.[159] The court found that the victim "was naked and alone in the presence of someone she believed she could trust—a masseur and police officer—and whom she allowed to touch her body only because of his position as masseur," and that the circumstances "left her vulnerable and susceptible to the psychological pressure and control exercised by [the defendant] in committing the assault."[160] Considering the totality of the circumstances, the court found that the defendant had "intimidated [the victim] into submission."[161]

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is reasonable to conclude that [the defendant's] paternal role, and his providing necessary financial support for [the victim] and her entire family, exerted sufficient psychological pressure on [the victim] to overcome her will and that [the victim] was 'vulnerable and susceptible to such pressure.'" (quoting *Bondi*, 824 S.E.2d at 517)), *and Bower II*, 563 S.E.2d at 738 ("[T]he 'good relationship' between [the defendant] and his daughter . . . could lead the child to submit to the overtures of the parent because a 'good relationship' between parent and child can include the child's general obedience to the parent's direction."), *and Clark*, 517 S.E.2d at 262 ("The paternal bond, along with the victim's age and relative isolation from others, impeded her ability to resist her father."). *Cf. Cairns,* 579 S.E.2d at 351 (opining that the court could consider the "violent atmosphere [the defendant] created in the home" despite the fact that the defendant "was not physically abusive to [the victim]").

[154] Decker & Baroni, *supra* note 39, at 1126. "Common examples of relationships involving positions of authority include those between prison employees and inmates, doctors and patients, clergymen and members of the parish, nursing home employees and patients, and teachers and students." *Id.* Police officers also are commonly recognized as being in a position of authority over the public generally. *Id.* at 1128.

[155] 579 S.E.2d 359, 365 (Va. Ct. App. 2003).

[156] 824 S.E.2d 512, 514, 517–18 (Va. Ct. App. 2019).

[157] 579 S.E.2d at 361, 365.

[158] *Id.* at 361.

[159] *Id.* at 362, 365.

[160] *Id.*

[161] *Id.*

In *Bondi*, the court held that the victim, M.V., was intimidated into submitting to sexual assault by her church "youth minister," whom she considered "her mentor and father figure" when she was a teenager.[162] M.V. was close with the defendant and his family, and, during her first semester of college, the defendant asked M.V. to babysit his children.[163] While M.V. was babysitting in the defendant's home, the defendant sexually assaulted her and, at one point, prevented her from leaving his home.[164] The court opined that courts could "consider 'the victim's age, the relative size of the defendant and victim, the familial relationship between the defendant and victim, and the vulnerable position of the victim' in evaluating whether an act was accomplished by intimidation."[165] As a result, the court held that "[the circuit court] could reasonably conclude that [the defendant] exercised emotional dominance over [the victim] through his actions" and that the victim "was susceptible to psychological pressure as a result of her relationship with [the defendant] and her sexual inexperience as a teenager."[166] Additionally, the court held that the victim's "fear, pain, and feeling of '[c]omplete[] paraly[sis]' demonstrated that [the defendant] overcame her mind and will by placing her in fear of bodily harm" and that the defendant could have perpetrated the sexual assault by intimidation.[167]

Mohajer and *Bondi* demonstrate that the power imbalance between a defendant and his sexual assault victim can intimidate the victim and, additionally, that the relevance of the power dynamic to a finding of intimidation is not limited to familial relationships, including any associated fear of future bodily harm within the family setting.[168] As noted in *Bondi* and *Bower II*, the familial relationship is only one factor—in addition to the victim's age, the relative size differential between the defendant and the victim, and the victim's vulnerable position—to be considered by a court when analyzing whether the victim was intimidated

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[162] 824 S.E.2d 512, 517–18 (Va. Ct. App. 2019). Of note, the fact that the victim viewed the defendant as a "father figure" arguably also makes this a case in which the defendant was *in loco parentis*, although the relationship in those cases arguably involves an implied threat of future bodily injury. *See supra* note 153 and accompanying text.

[163] *Bondi*, 824 S.E.2d at 514.

[164] *Id.* at 514–15.

[165] *Id.* at 517 (quoting Bower v. Commonwealth (*Bower II*), 563 S.E.2d 736, 738 (Va. 2002)).

[166] *Id.* at 518.

[167] *Id.* (citing Sutton v. Commonwealth, 324 S.E.2d 665 (Va. 1985)) (first, second, and third alterations in original).

[168] *See supra* notes 155–167 and accompanying text.

into submission.[169] Hence, a familial relationship is not required for intimidation when the victim does not fear bodily harm.

4. Intimidation Based on a Generalized Fear

Mohajer and *Bondi* offer another rationale to reconcile *Sabol* and *Benyo*: the implication of a fear of bodily harm from the victim's more generalized fear during the sexual assault itself. For instance, in *Mohajer*, the court inferred a fear of bodily harm as follows:

> [The victim claimed that when the defendant] touched her breasts without her consent, she was "scared to death," because she "had no idea what was going to happen next." [The victim] thus feared the harm inherent in [the defendant's] assault, viz., bodily harm. *See* Commonwealth v. Bower [(*Bower I*)], 563 S.E.2d 736, 738 (Va. 2002) (holding that fear of sexual assault is sufficient to prove fear of bodily harm because "[s]exual assaults are assaults against the body of the victim [and] are violent acts which common knowledge tells us inflict bodily hurt on the victim"). The evidence thus clearly establishes that [the defendant's] conduct intimidated [his victim], put her in fear of bodily harm inherent in such an assault, and overbore her will. *See Sutton* v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985).[170]

Citing both *Bower II* and *Sutton*, the *Mohajer* court found that the victim had a general fear of bodily harm despite not experiencing a specific fear of future bodily harm.[171]

Similarly, in *Bondi*, the victim apparently never feared future bodily harm but rather was "completely frozen and in shock" and in pain.[172] Again, despite failing to testify to a specific fear of future bodily harm, the court reached that conclusion based on her "fear, pain, and feeling of complete paralysis."[173] This analysis allows a court to follow *Sabol*—by finding the requisite fear of bodily harm if the victim experiences a general fear during the assault—while also allowing the court to follow *Benyo*—by analyzing the psychological pressure and influence imposed on the victim that constitutes intimidation.[174]

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[169] *Bondi*, 824 S.E.2d at 517 (explaining that "[a] factfinder may consider 'the victim's age, the relative size of the defendant and victim, the familial relationship between the defendant and victim, and the vulnerable position of the victim' in evaluating whether an act was accomplished by intimidation" (quoting *Bower II*, 563 S.E.2d at 738)).

[170] Mohajer v. Commonwealth, 579 S.E.2d 359, 365 (Va. Ct. App. 2003) (first citing *Bower II*, 563 S.E.2d at 738; then citing *Sutton*, 324 S.E.2d at 670).

[171] *Id.*

[172] *See Bondi*, 824 S.E.2d at 514–15.

[173] *Id.* at 517–18 (alterations and quotations omitted).

[174] Although this interpretation of *Sabol* and *Benyo* arguably could fill the gap in the law that this Article seeks to address, the authors suggest that a more explicit adoption of a broad interpretation of intimidation is a stronger solution. *See infra* Part III.C.

5. Intimidation Through Psychological Pressure

The above discussion simply points out the variety of interpretations Virginia courts have applied or inferred when interpreting intimidation in sexual assault cases after the Supreme Court of Virginia decided *Sutton*.[175] There has been an evolution of Virginia law toward accommodating a broader interpretation of intimidation and, therefore, a broader definition of sexual assault under Virginia law, allowing a court to use its discretion—under the unique circumstances present—to find intimidation through *either* the victim's specific fear of future bodily harm or the psychological pressure imposed by the defendant to overcome the victim's mind or both.[176]

Further, relevant factors in determining whether the victim was intimidated by the defendant include the individuals' relative size difference, the individuals' familial relationship, and the vulnerable position of the victim.[177] As discussed *infra*, the authors recommend that an interpretation of intimidation consistent with this expansive approach best satisfies the goal of criminalizing all nonconsensual sexual activity.[178]

III. A RECOMMENDED INTERPRETATION OF INTIMIDATION

It appears that the legislature's intent in requiring proof that the defendant possessed the more comprehensive *actus reus* of "force, threat or intimidation" for a sexual assault conviction was to encompass all nonconsensual acts, i.e., against the victim's will.[179] Hence, limiting

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[175] *See supra* Parts II.C.1–4.

[176] *Compare* Sabol v. Commonwealth, 553 S.E.2d 533, 537–38 (Va. Ct. App. 2001) (explaining that a fear of bodily harm is required to prove intimidation), *with* Benyo v. Commonwealth, 568 S.E.2d 371, 373 (Va. Ct. App. 2002) (finding that either psychological pressure or fear of future bodily harm could satisfy the requirement for intimidation).

[177] *Bondi*, 824 S.E.2d at 517.

[178] *See infra* Part III.C.

[179] *See* Molina v. Commonwealth, 624 S.E.2d 83, 92 (Va. Ct. App. 2006) ("First, we note that the crime of rape is, at its core, an offense against the will and consent of the victim, irrespective of the manner and means by which the rape is accomplished."), *aff'd*, 636 S.E.2d 470 (Va. 2006). Of note, the phrase "force, threat or intimidation" modifies a variant of "against the will of the complaining witness" in each of Virginia's sexual assault statutes. *See* VA. CODE ANN. § 18.2-61 (LexisNexis, LEXIS through 2023 Reg. Sess.) (requiring sexual intercourse to be "against the complaining witness's will"); § 18.2-67.1 (requiring forcible sodomy to be "against the will of the complaining witness"); § 18.2-67.2 (requiring object sexual penetration to be "against the will of the complaining witness"); § 18.2-67.3 (requiring aggravated sexual battery to be "against the will of the complaining witness"); § 18.2-67.4 (requiring sexual battery to be "against the will of the complaining witness"). Even before the reformation of Virginia's sexual assault statutes in 1981, it was understood that the purpose of requiring force was to demonstrate non-consent. *See, e.g.*, Jones v. Commonwealth, 252 S.E.2d 370, 372 (Va. 1979) ("To determine whether the element of force has been proved in the crimes of non-statutory rape and sodomy by force, the inquiry is whether the act or acts were effected with or without the victim's consent.").

criminal nonconsensual sexual relations to only those instances in which the victim fears bodily harm arguably would be unnecessarily limiting and contrary to the intent of the legislature.[180]

In addition, the authors recognize that there is considerable authoritative caselaw in Virginia interpreting intimidation in the context of criminal sexual activity.[181] As *Clark*, *Bower II*, *Benyo*, *Bondi*, and *Mohajer* demonstrate, there are situations in which courts have found that overpowering psychological pressure resulted in the victim submitting to sexual assault without the victim fearing bodily injury, especially when the defendant was the victim's parent, mentor, or other trusted figure.[182] However, other cases, including *Sabol*, hold that intimidation must induce a fear of bodily harm in the victim.[183] The goal in formulating a recommended interpretation of intimidation is not to ignore this caselaw but rather to reconcile it to the extent possible while at the same time acknowledging that coercive behavior that leads to sexual assault goes beyond physical force and threats of physical harm.[184] Before presenting a final recommendation regarding how Virginia courts should interpret intimidation, it is helpful to understand how other jurisdictions have structured their sexual assault statutes to address nonconsensual sexual activity.[185]

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[180] Sexual assault statutes arguably should target all unwanted nonconsensual sexual activity. *See* Decker & Baroni, *supra* note 39, at 1167 (opining that "non-consensual sex should be criminalized across the board" and that "[a] victim, frozen with fear, who fails to express approval by words or actions should have that decision protected by the criminal justice system"); *id.* at 1168 ("Coercion in any form or taking advantage of one's position of authority to achieve sex must be outlawed everywhere."); Hong, *supra* note 30, at 292, 305 (proposing a "rape by malice" statute composed of an actus reus of non-consent and a mens rea of malice). Professor Hong argues that such a reform is necessary because "[o]ur society's understanding and negotiation of permissible sexual intimacy outside of marriage, the recognition of women's equality and sexual autonomy, and the harm of rape to the actual victim have been radically transformed in the past fifty years." Hong, *supra* note 30, at 292.

[181] *See supra* Part II.

[182] *See supra* Parts II.B, II.C.

[183] *See*, *e.g.*, Sabol v. Commonwealth, 553 S.E.2d 533, 537–38 (Va. Ct. App. 2001).

[184] *See infra* notes 245–246, 269–270 and accompanying text.

[185] *See infra* Part III.A. Courts often look to caselaw from other jurisdictions as persuasive authority. *See, e.g.*, Rivera v. Commonwealth, 778 S.E.2d 144, 149–50 (Va. 2015) (referencing federal and non-Virginia state cases regarding the warrantless search of a cell phone incident to a lawful arrest); James G. Davis Constr. Corp. v. FTJ, Inc., 841 S.E.2d 642, 650 (Va. 2020) (looking to Arizona caselaw regarding the application of unjust enrichment and finding the "[p]ersuasive authority supports our conclusion").

A. Coercion Under Sexual Assault Statutes in Other Jurisdictions

Virginia is not the only state to have evolved from the English common law tradition that required force against the victim's will to constitute sexual assault.[186] It appears that those jurisdictions that have engaged in reform efforts have uniformly attempted to define criminal nonconsensual sexual activity in a way that provides guidance regarding the requisite proof of non-consent.[187] Although requiring proof of force by the defendant and resistance by the victim certainly satisfies the goal of proving a lack of consent, such requirements clearly do not capture all nonconsensual behavior.[188] It is now generally understood that non-physical threats and intimidation can also lead to nonconsensual sexual activity, and many jurisdictions have amended their sexual assault statutes in light of this recognition.[189]

Eighteen states have criminalized non-physical "threats" in the context of sexual assault in one form or another.[190] Six of these states have expressly criminalized by statute threats to the victim's property that cause submission to a sexual act.[191] Three states adopted comprehensive lists of non-physical threats that would criminalize sexual activity,[192] including threatening to injure another, to accuse someone of an offense, to expose a secret, to take or withhold action as an official, to bring about or continue a strike or boycott, or to perform any other act that is calculated to substantially harm someone.[193] And fourteen states have enacted statutes outlawing sexual assault stemming from more generalized, undefined behavior—including coercion, intimidation, public humiliation, or extortion—that arguably includes most or all non-physical

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[186] In fact, Virginia was behind most states in modernizing its sexual assault statutes and used other states' reform efforts as models. *See* Kneedler, *supra* note 32, at 469 n.29 (noting that, during the 1970s, "a majority of the states have revised their sexual assault laws, and as of 1978, all of the remaining states except Missouri were considering reform proposals" (citing NAT'L INST. L. ENF'T & CRIM. JUST., U.S. DEP'T JUST., FORCIBLE RAPE—AN ANALYSIS OF LEGAL ISSUES 1, 71 (1978))); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1512–13 (1975).

[187] *See infra* notes 190–197 and accompanying text.

[188] *See infra* notes 245–246 and accompanying text.

[189] *See infra* notes 190–197 and accompanying text.

[190] Decker & Baroni, *supra* note 39, at 1120.

[191] *Id.*

[192] *Id.* at 1120 & n.260 (citing Delaware, Idaho, and New Jersey statutes).

[193] *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 761(k), 791 (2023) (criminalizing threats to third parties); IDAHO CODE § 18-6101(10) (2023) (listing various non-physical threats such as accusing another person of a crime, exposing a secret, causing damage to property, etc.); N.J. STAT. ANN. §§ 2C:13-5, :14-1(j) (West 2023) (listing various criminal forms of coercion such as threatening a third party, accusing a third party of an offense, exposing a secret, taking or withholding official action, falsifying testimony, etc.).

threats.[194] Of these fourteen states, three, including Virginia, have criminalized a defendant intimidating a victim into nonconsensual sexual activity.[195]

Eight states have adopted sexual assault statutes that specifically target all sexual contact without consent.[196] And some jurisdictions have gone so far as to require proof of an individual's affirmative consent to make sexual assault convictions easier to obtain.[197] Although such a requirement certainly goes a long way toward guaranteeing that any non-criminal sexual activity is consensual, some have argued that this approach is not practical.[198]

B. Virginia's Current Uncertainty Regarding the Interpretation of Intimidation

In light of the inconsistent interpretations of intimidation in the context of Virginia's sexual assault statutes,[199] courts and practitioners are in the unfortunate position of not being able to predict the outcome of related cases.[200] What is clear is that, under Virginia law, a conviction for sexual assault based on either force or threat requires that the victim be

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[194] Decker & Baroni, *supra* note 39, at 1120 & nn.257–60 (citing Delaware, Florida, Hawaii, Michigan, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, South Carolina, Tennessee, Utah, Vermont, and Virginia statutes).

[195] *Id.* The boundaries of these undefined terms are not clear. For instance, North Dakota defines "coercion" as exploiting "fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance." N.D. CENT. CODE § 12.1-20-02(1) (2023).

[196] Hong, *supra* note 30, at 283 (noting that, for example, "Montana defines 'sexual assault' (its term for rape) as a crime targeting all unwanted sex with its definition of '[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.'"(quoting MONT. CODE ANN. § 45-5-502(1) (2017))).

[197] *See* Decker & Baroni, *supra* note 39, at 1083–84. As Professor Decker and Attorney Baroni point out, Washington defines "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact," *id.* at 1088 (quoting WASH. REV. CODE ANN. § 9A.44.010(2) (West 2023)), and Wisconsin defines "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact," *id.* (quoting WIS. STAT. ANN. § 940.225(4) (West 2023)). Additionally, "nearly 2,000 colleges and universities have adopted this [affirmative consent] standard." Hong, *supra* note 30, at 291.

[198] *See* Hong, *supra* note 30, at 262 ("More contemporary efforts at reforms, including rape by affirmative consent and rape by intoxication, also do not reach the social harm of unwanted sex. These reforms present an additional overinclusive problem of proscribing sex based on a failure to communicate or a failure of sobriety, which can occur when the parties are engaged in what both consider consensual intimacy.").

[199] *See supra* Part II.

[200] *See* Decker & Baroni, *supra* note 39, at 1125 ("Without a clear definition of the parameters of a law, courts and prosecutors cannot adequately enforce it.").

in fear of bodily injury.[201] A conviction based on intimidation, however, may or may not require such fear: While the *Sabol* court found that there was no intimidation because the victim did not fear bodily injury,[202] the *Benyo* court ruled that the victim's absence of a fear of bodily injury did not preclude a finding of intimidation.[203]

The situation presented in *Commonwealth v. Wallace*, the case that inspired this Article,[204] demonstrates how the interpretation of intimidation can be determinative of the case outcome.

C.R., a single mother, allowed a housemate to borrow her car to go to a local supermarket.[205] Preparing to depart the supermarket, the housemate realized that she left something in the store and drove the car near the store's entrance.[206] The housemate exited the vehicle, leaving the keys in the ignition, and reentered the store.[207] The car was stolen almost immediately thereafter.[208] The incident occurred around 5:00 p.m., and C.R. arrived at the store shortly thereafter.[209]

C.R. intended to file a police report and waited for the police to arrive.[210] While waiting, C.R. encountered the defendant, Wallace, an unarmed store security guard dressed in paramilitary garb, who informed C.R. that he was an off-duty police officer.[211] Wallace offered to call the police to expedite C.R.'s filing of a report.[212] While waiting for the police to arrive, C.R. and Wallace communicated both in the store and near Wallace's truck during Wallace's work break.[213] At some point, Wallace showed C.R. a video on his phone of the car theft recorded by a store video recorder.[214] Wallace initially refused to give C.R. a copy of the video,

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[201] *See* Snyder v. Commonwealth, 263 S.E.2d 55, 57 (Va. 1980); Breeden v. Commonwealth, 596 S.E.2d 563, 568 (Va. Ct. App. 2004); *see also supra* Parts I.B.1, I.B.2.

[202] Sabol v. Commonwealth, 553 S.E.2d 533, 538 (Va. Ct. App. 2001).

[203] Benyo v. Commonwealth, 568 S.E.2d 371, 373–74 (Va. Ct. App. 2002).

[204] See Commonwealth v. Wallace, No. CR22-1374, 2023 Va. Cir. LEXIS 210 (Norfolk Oct. 18, 2023) (decided by Judge Lannetti, one of the authors of this Article); see also supra note 89. Although the court ultimately found that there was sufficient evidence that C.R. was in fear of bodily harm through intimidation, *Wallace*, 2023 Va. Cir. LEXIS 210, at *12, it nevertheless went on to find that, even if C.R. were not in fear of bodily harm, the defendant intimidated her to submit to nonconsensual sexual activity under Virginia law, id. at *32–33. The following portions of this Article draw heavily on Judge Lannetti's opinion in *Wallace*.

[205] *Wallace*, 2023 Va. Cir. LEXIS 210, at *2.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* at *2–3.

[211] *Id.* at *3.

[212] *Id.*

[213] *Id.*

[214] *Id.*

claiming that doing so would violate his employer's rules; however, he later offered to provide C.R. a copy after observing that she was still in distress over the car theft.[215] To facilitate the provision of C.R. with a copy of the video, Wallace requested C.R.'s phone and then left C.R.'s vicinity after receiving her phone.[216] When Wallace returned, C.R. noticed that her phone had an outgoing text message to Wallace's phone stating "Hi" and an incoming text message from Wallace's phone with a copy of the car theft video.[217] After a few hours waiting for the police to arrive, C.R. confirmed with the police that an officer could meet her at her home to take a police report; C.R. then returned to her home.[218]

Wallace called C.R. around 9:00 p.m. and indicated that he needed to speak with her immediately, in person.[219] Wallace requested C.R.'s home address, which she provided via text message.[220] When Wallace, still dressed in his paramilitary gear, arrived at C.R.'s home, he told C.R. that he was an on-duty police officer now that his security guard shift at the supermarket was over.[221] Wallace informed her that he needed to arrest the housemate for shoplifting.[222] After Wallace asked C.R. how she was going to "take care" of the situation, he asked C.R. where her bedroom was.[223] Once C.R. indicated the general location, Wallace instructed C.R. that they both needed to go to her bedroom.[224] After the two of them entered C.R.'s bedroom, Wallace shut and locked the door, standing between C.R. and the doorway.[225] C.R. offered Wallace money to compensate for any items that supposedly were taken, but Wallace responded that he was aware C.R. had financial issues based on their earlier conversations.[226] Wallace then directed her to undress and forced her to perform fellatio on him.[227] Wallace then directed C.R. to "get on all fours" and proceeded to have sexual intercourse with her.[228]

C.R. testified that she thought Wallace was a police officer based on his express representations and his dress, that she had been raised to obey police officers, and that she feared that if a police officer thought he could

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[215] *Id.*
[216] *Id.*
[217] *Id.* at *3–4.
[218] *Id.* at *4.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.* at *33.
[224] *Id.* at *4.
[225] *Id.* at *4–5.
[226] *Id.* at *5.
[227] *Id.*
[228] *Id.*

sexually assault her, he might also file false charges if she failed to comply, which could lead to her losing her child.[229] Only when an actual police officer arrived at C.R.'s house later that night to take the car theft report did C.R. realize that Wallace was not, in fact, a police officer.[230] C.R. conceded that she did not physically resist Wallace's actions and that her only fear was that she might lose custody of her child.[231]

The court found that the circumstances clearly demonstrated that C.R. did not consent to Wallace's abuse and that Wallace imposed on C.R. "psychological pressure" and emotional domination.[232] Wallace's actions were conducted while C.R. credibly understood that the defendant was a police officer conducting an official investigation, clearly creating a power imbalance that pressured C.R. to submit to the sexual assault.[233] Among other things, Wallace befriended C.R., impersonated a police officer, used deception to get C.R.'s phone number, called C.R. and indicated that he needed to see her immediately, went to C.R.'s house after dark, represented that he was an "on duty" police officer at that time, threatened to arrest C.R.'s housemate, asked C.R. how she was going to "take care" of the situation, ordered C.R. to take him to her bedroom and locked the door once they were both inside, directed C.R. to undress, forced C.R. to perform fellatio on him, ordered C.R. to "get on all fours" as a prerequisite to sexual intercourse, and injured C.R. during nonconsensual sexual intercourse.[234]

Even when Wallace's actions clearly exceeded the authority and boundaries expected of a police officer in the line of duty, Wallace's misrepresentation of his identity—and the implied authority and power that came with that deception—reasonably caused C.R. to fear that she might lose custody of her child.[235] In addition to Wallace's actions toward C.R., C.R. testified to her pre-existing perception of police officers and their powerful influence over her.[236] As the court noted, C.R. undoubtedly submitted to Wallace's sexual assault because she was psychologically pressured in the presence of someone she believed was a police officer—who allegedly was conducting an official investigation, ordering her what

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[229] *Id.* at *4–5.

[230] *Id.* at *5–6.

[231] Id. at *5. Although C.R., on redirect, arguably indicated she was in fear of bodily injury, *id.* at *11–12, the court assumed that there was no such fear in its intimidation analysis, *id.* at *20.

[232] *Id.* at *32–33 (quoting Sutton v. Commonwealth, 324 S.E.2d 665, 669–70 (Va. 1985)).

[233] *Id.* at *33.

[234] *Id.*

[235] *Id.* at *33–34.

[236] *Id.* at *34. At trial, C.R. testified that "if law enforcement tells you to do something, it doesn't matter what it is, you do it because you'll have more bad repercussions in the long run." *Id.* at *10.

to do, and presumably had the power to impact her child custody arrangement—and she had been raised to obey police officers without question.[237] The question presented to the court was whether, under Virginia law, C.R. was "intimidated" into submitting to nonconsensual sexual activity.[238]

According to the holding in *Sabol*, the answer is no: C.R. was not intimidated because she was not in fear of bodily injury, and no further inquiry was necessary.[239] Under the analysis used in *Benyo*, however, a fear of bodily injury was not necessary if Wallace "impos[ed] . . . psychological pressure on [C.R.,] who, under the circumstances, [was] vulnerable and susceptible to such pressure," "by exercising such domination and control of [C.R.] as to overcome [the] mind and overbear [the will of C.R.]."[240] Additionally, the presence of psychological pressure in *Wallace* was supported by the imbalanced power dynamic between Wallace and C.R., which is analogous to the non-familial power dynamic in *Mohajer* and *Bondi*, with Wallace clearly fulfilling the role of authority figure over C.R.[241] As the Supreme Court of Virginia held in *Bondi*, courts can consider the "vulnerable position of the victim" when deciding whether the defendant intimidated the victim to submit to sexual assault.[242] In sum, there is no clear answer under current Virginia appellate caselaw regarding whether C.R. was intimidated for purposes of Virginia's sexual assault statutes.[243]

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[237] *Id.* at *33–34.

[238] *Id.* at *2. The court in Wallace ultimately found that "C.R. was therefore 'vulnerable and susceptible' to the psychological pressure imposed on her by Wallace." Id. *34–35 (quoting Sutton v. Commonwealth, 324 S.E.2d 665, 670 (Va. 1985)).

[239] *Wallace*, 2023 Va. Cir. LEXIS 210, at *20–21 (discussing Sabol v. Commonwealth, 553 S.E.2d 533, 538 (Va. Ct. App. 2001)); *see infra* notes 95–107 and accompanying text (discussing the analysis of "intimidation" by the *Sabol* court).

[240] *See Sutton*, 324 S.E.2d at 670; *see also supra* Part II.B.

[241] *Compare Wallace*, 2023 Va. Cir. LEXIS 210, at *4–5 (Norfolk Cir. Oct. 18, 2023) (holding the commands of an individual claiming to be a police officer posed a credible threat to a sexual assault victim), *with* Mohajer v. Commonwealth, 579 S.E.2d 359, 365 (Va. Ct. App. 2003) (holding an individual presenting himself as a masseur and police officer leaves a victim, who would ordinarily trust such positions, susceptible to psychological pressure), *and* Bondi v. Commonwealth, 824 S.E.2d 512, 517–18 (Va. Ct. App. 2019) (holding that acute pressure in a nonfamilial relationship that mirrors a familial one may constitute emotional domination).

[242] *Bondi*, 824 S.E.2d at 517 (quoting Commonwealth v. Bower (Bower II), 563 S.E.2d 736, 738 (Va. 2002)).

[243] The court in *Wallace* ultimately found that C.R. was "vulnerable and susceptible" to the psychological pressure imposed on her by Wallace and, relying on the interpretation of intimidation adopted by the *Benyo* court, found that the prosecution had proved, beyond a reasonable doubt, that Wallace raped and forcibly sodomized C.R. through intimidation. *Wallace*, 2023 Va. Cir. LEXIS 210, at *18, *20–21, *34–35 (quoting *Sutton*, 324 S.E.2d at 670).

C. *A Recommended Interpretation of Intimidation Under Virginia Law*

Based on Virginia appellate caselaw, the definitions of "force" and "threat" in the context of Virginia's sexual assault statutes are well-defined, and both require a fear of bodily harm by the victim.[244] Consequently, to the extent that non-physical threats or pressure are encompassed by the sexual assault statutes, they must fall within the ambit of "intimidation." And if intimidation is interpreted as requiring that the victim fear bodily harm, any threat or coercive pressure that compels sexual activity but does not induce a fear of bodily harm can never constitute sexual assault.

Limiting the interpretation of intimidation in Virginia sexual assault cases to only those cases where the victim is in fear of bodily injury, as the court did in *Sabol v. Commonwealth*, would be contrary to the nationwide expansion of the definition of sexual assault.[245] Requiring a fear of bodily injury would also fail to protect victims from common circumstances of coercive nonconsensual sexual activity, including submission resulting from a threat of harm to a third person about whom the victim cares deeply, the victim's unjustified sense of duty or loyalty to the defendant, the familial relationship between the defendant and the victim, direction from a trusted authority figure to the victim, or other psychological pressures leading to unwanted sexual contact.[246]

On the other hand, recognizing that sexual assault may occur without a specific fear of bodily harm, as the court did in *Benyo v. Commonwealth*, would be consistent with the modern expansion of sexual assault crimes.[247] There is a clear national trend toward abandoning the notion that criminally coercive behavior leading to sexual assault must impose a

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[244] *See, e.g.*, Jones v. Commonwealth, 252 S.E.2d 370, 372 (Va. 1979) (holding that a victim's lack of consent is key to the legal interpretation of force); *Sutton*, 324 S.E.2d at 670 (stating that the interpretation of threat is expressly tied to the intent to do bodily harm); *see supra* notes 65–79 and accompanying text.

[245] Sabol v. Commonwealth, 553 S.E.2d 533, 538 (Va. Ct. App. 2001) (interpreting intimidation to mean that a victim must be in fear of bodily harm); *see supra* notes 190–97 and accompanying text.

[246] A credible threat of criminal prosecution—such as that present in Sabol—arguably could be sufficient to qualify sexual activity as nonconsensual. *Sabol*, 553 S.E.2d at 537; *see also supra* Part II.A (explaining various ways to meet the intimidation requirement).

[247] 568 S.E.2d 371, 373 (Va. Ct. App. 2002) (quoting Clark v. Commonwealth, 517 S.E.2d 260, 262 (Va. Ct. App. 1999)) ("Assuming, without deciding, that the evidence does not prove [that the victim] feared bodily harm, we note that, as a matter of law proof of psychological pressure and 'emotional domination [may be] sufficient to constitute intimidation.'" (second alteration in the original)); *see* Decker & Baroni, *supra* note 39, at 1120 (surveying eighteen jurisdictions that include some variation of non-physical threats in sexual assault statutes); *supra* notes 190–97 and accompanying text.

fear of bodily harm on the victim,[248] which arguably is consistent with the Virginia General Assembly's recognition that Virginia needed to expand the breadth of criminal sexual assault when it added "intimidation" to its sexual assault statutes in 1981.[249] The modern view recognizes that *all* nonconsensual sexual behavior should be condemned and criminalized.[250] Simply put, narrowing the definition of intimidation such that a court is *required* to find that the victim had a specific fear of bodily harm defies common sense and ignores the vast array of compelling circumstances in which a victim may be intimidated without specifically fearing for his or her physical safety.[251]

Although some jurisdictions have chosen to identify various forms of non-physical coercive behavior by incorporating lists of specific threats or pressures that could result in nonconsensual sexual activity,[252] adopting a broad interpretation of intimidation could similarly—and appropriately—expand the definition of sexual assault while providing judges the necessary discretion to consider the unique circumstances of the allegedly assaultive situation.[253] In fact, if Virginia were to recognize that intimidation is not limited to circumstances in which the victim is put in fear of bodily harm, Virginia's sexual assault statutes would encompass criminal behavior that is not captured in other jurisdictions.[254] Further, a broad interpretation of intimidation could enable Virginia courts to find sexual activity criminally coercive when the situation involves multiple threatening elements that might not be considered coercive individually.[255]

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[248] *See* Decker & Baroni, *supra* note 39, at 1120 ("With twenty-eight true non-consent states, a trend toward rejecting force as a required element in sex offense prosecutions appears to be forming."); *see also* Hong, supra note 30, at 331 ("To most Americans, contemporary understandings over what defines rape is not about how much physical force or violence an offender uses or which power imbalances do or do not exist. Rather, the question presented by rape is whether there was consensual sex.").

[249] *See supra* notes 58–62 and accompanying text.

[250] Decker & Baroni, *supra* note 39, at 1096–100.

[251] *See supra* notes 190–97 and accompanying text.

[252] Decker & Baroni, *supra* note 39, at 1111.

[253] *See supra* notes 190–97 and accompanying text.

[254] *Cf.* Hong, *supra* note 30, at 261. *See generally supra* notes 190–97 and accompanying text.

[255] Virginia caselaw already recognizes this principle, at least in situations where the defendant is *in loco parentis*. See *Bondi v. Commonwealth* for the proposition that courts should consider the victim's age, size relative to the defendant, familial relationship to the defendant, and "vulnerable position of the victim" when evaluating whether the victim was intimidated into submission to unwanted sexual acts. 824 S.E.2d 512, 517–18 (Va. Ct. App. 2019) (quoting Bower v. Commonwealth (*Bower II*), 563 S.E.2d 736, 738 (Va. 2002)); *see* Mohajer v. Commonwealth, 579 S.E.2d 359, 365 (Va. Ct. App. 2003) (discussing the defendant's action in both acting as the masseur giving a massage to an inexperienced client and impersonating a police officer).

It is also worth noting that an interpretation of intimidation that does not require a fear of bodily harm is consistent with the modern understanding of intimidation.[256] The genesis of the "bodily harm" language in *Sutton* was the Supreme Court of Virginia's reference to the definition of "intimidation" in the then-current edition of *Black's Law Dictionary*.[257] The seventh edition of *Black's Law Dictionary*—published in 1999—first adopted the current definition of "intimidation," which is "[u]nlawful coercion; extortion"[258] and includes a quote from a torts treatise pointing out that "intimidation includes all those cases in which harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with."[259] Stated differently, the "intimidation" definition's reference to "bodily harm" was removed almost twenty-five years ago, and the current definition includes all unlawful forms of coercion.[260] Therefore, interpreting Virginia's current sexual assault statutes with the modern definition of intimidation eliminates any requirement of a specific fear of bodily harm and subsumes nonconsensual sexual activity resulting from psychological pressure on and emotional dominion over a vulnerable and susceptible victim.

As discussed *supra*, the Supreme Court of Virginia expressly defined intimidation in the context of sexual assault:[261]

> Intimidation, as used in the statute, means putting a victim in fear of bodily harm by exercising such domination and control of her as to overcome her mind and overbear her will. Intimidation may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure.[262]

Virginia should adopt an interpretation of this definition that is not limited to cases in which the victim fears bodily harm and recognizes that, even without the victim fearing physical harm, intimidation "may be caused by the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure."[263] This is consistent with the 1981 Virginia General Assembly's expansion of sexual

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[256] *See infra* notes 257–59 and accompanying text.

[257] Sutton v. Commonwealth, 324 S.E.2d 665, 669 (Va. 1985) (quoting *Intimidation*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

[258] *Intimidation*, BLACK'S LAW DICTIONARY (7th ed. 1999). Every edition of *Black's Law Dictionary* since—including the current edition, the eleventh—has had the same definition for "intimidation."

[259] *Id.* (quoting R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 364 (17th ed. 1977)).

[260] *See supra* notes 257–59 and accompanying text.

[261] *See supra* Part III.B.3.

[262] *Sutton*, 324 S.E.2d at 670.

[263] *Id.*

assault by adopting intimidation as an *actus reus*.[264] It is also aligned with the evolved social understanding of sexual assault,[265] the rejection of a requirement that a sexual assault victim fear bodily harm,[266] and the adoption of non-physical threats and pressure as criminal.[267] Further, eliminating the physical harm requirement will provide courts valuable discretion to determine whether the unique set of circumstances demonstrates nonconsensual sexual activity that arises from "the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure."[268] Finally, this interpretation does not require a change to Virginia's sexual assault statutes or the common law,[269] as the currently relevant statutory language is "against the complaining witness's will, by force, threat or intimidation."[270] In short, Virginia should adopt an interpretation of intimidation in the context of sexual assault as follows: "putting a victim in fear of bodily harm—or imposing psychological pressure on a victim who, under the circumstances, is vulnerable and susceptible to such pressure—by exercising such domination and control as to overcome the mind and overbear the will of the victim."

CONCLUSION

Ideally, the imposition of *any* coercive behavior—whether by force, threat, or intimidation—that results in a victim submitting to nonconsensual sexual activity should be criminalized. The Virginia General Assembly took a necessary step toward modernizing Virginia's sexual assault statutes in 1981 when it eliminated any requirement that victims physically resist and, at the same time, expanded the defendant's requisite nonconsensual behavior from an *actus reus* involving force to one involving force, threat, or intimidation. In doing so, the legislature's clear intent was to significantly broaden the scope of criminal sexual conduct.

Although the Supreme Court of Virginia defined "intimidation" as used in the new sexual assault statutory text, the court's definition, unfortunately, is unclear regarding whether intimidation is limited to

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[264] *Supra* notes 58–62 and accompanying text.

[265] *See* Hong, *supra* note 30, at 262 ("It is now time for rape too to reflect contemporary norms of unwanted sex when defining sex crimes, free from the lens of sexist presumptions of conduct, behavior, and entitlements."); *see also supra* note 180.

[266] Benyo v. Commonwealth, 568 S.E.2d 371, 373–74 (Va. Ct. App. 2002) (citing Clark v. Commonwealth, 517 S.E.2d 260, 261–62 (Va. Ct. App. 1999)).

[267] *See, e.g.*, Bower v. Commonwealth (*Bower II*), 563 S.E.2d 736, 738–39 (Va. 2002).

[268] *Sutton*, 324 S.E.2d at 670.

[269] *See supra* notes 179–82.

[270] VA. CODE ANN. §§ 18.2-61, -67.1 to -67.4 (LexisNexis, LEXIS through 2023 Reg. Sess.); *see* § 18.2-361.01 (showing that "force, threat, or intimidation" can be raised as affirmative defenses); *see, e.g.*, Jones v. Commonwealth, 252 S.E.2d 370, 372 (Va. 1979) (discussing the state common law rule that force is an essential element of rape).

coercive actions that put the victim in fear of bodily harm or also includes the imposition of psychological pressure on a vulnerable and susceptible victim without a concomitant fear of bodily harm. To make matters worse, subsequent Virginia appellate decisions have been inconsistent and have failed to draw a bright line of demarcation between intimidating and non-intimidating conduct.

Virginia judges and practitioners need clear guidance regarding the parameters of intimidation in the context of sexual assault both to provide uniformity and predictability and, more importantly, to properly criminalize all nonconsensual sexual activity. A defendant who imposes psychological pressure that coerces a vulnerable and susceptible victim into submitting to nonconsensual sexual activity should be guilty of sexual assault, even if the victim does not fear physical harm. Adopting an interpretation of intimidation that recognizes this is supported by current Virginia caselaw, consistent with the interpretation of sexual assault statutes in many other jurisdictions, and long overdue in Virginia.

CHRISTIANITY AND ORIGINALISM: THE MACHEN BROTHERS AND THE QUESTION OF LEGAL FUNDAMENTALISM

*Nathan J. Ristuccia**

ABSTRACT

Originalism is just fundamentalism—at least according to many of its opponents. Yet, despite abundant research into the roots of originalism, no historian has studied the theological views of the one early originalist writer who unquestionably was shaped by Protestant fundamentalism: Arthur W. Machen, Jr. Machen was not only a prominent legal scholar; he was also an active combatant in the Fundamentalist-Modernist Controversy and elder brother to the most famous fundamentalist theologian of the era: J. Gresham Machen. This Article, thus, examines the writings of the two Machen brothers together to demonstrate how originalist and fundamentalist thought interacted. The Article argues, however, that Protestant confessionalism—not fundamentalism—was the dominant theological influence on early originalism. It also observes that the Machen brothers' progressive foes borrowed from modernist theology in much the same way. On all sides of the American political spectrum, constitutional interpretation and scriptural hermeneutics intertwined.

TABLE OF CONTENTS

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INTRODUCTION

Originalism is just fundamentalism. At least, many of the legal theory's foes equate the two.[1] Originalism, allegedly, is a half-secularized update of conservative Protestant literalism, misdirected at the United States Constitution rather than at scripture.

Originalism's defenders have charged that attempts to link the legal theory with fundamentalism rest on little more than vague commonalities such as textualism and historical-grammatical methods.[2] It is not always clear if people coupling the two make an empirical argument (that conservative Protestantism disproportionately causes adherence to originalism);[3] a historical argument (that Protestant exegesis influenced key figures in the spread of originalism);[4] or a logical one (that the internal

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[1] *See, e.g.*, Adam Shapiro, *Originalism's Original Sin*, THE CHRON. OF HIGHER EDUC. (Mar. 1, 2021), https://www.chronicle.com/article/originalisms-original-sin; David Sehat, *On Legal Fundamentalism*, *in* AMERICAN LABYRINTH 21, 21 (Raymond Haberski Jr. & Andrew Hartman eds., 2018); David A.J. Richards, *Covert Fundamentalism*, 1 WAKE FOREST J.L. & POL'Y 281, 281–82, 286, 289 (2011); Tom Levinson, *Confrontation, Fidelity, Transformation: The "Fundamentalist" Judicial Persona of Justice Antonin Scalia*, 26 PACE L. REV. 445, 445–46 (2006); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 41, 116 (1993); Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 663 (1989) [hereinafter *Bork Nomination*].

[2] *See, e.g.*, Paul Gowder & Noah Feldman, *Humanists, Want to Attack Originalism? Learn About Law*, THE CHRON. OF HIGHER EDUC. (Mar. 8, 2021), https://www.chronicle.com/article/humanists-want-to-attack-originalism-learn-about-law; Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 763 (2011); Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 YALE L.J. 1501, 1512–13 (1989); Elizabeth-Jane McGuire & Steven F. McGuire, *Originalism Isn't the Judicial Version of Biblical Fundamentalism*, UNIV. NOTRE DAME: CHURCH LIFE J. (Oct. 12, 2020), https://churchlifejournal.nd.edu/articles/originalism-isnt-the-judicial-version-of-biblical-fundamentalism (asserting that although originalism and fundamentalism have similarities, they should not be equated as the same).

[3] *See* Jamal Greene et al., *Profiling Originalism*, 111 COLUM. L. REV. 356, 372–73 (2011) (compiling statistical demographics, like religion, on originalists); *see also* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 7, 80 (2009) (crediting the popularity of originalism to the high density of evangelicals in America).

[4] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27, 31–33 (1988) (depicting Hugo Black as a "great proponent of a 'Protestant' Constitution," whose individualistic textualism grew from his upbringing in the Primitive Baptist denomination); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309–10 (1990) (linking the

reasoning of originalism mirrors Protestant theology, regardless of connections on the ground).[5]

Originalism's foes and defenders alike, however, rarely engage the voluminous body of Protestant biblical exegesis produced in twentieth-century America.[6] Indeed, there seems to be no consensus among legal scholars about what "fundamentalism" means.[7] Is the term equivalent to "Biblicism," to "evangelicalism," to "religious traditionalism"?[8] Such words are far from synonyms. This Article uses "fundamentalism" and related words in their pure historical meanings to refer to the group of twentieth-century American Protestants who both applied the label to themselves and were identified that way by outsiders.[9]

Despite this debate, no historian or legal theorist has studied the theological views of the one early originalist writer who unquestionably was shaped by Protestant fundamentalism: the twentieth-century law professor Arthur W. Machen, Jr. (1877–1950). Although Machen was primarily a scholar of corporate law, his name occasionally appears in

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popularization of originalism to "the revival of religious fundamentalism" at roughly the same time). *But see* James R. Stoner, Jr., *Was Justice Joseph Story a Christian Constitutionalist?*, *in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY 144, 145 (Daniel L. Dreisbach & Mark David Hall eds., 2019) ("Being a Christian and being a constitutionalist, in short, are to a modern originalist unrelated; if one is both, it is a mere coincidence.").

[5] *See* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 113–14, 123 (2022) ("[O]riginalism is . . . an essentially Protestant method of hermeneutic that, taken to its logical extreme, invokes *sola scriptura* to unsettle doctrines . . . . As with the Protestantism it instantiates, originalism is at bottom a mode of rebellion against an established order . . . ."); CASS R. SUNSTEIN, RADICALS IN ROBES xiii–xiv (2005) ("[S]ince my topic is law, not religion, I do not mean to say anything about religious fundamentalism.").

[6] For a notable exception, see Smith & Tuttle, *supra* note 2, at 718 (noting that most comparisons "paint with a very broad brush" and "ignore the salient features of biblical literalism, constitutional originalism, or both").

[7] For the difficulty defining "evangelical" and "fundamentalist," see Andrew Koppelman, *The Nonproblem of Fundamentalism*, 18 WM. & MARY BILL RTS. J. 915, 915–16 (2010); Nathan J. Ristuccia, *In Search of a Rectification of Names*, UNIV. OF CHI. DIVINITY SCH. (Oct. 26, 2017), https://divinity.uchicago.edu/sightings/articles/search-rectification-names.

[8] *See also* Smith & Tuttle, *supra* note 2, at 698 & n.8, 727 (eliding fundamentalists with "biblical literalists" and "conservative Protestants" despite admitting that "a wide and quite diverse range of religious practices and commitments" divide these groups, which are only united by "a shared opposition to liberal movements in theology and morality"); Levinson, *supra* note 1, at 449, 453 (treating fundamentalism as a worldwide family of religions that share six "essential characteristics" such as "defiant attitude" and a "commitment to purity"); Richards, *supra* note 1, at 285–86 (suggesting Roman Catholics are supporters of natural law theory and fundamentalists); SUNSTEIN, *supra* note 5, at xiii–xiv (defining religious fundamentalism as a movement which seeks "to restore the literal meaning of a sacred text" like "the Koran or the Bible").

[9] *Cf.* DAVID HARRINGTON WATT, ANTIFUNDAMENTALISM IN MODERN AMERICA 170–71 (2017) (noting the usefulness of the term "fundamentalism" when discussing "the very conservative Protestants of the 1940s and 1950s" who "called themselves fundamentalists").

scholarship tracing the history of originalism.[10] Machen's reputation as a proto-originalist thinker depends largely on two articles—more accurately, one article in two parts—about "The Elasticity of the Constitution" that he published in consecutive issues of the *Harvard Law Review* in 1900.[11]

There, Machen championed the "original intention" of the framers and set out three "fundamental principles" by which the fixed meaning of the 1788 Constitution acquires new application because of changing factual circumstances.[12] In this same article, Machen became the first scholar to speak of a "living" Constitution: a phrase he coined in order to mock his opponents who taught the "heresy" that "the Constitution must be bent from its original meaning to suit present exigencies."[13] Eric Segall, in the only study of Machen's constitutional thought, portrays Machen as a "sophisticated" originalist whose scholarship was so thorough that "the academic debate over the legitimacy of originalist and non-originalist constitutional interpretation [had] not progressed materially" between Machen's time and the mid-1990s.[14]

No historian, however, has more than remarked on a dominant feature of Arthur Machen's life—that he was the elder brother of the most famous fundamentalist theologian of the era: Princeton Theological

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[10] *See, e.g.*, Alessio Sardo, *The Invisible Foundations of Originalism*, *in* COMMON LAW – CIVIL LAW 71, 75 (Nicoletta Bersier et al. eds., 2022); David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 448 (2020); ERIC J. SEGALL, ORIGINALISM AS FAITH 15, 30–31 (2018); Luciano D. Laise, *The Interpretation of the Constitution of the United States of America According to the Original Intent: Interpretive Method, Semantic Presuppositions and Difficulties*, 18 HISTORIA CONSTITUCIONAL 245, 248 n.11 (2017); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 24 (2005).

[11] Arthur W. Machen, Jr., *The Elasticity of the Constitution I*, 14 HARV. L. REV. 200 (1900) [hereinafter *Elasticity I*]; Arthur W. Machen, Jr., *The Elasticity of the Constitution II*, 14 HARV. L. REV. 273 (1900) [hereinafter *Elasticity II*].

[12] *Elasticity II*, *supra* note 11, at 205, 273, 284. Although Machen usually speaks of "discovering" the "original intention . . . of the framers," occasionally he refers to "original meaning" or "original intent." *Elasticity I*, *supra* note 11, at 203, 205, 207, 211, 213. Indeed, Machen stresses that interpreters ascertain intention through "reasonable construction of [the framers'] words," *Elasticity II*, *supra* note 11, at 284, and their "general concepts," because many cases will concern problems (such as technologies that did not exist in 1788) which "were not and could not have been specifically in the minds of the framers," *Elasticity I*, *supra* note 11, at 212.

[13] *Elasticity I*, *supra* note 11 at 205, 207; *see also id.* (complaining that his foes "befog the issue" in the "high-sounding platitude[]" that the Constitution "is not dead" and "no mere skeleton," but "a living, growing organism, capable of adapting"); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1255–56 (2019) (suggesting that Machen was the first to use the phrase but noting that Roscoe Pound picked it up by 1908).

[14] Eric J. Segall, *A Century Lost: The End of the Originalism Debate*, 15 CONST. COMMENT. 411, 412 (1998); *see also* SEGALL, *supra* note 10, at 30, 35 (describing Machen's "groundbreaking" and "extraordinary" article as the first one of its kind and superior to almost all later debates on the issue).

Seminary Professor J. Gresham Machen (1881–1937).[15] To avoid confusion, this Article refers to the two brothers as "Arthur" and "Gresham" respectively. During the same decades that Arthur was writing law articles and arguing Supreme Court cases, Gresham was rising to international prominence as the leader of the fundamentalist faction within the Northern Presbyterian Church.[16]

Arthur, moreover, was Gresham's close confidant.[17] According to Gresham, Arthur had a "breadth of education" and "true and spontaneous learning" far beyond his own, and Gresham overcame his own doubts about Christianity during early adulthood, thanks partly to Arthur.[18] During Gresham's decade-long conflict with the modernist faction in the Presbyterian Church, Arthur advised him on corporate governance aspects of denominational affairs and helped write legal briefs that the fundamentalists submitted in various proceedings.[19] Even after Gresham's death, Arthur sued in his own name in the Presbytery of the Potomac against three churches "riddled with, and controlled by, the heresy commonly known as 'Modernism'" in opposition to the "essential doctrines" and "standards of the Presbyterian church."[20] Arthur was as committed to the defeat of modernism as his brother.[21] The Machen

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[15] A recent article, for instance, discusses J. Gresham Machen's contributions to originalism without mentioning his brother. *See* Austin Lee Steelman, *How Evangelicalism's Twin Seeds of Biblical Literalism and Constitutional Originalism Spelled the End of* Roe, RELIGION DISPATCHES (May 3, 2022), https://religiondispatches.org/how-evangelicalisms-twin-seeds-of-biblical-literalism-and-constitutional-originalism-spelled-the-end-of-roe/.

[16] *Cf.* TERRY A. CHRISOPE, TOWARD A SURE FAITH: J. GRESHAM MACHEN AND THE DILEMMA OF BIBLICAL CRITICISM, 1881–1915, at 190–95 (2000) (discussing Gresham's rise as a "leading spokesman" for fundamentalism); C. ALLYN RUSSELL, VOICES OF AMERICAN FUNDAMENTALISM 142–61 (1976) (describing Gresham's leadership in the fundamentalist movement); *Dr. J. G. Machen Dies in West of Pneumonia*, BALT. SUN, Jan. 2, 1937, at 16 (describing Gresham's involvement in various Presbyterian circles).

[17] The two brothers were close until the end of their lives, and they frequently wrote letters to one another. *See, e.g.*, J. GRESHAM MACHEN, LETTERS FROM THE FRONT: J. GRESHAM'S CORRESPONDENCE FROM WORLD WAR I 247–50 (Barry Waugh ed., 2012) [hereinafter FROM THE FRONT]. A week before his death, Gresham spent Christmas with Arthur and his family, and a few days later, Arthur travelled from Baltimore to Bismarck, North Dakota, to see Gresham in the hospital before he died. *See Dr. J. G. Machen Dies of Pneumonia*, *supra* note 16, at 16; NED B. STONEHOUSE, J. GRESHAM MACHEN: A BIOGRAPHICAL MEMOIR 506–09 (1954).

[18] J. Gresham Machen, *Christianity in Conflict*, *in* J. GRESHAM MACHEN, SELECTED SHORTER WRITINGS 547, 55– 51 (D.G. Hart ed., 2004) [hereinafter SHORTER WRITINGS].

[19] *See* D.G. HART, DEFENDING THE FAITH 111, 127 (1994); STONEHOUSE, *supra* note 17, at 436.

[20] *Charges Filed on Churches' Union Services*, BALT. SUN, Apr. 20, 1937, at 26 (quoting from Arthur's complaint, accusing the Northern Presbyterians of "ceas[ing] to be a church of Jesus Christ" due to its tolerance of heresy and decisions to "cast[] out true Christians [like Gresham] from its communion").

[21] Arthur never left the Franklin Street Presbyterian Church in Baltimore and thus never joined the new denomination (the Orthodox Presbyterian Church) that his brother

brothers' lives and works are intertwined and cannot be understood apart from each other.

This Article, therefore, examines the writings of Arthur and Gresham Machen together, looking at places where Arthur's legal scholarship reveals the impact of his conservative Presbyterian background and where Gresham's theology owed a debt to the law. This Article argues that both a historical and a logical relationship between Arthur's originalism and his Protestantism is undeniable. However, that relationship is not to fundamentalism in particular. Christian confessionalism—not fundamentalism—supplied the intellectual foundation upon which Arthur and Gresham's thinking about law and politics rested. Originalism may have substituted the Constitution for an authoritative Protestant text, but that text is not the Bible. It is the Westminster Standards—the collection of confessions, catechisms, liturgies, and government forms—that structured the Presbyterian church from the seventeenth century forward.[22]

I. FUNDAMENTALISTS AND MODERNISTS

A. American Schism

The Fundamentalist-Modernist Controversy was the most momentous event in American religion during the first half of the twentieth century. Indeed, as two sociologists recently stressed, the present-day "culture war can best be understood in the context of the historical US modernist-fundamentalist conflict," because this "battle for religious and institutional power" and "battle to determine the identity of Christians" is "the direct ancestor to the current progressive-conservative division."[23]

At its most basic, the Fundamentalism-Modernist Controversy was a series of struggles for control of most of the major Protestant denominations in America that occurred between roughly 1910 and 1940.[24] During this period, several important church bodies—notably, the Northern Presbyterians and the Northern Baptists—broke apart, and

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founded in 1936. *See id.* (noting that Arthur attended Franklin Street and hence sued in the Presbytery of the Potomac).

[22] *See generally* THE WESTMINSTER CONFESSION OF FAITH AND CATECHISMS (The Orthodox Presbyterian Church ed., 2007) (1647). These are the "standards of the Presbyterian church" that Arthur drew on in his complaint quoted above. *Charges Filed on Churches' Union Services*, *supra* note 20.

[23] ASHLEE QUOSIGK & GEORGE YANCEY, ONE FAITH NO LONGER 20, 21 (2021); *see also* John Fea, *Understanding the Changing Facade of Twentieth-Century American Protestant Fundamentalism: Toward a Historical Definition*, 15 TRINITY J. 181, 189–90 (1994) (calling the period between 1919 and 1940 "one of the most pivotal periods in American religious history").

[24] *Cf.* 4 GEOFFREY R. TRELOAR, THE DISRUPTION OF EVANGELICALISM 187–194 (2017); Fea, *supra* note 23, at 184–87.

denominations that avoided schism often saw the creation of permanent antagonistic factions ensconced in rival institutions.[25] In the early twentieth century, most American Protestants (clergy and laity alike) were moderate evangelicals: traditional orthodox Christians who wanted to focus denominational energy on charitable work and evangelism rather than on doctrinal disputes.[26] Nonetheless, Protestant denominations grew increasingly riven due to the deeds of two factions on the theological right and left—the fundamentalists and the modernists.

Modernists (also called "Liberal Protestants") were theological revisionists who pressed denominations to accommodate Christianity to the modern world by preserving the moral core of Christianity but discarding doctrines that allegedly could no longer be believed in a scientific age.[27] In the words of the modernist theologian Rudolf Bultmann (an acquaintance and former classmate of J. Gresham Machen), "We cannot use electric lights and radios and . . . at the same time believe in the spirit[s]."[28] *The Fundamentals*, a collection of ninety apologetic essays published from 1910 to 1915, which gave the fundamentalist movement its name, defended five doctrines under special attack from modernists:

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[25] *See, e.g.*, DANIEL R. BARE, BLACK FUNDAMENTALISTS: CONSERVATIVE CHRISTIANITY AND RACIAL IDENTITY IN THE SEGREGATION ERA 122–25 (2021) (discussing the founding of Bible schools to support the fundamentalist wings of Black denominations); Kevin R. Kragenbrink, *The Modernist/Fundamentalist Controversy and the Emergence of the Independent Christian Churches/Churches of Christ*, 42 RESTORATION Q. 1, 15 (2000) (summarizing the rise in the Disciples of Christ—without any formal schism—of fundamentalist journals and colleges in opposition to the older denominational institutions already in the hands of modernists).

[26] *See* BRADLEY J. LONGFIELD, THE PRESBYTERIAN CONTROVERSY: FUNDAMENTALISTS, MODERNISTS, AND MODERATES 4, 233 (1991) (explaining how the Presbyterian church adopted doctrinal pluralism to accommodate differences in belief and "preserve the mission of the church").

[27] *See* ROGER E. OLSON, AGAINST LIBERAL THEOLOGY 5–7, 32–33 (2022) (defining modernism as a reinterpretation of doctrines that created a "unified, new religion" "entirely different" from traditional Christianity, comparable to the rise of Mormonism or the Jehovah's Witnesses). *See generally* TRELOAR, *supra* note 24, at 177–183 (highlighting that the liberal evangelicals changed their theology in order to adapt to a more progressive, modern society); Walter Russell Mead, *God's Country?*, 85 FOREIGN AFFS. 24, 26 (2006) (explaining how modernists believed that incorporating modern ideas into Christianity was the best way to defend and preserve the religion).

[28] Rudolf Bultmann, *New Testament and Mythology*, *in* NEW TESTAMENT AND MYTHOLOGY AND OTHER BASIC WRITINGS 1, 4 (Schubert M. Odgen ed., 1984); *see also* Harry Emerson Fosdick, Shall the Fundamentalists Win? (May 21, 1922), *in* THE RIVERSIDE PREACHERS 27, 28–29, 38 (Paul H. Sherry ed., 1978) (arguing that doctrines must change in light of "new knowledge about the physical universe, its origin, its forces, its laws; new knowledge about human history" and the "colossal problems" of "[t]he present world situation" such as genocide and poverty); Hart, *supra* note 19, at 53 (discussing Bultmann's critiques of Gresham's ideas); CHRISOPE, *supra* note 16, at 38–39 (noting that Bultmann was the most influential scholar in the history of religions school of thought after Gresham's death).

the infallibility of scripture, the virgin birth, substitutionary atonement, the bodily resurrection of Jesus, and the historicity of miracles.[29]

In 1920, the Baptist clergyman Curtis Lee Laws coined the term "fundamentalist" during that year's annual Northern Baptist Convention to denote the traditionalist faction that he supported.[30] The word quickly popularized. In an infamous 1922 sermon, for example, Harry Emerson Fosdick—America's leading modernist clergyman—stressed that "[a]ll Fundamentalists are conservatives, but not all conservatives are Fundamentalists," for only conservatives who were "essentially illiberal and intolerant" of modernists merited the title.[31] A fundamentalist was a "militantly anti-modernist Protestant evangelical[]," "an evangelical who is angry about something," in the words of one historian.[32] That is to say, they were evangelicals who insisted that modernists must be removed from positions of authority in denominational boards, schools, seminaries, and publishing houses—conservatives "who mean to do battle royal," as Curtis Law put it.[33]

Most fundamentalists loyally adhered to some denomination, not to a broad cross-denominational movement. There were fundamentalist Baptists, fundamentalist Lutherans, fundamentalist Presbyterians, and so forth. As a result, the struggle against modernists within each denomination had characteristics peculiar to that denomination. Fundamentalists among the Disciples of Christ, for instance, fought to preserve the distinctive Disciples' practice of believer baptism by full immersion as much as to shield common doctrines like the virgin birth.[34] Fundamentalists in the Northern Presbyterian church, such as the

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[29] THE FUNDAMENTALS: A TESTIMONY TO THE TRUTH (1910–1915); *see also* GEORGE M. MARSDEN, FUNDAMENTALISM AND AMERICAN CULTURE 118–120 (2006); TRELOAR, *supra* note 24, at 84–85; *cf.* WATT, *supra* note 9 at 50–51; Ken Rathbun, *What Are the Fundamental Doctrines of Faith?*, FRONTLINE, May/June 2019, at 6, 6–7.

[30] WATT, *supra* note 9, at 51–52.

[31] Fosdick, *supra* note 28, at 28 (observing that by 1922 "[a]lready all of us must have heard about the people who call themselves the Fundamentalists"); *see also* WATT, *supra* note 9, at 53, 59–60 (comparing fundamentalists with related groups such as biblical literalists and Protestant evangelicals); Ristuccia, *supra* note 7 (describing the changing meanings of "evangelical").

[32] MARSDEN, *supra* note 29, at 4, 235.

[33] C.L. Laws, *Convention Side Lights*, 102 WATCHMAN EXAM'R 834, 834 (1920), *reprinted in* Fea, *supra* note 23, at 187 ("'Conservatives' is too closely allied with reactionary forces in all walks of life . . . . We suggest that those who still cling to the great fundamentals and who mean to do battle royal for the great fundamentals shall be called 'Fundamentalists.'"); *see also* Fosdick, *supra* note 28, at 28 (stating that the Fundamentalists' "intention is to drive out of the evangelical churches men and women of liberal opinions").

[34] *See* MARSDEN, *supra* note 29, at 178; Kragenbrink, *supra* note 25, at 4, 10 (discussing the controversy between fundamentalism and modernism among the Disciples of Christ).

Machen brothers, sought to prevent alterations of the Westminster Confession—the Presbyterian creedal statement—and to require all pastors at ordination to espouse the Confession without mental reservation.[35]

Fundamentalists and moderate evangelicals shared the same theological beliefs and approaches to scripture. Indeed, moderates wrote many of the essays in *The Fundamentals*.[36] But as the controversy progressed and key denominational votes ensued, moderates repeatedly allied with the unorthodox modernists against their fundamentalist co-religionists. "Most members of the church, however, apparently had concluded . . . that insisting on the [theological] fundamentals did more damage than good to the church's evangelical witness," so they "opted to widen [the church's] doctrinal boundaries to preserve its united mission."[37] By the end of the Controversy, many fundamentalists left the old denominations—having failed to oust the modernists—and founded instead an array of new institutions that have been the backbone of American evangelicalism ever since.[38]

B. The Fundamentalist Doctor

When the Fundamentalist-Modernist controversy began around 1910, J. Gresham Machen was an obscure, German-trained Greek instructor at Princeton Theological Seminary.[39] Insofar as any member of the Machen family had national prominence, it was Arthur—a successful corporate lawyer and a prolific scholar. While Gresham was on the Western Front during World War I, for instance, he met a major from Georgia who had been a lawyer before the war and praised one of Arthur's corporate law treatises as invaluable to his practice.[40] To the major, Gresham was just somebody's brother.

By the middle of the 1920s, in contrast, Gresham was perhaps the most famous fundamentalist in America—indisputably the preeminent fundamentalist intellectual. His fame extended beyond Christian circles. For instance, the atheist journalist H.L. Mencken wrote an obituary for Gresham describing him as "a man of great learning, and, what is more,

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[35] BARRY HANKINS, JESUS AND GIN: EVANGELICALISM, THE ROARING TWENTIES AND TODAY'S CULTURE WARS 69–78 (2010); *cf.* LONGFIELD, *supra* note 26, at 74 (chronicling the battles over how to handle ministers who denied doctrines in the Westminster Confession).

[36] LONGFIELD, *supra* note 26, at 21; TRELOAR, *supra* note 24, at 84–85 (explaining that a wide range of scholars contributed to *The Fundamentals*).

[37] LONGFIELD, *supra* note 26, at 233.

[38] These institutions include not only new denominations like the Orthodox Presbyterian Church, but also new seminaries, like Westminster and Fuller, and new parachurch organizations like the National Association of Evangelicals. *See, e.g.*, WATT, *supra* note 9, at 66, 96–97, 99.

[39] HART, *supra* note 19, at 24–25, 30.

[40] FROM THE FRONT, *supra* note 17, at 280.

of sharp intelligence" whom Mencken "did greatly admire" even though Gresham preached doctrines that were "excessively dubious . . . [and] little removed from that of cannibalism."[41] The political commentator Walter Lippmann praised Machen's "cool and stringent defense of orthodox Protestantism" against the modernists as "the best popular argument produced by either side in the current controversy."[42] And when the New York Times needed a scholar to write a front-page spread on "What Fundamentalism Stands For Now," the paper tapped Gresham.[43]

Gresham's sudden rise to notoriety stems from a single moment: his 1923 publication of *Christianity and Liberalism*—still his best-known book.[44] During his year ministering to soldiers at the front during World War I, Gresham grew frustrated with his liberal Protestant superiors and discovered that he had shared more theologically with the Roman Catholic chaplains and Black preachers he met than with many pastors in his own denomination.[45] While in Paris awaiting his discharge in the months after

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[41] H.L. Mencken, *Doctor Fundamentalis*, THE EVENING SUN, Jan. 18, 1937, at 15 [hereinafter *Dr. Fundamentalis*]; *see also* H.L. Mencken, *The Impregnable Rock*, 24 AM. MERCURY 411, 411 (1931) [hereinafter *The Impregnable Rock*] (calling Gresham "a man of great learning and dignity" whose arguments are "completely impregnable" and contrasting him positively with various fundamentalist and modernist leaders).

[42] WALTER LIPPMANN, A PREFACE TO MORALS 32 (Transaction Publishers reprt. 1982) (1929); *see also id.* at 22, 33–34 (discussing opposition to Machen's writings from modernists such as Harry Emerson Fosdick and Roman Catholics such as T. Lawrason Riggs).

[43] J. Gresham Machen, *What Fundamentalism Stands for Now, Defined by a Leading Exponent of Conservative Reading of the Bible as the Word of God*, N.Y. TIMES, June 21, 1925 (§ 9), at 1; *see also* BRADLEY J. GUNDLACH, PROCESS AND PROVIDENCE: THE EVOLUTION QUESTION AT PRINCETON, 1845–1929, at 306–07 (2013) (describing how the New York Times tried to get Gresham to write article against evolution, even though Gresham was not an anti-evolutionist). Although Gresham embraced the doctrines of fundamentalism, he was unenthusiastic about the label itself. *See, e.g.*, J. GRESHAM MACHEN, *The Importance of Christian Scholarship*, *in* EDUCATION, CHRISTIANITY, AND THE STATE 13, 31 (John W. Robbins ed., 1987) [hereinafter EDUCATION] ("I can even endure the application to me of the term 'Fundamentalist,' though for the life of me I cannot see why adherents of the Christian religion—which has been in the world for some nineteen hundred years—should suddenly be made an '-ism' and be called by some strange new name.").

[44] J. GRESHAM MACHEN, CHRISTIANITY AND LIBERALISM (WM. B. Eerdmans Publ'g Co. 1977) (1923) [hereinafter CHRISTIANITY AND LIBERALISM]; *see also* D.G. Hart, *When is a Fundamentalist a Modernist? J. Gresham Machen, Cultural Modernism, and Conservative Protestantism*, 65 J. AM. ACAD. RELIGION 605, 606 (1997) (asserting that the success of *Christianity and Liberalism* led to Machen's fame).

[45] FROM THE FRONT, *supra* note 17, at 138, 278, 320; CHRISTIANITY AND LIBERALISM, *supra* note 44, at 52. Gresham was a Y.M.C.A. volunteer during World War I (rather than a normal chaplain), so he spent as much time cooking for the troops and selling them stamps and cigarettes as he did running church services. He almost died on several occasions in the war. FROM THE FRONT, *supra* note 17, at 57–58, 101, 126, 130, 139, 150–51, 174, 278, 282; *cf.* CHRISTIANITY AND LIBERALISM, *supra* note 44, at 52 ("[H]ow great is the common heritage which unites the Roman Catholic Church . . . to devout Protestants today! We would not indeed obscure the difference which divides us from Rome. The gulf is indeed profound. But

the armistice, Gresham was already researching and preparing the burst of anti-modernist speeches, articles, and books that he produced between 1921 and 1923.[46]

Christianity and Liberalism—the culmination of this burst—is primarily a work of apologetic theology, arguing that modernism is "a religion which is so entirely different from Christianity as to belong in a distinct category," "battling against" the older religion and "more destructive of the Christian faith because it makes use of traditional Christian terminology."[47] In less than two hundred pages, Machen sets forth five major doctrines—the nature of God, scriptural authority, the person of Christ, substitutionary atonement, and the mission of the church—in order to demonstrate how modernism rejects these all.

Yet, even in this slim volume, Gresham repeatedly digresses on legal and political topics.[48] He was a cultural commentator as much as a theologian.[49] Indeed, Gresham served on the executive committee of the Sentinels of the Republic, a forerunner to the American Liberty League committed to defending the "fundamental principles" of the U.S. Constitution and the "original intent of the framers" against government actions that "encroached on the reserved rights of the States and the individual citizen."[50] In the words of one historian, Gresham was "radically libertarian. He opposed almost any extension of state power and took stands on a variety of issues" that "violated usual categories of liberal

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profound as it is, it seems almost trifling compared to the abyss which stands between us and many ministers of our own Church . . . . [N]aturalistic liberalism is not Christianity at all.").

[46] *See, e.g.*, FROM THE FRONT, *supra* note 17, at 254, 264–66, 268–69; J. GRESHAM MACHEN, THE ORIGIN OF PAUL'S RELIGION (1921).

[47] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 2, 6–7. Machen's book abounds in military language, for he viewed "the present time [as] a time of conflict" and insisted that "things about which men agreed are apt to be the things that are least worth holding; the really important things are the things about which men will fight." *Id.* at 1–2.

[48] *See, e.g., id.* at 10–14, 64–65, 149–54, 168–69.

[49] Modernists at that time often mixed theology with social criticism. *See, e.g.*, MARK LILLA, THE STILLBORN GOD 232–34, 249 (2007) (discussing the cultural criticism of the modernist Ernst Troeltsch).

[50] Julia Bowes, *"Every Citizen a Sentinel! Every Home a Sentry Box!" The Sentinels of the Republic and the Gendered Origins of Free-Market Conservatism*, 2 MOD. AM. HIST. 269, 274, 277, 293 (2019) (noting that the executive committee included lawyers such as Thomas F. Cadwalader, who brought *Leser v. Garnett* before the Supreme Court, and William Guthrie, who argued *Pierce v. Society of Sisters*). Gresham produced his most political speeches and writings in his capacity as a leader of the Sentinels, rather than as a clergyman. *See, e.g.*, J. Gresham Machen, *Voices in the Church*, *in* SHORTER WRITINGS, *supra* note 18, at 383–84 [hereinafter *Voices*] (praising Cadwalader and the Sentinels); J. Gresham Machen, *Shall We Have a Federal Department of Education?*, *in* EDUCATION [hereinafter *Federal Department*], *supra* note 43, at 84, 93.

or conservative."[51] As such, Gresham was in favor of (among other things) traditional Calvinist morality, private schooling, mountain climbing, the Democratic party, and modern methods of biblical scholarship but against socialism, women's suffrage, Prohibition, Benito Mussolini, and Bible readings in public schools.[52] Gresham's main biographer has argued that the theologian shared more with conservative intellectuals such as the New Humanist Irving Babbitt or the Nietzschean journalist H.L. Mencken than he did with other fundamentalist clergymen.[53]

Gresham's writings—especially *Christianity and Liberalism*—often reveal the pastor's knowledge of the law, presumably learned through conversations with his father and brother. (Family letters indicate that Gresham not only kept informed about his brother's practice but also read his brother's scholarship and came to court to watch major cases.)[54] For example, Gresham lauded the Supreme Court's decisions in *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925), voiding state laws banning foreign language teaching in primary schools and requiring mandatory public education, respectively.[55] Such statutes were examples

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[51] George Marsden, *Understanding J. Gresham Machen*, 11 PRINCETON SEMINARY BULL. 46, 56 (1990); *see also* GILLIS J. HARP, PROTESTANTS AND AMERICAN CONSERVATISM 141–42, 146–47 (2019) (describing Gresham's connections to the Sentinels of the Republic and stressing how he was "a pivotal figure" who "anticipat[ed] the shift to individualistic libertarian political views that evangelicals would soon come to adopt almost universally"); Bowes, *supra* note 50, at 274, 294 (portraying Gresham as a "conservative ideologue[]" with "antistatist politics" who was central to the defeat of the Child Labor Amendment in the 1920s).

[52] HART, *supra* note 19, at 4–5; *see also* J. GRESHAM MACHEN, *Mountains and Why We Love Them*, *in* SHORTER WRITINGS, *supra* note 18, at 429 [hereinafter *Mountains*] (accusing Mussolini of destroying civilization in South Tirol); *Child Labor and Liberty*, 41 NEW REPUBLIC 145, at 145 (1924) [hereinafter *Child Labor*] (responding to the magazine's earlier criticism of his political activism); 56 CONG. REC. 799 (1918) (letter of Gresham read into the record, arguing that suffrage decisions must be left to the states); FROM THE FRONT, *supra* note 17, at 39 (discussing this letter in the record).

[53] HART, *supra* note 19 at 102, 141. Mencken thought the same, because the journalist contrasted Gresham with other fundamentalists and linked him instead with the New Humanist Paul Elmer More. *See The Impregnable Rock*, *supra* note 41, at 411 (presenting More and Gresham as allies at Princeton); *see also Dr. Fundamentalis*, *supra* note 41 (contrasting Machen with other fundamentalists).

[54] *See* FROM THE FRONT, *supra* note 17, at 51, 53–54, 148, 248, 263.

[55] *See, e.g.*, *Federal Department* (describing these laws as "very terrible sins"), *supra* note 50, at 92; J. Gresham Machen, *The Necessity of the Christian School*, *in* EDUCATION, *supra* note 43, at 67–68 [hereinafter *Necessity*] (noting that "the tyranny of the scientific expert is the most crushing tyranny of all" and commending Governor Alfred Smith and Justice James McReynolds by name for opposing these laws); J. Gresham Machen, *The Christian School: The Hope of America*, *in* EDUCATION, *supra* note 43, at 137 [hereinafter *Hope of America*] (praising the judiciary for "upholding the high principles of the Constitution"); STONEHOUSE, *supra* note 17, at 402–04 (explaining the rationale behind Machen's educational views). Although *Pierce* was unanimous, Justices Holmes and Sutherland dissented in *Meyer* on the grounds of judicial deference. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down Nebraska law that banned foreign language teaching in

of "the materialistic paternalism of the present age, [which] if allowed to go on unchecked, will rapidly make of America one huge 'Main Street'" and reduce "all mankind to the proportions of the narrowest and least gifted."[56]

As Gresham testified before the House and Senate committees on education, Justice McReynolds and the majority of the Court in these cases proved themselves the "last bulwark of our liberties," defending the great principle that "the child is not the mere creature of the State" and delivering children from "the despotic control of whatever superintendent of education happened to be in power."[57] Strikingly, Gresham believed that "the original intent" of "the great 'Bill-of-Rights' provisions of the Constitution" did not permit incorporation on the states.[58] Nonetheless, Gresham "rejoic[ed]" that in the "appalling deterioration" of the present age, the Court had "step[ped] in to do what the state courts ought to do."[59] Evidently, Gresham thought that the Court sometimes must ignore correct originalist methods when the real-world consequences were dire.[60]

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primary school); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (declaring unconstitutional an Oregon statute that mandated all children to attend public schools).

[56] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 12–15, 149, 154 (portraying these laws as "[m]anifestations" of the "drab utilitarianism" and "collectivism" of modern life). Gresham—who despised Bible readings in public schools and Religious Education classes—insisted that some state laws, by grandfathering in pre-existing parochial schools, constituted a church establishment contrary to the "fundamental idea of religious liberty." *See also id.* at 13 n.2, 14.

[57] J. Gresham Machen, *Proposed Department of Education*, *in* EDUCATION, *supra* note 43, at 104–05; *cf. Pierce*, 268 U.S. at 534–35 (1925) (holding that such laws "unreasonably interfere[] with the liberty of parents and guardians to direct the upbringing and education of children" because "[t]he child is not the mere creature of the State"); *see also Hope of America*, *supra* note 55, at 131 (contrasting America with the USSR where "the Russian idea [was] that children exist for the State and are the property of the State"); *Federal Department*, *supra* note 50, at 87 (tracing the "notion that the children belong to the State" back to Plato's *Republic*).

[58] *Necessity*, *supra* note 55, at 69; *cf.* Twining v. New Jersey, 211 U.S. 78, 99 (1908) (suggesting selective incorporation through the Fourteenth Amendment's Due Process Clause); Barron v. Baltimore, 32 U.S. 243, 250 (1833) (holding that the first ten amendments did not apply to the states directly).

[59] *Necessity*, *supra* note 55, at 68–69 (noting that even these "salutary decisions . . . [cannot] be contemplated with unmixed feelings by the lover of American institutions" because of their unconstitutional theory of incorporation). Arthur Machen also rejected incorporation through the Fourteenth Amendment. *See* Arthur W. Machen Jr., *Dissent and Stare Decisis in the Supreme Court*, 1940 MD. ST. B. ASS'N 79, 95–96 [hereinafter *Dissent*] (lamenting that the "New Court" appointed since 1937 had "extended the Fourteenth Amendment beyond anything ever dreamed of before").

[60] *See Necessity*, *supra* note 55, at 69 (explaining how Machen believed state courts should protect people's "fundamental rights," but he was still grateful when the Supreme Court stepped in and did so); *cf.* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

Another issue that forced Gresham to delve into constitutional law was his decade-long fight against the ratification of the Child Labor Amendment (CLA).[61] This amendment sought to overturn two unpopular Supreme Court opinions—*Hammer v. Dagenhart* (1918) and *Bailey v. Drexel Furniture C*o. (1922)—by granting Congress the "power to limit, regulate, and prohibit the labor of persons under eighteen years of age" and to "suspend[]" "the operation of State laws . . . to give effect to legislation" passed under the amendment.[62] Submitted to the states in 1924, the amendment twice neared ratification—in 1925 and again in 1937—but because of the opposition of groups like the Sentinels of the Republic, only twenty-eight of the thirty-six requisite states ever approved the amendment.[63]

Gresham was one of many clergymen—Protestants and Catholics alike—who believed that the CLA threatened parochial education and parental authority.[64] Gresham admitted that most proponents of the amendment only expected it to authorize legislation "to prevent sweatshop conditions or the like."[65] But original meaning—not expected application—was what mattered. According to Gresham, "the refusal of the framers of the amendment to word the amendment in any reasonably guarded way, show[s] plainly that the powers are intended to be exercised" to their fullest extent.[66] The framers, after all, rejected narrower language

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[61] *Necessity*, *supra* note 55, at 69–70. Arthur Machen also resisted the CLA, although he was less active in the fight than Gresham. *See Mr. Machen Also Opposes the Child Labor Amendment*, BALT. SUN, May 17, 1924, at 8 (noting that "the existence of child labor in certain States is a national disgrace" but warning that "the power of Congress under this amendment would be subject to no restriction whatsoever").

[62] Child Labor Amendment, H.R.J. Res. 184, 68th Cong., 43 Stat. 670 (1924). For these earlier cases, see Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918); *cf.* Arthur W. Machen, Jr., *The Strange Case of* Florida v. Mellon, 13 CORNELL L.Q. 351, 361, 375 (1928) (commending the Court's decisions in *Bailey* and *Dagenhart* but worrying that they did not go far enough in their protection of states' rights).

[63] *See, e.g.*, Bowes, *supra* note 50, at 269–70, 286–87, 296 (describing the Sentinels' campaign against the CLA); Gerard N. Magliocca, *Court-Packing and the Child Labor Amendment*, 27 CONST. COMMENT. 455, 456–57, 468 (2011) (narrating the CLA's history and discussing the effect of court-packing on the CLA); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1010 (2002) (depicting foes of the CLA as "a conservative network including the Sentinels of the Republic, the Woman Patriots, the National Association of Manufacturers, the American Farm Bureau Federation, and a small number of prominent religious leaders").

[64] *See* Magliocca, *supra* note 63, at 467–68.

[65] *Necessity*, *supra* note 55, at 69 (describing the CLA as a "heartless . . . piece of proposed legislation" that "masquerades under the cloak of humanitarianism . . . [which] gives power to Congress to enter right into your home" and "control . . . your children"); *see also Child Labor*, *supra* note 52, at 145 ("It has been maintained, indeed, by advocates of the amendment that the courts would never interpret it to mean what it says.").

[66] *Necessity*, *supra* note 55, at 70.

in favor of undefined words such as "labor" and "regulate," revealing that Congress could set what curricula children worked on in the classroom or prohibit children from helping on family farms.[67]

Gresham maintained that the CLA would grant Congress powers far beyond those possessed by the states because "the great 'bill-of-rights' provisions" will continue to bind the states, but the CLA will "set aside . . . those previous amendments" insofar as they conflict with the federal government's new authority.[68] Statutes like those struck down in *Meyer* will be revived, except they would now be passed by Congress rather than the states. The "arbitrary" officials of "Washington bureaus," "hostile to the decency of family life," will seize upon the CLA's broad wording to achieve "the complete destruction of the Constitution."[69] "Freedom," Gresham warned, "is not safe if it is written only with ink in the Constitution. It must be written also in the fleshy tables of the heart."[70] A Constitution amended against itself cannot stand.

J. Gresham Machen was, first and foremost, a churchman. Yet his pastoral concerns for the welfare of Christian schools and Christian families drew him into disputes about the U.S. Constitution. And, in these disputes, Gresham looked to the document's original intent and condemned the progressive understandings of the Constitution, which were beginning to dominate.

C. Westminster Standards Originalism

Legal and constitutional concepts influenced more than just Gresham's political activism. They also shaped his polemic against modernist theology.

Consider, for example, a passage in *Christianity and Liberalism* where Gresham decried many candidates for office. According to Gresham, instead of swearing their mandatory vows, candidates insist that constitutional language has "become a dead letter" because of "the growth of custom"; the candidates have "various mental reservations" or "various 'interpretations' of the declaration (which of course mean a

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[67] *Child-Labor Amendment to the Constitution: Hearing on S.J. 224 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923); *Hope of America*, *supra* note 55, at 129 (discussing how proposals to narrow the wording to exclude the home from the CLA's scope were rejected); *see also* Bowes, *supra* note 50, at 278 (noting that the CLA's drafters used "labor," instead of "employment," to ensure that chores and similar unpaid work performed at home and on farms could be regulated and prohibited).

[68] *Child Labor*, *supra* note 52, at 145; *see also Voices*, *supra* note 50, at 382–83, 389 (addressing the concerns that the CLA would threaten the Bill of Rights).

[69] *Necessity*, *supra* note 55, at 70; *see also Hope of America*, *supra* note 55, at 129–30 ("[T]hat measure is more than an amendment . . . . [I]t destroys the Constitution . . . . Federal agents will have a full right to enter your homes and supervise the simplest things that your children do . . . .").

[70] *Hope of America*, *supra* note 55, at 138.

complete reversal of the meaning)."[71] Through these excuses, they twist the oath's meaning until it is contentless. Because these candidates have not met the requirements for officeholding set forth in "part of the Constitution," they have "no right to be . . . officer[s]."[72]

Out of context, a reader might think that Gresham offered a version of the Oath Argument for originalism common in conservative legal circles today. Roughly, this argument claims that by swearing an oath to support and defend "this Constitution"—as required in Article VI—federal officeholders morally bind themselves to the fixed meaning of the document at the time of its ratification.[73] Gresham spoke, however, not of federal officials but of the Westminster Confession and the ministers of the Presbyterian Church.

"[I]n spirit," Gresham stressed, "evangelical churches are creedal churches," even if "[t]he creedal character of the churches is differently expressed in the different evangelical bodies."[74] In Presbyterianism, elders at their ordination had to pledge loyalty to this creed by making "a solemn declaration . . . that the Westminster Confession contains the system of doctrine taught in infallible Scriptures" and by affirming truthfully a series of "constitutional questions" about their beliefs.[75] If this ordination rite does not "fix clearly the creedal basis" of the church, then "it is difficult to see how any human language could possibly do so."[76]

Gresham respected honest atheists and Unitarians far more than he did the modernists in his own denomination.[77] In Gresham's view,

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[71] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 164.

[72] *Id.*

[73] U.S. CONST. art. VI, cl. 3; *see also id.* art. II, § 1, cl. 8 (articulating the President's oath to "preserve, protect and defend the Constitution"). For the Oath Argument, see generally Erik Encarnacion & Guha Krishnamurthi, *The Oath Doesn't Require Originalist Judges*, 15 HARV. L. & POL'Y REV. 571 (2021); Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?*, 103 NW. U. L. REV. 857 (2009).

[74] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 162; *see also id.* at 170 (describing the *Book of Common Prayer* as the creed of the Episcopal Church); J. GRESHAM MACHEN, *The Responsibility of the Church in Our New Age*, *in* SHORTER WRITINGS, *supra* note 18, 364, 371–73 [hereinafter *Responsibility of the Church*] (describing the differing approaches to the creedal nature of Protestant churches).

[75] *See* CHRISTIANITY AND LIBERALISM, *supra* note 44, at 163 (describing the confession of faith Presbyterian elders had to affirm).

[76] *Id.*; *cf.* J. GRESHAM MACHEN, WHAT IS FAITH? 28–29 (WM. B. Eerdmans Publ'g Co. 1946) (1925) [hereinafter FAITH] ("[V]arious creeds have recently been produced to take the place of the great historic confessions of faith . . . [But] historic creeds, unlike the modern creeds, were intended by their authors or compilers to be true.").

[77] HART, *supra* note 19, at 130 (noting that Gresham "admired the intellectual integrity of Unitarians" and had a "brief romance" with a Unitarian woman); *see also* CHRISTIANITY AND LIBERALISM, *supra* note 44, at 165 (describing the Unitarians as more honest than liberal Christians); FAITH, *supra* note 76, at 103 (speaking of "the honesty of the

modernists foreswore themselves by twisting the original meaning of the Westminster Confession through bad faith misinterpretation. Modernism stood upon the "false position" of "[e]quivocation, the double use of traditional terminology, subscription to solemn creedal statements in a sense different from the sense originally intended in those statements."[78] Indeed, "the modern liberal preacher seeks to produce an opposite impression by quoting [Bible verses] out of . . . context" and interpreting them "in a way as far removed as possible from the original sense."[79] Unless interpreted according to their original intention, the words of the Confession or of the Bible itself could not restrain clergymen.

Gresham compared denominations loyal to their creedal constitutions to various legal entities founded upon a written document. Modernist clergy are like a board of directors "acting *ultra vires*" and using "the name and the resources of the corporation" in defiance of "the incorporation paper, in which the objects of the corporation are set forth."[80] They are like a political club that nominally supports one party but "carr[ies] on a propaganda in favor of" the other party.[81] They are like trustees who commit "a violation of trust" by devoting "trust funds" to "any other purpose" than "the propagation of the gospel as set forth in the Bible and in the confessions of faith."[82] These legal metaphors demonstrate how central the original meaning of creeds was to Gresham's understanding of Protestant denominations. For Gresham, to be a confessionalist was to be an originalist.

No wonder, then, that when Gresham finally established a rival denominational body to the Northern Presbyterian Church in 1935, he initially called his new group the "Presbyterian Constitutional Covenant

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Unitarian Churches, for which we have the very highest possible respect"); STONEHOUSE, *supra* note 17, at 318–20 (discussing Gresham's near engagement to a Unitarian woman).

[78] *Responsibility of the Church*, *supra* note 74, at 373; *see also id.* at 372 (admitting that modernists misinterpreted "with the best and most honorable intentions in the world"); *cf.* OLSON, *supra* note 27, at 165 ("Liberal Christianity . . . does not adhere to anything like orthodox Christianity, except in its phraseologies.").

[79] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 25; *see also* FAITH, *supra* note 76, at 34 ("[I]t makes very little difference how much or how little of the creeds of the Church the Modernist preacher affirms . . . because all is affirmed merely as useful or symbolic and not as true.").

[80] CHRISTIANITY AND LIBERALISM, *supra* note 44, at 20.

[81] *Id.* at 169.

[82] *Id.* at 166. Gresham's works praise "the right of voluntary association" as basic to liberty—that is, the freedom to form institutions such as churches, unions, clubs, and private schools and to exclude outsides from membership. *Responsibility of the Church*, *supra* note 74, at 373; *see also Federal Department*, *supra* note 50, at 84–25; CHRISTIANITY AND LIBERALISM, *supra* note 44, at 168 (recognizing the importance of the right to associate); *cf.* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728–29 (1871) (recognizing a "right to organize voluntary religious associations" with their own disciplinary tribunals).

Union" (today, the Orthodox Presbyterian Church).[83] In one of its first actions, the denomination elected Gresham to a "Committee on the Constitution," tasked with reviewing amendments to the Westminster Standards that the Northern Presbyterian Church made over the past century in order to set the text of the new denomination's confession.[84] Gresham and the other committee members persuaded the OPC to eliminate revisions to the Standards dating to 1903—made under the influence of modernists—and return to the nineteenth-century version of the text.[85] Gresham was no longer just a defender of the church constitution's original intention; he was a framer.

II. AN ORIGINALIST AGAINST THE MODERN AGE

A. The Making of a Southern Originalist

In a conference speech given in 1937—the year of his brother's death—Arthur proclaimed not only his views on highly technical developments in tax law, but also his "confession of faith."[86] Arthur declared (imitating the style of the Nicene Creed) that "I still believe" in a series of tenets, including that "taxation of one class for the benefit of another . . . is vicious," "that contracts, public or private, should be inviolably performed," "that it is far better to starve in freedom than to live in surfeit in slavery," and "that the preservation of individual liberty is the only just end of government."[87] Arthur recognized that these beliefs left him an anomaly at the height of the New Deal. He was a "survival of the Eocene Age—a liberal, constitutional, southern, states rights democrat."[88] But unless the American people "recover their sanity" and return to these beliefs and the government practices they entail, "despotism in the United States is inevitable."[89] Arthur was just as "radically libertarian" as his brother.[90]

The Machen brothers' libertarian views stemmed partly from their aristocratic upbringing and partly from their hostile reactions to the social changes in America brought about by the Progressive movement and New Deal. The battles that they fought as adults intensified a latent conservatism already there. Many historians over the last century have

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83 LONGFIELD, *supra* note 26, at 211–12; STONEHOUSE, *supra* note 17, at 495.

84 WESTMINSTER CONFESSIONS OF FAITH AND CATECHISMS, *supra* note 22, at viii.

85 The Committee recommended keeping only two of the revisions from 1903. *Id.* at viii–ix.

86 Arthur W. Machen, Taxation in Maryland as Affected by the New Deal, Address at the National Tax Conference (Oct. 28, 1937), *in* 30 PROC. ANN. CONF. ON TAX'N UNDER AUSPICES NAT'L TAX ASS'N 489, 501 (1937).

87 *Id.*

88 *Id.* at 500–01.

89 *Id.* at 501–502 (citing the collapse of the Roman Republic as an example).

90 Marsden, *supra* note 51, at 54 (describing Gresham's political views).

studied Gresham, but Arthur's biography is almost entirely unwritten despite plentiful sources.[91] A brief sketch of his life, therefore, is necessary.

Arthur and Gresham Machen were the privileged sons of a wealthy southern family in Baltimore.[92] Their father, Arthur W. Machen Sr. (1827–1915), attended Harvard Law School and became a close friend of Christopher Columbus Langdell before settling down to a successful corporate practice in Baltimore.[93] Although a Whig and Know-Nothing before the Civil War, Arthur Machen Sr. transferred his allegiance to the Democratic Party in 1864 and remained a loyal Democrat the rest of his life.[94] Woodrow Wilson, a southern Democrat and a Presbyterian, was a friend of the family.[95] The Machen brothers grew up in a home devoted to Greek and Latin literature, Old School Presbyterian doctrine, and Lost Cause nostalgia for the South.[96] At least early in their lives, Arthur and Gresham were both segregationists.[97] After 1915—perhaps because of the death of their father or the trauma Gresham experienced during World War I—racial issues disappeared from their writings.[98] New concerns,

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[91] *See, e.g.*, Segall, *supra* note 14, at 411 n.2, 413 (describing Arthur only as a "Professor at the University of Chicago" who wrote "mostly about corporate law" but who also produced one of the first articles "ever written on the subject of constitutional theory" in a "university-affiliated law review[]").

[92] *See* LONGFIELD, *supra* note 26, at 31–32, 39; HART, *supra* note 19, at 11–14. Arthur and Gresham also had a younger brother, Thomas Machen (1886–1971) but were much closer with each other than with Thomas. For instance, in his brief memoir, Gresham praised Arthur repeatedly but barely mentioned Thomas. *See* J. GRESHAM MACHEN, *Christianity in Conflict*, *in* SHORTER WRITINGS, *supra* note 18, at 548, 550–51. Over his life, Gresham wrote dozens of extant letters to Arthur, but almost never corresponded with Thomas. *See, e.g.*, William D. Dennison, *J. Gresham Machen's Letters Home from Marburg 1905–1906*, 16 J. HIST. MOD. THEOLOGY 241, 242, 251, 259, 247 (2009); FROM THE FRONT, *supra* note 17, at 52, 75, 247, 296.

[93] *See* ARTHUR W. MACHEN, JR., LETTERS OF ARTHUR W. MACHEN 346 (1917); HART, *supra* note 19, at 12.

[94] MACHEN, *supra* note 93, at 74, 341–42.

[95] *See* HART, *supra* note 19, at 13 (mentioning Wilson's visit to the Machen's home in Baltimore); STONEHOUSE, *supra* note 17, at 72–73, 168–69 (describing the Machen family's friendship with Woodrow Wilson).

[96] *See* HART, *supra* note 19, at 11–15; CHRISOPE, *supra* note 16, at 58–60; MACHEN, *supra* note 93, at 334–35, 340, 344.

[97] *See* Nathan J. Ristuccia, *Fundamentalism in Black and White*, AD FONTES J. (Nov. 29, 2022), https://adfontesjournal.com/church-history/fundamentalism-in-black-and-white/ (laying out the evidence for Gresham's racial views); *Not a Denial, He Says: Mr. A.W. Machen, Jr., Defends the Suffrage Amendment*, BALT. SUN, Oct. 6, 1909, at 14; *cf.* FROM THE FRONT, *supra* note 17, at 248 (noting Arthur's appreciation for a new Confederate monument in Baltimore); Dennison, *supra* note 92, at 254 (expressing lament that a literacy test requirement failed).

[98] *Compare* Arthur W. Machen Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910) [hereinafter *Void*], *and* Dennison, *supra* note 92, at 254, *with* CHRISTIANITY AND LIBERALISM, *supra* note 44, *and* Machen, *supra* note 62.

such as opposition to Prohibition and Franklin Roosevelt, rose to govern their politics instead.[99]

After receiving his undergraduate degree at Johns Hopkins, Arthur attended Harvard Law School like his father, studying under the great constitutional law scholar James Bradley Thayer, a man Arthur praised as "the very incarnation of logic."[100] Arthur graduated *cum laude* and served on the law review editorial board—then limited to around fifteen of the best students from the 2L and 3L classes combined (more than four hundred students total).[101] In 1900, a year after graduating from Harvard, when he was just 23 years old, Arthur began to teach corporations at the law school of Baltimore University—a short-lived school eventually absorbed into the University of Maryland—and to produce legal scholarship.[102]

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[99] Later in life, Arthur was best known as a leader in the fight to repeal the Eighteenth Amendment (Prohibition) and as a foe of Franklin Roosevelt from within the Democratic Party. *See, e.g.*, H.H. Walker Lewis, *Round Table Reminiscences*, 10 MD. BAR J. 5, 5 (1977) (discussing Arthur's staunch opposition to prohibition); *A.W. Machen, Prominent Lawyer, Dies*, BALT. SUN, May 28, 1950, at 24 (discussing Arthur's opposition to the New Deal); *Heckling Follows Attack on 'Dry' Act*, BALT. SUN, May 28, 1922, at 24 (describing an address Arthur made against prohibition). Gresham's opposition to Prohibition cost him a promotion to full professor at Princeton Theological Seminary. HART, *supra* note 19, at 120–121; *see also* STONEHOUSE, *supra* note 17, at 387–92 (discussing Gresham's opposition to prohibition).

[100] MACHEN, *supra* note 93, at 127 n.3. Some contemporary scholars view Thayer as an early originalist. *See, e.g.*, William Michael Treanor, *Process Theory, Majoritarianism, and the Original Understanding*, 75 FORDHAM L. REV. 2989, 2991 (2007).

[101] *See, e.g.*, *Arthur W. Machen*, 1950 MD. STATE BAR ASS'N PROC. 151, 153 (official obituary); Lewis, *supra* note 99, at 5; *see also* Bruce A. Kimball, *Before the Paper Chase: Student Culture at Harvard Law School, 1895-1915*, 61 J. LEGAL EDUC. 31, 40, 60 (2011) (describing the *Harvard Law Review* before the reform of its selection process in 1902). Arthur was on the masthead from the third issue of volumes 11 through the eighth (and final) issue of volume 12—that is, from October 1897 through March 1899. *See, e.g.*, 11 HARV. L. REV. 187, 187 (1897); 12 HARV. L. REV. 557, 557 (1899).

[102] Arthur taught at Baltimore Law School for at least three years, from its incorporation by the legislature in 1900 until the end of the 1901–1902 school year. *See, e.g.*, 1 MD. L. REV. B. 1, 2, 12 (1901) (listing Arthur as a staff member of the Maryland Law Review, as well as the Corporations professor); 2 MD. L. REV. B. 97, 97 (1902-1903) (listing Arthur as faculty of the Baltimore Law School); *see also* Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890-1940*, 55 J. LEGAL EDUC. 208, 213 (2005) (describing the foundation of the Baltimore Law School in 1889). Multiple historians have claimed that Arthur was a law professor at the University of Chicago. *See, e.g.*, Segall, *supra* note 14, at 411 n.2; Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 220 (1985). I cannot locate any record from Arthur's life suggesting he taught anywhere but Baltimore. His brother Gresham, however, studied law at Chicago in 1902, which may account for the confusion. *See* HART, *supra* note 19, at 18–19; STONEHOUSE, *supra* note 17, at 58–59.

B. Arthur as a Scholar

Between 1900 and 1911, the wunderkind wrote a two-volume treatise on corporate law, a one-volume treatise on corporate tax law, and four major articles (three published in the *Harvard Law Review*).[103] Over the course of the 1910s, however, Arthur married, began having children, left teaching, and became a named partner at one of the Baltimore firms that eventually merged to form Venable LLP.[104] In 1913, he was appointed Special Assistant to Attorney General James McReynolds—leaving the position when Wilson appointed McReynolds to the Supreme Court in 1914.[105] Evidently, Arthur grew too busy for research, for he only published a single law review article in the remaining forty years of his life.[106]

Arthur's treatises and articles on corporate law dominated throughout the first half of the twentieth century, widely cited by judges and legal scholars alike.[107] Arthur's most "iconic" publication was one of the two "seminal accounts" of corporate personhood in the history of American scholarship.[108] Felix Frankfurter, then a professor at Harvard Law, declared Arthur's treatise on corporate law to be "easily the best work extant on the subject," written by the "careful scientist Mr. Machen" with "independence of thought and freshness of treatment."[109] Likewise,

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[103] *See* ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS (1908); ARTHUR W. MACHEN, JR., A TREATISE ON THE FEDERAL CORPORATION TAX LAW OF 1909 (1910); *Elasticity I*, *supra* note 11; *Elasticity II*, *supra* note 11; *Void*, *supra* note 98; Arthur W. Machen, Jr., *Corporate Personality* (pt. 2), 24 HARV. L. REV. 253 (1911) [hereinafter *Corporate Personality II*]; Arthur W. Machen, Jr., *Do the Incorporation Laws Allow Sufficient Freedom to Commercial Enterprise?*, 1909 MD. STATE BAR ASS'N 78.

[104] *See Arthur W. Machen*, *supra* note 101, at 153–54; *see also* City of Baltimore v. Machen, 104 A. 175, 176 (Md. 1918) (listing Arthur as counsel from the Baltimore firm of Machen & Williams); FROM THE FRONT, *supra* note 17, at 51 (discussing Arthur's successful corporate law practice); Arthur W. Machen III, *Personal Reminiscences of H. Vernon Eney*, 14 MD. BAR J. 4, 5 (1981) [hereinafter *Personal Reminiscences*] (describing how Machen and his partners grew their law practice).

[105] *See* STONEHOUSE, *supra* note 17, at 202.

[106] *See* Machen, *supra* note 62. Arthur continued to publish speeches on issues of corporate law and taxation. *See, e.g.*, Machen, *supra* note 86, at 490; *Dissent*, *supra* note 59, at 79.

[107] *See, e.g.*, Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061, 1068, 1103 (1994); Horwitz, *supra* note 102, at 220.

[108] Tyson C. Leonhardt, Hobby Lobby, Carnell Construction, *and the Theoretical Deficit of Second-Class Personhood: The Indecipherable Calculus of Corporate Rights*, 94 N.C. L. REV. 648, 680 n.181 (2016) (depicting Arthur's essay and a 1926 article by the Pragmatic philosopher John Dewey as the two seminal works of scholarship); *see also* Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 594, 608 (1987) (arguing that Arthur's theory was superior to Dewey's).

[109] F.F., *A Treatise on the Modern Law of Corporations. By Arthur W. Machen, Jr.*, 22 HARV. L. REV. 618, 618–619 (1909) (book review); *see also* Caspary v. La. Land & Exploration Co., 707 F.2d 785, 790 (4th Cir. 1983) (labeling Arthur's "imposing treatise" an "extremely

John Henry Wigmore insisted, twenty-five years after the treatise's publication, that it remained "still the most scholarly work on corporations . . . published in this country."[110] Moreover, Arthur twice argued before the Supreme Court and was listed as a named plaintiff in a third case, so his corporate law arguments had an impact beyond the written page.[111]

Arthur's constitutional law writings were more obscure. His article on Article V grew somewhat influential—indeed, notorious—and continues to be foundational in scholarship on constitutional unamendability.[112] This piece partly inspired *Leser v. Garnett*, an unsuccessful states-rights challenge to the Nineteenth Amendment that fellow Baltimore lawyer William L. Marbury brought before the Supreme Court.[113] In 1925, the political scientist Edward Corwin complained—with Arthur and Marbury likely in view—that his desk had become covered in "anti-nationalistic" pamphlets on "[t]he . . . relationship of the states and the nation" "emanating from the sovereign state of Maryland."[114]

Yet, according to Eric Segall's count, Arthur's most important constitutional article, "The Elasticity of the Constitution," was cited just

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respected authority" even fifty years later); Lewis, *supra* note 99, at 5 (describing the reception of Arthur's treatise).

[110] *Arthur W. Machen*, *supra* note 101, at 154; Lewis, *supra* note 99, at 5.

[111] *See* Miles v. Safe Deposit & Tr. Co. of Balt., 259 U.S. 247, 248 (1922) (Arthur as sole attorney of record for the unsuccessful trustee in a case on the taxation of securities); Buchanan v. Patterson, 190 U.S. 353, 359 (1903) (Arthur as one of three attorneys of record for the successful defendant in a restitution case about eighteenth-century French privateering); Smyth v. United States, 302 U.S. 329, 345 (1937) (Arthur as unsuccessful respondent).

[112] *See Void*, *supra* note 98, at 169 (arguing that the Fifteenth Amendment—but not the Thirteenth or Fourteenth—was invalid because it failed to follow the procedure in Article V according to the original meaning of the provision's language). For the influence of this article, see, for instance, Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 2029–30 (2019); R. George Wright, *Could a Constitutional Amendment Be Unconstitutional?*, 22 LOY. U. CHI. L.J. 741, 748, 750 (1991); William C. Coleman, *The Fifteenth Amendment*, 10 COLUM. L. REV. 416, 417 (1910).

[113] 258 U.S. 130, 136 (1922); *see also* Siegel, *supra* note 63, at 1004 n.173 (describing Arthur's impact on Marbury); Bowes, *supra* note 50, at 274, 296 (discussing the circle of Baltimore lawyers that brought *Leser*). Arthur and Marbury were never at the same firm, but they worked together on one corporate law case around this time. *See* Pa. R.R. Co. v. Minis, 87 A. 1062, 1062 (Md. 1913).

[114] Edward S. Corwin, *Constitution v. Constitutional Theory*, 19 AM. POL. SCI. REV. 290, 290 (1925); *cf.* Machen, *supra* note 62, at 355, 357, 376 (lamenting how "the great and once sovereign state[s]" have been reduced to "mere instrumentalities" of the federal government); *Void*, *supra* note 98, at 190 (seeking to defend "the most sacred constitutional rights of sovereign states" against federal encroachment); William L. Marbury, *The Limitations upon the Amending Power*, 33 HARV. L. REV. 223, 227 (1919) (arguing that no federal law or amendment can deprive "a sovereign state" of its right to "continue to exist as a state, within the meaning of the Constitution").

once between 1900 and 1997.[115] In truth, Arthur's article was more popular than Segall knew. My own research turned up citations of "The Elasticity of the Constitution" in at least eight articles from this time window, as well as in a dissenting Supreme Court opinion by Louis Brandeis.[116]

More importantly, two major legal thinkers from the early twentieth century almost certainly borrowed on Arthur's ideas, although neither explicitly cited his article. The first is Woodrow Wilson, in his treatise *Constitutional Government in the United States* (1908).[117] As mentioned, the Machens were friends of Wilson and supporters of James Woodrow (a theology professor and the President's uncle) after James was attacked in Presbyterian circles for teaching Darwinism.[118] When Woodrow Wilson was President of Princeton University in the first decade of the twentieth century, he occasionally invited Gresham—then a Princeton student—to dinner, and Gresham even attended some of Wilson's lectures on constitutional history and wrote to Arthur about them.[119]

Wilson was the first constitutional theorist to pick up on Arthur's coinage, the "living" Constitution, but turn it into a positive.[120] In his "elasticity" article, Arthur argued "that the original intention must prevail

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[115] Segall, *supra* note 14, at 411 n.3 ("A Westlaw search performed on September 20, 1998 revealed only one citation to this article, which simply identified Professor Machen as an originalist.").

[116] *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410–11, 411 n.8 (1932) (Brandeis, J., dissenting) (citing Arthur's article in support of a distinction between interpreting constitutional meaning and applying that meaning to facts); Evers v. Jackson Mun. Separate Sch. Dist., 232 F. Supp. 241, 252–54 (S.D. Miss. 1964) (viewing Arthur's meaning–application distinction as the key to understanding the holdings in *Burnet* and in *Brown v. Bd. of Ed.*); Orville C. Snyder, *Corporate Personality and the Fourteenth Amendment*, 8 BROOK. L. REV. 4, 29 n.119 (1938) (quoting at length Arthur's three principles of constitutional elasticity).

[117] *See generally* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (reprt. 1997). Wilson's treatise drew on his 1907 Blumenthal lectures. Although Wilson had been teaching American government for at least a decade by then, the Blumenthal lectures represented a break with his earlier views. *See* JOHN M. MULDER, WOODROW WILSON: THE YEARS OF PREPARATION 242 (1978); Sehat, *supra* note 1, at 23.

[118] For the James Woodrow affair, *see* GUNDLACH, *supra* note 43, at 164–65, 171; HART, *supra* note 19, at 13, 97–98 (noting that—unlike most fundamentalists of the era—the Machen family had "come to terms with Darwinism").

[119] STONEHOUSE, *supra* note 17, at 72–73; HART, *supra* note 19, at 20.

[120] WILSON, *supra* note 117, at 57, 183 (maintaining that "the real cause of [American] political success" is the "elastic adaption of constitutional processes to the various and changing conditions" of the country). No Supreme Court decision used the exact phrase "living constitution" until 1980, but versions of this phrase appeared in articles and lower court decisions through the twentieth century. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 307 (1980) (Powell, J., dissenting) ("We are construing a living Constitution."); Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966) ("[T]he Constitution is a living document . . . ."); Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (1936) ("[T]he Constitution as practice is a living thing.").

wherever discoverable" and complained that his foes would "befog the issue" in the "high-sounding platitude[]" that the Constitution "is not dead," "no mere skeleton" but "a living, growing organism, capable of adapting."[121] Wilson, in contrast, insisted that "[l]iving political constitutions must be Darwinian in structure and in practice. Fortunately, the definitions and prescriptions of our constitutional law, though conceived in the Newtonian spirit and upon the Newtonian principle, are sufficiently broad and elastic to allow for the play of life . . . ."[122] Because America's constitution is "a living reality," its government "has had a vital and normal organic growth" and has "eminently adapted" to new ages of man.[123] Thus, Wilson borrowed not only Arthur's phrase but also his evolutionary analogy and his distinctive terminology of "elastic" constitutions, to denounce the originalist vision that Arthur held.[124]

Second, Justice George Sutherland's majority opinion in *Village of Euclid v. Ambler Realty Co.* (1926) likely acquired its meaning-application distinction from *The Elasticity of the Constitution*.[125] The wording and originalist logic of *Euclid* parallels Arthur's article so remarkably—even employing Machen's hallmark term "elasticity"—it is difficult to believe that Sutherland did not know Arthur's work.[126] Indeed, Louis Brandeis,

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[121] *See Elasticity I*, *supra* note 11, at 205; *cf.* Machen, *supra* note 86, at 500–01 (calling himself a "survival of the Eocene Age" for his refusal to adapt to the New Deal).

[122] WILSON, *supra* note 117, at 57.

[123] *Id.*

[124] On Darwinian analogies in the Progressive Era legal theorists, see LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION 19–20 (2019). On evolutionary analogies among Princeton's theologians, see GUNDLACH, *supra* note 43, at 164–65, 308–09, 313–14.

[125] For the similarity between Arthur's article and Sutherland's *Euclid* opinion, see Schraub, *supra* note 10, at 448 (noting that *Euclid* "expressed a similar view" on the fixity of meaning and evolution of doctrine as Machen had). *See also* Christopher R. Green, *Justice Gorsuch and Moral Reality*, ALA. L. REV. 635, 643–45 (2019) [hereinafter *Justice Gorsuch*] (observing that "the meaning–application distinction" that Sutherland drew is "kin" to the one drawn by Machen and "clearly a component" of originalism); Christopher R. Green, *Originalism as Faithfulness*, THE UNIV. OF CHI. L. REV. ONLINE ARCHIVE (Oct. 31, 2019), https://lawreviewblog.uchicago.edu/2019/10/31/originalism-as-faithfulness-by-christopher-r-green/. *But see* VERMEULE, *supra* note 5, at 116, 122–28 (depicting *Euclid* as a central example of "non-originalist, developmental" constitutionalism because of its use of the meaning–application distinction).

[126] *Compare* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. . . . [A] degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles . . . ."), *with Elasticity II*, *supra* note 11, at 284 (arguing that under "the sound doctrines governing the application of the Constitution to . . . novel circumstances," "[t]he construction of the Constitution, being dependent on the unchanging intention of the framers, should never vary" but "[t]he elasticity, then, of the Constitution consists . . . in a liberal and statesmanlike construction

another justice in the *Euclid* majority, unquestionably read "The Elasticity of the Constitution" and may have pointed it out to Sutherland (or vice versa).[127] A decade after *Euclid*, Justice Sutherland defended the meaning-application distinction again in his famed dissent in *Home Building & Loan Association v. Blaisdell* (1934)—a key text in the early history of originalism—after the *Blaisdell* majority rejected this distinction.[128] Gresham Machen, at least, seems to have recognized the link between the *Blaisdell* opinions and his brother Arthur's theories.[129]

Unlike Woodrow Wilson, Justice Sutherland agreed with Arthur's concept of a fixed constitution.[130] The admiration, however, was not returned. Arthur condemned Sutherland's opinion in *Florida v. Mellon* (1927) as "the time when the seeds were planted of all the ills which have since choked [America]" and analogized this now-forgotten taxation case to *Dred Scott*.[131] As much as Arthur hated Franklin Roosevelt, he remained a loyal Democrat who insisted that Republicans like Sutherland and Coolidge had started the problem.

C. Originalism and Heresy

Two characteristics of Arthur's thought appear in both his corporate and constitutional writings. First, Arthur repeatedly borrowed theological categories to characterize legal theories. Arthur's confession of faith

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which will leave the government free play for all just and legitimate measures even in [new] times" and that "[t]hese [are] the principles by which our fundamental law must be administered").

[127] *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 410–11, 411 n.8 (1932) (Brandeis, J., dissenting) (citing Arthur's article).

[128] *See* 290 U.S. 398, 443 (1934) (repudiating "fine distinction[s] between the intended meaning of the words of the Constitution and their intended application"); *id.* at 451–53 (Sutherland, J., dissenting) (arguing the "meaning" of Constitutional provisions "is changeless; it is only their application which is extensible," "[t]he meaning of the constitution is fixed when it is adopted," and that "[t]he whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers"); O'NEILL, *supra* note 10, at 37. Three justices in the *Blaisdell* majority—Brandeis, Stone, and Roberts—had joined an opinion two years before that cited Arthur's meaning-application distinction from his *Elasticity* article positively. *See Burnet*, 285 U.S. at 410–11, 412–13 (Brandeis, J., dissenting); *see also* Evers v. Jackson Mun. Separate Sch. Dist., 232 F. Supp. 241, 252–54 (S.D. Miss. 1964) (treating Arthur's distinction as the key to understand *Burnet*).

[129] *See* Steelman, *supra* note 15 (describing how Gresham, in a letter, wrote that "Chief Justice Hughes and his four associates have declared that the whole Constitution is little more than a scrap of paper" through their majority opinion in *Blaisdell*).

[130] *See* LEVINSON, *supra* note 4, at 14 (noting that Sutherland elsewhere spoke of the Constitution as a "divinely inspired instrument").

[131] Machen, *supra* note 86, at 491, 495 (portraying case as a "blow at the independence of the states" which left them as "ex-sovereign"); Machen, *supra* note 62, at 351, 357 (noting that Sutherland's opinion describes the states as "quasi-sovereign"); *see also* Florida v. Mellon, 273 U.S. 12, 16 (1927) (holding that Florida lacked standing to challenge the federal inheritance tax).

against the New Deal, for instance, has already been mentioned.[132] Likewise, Arthur scorned "living" constitutionalism: the "heresy that the Constitution may be judicially altered to suit ephemeral conditions."[133] America transformed over the century from the time of "the wise patriots who formed the American Union" to Arthur's own "time when the politicians of both parties are uttering much nonsense under the guise of constitutional argument."[134] But those alterations only increased the need to "profess sound doctrine" of the unchanging Constitution and never to "depart from that construction of the instrument which the fathers would have approved."[135]

Arthur's most extensive use of theology appears in his theory of corporate personality. Arthur portrayed the crucial debate in the corporate law of his era as a clash between "Athanasian" "orthodox doctrine" of fiction theory, with its deep roots in American law, and a "sect of heretics" who were "rejecting the teachings of the fathers" and espousing real entity theory instead.[136] Arthur was a heretic on corporations. He assailed fiction theory as that "ancient dogma that a corporation is a creature of the state, existing only in contemplation of law, dependent for its breadth of life upon the fiat of the sovereign": an allusion to Genesis.[137] Far from respecting the corporate teachings of the fathers, Arthur lambasted fiction theory as a "creed out-worn" that subjected corporations to "the same governmental tyranny to which the doctrine of the divine right of kings would have subjected the individual."[138]

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[132] Machen, *supra* note 86, at 501.

[133] *See Elasticity I*, *supra* note 11, at 205, 207; *see also Elasticity II*, *supra* note 11, at 273 (rejecting the "heresy" that "the Constitution is capable of a varying construction"). The idea of the Constitution as evolving and "changeable" first arose in the 1890s in progressive circles. Arthur, thus, wrote against a fairly novel "heresy." *See Bork Nomination*, *supra* note 1, at 656–58 (tracing how "the rhetoric of originalism and of original intent" dominated constitutional discourse from 1788 until the 1890s).

[134] *Elasticity II*, *supra* note 11, at 284–85.

[135] *Id.* at 285.

[136] Arthur W. Machen, Jr., *Corporate Personality* (pt. 1), 24 HARV. L. REV. 253, 253 (1911); *see also* Trs. of Dartmouth Coll. v. Woodward, 4 Wheat. 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."); Phillips, *supra* note 107, at 1064–65 (describing the fiction or "concession" theory of corporations).

[137] Arthur W. Machen, Jr., *Responsibility for Crime by Corporations*, 1 PROC. ACAD. POL. SCI. CITY N.Y. 590, 594 (1911).

[138] *Id.*; *see also Corporate Personality II*, *supra* note 103 (presenting the French Revolutionaries as tyrannical adherents of fiction theory); Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1915, 1930 (2010) (positioning Arthur's theory of the corporation in its historical context).

Arthur was no mere traditionalist. He honored "the 'construction of . . . the fathers'" in constitutional law but despised the "teachings of the fathers" on corporations. For Arthur, real entity theory—that is, that corporations are naturally occurring beings—was common sense.[139] People ordinarily speak of schools, churches, political parties, and so forth as entities separate from their membership and independent of (indeed, often older than) government.[140] The Nicene Creed, with its words about "One Catholic and Apostolic Church," suggests that the real entity theory is Christian dogma.[141] Corporations, Arthur insisted, are "as real as . . . the Church."[142]

D. Originalism and Tyranny

Second, Arthur not only guarded the original "expressed intention" of the Constitution but also believed this original intention was encapsulated in the constitutional interpretation of nineteenth-century Whigs and Pro-Union Democrats.[143] As Eric Segall has demonstrated, Arthur was a sophisticated originalist who anticipated most of the theoretical moves associated with the "New" Originalism of the 1990s.[144] *The Elasticity of the Constitution* sets out three "fundamental principles" of Constitutional interpretation: (1) the "intention of the framers as evidenced by the reasonable construction of their words" must prevail; (2) this construction "should never vary"; and (3) "by reason of a change in the facts to which it is to be applied" this invariable construction permits that a law "which is unconstitutional at one time may be valid at another time."[145] The Constitution's meaning "however disastrous" was fixed by

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[139] Arthur's writings often exalt common sense and practical considerations over abstract metaphysics. *See, e.g.*, Machen, *supra* note 136, at 253, 263; *Corporate Personality II*, *supra* note 138, at 363, 365; *see also* Machen, *supra* note 137, at 597–98; CHRISOPE, *supra* note 16, at 63. This may reflect the popularity of Scottish Common Sense Realism in traditional Presbyterian circles and the rise of philosophical Pragmatism at the turn of the century. *See* GUNDLACH, *supra* note 43, at 281–82; HART, *supra* note 19, at 31–32.

[140] *See* Machen, *supra* note 136, at 258–60.

[141] *Id.* at 259 (depicting how a new convert "needs no theological instruction, still less any metaphysical disquisition" to understand he is joining a two-thousand-year-old church).

[142] Machen, *supra* note 136, at 261–62 (noting, however, that the corporation is not "a relic of the Middle Ages," indicating that Protestant churches are in view); *see also Corporate Personality II*, *supra* note 103, at 347.

[143] *Cf. Elasticity I*, *supra* note 11, at 203, 211–12 (delineating the two schools of interpretation but noting that both relied on the will of the Framers).

[144] *See* Segall, *supra* note 14, at 411–12; SEGALL, *supra* note 10, at 31–34. For the New Originalism, see, for example, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412–19 (2013) (comparing original public meaning textualism with original intent originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 607–11 (2004) (drawing a distinction between new and old originalism).

[145] *Elasticity II*, *supra* note 11, at 284.

original intention; the Constitution was not "living."[146] It is "elastic"—capable of multiple "liberal and statesmanlike" applications to facts that gave the government of future generations "free play for all just and legitimate measures even in times of the greatest national peril."[147]

When Arthur employed his theory to answer specific legal questions, his interpretations were startlingly flexible. Beyond a few references to hackneyed texts like Blackstone or *The Federalist Papers*, Arthur never plumbs historical documents from 1787 or 1868 for evidence of original meaning.[148] Rather, his sources were nineteenth-century cases by jurists he admired, such as Benjamin Curtis or Samuel Miller.[149] In fact, Arthur warned against overturning aged precedents because better evidence of original intention has been newly discovered. Stare decisis, after all, was central to eighteenth-century common law, so "any flagrant departure" from stare decisis "even in order to correct an error, would do greater violence to the intention of 1789 than the mistake it was designed to remedy."[150] Arthur also thought it plausible that some language in the Constitution was designed to update to fluctuating social norms.[151] And he viewed the Civil War as a "sacred" precedent, that conclusively determined a narrow range of constitutional questions without the need for formal amendment.[152]

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[146] *Elasticity I*, *supra* note 11, at 205–06.

[147] *Elasticity II*, *supra* note 11, at 284.

[148] *Cf. Void*, *supra* note 98, at 172–73 (referencing briefly *The Federalist Papers* for historical sources but no other sources); Machen, *supra* note 137, at 591 (discussing Blackstone and a few other sources briefly). When discussing the Fifth Amendment's grand jury right, Arthur speaks of "the framers of the Constitution and of the Fourteenth Amendment," indicating that he understood 1868—not 1788—to be the moment of original intention for some provisions. *See Elasticity II*, *supra* note 11, at 282.

[149] *See, e.g.*, Machen, *supra* note 137, at 599; *Elasticity I*, *supra* note 11, at 210; Machen, *supra* note 62, at 259, 369–70.

[150] *Elasticity I*, *supra* note 11, at 202, 210.

[151] *Elasticity II*, *supra* note 11, at 280 (suggesting that framers in 1791 may have intended "cruel and unusual" to mean penalties cruel at the time executed, rather than cruel by the standards of 1791).

[152] *Elasticity I*, *supra* note 11, at 202 (holding that the "arbitrament of arms" left "the precise point at issue between the contending parties" as "*res judicata*"). *But see* Orts, *supra* note 112, at 2029–30 (criticizing Arthur for supposedly ignoring the watershed nature of the Civil War, despite Arthur's statements to the contrary). Arthur emphasized that the Civil War settled only a small number of "political questions": seemingly including slavery and secession but not Black suffrage. *See Elasticity I*, *supra* note 11, at 202; *see also Void*, *supra* note 98, at 188 (seeking to supply legal basis for Jim Crow because "unless the Fifteenth Amendment is void . . . the restoration of political power to the white people of the South can only have had its origin in illegality").

No Supreme Court justice receives greater praise in Arthur's writings than Benjamin Curtis: the only Whig ever appointed to the Court, best known for his *Dred Scott* dissent.[153]

In various publications, Arthur spoke of Curtis' "clearness and logic," his "careful and reasoned judgment," and "characteristic accuracy."[154] He urged all lawyers: "[A]way with the modern glosses and extensions. Hark back to Curtis's opinion . . . ."[155] Arthur even derived a canon of originalist interpretation from Curtis's *Dred Scott* dissent, insisting that "a practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years . . . in doubtful cases should determine" the meaning of a constitutional provision.[156] That is to say, historical practice should control whenever fragmentary records prevent confidence as to original meaning.[157] In practice, this canon, plus Arthur's high opinion of stare decisis, guarantees the status quo in almost all cases.

As a result, Arthur's enemy was anyone who pressed for radical changes to nineteenth-century legal doctrine. He criticizes Progressive-era jurists such as Oliver Wendell Holmes and George Sutherland for strengthening the power of the federal bureaucracy and destroying state

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[153] *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 564, 621 (1856) (Curtis, J., dissenting) ("[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution . . . ."). Although Chief Justice Taney's majority opinion in *Dred Scott* is sometimes described as proto-originalist, other scholars have argued that Curtis's dissent is the better example of originalism. For this debate, see, for example, Robert E. Mensel, *Originalism and Ancestor Worship in the Post-Heroic Era: The Dred Scott Opinions*, 17 WIDENER L.J. 29, 49–50 (2007); HARRY V. JAFFA, STORM OVER THE CONSTITUTION 91–93, 161–62 (1999); *cf.* South Carolina v. United States, 199 U.S. 437, 488–49, 456 (1905) (citing *Dred Scott* in support of the principle that the Constitution's "meaning does not alter. That which it meant when adopted, it means now").

[154] MACHEN, *supra* note 93, at 113–15 (discussing how Arthur's father lauded Curtis as "a great man" with "perfect logic," "complete mastery . . . of law," and language that communicated "as through a medium of crystalline transparency and beauty"); *Void*, *supra* note 98, at 180, 190 (preferring Curtis' *Dred Scott* dissent over Taney's majority opinion and McLean's separate dissent); *cf.* Machen, *supra* note 62, at 351 (criticizing the *Dred Scott* majority for deciding the case at all, because the court lacked jurisdiction); *Justice Gorsuch*, *supra* note 125, at 643–45 (noting that Taney in *Dred Scott* "denied" the meaning-application distinction that Machen later promoted).

[155] *See* Machen, *supra* note 137, at 599 (extoling Curtis' opinion in Murray's Lessee v. The Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856)).

[156] *Void*, *supra* note 98, at 190–92 (quoting Curtis' dissent and applying its method to Article V); *see also Dred Scott*, 60 U.S. at 616 (Curtis, J., dissenting).

[157] For constitutional liquidation, see, for example, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2136–37 (2022), (establishing a history and tradition test for evaluating the constitutionality of regulation of firearms under the Second Amendment). *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (discussing the relationship between textualism and constitutional liquidation).

sovereignty.[158] But Arthur also lambasted *Lochner v. New York* (1905) as a "menace to democracy" and an "obstacle to [state] reforms."[159] Arthur agreed with the *Lochner* majority that the Due Process Clauses of the Fifth and Fourteenth Amendments forbid "arbitrary legislation" such as economic protectionism.[160] But he warned judges that they could not substitute their own views on the reasonableness of a regulation for the opinions of state legislators.[161]

No fanatic for corporate power, Arthur wrote in support of criminal liability for corporations—then a novelty.[162] As a firm adherent to the Calvinist doctrine of total depravity, Arthur believed that corporate law had to recognize that the "hearts" of men "incline to evil as the sparks fly upward" and "desire to do wrong—something that we ought not to be allowed to do."[163] Arthur feared that the Supreme Court would eventually use the *Lochner* precedent to invalidate corporate criminal liability.[164] Strikingly, Arthur crafted originalist arguments against *Lochner*, contending that the "fallacious reasoning" of its "new interpretation" of the Due Process Clause was a "stretching of the meaning of the constitution in order to fit changed conditions."[165] Arthur far preferred "the old meaning . . . the meaning of the fathers" who framed the Fifth and Fourteenth Amendments, which Arthur believed Justice Miller's majority opinion in the *Slaughter-House Cases* expressed.[166]

Arthur Machen glorified the original intention of the Constitution. But he also treated it as settled. Sometime around the 1870s, jurists like Benjamin Curtis and Samuel Miller had correctly interpreted the

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[158] Machen, *supra* note 86, at 491; Machen, *supra* note 62, at 354, 357 & n.9, 374 (laying out the Holmes precedents that undermined state sovereignty).

[159] Machen, *supra* note 137, at 598–99 (sympathizing with Holmes's *Lochner* dissent).

[160] *Elasticity II*, *supra* note 11, at 274–75, 277 (hypothesizing a ban on butter sales to please the margarine lobby as an example of arbitrary legislation); *cf.* Lochner v. New York, 198 U.S. 539, 546 (1905) ("Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.").

[161] Machen, *supra* note 137, at 598.

[162] For the rise of corporate criminal liability, see, for example, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492–93, 495 (1909) (holding that corporate criminal liability did not violate the Due Process Clause); Lipton, *supra* note 138, at 1931, 1939, 1950.

[163] Arthur W. Machen, Jr., *Do the Incorporation Laws Allow Sufficient Freedom to Commercial Enterprise?*, 1909 MD. STATE BAR ASS'N 78, 78, 80 (observing that "[i]f, then, we are to get good corporation laws, we must convince the public" and "be able to give reasons for the faith that is in us"); *cf. Job* 5:7; *1 Peter* 3:15.

[164] *See* Machen, *supra* note 137, at 591–92, 597–98; *see also* Lipton, *supra* note 138, at 1939.

[165] Machen, *supra* note 137, at 598–99 (advocating a golden mean between the *Lochner* majority on one side and progressive politicians such as Teddy Roosevelt and William Jennings Bryan on the other).

[166] *Id.* at 599.

Constitution once and for all, and there was little need for people today to delve through eighteenth-century documents trying to learn some new "original meaning." When it came to the Constitution, Arthur was no Biblicist, demanding some constant return to the sources to purify the church of the accretions and deviations of the medieval past. His originalism was not fundamentalist—it was creedal. Arthur had confessed his faith in a series of nineteenth-century legal doctrines and would defend them against the heresies of the twentieth century for the rest of his life.

E. Arthur Machen's Grand Matter

Every decade or so throughout his life, Arthur Machen discovered a new pet political project: defending Jim Crow early in the twentieth century, corporate tax reform in the 1910s, and the repeal of Prohibition in the 1920s.[167] But Arthur's political influence—unlike his scholarly renown—was confined to Maryland. Until that is, Franklin Roosevelt briefly elevated Arthur to national importance.

The Machen family, as noted above, had been Democrats since the Civil War and loyally voted for William Jennings Bryan, then Woodrow Wilson, then Al Smith.[168] Arthur even worked in Wilson's administration.[169] Franklin Roosevelt, however, horrified the Machens. According to a 1937 speech by Arthur, if "the federal pressure of the present [Roosevelt] administration" persisted, "despotism in the United States is inevitable," and the American people would suffer a "ruin" comparable to "the fall of the Roman Empire."[170] Arthur, moreover, belittled Roosevelt's appointees to the Supreme Court as "modern evangelists of topsy-turvydom" who ignored stare decisis and "shattered" "into the junk heap" the "great system of [American] constitutional law . . . and our Anglo-American heritage of ordered liberty."[171]

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[167] *See, e.g.*, Lewis, *supra* note 99, at 5; *A.W. Machen, Prominent Lawyer, Dies*, *supra* note 99, at 24; Richard R.W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023, 2024–25 (2006).

[168] *See, e.g.*, STONEHOUSE, *supra* note 17, at 406 (noting that Gresham "deserted the Democratic Party" to vote Republican for the first time in 1932 and 1936); HART, *supra* note 19, at 141, 143; Hart, *supra* note 44 at 606, 616 (describing Gresham's politics).

[169] *See* STONEHOUSE, *supra* note 17, at 202 (noting that Arthur was Special Assistant to Attorney General James McReynolds).

[170] Machen, *supra* note 86, at 491–92, 501–02 (analogizing "the new-deal policy of 'soak the rich'" to the reforms of the Tiberius and Gaius Gracchus).

[171] *See Dissent*, *supra* note 59, at 92, 94–95 (arguing that the New Deal court had largely dispensed with the principle of stare decisis); *cf. Elasticity I*, *supra* note 11, at 202 (presenting stare decisis as central to the Constitution's original intention).

Gresham concurred.[172] He declared in a 1935 radio address that "the same tendencies" that established "the most systematic and soul-crushing tyranny that the world has ever seen" in Russia and Germany were "mightily at work" in America through the Roosevelt administration.[173] Gresham praised the Supreme Court for "upholding the high principles of the Constitution" and "guaranteeing to the humblest citizen his inalienable rights against Congress and against the President" by striking down various New Deal laws.[174] But Gresham died in January 1937—a month before Roosevelt announced his court-packing scheme—so he never witnessed the New Deal transformation of constitutional law that Arthur so reviled.

Arthur's fury with Franklin Roosevelt focused especially on the President's decision to leave the gold standard. During the first year of Roosevelt's presidency, the Democratic-controlled Congress passed a series of acts aimed at stopping deflation and relieving pressure on debtors.[175] Together, these acts allowed Roosevelt to lower the dollar's gold weight, forced Americans to sell all gold to the government to be smelted into bullion, banned gold export and the domestic gold market, and made gold clauses in all public and private contracts unenforceable.[176] Such clauses required debtors to repay in specie or at a gold value pegged at issuance and were a common hedge against inflation. In practice, creditors received devalued paper worth about 70% less than the express language of their contracts promised.[177]

Creditors immediately sued both the federal government and private debtors, contending that the Due Process Clause, the Takings Clause, and the Public Debt Clause invalidated Congress' joint resolution abrogating

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[172] *See Mountains, supra* note 52, at 430 ("[I]t is almost as hopeless . . . as it would be to explain what color is to a blind man . . . to try to make President Roosevelt understand the Constitution . . . .").

[173] J. GRESHAM MACHEN, THE CHRISTIAN FAITH IN THE MODERN WORLD 3–4, 9–10 (reprt. 1974).

[174] *Hope of America*, *supra* note 55, at 137.

[175] *See* Gerard N. Magliocca, *The* Gold Clause Cases *and Constitutional Necessity*, 64 FLA L. REV. 1243, 1251–53 (2012); *see also* Asher Ang, *No Faith and No Credit: Is There Legal Recourse Against the Federal Government Should a Default on Treasury Debt Occur?*, 28 WIDENER L. REV. 187, 193–94 (2022) (discussing a joint resolution passed by Congress which stated repaying government obligations in gold was against public policy); David Glick, *Conditional Strategic Retreat: The Court's Concession in the 1935* Gold Clause Cases, 71 J. POL. 800, 804 (2009) (providing background on actions taken by the President and Congress that lead to the *Gold Clause cases*); Kenneth W. Dam, *From the* Gold Clause Cases *to the Gold Commission: A Half Century of American Monetary Law*, 50 U. CHI. L. REV. 504, 511–12 (1983) (describing some actions taken by the government "to reduce the weight of the gold dollar").

[176] Magliocca, *supra* note 175, at 1251–52; Dam, *supra* note 175, at 509–10.

[177] Glick, *supra* note 175, at 804.

gold clauses.[178] In two of the *Gold Clause Cases*, a divided Supreme Court ruled 5-4 against creditors, rejecting their due process and takings claims.[179] After all, acts of Congress—passed under its enumerated powers over war, bankruptcy, and commerce, for example—often render private contracts unenforceable, and no mere private obligation can defeat sovereign authority.[180]

The Public Debt Clause ensured that abrogating the gold clause in the federal government's Liberty Bonds (issued to fund World War I) was more controversial.[181] Indeed, in *Perry*, the third *Gold Clause Case*, eight Justices agreed that Congress violated the Constitution when it retroactively altered the terms of its own treasury bonds.[182] The joint resolution was illegal. Yet Chief Justice Hughes, writing for the four-member plurality, held that the lower court lacked jurisdiction to hear the case in the first place, as no remedy could make the plaintiffs whole.[183] Because Congress had bought and melted all gold coins, no gold market existed in the United States, and thus, no means of calculating the damage to bondholders.[184] The plaintiff, Hughes bizarrely concluded, "has

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[178] *See* Perry v. United States, 294 U.S. 330, 347, 354 (1935); Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 291–93, 316 (1935); Nortz v. United States, 294 U.S. 317, 323–24 (1935).

[179] *Norman*, 294 U.S. at 316; *Nortz*, 294 U.S. at 329–30; Charles E. Carpenter, *The* Gold Clause Cases, 8 S. CAL. L. REV. 181, 181 (1935). Altogether, the *Gold Clause Cases* encompassed five separate challenges in the lower courts consolidated into three cases before the Supreme Court, all argued in January 1935 and decided on February 18th of that year. *See* Glick, *supra* note 175, at 800, 805–06.

[180] *Norman*, 294 U.S. at 304–05, 307–08 ("Contracts, however express, cannot fetter the constitutional authority of the Congress."); Magliocca, *supra* note 175, at 1268 (explaining that "many acts of Congress, such as bankruptcy laws, declarations of war, and trade embargos, nullified private contracts"); *see* Dam, *supra* note 175, at 515.

[181] *See generally* U.S. CONST. amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.").

[182] *Perry*, 294 U.S. at 350–51, 354 (plurality opinion) ("To say that the Congress may withdraw or ignore that [contractual] pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government."); *see also id.* at 377–78 (McReynolds, J., dissenting) ("[The holding] amounts to a declaration that the Government may give with one hand and take away with the other."); Magliocca, *supra* note 175, at 1269–70 (explaining the holding in *Perry* and the reasoning the Court used).

[183] *Perry*, 294 U.S. at 355 (plurality opinion) ("[T]he Court of Claims has no authority to entertain an action for nominal damages.").

[184] *See id.* at 357 (plurality opinion) ("Plaintiff demands the 'equivalent' in currency of the gold coin promised. . . . [But] equivalence or worth could not properly be ascertained save in the light of the domestic and restricted market . . . ."); Magliocca, *supra* note 175, at 1252.

not shown, or attempted to show, that . . . he has sustained any loss whatever."[185] A right was violated but without any remedy.[186]

Hughes' position was absurd, as commentators then and now recognized.[187] Many remedies were possible. The Court could have looked to the foreign commodities market, for instance, or simply paid expectation damages based on the domestic market at issuance. Evidently, the plurality wanted to express disgust at the federal government's misdeeds while avoiding economic turmoil and interbranch conflict—for Roosevelt had promised privately to disregard the Court if it ruled against him.[188]

Five justices on the *Perry* court rejected Hughes' specious solution. Justice Stone concurred in judgment only, for he believed that national sovereignty permitted Congress to revoke its own promises and deemed the plurality's remedies argument to be "wholly [in] the realm of speculation."[189] Justice McReynolds—writing for the other three dissenters, Sutherland, Van Deventer, and Butler, the so-called "Four Horsemen"—excoriated the immorality and incoherence of the plurality opinion. "Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence."[190] For the Supreme Court to allow such wickedness would destroy America's "reputation for honorable dealing" and bring "unending humiliation" and "legal and moral chaos."[191] In

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[185] *Perry*, 294 U.S. at 357 (plurality opinion); *see also* Magliocca, *supra* note 175, at 1270–71 (explaining why the plaintiff in *Perry* had not sustained any loss); Glick, *supra* note 175, at 813 ("[T]he Court stated that without an accessible gold market, Perry could not demonstrate that he had suffered a loss."); Dam, *supra* note 175, at 517 (discussing how legislative changes made the plaintiff's claim for damages in *Perry* no longer relevant).

[186] *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."); Magliocca, *supra* note 175, at 1266–67 (comparing Chief Justice Marshall's opinion in *Marbury* to *Perry*).

[187] *See, e.g.*, Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057, 1074, 1088 (1935) (calling the plurality opinion "nonsense").

[188] Glick, *supra* note 175, at 800, 807 (characterizing the plurality opinion as a paradigmatic example of "strategic retreat" to preserve institutional legitimacy).

[189] *Perry*, 294 U.S. at 360–61 (Stone, J., concurring) ("It will not benefit this plaintiff, to whom we deny any remedy, to be assured that he has an inviolable right to performance of the gold clause.").

[190] *Id.* at 362 (McReynolds, J., dissenting).

[191] *Id.* at 374–75, 381 (observing that "holders of these corporate bonds are without remedy" only because of the unconstitutional statute itself and thus "if this power [of abrogation] exists," "[t]he destruction of all obligations by reducing the standard gold dollar to one grain of gold, or brass or nickel or copper or lead, will become an easy possibility").

remarks that McReynolds spoke from the bench but left out of his written dissent, the justice likened Roosevelt to "Nero in his worst form."[192]

Arthur Machen fully agreed with his old boss, McReynolds. As Arthur's "confession of faith" swore—with the *Gold Clause Cases* in view—he believed "that an irredeemable paper currency is the abomination of desolation," "that every dollar should represent a hard, metallic content which the owner should be allowed to export, or melt down," "that it is far better to starve in freedom than to live in surfeit in slavery," and "that contracts, public or private, should be inviolably performed even if performance bankrupts the contractor."[193] By "contractor," Arthur meant the United States government.

Gresham thought the same, as he said in a speech. Gresham recalled "bygone days when the phrase 'sound as a dollar' had not yet become a jest" and when the government was still concerned about "simple honesty, which is the law of God."[194] To Gresham, treasury bonds were "a solemn obligation . . . to the fulfilment [sic] of which the honor of the American people is pledged."[195] Instead of keeping its word, the government now threatened to imprison anyone with the integrity to pay private debts in gold as promised.[196] Like Justice McReynolds, the Machen brothers considered the *Gold Clause Cases* to be a sin as much as a legal error.

Within months of the Supreme Court's decision, Arthur Machen sued for the coupon payment on an unmatured $1000 Liberty Bond that he owned.[197] Arthur purchased those bonds in March 1933—the same month that Congress passed the Emergency Banking Act, removing gold from circulation—so he probably bought them to set up a test case.[198] He designed the suit to upset New Deal legislation and thwart Roosevelt's attempt to "nullify and evade the constitutional obligations of the republic."[199] Although Arthur arranged for his 28-year-old associate to

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[192] Magliocca, *supra* note 175, at 1272; *see also* Glick, *supra* note 175, at 812 (describing McReynolds as extemporaneously "sermonizing" that "the Constitution as many of us have understood it has gone").

[193] Machen, *supra* note 86, at 501.

[194] *Hope of America*, *supra* note 55, at 140; *see also* MACHEN, *supra* note 173, at 1, 78–79 (claiming that his radio address would talk "about God, and about an unseen world" rather than "about the gold standard or about unemployment," yet repeatedly alluding to the gold standard).

[195] *Hope of America*, *supra* note 55, at 140–41.

[196] *Id.* at 141.

[197] *Says Calling of 1st Liberty Loan Is Void*, BALT. SUN, Dec. 31, 1935, at 20.

[198] *See* Magliocca, *supra* note 175, at 1251; *Says Calling of 1st Liberty Loan Is Void*, *supra* note 197, at 20. Arthur had experience arranging test cases from his time bringing impact litigation against Prohibition. *See* Lewis, *supra* note 99, at 5–6 (narrating how Arthur built a fake farm in the middle of Baltimore so he could brew cider and goad officials into prosecuting).

[199] *Says Calling of 1st Liberty Loan Is Void*, *supra* note 197, at 20 (quoting from the complaint Arthur filed in the district court).

argue the case in court to avoid a *pro se* designation, he controlled the case personally.[200]

Arthur insisted that, under the logic of the plurality opinion in *Perry*, the federal government owed him seventeen dollars and fifty cents of interest.[201] After all, as eight justices declared, Congress lacked the constitutional authority to abrogate the bonds' gold clause.[202] And, unlike the plaintiff in *Perry*, Arthur's injury had a remedy.[203] His bond would not mature until 1947, and Arthur was willing to accept the interest in paper rather than gold.[204] Implicitly, Arthur expected that sometime between 1935 and 1947, a gold market would be re-established in the United States, and thus, a future court in 1947 would not be able to employ Chief Justice Hughes's "no means of calculating" cop-out. Investors like Arthur could hold their bonds and await full repayment of the principal in hard specie a decade later.

The government responded that it had properly exercised its contractual right to redeem the bond before maturity (and thus to redeem in devalued paper), a claim Arthur disputed on textual grounds.[205] The Fourth Circuit unanimously sided with Arthur.[206] But at the Supreme Court, the four members of the *Perry* plurality, along with the newly appointed Hugo Black, preferred the government's reading and reversed.[207] According to the majority, Machen's case was solely one of contract interpretation, and "[n]o question of constitutional law is involved."[208] Thus, there was no need to reconsider *Perry*.[209]

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[200] *See id.* (portraying Arthur as the driving force). *See generally Personal Reminiscences*, *supra* note 104, at 4, 6 (noting that Vernon Eney, the "youthful" associate, impressed judges with his skill, despite his age). At the Supreme Court, Eney argued against Solicitor General and future Justice Stanley Reed and alongside future Senator Robert Taft (who represented the other plaintiffs). *See* Smyth v. United States, 302 U.S. 329, 332, 341, 345 (1937).

[201] Machen v. United States, 87 F.2d 594, 595 (4th Cir. 1937).

[202] Perry v. United States, 294 U.S. 330, 354, 375–76 (1935).

[203] *Machen*, 87 F.2d at 596, 598. Justice Stone, in his *Perry* concurrence, had prophesied that the plurality opinion would inspire future litigation of the sort Machen brought. *See Perry*, 294 U.S at 360–61 (Stone, J., concurring) (expressing concern that although the present case is settled, this conclusion does not resolve doubts about the questions presented).

[204] *Machen*, 87 F.2d at 596.

[205] *Id.* at 595–97.

[206] *Id.* at 598 (noting that under the express terms of "the condition of redemption specified in the bond," the government could only accelerate the bond by paying face value, something all parties admitted did not occur).

[207] Smyth v. United States, 302 U.S. 329, 353, 360 (1937); *see also* Ang, *supra* note 175, at 194 (summarizing the holding in *Smyth*). Machen's case was consolidated with two others, hence the name change. *Smyth*, 302 U.S at 329, 353.

[208] *Smyth*, 302 U.S. at 353–54, 359.

[209] *Id.* at 359. Hugo Black signaled that he was open to overturning *Perry*, but the four justices from the old plurality sought to avoid that. *See id.* at 362–63 (Stone, J., concurring)

The dissenters—again McReynolds, writing for Sutherland and Butler—would have affirmed the Fourth Circuit, whose opinion was "obvious" and correct under "the ordinary rules of construction and principles of law governing contracts."[210] "The answer [to this case] ought not to be difficult where men anxiously uphold the doctrine that a contractual obligation 'remains binding upon the conscience of the sovereign' and reverently fix their gaze on the Eighth Commandment," McReynolds proclaimed in starkly Christian language.[211] Even Justice Stone agreed that the Fourth Circuit "correctly interpreted the bonds," "read in the light of long established custom" and that Arthur deserved to win under *Perry*.[212] So Stone concurred in the result only and repeated his conviction that *Perry* was wrong from the start.[213]

As Justice Stone, the three dissenters, and the Fourth Circuit panel all knew, Arthur Machen should have won his case—and bankrupted the country. Both his contract's language and the Court's holding in *Perry* supported him. But these were not times when "ordinary rules of construction" and "long-established custom" apply. The same justices who were willing to lie that no remedy existed in *Perry* were willing to ignore plain language. Original public meaning achieves little when the sovereign decides upon an exception.[214]

III. ORIGINALISM AS CONFESSIONALISM

The lives and writings of Arthur and Gresham Machen demonstrate that fundamentalism and originalism interweaved, at least in the early twentieth century. Both men were Presbyterian fundamentalists who worked to counter the spread of modernist theology and to drive their foes out of the denomination. But neither fits some stereotype of

(concurring in judgment only to say "that the Joint Resolution . . . was a constitutional exercise of the power to regulate the value of money"); *id.* at 364–66 (McReynolds, J., dissenting) (stating that a ruling in favor of Arthur Machen was "obvious" from the decision in *Perry*).

[210] *Id.* at 365 (McReynolds, J., dissenting).

[211] *Id.* at 368 (McReynolds, J., dissenting). On Roosevelt's use of Christian imagery in support of abrogating the gold clauses, see Magliocca, *supra* note 175, at 1263–64, 1277.

[212] *Smyth*, 320 U.S. at 360–61 (Stone, J., concurring).

[213] *Id.* at 362–64 (Stone, J., concurring) (declaring that "[d]ecision of the constitutional question being in my opinion now unavoidable," the Public Debt Clause "is without force to compel the sovereign").

[214] *See generally* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5, 7 (George Schwab trans., Univ. Chi. Press 1985) (1922) ("Sovereign is he who decides on the exception. . . . Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspend . . . .").

fundamentalists as backwater preachers.[215] They were wealthy, cultured, impeccably educated East Coast professionals who became nationally known for their scholarship.

Both men, moreover, defended the "original intent" of the Constitution and of the Westminster Confession, believing that loyalty to the fixed original meaning would restrain the heterodox. Arthur and Gresham Machen thought that modernist clergymen like Wilhelm Herrmann and Harry Emerson Fosdick and progressive politicians like Franklin Roosevelt or Oliver Wendell Holmes were making the same category of error. Modernists and progressives alike allowed contemporary social problems and scientific discoveries to dupe them into insisting that the truths of the past were obsolete. In furtherance of drab technocratic social reforms, they had abandoned the principles of liberty enshrined in the gospel and the Constitution.[216] And they disguised their revolutionary goals behind double talk and pseudo-scholarship. The defeat of modernism and progressivism was a single project. As a result, legal concepts and theological concepts intermingled across Arthur's and Gresham's writings, no matter the putative topic.

Arthur and Gresham Machen were Protestant fundamentalists, and they were constitutional originalists. But they were not fundamentalists because they were originalists. Or vice versa. The root of both positions was the Machen brothers' common intellectual formation as Presbyterian confessionalists. For conservative Protestants, the Bible is like no other book. When Presbyterians insist, for instance, that the Bible is infallible, clear in its essentials to the learned and unlearned alike, and necessary for the salvation of all people, they are not claiming that these literary features are true of all texts.[217] They are contrasting Scripture to other

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[215] Some prominent fundamentalists at the time (such as J. Frank Norris or John Roach Straton) more nearly matched this stereotype. *See, e.g.*, RUSSELL, *supra* note 16, at 160.

[216] *See generally* CHRISTIANITY AND LIBERTY, *supra* note 44, at 67 ("The Bible, to the Christian is . . . the very Magna Charta of Christian liberty.").

[217] *See, e.g.*, WESTMINSTER CONFESSION OF FAITH AND CATECHISMS, *supra* note 22, at 6–7 ("All things in Scripture are not alike plain . . . yet those things which are necessary to be known, believed, and observed for salvation, are so clearly propounded, and opened in some place of Scripture or other, that not only the learned, but the unlearned, in a due use of the ordinary means, may attain unto a sufficient understanding of them."); Smith & Tuttle, *supra* note 2, at 756, 761 ("[W]hen literalists declare that the Bible is clear and authoritative, they are not making a broader claim about the nature of all texts. . . . [F]or literalists, these attributes apply uniquely to the Bible. Biblical literalism thus does not commit its adherents to the view that all texts are similarly determinate and authoritative."); Allison R. Church, *Constitutional and Biblical Interpretation: Utilizing Speech-Act Theory in Support of Objective Meaning and Hermeneutical Realism*, 35 REGENT U.L. REV. 1, 5–6, 20 & n.106 (2022) (dismissing the "overlap" between normative arguments for originalism and for biblical authority as "small" and "not . . . particularly illuminating").

books—like the Constitution or the creed—that lack this clarity and authority.

The Westminster Confession is not infallible, according to Presbyterian doctrine. By the Confession's own terms, it is an amendable document created by a specific group of divines at a specific moment in history that sought to express the infallible truths of scripture.[218] Gresham himself later helped amend it.[219] Likewise, Arthur and Gresham never considered the U.S. Constitution as perfect. An amendment was sometimes necessary to update it or remove its flaws.[220] But the Constitution was the framers' attempt to structure a government around natural rights endowed by a creator. Creeds and constitutions are authoritative insofar as they embody higher sources of truth: Scripture, reason, and natural law. Yet, having sworn to uphold the Confession at ordination or the Constitution at election, modernists and progressives could not then destroy these texts through willful misinterpretation.

Envisioning the Machen brothers as confessionalists solves a basic problem in all scholarship that ties originalism with fundamentalism. Most influential originalists have been members of liturgical Christian churches with elaborate creedal statements—not Protestant biblical literalists at all. Antonin Scalia, for instance, was a devout Roman Catholic of pre-Vatican II sympathies who spoke publicly about his interpretations of the Catholic catechism and other papal documents.[221] Michael McConnell, similarly, is a Presbyterian ruling elder who believes that much of American constitutionalism grew out of Reformed Christian doctrines.[222] Neil Gorsuch is a mainline Episcopalian who, before

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[218] *See* WESTMINSTER CONFESSION OF FAITH AND CATECHISMS, *supra* note 22, at 145–46 (averring that the "synods and councils" which "set down rules and directions for the better ordering of the public worship of God," such as the Westminster Confession, "may err; and many have erred" and thus should be accepted only "if consonant to the Word of God").

[219] *See id.* at viii–ix.

[220] *See, e.g.*, *Void*, *supra* note 98, at 170 (contrasting "excellent" amendments which improve the Constitution with "radical changes" undermining the original text).

[221] ANTONIN SCALIA, ON FAITH: LESSONS FROM AN AMERICAN BELIEVER 134–37 (Christopher J. Scalia & Edward Whelan ed., 2019) (describing how he disagreed with reading the Catholic catechism and the encyclical *Evangelium vitae* as "an affirmation of two millennia of Christian teaching," due to their condemnations of capital punishment); *see also* Thomas C. Berg, *Antonin Scalia: Devout Christian; Worldly Judge?*, *in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY, *supra* note 4, at 245, 246–48, 255 (on the role of Scalia's Catholicism in his private life); Kannar, *supra* note 4, at 1313–16 (comparing Scalia's originalism to pre-Vatican II attitudes towards the Latin mass); Rev. T.J. Denley, *Originalism v. Dynamic Constitutionalism: Implications of Religious Beliefs on Constitutional Interpretation*, 23 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 21, 45, 75 (2023) (discussing how Scalia's Catholic upbringing guided his interpretation of the Constitution).

[222] Nathan S. Chapman, *A Reformed Liberalism: Michael McConnell's Contributions to Christian Jurisprudence*, *in* GREAT CHRISTIAN JURISTS IN AMERICAN HISTORY, *supra* note 4, at 286–89 (describing how McConnell traced classical liberalisms to the Reformed

becoming a justice, attended a parish that embraced modernist theology.[223] It is hard to name any prominent originalist who would qualify as evangelical (perhaps Hugo Black).[224] Confessionalism, in contrast, captures the actual beliefs of many originalist thinkers.

Second, the Machen brothers exemplify how it is difficult—probably impossible—for any American legal scholar to discuss constitutional interpretation without borrowing on scriptural hermeneutics. For centuries, Protestant, Catholic, and Jewish authors across the United States have devoted lifetimes of intellectual effort to understanding the Bible and developed complex theories of textual meaning in the process. To talk about interpreting any text in America is to adapt from the methods of scriptural exegesis.

Originalism may have emerged historically out of a particular strand of confessional conservative Protestantism, with its roots in common-sense realism and the theology of Old Princeton.[225] But then, living constitutionalism traces much of its start to the modernist and Unitarian thought that shaped figures like Wilson and Holmes.[226] And even Felix Frankfurter, a non-practicing Jew by faith, determined constitutional meaning by speaking of the historical "gloss which life has written upon" the words of the text: a gloss "embedded traditional ways" that are

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doctrines of total depravity, the "two kingdoms," faith, and the priesthood of all believers); *see also* McConnell, *supra* note 2, at 1512 (contrasting "Constitutional interpretation" performed in the manner of "conservative Protestants" from interpretation performed in the manner of "Christian fundamentalists" and claiming only the former "would look something like 'originalism,' at least in its most attractive form").

[223] JOHN GREENYA, GORSUCH: THE JUDGE WHO SPEAKS FOR HIMSELF 12–13 (2018).

[224] *See* Michael Sink, *Restoring Our Ancient Constitutional Faith*, 75 U. COLO. L. REV. 921, 952–54 (2004) (linking originalism with neither confessionalism nor fundamentalism, but rather with Restorationist denominations such as the Disciples of Christ—in which James McReynolds was a lifelong member—and the Primitive Baptists—the church in which Hugo Black grew up); *see also Bork Nomination*, *supra* note 1, at 663 (calling Black a "secularized Southern Baptist" in his thought); *cf.* Denley, *supra* note 221, at 48 n.196 (labeling Edwin Meese "a biblical inerrantist," based on his affiliation with the Lutheran Church–Missouri Synod).

[225] *See generally* GUNDLACH, *supra* note 43, at 68, 88, 282–83 (providing background on Old Princeton Common Sense realism); MARSDEN, *supra* note 29, at 14–16, 110–11, 216 (discussing the impact of Common Sense realism on American society); CHRISOPE, *supra* note 16, at 63–64 (describing the development of Princeton theology from Scottish Common Sense Realism).

[226] , John O. McGinnis, *Holmes: An Uncommon Common Lawyer, but No Constitutionalist*, L. & LIBERTY (Aug. 30, 2019), https://lawliberty.org/holmes-an-uncommon-common-lawyer-but-no-constitutionalist/ ("Unitarianism here can be seen as the halfway house to progressivism and living constitutionalism."); McConnell, *supra* note 2, at 1511–13 (likening "modern judicial activism" to the hermeneutics of "liberal theology"); *see* STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW, AND IDEAS (2019) (describing the unitarian background to Holmes' jurisprudence); *see, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . .").

"tougher and truer law than the dead words of the written text."[227] Scholars have noticed the Roman Catholic origins of Frankfurter's "scripture and tradition" perspective.[228] Indeed, the Glossa once primarily meant the standard set of Patristic commentaries that were written between the lines and in the margins of the biblical text in manuscripts of scripture.[229] Lawyers, like pastors and rabbis, are inescapably people of the book.

CONCLUSION

Originalism is just confessionalism. That may lack the excitement of tying the legal theory to "fundamentalism"—today a pejorative, despite its neutral usage in the early twentieth century. But close examination of the lives and writings of Arthur and Gresham Machen reveals confessionalism is the truer parallel. Originalism is a half-secularized update of Christian confessionalism, directed toward the Constitution rather than at the creeds and catechisms of specific denominations. But so what? All Western political thought cannot avoid being a half-secularized update of theology, if only because scholastic theology is the origin of the European mind.[230] Instead of bland transhistorical

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[227] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice . . . may be treated as a gloss . . . ."); Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. . . . Deeply embedded traditional ways . . . are often tougher and truer law than the dead words of the written text.").

[228] *See, e.g.*, LEVINSON, *supra* note 4, at 33–34, 51 (depicting Frankfurter and John Marshall Harlan II as "Catholics" in their hermeneutics); Marc O. DeGirolami, *Traditionalism Rising*, Forthcoming, J. CONTEMP. LEGAL ISSUES 48 (2022) (comparing traditionalist interpretation to the *sensus fidelium* in the theology of John Henry Newman); *cf.* W. Va. State Bd. of Ed. v. Barnette, 319 U.S. 624, 646–47 (1943) (Frankfurter, J., dissenting) ("One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. . . . But, as judges, we are neither Jew nor Gentile, neither Catholic nor agnostic."). *But see* Denley, *supra* note 221, at 27, 33, 62 (linking the "dynamic constitutionalism" used by Justices like Breyer and Harlan to "the Midrashic method of interpretation" employed by Orthodox rabbis).

[229] For the *Glossa Ordinaria*, see, for example, LESLEY SMITH, THE GLOSSA ORDINARIA: THE MAKING OF A MEDIEVAL BIBLE COMMENTARY (2009). Likewise, in Frankfurter's own Jewish tradition, standard commentaries by exegetes like Rashi and Ibn Ezra were usually placed in the margin of the Hebrew Bible and the Babylonian Talmud. *See* DAVID STERN, THE JEWISH BIBLE: A MATERIAL HISTORY 125, 145, 147 (2017); BARRY SCOTT WIMPFHEIMER, THE TALMUD: A BIOGRAPHY 211–14 (2018).

[230] *See* SCHMITT, *supra* note 214, at 36 ("All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical

comparisons, scholars must look at how particular Jewish or Christian doctrines operated to shape the legal arguments of individual thinkers.

Often, critics who equate originalism and fundamentalism are not making a historical claim anyway. Rather, they smear originalism by implying that originalist jurists force their theological beliefs on the country under the guise of law.[231] Yet, present-day originalists have no more reason to be ashamed of their historical links with the fundamentalists than living constitutionalists have of their borrowings from Protestant modernism. Originalists no more impose Biblical inerrancy than their rivals impose German higher criticism, liberation theology, or panentheism. The Fundamentalist-Modernist Controversy birthed America's contemporary ideological split.[232] So, no legal theorist can avoid theology.

development . . . but also because of their systematic structure . . . ."); *cf.* NATHAN J. RISTUCCIA, CHRISTIANIZATION AND COMMONWEALTH IN EARLY MEDIEVAL EUROPE: A RITUAL INTERPRETATION 217–18 (2018) ("[T]he history of secularization [is] medieval Christianization in reverse.").

[231] Shapiro, *supra* note 1 ("Originalism combines a Christian nationalist view of the United States' founding as a prophetic and holy act with notions of the inerrant truth of divinely inspired texts . . . . [O]riginalism isn't 'dumb'; it's theocratic."); Richards, *supra* note 1, at 286, 289 (speaking of "the power covert religious fundamentalism has had on legitimating originalism" which "only enjoys the appeal it has had when it leads to the result that religious fundamentalists endorse on sectarian grounds").

[232] QUOSIGK & YANCEY, *supra* note 23, at 20 ("The modernist-fundamentalist battle is the direct ancestor to the current progressive-conservative division.").

IRELAND AND THE UNITED STATES: TWO TALES OF NATURAL-LAW JURISPRUDENCE

Candace Terman[*]

ABSTRACT

Natural law has failed as a jurisprudential tool in both Ireland and the United States—two countries where it has, at times, played a prominent role. Why? In both countries, it has become misconceived as subjective, arbitrary, and inviting judicial usurpation. In Irish courts, natural law went hand-in-hand with subjectivity and judicial supremacy from the very beginning of their experiment with the doctrine, particularly in the realm of unenumerated rights. Judges who advocated for the use of natural law never even attempted to claim for the doctrine the traditional attributes of objectivity and immutability. Notions of dignity and autonomy have largely replaced natural law in Irish jurisprudence surrounding unenumerated rights, though Irish courts have been wary even to continue to recognize new unenumerated rights. In the United States, natural law suffered a similar fate when it became intertwined with substantive due process. Natural law became an epithet for dissenters to use against what they saw as unwarranted extensions of the Due Process Clause. But, unlike the Irish courts, the United States Supreme Court has not retreated from the realm of unenumerated rights but instead has come to rely even more on dignity and autonomy as the basis for such rights. I leave for future work the fuller examination of natural law in the jurisprudence of the early American republic. Nonetheless, these two tales of natural-law jurisprudence reveal that natural law cannot survive as a workable tool in the judicial toolkit when it is associated with subjectivity or judicial supremacy.

INTRODUCTION

To put it bluntly, natural-law jurisprudence has undergone an inglorious decline in both Ireland and the United States—two countries in which it has, at various times, played a crucial role. What accounts for this decline? A misconception of natural law itself and a rejection of what it has traditionally been understood both to mean and to do. Natural law

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has failed because it has been misconceived, misunderstood, and misapplied. In both Ireland and the United States, when natural law became associated with subjectivity and seen as providing judges a pretext to impose their will by judicial fiat and to discover new, unenumerated rights, other judges, as well as lawyers, stopped relying on it. In other words, once the legal community in these two countries came to view natural-law reasoning as unprincipled and arbitrary (in direct opposition to its traditional conception), natural law became an anachronism. The difference between Ireland and the United States is that in Ireland, natural-law reasoning went hand-in-hand with statements of subjectivity and judicial supremacy (even by judges claiming to apply natural law) from the beginning of the courts' experiment with the doctrine.[1] In the United States, this development did not occur until later in the history of that experiment.[2]

Even though the high courts in both countries have rejected it, natural law has not entirely died in either country. By its own definition, at least, it cannot. If natural law is a divine and immutable rule governing human conduct and suited to a rational and moral creature, for better or worse, the concept will always haunt the law.[3] Putting aside the fundamental modern jurisprudential divide regarding the moral content of law in general, natural law's own self-conception, at least, present in authors ranging from Cicero to Thomas Aquinas to John Locke, included these core features (divine origin, immutability, and binding force upon human beings and human institutions). According to this conception, what "law" is cannot be understood apart from this moral law.[4] Therefore, whether natural law lives on in some variant of its traditional definition or has been entirely replaced by doctrines of dignity and autonomy,[5] the

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[1] Eoin Carolan, *The Evolution of Natural Law in Ireland*, *in* THE INVISIBLE CONSTITUTION IN COMPARATIVE PERSPECTIVE 431, 439–40 (Rosalind Dixon & Adrienne Stone eds., 2018) (noting that one view of Irish natural-law jurisprudence is that judges subjectively identified implied constitutional rights).

[2] *See* STUART BANNER, THE DECLINE OF NATURAL LAW 188–89 (2021) (describing the shift in American jurisprudence in the 1920s and 1930s from viewing judges as objective law *finders* to subjective law *makers*).

[3] ST. THOMAS AQUINAS, SUMMA THEOLOGIÆ XXVIII pt. I-II, q. 94, arts. 2, 4–5 (Thomas Gilpy trans.) (1271).

[4] *See* CHARLES P. NEMETH, A COMPARATIVE ANALYSIS OF CICERO AND AQUINAS: NATURE AND THE NATURAL LAW 80, 96 (2017) (noting that the natural law precedes and supersedes human law, and that human law must comport with the natural law); Steven Forde, *Natural Law, Theology, and Morality in Locke*, 45 AM. J. POL. SCI. 396, 397 (2001) (arguing that morality has a theological foundation, and that "natural law is a species of divine law"). I have, in progress, further work demonstrating the relative unity and coherence of the "natural-law tradition" from the ancient period through the early-modern period. Specifically, this work compares Cicero, Aquinas, Locke and others.

[5] Arguably, certain conceptions of dignity and autonomy not only fit within the natural-law tradition but are deduced from the natural law itself. Without going beyond the

same fundamental questions will continue to raise its specter. As long as judges exist and find themselves responsible for interpreting and applying human laws, natural law will confront them. It will confront them most specifically and obviously when they find themselves empowered by a constitution that presupposes—and in fact explicitly adopts—natural-law reasoning.[6] How have judges in these two countries responded when confronted with constitutional provisions that do so? And what do their responses teach us today?

I propose to examine these questions by looking at two tales of natural-law jurisprudence side-by-side. Ireland and the United States present a useful comparison because natural-law reasoning has featured prominently and has undergone similar developments in both countries at various times. By comparing these two tales, one can discern a common pattern that might provide a useful starting point for those who view the role of natural law in jurisprudence with interest (either to confirm its uselessness or to restore its status as a helpful tool in the judicial toolkit). When one views these tales side-by-side, it becomes clear that the perception among lawyers and judges that natural-law reasoning is arbitrary spells its doom.

The first Section of this Article details the rise and fall of natural-law reasoning in Ireland. Natural-law reasoning in Ireland got its start in the turbulent waters of unenumerated rights.[7] Its prominent role was short-lived and ended when judges and scholars began to condemn it as subjective and inviting judicial usurpation.[8] The doctrine lives on in some important areas of law but usually in token references (particularly in cases involving family rights where the text of the Irish Constitution lends itself most obviously to natural-law reasoning).[9] Nevertheless, natural law's role as a source of unenumerated rights in Ireland is over. Principles

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scope of this Article, suffice it to say that the concepts of dignity and autonomy that both Irish and American courts increasingly have espoused are not related to, derived from, or dependent upon the natural-law tradition.

[6] *See* Aileen Kavanagh, *The Quest for Legitimacy in Constitutional Interpretation*, 32 IRISH JURIST (n.s.) 195, 216 (1997) (explaining that constitutional adjudication inevitably involves referring to principles not specified in the constitution); Joseph O. Losos, *Relativism and the Legal Process: Judicial Lawmaking and the Decline of Natural Law Concepts*, 42 SW. SOC. SCI. Q. 8, 18 (1961) (arguing that incorporating natural law into constitutional jurisprudence is "not only inevitable but also proper").

[7] *See* Ryan v. Att'y Gen. [1965] IR 294, 313 (Ir.) (acknowledging the existence of unenumerated, natural-law rights); McGee v. Att'y Gen. [1974] IR 284, 310 (Ir.) (discussing unenumerated rights in tandem with natural law). *See generally* Thomas Mohr, *Natural Law in Early Twentieth Century Ireland* – State (Ryan) v Lennon *and its Aftermath*, 42 J. LEGAL HIST. 1 (2021) (discussing how Irish natural-law jurisprudence developed pre-and post-*Ryan*).

[8] *See* V. Bradley Lewis, *Natural Law in Irish Constitutional Jurisprudence*, 2 CATH. SOC. SCI. REV. 171, 178 (1997) [hereinafter Lewis, *Natural Law*] (noting the rejection of natural-law reasoning by judges and academics).

[9] *See infra* note 76 and accompanying text.

of human dignity and autonomy have come to do the work that natural law used to perform in this arena.[10]

In the United States, Supreme Court Justices never explicitly invoked natural law as a source of unenumerated rights.[11] But even the implication of their doing so was enough to spell natural law's doom. The second Section of this Article traces this story. Since the end of the *Lochner* era, the United States Supreme Court has assiduously avoided referring to natural law, retreating behind the "safe" shelter of the Due Process Clause.[12] As in Ireland, dignity and autonomy have become the workhorses of unenumerated rights in the United States.[13] Once natural law became associated with uncertainty and subjectivity in the late nineteenth and early twentieth centuries, the Court began to rely on due process and dutifully claim that it was not invoking natural law.[14] Despite these efforts, natural law still became an epithet for dissenters accusing the majority of a reliance on due process that was untethered to the text of the Constitution.[15]

In short, natural-law reasoning in Ireland and the United States has declined into ignominy because subjective manipulations of it are obvious and have caused the doctrine to fall into disrepute. It is a caricature of natural law that has actually died. In Ireland, natural law never even claimed objectivity or immutability; from the beginning, it went hand-in-hand with judicial supremacy. In the United States, natural law was eventually seen in the same light. I leave for future work the demonstration of a different origin story for natural law in United States jurisprudence. One thing is clear, however. Natural law does not survive when it is associated with arbitrariness, subjectivity, or judicial supremacy.

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[10] Teresa Iglesias, *The Dignity of the Individual in the Irish Constitution: The Importance of the Preamble*, 89 STUD.: AN IRISH Q. REV. 19, 19 (2000).

[11] While natural law was not invoked explicitly by the United States Supreme Court in findings of unenumerated rights, natural law was referenced explicitly in findings of extra-Constitutional limitations of executive and legislative power, as well as in state-level findings of inherent rights. *See* Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 625, 628 (1916) (noting that federal and state cases have used natural-law reasoning in dicta but that "courts have seldom openly and avowedly used natural law notions").

[12] BANNER, *supra* note 2, at 209.

[13] *See*, *e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851, 916 (1992) (referencing dignity and autonomy as a key force in the right of a woman to engage in family planning), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Lawrence v. Texas, 539 U.S. 558, 566–67 (2003) (referencing dignity as a key force for sexual privacy between homosexual couples); *Dobbs*, 597 U.S. at 255–57 (abandoning blanket conceptions of dignity and autonomy in favor of a more nuanced and historical approach to unenumerated rights).

[14] BANNER, *supra* note 2, at 209–10.

[15] *Id.* at 210; *see infra* notes 91–92 and accompanying text.

I. IRELAND: THE RISE AND FALL OF NATURAL LAW IN UNENUMERATED RIGHTS

In Ireland, natural-law reasoning has centered around a few key constitutional provisions. There is, of course, the Preamble, with all of its theological language.[16] In addition, Article 40.3 declares that the state "guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen" and that the state "shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."[17] Article 41.1 declares that the state "recogni[z]es the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law" and "therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."[18] Finally, Article 42.1 declares: "The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."[19] Commentators agree that these provisions, along with the Preamble, are "grounded in a natural law perspective on political morality."[20]

Natural-law reasoning came onto the scene in Ireland quite suddenly in the 1960s, despite occasional references to it beforehand. The first major case addressed Article 40.3 and did not address natural law directly

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[16] The Preamble states:

> In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
>
> We, the people of Éire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

CONSTITUTION OF IRELAND 1937 Preamble.

[17] *Id.* art. 40.3.1°–.2°.

[18] *Id.* art. 41.1.1°–.2°.

[19] *Id.* art. 42.1°.

[20] *See* V. Bradley Lewis, *Liberal Democracy, Natural Law, and Jurisprudence: Thomistic Notes on an Irish Debate, in* REASSESSING THE LIBERAL STATE: READINGS IN MARITAIN'S MAN AND THE STATE 140, 148–49 (Timothy Fuller & John P. Hittinger eds., 2001) [hereinafter Lewis, *Liberal Democracy*]; Lewis, *Natural Law*, *supra* note 8 at 172–73.

but laid the groundwork for its use in the realm of unenumerated rights.[21] In *Ryan v. Attorney General*, the High Court of Ireland found that the phrase "in particular" in Article 40.3.2° guaranteed protection of certain unenumerated rights, including the right to bodily integrity, even relying in part on a papal encyclical to support its holding.[22] The Court referred to the "Christian and democratic nature of the State" to find that Article 40.3 guaranteed a right of bodily integrity, though it held that the fluoride treatment of water that the plaintiff had challenged as a violation of this right did not, in fact, amount to such a violation.[23] "With that, natural law was firmly back in play [after a dissent had referred to it decades earlier]. And the doctrine of unenumerated, or unspecified, rights was born."[24] The Supreme Court affirmed without contesting the finding of a constitutional right to bodily integrity.[25]

In *McGee v. Attorney General*, Justice Walsh relied on natural-law reasoning in his opinion, finding a law proscribing birth control unconstitutional.[26] His widely recognized application of the doctrine is worth quoting at length.

> Both in its [P]reamble and in Article 6, the Constitution acknowledges God as the ultimate source of all authority. The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law. There are many to argue that natural law may be regarded only as an ethical concept and as such is a re-affirmation of the ethical content of law in its ideal of justice. The natural law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of men. In view of the

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[21] *See* Ronan Keane, *Judges as Lawmakers—The Irish Experience*, 4 RADHARC: J. IRISH STUD. 81, 89–90 (2003) (describing the shift toward judicial activism in the early 1960s and, for the first time in *Ryan v. Attorney General*, the recognition of unenumerated rights that flowed from "the Christian and democratic nature of the State"). For an early example of natural-law reasoning in Ireland, see Buckley v. Att'y Gen. [1950] IR 67, 80–83 (Ir.), which found the right of property to be natural and inherent in human rationality, as recognized by the Irish Constitution, and the regulation of private property for the common good to be not outside the cognizance of the courts.

[22] *See* [1965] IR 294, 312–14 (Ir.). For criticisms of the logic and activism of the decision in *Ryan*, see generally Desmond M. Clarke, *Unenumerated Rights in Constitutional Law*, 34 DUBLIN U. L.J. 101 (2011); G.W. Hogan, *Unenumerated Personal Rights:* Ryan's *Case Re-Evaluated*, 25–27 IRISH JURIST 95 (1990–1992). For Clarke's criticism of natural-law reasoning as uncertain and as obscuring judicial reliance on personal views, see generally Desmond M. Clarke, *The Role of Natural Law in Irish Constitutional Law*, 17 IRISH JURIST 187 (n.s.) (1982) [hereinafter Clarke, *The Role of Natural Law*]. For Clarke's criticism of the legal reasoning of Irish judges in general, particularly surrounding natural law, see Desmond M. Clarke, *Judicial Reasoning: Logic, Authority, and the Rule of Law in Irish Courts*, 46 IRISH JURIST (n.s.) 152 (2011).

[23] Ryan [1965] IR at 313–315.

[24] RUADHÁN MAC CORMAIC, THE SUPREME COURT 88 (2016).

[25] Ryan [1965] IR at 345.

[26] [1974] IR 284, 305, 310–14 (Ir.).

acknowledgment of Christianity in the [P]reamble and in view of the reference to God in Article 6 of the Constitution, it must be accepted that the Constitution intended the natural human rights I have mentioned as being in the latter category rather than simply an acknowledgment of the ethical content of law in its ideal of justice. What exactly natural law is and what precisely it imports is a question which has exercised the minds of theologians for many centuries and on which they are not yet fully agreed. While the Constitution speaks of certain rights being imprescriptible or inalienable, or being antecedent and superior to all positive law, it does not specify them. Echoing the words of [Justice] O'Byrne [] in *Buckley . . . I do not feel it necessary to enter upon an inquiry as to their extent or, indeed, as to their nature*. It is sufficient *for the court* to examine and to search for the rights which may be discoverable *in the particular case* before the court in which these rights are invoked.[27]In locating a right of marital privacy in Articles 40 and 41 of the Irish Constitution, Justice Walsh specifically described the Irish Constitution as incorporating a "theological" rather than a merely "ethical" conception of natural law in its fundamental rights provisions.[28] One might expect that such a descriptor as "theological," when combined with the definition that Justice Walsh provided for this concept ("the law of God promulgated by reason and . . . the ultimate governor of all the laws of men"),[29] would have led him to the conclusion, in accord with Aquinas, that the natural law is objective and immutable (as in fact the traditional "theological" description of natural law held).[30] Yet Justice Walsh very intentionally

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[27] *Id.* at 317–18 (emphasis added).

[28] *Id.* at 315, 317.

[29] *Id.* at 317.

[30] *See* AQUINAS, *supra* note 3, pt. I-II, q. 94, arts. 1–6 (discussing the divine origin, immutabilitye, and universal applicability of natural law). I use Aquinas as the standard-bearer for natural law in Ireland because Justice Walsh himself, in extra-judicial writing, mentions Aquinas by name and hints that he has Aquinas in mind when he discusses the "theological" approach:

> While St Thomas Aquinas claimed that natural law was that part of the law of God which was discovered by human reason, others claimed that natural law did not depend upon the existence of God but was simply the dictate of right reason. *Yet what was important was that its existence was accepted and with it, inevitably, the concept of human rights.* In the view of many people, the influence of scholastic philosophy on the history of natural law was decisive in the European tradition and St Thomas Aquinas was the great exponent of this philosophy.
>
> It can be correctly asserted that the Constitution of Ireland has opted for the theological origin of natural law.

Brian Walsh, *The Constitution and Constitutional Rights*, *in* THE CONSTITUTION OF IRELAND 1937–1987, at 86, 94 (Frank Litton ed., 1988) [hereinafter Walsh, *The Constitution and Constitutional Rights*] (emphasis added). *But see* Carolan, *supra* note 1, at 441 (describing Irish natural law as being as much of a nationalist rejection of Benthamite positivism "as a

declined to define "[w]hat exactly natural law is," finding it "sufficient for the court to examine and to search for the rights which may be discoverable in the particular case," and his very next words reject the traditional characterization of natural law altogether.[31]

> In a pluralist society such as ours, the Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law. The same considerations apply also to the question of ascertaining the nature and extent of the duties which flow from natural law . . . . *In this country it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable.* In the performance of this difficult duty there are certain guidelines laid down in the Constitution for the judge. The very structure and content of the Articles dealing with fundamental rights clearly indicate that justice is not subordinate to the law. . . . According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. *The judges must, therefore, as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity.* It is but natural that *from time to time the prevailing ideas of these virtues may be conditioned by the passage of time*; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. *The development of the constitutional law of the United States of America is ample proof of this. There is a constitution which, while not professing to be governed by the precepts of Christianity, also in the Ninth Amendment recogni[z]es the existence of rights other than those referred to expressly in it and its amendments.* The views of the United States Supreme Court, as reflected in the decisions interpreting that constitution and in the development of their constitutional law, also appear firmly to reject legal positivism as a jurisprudential guide. . . . My reason for not referring to [the relevant United States cases] is not because I did not find them helpful or relevant, which indeed they were, but because I found it unnecessary to

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comprehensive endorsement of a single version of Thomistic natural law" while referencing Walsh's argument in *The Constitution and Constitutional Rights*); Clarke, *The Role of Natural Law*, *supra* note 22, at 191 (describing Irish natural law as a hybrid between Aquinas and "early twentieth-century Roman Catholic theology"); EOIN DALY & TOM HICKEY, THE POLITICAL THEORY OF THE IRISH CONSTITUTION: REPUBLICANISM AND THE BASIC LAW 57 (2015) (recognizing Clarke's hybrid scholastic theory while also noting "the secular natural-law theories").

[31] McGee [1974] IR 284, 318.

> rely upon any of the dicta in those cases to support the views which I have expressed in this judgment.[32]

If the law of nature and its attendant "imprescriptible rights" are "conditioned by the passage of time" and are subject, "from time to time," to the "prevailing ideas of the[] virtues," one might wonder whether Justice Walsh is really relying on natural law at all (let alone a traditional or "theological" version of it) or whether he is simply invoking the doctrine to add weight to his discovery of a fundamental right to marital privacy.[33] Aquinas would simply not agree that the natural law and any attendant imprescriptible rights are subject to the changing winds of consensus regarding the virtues that arise in a pluralistic society.[34]

More striking is Justice Walsh's statement that because judges cannot choose between different denominational interpretations of natural law, they must simply apply their own.[35] Put aside for the moment the fact that natural law is, by definition, non-denominational.[36] A traditional natural-law theorist might abide by Justice Walsh's statement that a judge might need to determine which rights are imprescriptible and, therefore, either explicitly or implicitly guaranteed by a constitution. However, based on Aquinas's definitions,[37] the conclusion that judges must "interpret these rights in accordance with *their ideas* of prudence, justice and charity"[38] would strike traditional natural lawyers as inconsistent with any purported reliance on natural law. As we will see, Justice Walsh did no favors to natural law by characterizing it in such subjective, "denominational," and judge-centric terms. In this case, one of Ireland's early and most influential cases involving the application of natural law in the realm of unenumerated rights, Justice Walsh placed the doctrine on a trajectory toward its own demise.

Finally, Justice Walsh's invocation of the United States is revealing and serves to confirm that natural law has had a similar trajectory in both

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[32] *Id.* at 318–19 (emphasis added).

[33] *See* Aileen Kavanagh, *The Irish Constitution at 75 Years: Natural Law, Christian Values and the Ideal of Justice*, 48 IRISH JURIST 71, 76–77, 79–83, 92–93 (n.s.) (2012) (arguing that Justice Walsh, while facially claiming reliance upon the "theological concept" of natural law, was in fact relying on the "broader ethical ideal of justice"); *see also* DALY & HICKEY, *supra* note 30, at 57–59 (adopting Kavanagh's criticism and concluding that judges have used natural law to strike down legislation based on their policy preferences rather than articulated philosophies).

[34] *See* AQUINAS, *supra* note 3, pt. I-II, q. 94, arts. 1–6 (describing the natural law as common to all men in its general principles and the limited ways in which it can change or fail in its secondary principles).

[35] McGee [1974] IR at 318–319.

[36] R. Randall Kelso & Charles D. Kelso, *Swing Votes on the Current Supreme Court: The Joint Opinion in* Casey *and Its Progeny*, 29 PEPP. L. REV. 637, 663 (2002).

[37] *See supra* note 30 and accompanying text.

[38] McGee [1974] IR at 319 (emphasis added).

countries. He looks across the pond for "ample proof" that constitutional law, in its interpretation of unenumerated, imprescriptible rights, must comply with "prevailing ideas and concepts."[39] To reiterate part of the reference to the United States:

> There is a constitution which, while not professing to be governed by the precepts of Christianity, also in the Ninth Amendment[40] recogni[z]es the existence of rights other than those referred to expressly in it and its amendments. The views of the United States Supreme Court, as reflected in the decisions interpreting that [C]onstitution and in the development of their constitutional law, also appear firmly to reject legal positivism as a jurisprudential guide.[41]

He references, but does not cite as authority, the United States Supreme Court's opinions finding a fundamental right of marital privacy.[42] As we will see, the United States Supreme Court, in similar cases raising similar questions, was desperately attempting to avoid invoking the natural law while causing natural law to fall prey to the same scrutiny to which it would ultimately succumb in Ireland after *McGee*.[43] Namely, natural law came to be viewed in both countries as a label for judicial activism based on subjective moral preferences. In Ireland, the association of natural law with these undesirable characteristics originated very early in the courts' experiment with the doctrine.

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[39] *Id.*

[40] As we will see *infra* Part II, Justice Walsh's invocation of the Ninth Amendment, while reminiscent of the arguments in *Griswold v. Connecticut*, 381 U.S. 479 (1965), does not accurately reflect United States jurisprudence surrounding that amendment. Justice Walsh nevertheless continued to advocate his view of the Ninth Amendment well after *McGee*. *See* Walsh, *The Constitution and Constitutional Rights*, *supra* note 30, at 106. Other authors have made similar observations while focusing on the Irish's Constitution's "due process" clause. *See* Donal Barrington, *The Constitution in the Courts*, *in* THE CONSTITUTION OF IRELAND 1937–1987 110, 125–26 (Frank Litton ed., 1988); Charles L. Black, Jr., *A Round Trip to Eire: Two Books on the Irish Constitution*, 91 YALE L.J. 391, 393–94 (1981) (reviewing JAMES O'REILLY & MARY REDMOND, CASES AND MATERIALS ON THE IRISH CONSTITUTION (1980); J.M. KELLY, THE IRISH CONSTITUTION (1980)); Hogan, *supra* note 22, at 96–97, 116 (describing substantive due process as having a "natural law disguise" and as infusing Irish jurisprudence on unenumerated rights while comparing Article 40.3 of the Irish Constitution to the Fourteenth and Ninth Amendments of the United States Constitution and the jurisprudence surrounding unenumerated rights in Ireland to that surrounding the European Convention); Lewis, *Liberal Democracy*, *supra* note 20, at 151–52 (describing Article 40.1.1° as "play[ing] a role analogous to that of the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment to the U.S. Constitution" and noting that "the American debate over constitutional law has loomed over the Irish").

[41] McGee [1974] IR at 319.

[42] *See id.* One author has described Justice Walsh's reluctance to rely on the American cases as possibly based on the "direct line" between them and *Roe v. Wade*. *See* MAC CORMAIC, *supra* note 24, at 174.

[43] *See infra* Part **Error! Reference source not found.**.

McGee "marked a high point of the doctrine of unenumerated rights and showed that natural law still exerted a strong hold on judicial thinking."[44] But natural law as a freestanding source of unenumerated rights did not have a long heyday.[45] In *Norris v. Attorney General*, the Supreme Court declined to find an unenumerated right to privacy or bodily integrity to engage in homosexual sodomy.[46] The Court relied explicitly on the Preamble to discern "the Christian nature of our State" and an intent to adopt a constitution "consistent with" the religious convictions of the framers, i.e., "Christian beliefs."[47] The Court did so despite one dissenter's reliance on Justice Walsh's evolving version of natural law from *McGee*.[48] A little over a decade later, the Court directly refused to refer to natural law in the realm of unenumerated rights. In *In Re Article 26 of the Constitution*, the Court was confronted squarely with the argument that natural law "is the fundamental law" of Ireland, superior even to the Constitution, and, thus, that a constitutional amendment allowing the provision of information regarding abortion services would be an unconstitutional constitutional amendment.[49] The response was simple: "The Court does not accept this argument."[50] Chief Justice Hamilton reiterated the Constitution's description of Ireland as "a sovereign, independent, [and] democratic state," and, while referencing the Preamble's description of the sovereign authority of the people "under God," he emphasized the former as paramount and the Constitution as supreme.[51]

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[44] MAC CORMAIC, *supra* note 24, at 175.

[45] Even before *McGee*, Justice Walsh had declined to find a natural-law right in fathers having custody of their illegitimate children. State (Nicolaou) v. An Bord Uchtála [1966] IR 567, 642–43 (Ir.). The Court adhered to his approach in W O'R v. EH [1996] 2 IR 248, 264–66 (Ir.). Justice Walsh reiterated his conception of natural law in another case dealing with the rights of natural mothers. G v. An Bord Uchtála [1980] IR 32, 67–68 (Ir.). But his reasoning drew skepticism or simple acceptance from other members of the Court. *See id.* at 95–96, 98. For an extra-judicial statement of Justice Walsh's views, see, for example, Walsh, *The Constitution and Constitutional Rights*, *supra* note 30, at 87–90, 94–95, 106–07.

[46] [1984] IR 36, 60–61, 64 (Ir.).

[47] *Id.* at 64–65 (O'Higgins, CJ.); *id.* at 99 (McCarthy, J., dissenting).

[48] *See* [1984] IR at 63–65; (O'Higgins, C.J.); *id.* at 95–101 (McCarthy, J., dissenting). For a description of *Norris* as proof that Justice Walsh had been ambivalent about Christian or theological concepts of natural law in *McGee* and of the dissenters' reliance in *Norris* on the concept of dignity, informed by Christianity, see Kavanagh, *supra* note 33, at 82–85. For a description of *Norris* as having "crystallized" the debate over natural law and of the changing attitudes that had made "the problems with reliance on natural law gr[o]w increasingly apparent," chief among them that "natural law [gives] judges immense power" and is "a highly subjective doctrine," see MAC CORMAIC, *supra* note 24, at 211–14. Mac Cormaic also describes the invalidation of the anti-sodomy legislation in the European Court of Human Rights and its eventual repeal. *Id.* at 214–15.

[49] [1995] 1 IR 1, 36–37 (Ir.) [hereinafter *Abortion Reference Case*].

[50] *Id.* at 37.

[51] *Id.* at 18, 37 (referencing CONSTITUTION OF IRELAND 1937 Preamble).

More importantly for our purposes, however, Chief Justice Hamilton emphasized Justice Walsh's articulation of judicial responsibility to determine the unenumerated rights guaranteed by the Constitution as well as Justice Walsh's doctrine of a flexible natural law for a pluralistic society.[52] Chief Justice Hamilton then concluded by effectively re-casting Justice Walsh's language in *McGee*:

> From a consideration of all the cases which recogni[z]ed the existence of a personal right which was not specifically enumerated in the Constitution, it is manifest that the Court in each such case had satisfied itself that such personal right was one which could be reasonably implied from and was guaranteed by the provisions of the Constitution, interpreted in accordance with its ideas of prudence, justice and charity.
>
> The courts, as they were and are bound to, recogni[z]ed the Constitution as the fundamental law of the State to which the organs of the State were subject and at no stage recogni[z]ed the provisions of the natural law as superior to the Constitution.
>
> The People were entitled to amend the Constitution in accordance with the provisions of Article 46 of the Constitution and the Constitution as so amended . . . is the fundamental and supreme law of the State representing as it does the will of the People.[53]

So much for Justice Walsh's description of the Irish Constitution as emphatically rejecting positivism and placing justice above the law. Chief Justice Hamilton conveniently reiterated Justice Walsh's broad description of judicial authority and living constitutionalism. Even more conveniently, he left out Justice Walsh's definition of "theological" natural law (which even Justice Walsh seemed not to apply) and Justice Walsh's description of the United States and Ireland as compatriots in rejecting positivism.[54] In other words, Justice Walsh's natural-law approach, as untethered as it was to traditional natural-law reasoning, was rejected altogether except for the parts pertaining to judicial authority and a living constitution.[55] Even Justice Walsh's perfunctory references to the law of

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[52] *Id.* at 39–42.

[53] *Id.* at 42.

[54] Even before the decision in the *Abortion Reference Case*, the Supreme Court had taken a similar approach, quoting some of Justice Walsh's expansive language and leaving off even his thin conception of natural law. *See, e.g.*, State v. Donoghue [1976] IR 325, 346–47 (Ir.); Att'y Gen. v. X. [1992] 1 IR 1, 52–53 (Ir.); Kavanagh, *supra* note 33, at 87–88 (describing the selective use of Justice Walsh's dicta in these cases). The High Court also has taken a similar approach. *See, e.g.*, Merriman v. Fingal Cnty. Council [2017] IEHC 695, §§ 245–46 (Ir.) (finding an unenumerated right to an environment consistent with human dignity and omitting Justice Walsh's concept of theological natural law).

[55] *See* Friends of the Irish Env't CLG v. Ireland [2021] 3 IR 1, §§ 156, 159–63 (Ir.) (advocating for a Constitutional reading that considers unenumerated rights as they are

God and human rationality were gone; all that remained was judicial responsibility to discover unenumerated rights in the context of an evolving, pluralistic society.

Following this case, some commentators proclaimed that natural law was dead in Ireland.[56] The truth is that the doctrine may never have been alive and well to begin with.[57] At least in the context of unenumerated rights, those who employed natural law never even attempted to claim for it the traditional attributes of objectivity, universality, or immutability.[58] It was quickly seen as inherently subjective and open to judicial abuse.[59]

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brought before the Court rather than a textualist approach). This approach implicates both the judicial authority to interpret the Constitution and a living Constitution approach. For examples in which Chief Justice Hamilton continued to adopt this approach, even after the *Abortion Reference Case*, see, for example, IO'T v. B [1998] 2 IR 321, 340–42, 345 (Ir.) (finding that the Supreme Court and High Court have the authority to determine unenumerated rights but not referencing natural law); TF v. Ireland [1995] 1 IR 321, 358–59, 375–76 (Ir.) (affirming the decision of the High Court to exclude evidence regarding the natural law's position on marriage).

[56] *See* Carolan, *supra* note 1, at 439. The Supreme Court reiterated this view in a few recent cases. *See* I.R.M. v. Minister for Just. and Equal. [2018] IESC 14 § 10.28 (Ir.); Kershaw v. Ireland [2016] IESC 35 § 43 (Ir.).

[57] *See* Hogan, *supra* note 22, at 110 (quoting Justice Walsh's dicta and concluding that "not even [natural law's] most valiant supporters appear to have suggested that natural law theory provides an objective method whereby the existence of a particular personal right can be ascertained").

[58] *See* Siobhán Mullally, *Searching for Foundations in Irish Constitutional Law*, 33 IRISH JURIST (n.s.) 333, 336–37, 350 (1998) (criticizing the Irish Supreme Court's language for failing to "provide adequate protection against judicial subjectivity and strong discretion" with its reliance on vague natural-law morality); Carolan, *supra* note 1, at 441–42 (concluding that natural law was never "a superior or antecedent source of *legal* values," indicating that the Irish Supreme Court never offered an "objective" natural law approach but instead used the natural law to justify an Irish jurisprudence distinct from British jurisprudence); DALY & HICKEY, *supra* note 30, at 155 (noting that natural law is "at most, simply the background moral inspiration for the constitutional provisions, and not a direct source of constitutional principle").

[59] For general accounts of the decline of natural law reasoning due to its alleged subjectivity and the excessive latitude given to judges, see GERARD HOGAN ET AL., KELLY: THE IRISH CONSTITUTION § 1.1.77, at 44, § 7.1.20, at 1463 (5th ed. 2018) [hereinafter KELLY: THE IRISH CONSTITUTION] (explaining the slow decline of judges using natural law due to its objectionable subjectivity); Keane, *supra* note 21, at 93 (same); Mullally, *supra* note 58, at 334 (same); Conor O'Mahony, *Unenumerated Rights After* NHV, 40 DUBLIN U. L.J. 171, 185 (2017) (describing criticism of the human-personality doctrine, human-dignity theory, and natural law as subjective and ill-defined); Marc de Blacam, *Justice and Natural Law*, 32 IRISH JURIST (n.s.) 323, 333 (1997) (recognizing criticism of natural law because it potentially could be used by judges to supersede the Constitution and amendments); Kavanagh, *supra* note 33, at 94–95 (criticizing natural law's vagueness and judges' reliance on theology in matters of judicial interpretation); MAC CORMAIC, *supra* note 24, at 212–13, 335–36 (same); DALY & HICKEY, *supra* note 30, at 59 (same); Lewis, *Liberal Democracy*, *supra* note 20, at 152 (same). For a criticism of natural-law reasoning by a prominent lawyer prior to the *Abortion Reference Case* by the lawyer who argued for the state in that case, see Gerard Hogan, *Constitutional Interpretation*, *in* THE CONSTITUTION OF IRELAND 1937–1987, at 173,

As a result, the Supreme Court took an early opportunity to extricate itself from such a fraught, unprincipled enterprise and simply owned up to its claim of supremacy in the name of the people's evolving constitution.[60] In the context of unenumerated rights, natural law has, in part, been replaced by various articulations of human dignity and autonomy hinted at in earlier decisions and referenced in the Constitution's Preamble,[61] though there is no obvious successor to the doctrine.[62] The story of natural law in Ireland reveals that natural-law reasoning (or at least some variant of it) is inevitable in a context in which a constitution itself suggests the existence of unenumerated rights. When such reasoning became branded as a vehicle of subjective judicial caprice, Irish courts were loath to carry on the enterprise, abandoning the doctrine in hopes of appearing more principled through adherence to an evolving constitutional text in the name of a pluralistic people.[63]

A related, more specific cause of the Irish courts' turning away from natural-law reasoning has been natural law's association with religious belief and, particularly, with the Catholic Church. The courts' repeated conflation of natural law with the Christian identity reflected in the

181 (Litton ed., 1988) (correlating judges using the natural law with eroding respect for the judiciary).

[60] *See* Kavanagh, *supra* note 33, at 82–83 (describing the majority opinion in *Norris v. Attorney General* as relying solely on the judges' interpretation of whether legislation aligned with Christian values incorporated by the Irish Constitution and ignoring both natural law and precedent).

[61] *See, e.g.*, State v. Donoghue [1976] IR 325, 347 (Ir.) (finding that the Preamble's concept of justice applies "to the dignity of the individual"). *See generally* Elaine Dewhurst, *Human Dignity in Ireland*, *in* HANDBOOK OF HUMAN DIGNITY IN EUROPE 431 (Paolo Becchi & Klaus Mathis eds., 2019) (describing the relationship in Irish jurisprudence between dignity in the Preamble and in Article 40.3°); Iglesias, *supra* note 10 (same). The United States Constitution does not reference dignity as the Irish Constitution does, but a similar shift in emphasis to dignity and autonomy also took place in United States jurisprudence from around 1990 to 2015. *See* discussion *infra* Part II.

[62] *See, e.g.*, NHV v. Minister for Just. & Equal. [2018] 1 IR 246, 315–17 (Ir.) (connecting human dignity with the human personality and holding unconstitutional a complete prohibition on the right to work for illegal immigrants); Fleming v. Ireland [2013] 2 IR 417, 444, 446–48 (Ir.) (recognizing autonomy and dignity as protected by the Constitution but not as including an unenumerated right to assisted suicide); DALY & HICKEY, *supra* note 30, at 59 (explaining that "there has been little sense of what alternative philosophical understanding, if any, might replace [natural law]" since it is now viewed as "unsuitable" for constitutional interpretation). *But cf.* KELLY: THE IRISH CONSTITUTION, *supra* note 59, § 7.1.26, at 1465–67 (suggesting that the Court simply has "quietly retreated from recogni[z]ing implied rights" but that human dignity and personality can "fill the place of the natural law" to again "adopt expansive readings of constitutional rights").

[63] *See* Oran Doyle, *Legal Positivism, Natural Law and the Constitution*, 31 DUBLIN U. L.J. 206, 209, 224–25 (2009) (describing the Court's rejection of the natural law as superior to constitutional amendments and the majority's skepticism of the unenumerated rights doctrine).

Constitution did not help in this regard.[64] The increasing reluctance of the courts to invoke natural law is "inseparable from the broader secularis[z]ation of Irish politics and society" and "has, to some degree, simply mirrored secularis[z]ation in Irish society, as [natural law] has been strongly associated with religious thought."[65] Even Justice Walsh, in claiming that Ireland had "opted for the theological origin of natural law," felt the need to provide non-religious support for the Irish courts' use of natural law.[66] "Those who rush to condemn those Articles . . . that are formed by natural law simply on the basis that they smack of Catholicism display little knowledge of the history of natural law and its development. The concept of natural rights is universally accepted in the Europe of today."[67] His efforts did not succeed. Justice Walsh felt comfortable referencing the religious valence of natural-law reasoning in his decisions and in his extra-judicial writings.[68] Yet in neither setting was he willing to engage systematically with the "theological approach" beyond simply asserting that that approach is what Ireland had adopted.[69] And he did not convince the legal community in Ireland that natural law is or can be non-sectarian.[70]

Justice Walsh's equivocation between a theological approach and an evolving, modern, international-human-rights approach aside, natural law in Ireland has been equated with Catholic teaching and "divine law," and judges came to view reliance on religious sources as increasingly inappropriate.[71] They had largely avoided reliance on explicitly religious sources anyway, using natural law mostly as an indication of willingness to strike down unjust laws.[72] By the time of the *Abortion Reference Case*, even Justice Walsh's equivocal description of the theological approach was gone, a testament to the growing secularization of Irish society.[73] As

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[64] *See* McGee v. Att'y Gen. [1974] IR 284, 317–18 (Ir.) (stating that human rights are more than just an "ethical content of law in its ideal of justice," given that God is the source of the Constitution's authority and that the natural law serves as "the ultimate governor of all the laws of men").

[65] *See* DALY & HICKEY, *supra* note 30, at 59, 155.

[66] Walsh, *The Constitution and Constitutional Rights*, *supra* note 30, at 94–95.

[67] *Id.* at 95.

[68] *E.g.*, McGee [1974] IR at 317–318; Walsh, *The Constitution and Constitutional Rights*, *supra* note 30, at 94–95.

[69] McGee [1974] IR at 317–318; Walsh, *The Constitution and Constitutional Rights*, *supra* note 30, at 94–95.

[70] *See* Gerard Whyte, *Religion and the Irish Constitution*, 30 J. MARSHALL L. REV. 725, 740 (1997) (criticizing Justice Walsh's natural law approach as vague, with "natural" being interpretable in five ways).

[71] Kavanagh, *supra* note 33, at 94–95.

[72] *See id.* at 93–95 (describing the general decline of Christian and natural-law reasoning in Irish jurisprudence).

[73] *See* Carolan, *supra* note 1, at 439, 447–49, 453–54 (emphasizing the consistency of later rhetoric with "secular conceptions of natural law and of human rights" and affirming the rejection of Christian rhetoric "in a more pluralistic and less religious society").

further evidence, the Constitutional Review Group that recommended changes to the Constitution in 1996 recommended recrafting the Preamble to remove its religious language to reflect the diversity of belief in Ireland.[74] Though this recommendation was not adopted,[75] the evidence of secularization is clear, and this development contributed to the castigation of natural law as subjective.

The doctrine of natural law does live on in Ireland, however. It does so mainly in cases pertaining to the rights of the family as the natural foundation of society and the natural educator of children, particularly in cases addressing immigration and asylum.[76] It also lives on in the occasional criminal procedure case.[77] However, in both of these areas, the cases usually include mere perfunctory references to the natural law that rarely, if ever, control the outcome of the case.[78] Natural-law arguments are sometimes not successful in these cases.[79] Natural law's rapid rise and

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[74] *See* Iglesias, *supra* note 10, at 21, 24 (quoting the recommended changes).

[75] Kavanagh, *supra* note 33, at 100.

[76] *See, e.g.*, Nottinghamshire City Council v. KB [2013] 4 IR 662, 723–25 (O'Donnell, J.) (urging caution in adopting Justice Walsh's approach in *McGee* when considering whether to allow non-citizens to invoke Article 41 of the Irish Constitution to prevent the return of children to their habitual residence); Dir. of Pub. Prosecutions v. Best [2000] 2 IR 17 (holding that a parent can face conviction under a school-attendance statute over natural-law arguments from the dissent); AO v. Minister for Just., Equal., & L. Reform [2003] 1 IR 1 (upholding deportation decisions over natural-law arguments from the dissenters); Lobe v. Minister for Just., Equal., & L. Reform [2003] IESC 3 (same); MR v. An t-ARD Chlaraitheoir [2013] IEHC 91 (Abbott, J.) (countenancing natural-law arguments regarding surrogacy and parental registration but deciding the case in terms of natural and constitutional justice); M v. Minister for Just., Equal., & L. Reform [2009] IEHC 500 (Edwards, J.) (accepting natural-law arguments in considering the Minister's response to an application to remain but finding no dependency); Elaine Dewhurst, *Exclusionary or Inclusionary Constitutional Protection: Protecting the Rights of Citizens, Non-Citizens and Irregular Immigrants Under Articles 40–44 of the Irish Constitution*, 49 IRISH JURIST 98, 129 (2013) (describing natural law as the most common reason for the extension of particular constitutional rights to non-citizens); KELLY: THE IRISH CONSTITUTION, *supra* note 59, §§ 7.1.27–.36, at 1467–72 (describing the use of natural-law reasoning to extend fundamental rights to non-citizens and the replacement of natural law with reliance on the human personality and human dignity in *NHV*). *See generally* Oran Doyle, *Family Autonomy and Children's Best Interests: Ireland, Bentham, and the Natural Law*, 1 INT'L J. JURIS. FAM. 55 (2010).

[77] *See* de Blacam, *supra* note 59, at 335–36. These cases often make reference to natural law in the context of criminal procedure and sometimes use the phrase "natural justice." *See, e.g.*, People (at the suit of the Dir. of Pub. Prosecutions) v. JC, [2017] 1 IR 417, 493 (Hardiman, J., dissenting); Walsh v. Governor of Midlands Prison [2012 IEHC] 229 (Charleton, J.); Ronan v. Coughlan [2005] IEHC 370, [2005] 4 IR 274, 280 (Quirke, J.); Garvey v. Ireland [1981] IR 75, 90–91 (O'Higgins, C.J.); Nolan v. Irish Land Comm'n [1981] IR 23, 33–34 (Costello, J.); *id.* at 36, 39 (O'Higgins, C.J.); Conroy v. Att'y Gen. [1965] IR 411, 435 (Walsh, J.). In one case, the Court suggested that a statute is superior even to a common-law rule traditionally understood to incorporate a principle of natural law (the prohibition against self-incrimination). *See* Heaney v. Ireland [1996] 1 IR 580, 588–89 (O'Flaherty, J.).

[78] *E.g.*, Conroy v. Att'y Gen. [1965] IR 411, 435 (Ir.); MR v. tArd Chláraitheoir [2013] IEHC 91, ¶ 104 (H. Ct.) (Ir.).

[79] People v. JC [2017] 1 IR 417, 493 (Ir.) (Hardiman, J., dissenting).

fall in Ireland can be attributed to its association with arbitrariness, subjectivity, and judicial supremacy (in addition to its sectarian valence in Ireland).[80] The courts have largely abandoned using natural law to discover unenumerated rights in favor of apparently less subjective notions of dignity and autonomy.[81]

II. THE UNITED STATES: REJECTING THE NATURAL-LAW-DUE-PROCESS PHILOSOPHY

While natural law remains barely alive in Ireland, the doctrine is dead in the Supreme Court of the United States, to be used only as an insult and accusation of judicial usurpation.[82] Although natural law in the United States does not have any association with a particular religious denomination as it does in Ireland, its original conception in the United States was arguably classical and Christian.[83] The modern debate[84] about natural law's role in American constitutional law originated in cases involving the doctrine of incorporation: whether the Due Process Clause of the Fourteenth Amendment includes protections against *state* (as opposed to federal) violations of the liberties set forth in the Bill of Rights.[85] By and large, however, the United States Supreme Court has assiduously avoided even using the term natural law in these cases, preferring instead to rely on fundamental rights rooted in the nation's

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[80] *See* MAC CORMAIC, *supra* note 24, at 211–12 (describing natural law as unifying the country after independence but later becoming skeptically viewed as arbitrary power "in an increasingly pluralistic society").

[81] *See* Kavanagh, *supra* note 33, at 99 (noting judges' shifting focus from the Holy Trinity to individual freedom and dignity).

[82] David Upham, *Pope Pius XI's Extraordinary—But Underserved—Praise of the American Supreme Court*, 14 RUTGERS J.L. & RELIGION 25, 47 & n.103 (2012) (observing that "countless scholarly publications" pronounced that "[n]atural law is dead . . . and good riddance!" and citing early twentieth century scholars criticizing natural law). *But see, e.g.*, J.A.C. Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 58 (1931) (noting the decline of natural-law reasoning but commenting that "the Court's interpretations of 'natural rights' and 'insuperable incidents of republican government' were gradually read into the written Constitution").

[83] KODY W. COOPER & JUSTIN BUCKLEY DYER, THE CLASSICAL AND CHRISTIAN ORIGINS OF AMERICAN POLITICS: POLITICAL THEOLOGY, NATURAL LAW, AND THE AMERICAN FOUNDING 4–5 (2022).

[84] By "modern" I mean the late nineteenth century, which marked a shift in the predominance of natural-law theory in the United States in part because of the beginning of a new debate over incorporation of the Bill of Rights through the Fourteenth Amendment. I leave for future work a fuller examination of the role of natural law in the early American republic but will reference that subject as relevant to the modern debate.

[85] Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1020–21, 1023–25 (2009) (describing the incorporation debate, including positivist Justice Black's criticism of Justice Frankfurter's selective incorporation doctrine as a natural law approach).

history and tradition and rights inherent in the concept of ordered liberty.[86]

The United States Constitution, like that of Ireland, certainly gives countenance to unenumerated rights, particularly in the Ninth and Fourteenth Amendments.[87] The Supreme Court has never directly relied on the Ninth Amendment to discover such rights,[88] but instead, it has relied on the protection afforded to "liberty" in the Due Process Clause of the Fourteenth Amendment.[89] The Court has never invoked natural law

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[86] For a helpful overview of the Supreme Court's "fundamental rights" jurisprudence, which treats natural law as inherently subjective, see 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7 (5th ed. 2012).

[87] *See* Robert S. Barker, *Natural Law and the United States Constitution*, 66 REV. METAPHYSICS 105, 124–25 (2012) (noting that rights originate in the natural law, not in the government, and that amendments like the Ninth Amendment acknowledge this); Randy E. Barnett, *Who's Afraid of Unenumerated Rights*?, 9 U. PA. J. CONST. L. 1, 1 (2006) ("[T]here are not one but two distinct unenumerated rights provisions mentioned in the text of the Constitution . . . ."); Trisha Olson, *The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment*, 48 ARK. L. REV. 347 (1995); Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63–64 (1989) (recognizing the existence of unenumerated rights while arguing for natural-rights jurisprudence based on higher law). Thomas advocated his higher-law view of the Constitution in other work. *See* Clarence Thomas, Chariman, Equal Emp. Opportunity Comm'n, Why Black Americans Should Look to Conservative Policies, Speech at the Heritage Foundation (June 18, 1987), *in* HERITAGE FOUNDATION at 8–9 (Aug. 1, 1987), https://www.heritage.org/political-process/report/why-black-americans-should-look-conservative-policies [hereinafter Clarence Thomas, Equal Emp. Opportunity Comm'n] (stating natural law "has been an integral part of the American political tradition" and "[w]ithout such a notion of natural law, the entire American political tradition . . . would be unintelligible"). *But cf.* BANNER, *supra* note 2, at 238–39 (2021) ("It is often said that judicial confirmation hearings are a form of theater. . . . Clarence Thomas played his assigned role. . . [and] agreed with his critics that natural law formed no part of the work of a judge.").

[88] *See* Griswold v. Connecticut, 381 U.S. 479, 527, 529–30 (1965) (Stewart, J., dissenting) (countering Justice Goldberg's reliance on the Ninth Amendment by stating that "[u]ntil today no member of this Court has ever suggested that the Ninth Amendment meant anything else" other than a mere truism). A vast amount of scholarship exists on the Ninth Amendment and unenumerated rights, although such a debate is beyond the scope of this article. *See generally* THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989) (collecting works on the Ninth Amendment); Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1 (2006) (arguing against the Ninth Amendment's supposed irrelevance); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597 (2005) (emphasizing the established Ninth Amendment jurisprudence of the early nineteenth and mid-twentieth centuries); Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49 (1992); Thomas B. McAffee, *A Critical Guide to the Ninth Amendment*, 69 TEMP. L. REV. 61 (1996) (expounding on the Ninth Amendment debate).

[89] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty."); *see also* Calvin R. Massey, *The Natural Law*

in finding an unenumerated right, even under the Due Process Clause.[90] That fact has not prevented dissenting justices from accusing the majority of doing so via stealth. Justice Hugo Black famously and repeatedly advocated the use of the Due Process Clause of the Fourteenth Amendment to incorporate the Bill of Rights. He derided using the Clause to selectively discover unenumerated rights as the "natural law due process philosophy" and "an incongruous excrescence on our Constitution," often forcing the majority to disclaim any reliance on natural-law reasoning.[91] In the United States, natural law has thus become an epithet and accusation,[92] not merely a doctrine that has fallen from prominence. Yet, the same factors are at play here as in Ireland. Once prominent judges and lawyers came to view natural law as synonymous with subjectivity and judicial supremacy, the doctrine became a derogatory label to hurl at anything even resembling judicial overreach to the disgruntled dissenter.

As suggested earlier, the modern debate over natural law began in the struggle over incorporation. In *Hurtado v. California*, the Supreme Court determined that the phrase "due process of law" in the Fourteenth

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Component of the Ninth Amendment, *supra* note 88, at 91–92 ("The Court's response to the desire to protect against state invasion [of rights] . . . has been read into the Due Process Clause protection for certain implied fundamental rights."); Grant, *The Natural Law Background of Due Process*, *supra* note 82, at 56–57 (1931); Losos, *supra* note 6, at 16–17; Massey, *supra* note 88, at 91–92; William P. Sternberg, *Natural Law in American Jurisprudence*, 13 NOTRE DAME L. REV. 89, 98 (1938) .

[90] A few scholars have described the principles guiding incorporation as flowing from natural law rather than usurping it. *See* Edward S. Corwin, *The Debt of American Constitutional Law to Natural Law Concepts*, 25 NOTRE DAME LAW 258, 273–75 (1950) (pointing to the Court's use of the Due Process Clause to enforce unenumerated natural-law rights yet avoid explicit natural-law reasoning); Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 636, 638–39, 652 (1916) (stating "natural law notions have been brought under the specific language of the constitution by judicial interpretation or by the expansion of certain phrases" and describing the broadening of the concept of due process). For a very helpful and thorough overview of natural-law reasoning from the Marshall Court through the New Deal era, although the overview treats the substantive due process line of cases as consonant with earlier natural-law reasoning, see generally David C. Bayne, *The Supreme Court and the Natural Law*, 1 DEPAUL L. REV. 216 (1952).

[91] *See* In re Winship, 397 U.S. 358, 377–84 (1970) (Black, J., dissenting); Sniadach v. Fam. Fin. Corp. of Bay View, 395 U.S. 337, 350–51 (1969) (Black, J., dissenting); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 675–77 (1966) (Black, J., dissenting); *Griswold*, 381 U.S. at 514–27 (1965) (Black, J., dissenting); Rochin v. California, 342 U.S. 165, 169–71; *id.* at 174–77 (Black, J., concurring); Adamson v. California, 332 U.S. 46, 69–70, 74–92 (1947) (Black, J., dissenting); Int'l Shoe Co. v. Wash., 326 U.S. 310, 325–26 (1945) (opinion of Black, J.); Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula*, 16 UCLA L. REV. 716, 725–30 (1969).

[92] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 734, 758 (1999) ("In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law."); BANNER, *supra* note 2, at 232 (describing Justice Black's "pet rhetorical strategy" of insulting majority opinions for wandering too far from the Constitution's text).

Amendment did not require the prosecution of a felony to proceed by way of indictment as opposed to an information.[93] Even in doing so, it recognized that "[i]t is not every act, legislative in form, that is law"; there are certain fundamental rights that are beyond the reach of arbitrary power.[94] In language reminiscent of Aquinas, the Court stated that "any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."[95] Even "[t]ried by these principles," the California procedure of proceeding via information rather than indictment did not violate due process.[96] Justice Harlan's dissent specifically invoked "the immutable laws of nature" and the "fundamental principles" of Magna Carta as a source of rights, and, while the majority recognized the existence of these "principles of liberty and justice," it had, "for reasons which d[id] not impress [Harlan's] mind as satisfactory," excluded freedom from prosecution by information from among these "principles of liberty and justice."[97] Even as late as 1884, judges still felt comfortable engaging in natural-law reasoning, but they invoked it as an objective constraint on government power.[98] The Court eventually settled on a process of selective incorporation, finding most of the Bill of Rights applicable to the states through the Fourteenth Amendment as a result of their being so rooted in the nation's history and tradition as to be considered fundamental or "implicit in the concept of ordered liberty."[99]

Later in the nineteenth century and early in the twentieth century, the bench and bar adopted a "*new doctrine of Natural Law*" based on

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[93] 110 U.S. 516, 538 (1884). An information, like an indictment, is an accusatory pleading, but whereas an indictment is presented to the court by a grand jury, an information is presented by a magistrate. 2 CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 40.03–.04 (2023).

[94] *Hurtado*, 110 U.S. at 535–36.

[95] *Id.* at 537. *Cf.* AQUINAS, *supra* note 3, pt. I-II, q. 90, art. 4 (defining "law" as "n[a]ught else than an ordinance of reason for the common good made by the authority who has care of the community and promulgated").

[96] *Hurtado*, 110 U.S. at 538.

[97] *Id.* at 539–40, 546 (Harlan, J., dissenting).

[98] *See id.* at 535–36 (majority opinion) (noting "[a]rbitrary power . . . is not law" when discussing the scope of legislative power). For a similar, later case utilizing natural-law reasoning, see Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1874), which relied on the rights and characteristics essential to free government. The dissent warned of "judicial despotism" and relied on the principle that, in the absence of a specific constitutional violation, "the power of legislation must be considered as practically absolute." *Id.* at 668–69 (Clifford, J., dissenting).

[99] *E.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969).

individual effort and economic progress[100] that culminated in *Lochner v. New York*.[101] The natural law that was actually "defeated" in the United States was this caricature of it in the form of natural-law-due-process (the form that Justice Black later excoriated). It was not until the early twentieth century that natural law truly became a widespread insult as lawyers rejected both reason and custom as sources of the common law in its attempt to apply the natural law; judges came to be seen as lawmakers, and their opinions, rather than evidence of the law, became the law itself.[102] During this period as well, courts in the United States, mirroring the culture at large, began to separate law and religion.[103] It was not until this late period that courts began to refrain from addressing religion in their opinions, and the maxim that "Christianity is part of the common law" came under attack, with a concomitant effect on the doctrine of natural law:

> This change required rethinking the place of natural law within the legal system. When law and religion were understood to be intertwined, constituting mutually reinforcing systems of public order, it made perfect sense for principles placed in the world by God to be enforceable by judges. But when law and religion were reconceptualized as separate domains, the use of natural law in the legal system began to seem anomalous. . . .
>
> The gradual separation of the spheres of law and religion did not weaken lawyers' belief in the *existence* of natural law so much as it weakened their belief in the *relevance* of natural law to the court system.[104]

Despite the fact that natural law did not have any sectarian associations in America, the weakening influence of religion in public life contributed to the decline in the relevance of natural law in American jurisprudence

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[100] Corwin, *supra* note 90, at 276–80; *see also* Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910) ("Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.").

[101] *See* 198 U.S. 45, 56, 64 (1905) (striking down a labor law after asking whether it was "a fair, reasonable, and appropriate exercise of the police power"), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[102] *See* BANNER, *supra* note 2, at 182–83, 187, 214 (quoting state courts, lawyers, and law professors rejecting custom as a source of law, with some doubting if "custom had *ever* played the role that lawyers traditionally assigned it").

[103] *Id.* at 115–18.

[104] *Id.* at 113, 118.

as it did in Ireland.[105] Following this decline in relevance, and as in Ireland, natural law needed a replacement. And as noted previously, one of the main ways that the United States Supreme Court replaced natural-law reasoning in judicial decisions was to invoke the Due Process Clause as protecting fundamental rights. This "textual hook," as opposed to "freestanding natural law," had the counterintuitive effect of "remov[ing] what once had been a major inhibitor of the invalidation of statutes": uncertainty about whether natural law was a proper ground to invalidate a statute.[106] In other words, when natural law had to operate with its own force, judges were more hesitant to use it; supplied with the force of the Due Process Clause, they did not hesitate.[107]

The earliest example of this phenomenon, and one that suggests that the "new" natural law is the caricature that opponents of natural law have actually succeeded in discrediting, is *Dred Scott*.[108] Chief Justice Taney relied on the "new" natural law, invoking the Due Process Clause to find that the Missouri Compromise violated the right of property in slaves; Justice McClean, in dissent, relied at least in part on a classical understanding of natural law in which property in man was never legitimate.[109] Ultimately, the new, "due process" version of natural law, which did not view natural law as an objective constraint on power but as enabling judges to ensure the reasonableness of legislation in light of changing circumstances, took over the name of natural law and received the disdain of the bench and bar.[110]

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[105] *See* Douglas W. Kmiec, *America's "Culture War" — The Sinister Denial of Virtue and the Decline of Natural Law*, 13 ST. LOUIS U. PUB. L. REV. 183, 188–89 (1993) ("Natural law fell out of favor in American constitutional interpretation with the rise of pragmatism and moral relativism, and the modern denial of God.").

[106] BANNER, *supra* note 2, at 209.

[107] *Id.* at 208–09.

[108] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[109] *Compare id.* at 450–52 (pointing to the united property and personal rights recognized in the Fifth Amendment as overriding the Missouri Compromise), *with id.* at 549–50 (McClean, J., dissenting) ("A slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."). *See generally* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911) (discussing *Scott v. Sandford* in a natural-law and historical context); JUSTIN BUCKLEY DYER, NATURAL LAW AND THE ANTISLAVERY CONSTITUTIONAL TRADITION (2012) (noting that Justice McClean believed slavery runs against the Constitution, with the institution coming out of municipal law, not the common law nor the Constitution).

[110] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 325–26 (1945) (opinion of Black, J.) (criticizing the majority's use of the Fourteenth Amendment's Due Process Clause to unconstitutionally expand the Court's power); Harper v. Va. Bd. of Elections, 383 U.S. 663, 675–76 (1966) (Black, J., dissenting) (same); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1676 (2012) ("Others contend that 'due process *of law*' entailed judicial procedure *and* natural law norms such as reasonableness, justice, or fairness. Due process thus applied to legislative acts that failed to live up to those norms.").

The reliance on due process to apply an economic version of natural law finds its ultimate expression in *Lochner v. New York*, as mentioned previously, where the Supreme Court struck down, as a violation of the right to contract, labor legislation preventing individuals in bakeries from working more than sixty hours per week or ten hours in one day.[111] Before striking down the statute, the Court engaged in a lengthy discourse on why the law would not actually increase the health of bakers or their bread and why such a vast conception of state police powers was dangerous, all in answer to the question whether the statute was "fair, reasonable and appropriate."[112] Justice Oliver Wendell Holmes, a known critic of natural law,[113] dissented, accusing the majority of interpreting the Constitution as enacting their preferred economic theory when the Constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution."[114]

Eventually, the Court repudiated this approach to due process in the realm of economic legislation and freedom of contract, but it pressed on in its use of substantive due process to find other unenumerated rights.[115] Perhaps not surprisingly, the Supreme Court decided a major case that touched on the natural-law debate in the context of unenumerated rights just a handful of years before the Irish Supreme Court decided *McGee*. The case involved an almost identical issue, too. In *Griswold v. Connecticut*, the United States Supreme Court struck down a Connecticut statute banning the use of contraceptives.[116] The majority found an unenumerated right to marital privacy in the "emanations" from the "penumbras" of the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.[117] Justice Goldberg's concurrence famously relied on the Ninth Amendment as "lend[ing] strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments . . . is not restricted to rights specifically mentioned in the first eight amendments," though he rejected interpreting the Ninth Amendment as "an independent

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111 198 U.S. 45, 52–53, 64 (1905).

112 *Id.* at 56–59.

113 *See, e.g.*, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) ("The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.").

114 *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

115 *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 406 (1937); BANNER, *supra* note 2, at 205–12; Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 46, 71–72 (2010) (noting the Supreme Court's protection of voting, citizen, and minority rights through the Due Process Clause).

116 381 U.S. 479, 480, 485 (1965).

117 *Id.* at 481, 484–85.

source of rights."[118] Justice Black, in dissent, hurled his familiar epithet of the "natural law due process philosophy" and raised the specter of *Lochner*.[119]

The majority, for its part, "decline[d]" any invitation to be guided by *Lochner* and reaffirmed that the Court "do[es] not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *This law, however*, operates directly on an intimate relation . . . ."[120] In doing its best to dispel the ghost of *Lochner*, the majority decided that certain personal rights were different than the mere right to contract.[121] Natural-law reasoning, according to the majority in *Griswold*, was the discredited rationale for striking down economic regulation and had nothing to do with discovering fundamental, unenumerated rights.[122]

The U.S. Supreme Court has never used natural law as a basis for discovering unenumerated rights but instead has repeatedly disputed any accusations of reliance upon natural law in this context. Yet the end result for natural law has been very similar to that reached in Ireland (where the courts relied on natural law explicitly, even if untraditionally): Dignity and autonomy have come to perform much of the substantive work in this arena. Rather than "emanations," "penumbras," or descriptions of fundamental rights as "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition,"[123] the Court has

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[118] *Id.* at 492–93 (Goldberg, J., concurring); Calvin R. Massey, *The Anti-Federalist Ninth Amendment and its Implications for State Constitutional Law*, 1990 WIS. L. REV. 1229, 1230 ("Perhaps the most famous judicial invocation of the [N]inth [A]mendment was Justice Goldberg's concurrence in *Griswold v. Connecticut*.").

[119] *See Griswold*, 381 U.S. at 515–16, 524 (Black, J., dissenting).

[120] *Id.* at 481–82 (majority opinion) (emphasis added).

[121] *See id.*

[122] *Compare id.* at 481–82 (rejecting the *Lochner* natural-law theory), *with* Mattei Ion Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 VILL. L. REV. 247, 274 (2009) (juxtaposing natural law and substantive due process). For an interesting debate regarding *Griswold* and natural law, see Robert P. George, *Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2269 (2001); Robert P. George, *The Natural Law Due Process Philosophy*, 69 FORDHAM L. REV. 2301 (2001); Robert P. George, *Natural Law and the Constitution Revisited*, 70 FORDHAM L. REV. 273 (2001); James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 FORDHAM L. REV. 2285 (2001); Joseph W. Koterski, *Response to Robert P. George, Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 FORDHAM L. REV. 2297 (2001); James E. Fleming, *A Further Comment on Robert P. George's "Natural Law"*, 70 FORDHAM L. REV. 255 (2001); Charles A. Kelbley, *The Impenetrable Constitution and Status Quo Morality*, 70 FORDHAM L. REV. 257 (2001).

[123] *Griswold*, 381 U.S. at 484; *see* Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (citations omitted) (first quoting Palko v. Connecticut, 302 U.S. 319, 324–25 (1937); and then quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)) (describing these cases as characterizing the Court's then-current approach and as reflecting a Court "[s]triving to assure itself and the public that announcing rights not readily identifiable in the

begun to root its fundamental rights jurisprudence more in dignity and autonomy. Like the Irish courts, the Supreme Court of the United States has taken up the mantra of dignity and autonomy, but unlike its Irish counterparts, the Supreme Court of the United States has not generally retreated from the realm of unenumerated rights.

The shift in emphasis to dignity and autonomy, as well as the refusal to disengage from unenumerated rights, can both be seen in a line of cases addressing abortion and in a line of cases addressing the rights of same-sex individuals. In describing the right to privacy in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (which upheld *Roe v. Wade* in its relevant aspects pertaining to the right to have an abortion), the Court added to its traditional language regarding personal and intimate choices the following language:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define *one's own concept of existence, of meaning, of the universe, and of the mystery of human life*. Beliefs about these matters could not *define the attributes of personhood* were they formed under compulsion of the State.[124]

In *Lawrence v. Texas*, when the Court ruled that anti-sodomy laws violate the right to privacy found in the Due Process Clause of the Fourteenth Amendment, it again added the components of dignity and autonomy to the analysis.[125] In *United States v. Windsor*, the Court struck down the

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Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government"), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[124] 505 U.S. 833, 851, 871 (1992) (emphases added). The Supreme Court has dialed back or called into question this language in a few prominent cases, most notably in its most recent abortion case. In *Dobbs v. Jackson Women's Health Organization*, the Court described this broader right to autonomy as not "absolute" and the right to act on such beliefs as limited by history, tradition, and ordered liberty, which do not provide the basis for a right to an abortion. 142 S.Ct. 2228, 2253–54, 2257 (2022). Additionally, in a way analogous to the Irish Supreme Court's decision in *Fleming*, the United States Supreme Court declined to find an unenumerated right to engage in assisted suicide. In doing so, it specifically addressed the broad autonomy language in *Casey* and constrained it, emphasizing instead history and tradition; the Court concluded as follows: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . ." Washington v. Glucksberg, 521 U.S. 702, 725–28 (1997). Nevertheless, the Court has never overruled the language in *Casey* and continues to rely on broad conceptions of dignity and autonomy in other cases.

[125] 539 U.S. at 567, 578 ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the

federal Defense of Marriage Act on Fifth Amendment due process grounds, finding that the statute created a "resulting injury and indignity [that was] a deprivation of an essential part of the liberty protected by the Fifth Amendment."[126] Finally, the Court relied on the liberties found in the Due Process Clause (as well as the Equal Protection Clause) that "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" in striking down state laws that prohibited or did not recognize same-sex marriages.[127]

Natural law has not played a role in modern American jurisprudence except as an accusation. A caricature[128] of it in the form of the "natural-law-due-process philosophy" was discredited, but the Court forged on in the realm of unenumerated rights, steadfastly denying that it was engaging in natural-law reasoning when looking to tradition and history as sources of unenumerated rights and increasingly relying on dignity and autonomy.[129] One scholar contends that,

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conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."); *see also id.* at 574 (quoting the language from *Casey* and stating that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do").

[126] 570 U.S. 744, 768, 775 (2013).

[127] Obergefell v. Hodges, 576 U.S. 644, 663, 675–76 (2015).

[128] As previously mentioned, I leave for future work the task of offering further and more thorough proof that the original conception of natural law in the early American republic was predominantly, though not unanimously, one in which natural law played the role of an objective constraint on government power rather than as a convenient weapon in the hands of designing judges. The main argument of this Article is that natural law fails when it does become such a malleable tool and when it is largely viewed as subjective and as imposing no real constraints on judges. For helpful insights into theories of natural law and judicial review in the early American republic, see BANNER, *supra* note 2, at 11–46, 63–68 (discussing natural law concepts and the history of its application in the courts); R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142–72 (2015) (addressing the natural law's role in different fields of American law); Gary J. Jacobsohn, *Abraham Lincoln "On this Question of Judicial Authority": The Theory of Constitutional Aspiration*, 36 W. POL. Q. 52 (1983) (contrasting Professor Ely's widely-acclaimed analysis with Lincoln's perspective on judicial review); Gary J. Jacobsohn, *Hamilton, Positivism, & the Constitution: Judicial Discretion Reconsidered*, 14 POLITY 70 (1981); Losos, *supra* note 6 (discussing the history of competing views of the Court's judicial standards in an age of relativism); Symposium, *Natural Law Reasoning and American Constitutional Discourse*, 12 GOOD SOC'Y 27, 28 (2003) (discussing the importance of "(1) maintaining a distinction between the higher law and ordinary politics; and (2) supporting judgments through the articulation of principles").

[129] *Compare* Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) (determining that *Lochner* will not be the Court's guide), *with id.* at 514–16 (Black, J., dissenting) (suggesting that Chief Justice White and Justice Goldberg's opinion was influenced by the "natural law due process philosophy found in *Lochner*"). *See, e.g.*, Lawrence, 539 U.S. at 565, 567, 574 (considering *Griswold* and again relying on dignity and autonomy).

> [w]hile there is a venerable tradition of constitutional scholarship that holds the American founding to have been informed by some version of natural law theory, it is difficult to defend the thesis that American judges have ever deployed what one could plausibly call a natural law theory in deciding cases. The American experience, then, is of limited value in assessing the possibility of a serious jurisprudence of natural law.[130]

This article takes this to be a correct assessment of natural-law reasoning in America after the late nineteenth and early twentieth centuries. Judges have assiduously avoided even referencing natural law in their decisions and have avoided association with the doctrine in their confirmation hearings.[131] The term has become an epithet and an insult used to destroy a strawman. Eventually, as in Ireland, dignity and autonomy won out as the bases for unenumerated rights. Further work is necessary to demonstrate that these observations have not always been true in America.

CONCLUSION

Natural law has failed in Ireland and the United States, but only after having been redefined and reconceived. In Ireland, natural law went hand-in-hand with subjectivity and judicial supremacy from the start, and the judges who employed it never attempted to make claims for its objectivity or restraining influence on judicial power. In the United States, natural law suffered the same fate after it had become associated with subjectivity and judicial usurpation in the late nineteenth and early twentieth centuries. When natural law is stripped of its defining features of objectivity, immutability, and constraining force, it does become a weapon in the hands of designing judges to impose their policy preferences. With these features intact, however, natural law may be, at the very least, a workable tool in the judicial toolkit that can constrain judges and legislatures alike. I leave for future work a more thorough

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[130] Lewis, *Liberal Democracy*, *supra* note 20, at 141 (footnotes omitted). Lewis contends that "[t]he Irish case is a different matter" and that, while the Abortion Reference Case "seemed decisively to reject natural law as an authority," both before and after that decision, "Irish legal scholars, politicians, and pundits debated the role of natural law in Irish public life." *Id.* at 141–42 & n. 10. He describes Ireland as "the one jurisdiction in which natural law has been incorporated into actual decisions." *Id.* at 141; *see also* Lewis, *Natural Law*, *supra* note 8, at 171 (describing Ireland's "sustained use" of natural law). As discussed above, *see supra* Part I, the Irish courts never fully embraced the classical, Thomistic conception of natural law. I leave for future work the task of demonstrating that Lewis's observations are not an entirely accurate description of the early American republic.

[131] *See* Clarence Thomas, Equal Emp. Opportunity Comm'n, *supra* note 87, at 8–9; *e.g.*, Scott D. Gerber, *The Jurisprudence of Clarence Thomas*, 8 J.L. & POL. 107, 112 (1991) (discussing Justice Thomas "distanc[ing] himself" from natural law during his confirmation hearings).

investigation into whether judges and scholars have delivered an effective refutation of the traditional conception of natural law. That version might have been the one relied upon, albeit hesitantly and not unanimously, by lawyers and judges in the early years of the American republic. For now, these two tales reveal that natural law, when not conceived of as an objective, immutable law constraining government power, does not survive as a workable tool in the judicial toolkit.

DOES AMERICAN HISTORY LEGITIMIZE THE ADMINISTRATIVE STATE?

Joseph Postell[*]

TABLE OF CONTENTS

INTRODUCTION

It is an honor to give the opening remarks at this year's law review symposium on the history of an ongoing controversy over the administrative state. This year's theme is "Counteracting Ambition: Rethinking the Administrative State." This theme is timely. This year's term at the Supreme Court may address several critical legal questions involving the administrative state. News media are reporting that the Court has grown increasingly skeptical of the administrative state's legitimacy. For instance, *The Economist* recently published an article

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titled "The New Supreme Court Term Takes Aim at the Administrative State."[1]

The administrative state's history is the subject of my remarks this morning. This history bears significantly on the legal issues surrounding the administrative state's legitimacy. I argue that the administrative state is a twentieth-century creation that is in considerable tension with the Constitution's design.[2] I do not deny that administrative agencies were given considerable power and discretion over important questions in early American history.[3] The historical record makes it reasonably clear, however, that both the supporters and the opponents of the administrative state saw it as a departure from well-established forms and modes of governance that prevailed in the first century of American history.[4]

After making my case, I offer a warning to those who agree with me that the administrative state is in tension with the Constitution. A tremendous outpouring of scholarship over the past several years has shed new light on the way the Constitution's Framers approached questions involving the creation of administrative agencies, their structure and design, and the delegation of lawmaking power to administrative officials.[5] Many originalists who have argued persuasively in the past that the administrative state is inconsistent with the Constitution's design have neglected, thus far, to engage with this recent scholarship.[6] I conclude with a call to continue to engage in this historical debate in good faith to inform the Court's jurisprudence in the coming years.

I. WHAT IS THE ADMINISTRATIVE STATE?

As a preliminary matter, though, we ought to ask: what exactly *is* the administrative state? The term is ubiquitous in legal scholarship and judicial opinions, but it is almost never defined. Until recently, most scholars believed that the term originated in 1948 with the publication of

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[1] *The New Supreme Court Term Takes Aim at the Administrative State*, ECONOMIST (Sept. 28, 2023), https://www.economist.com/united-states/2023/09/28/the-new-supreme-court-term-takes-aim-at-the-administrative-state.

[2] *See* discussion *infra* Section II.B.

[3] *See* discussion *infra* Section II.A.

[4] JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 4–5, 189 (2017) (explaining various perspectives on the tension between the administrative state and the early American constitutional form of government).

[5] *See* discussion *infra* Part IV.

[6] Cass R. Sunstein, *Does Evidence Matter? Originalism and the Separation of Powers* (forthcoming) (manuscript at 8–9, 11–12) (on file with authors), https://ssrn.com/abstract=4584484 (noting that originalist scholars and judges have not confronted recent historical evidence indicating inconclusive findings on the original public meaning of the nondelegation doctrine).

Dwight Waldo's classic book by that title.[7] Within the next two years, two more books appeared with *The Administrative State* in their titles.[8] But, recent work indicates that the concept of an administrative *state* originated earlier. As Alasdair Roberts explains, "Waldo did not invent the concept of the administrative state . . . . European scholars were writing about the administrative state . . . in the nineteenth century. Many early American specialists in public administration were familiar with this European literature."[9] Roberts offers a lengthy list of scholars in America who "invoked the concept after the 1920s in response to the rapid expansion of government and bureaucratic power" during the Progressive Era.[10]

In short, the term "administrative state" seems to have emerged in America only after 1900, and it drew heavily on continental European thinkers who used it in a highly specified manner. They used it to describe, in the words of a 1957 article Roberts cites, "a state in which administrative organization and operations are particularly prominent."[11] While there is obviously some overlap between this concept and the idea of a large government with significant regulatory authority, it is the specific organization and form of government that characterizes a regime as an *administrative state*. Put another way, it is possible to have a large and powerful government that is not an administrative state, and it is possible to have pervasive regulation without having an administrative state.

For present purposes, then, the administrative state can be defined as a form of government in which the authority to make, execute, and adjudicate the law is exercised by administrative bodies. Administrative states bear a few central characteristics:

- The first and most important characteristic is delegation — the delegation of policymaking power from Congress to administrative agencies. This characteristic implicates a core constitutional principle known as the nondelegation doctrine, rooted in Article I, Section 1 of the Constitution, which states:

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[7] DWIGHT WALDO, THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION (1948); *see also* Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DAEDALUS 33, 34 (2021) (explaining that many scholars attribute Dwight Waldo's book with the term "administrative state").

[8] JOSEPH ROSENFARB, FREEDOM AND THE ADMINISTRATIVE STATE (1948); JAMES MACGREGOR BURNS, CONGRESS ON TRIAL: THE LEGISLATIVE PROCESS AND THE ADMINISTRATIVE STATE (1949).

[9] Alasdair Roberts, *Should We Defend the Administrative State?*, 80 PUB. ADMIN. REV. 391, 392 (2020).

[10] *Id.*

[11] *Id.* at 393 (quoting FRITZ MORSTEIN MARX, THE ADMINISTRATIVE STATE: AN INTRODUCTION TO BUREAUCRACY 2 n.1 (1957)).

"All legislative Powers herein granted shall be vested in a Congress."[12]

- A second characteristic of the administrative state is the emphasis on expert decision-makers. Functionally, this means granting policymaking power to officials who are not directly elected by the people and who may not even be removable by an elected official except for cause. This feature of the administrative state challenges the "unitary executive" theory, which claims that Article II of the Constitution places all executive power in the hands of an elected president.[13] The creation of independent agencies, headed by and staffed with officers insulated from accountability through removal, arguably threatens that unity in the executive that Alexander Hamilton praised in *Federalist* number 70.[14]
- Third, the administrative state takes this delegated power, granted to experts, and consolidates it. Agencies regularly engage in rulemaking, in enforcement, and in adjudication. They are not only judge, jury, and executioner, but lawmaker, investigator, prosecutor, judge, jury, and executioner in many cases. This combination of powers seems potentially to be at odds with the Constitution's separation of powers. James Madison famously calls the accumulation of legislative, executive, and judicial power in the same hands "the very definition of tyranny."[15] Yet some see exactly that when they look at the consolidation of powers in today's administrative agencies.

II. THE IMPORTANCE OF HISTORY

Given the constitutional concerns around the administrative state, it is critical to have some sense of its history. When did it actually come into existence? What caused its creation? And most importantly, what does history tell us about the compatibility between the administrative state and our constitutional system?

These questions are hotly contested because of their enormous implications for modern governance. My core argument this morning is that the administrative state is a twentieth-century creation, and it was created by people who openly and knowingly rejected core features of the legal and constitutional tradition that they inherited. In other words, the

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[12] U.S. CONST. art. I, § 1.

[13] Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439, 440–41 (2021).

[14] THE FEDERALIST NO. 70 (Alexander Hamilton).

[15] *Id.* NO. 47 (James Madison).

history of the administrative state shows that it is alien to the Founders' constitutional and legal theory.

Scholars tended to neglect this history for decades because the administrative state's existence was relatively uncontroversial for most of the twentieth century. People of all parties and ideological persuasions accepted its legitimacy.[16] The publication of Gary Lawson's "The Rise and Rise of the Administrative State" in the *Harvard Law Review* in 1994 marked the beginning of a change.[17] The opening sentence of Professor Lawson's article was unequivocal: "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a . . . constitutional revolution."[18]

Yet Lawson's article had little immediate impact. For the most part, it went unnoticed by politicians, jurists, and legal academics over the next ten to fifteen years.[19] Thirty years after its publication, however, things have changed dramatically. Instead of Lawson's isolated voice warning about the tension between the administrative state and the Constitution, there are now politicians, judges, and professors talking about this tension.[20] The same *Harvard Law Review* that published "The Rise and Rise of the Administrative State" in 1994 opened its issue on the 2016 Supreme Court term with an article by Gillian Metzger titled "1930s Redux: The Administrative State Under Siege."[21] The article claimed that there has been a resurgence of "anti-administrativist" forces challenging the administrative state, the same "antiregulatory and antigovernment forces that lost the battle of the New Deal."[22]

The contrast between 1994 and 2016 is striking. Instead of "The Rise and Rise of the Administrative State," we now have "The Administrative State Under Siege." In just a short time, the administrative state has gone from being an obscure, arcane, academic subject to a constitutional

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[16] *See* POSTELL, *supra* note 4, at 62, 300.

[17] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

[18] *Id.* at 1231 (footnotes omitted).

[19] *See, e.g.*, Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1700 & n.2 (2018) (noting that critics of the administrative state have remained largely on the outskirts of scholarly, judicial, and political discourse).

[20] *See, e.g.*, Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law,* 3 N.Y.U. J.L. & LIBERTY 491, 496 (2008) (stating Professor Epstein's argument that the wide array of powers given to independent agencies contradicts the text and structure of the Constitution); Lee, *supra* note 19, at 1700 (explaining that "scholars, judges, [and] lawyers" have reached a "critical mass" in challenging the constitutional validity of the administrative state); Christopher J. Walker, *Constraining Bureaucracy Beyond Judicial Review*, 150 DAEDALUS 155, 156–57 (2021) (describing the Trump administration's efforts to deconstruct the administrative state).

[21] Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); *see also* Lawson, *supra* note 17.

[22] Metzger, *supra* note 21, at 2, 7.

controversy.[23] And furthermore, scholars have come to the administrative state's defense, attempting to beat back the siege Professor Lawson started.[24]

It is fair to say we are at a key moment, even perhaps a turning point, in the administrative state's history. Examining whether history criticizes or legitimates the administrative state is central to finding the path forward. In fact, accurately understanding that history is absolutely essential.

Why does this history matter? The simple answer is this: where we place the birthdate of the administrative state matters immensely in terms of evaluating its legitimacy. If the administrative state is really a creation of the Constitution itself and of the Constitution's Framers, then originalists and conservatives are creating a controversy where none exists. The administrative state must be consistent with the Constitution and its principles, not in tension with them.

Conversely, if the administrative state is an innovation—one that significantly alters the underlying constitutional framework and weakens the structural protections established by the Constitution—then it can be opposed as antithetical to the core principles on which the nation was founded. And if that is the case, then the administrative state can be said to be in some sense *illegitimate*, beyond the Constitution's boundaries, or at least in great tension with them.[25]

It is for these reasons that the scholarly debates over the administrative state's history have become a proxy war in the battle over the administrative state itself. This is why defenders of the administrative state have tried to prove either that it existed at the time of the Founding or not too long after the Constitution was ratified.

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[23] *Id.* at 8–9. As Metzger writes, "Across a range of public arenas — political, judicial, and academic in particular — conservative and libertarian challenges to administrative governance currently claim center stage. . . . While still a minority position, this view is gaining more judicial and academic traction than at any point since the 1930s." *Id.* Though Metzger grants that the anti-administrativist movement may have "little lasting significance," she also suggests that it would be "too sanguine" to dismiss the possibility that it will undermine the capacity, morale, and goals of the administrative state. *Id.* at 48.

[24] *See, e.g.*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 126 & n.109 (2005) (contrasting Professor Lawson by arguing for increased administrative delegation); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2130 nn.127–28 (2004) (arguing for increased delegation and distinguishing Professor Lawson's interpretation of the Necessary and Proper Clause).

[25] I stress the "in some sense" portion of this sentence. To say that a policy or set of policies is illegitimate from the perspective of American constitutionalism is not to say that its goals are not laudable, or that the people who support those policies are hostile to the Constitution itself. It may simply mean that structural reforms are needed to mitigate or resolve the inconsistency between the structure and process of modern agencies and the constitutional design.

These various historical defenses have taken two essential forms: first, that the administrative state was established in 1887, but that it was an inevitable outgrowth of modern circumstances; second, that the administrative state has been with us from the beginning.

A. The Two Conventional Histories

At first, defenders of the administrative state crafted a "conventional" history that is still prevalent today. This conventional history says that the creation of the Interstate Commerce Commission in 1887, which regulated the railroad industry, marks the origins of the administrative state.[26] This was the first great independent regulatory commission, according to the conventional history.[27]

Placing the creation of the administrative state in 1887 implies that the administrative state is simply an inevitable and logical outgrowth of modern business conditions and modern technology — that if James Madison were alive in 1887, he would have helped found the administrative state. In this view, the administrative state is simply a modern necessity, and no other choice could be made if we want regulation in a modern society.

But even this claim suggests some tension between the principles of the Framers and modern practice. Consequently, more recent defenders of the administrative state have modified the conventional account of the founding of the administrative state.[28] They argue that it was actually born much *earlier*.[29]

The most fascinating version of this argument comes from Professor Jerry Mashaw's recent book *Creating the Administrative Constitution*. There, Mashaw argues, "[W]e should rid ourselves of the nostalgic idea that the emergence of administrative governance in the twentieth century upset the grand design of a non-administrative state."[30] He claims that, from the very beginning of American history, Congress delegated vast swaths of authority to administrative agencies, laying the groundwork for the administrative state in the first years of American history.[31]

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[26] *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 13 (2012) (explaining that "there is no denying the conventional view, particularly in the legal academy, that the American national administrative state, and with it federal administrative law, emerged with the late nineteenth-century passage of the Interstate Commerce Act of 1887").

[27] *See id.* at 4–5.

[28] *See id.* at 312; Merrill, *supra* note 24, at 2133–34 (explaining that the Framers may not have been opposed to the sharing of legislative powers).

[29] *See, e.g.*, MASHAW, *supra* note 26, at 312.

[30] *Id.*

[31] *Id.* at 309.

In addition to examples drawn from very early in American history, Mashaw focuses extensively on an 1852 law regulating steamboats.[32] Steamboat explosions were a regular occurrence by the 1830s.[33] Sitting senator Josiah Johnson from Louisiana was killed in an explosion in 1833, and several members of the House of Representatives died in these accidents.[34]

The problem had to do with a lack of safety standards for steamship boilers and hulls.[35] Thus, in 1852, Congress passed a law establishing a Board of Supervising Inspectors, appointed by the President with Senate confirmation, who could make rules and inspect steamships to ensure compliance.[36]

For Mashaw, the 1852 steamship board shows that the administrative state was around even before the Civil War.[37] In his words, the Board of Supervising Inspectors "combined something of the 'New Deal' independent regulatory commission with 'Great Society' health and safety regulation by delegating administrative authority to a multimember Board that combined licensing, rulemaking, and adjudicatory functions."[38] It possessed "the rulemaking capacities of later health and safety regulators like OSHA, NHTSA, and EPA."[39]

Professor Mashaw implies that if the Steamboat Act was acceptable to early Americans, then modern agencies like OSHA, NHTSA, and EPA must be perfectly within the constitutional pale.

B. The True Origins of the Administrative State

In my view, these attempts to place the administrative state's birthdate at 1887, 1852, or even 1789 all miss the mark. In *Bureaucracy in America* (a title shamelessly borrowed from Alexis de Tocqueville's famous work), I make two central claims about the beginnings of the administrative state. First, an administrative state proper does not emerge until after the turn of the twentieth century.[40] Second, those who did create it knew they were breaking with the legal and constitutional tradition of the nineteenth century.[41] Both of these claims are at odds with the history offered by the administrative state's defenders.

First, take the 1852 Steamboat Act cited by Professor Mashaw. It is true that the law gave the steamboat inspectors the power to make rules

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[32] *See id.* at 187–202.
[33] POSTELL, *supra* note 4, at 95–96.
[34] *Id.* at 96–97.
[35] *See id.* at 97.
[36] *Id.* at 96–97.
[37] *See* MASHAW, *supra* note 26, at 21, 186.
[38] *Id.* at 187.
[39] *Id.* at 194.
[40] POSTELL, *supra* note 4, at 167, 205–06.
[41] *Id.* at 205–06.

and regulations. But a closer inspection of the law reveals that those rules were far narrower than the rulemaking powers of OSHA, NHTSA, and EPA today.[42] The inspectors were authorized by Congress in one rulemaking provision to make rules governing their own conduct, relating to the frequency with which they had to attend certain locations to carry out their duties.[43]

The only other rulemaking power given to the steamship board related to "rules and regulations to be observed by all vessels in passing each other."[44] Other than internal rules governing its own practices, the Commission's only rulemaking power governed matters like ships passing in the night. Even this authority was only granted after Congress rejected a provision that copied existing rules navigators used to avoid collisions.[45] This provision caused confusion among members regarding which ships were considered "ascending" and "descending" in tidewaters.[46] Ultimately, this confusion led the members to grant the rulemaking authority Mashaw cites, but that authority seems to extend only to the power to clear up this ambiguity.[47]

In short, while the 1852 law did give rulemaking power to an agency, that power bears almost no resemblance to the powers of modern administrative agencies. The rulemaking power granted in the statute was so limited that when the supervising inspectors sought authority to require steamships to install lights to prevent collisions, they petitioned Congress to amend the law rather than rely on a general rulemaking power.[48]

Second, consider the Interstate Commerce Commission's ("ICC") establishment in 1887. Professor Robert Rabin has argued that "when Congress established the [ICC], it initiated a new epoch in responsibilities of the federal government" by utilizing "an institutional mechanism that was virtually untested on the national stage, an independent regulatory commission."[49]

In practice, however, the ICC that was created in 1887 was not an independent agency at all — it was situated in the Interior Department.[50] It became an independent regulatory commission by "largely a historical

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[42] *See id.* at 98–99, 101 (explaining that steamboat inspectors' rulemaking authority could not bind the public and extended only to internal matters).

[43] *Id.* at 98–99.

[44] *Id.* at 99.

[45] *Id.* at 99–101.

[46] *Id.* at 100.

[47] *See* MASHAW, *supra* note 26, at 194; *see also* POSTELL, *supra* note 4, at 97–102 (discussing the 1852 Act and the debate in Congress that led to the rulemaking authorities).

[48] POSTELL, *supra* note 4, at 102.

[49] Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189 (1986).

[50] POSTELL, *supra* note 4, at 127, 154.

accident."[51] Benjamin Harrison's election in 1888 caused Congress to place the Commission outside the Interior Department for fears that the railroad attorney in the White House would give preferential treatment to the railroads.[52] It was not a theoretical commitment to an administrative state but politics and congressional jealousy that made the ICC independent.

More importantly, the original powers of the ICC were very limited by design. As one of the Senate's leading members, Orville Platt of Connecticut, explained, the law was "carefully drawn so as to avoid the exercise of judicial powers by these commissioners, so as to deprive it of any constitutional objection."[53] In addition, the ICC had no legislative power to set railroad rates, nor enforcement power to back its decisions, nor did it disrupt the common law remedies for unjust and unreasonable railroad rates that were available before the law was passed.[54]

The weakness of the ICC at its creation helps explain one perplexing fact: namely, the identity of its first chairperson. That person was none other than Thomas Cooley, the prominent defender of limited government and individual rights.[55] Today, Cooley is notorious in many circles for being an advocate of "laissez-faire constitutionalism."[56] If the ICC had crossed the Rubicon, marking a new epoch as the birth of the administrative state, how could a defender of limited government serve as its first chair?

The answer is that the ICC *was not* the behemoth that some scholars think it was. During its first few decades, the ICC was a weak body, and courts tried ICC cases de novo.[57] It was not until later, in 1906, that the ICC gained the power to set railroad rates with the passage of the Hepburn Act.[58] If we are looking for a birthdate of the American administrative state, in my view, it is in the Progressive Era, during the

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[51] *Id.* at 154 (quoting MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 48 (1993)).

[52] *Id.*

[53] 17 CONG. REC. 4422 (1886) (statement of Sen. Orville Platt), https://www.congress.gov/congressional-record/49th-congress/browse-by-date.

[54] Hiroshi Okayama, *The Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State*, 15 J. GILDED AGE & PROGRESSIVE ERA 129, 133–35 (2016). In his article, Okayama discusses the ICC's original authority. *See id.*

[55] POSTELL, *supra* note 4, at 155.

[56] *See* Joseph Postell, *The Misunderstood Thomas Cooley: Regulation and Natural Rights from the Founding to the ICC*, 18 GEO. J.L. PUB. POL'Y 75, 76–78 (2020) (disputing the prevalent characterization of Cooley as a "laissez-faire constitutional[ist]"). Alan Jones disputed this characterization as early as 1967, but the attribution has stuck around. Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751, 751–52 (1967).

[57] POSTELL, *supra* note 4, at 154–55.

[58] *Id.* at 186–87.

presidency of Theodore Roosevelt, with the passage of the Hepburn Act and the grant of a ratemaking power to an administrative commission.

III. CONSISTENCY OR DEPARTURE?

When we understand that the administrative state is a creation of the Progressive Era, advocated by progressives, we are better able to make sense of another point: namely, that the administrative state's founders knew they were departing from the earlier tradition and openly acknowledged they were doing so.[59] As opposed to modern scholarly defenses of the administrative state, the creators of the administrative state did not equivocate. They openly acknowledged what they were doing.[60]

In 1900, Frank Goodnow, a prominent political scientist and first President of the American Political Science Association, contrasted what he called the "two main forms" of "[t]he administrative systems of the world."[61] One form was characteristic of European nations in 1900, and the other still prevailed in America.[62] These two forms of administration could be differentiated along two lines. First, in the European form, administrators "are vested, with large discretion, so much in fact as to make them really organs for the expression of the will of the state."[63] In the American form, administrators "are vested with almost no discretion at all."[64]

Second, the European system of administration is characterized by "a hierarchy of officers, in which the subordinates owe allegiance to the superior officers rather than to the law of the land."[65] By contrast, the American system "lays emphasis on the allegiance of each [officer] to the law as laid down by" the legislature.[66]

In other words, according to Goodnow, under the American approach to administration during the nineteenth century, elected legislatures made the law, limited official discretion, and courts engaged in judicial

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[59] *See id.* at 171–73.

[60] *See id.*

[61] FRANK J. GOODNOW, POLITICS AND ADMINISTRATION: A STUDY IN GOVERNMENT 94 (1900).

[62] *See id.* at 98–99.

[63] *See id.* at 94, 98–99.

[64] *Id.* at 94, 98.

[65] *See id.* at 94–95, 98, 100.

[66] *Id.* at 95, 98; *see also id.* at 65 ("On the Continent, the legislature is less important, the administrative authorities are more important, than here. The legislature is more in the position of a body which vetoes, amends, or approves propositions submitted to it by the executive, than in that of a body which formulates the propositions that become law. The laws which it passes, further, deal much less with detail, much more with general principles, than do the laws passed by American legislatures.").

review to ensure the administrators followed the law.[67] Goodnow noted that the American system "has been termed 'a government of laws, and not of men.' It has unquestioned advantages, particularly in retarding the development of despotism and in preventing arbitrary administrative action; but it makes the development of the administrative function free from the influences of politics almost impossible."[68]

Legal scholars concurred with Goodnow's assessment. For example, Ernst Freund, who taught law at Columbia University in the early twentieth century, where Goodnow also taught, offered the same view as Goodnow.[69] As he explained, "[T]he two greatest modern republics, the United States and France, represent the opposite extremes of administrative organization."[70]

Like Goodnow, Freund contrasted the American and European systems of administrative law in three fundamental respects. First, "[i]n the European states," according to Freund, the organs of government "appear as a distinct portion of the state and of the people."[71] Second, in the European system, administrative power is organized hierarchically, with the chief executive serving as "the head of an army of officials who derive their functions and duties directly or indirectly from him."[72] Third, the French system grants significant discretion to executive officials, binding them not to the law but to the officers who supervise them in the hierarchy. The European system, according to Freund, "may be designated as bureaucratic government."[73]

Bureaucratic government, Freund admitted, "is believed to be contrary to the American conception of popular government."[74] First, in the American system, "not only are the people the source of governmental power, but they exercise that power themselves."[75] There is no distinction between the people and the state in the American system, unlike the

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[67] *Id.* at 95–96, 98 & n.1, 100 (explaining that "[t]he necessary central control may thus be vested in the judicial authorities" rather than a chief executive at the head of an official hierarchy).

[68] *Id.* at 97–98 (quoting JOHN ADAMS, NOVANGLUS, AND MASSACHUSETTENSIS; OR POLITICAL ESSAYS 84 (1819)).

[69] Comment, *Ernst Freund—Pioneer of Administrative Law*, 29 U. CHI. L. REV. 755, 755 (1962); Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. LEGAL EDUC. 28, 30, 32 (2015) (discussing Goodnow's tenure at Columbia University where Freund was his student).

[70] Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 405 (1894).

[71] *Id.* at 407.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

European system.[76] Second, in the American system, there is no hierarchy of officers: "a higher degree of official power" in America "does not necessarily mean the right of direction or control over a lower office in the same sphere."[77] This lack of hierarchical control occurs because, finally, the allegiance of administrative officers is to the law, not to men who sit above them in the hierarchy.

Thus, as Freund granted, the American system of administration reverses all three presumptions of the European system: the government *is* the people, power is decentralized and dispersed rather than hierarchical, and administrators are accountable to the law and to courts rather than to superior officers. Freund contrasted this system with "bureaucratic government," explaining, "[t]his system may be designated as self-government, because the difference between rulers and ruled is reduced to a minimum."[78]

> Freund admitted that the two systems had competing advantages:
> The advantage of our system is clear: the allegiance and responsibility of every officer is to the law; we may truly speak of a government by law and not by men. But we should also see the true effects of such a system with regard to the chief executive authority. . . . This system compels the legislature to specify in detail every power which it delegates to any authority. No discretion as to scope of action or choice of means can be allowed to subordinate officers without superior control, and the hierarchical organization necessary for such control does not exist. The legislature must also regulate the exercise of official powers in every particular . . . because the officer has no one to look to for instruction and guidance except the letter of the statute.
> Thus we arrive at the fundamental principles of our administrative system: no executive power without express statutory authority—the principle of enumeration; minute regulation of nearly all executive functions, so that they become mere ministerial acts . . . . In contrast to these we find in Europe executive powers independent of statute, discretionary powers of action and control vested in superior officers, and the concentration of the administrative powers of the government through the hierarchical organization of the executive department.[79]

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[76] *Id.* (noting that in the American system of administration, "[n]ot only are the officers of the government not separated from the people . . . they are held together only through their common allegiance and responsibility to the people").

[77] *Id.*

[78] *Id.*

[79] *Id.* at 409–10. One should hasten to note that Freund and Goodnow were speaking, especially regarding the lack of hierarchical control by a chief executive, of *state*-level administrative law and organization. *Id.* at 410–11. At the national level, there was a much clearer unity of executive power and control by a chief executive over subordinate officers. *Id.* at 408, 415. But since most regulation and administration was state-level in the nineteenth century, Freund and Goodnow saw that history as more illustrative of American governance. *Id.* at 410–11; *see* POSTELL, *supra* note 4, at 68.

Scholars like Goodnow and Freund understood something that current defenders of the administrative state will not admit: regulation and administration during the nineteenth century were based on a fundamentally different system than the modern administrative state.[80] Either these scholars were entirely confused about the legal and constitutional history they inherited, or the modern scholars who see continuity between the modern administrative state and early American history are missing something important.

As Goodnow and Freund knew and admitted, regulation in nineteenth-century America was pervasive.[81] Yet, America still lacked a "bureaucratic . . . government."[82] There was no administrative state because regulation was produced by elected officials and bound by law. As Alexis de Tocqueville explained, America's model of administrative decentralization ensured that "authority is great and the official is small, so that society would continue to be well regulated and remain free."[83] In other words, generations of scholars, from de Tocqueville to Goodnow, agreed that importing an administrative state into America would require and produce fundamental changes in America's legal, constitutional, and political system. Recent scholarship focuses narrowly on legal precedents and misses this larger scholarly consensus and its implications.[84]

IV. OLD CONTROVERSIES, NEW EVIDENCE

As the conflict over the administrative state has grown more intense in recent years, the debate over its history has similarly intensified. A number of recent articles have sought to influence this historical debate and, by extension, address the administrative state's legitimacy.[85] Unlike

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[80] *See, e.g.* ,William J. Novak, New Democracy: The Creation of the Modern Administrative State (2022) (arguing that the modern state is a fundamentally new kind of state than the one established by the Framers); *see* POSTELL, *supra* note 4, at 164–69 (explaining how the creation of the first independent regulatory commission in 1880 changed the administrative state).

[81] The scholarship refuting the "myth of laissez-faire" is extensive. See Harry N. Scheiber, *Government and the Economy: Studies of the "Commonwealth" Policy in Nineteenth Century America,* 3 J. Interdisciplinary Hist. 135 (1972), for an overview of early studies. William J. Novak, The People's Welfare (1996) also surveys the extent of regulation in nineteenth-century America. (

[82] Freund, *supra* note 81, at 18.

[83] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 63 (Harvey C. Mansfield & Delba Winthrop trans. & eds. 2000); *see also* POSTELL, *supra* note 4, at 70–73 (discussing Tocqueville's description of American administrative law and structure, which closely mirrors Freund and Goodnow's description).

[84] *See* Ryan Calo & Danielle Keats Citron, The Automated Administrative State: A Crisis of Legitimacy, 70 EMORY L.J. 797, 813 (2021); discussion *infra* Section IV.

[85] For a non-exhaustive sampling, see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282, 366–67 (2021) [hereinafter

most of the scholars discussed above, recent defenders of the administrative state have tried to show that it was there in America all along.[86] Thus, they present perhaps the most forceful challenge yet to the idea that the administrative state was a departure from the Framers' design.

For the sake of brevity, I will briefly sketch the highlights of this new scholarship and confine the sketch to two issues: the nondelegation doctrine and the unitary executive theory.

A. Nondelegation

First, as to nondelegation: Several recent articles have challenged the idea that there was even such a thing as a nondelegation doctrine at the time of the Constitution's ratification. Or, at the very least, they claim that the limits on delegation are so weak that today's delegations to the administrative state easily pass muster.

The most forceful version of this argument comes from Professors Julian Mortenson and Nicholas Bagley in the *Columbia Law Review*.[87] Mortenson and Bagley offer a vast array of examples from early American history in which Congress "delegated expansive legislative authority without even spotting a constitutional issue . . . without betraying a hint of concern that doing so might violate the Constitution."[88] Surveying this vast evidence, they conclude tersely, "[t]here was no nondelegation doctrine at the Founding, and the question isn't close."[89]

Delegation at the Founding]; Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 90–91, 158–59 (2021) [hereinafter *The Lost History of Delegation*]; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power*, 130 YALE L.J. 1288, 1302, 1307, 1309, 1311–12, 1455 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493–94, 1496–97, 1556 (2021); Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. 88, 90–91, 118 (2020); Julian Davis Mortenson & Nicholas Bagley, Essay, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2328, 2364–65 (2022); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 132, 138, 196–97 (2022) [hereinafter *Interring the Unitary Executive*]; Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal,* 136 HARV. L. REV. 1756, 1761–62, 1843–44 (2023); Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. 404, 406, 425–27 (2023). Though the recent scholarship addresses other issues, this list focuses on scholarship around two specific legal questions: the nondelegation doctrine and the so-called "unitary executive."

[86] *See, e.g.*, Lee, *supra* note 19, at 1710–44 (discussing the history of administrative constitutionalism from the Founding to the present); MASHAW, *supra* note 26, at 66–67, 187, 189 (noting examples of administrative law and authority, in addition to the 1852 Steamboat Safety Act, that existed at the very beginning of American history).

[87] *Delegation at the Founding*, *supra* note 85, at 332.

[88] *Id.* at 332–33, 349.

[89] *Id.* at 367.

Other recent attacks on the nondelegation doctrine are less strident but still highly critical of the idea that there were limits on the delegation of legislative power at the time of the Founding. Professor Christine Chabot has highlighted the early Congress's delegations of power to a Sinking Fund Commission to manage the new government's debt financing and payments, as well as the establishment of a Patent Board with broad authority to decide matters such as whether an invention or discovery was "sufficiently useful and important" to warrant a patent.[90] In both of these cases, Congress chose to give policymaking discretion to administrative officers, suggesting to Chabot that "[t]he First Congress's understanding [of delegation] is close to today's intelligible principle requirement" used by the Supreme Court to validate statutes on nondelegation grounds.[91]

Unlike Professors Mortenson and Bagley, Professor Chabot acknowledges that "some members of Congress raised delegation concerns before passing [these] early statutes."[92] Nevertheless, in her view, these examples show that "[t]he notion that the Constitution banned capacious statutory language or legislation that handed off major national policy questions to the Executive Branch was not even a well-developed minority position" among the members of the First Congress.[93]

B. The Unitary Executive

Scholars have made similar arguments in recent work on the unitary executive theory, which, among other things, specifies that the president, as chief executive, should exercise control over all subordinate executive branch officials.[94] For example, another recent article by Professor Chabot

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[90] *The Lost History of Delegation*, *supra* note 85, at 134–35, 141.

[91] *Id.* at 99, 122–23 (noting that today's intelligible principle requirement resembled the borrowing power delegated by the First Congress to the President because the First Congress only capped the President's borrowing power).

[92] *Compare id.* at 112–13, *with Delegation at the Founding*, *supra* note 85, at 332.

[93] *The Lost History of Delegation*, *supra* note 85, at 122. It is beyond my purposes here to respond at length to these arguments — indeed, my purpose is to show that these arguments have not been adequately refuted. However, a close reading of Chabot's article suggests some tension between her position and Mortenson and Bagley's position. Mortenson and Bagley argue that there were no serious delegation arguments in the early republic. *Delegation at the Founding*, *supra* note 85, at 366–67. Whereas Chabot seems to acknowledge that such arguments not only existed but caused the First Congress to draw delegations more narrowly in many cases. *See, e.g.*, *The Lost History of Delegation*, *supra* note 85, at 118–19 (noting that the First Congress cabined the executive's discretion by placing statutory limits on how much money he could borrow); *id.* at 123 (discussing statutory limits on the president's ability to refinance the national debt); *id.* at 125–25 & n.253, 135 (noting the repayment, interest, and refinancing restrictions on the president's spending power).

[94] Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 668 (2003) (noting the theory of the

claims to "bury" the unitary executive theory.[95] She notes that dozens of statutory provisions "enabled independent exercises of significant executive power" that were not supervised by the president or carried out by officials who could be removed at will.[96]

In the early days of the republic, in her account, Congress frequently gave enforcement power to independent officials such as deputy marshals and judges, who could not be removed at will by the President. The Sinking Fund Commission, an agency established by the First Congress to manage purchases of federal government securities, is perhaps the most prominent example. That Commission included not only cabinet secretaries but also the Chief Justice of the Supreme Court and the Vice President, neither of whom is accountable to or removable by the President.[97] It exercised significant discretion in making open market purchases of securities in response to financial crises and panics.[98] It is the most prominent but hardly the only example, Chabot argues, of Congress's willingness to vest significant executive authority in the hands of officers who were not removable at will by the President.[99] Thus, she concludes, "the Founding generation never understood the unitary executive to be part of our Constitution."[100]

V. BRIEFLY ASSESSING THE DEBATE AND THE EVIDENCE

These examples complicate the arguments offered by many originalists that the Constitution limited the delegation of legislative power and gave the president the power to remove administrative officers at will.

My point in briefly surveying these recent articles is to give credit to the defenders of the administrative state. They have taken up the challenge laid down by originalist critics. They are examining the historical record, looking for evidence that the administrative state was

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unitary executive involves the following mechanisms: "the president's power to remove subordinate policy-making officials at will, the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power").

95 *Interring the Unitary Executive*, *supra* note 85, at 133.

96 *Id.*

97 *Id.* at 172–73. This would be especially true of the Vice President when the First Congress created the Sinking Fund Commission, since the Twelfth Amendment had neither been proposed nor ratified. *Id.*

98 *Id.* at 172–74; Richard Sylla et al., *Alexandar Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 BUS. HIST. REV. 61, 69, 71–73, 78, 81–82 (2009) (discussing how the Treasury Secretary authorized the sinking-fund commission to purchase public debt securities).

99 *Interring the Unitary Executive*, *supra* note 85, at 138, 194 (noting that although the President could remove some members of the Commission, he could not remove all members).

100 *Id.* at 132.

around from the beginning, and that it does not depart from basic constitutional principles. They have found many examples, not sufficiently appreciated by previous scholars, that raise questions about the Framers' intentions.

A. The (Thus Far) Inadequate Response

Their work presents the administrative state's skeptics with a challenge to respond. Thus far, with a few notable exceptions, the skeptics have not stepped up.[101] Thus, I want to end with a call to those who think the administrative state has done damage to the Constitution's structure. Engage in this historical debate and do so in good faith. There is a lot of work still to be done.

The failure thus far to respond adequately to the new scholarship has legal implications. Justice Kagan's dissenting opinion in *Seila Law LLC v. Consumer Financial Protection Bureau* from a few terms ago illustrates why it is critical to engage in this historical debate.[102] She attacked the logic of Chief Justice Roberts' majority opinion, which claimed that Article II of the Constitution vests all executive power in the president, including the power to supervise and remove executive officers.[103] In response, Justice Kagan noted that even early Congresses "debated and enacted measures to create spheres of administration . . . detached from direct presidential control."[104] She argued, in other words, that the history was actually against the unitary executive theory and that the Framers' Constitution permits the creation of independent administrative officers.

As the Court continues to look at the nondelegation doctrine and the unitary executive theory in upcoming cases, it is more pressing than ever to present an accurate historical record to ground the reasoning of the justices.

B. The Ambiguity of Precedent

So, what do we make of these recent defenses of the administrative state? Have originalists been wrong about the historical record all this time? I don't think so, but it depends on some as-yet unexplained and unexplored assumptions. These assumptions pertain to the validity of precedent and what we mean when we say that something is unconstitutional. Lawyers often have a different sense of these terms than

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[101] *See* Sunstein, *supra* note 6. To be clear, this is not entirely accurate. Many administrative skeptics have published responses to the recent defenses of the administrative state. *See* sources cited *supra* note 85. Especially noteworthy in this regard is Wurman. *See* Wurman, *supra* note 85, at 1494–97 (responding to and systematically engaging with the major anti-nondelegation arguments discussed above).

[102] 140 S. Ct. 2183, 2224–26 (2020) (Kagan, J., concurring in part and dissenting in part).

[103] *Id.* at 2227–29.

[104] *Id.* at 2225.

historians and political scientists, and perhaps some of the confusion relates to this difference.

As implied in the earlier discussion of Goodnow, Freund, and de Tocqueville, when I read accounts of how government functioned in the nineteenth century, I see a state that is very different from the state that emerged in the early twentieth century. The nineteenth-century state, to my mind, is clearly tied to the Framers' constitutional theory, which emphasizes republicanism and representation by elected officials, separation of powers, the rule of law, and limits on official discretion. The modern administrative state challenges those assumptions. In that way, it can be said to be in tension with the state that it replaced.

But the debates in recent legal scholarship seem to focus on a different question: can we find any examples in early American history that are analogous to the modern administrative state? Its defenders look at the Sinking Fund Commission or the Steamboat Inspection Act and say, "Yes." Its critics look at those same precedents and conclude that they are a far cry from the Federal Trade Commission, the Occupational Health and Safety Administration, the Environmental Protection Agency, and so on.

Both sides seem to think that the administrative state's legitimacy can turn on the status of early American precedents, but neither side has a clear position on how to relate those precedents to modern examples. Thus, the debate has become focused on these narrow precedents rather than the larger historical picture. Precedents are only useful as a guide to thinking about current cases if cases are analogous. But, determining whether an early precedent is consistent with a later one requires judgment. Does giving an independent Sinking Fund Commission the power to refinance the national debt set a precedent for the creation of the Federal Reserve and the Securities and Exchange Commission? Does the fact that Congress in 1789 gave the President the power to license and regulate trade with the Indian tribes set a precedent for the rulemaking authority of the Environmental Protection Agency today? Citing the precedents may help guide our thinking about these questions, but they cannot by themselves answer them.

CONCLUSION

These questions about the implications of early American history suggest that the administrative state's legitimacy is not a purely legal question and that courts will not be able to do much more than police the outer limits of administrative power. On the other hand, accepting the limits of a purely legalistic approach to the administrative state's legitimacy might allow scholars the freedom to present a more accurate picture of the administrative state's history and relationship to the constitutional system as a whole.

Another implication of this way of thinking about the administrative state's history has to do with the appropriate remedy. Even if we accept that the administrative state exists in some tension with the constitutional design, there might be differences of view about what needs to be done to reconcile them.[105] It is often believed, wrongly, that critics of the administrative state wish to dismantle and cripple government altogether. I am often asked both by those who sympathize with and those who criticize my views on the subject: if the administrative state threatens the constitutional design, how many agencies must we abolish to restore the Constitution?

The answer, in my view, is *none*. Regulation is a well-established part of the American political and legal tradition. Regulation was everywhere in the nineteenth century under the police power. But the nineteenth-century approach managed to have regulation, without an administrative state. The Constitution's Framers clearly anticipated a role for administration in their government. But those agencies were administrative in the traditional sense: bodies that executed the law rather than made, enforced, and adjudicated it.

By restructuring agencies so that they conform to the Constitution's nondelegation doctrine and separation of powers, we can have reasonable regulation without doing damage to our governmental system. In my view, that should be our goal, rooted in a full and honest understanding of the administrative state's history.

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[105] One of the core arguments of *Bureaucracy in America* is that administrative law should be framed in exactly this manner—as a body of law that seeks to reduce the tension or incompatibility between the administrative state and the Constitution by replicating, to some extent, the democratic accountability, legal accountability, and separation of powers within the administrative process. *See* POSTELL, *supra* note 4, at 318–21.

STATE SOLICITORS GENERAL AND THE ADMINISTRATIVE STATE

Distinguished Panelists[*]

Hon. Kyle Duncan: It's an honor to moderate this panel. I'm glad to be with you. I'm always glad to be at Regent Law School, where I have the privilege of occasionally teaching and hopefully will continue to do that. In this symposium on the administrative state, this panel will focus on rethinking the administrative state from a federalist perspective. Now, that sounds like a broad and abstract concept, but we are lucky to have with us two state solicitors general, one former and one current. Actually, you have two former state solicitors general here because, at one time, I was the appellate chief of the Louisiana Department of Justice.

And, so, what you will get is a sort of ground-level perspective on what it means to do administrative law litigation from the perspective of the chief appellate officer of states. And I think that will give you a valuable perspective on the dimensions of federalism within administrative law. And I know that the three of us on this panel have litigated interesting administrative law issues. You just heard about the loan case that Jim litigated. I will moderate and hopefully let my panelists talk a lot more than me, but I will jump in occasionally and talk about some cases I litigated and also some cases that I've decided on my court. Administrative law seems like a daily topic on my court.

And, so, generally, we'll talk about just how ubiquitous administrative law is. Then, we'll talk about the role of the states in restoring a federalist structure. I think what that means, from the perspective of this panel, is making sure the administrative state is held accountable under the law. And we'll hear about that and some specific cases. We will also, if we have time, turn to the question of what administrative law looks like at the state level because states also have administrative law. And then, again, time permitting, we will talk about a possible intervention from the legislative branch to deal with some of the problems of administrative law. We certainly hope to build in some time for your questions.

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* This panel was held on September 29, 2023, at Regent University School of Law during the Regent University Law Review Symposium entitled *Counteracting Ambition: Rethinking the Administrative State*. The panelists included Jim Campbell, Chief Legal Counsel for Alliance Defending Freedom and the former Solicitor General of the State of Nebraska; Theo Wold, Director of the Administrative State Project at the Claremont Institute and the former Solicitor General of the State of Idaho; moderated by the Honorable Kyle Duncan, judge on the Court of Appeals for the Fifth Circuit. The transcript for this panel discussion has been lightly edited for brevity and clarity. The statements of the panelists and moderator are their own.

So, let's start off. I will turn it over to Jim—let's go with you first. If you could just talk about some of the areas in which you've litigated in administrative law issues—the areas in which administrative law issues have come up in your career—that would be a great starting point.

Jim Campbell: Sure. Happy to do that. So, as you heard at the outset, I formerly was Solicitor General in the state of Nebraska, and I currently work for Alliance Defending Freedom. Alliance Defending Freedom focuses a lot on religious liberty and freedom of speech issues, family issues, pro-life issues, etc. I'll use a few of those topics just to illustrate how broad administrative law is. In fact, about two to three years ago, Alliance Defending Freedom ("ADF") first launched what we call our regulatory team, which is our response to the administrative state; our CEO calls it our Biden Accountability Project. [Laughter]. We do a lot of work in that space. So, just to illustrate, one issue that we're waiting on right now is a federal law called Title IX. The Administration has announced proposed rules involving Title IX. Title IX is the federal law that prohibits sex discrimination in education. And the Administration says that the prohibition on sex discrimination also extends to gender identity. And the two proposed rules—one is a general rule, and one is specific to the issue of sports and education—say that gender identity is included. So, we're waiting for those final rules to be issued, and when they are, that'll tease up what administrative law lawyers are waiting for, which is clear: final agency action through a rule, after which you can file a lawsuit—you can raise claims under the federal Administrative Procedures Act. So, that's one instance in which you see these issues come up. We have another case that was decided on by the Fifth Circuit recently, and there are currently two pending cert petitions in the case. The name of the case is *Alliance for Hippocratic Medicine v. FDA*.[1] It's a challenge to the FDA's regulatory actions involving the chemical abortion drugs on the market. There are two aspects to the case. One is we're challenging the original approval of those drugs. And second, over the last seven or eight years, there's been regulatory efforts to remove the safeguards surrounding the use of those drugs that once protected women and girls; we're challenging those. So, the Fifth Circuit's ruling agreed with us that the FDA's removal of those safeguards was unlawful and that it was, in fact, arbitrary and capricious under the APA. Now, the FDA is asking the Supreme Court to step in and litigate that issue. So, again, this is a topic where it's a pro-life issue that you wouldn't be able to litigate the way we are unless you are willing to engage in administrative law. And then the last set of topics I'll mention, but I won't really unpack,

[1] All. for Hippocratic Med. v. U.S. Food & Drug Admin., 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom.* FDA v. All. for Hippocratic Med., 144 S. Ct. 537 (2023).

is that it's really ubiquitous in environmental law. Whether you're dealing with regulating greenhouse gasses, whether you're dealing with something called WOTUS, the Waters of the United States, and what it means to be a navigable water. That is a hot-button issue in administrative law. It's probably not one as interesting to most of the people in the audience today, but it is one that, trust me, at the state level, we care very deeply about, and we litigate in many different areas. So, that's just a little bit of an overview.

Hon. Kyle Duncan: Thank you, Jim. Theo, did you want to add anything to that?

Theo Wold: I think, interestingly, just to give another take on both of those issues—we also in Idaho are involved in a Mifepristone case, that's the chemical abortion drug, but going the opposite way. And here's how I'll connect those two ideas on Title IX and on Mifepristone: Often, you'll see those who are opposed to the new rulemaking, and they'll say, "You can't do this. This isn't the actual meaning of Title IX; the rule that you're promulgating contorts or perverts the meaning of the statute. We want to stop the rulemaking." And, then, on the other side, you may see, in some instances, Democrat attorneys general, as is the case right now under Biden, who will say, "You didn't go far enough." So, in the Mifepristone context, there's litigation that was occurring in Texas, in district court in Texas in the Fifth Circuit, in which Republican attorneys general were saying, "This is violative of what the FDA's obligations are, to ensure the safety of this drug. You've taken away the safeguards." But over in my corner of the country, in the eastern district of Washington, the attorneys general of Oregon and Washington got together with sixteen of their Democrat colleagues, and they said, "You shouldn't have any safeguards at all."[2] So, the decision that we had to make in Idaho, and this gives you a flavor, as Judge Duncan said, of the day-to-day grind with administrative law, the question that I had to answer and to counsel my boss, the attorney general, on was, "Is there an interest here for the state of Idaho to vindicate? And what happens if we do? What happens if we get involved, and then we lose?" So, we attempted to intervene in the other Mifepristone case, and the district court judge denied our intervention. We're appealing that, and you all can read about that in Law 360 or somewhere else as that unfolds. But that gives you an idea of the questions that solicitors general are tasked with determining: What's the

[2] *See* Amended Complaint, Washington v. FDA, 2023 WL 7461669 (E.D. Wa. 2023) ("Mifepristone continues to hold immense promise for patient access to a safe and effective early abortion option, but medically unnecessary regulations are impeding its full potential.").

interest of the state here? If there is an interest, what does it mean to try and vindicate it? And, just to put a finer point on this, what we were trying to do was to stop the Democrat attorneys general from eliminating (1) all of the safeguards around the use of Mifepristone and (2) some certified pharmacists and a required doctor's visit. And, so, sometimes, it's an offensive attack against a regulation, and sometimes it's a defensive maneuver to prevent the entirety of a regulatory architecture from being eviscerated.

Hon. Kyle Duncan: That's very helpful. I should mention, of course, in case you were wondering, some of the cases that are being discussed here have come through my court. It's not my court; I just happen to serve on it. And, so, I won't offer any comments about those cases. Of course, our judges just decide those cases, and then we send them along to SCOTUS, and SCOTUS can tell us whether we were right or not. So, I won't offer any comments on that. However, I was a litigator before I was a judge, and my experience there mirrors much of what Theo and Jim are talking about. And that is that you, in the public eye, identify this really important issue and the issues that they were talking about—or, in my case, when I came to the Becket Fund, it was the issue of the so-called contraceptive mandate under the Affordable Care Act. I'm not even sure if it's correct to call it a regulation under the ACA, as I recall. Obamacare said something along the lines of, "All health insurance needs to include preventive care services." Preventive care—it's not defined in the statute. Congress didn't say, "And preventive care shall be Tylenol or whatever. It shall be cancer screening or something like that." They left it up to an agency. And, so, my point here is that there may be this really important issue, the contraceptive mandate, everybody was talking about that. But the way that it cashes out in litigation has to do with very fine points of administrative law, which is why we're talking about administrative law. And, so, there was litigation in which numerous groups, non-profits, universities, and religious organizations challenged this, saying, "You can't force us, under the First Amendment or under the Religious Freedom Restoration Act or under the APA, to subsidize drugs that are against our conscience." And, when I was at Becket, we litigated many of these. And one of them was the Hobby Lobby case.[3] And, so, although that wasn't an administrative law case, per se, principles of administrative law were all bound up together. And, believe me, we had to pour over the Code of Federal Regulations and figure out exactly where this stuff came from. And, then, there'd be additional guidance from the administration about exemptions. And I think my friends at Becket had a similar experience to the sort of whiplash where somebody's challenging the regulation;

[3] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

somebody's saying, "It violates RFRA." Then, the administration puts in some sort of exemption, and then a bunch of other states get together and say, "You just violated the Establishment Clause by putting in an exemption at all." So, all of that to say, everybody had heard of that case, *Hobby Lobby*. And ADF was litigating one right alongside us, *Conestoga Wood*.[4] And, so, there's this very high-level understanding of it in the public eye. But then, when you get down into the legal weeds of it, it's an admin law case.

The other case I litigated like that when I was in private practice was called *G.G. v. Gloucester County*.[5] I represented a school district, and the case was about whether the plaintiff could use a restroom in accordance with the plaintiff's internal sense of the plaintiff's gender. Notice how I'm avoiding the use of pronouns right now because I don't want to be disbarred in Michigan. We can talk about that in a second. But everyone thought it was a bathroom case. Actually, it came down to something called a Dear Colleague letter that was issued by the Department of Education. This Dear Colleague letter changed everything about what Title IX meant. And, so, we litigated that, and we did thankfully get the Supreme Court to grant cert in that case.[6] But it was interesting. Speaking of admin law, what questions did we ask to get cert granted? Well, the first one was, can a Dear Colleague letter effectively change the meaning of sex in Title IX? The second one, which is an admin law question, was, "Should *Auer v. Robbins*[7] be overruled?" And what is *Auer v. Robbins*? Well, that's an administrative law precedent about the amount of deference that we should give to administrative law agencies when they're interpreting their own regulations. So, SCOTUS didn't grant cert on that case; it granted cert on that issue in a later case. But the point being is, at a high level, the issues appear to be bathrooms and transgenderism. But, when you get down to the weeds, it's all about Dear Colleague letters and *Auer* deference stuff that, quite frankly, is a little bit dry and boring, but you have to talk about that stuff in order to figure out the legal issues. Alright. Well, we've got either present or former state solicitors general. And, so, we want to see the perspective of these unique and important officers of a state in doing administrative law. Theo, can you talk about, as a state SG, what are your general duties?

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[4] *See* Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS, 724 F.3d 377 (3rd Cir. 2013), *cert. granted sub nom.* Conestoga Wood Specialties Corp. v. Sebelius, 571 U.S. 1067 (2013), *rev'd sub nom.* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[5] G.G. v. Gloucester Cnty. Sch. Bd., 853 F.3d 729 (4th Cir. 2017).

[6] Gloucester Cnty. Sch. Bd. v. G.G., 580 U.S. 951 (2016) (granting certiorari on questions two and three of the petition).

[7] 519 U.S. 452, 461 (1997).

Theo Wold: Day-to-day, there's essentially three buckets, if you will, that I'm kind of monitoring at any given time. So, the first is in my position, and this isn't true of all states. But I think it's certainly true of many of the smaller states. Idaho is a small, rural state. We don't have the same kinds of resources that, say, a Texas or Virginia or Florida have. I was recently seated next to my counterpart from the state of California at the National Constitutional Center in Philadelphia. And he asked me, "How many guys do you have working for you in your shop?" And I said, "It's me and my deputy. How many guys do you have?" And he said, "There's about 340 appellate lawyers in California and the Office of the Attorney General." That's more than the total size of the Office of Attorney General in Idaho. So, it's an asymmetrical contest.

One of the things that I do is constantly giving the attorney general, my boss, strategic advice on the range of cases that we see coming up through the pipelines in our various divisions, whether that's natural resources, tax and insurance, or civil litigation. And my view there is: How will this shape up? What are the likely outcomes, depending on the argumentation that we're going to be offering in the trial court or the shape of the law in our circuit, the Ninth Circuit? And what are some of the pitfalls that we should be mindful of?

The other piece, day-to-day is, and this is something I think a lot of folks who are not enmeshed in this world are unaware of, but state solicitors general are kind of plugged into a nationwide network. A good friend of mine, the current SG of Texas, told me about this before I took this role. Sometimes people say, "It's really great because you get to be with all your friends from all around the country." And you think, "Sure. Sure." And it really turns out to be true. So, there are constant requests to participate in multi-state litigation efforts to draft or to sign onto amici in support of different efforts that states are bringing. And then the occasional request for cert petitions on a certain discrete issue. And, so, that multi-state effort, that's a daily sort of a project. And it's always similar to the sort of strategic advice which is to determine what's the interest of Idaho in this issue? It may be a great issue for the state of Louisiana. It may actually be kind of a loser for the political or economic interests of Idaho. So, it's to determine, what does this mean for us in Idaho? And then, too, what does it mean for our resources? We're not a big shop. So, what are they asking of us to contribute? And then the third is, is this the right or prudent legal posture to be taking? Because sometimes it's the right issue, and you read the brief, or you look at the proposed argumentation from your colleagues, and you'd say, "Well, that's not how we would argue that."

And I'll give you one sort of distillation of this. Our predecessor, the previous Republican attorney general of Idaho, served in that office for 22 years, and he signed onto 36 multi-state efforts in total over those two

decades. And he led on six. The state of Idaho has led on six since taking office in January 2023; we have led on sixteen of our own multi-state efforts, and we have signed onto 140 multi-state efforts from our colleagues. So, it's a big project, but it's all very important work.

And then, I think the third bucket, which I enjoy the most, is the writing. There's an opportunity to do a lot of writing, and some may say to add on their oral advocacy, and that's just where sort of where the chips fall. You may get a great case in your circuit, and some folks get the prized possession of getting a chance to argue in the U.S. Supreme Court. But the writing is really, for me, where you're really applying your trade, your vocation as a lawyer; you're taking research, you're constructing the architecture of an argument, and you're using that little bit of EQ that lawyers have. Some of you have more than others. But you're using that EQ to kind of determine what is likely to be persuasive to this panel of judges or to my state's supreme court, given their prior jurisprudence or what I know about them. What's the best way to sort of distill these arguments to ensure the highest probability of success? And, so, there's the three buckets day-to-day that a state solicitor general, or, at least, in my instance, what I'm doing to fulfill my duties and keep my eye on where we should be going with our limited resources.

Hon. Kyle Duncan: That's very good. Jim, what would you add to that in terms of your own duties as SG of Nebraska? And also, how do you think SGs generally are part of the federalist structure of our government? They have a unique role in that. I think that has become more prominent in recent years.

Jim Campbell: So, I, too, would break it into three buckets, although I divide it more, I think, by types of cases. This is the way that I would always describe it to people when I was in the role. The first set of cases was overseeing all of the state civil appeals. And, so, whether the case was in federal court, whether it was in state court, whether we were a defendant, or whether we were a plaintiff: If the state was in a non-criminal case, which is what I mean by civil, then it fell within our SG unit. And that was really what I would call the meat and potatoes of the work. When it comes to the multi-state work that Theo was referencing, you can do as much of it as you have the capacity for. But, at the end of the day, if you don't do a multi-state effort, if you don't lead out there, it doesn't get done, but you don't commit malpractice by not representing your client. So, the meat and potatoes of the job for me was I had to represent the state in those civil appeals. And the payoff there is a regular appearance before the state supreme court every month when the court would have arguments; I would have one or two arguments a month. And, so, it was a great opportunity to get a lot of experience on my feet in front

of judges. That was the first category of cases. The second category is what Theo was talking about with the multi-state work, and, to Judge Duncan's point, this is where you're really doing that important federalist role. I divide that work into party work and then amicus work. So, party work is when you're actually filing a lawsuit, joining with other states, filing one of these regulatory actions against the federal government, and trying to push back when they're interfering with the state's prerogatives. But then you also have the very important amicus work, and we did a lot of that too in my time, and I find that work is very important. It probably comes as no surprise to many of you that the Supreme Court, in certain cases, will get more than 100 amicus briefs. But there is a class of amicus briefs that they pay more attention to. And one class of those briefs is multi-state amicus briefs. The Court just pays more attention to those. And, so, it's an honor and a privilege to be able to be in a role and in a position where you can file one of those amicus briefs that's probably going to catch the Court's attention more. And then the last category of cases that I worked on in my role as SG was what I would call the ad hoc important trial court case. So, if there was an important constitutional challenge in federal district court or an important constitutional issue in state trial court, oftentimes, we would get involved in that as well, and that was particularly fun because you could pick and choose. Now, of course, sometimes we make it sound like, as the SG, we make all the decisions; we actually don't. The AG makes all the decisions. But, so, if the AG wants you to take one of those cases, even if I don't think it's particularly interesting, you're going to take that case. But you do get to speak into it, and that was some of the most fun work that I did when I was in the role, which was to be able to get involved at the trial court level to argue a lot of cases at that level. And, hopefully, to make a difference in significant issues. So, I do think that multi-state actions really are where SGs are having their most impact in pushing back on the administrative state. And the last thing I would add is just to echo what Theo said about this network of SGs around the country. It really is powerful when you can pick up the phone and call a like-minded SG in a similar state with similar interests. And then you can combine forces of two or three AG offices to really start to have more legal firepower to pushback.

Hon. Kyle Duncan: I totally agree with everything you guys are saying. And it's very much consonant with my own experience in two SG offices early in my career. I joined the Texas SGs office in 1999. I was a very young attorney. I didn't know anything. But I knew that if I wanted to learn to be a lawyer, I needed to go into a court. I was pretty sure that was important. And not only go into court, but not to be the eighth guy at the table, but to be the guy at the table who had to stand up, as one of my law professors liked to say, on your hind legs and actually try to convince

a court to agree with you. And I was very fortunate. Like most of the things in my career, it was a combination of providence and competence on my part and luck, but I was at a law firm and not understanding how I was going to get experience. And I got a call from the office of a guy named Greg Coleman, who was the first Solicitor General of Texas. John Cornyn, who's now the senator, was then the attorney general and decided that he wanted to improve the level of advocacy in the Texas Supreme Court and the federal appellate courts by the office. And, so, he got Greg. He was a brilliant attorney, a young guy, and had clerked for Justice Thomas and Judge Jones on my court, and he was just hiring young attorneys. And I got a call and next thing I knew, I was in Austin, in front of two people I had never met who were saying, "Do you want to go around Texas and argue appeals?" I said, "Yeah, will you pay me?" And they said, "Yes, we'll pay you to do this." So, the next thing I knew, I was in the 13th Court of Appeals in Edinburgh, Texas, which is on the Texas-Mexico border, arguing a case on behalf of the state in which I was the only attorney in the entire courtroom who didn't speak Spanish. And my boss came with me and observed me lose the case unanimously, which was a really important experience. It's very important to fail, and to fail well, and to fail early. And, so, I did that.

But I got to be in that office, which at the time had maybe ten or twelve attorneys in it. So, it was large by Idaho standards. And, yet, it has grown over the years to become a very large, very influential office. It's extremely important to litigation in my circuit. You've had state SGs who are very well-known. Ted Cruz was a state SG. Jim Ho, on my court, was a state SG. Jonathan Mitchell was a state SG. And you've got people like Scott Keller who now have their own firms, and you've got Judd Stone. It was fascinating. So, I got to be there, and then I got to start an appellate shop in Louisiana, which has continued on and is now the Solicitor General's Office in Louisiana. And to see that when I started it, it was sort of an Idaho scale. It was me and another guy. And it wasn't clear what my responsibilities were. It wasn't clear that I actually had the authority to take cases from agencies. It was clear that I had no authority to take criminal cases because the state constitution didn't give the attorney general the authority to take criminal cases from DAs, which meant that we had to have a lot of uncomfortable meetings in which a case was going up to SCOTUS, and it's worth x-million dollars and will destroy the office if it's lost. And this guy from the Attorney General's Office is trying to make the argument that they should give up the case to us.

And, so, that leads to my last point is that, yes, these are legal offices. Yes, they're very important in our federal structure, but they're also inescapably political. That's not to say that you go into court and make political arguments, but how you choose cases, what coalition of states you put together, which cases you don't get involved in—those are political

decisions that, as SG, you hope you have some input into, but it's really the call of the attorney general. And I was sitting in my office on more than one occasion when the attorney general waltzed in and threw a stack of papers on my desk—that was back in the day when there were papers—and said, "You're handling this case." And I would look in the newspapers and figure out why I was handling the case later. It doesn't mean there's anything wrong with doing that. It just means that it's politics. There was also the perennial question of what is the relationship between the attorney general and the governor on any given Tuesday? Were they getting along? Did they like each other? In Louisiana, they were separately elected officials, part of the same branch of government. They didn't always like each other. And, so, you were sometimes caught in the middle of all that. So, it's fascinating work. Maybe to bring back our focus on administrative law, Jim, we heard you've argued some very significant cases with respect to administrative law. If you could talk about that and talk about your experience in those cases. I'm not sure which ones you want to talk about.

Jim Campbell: Yeah, I'll talk about the student loan case[8] since that one is the only one that took me all the way up to the Supreme Court. So, it's pretty recent, and most of you may be pretty upset with me about that case. And, so, let's just call it out; let's acknowledge it for what it is. Let's move past it and talk about the case.

I do like to tell people, though, that my wife still had $3,000 or $4,000 worth of loans that would have been forgiven. So, even I was adversely affected by it, but I'm still glad we did it. A couple of things that we've talked about so far, hopefully, I can illustrate through the story of how this case came to be.

So, when it first hit the media in August of 2022 that the President announced this plan to forgive over $400 billion in student loans, we all just started putting our heads together in the Republican community, and we just knew from the get-go, "This doesn't feel right. This doesn't feel like there's legal authority for it." So, we pulled the statute, and the president was invoking something called the Heroes Act. The Heroes Act[9] is a post-September 11th law that was created to allow the Secretary to have the power to waive or modify various provisions. And to allow the Secretary of the Department of Education to waive and modify various provisions in light of a national emergency. The problem for the President is that, weeks after he announced this new program where he was invoking the COVID-19 pandemic, he told the world on 60 Minutes that the COVID-19

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8 Biden v. Nebraska, 600 U.S. 477 (2023).

9 The Higher Education Relief Opportunities for Students (HEROES) Act, 20 U.S.C. § 1098bb(a)(1).

pandemic was over. And, so, the president was trying to play this on both sides. But, anyways, we knew from the outset, we certainly had a strong feeling, that this was an unlawful use of agency authority through the President acting through the Department of Education. But the trick is, does anyone have standing who has an interest? And, so, we started to put our heads together.

We identified a number of theories. There were theories based on tax injuries to the state tax revenues. There were theories based on the state's interest in student loans as assets. So, there were some sets of states that actually held student loans as assets, and the individuals would pay the interest to these states. So, they were actually making money off of holding these student loans. There were other states that invested in something called SLABs, which is an acronym for Student Loan Asset-Backed Securities. So, we had all of these arguments for how the states were adversely impacted. But we had one more, and this other one ended up being the one that the Supreme Court agreed with. And that is, a state agency, an entity that was created and controlled by the state of Missouri, which was one of our co-plaintiffs in the case. That state agency is one of the largest administrators of the federal government student loan program. So, it gets paid based on how many loans it administers; the more loans it administers, the more money it makes. Well, when you implement widespread student loan forgiveness, you're taking the amount of loans that are out there, and you're reducing it. So, you're reducing the amount of money that the state agency is going to make. That was our argument. The federal government's counter to that argument was that the state agency was actually not a part of the state; it was a separately created entity. It had its own ability to sue and be sued. Ultimately, the Supreme Court agreed with us. But the way that the case came about, and just to sort of give you a little bit of a peek behind the curtain, is just a bunch of state attorney general staff members, usually in the SGs' offices, getting on phone calls, analyzing our own laws, figuring out how we're affected, and talking back and forth. And then, once we came up with a number of state interests, then we figured out, "Who's going to take the lead? Where are we going to file this? Who has the strongest interest, who has the bandwidth, the resources to be able to take the lead in this case?" So, we filed the case; we lost at the trial court. The trial court kicked us out and said we didn't have standing. We sought an injunction pending appeal from the Eighth Circuit Court of Appeals, and they gave us that injunction. And, then, the Solicitor General of the United States asked the U.S. Supreme Court to step in. The U.S. Supreme Court agreed to step in and set oral argument for merely two months later. So, we had an expedited briefing schedule. We argued the case in February. We got a ruling in June. But all of it involved knowledge of administrative law.

And, so, I'll just finish with this point just to kind of get a little more into the nuts and bolts of administrative law. So, as I mentioned before, the Administrative Procedures Act ("APA")[10] is the mechanism by which you bring these lawsuits that are challenging federal actions. There are a number of arguments you can make under that statute, but I'll highlight two because I think they illustrate some of the main theories that attorneys raise under that statute. The first is you argue that the agency just exceeded its statutory authority. And that's one of the best arguments you can make because if the agency did exceed its statutory authority, then it can't go back to the drawing board and fix it. If you're right on that, then the agency action is done, and there's really no way around it. The second major theory that often comes up is known as an arbitrary and capricious claim. And that's essentially an argument that what the agency did was just wholly irrational, wholly arbitrary. It failed to consider factors that it should have considered; it considered things that it shouldn't have considered. It ignored reliance interests that people may have had that it should have taken into account. Those are the sorts of arguments that you make under an Administrative Procedures Act arbitrary and capricious challenge.[11] But the point I want to highlight is that, if you succeed only on that claim, then, typically, the agency has the authority to go back to the drawing board to consider the issue anew and then perhaps to do the same thing, so long as it does its homework a little bit better. Again, there are a number of other arguments you can make under the APA, but for the sake of time, I'll stop with those as just a way to illustrate the way that we approach these problems when we see the federal government reaching too far, and the states want to push back.

Hon. Kyle Duncan: Jim, if I could follow up with just a couple of questions, and then we'll go to Theo. When you're involved as a state SG in a case from the very beginning, actually formulating a lawsuit with the legal theories, did you have a hand in drafting the complaint? Were you overseeing that part of the case? Not just the appellate aspect?

Jim Campbell: That's right. So, for that one, at that point, I had a legal fellow working in my office, and he and I drafted the complaint.

Hon. Kyle Duncan: And that was your first SCOTUS argument. I'm sure that people would love to hear: What's it like to argue in SCOTUS?

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[10] 5 U.S.C.A. § 701 *et seq.*

[11] *See* 5 U.S.C. § 706 (establishing the arbitrary or capricious standard of review under the Administrative Procedure Act).

Jim Campbell: It's quite the experience, I will say. One practical thing that I love to tell people: Unless you've been to the court, you don't realize how close you are to the justices. You feel like you could almost reach out, and if the Chief Justice reached out, you could almost touch fingertips. That's how close you feel to the justices. The other point—and I had sat as second chair in two prior cases at the Supreme Court when I worked for Alliance Defending Freedom the first time. But I didn't even realize it until I was in that first seat that you're so close to the lectern. So, your opponent is arguing, and you could actually look at the lectern and see your opponent's notes if you wanted to. I felt like I had to look away. But they're so close to you. If I had simply reached out, I would have had my hand on the side of the solicitor general arguing the case. So, it's just such a close quarter. And I think a lot of people realize that, but it's really fun.

I will say, one of the dynamics that I love about it is that you know these people's jurisprudence in a way that you oftentimes don't know if you're arguing at, say, the Sixth Circuit, and you draw three judges, and maybe you know one of them and a lot of the things they've written, but you're probably not going to know their judicial philosophy the way that you typically understand the Supreme Court. And that makes it a really interesting and fun dynamic. You can go back, and you can read their opinions; one of the developments that I took away from the student loans case is Justice Barrett's concurrence. I think it's a fascinating concurrence. She tries to really explain why textualism is consistent with the major questions doctrine. And I think it's just a fascinating read, and when I was getting ready for the argument, I read her law review article on canons of construction,[12] and I read some of the things that she had written and some of the stuff that she had said. I listened to some of the presentations she had given about the major questions doctrine. And, so, it's just interesting. You prepare for it; you're ready. You try to understand the way that they think about the issues. And then, on the back end, sometimes you get one of these special concurrences where they're focusing on one of the issues that you really paid attention to getting ready. And it's just an interesting dynamic that you don't get in many other settings.

Hon. Kyle Duncan: Theo, what would you add to that?

Theo Wold: I think the one thing that's always understated by people who have argued at the Supreme Court, and I have not, is it's nine people shooting at you. I know, having argued in a couple of three-judge

[12] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

panels in the Ninth Circuit, three people shooting at you is a lot. The Idaho Supreme Court is a five-member court that seemed like a whole army was up there shooting at me. I can't imagine what it's like when you've got the nine with such pronounced philosophies and personalities all wanting to get their chance to grill you.

So, one thing: I wanted to convert some threads that have been raised here. The relationship between the governor and the attorney general. This is a peculiar feature of some states, but not all states. But it is true in Idaho, as you described in Louisiana, it is a dual sovereign. They're both popularly elected, and they are both executives. And then there's this peculiar wrinkle in Idaho. There was an effort by a Democrat attorney general in the early 1990s who believed that the Republican governor's lawyers in the agencies were running in contradiction to his legal philosophy. So, he moved the legislature to consolidate representation. So, the attorney general also must provide, under statute, legal representation to the governor's executive agencies—if you can figure that one out. So, this cropped up now for us in numerous instances in which we have not agreed with the governor's stated legal distillation of a certain issue, whether it's on Endangered Species Act stuff, etc. But, at the same time, the agencies that are in disagreement with us or vice versa, are those that we are obligated to provide legal representation to.

This has become quite the firestorm in Idaho on the side of professional responsibility ethics. It's become a bar issue, and we can speak to that later about law fair vis-a-vis state attorneys general. But this really came home in a case that we did recently on the Waters of the United States, which some of you may be familiar with. WOTUS is sort of a recurring Jean-Claude Van Damme regulatory zombie that crops up every few years. There was a major rulemaking undertaken by the Obama Administration, and then colleagues of mine and I worked on rescinding it in the Trump White House, and then now it's back again under Biden. So, to tie a couple of threads here: We in Idaho had to make the determination as to what active suit we were going to be a party to, and as part of this network, in talking to different state solicitors general throughout the country. We were kind of the new kid on the block, and people were very interested in having our participation as a Western state because, when you think about water issues, it's usually of vital and paramount importance for the Western United States. So, we got various offers from the three suits that were forming. Kentucky had sued on its own.[13] Ohio and West Virginia were leading a group of twenty-four states and intended to file in the district of North Dakota.[14] And then I put in a

[13] Kentucky v. EPA, No. 3:23-cv-00007-GFVT, 2023 WL 2733383 (E.D. Ky. Mar. 31, 2023).

[14] West Virginia v. EPA, 669 F. Supp. 3d 781 (D.N.D. 2023).

call to my friend, the SG of Texas, and asked, "Why didn't you guys join North Dakota?" And their view was, on one part, "We're leaders; we're not followers. We're not going to be in the clown car; we're Texans," on the other part, it was, "We think we've got better district courts here in Texas, and we think we have better district court judges in Texas." And I made the recommendation to the attorney general, "I think we should file with Texas in the southern district of Texas." We decided to do that.[15] We helped form the complaint, and little old Idaho found a number of errors that Texas had made—1/30th the size of Texas. And we, in fact, helped argue Texas out of a brown paper bag in district court when it came to it.

But the interesting wrinkle of this was the next day, it became front-page news in Idaho that these dummies in the state Attorney General's Office decided to go with Texas and not the other group of twenty-four states in North Dakota.[16] And agency heads, who are the directors of the Governor's executive agencies went on the record in the press and said, "This was essentially legal malpractice. These guys are not only incompetent; they disregarded our advice. And the state of Idaho is now going to pay because of their mistake." And that has had a happy ending for us, because the judge that ended up handling this matter in the southern district of Texas has had a number of fairly significant and complex environmental cases. He handled the Keystone pipeline litigation, and he's known as having something of a rocket docket, meaning there's not a lot of delays. There's not a lot of extended timelines; there's not a lot of guff that goes on in the management of the docket. So, we knew we were going to get a fairly expeditious outcome: win, lose, or draw. And we did; we got an injunction for two states, Texas and Idaho, about two and a half months before the other twenty-four states' litigation even started. And, so, of course, as the judge mentioned a moment ago, there is a political valance to this work, and it's not capital P politics. It's not, "You wear the red jersey; we wear the blue jersey." It's an understanding of the political pressure points and how things may be portrayed or misconstrued in the popular press. So, as you can all imagine, the next day, the governor and his executive agency directors all issued a retraction in the papers and apologized for calling us idiots. No, that didn't happen. [Laughter.] But the upshot was this has led to decreasing tension with the governor's office, and that's a big aspect of the work that we do because we do have to work together, and there are many instances where only the governor's authority provides sufficient grounds for standing or only the governor can agree to sign off to allow an executive agency to

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[15] *See* Texas v. EPA, 662 F. Supp. 3d 739 (S.D.T.X. 2023).

[16] *See, e.g.,* Rebecca Boone, *Rift in Idaho GOP Exposed Amid Multistate Water Rule Lawsuit*, ASSOCIATED PRESS (Feb. 24, 2023), https://apnews.com/article/science-politics-idaho-state-government-legal-proceedings-raul-labrador-e0c1780d802c916844c82f807d0cc6a9.

participate. As is the case, a few weeks later, when we needed the state medical officer who reports to the governor it is his appointee, to assist us in building out our own rulemaking process inside of Idaho to buttress against some federal actions on transsexual pediatric surgery. And, so, we had a lot of tension, and then, a week later, we had to go and essentially play nice. And that's an aspect of this job that often isn't in front of the public but occurs behind closed doors.

Hon. Kyle Duncan:: Yeah. When I was the appellate chief in Louisiana, by chance, I didn't litigate any significant administrative law issues. But, since I've been on the Fifth Circuit, the number of administrative law issues that have arisen has really been staggering, even just limiting myself to cases that I have written myself. We had an issue come up in which a federal agency decided that in the Gulf of Mexico—which is extremely important to the commercial, environmental, and recreational lives of so many millions of people in the Fifth Circuit—an agency decided that this would be a great place to have a massive aquaculture experiment which is fish farming. And I don't mean a little cage the size of this table where you raise some whatever trout or whatever they do. I'm not a fisherman. But it's a massive experiment in the Gulf of Mexico that would have, according to the plaintiffs in the lawsuit, altered major ecosystems in the Gulf of Mexico and effectively changed the face of commercial fishing in the Gulf of Mexico. So, there was an unlikely coalition of environmentalists and commercial fisheries that sued[17] and said, "The agency has no authority given to it by Congress to establish this massive aquaculture regime in the Gulf of Mexico." And the Chief Judge of the Eastern District of Louisiana and New Orleans agreed with the challengers, and it came up to the Fifth Circuit. [18] And I was on the panel that considered the issue, and I was not the presiding judge, but the presiding judge kindly assigned the case for me to write, and I wrote a decision concluding that the district court was correct and that Congress never gave any authority to this particular agency to start an aquaculture experiment in the Gulf of Mexico. And it was one of these cases, I think, that showed—I know nothing about aquaculture. I know nothing about fishing. I mean, I know how to bait a hook. But I don't know anything about these things. I don't know whether aquaculture would be good for the Gulf of Mexico. I just don't know anything about these things. And I didn't really even know much about the law. I had heard of the law. It was called the Magnuson-Stevens Act, which has to do with preserving

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[17] Gulf Fishermen's Ass'n v. Nat'l Marine Fisheries Serv., No. 2:16-CV-1271-JTM-KWR, 2018 WL 8787629 (E.D. La. Nov. 2, 2018)

[18] Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454 (5th Cir. 2020).

fisheries. I had heard of that law, but I don't think I'd ever read a single subsection of that law. And, yet, here I was being called on to decide this question. And it was important to me and to my clerks who worked on this case, which is in a sense very simple (Did Congress pass a law saying you can have aquaculture? And, of course, the answer is no.), and yet, it was also very complicated (Because you had to go into every single nook and cranny of this law and to chase down whether, in fact, maybe the authority was hiding in there somewhere.)—but it highlighted a very basic point about administrative law, which you could call it a major question. We didn't decide it on the basis of major questions, which was still a developing doctrine at the time. But it's basically what I think of as the "Did Congress pass a law?" test when an agency wants to do something. It may be the greatest idea in the world. It may save the Gulf of Mexico, for all I know. But a basic proposition of our system of government is accountability. Administrative agencies are not accountable. You don't vote for them. This particular agency—I didn't vote for the head of NOAA or whoever it was. Nobody does. You vote for members of Congress. And if Congress wants there to be an aquaculture regime in the Gulf of Mexico, then Congress can pass a law called Aquaculture Regime in the Gulf of Mexico. But it didn't do that.

And, so, the court, we felt we had no choice but to say the agency had grossly exceeded its authority. Is that Chevron step one or step zero? I forget. It's just no authority. And that was a very interesting exercise for me. I've had plenty of other administrative law cases that are too boring for me to discuss here, involving mostly involving the EPA. And, in some of these cases, I will decide cases that make me a villain in the press and somebody who desires to destroy the earth. And, in others of these cases—I particularly recall a Sierra Club press release hailing me as a champion of the environment. And I'm very proud of that, even though I'm not; I'm just a judge deciding cases and having to make sure the administrative agencies, in that case, the EPA, are actually following the rules. And that's been my experience so far with admin law. I was on the OSHA vaccine panel,[19] and that was a major questions case: Did OSHA—the agency that regulates the angle that you hold your wrists at in order not to get carpal tunnel syndrome—have the authority to mandate COVID vaccines for two-thirds of the private workforce in the United States? That, I will say, because I wrote publicly, did not seem to be a difficult question. The answer is no. But, unlike some of my other cases, SCOTUS was happy to agree with me on that one.[20]

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[19] BST Holdings, L.L.C. v. OSHA, 17 F.4th 604 (5th Cir. 2021).

[20] *See* Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 673 (2022) (per curiam) ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.").

CONGRESSIONAL "ACTIVATION" OF EXECUTIVE AUTHORITY AND THE NONDELEGATION DOCTRINE

TABLE OF CONTENTS

INTRODUCTION

A divided Fifth Circuit panel shocked the legal community when it released its decision in *SEC v. Jarkesy* in 2022.[1] The opinion gutted the SEC's enforcement authority by holding unconstitutional an in-house adjudication before an administrative law judge,[2] which could "dismantle much of the system the federal government uses to enforce longstanding laws."[3] The Fifth Circuit relied on three independent reasons for the unconstitutionality of the proceeding,[4] each of which the

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[1] *See, e.g.*, Brad Kutner, *A Circuit Court's Ruling Was Supposed to Spell Doom for SEC. Months Later Agency Thrives*, N.Y.L.J., Nov. 28, 2022, at 1, https://www.law.com/nationallawjournal/2022/11/22/months-after-5th-circuit-dismantled-sec-administrative-courts-agency-still-thrives/ [https://plus.lexis.com/api/permalink/bfde2d74-3700-4249-80cf-bbc551856cdc/?context=153067].

[2] Jarkesy v. SEC, 34 F.4th 446, 449 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023); *see Fifth Circuit Holds SEC Proceeding Brought in Agency's In-House Court Unconstitutional*, SKADDEN (May 20, 2022), https://www.skadden.com/insights/publications/2022/05/fifth-circuit-finds-sec-proceeding-brought.

[3] Ian Millhiser, *A Wild New Court Decision Would Blow Up Much of the Government's Ability to Operate*, VOX (May 19, 2022, 4:10 PM), https://www.vox.com/2022/5/19/23130569/jarkesy-fifth-circuit-sec.

[4] *Jarkesy*, 34 F.4th at 449 (holding that the in-house proceeding violated the Petitioner's right to a jury trial, Congress failed to provide an intelligible principle making its delegation unconstitutional, and the statutory removal restrictions on the SEC's administrative law judges violated the Take Care Clause).

Supreme Court has since agreed to review.[5] This Note focuses on the court's most stunning reason—that Congress failed to provide the SEC with an "intelligible principle" with which to exercise its discretion, thus violating the nondelegation doctrine.[6] Not invoked to strike down a statute in nearly a century, the Fifth Circuit's application of the doctrine represents a recognition that the Supreme Court may be ready to curb congressional delegations going forward by developing a new nondelegation standard.[7]

The Fifth Circuit's nondelegation holding was wrong—not only under the intelligible principle test but also under the test proposed by Justice Gorsuch in his dissent in *Gundy v. United States*.[8] The history and purpose of the nondelegation doctrine in constitutional law, recent developments at the Supreme Court regarding the doctrine's application, and the potential implications of the Fifth Circuit's holding all support this conclusion.

I conclude by arguing that the SEC's ability to choose between prosecuting a defendant in federal court or initiating an administrative proceeding, as provided by Congress, is an exercise of executive authority "activated" by the Legislative Branch that does not implicate the nondelegation doctrine. Indeed, the SEC's discretion in choosing a forum for enforcement is immune from a nondelegation challenge because prosecutorial discretion is an executive power given near absolute deference by the judiciary.

I. THE NONDELEGATION DOCTRINE

An examination of the nondelegation doctrine's history provides background for the surprising nature of the Fifth Circuit's decision in *Jarkesy*. Discussing the constitutional purpose of the doctrine—and contrasting the broad sweep of the intelligible principle test with the new framework offered by Justice Gorsuch in his dissent in *Gundy v. United States*—offers necessary context for understanding the issues at play.

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[5] *See* Petition for Writ of Certiorari, SEC v. Jarkesy, No. 22-859 (argued Nov. 29, 2023) (granting certiorari on all three questions); SEC v. Jarkesy, 143 S. Ct. 2688, 2688 (2023).

[6] *Jarkesy*, 34 F.4th at 461–62; *see* Robert Stebbins, Abigail Edwards, & Ariel Blask, *The* Jarkesy *Decision and Ramifications for Administrative Proceedings*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 29, 2022), https://corpgov.law.harvard.edu/2022/06/29/the-jarkesy-decision-and-ramifications-for-administrative-proceedings/; Jonathan H. Adler, *The Good, the Bad, and the Ugly of* Jarkesy v. SEC, REASON: THE VOLOKH CONSPIRACY (Aug. 17, 2022, 6:10 PM), https://reason.com/volokh/2022/08/17/the-good-the-bad-and-the-ugly-of-jarkesy-v-sec.

[7] *See* Johnathan Hall, Note, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 178 (2020); Madison Fitzgerald, Note, *A Blast from the Past: Revival of the Nondelegation Doctrine in* Jarkesy v. SEC, 68 VILL. L. REV. TOLLE LEGE 1, 13–14 (2023).

[8] Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting).

A. The Intelligible Principle Test

"The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."[9] Under Article I of the Constitution, "[a]ll legislative Powers" are vested in Congress.[10] Early in American history, the Supreme Court held that this constitutional instruction bars Congress from delegating powers that are "strictly and exclusively legislative" to another branch of the government.[11] This prohibition is consistent with the separation of powers, which provides that the American people cannot "be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them" as legislators.[12] What constitutes an "exclusively" legislative power is subject to vigorous scholarly debate.[13] Justice Gorsuch, in his dissent in *Gundy*, contends that legislative powers include "prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated [and] . . . for the government of society."[14]

But if understood too broadly, the constitutional stricture presented by the nondelegation doctrine would introduce myriad practical problems for a functioning government.[15] Congress *must* delegate certain decisions to the other branches; it simply cannot do everything on its own.[16] To reconcile this reality with the constitutional mandate, the Court has derived a test to determine whether a delegation is constitutional.[17] As the Court has explained, "[i]n determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."[18] For the past century, this has meant that a delegation is permissible where Congress sets out an "intelligible principle" to guide the decision-making of the recipient of the delegation.[19]

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[9] *Id.* at 2121; *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) (distinguishing Congress's restriction on legislative delegation with permitted delegative powers).

[10] U.S. CONST. art. I, § 1.

[11] *Wayman*, 23 U.S. at 42–43.

[12] *Gundy*, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting) (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 141, at 74–75 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690)).

[13] *Compare* David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1252–53 (1985) (arguing for a broad definition of which legislative powers may not be delegated by Congress), *with* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324–29 (1987) (discussing why a broad prohibition on delegating legislative power is unworkable).

[14] *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (first quoting THE FEDERALIST NO. 78, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961); and then quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)).

[15] *See, e.g.*, *id.* at 2123.

[16] *See* Mistretta v. United States, 488 U.S. 361, 371–72 (1989); Yakus v. United States, 321 U.S. 414, 425–26 (1944) (stating that Congress has the discretion to implement less restrictive standards when delegating authority).

[17] *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406–09 (1928).

[18] *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton*, 276 U.S. at 406) (alteration in the original).

[19] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); *Mistretta*, 488 U.S. at 372 (permitting Congress to delegate power as long as the acting person or body conforms to an intelligible principle); *J.W. Hampton*, 276 U.S. at 409.

The nondelegation doctrine applies to legislative power delegated to any other branch,[20] but *Jarkesy* and this Note focus on delegations in the context of the Executive Branch. When questioning the authority of an executive agency, any challenge to a statute's constitutionality on nondelegation grounds proceeds by determining (1) whether Congress "has delegated legislative power to [an] agency" and, if yes, (2) whether Congress has provided an "intelligible principle" to guide the exercise of the delegated authority.[21] According to the Court, this test makes sense because it ensures fidelity to the Constitution but allows Congress to rely on the expertise of the other two branches.[22]

In practice, the evidence required to clear the intelligible principle bar is low,[23] frustrating those who believe that the Constitution necessitates a more rigorous application of the nondelegation doctrine.[24] When applying the nondelegation doctrine to statutes authorizing executive action, the Supreme Court has rarely found that Congress failed to provide an agency with an intelligible principle.[25] In fact, the Court has done so only twice, each nearly a century ago.[26] While the Court has declined to strike down any statutes as unconstitutional delegations of legislative power since 1935,[27] it did so twice that year in *Panama Refining Co. v. Ryan*[28] and *A.L.A. Schechter Poultry Corp. v. United States*.[29]

In *Panama Refining*, an oil company contended that the National Industrial Recovery Act ("NIRA") unconstitutionally delegated power to the President by allowing him to seize petroleum in interstate commerce.[30] The Court agreed; it determined that Congress had provided no standards to guide the regulations governing how much oil could be seized.[31] The relevant portion of the statute, according to the Court, "establishes no criterion to govern the President's course . . . . giv[ing] to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."[32] This violated the nondelegation doctrine because no "limitations upon the power of the Congress to delegate its law-making function" would remain should the statute survive.[33]

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[20] *See Gundy*, 139 S. Ct. at 2123.

[21] *See Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton*, 276 U.S. at 409).

[22] *See Mistretta*, 488 U.S. at 371–72.

[23] Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 85 (2015) (Thomas, J., concurring in judgment).

[24] *See, e.g.*, *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting) (referring to the intelligible principle test as a "misadventure").

[25] Jarkesy v. SEC, 34 F.4th 446, 462 (5th Cir. 2022) (citing *Whitman*, 531 U.S. at 474–75); *Whitman*, 531 U.S. at 489–90.

[26] *See Whitman*, 531 U.S. at 474 (citing *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

[27] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318–19 & n.19 (2000); Erin Webb & Eleanor Tyler, *ANALYSIS: Justice Mull Sawing Off Executive Branch This Term*, BLOOMBERG L. (Oct. 3, 2023, 5:00 AM), https://news.bloomberglaw.com/us-law-week/analysis-justices-mull-sawing-off-executive-branch-this-term?.

[28] 293 U.S. at 433.

[29] 295 U.S. at 551.

[30] *Panama Refin. Co.*, 293 U.S. at 405–06, 410–11.

[31] *Id.* at 415, 430–32.

[32] *Id.* at 415.

[33] *Id.* at 430.

The dispute in *Schechter Poultry* hinged on whether Congress could delegate authority under NIRA to the President to give codes created by an industry body the power of law.[34] The statute allowed the President to promulgate "codes of fair competition" submitted by private trade groups (along with his additions or changes), violation of which constituted a crime.[35] But, according to the Court, NIRA "supplies no standards for any trade, industry, or activity . . . . aside from the statement of the general aims of rehabilitation, correction, and expansion . . . ."[36] Allowing the codes to become penal statutes through presidential decree was unconstitutional because NIRA gave the President plenary authority "to make whatever laws he thinks" are necessary.[37] For the Court, this lack of guidance could not clear the intelligible principle hurdle, thus making the statute an unconstitutional delegation of legislative power to the President.[38]

B. The Future of the Nondelegation Doctrine: The Gorsuch Test[39]

The intelligible principle test is not without its detractors.[40] While a nascent conservative majority on the Court has indicated that it is willing, if not eager, to reconsider the intelligible principle test, it has so far declined to do so.[41] Chief Justice Roberts and Justice Thomas joined Justice Gorsuch in his dissent in *Gundy*, deriding the intelligible principle test as having "no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[42] Justice Alito has signaled that he, too, is willing to reconsider the "extraordinarily capacious standard[]" of the intelligible principle test.[43] And Justice Kavanaugh has written approvingly of Justice Gorsuch's dissent in *Gundy*.[44] Indeed, the Court may very well announce an update to the test when it issues its decision in *Jarkesy* this term.[45]

In his dissent in *Gundy*, Justice Gorsuch sketched a framework for resolving nondelegation disputes to supplant the intelligible principle test.[46] Whether this test would change the outcomes in most nondelegation cases is an open question.[47] Still, it does provide a helpful analytical paradigm through which to view the facts presented

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[34] *Schechter Poultry*, 295 U.S. at 530.

[35] *Id.* at 530; *see id.* at 521–23.

[36] *Id.* at 541.

[37] *Id.* at 537–38.

[38] *See id.* at 541–42.

[39] *See* Hall, *supra* note 7, at 177 n.13 (providing a pithy name for the nondelegation test Justice Gorsuch presents in *Gundy*).

[40] *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 328–31 (2002).

[41] *See* Hall, *supra* note 7, at 178–79.

[42] Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

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

[44] Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., concurring in the denial of certiorari).

[45] SEC v. Jarkesy, 143 S. Ct. 2688, 2688 (2023) (granting petition for writ of certiorari); *see* Jeremiah Williams & Rory Skowron, *SEC In-House Judge Case Has Major Implications for Federal Courts*, BLOOMBERG L. (Dec. 6, 2023, 4:30 AM), https://news.bloomberglaw.com/us-law-week/sec-in-house-judge-case-has-major-implications-for-federal-courts.

[46] *Gundy*, 139 S. Ct. at 2135–37 (Gorsuch, J., dissenting).

[47] *See* Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 441, 485 (2022).

by *Jarkesy*. Justice Gorsuch proposes replacing current nondelegation jurisprudence with three categories of permissible delegations: (1) Congress may, after making a policy decision, give another branch authority to "fill up the details"; (2) Congress may allow fact-finding by the Executive Branch to trigger the application of a rule; and (3) "Congress may assign the executive and judicial branches certain non-legislative responsibilities."[48] According to Justice Gorsuch, there is not a nondelegation problem where "the discretion is to be exercised over matters already within the scope of executive power."[49] This may be because limitations on delegation are not as necessary in instances where "the entity exercising the delegated authority itself possesses independent authority over the subject matter."[50] But without five votes, Justice Gorsuch's test remains only a prospective approach to nondelegation problems, which makes the Fifth Circuit's holding in *Jarkesy* all the more curious.

II. THE FIFTH CIRCUIT DECISION IN *SEC V. JARKESY*

The implications of the Fifth Circuit's reasoning in *Jarkesy* are far-reaching. Should the Supreme Court adopt the Circuit's analysis when overhauling the intelligible principle test, other areas of the law could become unsettled.

A. The Fifth Circuit Held that the SEC's Proceeding Violated the Nondelegation Doctrine

Jarkesy involves a hedge fund manager the SEC found liable for securities fraud in a proceeding before an administrative law judge ("ALJ").[51] The hedge fund manager then brought an action against the SEC, challenging the constitutionality of the proceeding.[52] One of the issues presented by the case is whether it is constitutionally permissible, under the nondelegation doctrine, for Congress to give the SEC absolute discretion to choose between bringing an enforcement action through prosecution in federal court or before an ALJ in an in-house agency proceeding.[53] In a divided decision, the Fifth Circuit held that it is not.[54]

At first glance, the Fifth Circuit's decision appears to be a relatively straightforward application of the nondelegation doctrine. Passed in 2010, the Dodd-Frank Act gave the SEC the ability to choose whether to prosecute a defendant in federal court or to initiate an administrative proceeding, and the relevant statutes do not provide any guidance for the SEC in deciding between the two options.[55] The court

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[48] *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting).

[49] *Id.* at 2137 (quoting Schoenbrod, *supra* note 13, at 1260).

[50] United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936)).

[51] Jarkesy v. SEC, 34 F.4th 446, 449–50 (5th Cir. 2022).

[52] *Id.*

[53] *See id.* at 459.

[54] *See id.* at 459, 466.

[55] *Id.* at 461–62; 12 U.S.C. § 5391(f)(1)(D); *see also* Stebbins, *supra* note 6 (explaining how the Dodd-Frank Act expanded the SEC's authority by permitting it to use its discretion when determining whether to bring securities fraud actions in Article III courts or administrative proceedings).

first concludes that the "exclusive authority and absolute discretion" extended to the SEC by Congress is a delegation of legislative power.[56] And because "[a]ll legislative Powers" are vested in Congress by the Constitution,[57] the court then turns to the second step of the intelligible principle test.

The Fifth Circuit draws from the lessons in *Panama Refining* and *Schechter Poultry*, reasoning that "[i]f the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution."[58] Like in *Panama Refining*, where "Congress has declared no policy, has established no standard, [and] has laid down no rule,"[59] the court reasons that such a vast grant of discretion to the SEC—absolute discretion—"fail[s] to provide an intelligible principle by which the SEC would exercise the delegated power,"[60] thus violating the nondelegation doctrine.

If it were not for nearly a century of precedent that cuts against the majority's position,[61] it would be persuasive, as there *appears* to be a lack of guidance for the SEC about how to choose which enforcement action to take. But the Supreme Court has also emphasized that it "almost never fe[els] qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[62] The Court has found intelligible principles in statutes where the only policy Congress has specified is that the Executive Branch make decisions that are "fair and equitable"[63] or "in the public interest."[64] And, when one considers that the Fifth Circuit's extraordinary application of the nondelegation doctrine in *Jarkesy* is not an aberration,[65] it is reasonable to worry that "the absence of judicially manageable and defensible criteria to distinguish permissible from impermissible delegations"[66] could open the door to judges injecting their own policy preferences into nondelegation cases inconsistently.[67] Indeed, Jarkesy seems to admit as much by spending only six pages of his seventy-three-page Supreme Court brief defending the Circuit's nondelegation holding.[68]

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[56] *Jarkesy*, 34 F.4th at 462.

[57] U.S. CONST. art. I, § 1.

[58] *Jarkesy*, 34 F.4th at 462.

[59] *See* Panama Refin. Co. v. Ryan, 293 U.S. 388, 430 (1935).

[60] *Jarkesy*, 34 F.4th at 449.

[61] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001) (tracing the history of the Court's nondelegation jurisprudence).

[62] *Id.* at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[63] *Id.* at 474 (quoting Yakus v. United States, 321 U.S. 414, 420 (1944)).

[64] *Id.* (citing Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943)).

[65] *See* Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 53 F.4th 869, 872 (5th Cir. 2022) (striking down a statute for delegating federal power to private entities).

[66] Stewart, *supra* note 13, at 324.

[67] *Id.* at 325–26.

[68] *See* Brief for Respondents at 47–52, SEC v. Jarkesy, 143 S. Ct. 2688 (certiorari granted June 30, 2023) (No. 22-859).

B. The Fifth Circuit's Holding that the Facts Presented in Jarkesy Are Not Analogous to Prosecutorial Discretion Is Suspect

The *Jarkesy* majority and dissent disagreed on a deciding factor in the case: whether the facts presented by *Jarkesy* were analogous to prosecutorial discretion. This is an important distinction because the nondelegation doctrine prohibits the delegation to the Executive Branch of *legislative*—but not executive—power,[69] and prosecutorial discretion is generally considered an executive power.[70] In attempting to show a connection between the facts in *Jarkesy* and prosecutorial discretion, the dissent notes that *Jarkesy* is not the first case where Congress has given the Executive Branch the ability to choose between two routes of prosecution with absolute discretion.[71] Then, pointing to *Heckler v. Chaney*, the dissent argues that the Supreme Court has analogized prosecutorial discretion and agency enforcement actions.[72]

This disagreement helps explain why the majority briefly attempts to shut down any comparison between the facts in *Jarkesy* and prosecutorial discretion, as the majority recognizes that "prosecutorial discretion [is] an executive, not legislative, power."[73] Had it identified *Jarkesy* as a case of prosecutorial discretion, then the outcome may have been different; as the SEC argued below, "[t]hese kinds of enforcement decisions have 'long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to take Care that the Laws be faithfully executed.'"[74]

The court also tries to preempt any claim that *Jarkesy* is analogous to prosecutorial discretion by affirmatively claiming that the SEC improperly exercised legislative power.[75] It relies on *INS v. Chadha* to define legislative power as any government action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch."[76] The majority then contends that allowing the SEC to choose between two modes of enforcement—as opposed to whether to enforce at all—is sufficiently different from prosecutorial discretion because Congress "gave the SEC the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not."[77] But as the *Jarkesy* dissent notes, this reading of Supreme Court precedent is not persuasive.[78]

The facts and the constitutional issues in *Chadha* do not remotely resemble those in *Jarkesy*. The Supreme Court in *Chadha* held that an action by a single House of

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[69] Jarkesy v. SEC, 34 F.4th 446, 460–61, 461 n.14 (5th Cir. 2022); *Whitman*, 531 U.S. at 489–90.

[70] United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .").

[71] *Jarkesy*, 34 F.4th at 473–75 (Davis, J., dissenting).

[72] *Id.* at 474 & n.65 (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985)).

[73] *Id.* at 461–62 (majority opinion).

[74] Brief for Respondent at 51, *Jarkesy*, 34 F.4th 446 (5th Cir. 2022) (No. 20-61007) (internal quotation marks omitted) (quoting *Heckler*, 470 U.S. at 832 (1985)).

[75] *Jarkesy*, 34 F.4th at 461–62.

[76] *Id.* at 461 (quoting INS v. Chadha, 462 U.S. 919, 952 (1983)) (alteration in original).

[77] *Id.* at 461–62 (emphasis omitted).

[78] *See id.* at 474–75 (Davis, J., dissenting).

Congress is not constitutional unless it falls "within any of the express constitutional exceptions authorizing one House to act alone."[79] This led the Court to hold a statute that enabled a single house of Congress to veto an executive action unconstitutional because such an exception to bicameral passage and presentment to the President does not appear in the Constitution.[80] In contrast, the central question in *Jarkesy* is whether Congress unconstitutionally delegated legislative power to the Executive Branch in violation of the nondelegation doctrine.

In addition, the definition of legislative power given by the Court in *Chadha*, which the *Jarkesy* majority relies on, has nothing to do with delegation.[81] While the single-justice dissent in *Chadha* briefly discussed nondelegation principles, it did so in a context that does not resemble the one in *Jarkesy*.[82] For the Court's definition of legislative power from *Chadha* to control in *Jarkesy*, it must be "interpreted broadly and out of context"[83] in such a way as to "swallow core executive and judicial functions."[84]

C. Potential Implications of Jarkesy

Several potential implications of *Jarkesy* should also be considered in evaluating the Fifth Circuit's reasoning in support of the decision. If the Constitution prohibits the Executive Branch from having absolute discretion to choose between two valid enforcement actions, then other significant discretionary acts conducted by the Executive could also be on the chopping block, including foundational elements of the nation's criminal justice system. These include the discretion given to prosecutors in forum selection and whether to charge an individual with a crime in the first place. In addition, the authority of the Executive to engage in certain immigration enforcement activities could also be implicated.[85]

Under the Fifth Circuit's reasoning in *Jarkesy*, a prosecutor's discretion to select a forum in which to bring criminal charges could be considered an unconstitutional delegation of legislative power.[86] But Congress has given the Executive absolute discretion to choose where to bring criminal charges for a crime that occurs across multiple districts.[87] "[A]ny offense against the United States . . . committed in more than one district, may be inquired of and prosecuted in *any* district in which such

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79 *Chadha*, 462 U.S. at 955–57.

80 *Id.* at 955–58.

81 *See Jarkesy*, 34 F.4th at 474–75 (Davis, J., dissenting).

82 *Compare Chadha*, 462 U.S. at 985–87 (White, J., dissenting) (arguing that Congress should be permitted to reserve a check on delegated legislative authority if the original delegation of lawmaking power is constitutional), *with Jarkesy*, 34 F.4th at 474–75 (Davis, J., dissenting) ("*Chadha*, one of the primary authorities the majority relies on, does not touch on any issue involved in this case.").

83 *See Jarkesy*, 34 F.4th at 475 (Davis, J., dissenting).

84 Brief for the Petitioner at 42, SEC v. Jarkesy, 143 S. Ct. 2688 (cert. granted June 30, 2023) (No. 22-859).

85 Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 535 (2023).

86 *See Jarkesy*, 34 F.4th at 461–62.

87 *See* 18 U.S.C. § 3237(a).

offense was begun, continued, or completed."[88] This general forum selection statute allows prosecutors to bring charges "in *any* district" where the crime occurred but provides no guidance to the Executive Branch about how to choose between districts.[89] This forum selection discretion appears to run afoul of the Fifth Circuit's reasoning in *Jarkesy* because at least *some* guidance is necessary.

Whether a prosecutor decides to bring charges against a defendant and which charges she decides to bring are also discretionary acts that could conflict with *Jarkesy*. Currently, prosecutors enjoy near limitless discretion to choose "whether or not to prosecute, and what charge to file or bring before a grand jury."[90] In addition, the Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either [statute]."[91] But such broad discretion to choose between two courses of action—to prosecute or not, as well as to charge under one statute or another—could conflict with the prohibition against absolute discretion proclaimed by *Jarkesy* because there is no guidance from Congress regarding how to decide whether to charge or how to choose between two different statutes.

Finally, immigration law is another realm in which *Jarkesy's* reasoning could apply.[92] The Immigration and Nationality Act (INA) allows the Attorney General to waive the deportation of certain aliens.[93] The Supreme Court has held that the language of the statute "imposes no limitations on the factors that the Attorney General . . . may consider in determining who, among the class of eligible aliens, should be granted relief."[94] Again, the absolute discretion provided to the Executive Branch under the INA may present a nondelegation problem under the Fifth Circuit's reasoning in *Jarkesy* because a complete lack of limitations on the Attorney General's discretion is similar to the SEC's discretion to choose between two different enforcement forums.

III. CONGRESSIONAL "ACTIVATION" OF EXECUTIVE AUTHORITY, THE GORSUCH TEST, AND WHERE THE FIFTH CIRCUIT WENT WRONG

I now offer a new framework for understanding why Congress providing the SEC with the authority to choose how to conduct an enforcement action does not implicate the nondelegation doctrine. There exists a thread of cases where the Supreme Court has held that the Executive Branch holds inherent powers that run concurrent to congressional authority. I propose that, in a subset of these cases, congressional action "activates" executive authority.[95] Through this analytical framework, I attempt to show why *Jarkesy* came out the wrong way.

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88 *Id.* (emphasis added).

89 *See id.* (emphasis added).

90 Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

91 United States v. Batchelder, 442 U.S. 114, 123–24 (1979).

92 Shah, *supra* note 85, at 535.

93 8 U.S.C. § 1227(a)(1)(H).

94 *See* INS v. Yueh-Shaio Yang, 519 U.S. 26, 29–30 (1996).

95 *See* discussion *infra* Part III.B.

A. The Constitution Provides the Executive Branch with Limited Inherent Executive Authority

Where does the Executive Branch possess authority independent from Congress—in other words, which powers are *inherent* to the Executive? The Constitution does not answer this question definitively,[96] and the Supreme Court has resolved cases involving inherent executive power inconsistently.[97] In international relations, the Court has held that the President receives his power not from Congress but from the "plenary and exclusive" power inherent in the Executive—regulated only by the Constitution.[98] This sweeping authority allows the President to establish executive agreements with foreign nations and freeze their assets without congressional authorization, despite the Constitution's apparent silence on such matters.[99] However, the Executive Branch possesses inherent authority only in limited circumstances.[100]

B. Congress May "Activate" Certain Executive Branch Powers that Add to the Executive Branch's Inherent Authority

But what about areas where Congress and the Executive Branch share authority? While it may appear that the separation of powers doctrine forecloses such a result, this sharing of power is not a novel idea.[101] The separation of powers "d[oes] not mean that [the three branches] ought to have no partial agency in, or no controul over the acts of each other."[102] The Supreme Court has repeatedly held that there are areas in which Congress and the Executive Branch share authority under the Constitution.[103] In *Panama Refining*, the Court discussed how the President's authority to "lay and revoke embargoes" granted to him via statute by Congress is "cognate" to his inherent power in international relations.[104] In his persuasive concurrence[105] in *Youngstown Sheet & Tube Co. v. Sawyer,* Justice Jackson wrote that "there is a zone of twilight in which [the President] and Congress may have concurrent authority."[106] In some cases, this "concurrent authority" has allowed the Court to sidestep the issue of whether the

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[96] Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 867–69 (1983).

[97] *Id.* at 864–65.

[98] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

[99] Chemerinsky, *supra* note 96, at 876–77.

[100] *See id.* at 872–76 (collecting Supreme Court cases which limited the scope of inherent presidential powers).

[101] *See* Loving v. United States, 517 U.S. 748, 756–59 (1996).

[102] *Id.* at 757 (quoting Mistretta v. United States, 488 U.S. 361, 380–81 (1989)).

[103] *See e.g.*, *id.* at 758–59.

[104] 293 U.S. 388, 421–22 (1935); *see also* Alexander Volokh, *Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law*, 66 EMORY L.J. 1391, 1398–99 (2017) (explaining how the Court distinguished the issue in *Panama Refining Co.* from its previous holdings).

[105] Chemerinsky, *supra* note 96, at 869 ("Virtually every case dealing with the President's authority begins by reciting Justice Jackson's analysis of Presidential power in *Youngstown Sheet and Tube Co. v. Sawyer*.").

[106] 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Executive Branch would have the authority to act on its own in favor of recognizing that the Executive Branch's "authority is at its maximum" when acting "pursuant to . . . authorization of Congress."[107]

I propose referring to some such cases as ones where Congress "activates" executive power. *Loving v. United States* provides a persuasive illustration of this idea. In *Loving*, the Court explicitly confronted the idea of Congress and the Executive Branch sharing authority.[108] The Court considered whether the President could "prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder."[109] The plaintiff argued that allowing the President to do so would violate the nondelegation doctrine because Congress did not provide an intelligible principle for the President to observe in his decision-making.[110]

However, instead of determining whether Congress provided the President with an intelligible principle, the Court rejected the plaintiff's premise entirely by holding the governing question was "whether any such guidance was needed" at all.[111] The Court explained that when Congress delegates a power that "is interlinked with duties already assigned to the President" by the Constitution, then "the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'"[112] Put differently, the intelligible principle test falls away because the President has "undoubted competency" to act in areas where he has some independent constitutional authority in addition to the authority granted by Congress.[113] While the Court refrains from inquiring into the exact scope of that executive authority, Congress's "activation" of the power necessarily weighs in the analysis.

Other cases in areas such as foreign affairs, immigration, and prosecutorial discretion can also be explained by the mechanism of congressional activation of executive power. In *United States v. Curtiss-Wright*, which dealt with the President's authority to issue embargoes on foreign nations, the Court held that congressional authorization, in addition to the President's inherent authority to engage in foreign affairs, eliminated any question about whether the nondelegation doctrine was implicated.[114] While the Court did not state explicitly whether the President could issue an embargo on his own,[115] one scholar has argued that "it was close enough that congressional authorization pushed it over the edge."[116] The Executive Branch's authority over immigration also implicates the idea of congressional activation of executive authority. The Court has held that the ability to exclude aliens is "inherent

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[107] *Id.* at 635 & n.2, 637.

[108] *See* 517 U.S. at 759–61.

[109] *Id.* at 751.

[110] *Id.* at 759.

[111] *Id.* at 772.

[112] *Id.* at 772–73 (quoting United States v. Mazurie, 419 U.S. 544, 556–57 (1975)).

[113] *Id.*

[114] *See* 299 U.S. 304, 319–20, 322 (1936).

[115] *See id.* at 319–20.

[116] Volokh, *supra* note 104, at 1399–400.

in the executive power" as "a fundamental act of sovereignty."[117] Crucially, though, Congress activates this executive authority because it "implement[s] an inherent executive power" when it "prescribes a procedure concerning the admissibility of aliens."[118]

C. Congress Activated the SEC's Authority to Choose Between Two Valid Methods of Enforcement

Under the theory of congressional activation of executive authority, the Fifth Circuit made a mistake when it applied the nondelegation doctrine in *Jarkesy* because there is no meaningful distinction between prosecutorial discretion and the facts presented in *Jarkesy*.

Prosecutorial discretion offers an instructive view into congressional activation of executive authority. After Congress decides which acts constitute crimes, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."[119] In the *Confiscation Cases*, the Court held that "[p]ublic prosecutions . . . are within the exclusive direction of the district attorney."[120] In addition to the decision to prosecute in the first place, "what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion."[121] This state of affairs strongly suggests that the Executive Branch possesses the authority to prosecute crimes, but this authority requires Congress to "activate" it by determining what constitutes a crime. And once Congress sets out the crime and the punishment, it has met its constitutional burden—no intelligible principle required.

The Supreme Court's holding in *United States v. Batchelder* bolsters the idea that prosecutorial discretion is an executive power. In *Batchelder*, the Court held that prosecutorial discretion did not violate the nondelegation doctrine.[122] The Court considered the case of an individual who committed an act criminalized by two different provisions of a statute, each with a different scheme of penalties attached.[123] Two separate provisions "prohibit[ed] convicted felons from receiving firearms, but each authorize[d] different maximum penalties,"[124] and the prosecutor had the authority to choose under which statute to charge the defendant.[125] However, the statutes operated independently of each other; they provided no instruction to a prosecutor on how to choose between them.

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[117] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[118] *See id.* at 542–43 ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.").

[119] United States v. Nixon, 418 U.S. 683, 693 (1974).

[120] 74 U.S. (7 Wall.) 454, 457 (1869).

[121] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[122] 442 U.S. 114, 124–26 (1979).

[123] *Id.* at 115–17.

[124] *Id.* at 115–16.

[125] *Id.* at 123–26.

The Supreme Court explicitly rejected the Seventh Circuit's assertion that such a scheme may present a nondelegation problem.[126] "Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available . . . Congress has fulfilled its duty" because "[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose."[127] Put differently, there was no need for Congress to provide an intelligible principle to guide how prosecutors should exercise their discretion when choosing between two different statutes because that is an exercise of executive authority.[128]

This discretion to choose is similar to the discretion in *Jarkesy*. The statutes at issue in *Jarkesy* allow the Executive Branch to choose between two different modes of enforcement, which determines the outer bounds of how the SEC may implement its executive power to enforce the laws like the fixed "range of penalties" in *Batchelder*.[129] The Court in *Batchelder* clearly upheld the discretion of a prosecutor to choose between bringing charges under one statute or another, and it is difficult to discern how the decision to initiate an administrative proceeding or to charge in federal court is a sufficiently meaningful distinction to warrant the result that the majority arrived at in *Jarkesy*.[130] And if that is the case, then, like in *Batchelder*, choosing to bring an enforcement action in federal court or an administrative proceeding must be an executive, not a legislative, power. For this reason, congressional activation of the SEC's authority to choose an enforcement forum does not implicate the nondelegation doctrine.

D. The Fifth Circuit's Analysis Also Fails the Gorsuch Test

Had Justice Gorsuch's test been operative when the Fifth Circuit considered *Jarkesy*, it may have given the court more pause in finding a nondelegation problem. First, the intelligible principle test can be thrown out of the analysis, as Justice Gorsuch's framework would replace it.[131] Therefore, whether a grant of absolute discretion is constitutionally problematic for lack of guidance to the SEC is irrelevant. However, the question remains whether the discretion granted to the SEC to choose between prosecuting a defendant in federal court or initiating administrative proceedings is a legislative or executive power.

Beyond providing a single example, Justice Gorsuch does not outline what constitutes a "non-legislative responsibilit[y]" that may be delegated to the Executive Branch.[132] However, he acknowledges that "Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch."[133] This

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[126] *Id.* at 125–26.

[127] *Id.* at 126.

[128] *See id.* at 125–26.

[129] Jarkesy v. SEC, 34 F.4th 446, 474 (5th Cir. 2022) (Davis, J., dissenting) (quoting *Batchelder*, 442 U.S. at 126).

[130] *See id.*

[131] *See* Gundy v. United States, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting).

[132] *Id.* at 2137.

[133] *Id.*

is consistent with the idea that Congress may activate executive authority in certain cases. For the reasons laid out in Part III.C.,[134] because Congress gave the SEC a choice between initiating administrative proceedings or prosecuting in federal court, exercising that power is analogous to the discretion wielded by a prosecutor, which is executive, not legislative, in nature.[135]

CONCLUSION

This Note offers a critique of the Fifth Circuit's decision in *Jarkesy* by proposing a new framework for understanding why the Constitution does not forbid Congress from giving the SEC the choice of how to prosecute violations of the law. Congressional activation of executive authority comports with Supreme Court precedent surrounding areas where the Executive Branch and Congress share power. Should the Fifth Circuit's nondelegation holding in *Jarkesy* withstand the Supreme Court's scrutiny, it threatens to unleash drastic changes to the Executive Branch's authority to prosecute crimes and conduct basic executive functions, which is all the more reason for the judiciary to exercise restraint.

Andrew J. Yablonsky[*]

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[134] *See supra* Part III.C.

[135] Brief for Respondent, *supra* note 74, at 51–53.

[*] Georgetown University Law Center, J.D. 2024; Columbia University, B.A. 2020; Jewish Theological Seminary of America, B.A. 2020. Thank you to Irv Gornstein and Judge Nina Pillard for teaching me how to think about the law, as well as for their comments at each step of the drafting process. I also have significant gratitude for the editorial staff at the Regent University Law Review for their work in editing this Note for publication.

GAMBLING ON ANOTHER'S DIME: HOW ESG INVESTING VIOLATES THE FIDUCIARY DUTY

TABLE OF CONTENTS

INTRODUCTION

In March of 2023, Silicon Valley Bank crumbled in the largest bank collapse since the 2008 recession.[1] As the financial sector grappled with the fallout, many questioned the bank's strategy of prioritizing Environmental, Social, and Governance (ESG) indexing in investment selection.[2] Concerns about investment schemes that prioritize other considerations over profit are not new. Common law principles have protected investors' funds in Western economies for centuries.

Everything in our world involves economics. Whether it is our careers, our politics, our news and entertainment, or even our opportunities for leisure, every area of our lives is impacted by our economic system. As Adam Smith described it, economics is the invisible hand that guides our way of life.[3]

One key economic principle that has long guided this invisible hand is the binding fiduciary duty a person or entity has when holding money in trust.[4] The nature of the fiduciary duty requires publicly traded corporations to manage their investments in a way that a "prudent investor" would.[5] This duty means that fiduciaries must act in the sole interest of their beneficiaries by prioritizing the financial reward of their

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[1] Kat Stafford & Claire Savage, *Silicon Valley Bank Collapse Concerns Founders of Color*, AP NEWS (Mar. 27, 2023, 5:22 PM), https://apnews.com/article/silicon-valley-bank-race-immigrants-98bc1692beddfa69d862b7e3cfe547e4.

[2] *See, e.g.*, Sam Sutton, *Silicon Valley Bank Gets a Spin on the Anti-ESG Turntable*, POLITICO (Mar. 15, 2023, 11:30 AM), https://www.politico.com/news/2023/03/15/silicon-valley-bank-gets-a-spin-on-the-antic-esg-turntable-00087169 (discussing concerns expressed by Republican leaders that ESG investing caused the collapse of the bank and noting Florida Governor Ron DeSantis's role in "leading the national conversation on the dangers of putting a political agenda before a fiduciary duty"). Interestingly enough, two of the main owners of Silicon Valley Bank were The Vanguard Group, Inc. and BlackRock Fund Advisors—two investment firms which historically have been the major proponents of ESG investing. Erin Gobler, *What Happened to Silicon Valley Bank?*, INVESTOPEDIA, https://www.investopedia.com/what-happened-to-silicon-valley-bank-7368676 (Feb. 27, 2024) (listing The Vanguard Group, Inc. and BlackRock Fund Advisors as primary investors in Silicon Valley Bank); Dan Morenoff, *Break Up the ESG Investing Giants*, WALL ST. J. (Aug. 31, 2022, 3:10 PM), https://www.wsj.com/articles/break-up-the-esg-investing-giants-state-street-blackrock-vanguard-voting-ownership-big-three-competitor-antitrust-11661961693 (noting that Vanguard and BlackRock are two of three major investment funds that focus on ESG).

[3] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477 (Univ. of Chicago Press 1976) (Edwin Cannan ed., Univ. of Chicago Press 1976) (1776).

[4] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. L. INST. 2007) (defining the fiduciary duty and the requirements it places upon corporations).

[5] *Id.*; *see also* UNIF. PRUDENT INV. ACT § 1 (UNIF. L. COMM'N 1994).

investments.[6] This common law rule traditionally serves as the default rule out of which fiduciaries may contract with the consent of all parties.[7] However, in some contexts, such as the Employment Retirement Income Security Act (ERISA), the prudent investor rule is a mandatory requirement of the fiduciary relationship out of which fiduciaries may not contract.[8]

Examples of this fiduciary duty abound in modern economics. In the context of corporations, the board of directors is generally considered to have a duty to make investment choices that maximize shareholder wealth.[9] Other contexts in which a fiduciary relationship frequently arises include investment portfolios or retirement funds, such as those regulated by ERISA.[10]

For years, the notion of a publicly traded corporation managing its shareholders' resources in their best financial interest went unquestioned. It was only flagrantly broken by the most unethical and careless corporations. Similarly, only the most negligent investment firms would take the hard-earned income of their investors and place it in funds that would not provide maximum benefit. Today, however, this basic principle is commonly ignored and, too often, flagrantly violated by mainstream corporations gambling with their shareholders' investments.[11] Of course,

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[6] Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020).

[7] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. i (explaining that "[t]he terms or circumstances of a trust, of course, may eliminate or modify the duty to make trust investments productive" and that consent can prevent a breach of duty); Leslie Joyner Bobo, Comment, *Nontraditional Investments of Fiduciaries: Re-examining the Prudent Investor Rule*, 33 EMORY L.J. 1067, 1069–70 (1984) (explaining the common-law development of the prudent investor rule); Joseph K. Leahy, *An LLC Is the Key: The False Dichotomy Between Inadvertent Partnerships and the Freedom of Contract*, 52 TEX. TECH L. REV. 243, 252–53 (2020) (exploring the contractual modification of fiduciary duties under partnership law in different jurisdictions).

[8] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1104(a)(1)(B), 1110(a) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .").

[9] *See* Martin Edwards, *Shareholder Wealth Maximization: A Schelling Point*, 94 ST. JOHN'S L. REV. 671, 674 (2020) (noting that "[s]hareholder wealth maximization is the norm within corporate law and governance").

[10] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1102.

[11] *See* Akio Otsuka, *ESG Investment and Reforming the Fiduciary Duty*, 15 OHIO STATE BUS. L.J. 136, 137–39 (2021) (explaining that "changing investment climates" recently prompted corporations to make decisions based on ESG considerations rather than the investors' financial best interests).

these violations of the fiduciary duty are not flaunted but are disguised through ESG metrics.[12]

ESG indices are developed based on a broad range of non-financial criteria.[13] Environmental criteria analyze an investment's impact on climate change, pollution, and consumption of non-renewable resources.[14] Social criteria measure an investment's impact on a corporation's employees, customers, and broader stakeholders, often focusing on supporting various minority groups, such as racial minorities and members of the LGBTQIA+ community.[15] Governance criteria examine a corporation's governance structure and are often tied to Diversity, Equity, and Inclusion (DEI) metrics.[16]

It is undeniable that many see these as noble goals. However, none of these metrics have any bearing on the financial return to the investors or shareholders, flouting the basic economic principles that underlie the fiduciary relationship. Moreover, these metrics cannot be measured objectively as the factors are inherently subjective. Pursuing these metrics, then, can become complicated and arbitrary. When fiduciaries make decisions based solely on ESG metrics rather than on the best financial interests of their beneficiaries, they breach their fiduciary duty.

Much legal scholarship has been dedicated to the nature of the fiduciary duty, and an increasing amount of scholarship addresses whether ESG-based investment decisions violate that fiduciary duty.[17]

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[12] *See* Schanzenbach & Sitkoff, *supra* note 6, at 388–89 (describing how ESG metrics were rebranded as a means of improving risk-adjusted returns).

[13] *See* David McSweeney & Lisa Shelton, *Corporate Financial Disclosures and Environmental, Social, and Governance Concerns: Evolving Issues*, NAT. RES. & ENV'T, Fall 2020, at 23, 23 (discussing the considerations that influence ESG scores), https://www.americanbar.org/content/dam/aba/publications/natural_resources_environment/20-21/nre-v035n02-fall2020-web.pdf.

[14] *Id.* at 24.

[15] *Id.* at 23; Ron S. Berenblat et. al., *Racial Equity Audits: A New ESG Initiative* (Oct. 30, 2021), HARV. L. SCH. F. ON CORP. GOVERNANCE, https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/; *see* E. Napoletano & John Schmidt, *LGBTQ Investing: SRI/ESG Guide*, FORBES: ADVISOR, https://www.forbes.com/advisor/investing/lgtbq-esg-investing-sri/ (Dec. 16, 2020, 7:13 AM) (explaining how ESG scores promote funding for LGBT initiatives through investment).

[16] McSweeney & Shelton, *supra* note 13, at 23; Rusty Wiley, *Why the ESG Spotlight Should Be on Diversity and Inclusion in 2021*, FORBES (May 23, 2021, 9:20 AM) https://www.forbes.com/sites/forbestechcouncil/2021/03/23/why-the-esg-spotlight-should-be-on-diversity-and-inclusion-in-2021/?sh=35e7d973399d (advocating for more emphasis on diversity and inclusion in ESG considerations).

[17] *E.g.*, Schanzenbach & Sitkoff, *supra* note 6, at 389–92; Otsuka, *supra* note 11, at 138–39; Jonathan R. Macey, *ESG Investing: Why Here? Why Now?*, 19 BERKELEY BUS. L.J. 258, 263–64 (2022); Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L.J. 129, 135–36 (2021); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 733–36 (2019); Carlos

However, there is a substantial lack of scholarship calling for government action to solve this issue and even less that defines the proposed contours of that government action. This Note seeks to fill that void.

This Note argues that ESG-based decisions violate the fiduciary duty and calls for updates to the law in furtherance of this duty. First, this Note provides definitions and an overview of ESG indices, the fiduciary duty, and the relationship between the two. Next, this Note explains how basing investment decisions on ESG scores violates the fiduciary duty. Third, this Note describes how prohibiting ESG investment is consistent with the conservative, liberal, and libertarian political philosophies. Finally, this Note presents several policy solutions at the state and federal levels for removing ESG considerations from publicly traded corporations and investment firms.

I. THE HISTORY OF ESG AND THE PRINCIPLE OF THE FIDUCIARY DUTY INFORMS THE MODERN CONVERSATION ON ESG.

ESG scores have become popular as a method for advancing particular economic and social values, primarily promoting more politically progressive values and priorities.[18] Until the early twenty-first century, very few investment firms used these metrics for making investment decisions.[19] In fact, even in 2014, only 90 of the more than 23,000 private investment funds considered ESG factors in their investment decisions.[20] Now, many major investment firms have made ESG investing a core component of their investment strategy, leading regulators to seek to clarify the regulatory scheme in this area.[21] In 2020, the Department of Labor (DOL) employed the administrative rulemaking process, developing a final rule that placed limitations on ESG investment in limited contexts.[22] However, with a change in administrations, the

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Micames, *Socially Responsible Lawyering: How ESG Investing Is Shaking Up the Role of the Corporate Lawyer*, 27 J.L. BUS. & ETHICS 9, 10 (2021); Patrick J. Paul, *The ESG Train Is Coming: Next Stop—Disclosure Requirements*, NAT. RES. & ENV'T, Winter 2022, at 48, 48–49.

[18] *See* Otsuka, *supra* note 11, at 136–37, 136 n.2.

[19] *See* Dana Brakman Reiser & Anne Tucker, *Buyer Beware: Variation and Opacity in ESG and ESG Index Funds*, 41 CARDOZO L. REV. 1921, 1922–23, 1977–80 (2020) (documenting the recent exponential growth of the number of corporations and businesses that rely on ESG factors to make investment decisions); *Exploring 30 Years of ESG Indexes*, MSCI, https://www.msci.com/esg/30-years-of-esg (last visited Apr. 10, 2024).

[20] Reiser & Tucker, *supra* note 19, at 1923 (explaining that only ninety "sustainable" funds existed in 2014); RISK AND EXAMINATIONS OFF., SEC. & EXCH. COMM'N, PRIVATE FUNDS STATISTICS: FOURTH CALENDAR QUARTER 2014, at 1, 4 (2015) (reporting that the number of private investment funds governed by the SEC exceeded 23,000 in every quarter of 2014).

[21] Otsuka, *supra* note 11, at 137.

[22] *See* 29 C.F.R. § 2550.404a-1(c)(1) (2021) (prohibiting retirement plan fiduciaries from evaluating investments based on non-pecuniary factors); *see also* Quinn Curtis et al.,

Biden administration changed the administrative rule to allow ESG factors to be considered under DOL regulations.[23] State legislatures and Congress have also begun considering how to address this pressing issue.[24] This rise in ESG scores presents unique challenges for lawyers advising their clients on complying with their fiduciary duties to shareholders.[25]

While ESG investing is a relatively modern construct, fiduciary duties are not. Finding its basis in the common law, the fiduciary duty of one who holds funds in trust for another traces its roots through centuries of Anglo-American law.[26] In fact, the biblical parable of the talents presents an example of the fiduciary duty as a sense of stewardship.[27] There, a master entrusted several servants with his property.[28] While two servants capitalized on the property and made money for the master, a wicked servant simply held onto the money.[29] The one who entrusted the money was angry at the servant for not at least investing his money in the bank where it could have collected interest.[30] The economic principle from the parable is clear: an individual entrusted with another's money has a

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Do ESG Mutual Funds Deliver on Their Promises?, 120 MICH. L. REV. 393, 396 (2021) (discussing how the SEC and the DOL took an interest in regulating ESG funds).

[23] *Compare* § 2550.404a-1(c)(1) (2019) (prohibiting retirement plan fiduciaries from considering non-pecuniary factors in investment decisions), *with* 87 Fed. Reg. 73,822, 73,884–85 (Dec. 1, 2022) (to be codified at 29 C.F.R. pt. 2550) (removing the prohibition); *see also US Department of Labor Announces Final Rule to Remove Barriers to Considering Environmental, Social, Governance Factors in Plan Investments*, DEP'T OF LAB. (Nov. 22, 2022), https://www.dol.gov/newsroom/releases/ebsa/ebsa20221122 (announcing the promulgation of the final rule allowing ESG considerations for retirement investment funds). It is important to recognize, however, that the fiduciary duty does not arise from the administrative regulation but rather from long-established legal principles in the common law that still govern fiduciary duties in the absence of regulation or statutes. *Cf.* RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. L. INST. 2007); Bobo, *supra* note 7, at 1069–70.

[24] *See, e.g.*, Kelly Laco, *All GOP Senators, Manchin Challenge Biden's ESG Climate Investment Rule 'Politicizing' Americans' 401(k)s*, FOX NEWS (Feb. 1, 2023, 2:00 AM), https://www.foxnews.com/politics/gop-senators-manchin-challenge-bidens-esg-climate-investment-rule-politicizing-americans-401ks (discussing a congressional attempt to override the Biden Administration's rule allowing retirement plan managers to pursue ESG-motivated investment decisions); Clark Corbin, *Idaho Legislators Readying Bill to Restrict Environmental and Social Ratings in Investments*, IDAHO CAP. SUN (Nov. 22, 2022, 4:30 AM), https://idahocapitalsun.com/2022/11/22/idaho-legislators-readying-bill-to-restrict-environmental-and-social-ratings-in-investments/ (describing new legislation prepared by Idaho legislators to further restrict using ESG metrics to direct public funding and investments).

[25] *See* Micames, *supra* note 17, at 9–10 (explaining how ESG impacts the corporate attorney's duty to the corporation and advice regarding shareholders).

[26] *See generally* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011) (providing an in-depth historical analysis of the development of the principle of fiduciary duty as traced through the origins of Anglo-American common law).

[27] *See Matthew* 25:14–30.

[28] *Id.*

[29] *Id.*

[30] *Id.*

duty to manage it well. The principle has carried on through the common law to the present, obligating those who manage someone else's resources to manage them as a "prudent investor" would.[31] A bulwark against abuse in a free market, the duty to manage an investor's funds as a prudent investor would invest them has become a backbone of the law in any area in which one holds funds in trust for another.[32] The basic common law fiduciary duty has even been codified in statutory schemes like ERISA to protect employee retirement accounts, remaining an essential standard throughout the economy and the legal system.[33]

The fiduciary duty revolves around the requirement that when individuals lack the ability to consent meaningfully to how their financial resources are handled, then the holder of those resources must invest those individuals' money as a prudent investor would.[34] In the context of publicly traded corporations, there is a clear fiduciary duty that corporations, namely the board of directors, have to invest as a prudent investor would.[35] When that duty is violated, derivative actions may be brought by the shareholders to hold the directors accountable for their breaches, so long as the questions raised are outside the scope of the corporation's permissible latitude under the business judgment rule.[36] The

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[31] *See* Bobo, *supra* note 7, at 1069–70.

[32] The common law prudent investor rule is stated succinctly in the 1830 case *Harvard College v. Amory of Internal Revenue* and remains substantively identical to this day: "[A trustee must] observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." 26 Mass. (9 Pick.) 446, 461 (1830); *see also Knight v. Comm'r*, 552 U.S. 181, 193 (2008).

[33] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1104(a)(1)(B) ("[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.").

[34] *Knight*, 552 U.S. at 193.

[35] A common practice in business is to invest cash on hand into other publicly traded stocks to continue to receive financial gains from these assets. This practice is consistent with a fiduciary duty as it allows the corporation to manage its resources in a way to maximize shareholder wealth. *See* W. Shoshone Identifiable Grp. v. United States, 158 Fed. Cl. 633, 723 (2022) (noting that it is acceptable for a business to keep some of its assets invested in long-term securities which provide sufficient liquidity for the corporation to meet its cash needs in furtherance of its fiduciary duty). However, when the corporation starts to manage these provisions in such a way as to pursue ESG considerations, it is using its cash on hand in a way that violates the fiduciary duty, even if its own actions as a corporation are not related to ESG metrics.

[36] *See* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). *See generally* Lael Daniel Weinberger, *The Business Judgment Rule and Sphere Sovereignty*, 27 T.M. COOLEY L. REV. 279 (2010) ("The standard formulation of the Business Judgment Rule usually includes the

question, then, is whether the investment of those funds through an investment scheme prioritizing ESG scores—rather than purely economic evaluations—violates the fiduciary duty a corporation has to its shareholders.

II. ESG SCORES VIOLATE A FIDUCIARY'S DUTY TO INVEST AS A PRUDENT INVESTOR WOULD.

The prudent investor rule requires those who hold funds for another to invest those funds as a prudent investor would—in other words, for the sole purpose of the financial interest of the trustor.[37] When investments are made for any other reason, including for the purpose of advancing ESG priorities, the fiduciary duty is breached.[38] To analyze the legality of ESG metrics as the basis of decision-making, one must first consider how investment decisions are made. As Professor Akio Otsuka noted in his article *ESG Investment and Reforming the Fiduciary Duty*, when ESG considerations are used to further the values of the corporation rather than for the sole financial interest of the investor, such investment constitutes a breach of the fiduciary duty.[39] On the other hand, investments that may be friendly to ESG priorities are not prohibited if they are in the best financial interests of the trustor but coincidentally also further ESG priorities.

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following components: courts will not review the substantive reasonableness of a business decision that is reasonably well informed, made in good faith, and without conflicts of interest, fraud, or illegality."). The business judgment rule is an important consideration for shareholder derivative suits for violations of the fiduciary duty by ESG investments. If the reforms advocated in this Note are advanced, then such derivative suits will be much easier to bring since there will be a per se violation of the fiduciary duty when decisions are made based on ESG considerations. However, even without such reforms, the business judgment rule should not preclude a derivative action brought by shareholders because investments made for some purpose expressly other than the financial interest of the corporation are not made in good faith—thereby meaning the business judgement rule does not apply. *But see, e.g.*, Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz, No. 2:22-CV-00267, 2023 WL 5945958, at *4–5 (E.D. Wash. Sept. 11, 2023) (dismissing a shareholder derivative action brought against Starbucks by concluding that ESG considerations are within the scope of the business judgment rule). Extensive analysis of whether derivative suits for ESG investing can cross the business judgment rule bar is beyond the scope of this Note but deserves future analysis as the prevalence of ESG decisions by corporations increases.

[37] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 (AM. L. INST. 2007); Otsuka, *supra* note 11, at 138–39.

[38] Jeb Rubenfield & William P. Barr, *ESG Can't Square with Fiduciary Duty*, WALL ST. J. (Sept. 6, 2022, 6:31 PM), https://www.wsj.com/articles/esg-cant-square-with-fiduciary-duty-blackrock-vanguard-state-stree-the-big-three-violations-china-conflict-of-interest-investors-11662496552; Terrence Keeley, *Vanguard's CEO Bucks the ESG Orthodoxy*, WALL ST. J. (Feb. 26, 2023, 1:08 PM), https://www.wsj.com/articles/vanguards-ceo-bucks-the-esg-orthodoxy-tim-buckley-net-zero-emissions-united-nations-initiative-nzam-f6ae910d (reporting on Vanguard pulling out of the Net Zero Asset Managers Initiative because, as the CEO admitted, investing in ESG-driven funds violates the fiduciary duty).

[39] Otsuka, *supra* note 11, at 138–39.

Those favoring ESG investing take different approaches to justifying the valuation of ESG metrics in investment decisions. First, some proponents note that these investment strategies still often reward the client financially.[40] Some will go so far as to argue that ESG actually provides the greatest long-term financial benefit to shareholders.[41] As such, they argue, there is no breach of the fiduciary duty.[42] For example, Schanzenbach and Sitkoff contend in their article, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, that investments made with ESG considerations do not always breach the fiduciary duty.[43] They argue that two requirements must be met for an ESG investment program to be consistent with the fiduciary duty. First, "the trustee [must] reasonably conclude[] that the ESG investment program will benefit the beneficiary directly by improving risk-adjusted return."[44] Second, "the trustee's exclusive motive for adopting the ESG investment program [must be] to obtain this direct benefit."[45] In their article, they argue that investments in funds that use ESG metrics may not violate the fiduciary duty because those funds may, in fact, be the most economically valuable investments.[46]

This rationale supporting ESG considerations premised upon the potential of greater financial reward demonstrates that maximizing shareholder return consistent with the fiduciary duty is the paramount goal. In fact, by measuring the appropriateness of using ESG metrics against the standard of financial reward, these arguments inherently concede that the fiduciary duty is the primary standard by which investments should be evaluated. Thus, even this rationale for ESG recognizes the supremacy of the fiduciary duty for investment decisions. If the fiduciary duty is paramount, then utilizing ESG as a metric for selection is only appropriate when all possibilities of financial reward are equal between available investment options. This precludes ESG as an investment selection tool in all cases except those very rare ones in which there is no financial difference between the two methods of investment selection. If the financial reward is the supreme metric by which investment choices are judged, then the fiduciary duty is incompatible

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40 *See, e.g.*, Schanzenbach & Sitkoff, *supra* note 6, at 385–86 (arguing that ESG investing is appropriate if it "benefit[s] the beneficiary directly by improving risk-adjusted return").

41 *Id.* at 385 ("A group convened by the United Nations, the Principles for Responsible Investment (PRI), along with a growing and influential group of scholars and practitioners, has even taken the position that fiduciary principles require a trustee to use ESG factors.").

42 *Id.* at 385–86.

43 *Id.*

44 *Id.* at 386.

45 *Id.*

46 *Id.* at 389.

with justifications other than maximizing the wealth of the shareholder or investor.

Others argue that ESG should be permitted as a factor in the decision-making process, even if the investment is financially detrimental, for non-financial reasons.[47] This reasoning would require a modification of the fiduciary duty rule, something some have argued would be a plausible or even recommended change.[48] However, ignoring or changing the fiduciary duty rule would bring profoundly negative consequences to the economy. This is because the fiduciary duty ensures both trust and economic efficiency by giving individuals confidence in their investments without forcing them to monitor every financial decision to ensure their money is managed in their best interest. Additionally, the prudent investor rule serves as an important check against corporate executives who make economically harmful investment decisions that benefit them personally or professionally. By requiring fiduciaries to invest in accordance with the fiduciary duty, the law keeps them accountable and protects investors. Allowing modification or outright violation of this rule would harm the economy.

Prohibiting investment based upon ESG considerations rather than financial ones does not prevent investment in funds that still might advance the goals of ESG; rather, it simply recognizes that the analysis must be based solely on whether those investment funds are the best financial investment for the shareholders. For example, one cannot invest in lower-rewarding solar power investments as opposed to higher-rewarding oil investments because the former may be a cleaner source of power. That would be a breach of the fiduciary duty. However, if solar is a better financial investment than oil, then a prudent investor would invest in solar—which would, coincidentally, be better from an ESG perspective. Thus, it is acceptable to invest in ways that might incidentally further what are traditionally outcomes prioritized by ESG advocates. However, the moment the calculus for investment decisions includes ESG priorities as a factor for deciding whether to make an investment, the sole interest is not investing as a prudent investor would but has instead shifted to investing for political or cultural purposes. Such investment violates the fiduciary duty.

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[47] Anat Alon-Beck et al., *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 445, 450–51 (2021) (arguing that the fiduciary duty requires corporations to pursue gender equity because, among other things, it "establishes equality as a normative goal, reflecting the public value equality already holds").

[48] *Id.* at 482–83.

III. GOVERNMENTS MUST RESTORE THE FIDUCIARY DUTY RULE GOVERNING THE USAGE OF ESG.

The case for prohibiting the usage of ESG considerations is often a political one.[49] This need not be the case. As discussed above, a clear breach of the fiduciary duty arises from the prioritization of ESG considerations in investment decisions. Thus, the opposition need not be political; rather, it should simply be legal. That said, our legal system often gains its principles from policy underpinnings, so this question can be beneficially informed by political discussion. The majority of current political opposition comes from the conservative sphere of political discourse,[50] but strong rationales exist within the libertarian and liberal ideological perspectives as well. This section discusses the rationale behind each.

A. The Conservative Case for Banning the Usage of ESG Considerations

Traditionally, opposition to ESG considerations is primarily from conservative political philosophy.[51] This is understandable because ESG priorities largely contradict conservative ideals and philosophy. For example, the LGBTQIA+ agenda, affirmative action in corporate boardrooms, environmental regulations, and other mainstream progressive ideals are frequently the beneficiaries of ESG metric-selected investments.[52] The world of investment has been weaponized through the usage of ESG investment decisions to attack conservative values.

Of particular note, conservatives should be concerned because ESG investments compel shareholders to engage in speech through the usage of their financial resources to support causes for which they will have no say. How one spends one's money, specifically in the context of political discourse, is considered to be a form of speech.[53] Thus, if the majority of investment strategists adopt ESG metrics in their decision-making processes, conservative individuals will either be compelled to speak

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[49] *See, e.g.*, David Gelles, *How Environmentally Conscious Investing Became a Target of Conservatives*, N.Y. TIMES, https://www.nytimes.com/2023/02/28/climate/esg-climate-backlash.html (Mar. 1, 2023) (reporting on recent actions by conservative Republican politicians leading the push against ESG investing both in Congress and at the state level).

[50] *See, e.g.*, Max Zahn, *What is ESG Investing and Why are Some Republicans Criticizing It?*, ABC News (Feb. 15, 2023 9:15 AM), https://abcnews.go.com/Business/esg-investing-republicans-criticizing/story?id=97035891.

[51] *Id.*

[52] *See* Curtis et al., *supra* note 22, at 401 (explaining ESG's focus on solving environmental and cultural issues of concern to individuals who hold generally progressive ideals).

[53] *See, e.g.*, FEC v. Ted Cruz for Senate, 142 S. Ct. 1638, 1651 (2022) (holding that restrictions on personal loans to campaigns burden political speech under the First Amendment).

adversely to their beliefs through the investment of their money or be unable to participate in the investment market.[54] While some may argue that ESG investing could be an appropriate tool for conservatives to advance conservative priorities, conservative political philosophy recognizes the important restraints on individual choice within the confines of the rule of law.[55] By its nature, ESG investment by those with a fiduciary duty violates this rule of law designed to protect individual choice and, thus, is antithetical to a key tenet of conservative philosophy.[56] Therefore, it is consistent with conservative political philosophy to prohibit ESG considerations.

B. The Liberal Case for Banning the Usage of ESG Considerations

While opposition to investment strategies focusing on ESG considerations has typically been by those on the conservative and libertarian ends of the political spectrum, dismissal of this opposition as mere mortars in the culture wars drastically ignores the substantial negative impact on politically liberal priorities that also accompany ESG investment. Those of a more liberal political bent should likewise seek the prohibition of ESG considerations from investment strategies for two primary reasons. First, the modern framework for implementing ESG in investment strategies is inherently anti-democratic and places significant societal power squarely in the hands of large corporations.[57] Second, the current economic market's embrace of ESG investment actually harms the goals of those who share values aligned with the traditional priorities of ESG investing.

First, the modern framework is inherently anti-democratic.[58] When large corporations are allowed to invest in their own policy preferences,

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[54] *Cf.* Janus v. American Federation of State, County, and Municipal Employees, 138 S. Ct. 2448, 2459–60 (2018) (recognizing that requiring public employees to spend their money on unions compelled them to engage in speech).

[55] Mike Johnson, *The 7 Core Principles of Conservatism*, WEBSITE OF U.S. CONGRESSMAN MIKE JOHNSON, https://mikejohnson.house.gov/7-core-principles-of-conservatism/ (last visited Feb. 4, 2023) (explaining that the rule of law, not of men, is one of the key tenets of conservative political philosophy).

[56] Terrence Keeley, *How Conservatives Can Get ESG Right*, NAT'L REV. (Jan. 25, 2023, 6:30 AM), https://www.nationalreview.com/2023/01/how-conservatives-can-get-esg-right/ (arguing that conservatives must, consistent with conservative principles, oppose ESG and that conservative political philosophy is incongruent with ESG investment).

[57] Eric C. Chaffee, *Index Funds and ESG Hypocrisy*, 71 CASE W. RSRV. L. REV. 1295, 1312–13 (2021) ("BlackRock, Vanguard, and State Street . . . can act as de facto regulators in instances in which federal and state governments have failed or refused to act [regarding ESG issues]. Such behavior is problematic, however, because allowing these entities to play such a role is undemocratic in a variety of different ways, including that these entities are unelected, are focused solely on the financial interests of investors, are subject to inadequate check and balances, and have limited to no regulatory experience.").

[58] *Id.*

they are given the authority to drive societal decision-making, leading to an oligarchical power structure that unequally distributes power to the wealthier members of society, all while claiming to support marginalized communities. To add insult to injury, the middle and lower classes get no say in how these decisions are made, creating an undemocratic system that squelches the voice of the people and amplifies the voice of the richest members of society.[59] Large corporations can then run the market and drive social and cultural policy and priorities by using shareholder dollars (over which most average shareholders have relatively little influence) in breach of the fiduciary duty that has long protected the working class's investments.

Second, because ESG considerations lack any meaningful definition, there is actually a divestment of funds from liberal causes to ordinary business activities falsely labeled as ESG. Any meaningful and objective definition or even ranking of how ESG-conscious an investment strategy might be simply escapes the realm of possibility.[60] Because of this, corporations seeking to capitalize on current societal trends can exploit shareholder values by simply labeling their investments as those prioritizing ESG.[61] This strategy is known as "greenwashing."[62] Without meaningful regulation, this virtue signaling leads to a loss of potential societal change by those who hold values aligned with those traditionally articulated by ESG proponents. While economic realities such as profit, market value, and asset levels are transparent and clear, ESG considerations are not, to such proponents' detriment.[63] A recent study of the major banks which have made commitments to their shareholders to invest according to ESG found that the banks were not making the impact they claimed.[64] The study found that the methodologies used to analyze the ESG investment strategies "lack[ed] sufficient comparability and transparent disclosure" and left "an array of material business activities outside of the scope of their targets, which in turn create[d] loopholes for

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[59] *See* John Murante, *ESG Investing Hurts the Poor and Empowers Tyrants*, NAT'L REV. (Nov. 21, 2022, 6:30 AM), https://www.nationalreview.com/2022/11/esg-investing-hurts-the-poor-and-empowers-tyrants/ (discussing how ESG investment empowers unelected investment managers to make financial decisions at the expense of the poor).

[60] *Cf.* Curtis et al., *supra* note 22, at 402–03 (highlighting the concerns and the difficulties of defining ESG).

[61] *Id.* at 408 (noting that the lack of definable criteria enables corporations to "falsely portray themselves as adhering to an ESG investing (or voting) strategy to attract investor money," making it easier to receive investment through deception).

[62] *Id.*

[63] *Id.* at 402–03.

[64] *U.S. Banks and the Road to Net Zero*, CERES (Apr. 12, 2023), https://www.ceres.org/resources/reports/us-banks-and-road-net-zero.

banks."[65] Despite these banks' public commitment to ESG and their claims of investing to advance these priorities, the lack of transparency and the inability to measure the claims has created the false impression that these ESG strategies are actually achieving the goals that investors are being told they are achieving.[66]

This tendency to exaggerate the impact of ESG through greenwashing presents some unique questions in litigation. Recently, such questions were raised in *Hicks v. Grimmway Enterprises, Inc.*, a case in which class-action plaintiffs sued Grimmway, contending that it fraudulently misrepresented its dedication to ESG considerations, causing plaintiffs to rely upon those representations in making their purchasing decisions.[67] Adding to the unique questions raised in this context, defendants moved to dismiss their claims under California's anti-SLAPP statute but ultimately failed when the court denied their motion under the commercial speech exemption.[68] This case provides a great example of the unique questions raised by this kind of misrepresentation expressed in greenwashing, which is becoming increasingly prevalent with the proliferation of ESG metrics as the basis for investment decisions.

These concerns have led a majority of Democrat-affiliated Americans to support regulating ESG investing.[69] While support for regulating ESG does not indicate opposition to its usage as an investment metric, it does show that many on the political left recognize an important reality—without legal protections in ESG investing decisions, there is great potential for abuse. This potential for abuse is not new. It is precisely the reason that the fiduciary duty was developed.

In the interest of ensuring that those who seek to change society in ESG areas can do so, returning the investment sector to being solely based on the monetary interests of investors ensures that large corporations cannot obscure mismanagement of funds under the guise of ESG investments. What should cause greater concern for activists is the negative impact on the movements for which they advocate—a negative impact caused by giant corporations misleading innocent members of the public, who share deeply held values and beliefs, into investing in nominal

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[65] *U.S. Banks Set to Fall Short of Global Oil and Gas Emissions Reductions Goals by 2030, New Analysis Finds*, CERES (Apr. 12, 2023), https://www.ceres.org/news-center/press-releases/us-banks-set-fall-short-global-oil-and-gas-emissions-reductions-goals.

[66] *See id.* (noting the lack of transparency regarding target-setting methodologies, and the inconsistent nature of their development).

[67] No. 22-CV-2038, 2023 WL 3829689, at *1 (S.D. Cal. June 5, 2023).

[68] *Id.* at *5.

[69] Lindsay Singleton, *Navigating ESG in the New Congress*, ROKK SOLS. (Dec. 5, 2022), https://rokksolutions.com/wp-content/uploads/2022/12/Navigating-ESG-in-the-new-Congress.pdf.

ESG funds that do not make nearly the impact that would be achieved through investing those funds in organizations dedicated to actual solutions for these issues.[70] Business investment simply labeled as ESG in the current consumer-driven marketplace will prove to be counterproductive to the advancement of the ESG agenda.

C. The Libertarian Case for Banning the Usage of ESG Considerations

Libertarian philosophy is based upon the idea of individual choice.[71] Namely, the principles of free markets and individual consent make up the backbone of libertarian political ideology.[72] Unlike the concerns raised by the conservative movement that often deal with the substance of ESG indexing itself, the libertarian opposition focuses more on the basic principles necessary to protect property rights in a society in which the rule of law ensures that individuals respect each other's rights.[73] While some argue that the libertarian movement should fully condone the usage of ESG metrics by corporations from a free-market perspective,[74] this argument fails to recognize that shareholders lose any meaningful ability to consent to how their dollars are spent. While the choice to invest or not invest in funds that use ESG metrics might hypothetically exist, there is not a meaningful ability to consent to individualized investment decisions because of the aggregation of power by large investment firms. This is the rationale behind a fiduciary duty in the first place. If an individual could control all the decisions of those to whom they entrust their resources, there would be no point in entrusting these resources. The fiduciary duty requires money managers to invest as a prudent investor would because

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[70] Zachary Barker, *Socially Accountable Investing: Applying* Gartenberg v. Merrill Lynch Asset Management*'s Fiduciary Standard to Socially Responsible Investment Funds*, 53 COLUM. J.L. & SOC. PROBS. 283, 285–86 (2020) (expressing concerns about the lack of SEC regulations on funds marketed as climate conscious when, in fact, the funds are using "greenwashing" as a marketing technique).

[71] David Boaz, *Key Concepts of Libertarianism*, CATO INST. (Apr. 12, 2019), https://www.cato.org/commentary/key-concepts-libertarianism ("Libertarians see the individual as the basic unit of social analysis. Only individuals make choices and are responsible for their actions.").

[72] *Id.* ("Libertarian thought emphasizes the dignity of each individual, which entails both rights and responsibility. . . . To survive and to flourish, individuals need to engage in economic activity.").

[73] *See id.* ("[L]ibertarianism proposes a society of liberty under law, in which individuals are free to pursue their own lives so long as they respect the equal rights of others. The rule of law means that individuals are governed by generally applicable and spontaneously developed legal rules, not by arbitrary commands; and that those rules should protect the freedom of individuals to pursue happiness in their own ways, not aim at any particular result or outcome.").

[74] *E.g*, Houssem Hajlaoui, *The Libertarian Case for ESG*, SUSTAINABLE SQUARE (June 22, 2023), https://sustainablesquare.com/the-libertarian-case-for-esg/.

of the lack of individual consent to each investment decision. As such, allowing ESG policies in the marketplace is inconsistent with a libertarian ideal as ESG decisions are made without the consent of those for whom the corporation holds resources, thereby violating this central tenet of the libertarian movement.[75]

IV. POLICIES AT THE FEDERAL AND STATE LEVELS OF GOVERNMENT MUST RECOGNIZE ESG AS A BREACH OF THE FIDUCIARY DUTY.

Efforts to restore the consistent application of the fiduciary duty are needed. These efforts are not pointless. In fact, even the mere threat of potential action caused Vanguard, one of the largest investment firms in the world and one leading the charge on ESG, to withdraw from the Net Zero Asset Mangers Initiative, a global initiative focused on combating climate change in accordance with the environmental focus of ESG.[76] This illustrates that when the government pursues the right policy solutions, investors can be protected from breaches of the fiduciary duty that threaten citizens' investments.

Several solutions should be pursued to prohibit fiduciaries from investing based on ESG metrics. By taking these steps, states and the federal government can create similar pressure to that applied to Vanguard and can accomplish the same results. These solutions exist at both the state and federal levels. This section provides an outline for several potential solutions that policymakers should implement.

Before examining these solutions, however, it is important to note that while this Note argues for legislative and executive action, the law already prohibits ESG-driven investing. As articulated in this Note, investing based upon ESG considerations and not for financial gain violates the prudent investor default common law rule and many statutory requirements, including ERISA.[77] As such, policymakers and judges should recognize that prioritizing these metrics above pure financial gain breaches the fiduciary duty.[78]

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[75] *But see* Macey, *supra* note 17, at 263 (arguing that the shift to integrating ESG metrics in corporate decision-making is a libertarian-type movement).

[76] Gelles, *supra* note 49; *An Update on Vanguard's Engagement with the Net Zero Asset Managers Initiative (NZAM)*, VANGUARD (Dec. 7, 2022), https://corporate.vanguard.com/content/corporatesite/us/en/corp/articles/update-on-nzam-engagement.html.

[77] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 420–21 (2014) ("[I]n the context of ERISA as a whole, the term 'benefits' in the provision just quoted must be understood to refer to the sort of *financial* benefits (such as retirement income) that trustees who manage investments typically seek to secure for the trust's beneficiaries. The term does not cover nonpecuniary benefits . . . ." (citations omitted)).

[78] However, neither state nor federal judges should jettison judicial restraint to recognize this breach of fiduciary duty. Remaining within their defined roles in our

One may wonder if courts can already enforce the fiduciary duty through a proper interpretation of existing law, then why is legislative and executive action needed at all. There are two reasons. First, because some have argued that ESG metrics are acceptable,[79] courts could foreseeably differ in their rulings on this issue. A consistent principle of business law is ensuring economic efficiency through legal certainty.[80] By promulgating a consistent standard through statute or regulation, the market can operate without fear of violation of law. Secondly, statutory and regulatory schemes can make the common law default rule mandatory, such as has been done with ERISA, to ensure consistency in the market as well as to protect consumers. As such, adopting policies restricting ESG considerations at the state and federal levels is appropriate and necessary to ensure the continuation of the fundamental economic principle that ensures economic efficiency and investor protection.

A. State-Level ESG Prohibitions

Any proper analysis of government policy should begin with whether the government has the authority to regulate a particular activity.[81] States, as governments of general police powers, have the authority to regulate economic policy within their borders.[82] While the Commerce Clause supposedly expands the scope of the federal government's authority for almost any economic activity that would invoke a fiduciary duty, state government solutions are preferable. States should not simply adopt the federal minimum level of protection but should instead seek to

constitutional form of government that seeks to ensure the separation of powers is necessary to ensure the legitimacy of clarifications in this area of the law. Because of the limitation placed on the judiciary to decide only cases and controversies properly before it, legislative and executive solutions will more rapidly and thoroughly clarify this dynamic area of the law.

[79] *See, e.g.*, Schanzenbach & Sitkoff, *supra* note 6, at 385–86.

[80] *Cf.* U.C.C. § 1-103 (AM. L. INST. & UNIF. L. COMM'N 2023) ("[The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions." (brackets in original)).

[81] *Cf.* THE FEDERALIST NO. 45, at 241 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The powers delegated by the proposed constitution to the federal government, are few and defined.").

[82] *Id.* ("The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.").

protect their citizens against breaches of the fiduciary duty even where the federal government does not.[83]

There are many reasons why prohibiting the usage of ESG scores at the state level is preferable to a federal solution. First, it is a much more achievable goal. With partisan gridlock in Congress,[84] the potential for advancing legislation at the state level is far greater. Additionally, because of the interconnected nature of the economy, if a selection of states were to pass legislation of this sort, substantial pressure would be placed upon national corporations to stop using these metrics. Further, the Founders' vision for the states to serve as laboratories of democracy allows for these policies to be refined before their implementation at the federal level,[85] providing greater opportunities to protect shareholders nationwide. As those intent on using ESG scores find loopholes, state legislatures will be able to close those loopholes much more quickly due to the reduced level of partisan gridlock. Finally, while the Commerce Clause may, in fact, allow for this type of regulation at the federal level, it may be more consistent with the Founders' intent to implement these restrictions at the state level.[86]

However, there are drawbacks to prohibiting ESG scores at the state level. These include the difficulty of enforcement due to the nationwide footprint of many national or even multi-national corporations, the subsequent movement of large corporations out of state to other states that allow for ESG investing, inconsistent rules of business practice across state lines, and the fact that the regulatory framework already exists at

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[83] *Cf.* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16–21 (2018) (arguing that state courts should look to the historical meaning of their constitutional provisions rather than simply looking to federal courts' interpretations of similar provisions in the United States Constitution).

[84] *See e.g.*, Paul Kane, *Congress Deeply Unpopular Again as Gridlock on Coronavirus Relief Has Real-Life Consequences*, WASH. POST (Aug. 1, 2020, 7:00 AM), https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7fa5e82ab_story.html.

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

[86] *Cf.* Hammer v. Dagenhart, 247 U.S. 251, 272–73 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941) (noting that if the Commerce Clause gave authority to regulate commerce before its actual delivery to the carrier for interstate transport, "all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States").

the national level with the Securities and Exchange Commission (SEC).[87] While these multiple layers of regulation are obviously impractical and perhaps outside the scope of the Founder's vision of the Commerce Clause,[88] modern jurisprudence allows for a duplicate set of regulatory schemes.[89] As such, states should go beyond the minimal protections of their citizens' investments offered by the federal government[90] and should provide further clarification that the fiduciary duty extends to ESG investments.

Three primary actions can be taken by states to protect the fiduciary duty requirement. First, legislatures can pass legislation prohibiting state investment in funds that make their determinations based on ESG. Second, legislatures can pass legislation clarifying the prudent investor rule in statute specifically to delineate that investment based on ESG metrics is prohibited. Finally, governors, state treasurers, directors of finance departments, and other executive officials should unilaterally order that no state funds be invested in portfolios that violate the fiduciary duty through ESG indexing. Each of these are examined here.

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[87] *See, e.g.*, Thomas Lee Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. PA. J. BUS. L. 740, 744 (2021).

[88] *Hammer*, 247 U.S. at 272–73; United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes.").

[89] The Supreme Court's jurisprudence regarding the Interstate Commerce Clause vastly changed throughout the twentieth century. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."); Wickard v. Filburn, 317 U.S. 111, 127–28 (1942) (allowing regulation of wheat personally grown and personally consumed because it could have a substantial effect, in the aggregate, upon interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258–59 (1964) (reducing judicial analysis of legislation under the Commerce Clause to rational basis scrutiny); Gonzales v. Raich, 545 U.S. 1, 2 (2005) ("In assessing the scope of Congress' Commerce Clause authority, the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). *But see Lopez*, 514 U.S. at 584–85 (Thomas, J., concurring) (noting that the federal government "has nothing approaching a police power"); United States v. Morrison, 529 U.S. 598, 617 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

[90] *Cf.* SUTTON, *supra* note 83, at 16–21 (discussing the authority of state governments to fashion their own legal standards distinct from the federal government).

1. Legislative action prohibiting state investment in ESG

One policy proposal that has gained traction is the prohibition of state investment in funds that utilize ESG considerations.[91] While not a full prohibition, removing state investment of resources, such as public employee pension funds, has the potential to place substantial pressure on corporations to cease making investment decisions based upon ESG considerations.

For example, in 2022, Idaho passed legislation prohibiting public entities from investing based on ESG considerations in violation of the prudent investor rule.[92] Idaho is not the only state that has taken or considered this action. Similar proposals have been enacted in other states, including Arkansas, Utah, and West Virginia.[93] This approach allows the state to make an impact (with some states having state funds invested in the billions of dollars)[94] and to reduce the incentive for investment funds to breach the fiduciary duty. However, this approach does not protect its citizens in the broader market. Although it upholds the state's duty to manage the tax dollars of its citizens properly, it does not protect consumers from breaches of the fiduciary duty.

2. Legislative action clarifying the fiduciary duty

States have been much more hesitant to prohibit ESG altogether. Driven by a false conception of free markets, some have claimed that prohibiting ESG is an attempt to restrict the free market, not to protect investments.[95] However, all states have adopted the prudent investor rule

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[91] Ross Kerber, *Business Fights Back as Republican State Lawmakers Push Anti-ESG Agenda*, REUTERS (Apr. 24, 2023, 1:57 PM), https://www.reuters.com/business/sustainable-business/business-fights-back-republican-state-lawmakers-push-anti-esg-agenda-2023-04-22/ (noting that in 2023, ninety-nine anti-ESG bills had been filed in state legislatures, many aiming to prohibit investment in ESG).

[92] IDAHO CODE § 67-2345(1) (LEXIS through Ch. 262 from the 2024 Reg. Sess. and effective as of April 1, 2024).

[93] ARK. CODE ANN. § 25-1-1003 (LEXIS through all legislation of the 2023 Regular Session and the 2023 First Extraordinary Session) (divesting state funds from ESG-driven funds); W. VA. CODE ANN. § 12-6-11a(c) (LEXIS through legis. signed as of February 16, 2024) (prohibiting the West Virginia Investment Management Board and the Board of Treasury Investments from voting for investment decisions based upon non-pecuniary interests); UTAH CODE ANN. § 49-11-203(1)(q) (LexisNexis, LEXIS through the Second Spec. Sess. laws of 2023) (requiring the state's investment fund to make decisions with the sole purpose of maximizing risk-adjusted returns in accordance with its fiduciary duty).

[94] *See e.g.*, Ross Kerber, *Florida Pulls $2 Bln from BlackRock in Largest Anti-ESG Divestment*, REUTERS (Dec. 1, 2022, 4:39 PM), https://www.reuters.com/business/finance/florida-pulls-2-bln-blackrock-largest-anti-esg-divestment-2022-12-01/.

[95] Andrew Stuttaford, *To Be Anti-ESG Is to Be Against Free Market Capitalism? Not So Much*, NAT'L REV. (Sept. 30, 2022, 8:23 PM), https://www.nationalreview.com/2022/09/to-be-anti-esg-is-to-be-against-free-market-capitalism-not-so-much/.

as a part of their fiduciary duty requirements.[96] Legislation is needed to amend these statutes to clarify that the existing statutory requirements of a fiduciary duty preclude making investment decisions for any reason other than prioritizing the best financial interest of the investor. While each state's laws will look a little different, either adding a mandatory prudent investor rule (such as that in ERISA) or modifying existing statutes would give states the ability to protect the financial resources of their citizens.

3. Executive action prohibiting state investment in ESG

Action is not limited to the legislative branch. The executive branch of government can take steps to remove state funding from financial institutions that make their investment decisions based upon non-financial considerations, such as ESG. For example, West Virginia Treasurer Riley Moore recently used his authority to produce a list of financial institutions that violate state law through ESG investing.[97] In fact, in 2021, fifteen state treasurers formed a coalition to remove investment from organizations that managed their funds with ESG considerations in mind, noting the fiduciary duty that the treasurers have to manage the money of their respective states.[98] Consistent with that threat, Florida's Chief Financial Officer recently pulled nearly two billion dollars of state investment from ESG-driven investment firm BlackRock.[99] Many state attorneys general have also noted that ESG-driven investing violates their state law and have warned banks that they will take legal action to enforce the law regarding fiduciary duty if the banks do not invest consistent with their fiduciary duty.[100] Nineteen governors also recently created an alliance to push back against ESG by opposing the Biden Administration's support of ESG, advancing legislation at the state level prohibiting ESG, and removing state funds from investment firms

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[96] Schanzenbach & Sitkoff, *supra* note 6, at 129.

[97] *Treasurer Moore Publishes Restricted Financial Institution List*, W. VA. TREASURY (July 28, 2022), https://wvtreasury.com/About-The-Office/Press-Releases/ID/452/Treasurer-Moore-Publishes-Restricted-Financial-Institution-List.

[98] *WV Treasurer Moore Leads 15-State Coalition to Push Back Against Bank Boycotts of Traditional Energy Industries*, W. VA. TREASURY (Nov. 22, 2021), https://www.wvtreasury.com/About-The-Office/Press-Releases/ID/394/WV-Treasurer-Moore-Leads-15-State-Coalition-to-Push-Back-Against-Bank-Boycotts-of-Traditional-Energy-Industries.

[99] Kerber, *supra* note 94.

[100] *AG Reyes Leads Coalition & Warns Asset Managers About ESG Investments*, UTAH OFF. OF THE ATT'Y GEN. (Mar. 31, 2023), https://attorneygeneral.utah.gov/ag-reyes-leads-coalition-warns-asset-managers-about-esg-investments/; Thomas Catenacci, *21 States Threaten Banks with Legal Action over Woke Policies: 'Stay in Your Lane'*, FOX NEWS (Mar. 31, 2023, 5:00 AM), https://www.foxnews.com/politics/21-states-threaten-banks-legal-action-woke-policies-stay-your-lane.

using ESG.[101] Thus, executive action to invest state funds consistent with the fiduciary duty is both effective and appropriate.

4. Judicial action regarding ESG investing

There is a surprising lack of litigation at the state level challenging ESG investments under the fiduciary duty because, as discussed earlier, the prevalence of ESG investments is a recent development.[102] While courts generally should be nowhere near the policymaking process, clarification of the fiduciary duty by state courts within a suit involving ESG considerations as an alternative rationale to the prudent investor rule would be a highly appropriate method of protecting shareholders from breaches of the fiduciary duty by ESG investment. This would not be policymaking. Rather, it would simply clarify the fiduciary duty as applied in a new context. This certainly is the business of judges—applying old rules to new situations—and state courts should not hesitate to speak in this space.

B. Federal-Level ESG Prohibitions

Federal solutions prohibiting breaches of the fiduciary duty are also valid and should be pursued where possible. The first question must be what authority the federal government has to regulate such activities. Held by a government of limited, enumerated powers,[103] the federal government's authority to regulate ESG investment strategies initially appears dubious. However, in our modern jurisprudence, the only thing more certain than death and taxes is the recognition that economic activities of any type can be regulated under the Commerce Clause. Due to the expansive nature of federal regulation of economic activities, federal restrictions on these investment strategies may be the most effective.

The largest benefit of federal regulation is the already-existent regulatory framework for publicly traded corporations and investment funds through federal statutes and administrative rules promulgated by

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[101] Julia Mueller, *DeSantis, 18 States to Push Back Against Biden ESG Agenda*, THE HILL (Mar. 16, 2023, 10:02 AM), https://thehill.com/homenews/state-watch/3903188-desantis-18-states-to-push-back-against-biden-esg-agenda/.

[102] *See* Reiser & Tucker *supra* note 19, at 1922–23 (explaining the recent growth of ESG investing strategies). *But see* Forman v. TriHealth, Inc., 40 F.4th 443, 449 (6th Cir. 2022) (deciding whether offering additional, more expensive retirement investment plans that do not provide more economic reward violates the fiduciary duty and briefly mentioning that the issue could arise in cases with optional ESG-driven investment funds); Andrew Ramonas, *Attorneys General Group Sued by Utah Over ESG Investing Claims*, BLOOMBERG L. (Mar. 7, 2023, 6:15 PM) https://news.bloomberglaw.com/esg/attorneys-general-group-sued-by-utah-over-esg-investing-claims (reporting on the lawsuit brought by Utah against the National Association of Attorneys General claiming that the association invests its money in ESG investment funds in violation of Utah state law).

[103] THE FEDERALIST NO. 45, *supra* note 81.

agencies such as the SEC.[104] This structure allows for greater efficiency in regulating interstate and multi-national corporations. Additionally, due to the interconnected nature of the economy, regulation at the state level may be less effective and may simply drive businesses out of states that recognize investment decisions made upon ESG as a breach of the fiduciary duty and into states that do not consider ESG investment to be such a breach. This economic disincentive should rightfully make states hesitant to adopt broad, sweeping proposals. However, the proposals advocated above would properly restrict ESG breaches of the fiduciary duty while ensuring that principles of federalism are maintained and human flourishing is promoted.

Two primary courses of action could be taken at the federal level: congressional action and administrative rulemaking. While congressional action is most appropriate and consistent with the original conception of the federal government as one characterized by the separation of powers, administrative rulemaking will allow for greater detail in defining the contours of investment action as well as a faster implementation due to partisan gridlock in Congress. Each avenue should be pursued at the federal level to provide a complete clarification of the fiduciary duty.

1. Congressional action to clarify the fiduciary duty rule

Congressional legislation on ESG would provide the most appropriate action at the federal level. It would be the most effective at prohibiting the usage of these metrics by publicly traded corporations, investment funds, and other fiduciaries. Such action is not impossible, even with the current partisan gridlock. For example, following the DOL's promulgation of a rule allowing for ESG considerations in retirement funds, a bipartisan coalition in Congress sought to repeal the rule.[105] However, despite the resolution's passage with bipartisan support through the House and the Senate, President Biden vetoed the resolution to allow the rule to proceed.[106]

There are two primary actions Congress can take when pursuing legislative action. One potential avenue for congressional legislation to clarify fiduciary duty is through ERISA.[107] This section governs the

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[104] Curtis et al., *supra* note 22, at 395 (noting that the SEC now has a designated policy advisor for ESG issues); Hazen, *supra* note 87 (recognizing that the SEC has authority to regulate securities).

[105] Austin R. Ramsey & Diego Areas Munhoz, *ESG 401(k) Rule Targeted by GOP in Push to Override Biden Veto*, BLOOMBERG L. (Mar. 21, 2023, 5:20 AM), https://news.bloomberglaw.com/daily-labor-report/esg-401k-rule-targeted-by-gop-in-push-to-override-biden-veto.

[106] *Id.*

[107] Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1104(a)(1)(B).

investment of retirement funds, an area proven to be controversial in the congressional fight over the DOL rule.[108] Not only did this rule lead to controversy in Congress, but it also led to high-profile litigation in which twenty-five state attorneys general challenged the rule under the Administrative Procedures Act (APA).[109] After a ruling upholding the rule under the APA, the Attorneys General filed an appeal with the Fifth Circuit, which is still pending.[110] In his district court opinion, Judge Kacsmaryk interpreted the updated rule to allow fund managers to choose ESG funds only when they are the best financial option or, in the case of a tie, not to prioritize them above financial considerations.[111] While the plaintiffs would disagree with the outcome of their challenge under the APA, the interpretation of ERISA made it clear that ESG considerations cannot be considered above financial considerations under ERISA.[112] This clarification of ERISA is particularly important because, unlike the common-law default fiduciary duty rule out of which the parties may contract as a part of the duty of care, ERISA's fiduciary duty requirement is mandatory.[113] Thus, by modifying this federal statutory provision to clarify that ESG investing violates this fiduciary duty, Congress could begin to turn the tide against ESG-based investment decisions.

Second, Congress must pass more sweeping legislation to affirmatively prohibit such investment strategies for those entities that owe a fiduciary duty in law to the investor. Such legislation will be the most effective by avoiding a patchwork of state laws and ensuring a consistent application of the fiduciary duty that has served as a fundamental rule within our economic framework.

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[108] *Id.*; *see also* Ramsey & Munhoz, *supra* note 105 (describing the controversial nature of an ESG rule that targets the investment of retirement funds).

[109] *See* Complaint at 2, Utah v. Walsh, No. 2:23-CV-00016, 2023 WL 6205926 (N.D. Tex. 2023); *see also AG Reyes Leads 25-State Lawsuit on New Labor Rule Allowing Asset Managers to Direct Their Clients' Retirement Money to ESG Investments*, UTAH OFF. OF THE ATT'Y GEN. (Jan. 26, 2023), https://attorneygeneral.utah.gov/ag-reyes-leads-25-state-lawsuit-on-new-labor-rule-allowing-asset-managers-to-direct-their-clients-retirement-money-to-esg-investments/.

[110] Daniel Wiessner, *Republican-led US States Appeal Ruling Allowing Biden ESG Investing Rule*, REUTERS (Oct. 26, 2023, 5:27 PM), https://www.reuters.com/legal/republican-led-us-states-appeal-ruling-allowing-biden-esg-investing-rule-2023-10-26/.

[111] *Walsh*, 2023 WL 6205926, at *4 ("Where the 2020 Rule explained that collateral factors may be considered when a fiduciary is 'unable to distinguish' between two investment options based on financial factors alone, the 2022 Rule allows the same when the two options 'equally serve the financial interests of the plan.' And while Plaintiffs aver that the 2022 changes loosen restrictions on fiduciaries, there is little meaningful daylight between 'equally serve' and 'unable to distinguish.'" (citation omitted)).

[112] *Id.* at 7–9.

[113] Alon-Beck, *supra* note 47, at 481 n.163.

2. Administrative action in opposition to ESG-driven investments

There are two primary ways by which the federal government can prohibit ESG-based investment decisions by fiduciaries through administrative law. The first is through regulations by the DOL related to retirement investments under ERISA, and the second is through regulations by the SEC related to publicly traded corporations.

The DOL has been at the forefront of the dispute regarding ESG investing at the federal level.[114] Under the Trump Administration, the DOL promulgated a rule prohibiting ESG investing by retirement portfolios, noting it causes a breach of the prudent investor rule under ERISA.[115] Unfortunately, that rule has since been rolled back by the Biden Administration.[116] Rulemaking of this type is within the scope of the DOL's congressionally granted authority and provides helpful clarification of the existing federal statute. Preferably, Congress would take action as proffered above to clarify ERISA itself, making such rulemaking by the DOL unnecessary. However, in the absence of congressional clarification, the DOL must provide this clarification to ensure that the investment portfolios of millions of Americans are protected from investing strategies that undermine the financial interests owed to them under ERISA's mandatory prudent investor rule.

The SEC should also take action to recognize that the fiduciary duty of publicly traded corporations forbids these corporations from investing in funds for reasons other than the financial interest of the corporation's shareholders.[117] While supporters of ESG have called on the SEC to provide a framework for consistently measuring ESG metrics,[118] the SEC should recognize that the lack of clarity and consistency in ESG metrics

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[114] Cara Beth Musciano, Note, *Is Your Socially Responsible Investment Fund Green or Greedy? How a Standard ESG Disclosure Framework Can Inform Investors and Prevent Greenwashing*, 57 GA. L. REV. 427, 456 (2022).

[115] *See* sources cited *supra* notes 22–23; Emily Chasan, *Trump Administration Targets ESG Funds with Proposed 401(k) Rule*, BLOOMBERG L. (June 25, 2020, 1:28 PM), https://news.bloomberglaw.com/employee-benefits/trump-administration-targets-esg-funds-with-proposed-401k-rule (discussing the proposed rule). *But see* Jessica DiNapoli & Ross Kerber, *Labor Department Finalizes U.S. Rule Curbing Sustainable Investing by Pension Funds*, REUTERS (Oct. 30, 2020, 9:18 PM), https://www.reuters.com/article/us-esg-rule/labor-department-finalizes-u-s-rule-curbing-sustainable-investing-by-pension-funds-idUSKBN27F35M (noting that express references to ESG were removed from the final rule).

[116] *See* sources cited *supra* note 23.

[117] One of the problems with focusing on the SEC as a solution is that it will lead to more litigation moving to federal courts. *See* Lee v. Fisher, 70 F.4th 1129, 1137 (9th Cir. 2023) (noting the "modern trend, in which plaintiffs frame corporate mismanagement claims that normally arise under state law"—including ESG issues—as "proxy nondisclosure claims under § 14(a), in order to invoke exclusive federal jurisdiction and avoid any forum-selection clause pointing to a state forum.").

[118] *See, e.g.*, Hazen, *supra* note 87, at 748.

is not only problematic but also in direct breach of the requirements imposed upon those in a fiduciary relationship. The SEC should promulgate rules recognizing that the board of directors of a publicly traded corporation has a fiduciary duty to its shareholders to maximize shareholder wealth rather than to invest based upon any non-financial factors, such as ESG.

America needs federal action to provide consistency in the economy by restoring the prudent investor rule consistent with the fiduciary duty. Such action can most appropriately be taken through congressional legislation to amend relevant statutes, such as ERISA, to clarify that the fiduciary duty prohibits ESG investing. Administrative action can also be taken independent of new congressional action and consistent with existing federal law to clarify that such fiduciary duty provisions prohibit ESG investing.

Action at the state and federal levels by the legislative and executive branches is needed to clarify the legal status of fiduciary duties in relation to ESG considerations. While judges can and should clarify the requirements of the fiduciary rules in cases or controversies brought before them, America needs broader, more immediate action to restore protection for investors and shareholders. Such action can be taken by the legislative and executive branches of state and federal governments through a variety of approaches to create a consistent, workable standard.

CONCLUSION

Investment strategies that prioritize ESG considerations over financial stewardship violate the prudent investor rule required by the fiduciary duty arising out of the common law and existing in statutory schemes. The recent rise of investment decisions skewed towards ESG considerations necessitates action to preserve long-standing financial principles essential to the ordered function of a free-market economy and, thereby, the promotion of human flourishing. This action is justified through conservative, liberal, and libertarian political ideologies and should be taken at both the state and federal levels to ensure the preservation of the fiduciary duty. Without a restoration of the fiduciary duty in the investment context, our economy will be one in which anyone can gamble on another's dime.

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BE SURE YOUR SIN WILL FIND YOU OUT: ABROGATING CLERGY PRIVILEGE TO COMBAT CHILD SEXUAL ABUSE IN THE CHURCH

TABLE OF CONTENTS

INTRODUCTION

"[Y]ou may be sure that your sin will find you out."[1] This promise that sin will pay back the sinner dates back to the Exodus of Israel.[2] Even the church itself cannot outrun the consequences of sin, leaving Protestant churches in disarray after the recent exposure of the epidemic of child sexual abuse in the church. In 2019, the Southern Baptist Convention

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[1] *Numbers* 32:23 (New International Version) (revealing that mankind cannot run from the consequences of sin).

[2] *Id.* at 32:1–23 (detailing Moses's response to the request by the tribes of Gad and Reuben to settle on the East of the Jordan after helping their fellow Israelites conquer the promised land).

("SBC") released a report detailing stories of sexual abuse in Protestant churches.[3] In one story, a fourteen-year-old girl disclosed the sexual abuse she had suffered at the hands of her youth minister, only to be told by her pastor that she deserved the abuse.[4] In another narrative, a teenage boy who divulged that his youth minister exposed him to pornography was silenced for fear of embarrassment to the reputation of the church.[5] These and numerous other reports show the prevalence of the church leadership's predatory sexual sin not only going unreported but deliberately hidden and protected from legal accountability. This Note proposes to address the pervasive problem of child sexual abuse in churches by examining the mandatory reporter laws as they pertain to clergy-penitent privilege and recommending a new statutory scheme to revoke clergy privilege in cases of abuse.

"Every [nine] minutes, child protective services substantiates, or finds evidence for, a claim of child sexual abuse."[6] Child sexual abuse is pervasive in our society and, unfortunately, in our churches. There are approximately 260 annual reports of children being sexually abused by ministers or other church workers.[7] In the Southern Baptist Convention of churches alone, there have been 380 credibly accused pastors and staff since 1998.[8] But the churches' response to this epidemic of sexual abuse just compounds the trauma. Sexual abuse survivors are often disregarded, belittled, and even disparaged by the clergy in Protestant churches.[9] One high-ranking SBC official referred to the allegations of child sex abuse as "a satanic scheme to completely distract us from evangelism" and alleged that they were blown out of proportion.[10] Yet, with thousands of

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[3] CARING WELL, A REPORT FROM THE SBC SEXUAL ABUSE ADVISORY GROUP 4 (2019), https://caringwell.com/wp-content/uploads/2019/06/SBC-Caring-Well-Report-June-2019.pdf [hereinafter SBC].

[4] *Id.* at 4.

[5] *Id.* at 16–17.

[6] *Children and Teens: Statistics*, RAINN, https://www.rainn.org/statistics/children-and-teens (last visited Feb. 29, 2024) (reporting that in 2016, the agency substantiated 57,329 claims of child sex abuse).

[7] Associated Press, *Data Shed Light on Child Sexual Abuse by Protestant Clergy*, N.Y. TIMES (June 16, 2007), https://www.nytimes.com/2007/06/16/us/16protestant.html (gleaning this data from the three insurance companies that insure most Protestant churches).

[8] *See* Daniel Burke, *380 Southern Baptist Leaders and Volunteers Accused of Sexual Misconduct*, CNN (Feb. 11, 2019), https://www.cnn.com/2019/02/11/us/southern-baptist-abuse/index.html (reporting that victims are pressured to forgive their abusers rather than pressing charges).

[9] *See* SBC, *supra* note 3, at 10.

[10] Sarah Einselen, *Former SBC Leader Says Abuse Survivor Advocates Are Part of 'Satanic Scheme' to Derail Evangelism,* ROYS REP. (June 8, 2021, 6:20 PM), https://julieroys.com/august-boto-satanic-scheme/ (referring to the leaked email of August Boto, the former Executive VP of the SBC's Executive Committee).

accusations of sexual abuse against church leaders,[11] Protestant churches should be focused on taking steps to improve the statistics rather than deny their existence.

Members of the clergy are in a particularly advantageous position to observe the signs of child abuse due to their roles as spiritual advisors.[12] As such, they are primed to be zealous mandatory reporters, and most states enumerate them as persons required to report known or suspected child abuse.[13] However, the majority of states have adopted the clergy-penitent communications privilege, which abrogates the mandatory reporter requirement if the abuse was disclosed during privileged communications.[14] New Hampshire imposes mandatory reporter requirements on clergy members and revokes clergy privilege for confidential communications regarding child abuse.[15] This Note proposes that all states adopt a statutory scheme similar to New Hampshire's to overcome clergy privilege in cases of abuse.

Part I of this Note surveys the history and status of mandatory reporter laws in the United States. Part II analyzes the penalties, both criminal and civil, for a mandatory reporter's failure to report instances of child abuse. Part I seeks to demonstrate that while the penalties, in theory, seem sufficient to make victims of failed reporting whole, the statute of limitations for these claims is often too short.[16] Part III dissects three relevant test cases that demonstrate the church's failure to report instances of child abuse and its silencing of child sex offense victims. Part IV discusses the background of clergy-penitent communications privilege and how this privilege intersects with mandatory reporting requirements. Specifically, this Section examines how state statutes differ in abrogating reporting requirements when the disclosure of child abuse took place

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[11] Associated Press, *supra* note 7.

[12] Gabriella DeRitis, Note, *Forgive Me Father, for I Have Sinned: Explicitly Enumerating Clergy Members as Mandatory Reporters to Combat Child Sexual Abuse in New York*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 283, 300 (2020).

[13] *See, e.g.*, ALA. CODE § 26-14-3(a) (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-3620(A)(2) (Westlaw through legis. of the 1st Reg. Sess. of the 56th Leg. (2023)); ARK. CODE ANN. § 12-18-402(a)–(b)(29) (LEXIS through all legis. of the 2023 Reg. Sess. and the 2023 1st Extraordinary Sess.).

[14] *See, e.g.*, ALA. CODE § 26-14-3(f) (Westlaw through the end of the 2023 1st Spec., Reg. and 2d Spec. Sess.); COLO. REV. STAT. § 19-3-304(1)(aa) (LEXIS through the 2023 Reg. and 1st Extraordinary Sess.); DEL. CODE ANN. tit. 16, § 909(a) (LEXIS through 84 Del. L., c. 240).

[15] N.H. REV. STAT. ANN. § 169-C:32 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.).

[16] *See* MICHELLE KIRBY, CONN. GEN. ASSEMBLY OFF. LEGIS. RSCH., STATUTE OF LIMITATIONS TO PROSECUTE A MANDATED REPORTER'S FAILURE TO REPORT CHILD ABUSE OR NEGLECT, 2021-R-0037, at 2 (2021), https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0037.pdf (asserting that in most states the statute of limitations to prosecute failure to report child abuse is one year).

during confidential communication with a clergyman within the confines of his role as a spiritual advisor.

Part V analyzes New Hampshire's statutory scheme, which enumerates clergy members as mandatory reporters and denies clergy privilege in cases of child abuse. Part VI proposes that all states adopt New Hampshire's statutory scheme to combat child abuse in the church and revisits the three test cases to analyze how the results would have changed under this new statutory scheme. Part VII discusses how the Establishment Clause and Free Exercise Clause interplay with clergy privilege and examines whether New Hampshire's statutory scheme violates these constitutional protections. This Note concludes with a survey of all the proposals and issues raised throughout this Note.

I. CURRENT MANDATORY REPORTER LAWS

The Federal Child Abuse Prevention and Treatment Act of 1974 provided federal funds to establish a program for the prevention of child abuse and create a National Center on Child Abuse and Neglect.[17] The Act defines child abuse and neglect as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare . . . ."[18] Since the passage of this Act, all fifty states have adopted a list of specified individuals who are legally required to report known or suspected child maltreatment.[19] These individuals are referred to as mandatory reporters.[20] Because of the frequent relational accessibility between victims and offenders, mandatory reporters are often chosen due to their prime position of interaction and observation of families.[21]

Mandatory reporting laws have had mixed results.[22] "One perceived success has been the continued increase in the number of children who receive a Child Protective Services (CPS) investigation, usually as a result of a submitted report regarding the child's well-being."[23] The Child Maltreatment Bureau released data indicating that nearly 3.2 million children received an investigation in 2020, and 17.6% of these

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[17] Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 2, 88 Stat. 4, 5 (authorizing the Secretary of Health to grant funds to local organizations for the purpose of establishing programs to identify and prevent child abuse).

[18] *Id.* § 3, at 5.

[19] DeRitis, *supra* note 12, at 292.

[20] *Id.*

[21] *See id.* (noting that a mandatory reporter's profession uniquely situates that person to observe and report on a child's well-being). In 2020, "90.6 percent of victims [were] maltreated by one or both parents." CHILDREN'S BUREAU, CHILD MALTREATMENT 27 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2020.pdf.

[22] Matthew J.C. Branaugh, *Mandatory Child-Abuse Reporting Laws and the #MeToo Movement: Federal and Colorado Examples and Six Paths Forward*, 97 DENV. L. REV. ONLINE *19, *24 (2019).

[23] *Id.*

investigations led to substantiated claims of maltreatment.[24] However, for every case of child abuse that is reported, two cases of child abuse go unreported.[25] These statistics raise questions about the effectiveness of mandatory reporting laws and how they can be improved to protect children better.

Of the states that include clergy as mandatory reporters, they are listed in one of two ways: itemizing a list of professionals as mandatory reporters or identifying "any person" as a mandatory reporter.[26] Currently, only twenty-eight states explicitly enumerate members of the clergy as mandatory reporters of child abuse.[27] For instance, the New Hampshire mandatory reporter statute includes "[p]riest[s], minister[s],

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[24] CHILDREN'S BUREAU, *supra* note 21, at 19–20.

[25] *Facts About Child Abuse*, CHILD PROTECT, https://www.childprotect.org/facts-about-child-abuse.html (last visited Feb. 7, 2024).

[26] DeRitis, *supra* note 12, at 292.

[27] *See* ALA. CODE § 26-14-3(a) (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-3620A(2) (Westlaw through legis. of the 1st Reg. Sess. of the 56th Leg. (2023)); ARK. CODE ANN. § 12-18-402(b)(29) (LEXIS through the 2023 Reg. Sess. and the 2023 1st Extraordinary Sess.); CAL. PENAL CODE § 11165.7(a)(32) (West, Westlaw through Ch. 1 of 2023–24 1st Extraordinary Sess., and all laws through Ch. 890 of 2023 Reg. Sess.); COLO. REV. STAT. § 19-3-304(2)(aa)(I), (III) (LEXIS through all legis. from the 2023 Reg. and 1st Extraordinary Sess.); CONN. GEN. STAT. § 17a-101(b)(18) (LEXIS through 2023 Reg. Sess. and Sept. Spec. Sess.); GA. CODE ANN. § 19-7-5(b)(7), (g) (LEXIS through 2023 Reg. Sess. of the Gen. Assemb.); 325 ILL. COMP. STAT. ANN 5/4(a)(9) (LexisNexis, LEXIS through P.A. 103-569 of the 2023 Reg. Sess. of the 103d Gen. Assemb.); LA. CHILD. CODE ANN. art. 603(17)(c) (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(27) (West, Westlaw through the 2023 1st Reg. and 1st Spec. Sess. of the 131st Leg.); MASS. GEN. LAWS ANN. ch. 119, § 21 (West, Westlaw through Ch. 76 of the 2023 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 722.623(3)(1)(a) (West, Westlaw through P.A. 2023, No. 321, of the 2023 Reg. Sess., 102nd Leg.); MINN. STAT. ANN. § 626.556(3)(a)(2) (West, Westlaw through all legis. from the 2023 Reg. Sess.); MISS. CODE ANN. § 43-21-353(1) (LEXIS through 2023 Reg. Sess. including changes and corrections authorized by the Joint Legis. Comm. on Compilation, Rev. and Publ'n of Legis.); MO. ANN. STAT. § 210.115(1) (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102nd Gen Assemb.); MONT. CODE ANN. § 41-3-201(2)(h) (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.); NEV. REV. STAT. ANN. § 432B.220(4)(d) (LexisNexis, LEXIS through the end of legis. from the 82d Reg. Sess. (2023), 34th and 35th Spec. Sess. (2023), subject to rev. by the Legis. Couns. Bureau); N.H. REV. STAT. ANN. § 169-C:29 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.); N.M. STAT. ANN. § 32A-4-3(A) (West, Westlaw effective July 1, 2023 of the 2023 1st Reg. Sess. of the 56th Leg. (2023)); N.D. CENT. CODE § 50-25.1-03(1) (LEXIS through all legis. from the 68th Legis. Assemb. – Spec. Sess. (2023)); OHIO REV. CODE ANN. § 2151.421(A)(4)(a) (LexisNexis, LEXIS through File 13 of the 135th Gen. Assemb. (2023-2024)); OR. REV. STAT. ANN. § 419B.010(1) (West, Westlaw through laws of the 2023 Reg. Sess. of the 82d Legis. Assemb.); 23 PA. STAT. AND CONS. STAT. ANN. § 6311(a)(6) (West, Westlaw through 2023 Reg. Sess. Act 66); S.C. CODE ANN. § 63-7-310(A) (LEXIS through 2023 Reg. Sess. Act No. 66, and Act No. 68, not including changes and corrections made by the Code Comm'r); VT. STAT. ANN. tit. 33, § 4913(a)(12) (LEXIS through all legis. from the 2023 Reg. Sess.); VA. CODE ANN. § 63.2-1509(A)(19) (LEXIS through 2023 Spec. Sess. I); W. VA. CODE ANN. § 49-2-803(a) (West, Westlaw through legis. of the 2023 Reg. Sess. and 1st Spec. Sess.); WIS. STAT. ANN. § 48.981(1)(cx), (2)(bm)(2) (West, Westlaw through 2023 Act 39, published Nov. 17, 2023).

or rabbi[s]" as individuals required to report knowledge and scenarios indicative of child abuse.[28] By contrast, the Maryland reporting statute states, "[A] person in this State . . . who has reason to believe that a child has been subjected to abuse or neglect shall notify the . . . law enforcement agency."[29] In Maryland, clergy still qualify as mandatory reporters within the umbrella of "any person."[30] While the approach may vary, thirty-six states designate clergy as mandatory reporters either explicitly or within the "any person" standard.[31] The rationale behind including clergy as

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[28] N.H. REV. STAT. ANN. § 169-C:29 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.).

[29] MD. CODE ANN., FAM. LAW. § 5-705(a)(1) (LexisNexis, LEXIS through all legis. from the 2023 Reg. Sess. of the Gen. Assemb.).

[30] DeRitis, *supra* note 12, at 297.

[31] *See* ALA. CODE § 26-14-3(a) (Westlaw through the end of the 2023 1st Spec., Reg. and 2d Spec. Sess.); ALASKA STAT. § 47.17.020(b) (LEXIS through all 2023 legis.); ARIZ. REV. STAT. ANN. § 13-3620(A)(2) (Westlaw through legis. of the 1st Reg. Sess. of the 56th Leg. (2023)); ARK. CODE ANN. § 12-18-402(b)(29) (LEXIS through all legis. of the 2023 Reg. Sess. of the 2023 1st Extraordinary Sess.); CAL. PENAL CODE § 11165.7(a)(32) (West, Westlaw through Ch. 1 of 2023-2024 1st Ex. Sess., and all laws through Ch. 890 of 2023 Reg. Sess.); COLO. REV. STAT. § 19-3-304(2)(aa)(I), (III) (LEXIS through all legis. from the 2023 Reg. and 1st Extraordinary Sess.); CONN. GEN. STAT. § 17a-101(b)(18) (LEXIS through 2023 Reg. Sess. and Sept. Spec. Sess.); DEL. CODE ANN. tit. 16, § 903(a) (LEXIS through 84 Del. Laws, ch. 240); FLA. STAT. ANN. § 39.201(1)(a)(2) (West, Westlaw through laws, joint and concurrent resols. and mem'ls in effect from the 2023 Spec. B and C Sess. and the 2023 1st Reg. Sess.); GA. CODE ANN. § 19-7-5(g) (LEXIS through 2023 Reg. Sess. of the Gen. Assemb.); IDAHO CODE § 39-5303(3) (LEXIS through all legis. from the 2023 Reg. Sess.); 325 ILL. COMP. STAT. ANN. § 5/4(a)(9) (LexisNexis, LEXIS through P.A. 103-569 of the 2023 Reg. Sess. of the 103rd Gen. Assemb.); KY. REV. STAT. ANN. § 620.030(2)(a) (West, Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election); LA. CHILD. CODE ANN. art. 603(17)(b) (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.); ME. REV. STAT. ANN. tit. 22, § 4011-A(1)(A)(27) (West, Westlaw through the 2023 1st Reg, and 1st Spec. Sess. of the 131st Leg.); MD. CODE ANN., FAM. LAW § 5-704(a) (LexisNexis, LEXIS through all legis. from the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 119, § 21 (West, Westlaw through Ch. 76 of the 2023 1st Ann. Sess.); MICH. COMP. LAWS ANN. subsec. 722.623(1)(a) (West, Westlaw through P.A. 2023, No. 321, of the 2023 Reg. Sess., 102d Leg.); MINN. STAT. ANN. § 626.556(3)(a)(2) (West, Westlaw through all legis. from the 2023 Reg. Sess.); MISS. CODE ANN. § 43-21-353(1) (LEXIS through 2023 Reg. Sess. including changes and corrections by the Joint Legis. Comm. on Compilation, Rev., and Publ'n of Legis.); MO. ANN. STAT. § 210.115(1) (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102nd Gen. Assemb.); MONT. CODE ANN. § 41-3-201(2)(h) (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.); NEV. REV. STAT. ANN. § 432B.220(4)(d) (LexisNexis, LEXIS through the end of legis. from the 82nd Reg. Sess. (2023), 34th and 35th Spec. Sess. (2023), subject to rev. by the Legis. Couns. Bureau); N.H. REV. STAT. ANN. § 169-C:29 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.); N.M. STAT. ANN. § 32A-4-3(A) (West, Westlaw through July 1, 2023 of the 2023 1st Reg. Sess. of the 56th Leg. (2023)); N.D. CENT. CODE § 50-25.1-03(1) (LEXIS through all legis. from the 68th Legis. Assemb. – Spec. Sess. (2023)); OHIO REV. CODE ANN. § 2151.421(A)(4)(a) (LexisNexis, LEXIS through File 13 of the 135th Gen. Assemb. (2023-2024)); OR. REV. STAT. ANN. § 419B.010(1) (West, Westlaw through laws of the 2023 Reg. Sess. of the 82nd Legis. Assemb.); 23 PA. STAT. AND CONS. STAT. ANN. § 6311(a)(6) (West, Westlaw through 2023 Reg. Sess. Act 66); S.C. CODE ANN. § 63-7-310(A)

mandatory reporters is that they are often closely involved in overseeing the welfare of children and hold a powerful role in the protection of the welfare of their congregation.[32] As such, they are more likely to hear of and witness child maltreatment.[33] Although states differ in their reporting requirements, the purpose of these statutes is largely the same, which is to call attention to instances of child abuse and prompt a state investigation to protect children.[34] Despite states' continued modification to mandatory reporter laws, challenges still exist today in failure to report known child abuse, leaving victims with inadequate correctives.

II. PENALTIES FOR FAILURE TO REPORT OVERVIEW

There are criminal and civil penalties that mandatory reporters can face if they fail to report both actual and reasonably suspected cases of child abuse.[35] In forty states, since mandatory reporters are charged by law to report, failure to report child abuse is a crime classified as a misdemeanor or other similar charge.[36] Upon conviction, in twenty of

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(LEXIS through 2023 Reg. Sess. Act No. 66, and Act No. 68, not including changes and corrections made by the Code Comm'r); UTAH CODE ANN. § 80-2-602(4)(a) (LexisNexis, LEXIS through 2d Spec. Sess. laws of 2023); VT. STAT. ANN. tit. 33, § 4913(a)(12) (LEXIS through all legis. from the 2023 Reg. Sess.); VA. CODE ANN. § 63.2-1509(A)(19) (LEXIS through 2023 Spec. Sess. I); W. VA. CODE ANN. § 49-2-803(a) (West, Westlaw through legis. of the 2023 Reg. Sess. and 1st Spec. Sess.); WIS. STAT. ANN. § 48.981(2)(bm) (West, Westlaw through 2023 Act 39, published Nov. 17, 2023); WYO. STAT. ANN. § 14-3-205(a) (LEXIS through 2023 Gen. Sess.).

[32] *See* DeRitis, *supra* note 12, at 301 (explaining that the reason clergy are designated as mandatory reporters is because they are uniquely situated to protect vulnerable children); *see also* Tim Gregory, *Transformational Pastoral Leadership*, 9 J. BIBLICAL PERSPS. LEADERSHIP 56, 58 (2019) (emphasizing that clergy are responsible for the total well-being of their congregation).

[33] *See* DeRitis, *supra* note 12, at 300 (detailing how instances of child abuse and identities of perpetrators and victims are uniquely disclosed to clergy in the context of confessions).

[34] Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 727–28 (1987).

[35] RICHARD HAMMER, § 4.08 CHURCH L. & TAX, PASTOR, CHURCH & LAW: FAILURE TO REPORT CHILD ABUSE (2019) (ebook), https://www.churchlawandtax.com/pastor-church-law/liabilities-limitations-and-restrictions/failure-to-report-child-abuse/.

[36] *See* ALA. CODE § 26-14-13 (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); ALASKA STAT. ANN. § 47.17.068 (West, Westlaw through all amends. received through ch. 26 of the 1st 2023 Reg. Sess. of the 33rd Legis.); ARIZ. REV. STAT. ANN. § 13-3620(A), (O) (Westlaw through all legis. of the 1st Reg. Sess. of the 56th Leg. (2023)); ARK. CODE ANN. § 12-18-201(b) (LEXIS through all legis. of the 2023 Reg. Sess. and the 2023 1st Extraordinary Sess.); CAL. PENAL CODE § 11166(c) (West, Westlaw through Ch. 1 of the 2023-2024 1st Extra Sess., and all laws through Ch. 890 of 2023); COLO. REV. STAT. § 19-3-304(1)(a), (4) (LEXIS through all legis. from the 2023 Reg. and Spec. Sess.); CONN. GEN. STAT. ANN. § 17a-101a(a), (b) (West, Westlaw through all enactments of the 2023 Reg. Sess. and the 2023 Sept. Spec. Sess.); GA. CODE ANN. § 19-7-5(c)(2), (h) (LEXIS through the 2023 Reg.

these states, jail terms range from thirty days to five years, with fines ranging from $300 to $10,000.[37] For example, Alabama designates a

Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 350-1.2 (LexisNexis, LEXIS through the 2023 Legis. Sess.); IDAHO CODE § 16-1605(1), (4) (LEXIS through all legis. from the 2023 Reg. Sess.); 325 ILL. COMP. STAT. ANN. 5/4(a), (m) (West, Westlaw through P.A. 103-569 of the 2023 Reg. Sess.); IND. CODE ANN. § 31-33-22-1 (West, Westlaw through all legis. of the 2023 1st Reg. Sess. of the 123rd Gen. Assemb. effective through July 1, 2023); IOWA CODE ANN. § 232.75(1) (West, Westlaw through legis. effective July 14, 2023 from the 2023 Reg. Sess., and the 2023 1st Extraordinary Sess., subject to changes made by Iowa Code Ed. for Code 2024.); KAN. STAT. ANN. § 38-2223(a), (e) (West, Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 620.030(1), (8) (West, Westlaw through the 2023 Reg. Sess. and the Nov. 8, 2022 election); MICH. COMP. LAWS SERV. § 722.633(2) (LexisNexis, LEXIS through Act 214 of the 2023 Reg. Legis. Sess. and E.R.O. 2023-1); MINN. STAT. ANN. § 260E.08(a)–(c) (West, Westlaw through all legis. from the 2023 Reg. Sess.); MO. ANN. STAT. § 210.165(1) (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102nd Gen. Assemb.); MONT. CODE ANN. § 41-3-207(2) (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.); NEB. REV. STAT. ANN § 28-717 (LexisNexis, LEXIS through all Acts of the 1st Reg. Sess. of the 108th Leg. (2023) and 2022 ballot propositions); NEV. REV. STAT. ANN. § 432B.240 (LexisNexis, LEXIS through the end of legis. from the 82nd Reg. Sess. (2023), 34th and 35th Spec. Sess. (2023)); N.H. REV. STAT. ANN. § 169-C:39 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.); N.J. STAT. ANN. § 9:6-8.14 (West, Westlaw through L.2023, c. 150 and J.R. No. 12.); N.M. STAT. ANN. § 32A-4-3(A), (F) (West, Westlaw through July 1, 2023 of the 2023 1st Reg. Sess. of the 56th Leg. (2023)); N.Y. SOC. SERV. LAW § 420(1) (McKinney through L.2023 chs. 1 to 682); N.C. GEN. STAT. § 7B-301(a)–(b) (LEXIS through Sess. Laws 2023-149, except for Sess. Laws 2023-129, 2023-132 through 2023-134, and 2023-136 through 2023-144 of the 2023 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE § 50-25.1-13 (LEXIS through all legis. from the 68th Legis. Assemb. – Spec. Sess. (2023)); OHIO REV. CODE ANN. § 2151.99 (LexisNexis, LEXIS through File 13 of the 135th Gen. Assemb. (2023-2024)); OKLA. STAT. ANN. tit. 10A, § 1-2-101(C) (West, Westlaw through legis. of the 1st Reg. Sess. of the 59th Leg. (2023) and the 1st Extraordinary Sess. of the 59th Legislature (2023)); OR. REV. STAT. ANN. § 419B.010(1), (5) (West, Westlaw through laws of the 2023 Reg. Sess. of the 82nd Legis. Assemb. which convened Jan. 17, 2023 and adjourned sine die June 25, 2023, in effect through Dec. 31, 2023, pending classification of undesignated material and text revision by the Or. Reviser); 23 PA. STAT. AND CONS. STAT. § 6319(a)(1)–(3) (West, Westlaw through 2023 Reg. Sess. Act 66.); 40 R.I. GEN. LAWS § 40-11-6.1 (LEXIS through Ch. 398 of the 2023 Sess., including corrections and changes by the Dir. of L. Revision); S.C. CODE ANN. § 63-7-410 (West through 2023 Act No. 102, subject to final approval by the Legis. Council, technical revisions by the Code Comm'r, and publ'n in the Official Code of L.); S.D. CODIFIED LAWS § 26-8A-3 (Westlaw through the 2023 Reg. Sess. and Sup. Ct. Rule 23-17); TENN. CODE ANN. § 37-1-412(a) (LEXIS through 2023 1st Extraordinary Sess.); TEX. FAM. CODE ANN. § 261.109 (West, Westlaw through the end of the 2023 Reg., 2d and 3rd Called Sess. of the 88th Leg., and the Nov. 7, 2023 gen. election); UTAH CODE ANN. § 80-2-609(2)(a) (LexisNexis, LEXIS through 2d Spec. Sess. laws of 2023); VA. CODE ANN. § 63.2-1509(A), (D) (LEXIS through 2023 Spec. Sess. I); WASH REV. CODE ANN. § 26.44.080 (West, Westlaw through all legis. from the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.); W. VA. CODE ANN. § 49-2-812 (LexisNexis, LEXIS through all enacted 2023 reg. sess. legis. and the 1st extraordinary sess.).

[37] *See See* ALA. CODE § 26-14-13 (Westlaw through the 2023 1st Spec., Reg., and 2d Spec. Sess.); CAL. PENAL CODE § 11166(c) (West, Westlaw through Ch. 1 of 2023-2024 1st Extra Sess., and all laws through Ch. 890 of 2023); CONN. GEN. STAT. ANN. § 17a-101a(a)(1), (b)(1) (West, Westlaw through with all enactments of the 2023 Reg. Sess. and the 2023 Sept. Spec. Sess.); DEL. CODE ANN. tit. 16, § 914(a) (LEXIS through 84 Del. L., c. 240); FLA. STAT.

maximum of six months imprisonment and a fine of $500 to any person who knowingly fails to report.[38] By contrast, Florida labels failure to report as a felony and imposes penalties of up to five years in prison and a fine of $5000.[39] Regardless of the sentence imposed, the purpose of the penalties is to highlight the importance of compliance with reporting statutes because mandatory reporters are often in the "best position" to recognize early signs of child maltreatment.[40]

There are also civil penalties imposed on mandatory reporters for their failure to report. Eight states impose penalties in their mandatory reporter statutes to hold the reporter civilly liable.[41] Montana is a prime example of an ordinary civil penalty statute stating that "[a]ny person, official, or institution required by 41-3-201 to report known or suspected

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ANN. § 39.205(1) (West, Westlaw through laws, joint and concurrent resols. and mem'ls in effect from the 2023 Spec. B and C Sess. of the 2023 1st reg. sess.); LA. STAT. ANN. § 14:403(A) (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.); ME. REV. STAT. ANN. tit. 22, § 4009 (West, Westlaw through legis. through the 2023 1st Reg. and 1st Spec. Sess. of the 131st Leg.); MASS. GEN. LAWS ANN. ch. 119, § 51A(c) (West, Westlaw through Ch. 76 of the 2023 1st Ann. Sess.); MICH. COMP. LAWS SERV. § 722.633(2) (LexisNexis, LEXIS through Act 321 of the 2023 Reg. Legis. Sess. and E.R.O. 2023-1); MINN. STAT. ANN. § 260E.08(a), (c) (West, Westlaw through all legis. from the 2023 Reg. Sess.); MISS. CODE ANN. § 43-21-353(7) (LEXIS through 2023 Reg. Sess. including changes and corrs. authorized by the Joint Legis. Comm. on Compilation, Rev. and Publ'n of Legis.); N.M. STAT. ANN. § 32A-4-3(F) (West, Westlaw through July 1, 2023 of the 2023 1st Reg. Sess. of the 56th Leg. (2023)); 40 R.I. GEN. LAWS § 40-11-6.1 (LEXIS through Ch. 398 of the 2023 Sess. including corrs. and changes by the Dir. of L. Revision); S.C. CODE ANN. § 63-7-410 (Westlaw through 2023 Act No. 102 subject to final approval by the Leg. Council, tech. revisions by the Code Comm'r, and publ'n in the Off. Code of L.); TENN. CODE ANN. § 37-1-412(a)(1)–(2)(A), (b)(2) (LEXIS through the 2023 1st Extraordinary Sess.); VT. STAT. ANN. tit. 33, § 4913(h)(1)–(2) (LEXIS through all legis. from the 2023 Reg. Sess.); VA. CODE ANN. § 63.2-1509(D) (LEXIS through 2023 Spec. Sess. I); WASH REV. CODE ANN. § 26.44.080 (West, Westlaw through all legis. from the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.); W. VA. CODE ANN. § 49-2-812 (LexisNexis, LEXIS through all enacted 2023 reg. sess. legis. and the 1st extraordinary sess.); WIS. STAT. ANN. § 48.981(6) (West, Westlaw through 2023 Act 39, published Nov. 17, 2023).

[38] ALA. CODE § 26-14-13 (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.).

[39] FLA. STAT. ANN. §§ 39.205(1), 775.083(1)(c), 775.082(3)(e) (West, Westlaw through laws, joint and concurrent resols. and mem'ls in effect from the 2023 Spec. B and C Sess. and the 2023 1st reg. sess.).

[40] Paul Winters, Comment, *Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 189 (2012).

[41] *See* ARK. CODE ANN. § 12-18-206 (LEXIS through all legis. of the 2023 Reg. Sess. and the 2023 1st Extraordinary Sess.); COLO. REV. STAT. § 19-3-304(4)(b) (LEXIS through all legis. from the 2023 Reg. and 1st Extraordinary Sess.); IOWA CODE ANN. § 232.75(2) (West, Westlaw through legis. effective July 14, 2023 from the 2023 Reg. Sess., and the 2023 1st Extraordinary Sess.); MICH. COMP. LAWS ANN. § 722.633(3)(1) (West, Westlaw through P.A.2023, No. 321, of the 2023 Reg. Sess., 102d Leg.); MONT. CODE ANN. § 41-3-207(1) (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.); N.Y. SOC. SERV. LAW § 420(2) (Consol. through 2023 released Chs. 1-730); OHIO REV. CODE ANN. § 2151.421(M) (LexisNexis, LEXIS through File 17 of the 135th Gen. Assemb. (2023-2024)); 40 R.I. GEN. LAWS § 40-11-6.1 (LEXIS through Ch. 398 of the 2023 Sess.).

child abuse or neglect who fails to do so or who prevents another person from reasonably doing so is civilly liable for the damages proximately caused by the act or omission."[42] Victims' parents or guardians can sue mandatory reporters under these statutes for the physical or psychological harm their children suffered after the disclosure of the abuse went unreported.[43] Further, professional sanctions are often "imposed for failing to report, such as losing a teaching credential or license to practice medicine or psychiatry."[44]

The problem with these remedies is often with the statute of limitations. While the remedies seem sufficient to make victims of failed reporting whole, states' reporting requirements are often "inapplicable" because the statute of limitations has already run out, or the victim is no longer a minor and the abuse was not reported within a defined number of years after the minor became an adult.[45] The majority of states impose a one-year statute of limitations to prosecute failure to report, which negates recovery by many victims of failed reporting.[46] Some states acknowledged this weakness in their mandatory reporter laws and extended the time frame to allow for the prosecution of more claims.[47] Longer statutes of limitation would not only permit criminal and civil liability for mandatory reporters who fail to report instances of child abuse but also place a greater emphasis on the importance of reporting.

III. THE REALITIES OF SEXUAL ABUSE IN THE CHURCH

Protestant churches have repeatedly failed the families and victims of abuse in the ways they have handled sexual abuse allegations. This Section discusses three prominent test cases in which Protestant churches

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[42] MONT. CODE ANN. § 41-3-207(1) (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.).

[43] *See* Steven J. Singley, Comment, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 U. LA. VERNE J. JUV. L. 236, 247–48 (1998) (discussing how the court in *Kimberly S.M. v. Bradford Central School*, 649 N.Y.S.2d 588 (N.Y. App. Div. 1996), held a teacher civilly liable for breach of duty to report after a sixth-grade student disclosed that her uncle was abusing her).

[44] *Id.* at 247.

[45] *See, e.g.*, Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 402, 442 (2004) (explaining that California's code prohibits an action for failed reporting commenced on or after the child's twenty-sixth birthday).

[46] *See, e.g.*, ALA. CODE § 15-3-2 (LexisNexis, LEXIS through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); ARK. CODE ANN. § 5-1-109(b)(3)(A) (LEXIS through all legis. of the 2023 Reg. Sess. and the 2023 1st Extraordinary Sess.); IOWA CODE ANN. § 802.4 (West, Westlaw through legis. effective July 14, 2023 from the 2023 Reg. Sess., and the 2023 1st Extraordinary Sess.).

[47] *See, e.g.*, ALASKA STAT. § 12.10.010(b)(2) (LEXIS through all 2023 legis.) (designating a five-year statute of limitations for failure to report); D.C. CODE § 23-113(a)(6) (LEXIS through Dec. 7, 2023) (designating a six-year statute of limitations for failure to report); KAN. STAT. ANN. § 21-5107(c)(2) (LEXIS through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.) (designating a ten-year statute of limitations for failure to report).

have covered up allegations of child sex offenses. Specifically, this Section analyzes the allegations, the church leaders' responses, and the reporting of the abuse.

In 2021, Brian Houston, the founder of Hillsong Megachurch in Sydney, Australia, was charged with knowingly concealing allegations of child sex offenses perpetrated by his late father, Frank Houston.[48] In 1999, Brian Houston was informed that a seven-year-old boy was sexually abused by his father in the 1970s.[49] When the allegation came to light, Frank Houston, who admitted to the abuse, was dismissed quietly from his leadership position.[50] The church leadership team, which Brian Houston led, failed to report the abuse to authorities, subsequently claiming that the adult victim did not want the matter reported.[51] The Royal Commission into Institutional Responses to Child Sex Abuse began investigating the case and found that church leadership failed in the following three basic practices: They did not adhere to complaint procedure, they failed to interview the victim or Frank Houston about the abuse, and they did not record any steps taken in dealing with the allegations.[52] Brian Houston was ultimately exonerated in the trial for his failure to report the abuse.[53] He avoided a guilty verdict by presenting evidence that demonstrated a reasonable excuse not to report.[54] The law in Australia, when the allegation came to light, granted an exception to reporting when the person had a reasonable excuse not to report—an adult victim desiring that the information not be reported "qualified as a reasonable excuse under the law."[55]

In 2022, the Village Church in Texas settled a civil lawsuit over allegations of sexual abuse of an eleven-year-old girl at a church camp

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[48] Rachel Pannett, *Founder of Hillsong Global Megachurch Charged with Concealing Child Sex Abuse*, WASH. POST (Aug. 6, 2021, 1:52 AM), https://www.washingtonpost.com/world/2021/08/06/hillsong-megachurch-child-abuse/.

[49] Yan Zhuang, *Megachurch Co-Founder is Charged with Concealing Child Sexual Abuse*, N.Y. TIMES (Aug. 5, 2021), https://www.nytimes.com/2021/08/05/world/australia/hillsong-brian-houston.html.

[50] Marcus Jones, *Explained: Why Hillsong's Brian Houston Has Been Charged with Covering up Sex Abuse*, PREMIER CHRISTIANITY (Aug. 5, 2021), https://www.premierchristianity.com/news-analysis/explained-why-hillsongs-brian-houston-has-been-charged-with-covering-up-sex-abuse/5313.article.

[51] *Id.*

[52] *Id.*

[53] Associated Press, *Hillsong Church Founder Found Not Guilty of Concealing his Father's Sex Crimes*, NPR (Aug. 17, 2023, 5:45 PM), https://www.npr.org/2023/08/17/1194499061/hillsong-church-brian-houston-not-guilty-concealing-sex-crimes.

[54] *See* Jones, *supra* note 50 (noting that Houston contended he maintained his silence at the victim's behest).

[55] *Id.*

event that took place in 2012.[56] The victim told her parents in 2018 that she was sexually abused as a child by the former youth pastor of the church while at a church sleepaway camp.[57] Her parents immediately filed a police report and notified the church.[58] Although the church cooperated with police and informed the other parents at the church of the allegations, the church responded in a "spiritually abusive manner and appeared to be more concerned with the reputation of the megachurch instead of their daughter."[59] The parents of the child asserted that the church negligently breached its duty of care by "failing to 'implement reasonable policies and procedures to detect and prevent the sexual abuse . . .' and failing 'to adhere to the policies and procedures it had in place at the time.'"[60] After settling out of court, the church claimed to have "committed no wrong" and maintained that it abides by the proper procedures for increasing staff awareness and filing reports.[61]

In 2013, eleven plaintiffs filed a class action lawsuit against Sovereign Grace Church of Fairfax, Virginia, alleging that the church had covered up allegations of child molestation.[62] One of the plaintiffs was Karl Koe, a seven-year-old boy who was repeatedly sexually molested by the son of a Church pastor.[63] Although his parents disclosed the abuse to the pastor and other elders in the church in a confidential meeting, the church failed to report the assault to authorities.[64] Moreover, the church did not take any steps to prevent the "predator from preying" on "other children" and "continued to permit [him] to have unfettered access to children."[65] The complaint alleged that the church was more concerned about protecting its own interests rather than the safety and needs of children.[66]

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[56] *Update on 2012 Kids Camp* Case, VILL. CHURCH (Aug. 1, 2022), https://www.thevillagechurch.net/events/2012-kids-camp-updates [hereinafter *Update*]; Ian M. Giatti, *The Village Church Settles Sexual Abuse Lawsuit, Says 'We Committed No Wrong'*, CHRISTIAN POST (Aug. 10, 2022), https://www.christianpost.com/church-ministries/the-village-church-settles-sexual-abuse-lawsuit.html.

[57] Giatti, *supra* note 56; *see also* Diana Chandler, *Village Church Rebuts Sex Abuse Liability, $1M Claim*, BAPTIST PRESS (Aug. 26, 2019), https://www.baptistpress.com/resource-library/news/village-church-rebuts-sex-abuse-liability-1m-claim/ (specifying that the victim's abuser was her youth pastor).

[58] Giatti, *supra* note 56.

[59] *Id.*

[60] Chandler, *supra* note 57.

[61] *Update*, *supra* note 56.

[62] *Doe v. Sovereign Grace Ministries, Inc.*, 94 A.3d 264, 268 (Md. Ct. Spec. App. 2014).

[63] *Recalling When Vince Hinders Was a Defendant in Child Sex Abuse Cover-up Allegations at Sovereign Grace Fairfax (Now Redeeming Grace Church)*, WONDERING EAGLE (Sept. 25, 2019), https://wonderingeagle.wordpress.com/2019/09/25/ [hereinafter *Recalling*].

[64] *Id.*

[65] *Id.*

[66] Tiffany Stanley, *The Sex-Abuse Scandal that Devastated a Suburban Megachurch*, WASHINGTONIAN (Feb. 14, 2016), https://www.washingtonian.com/2016/02/14/the-sex-abuse-scandal-that-devastated-a-suburban-megachurch-sovereign-grace-ministries/.

Virginia law at the time of the assaults exempted pastors from mandatory reporting requirements in instances where the abuse was disclosed during confidential communications with their parishioners.[67] Thus, although the pastor admitted to being aware of the sexual abuse of children taking place within the walls of the church and failing to disclose it, this fact alone did not win the case.[68] In fact, the lawsuit was dismissed due to "restrictive civil statute of limitations for child-sex-abuse cases."[69]

The cases discussed above are not unique. Protestant churches all over the globe are facing allegations of failed reporting and alleged intent to cover up sex offenses against children to protect the reputation of their church.[70] From 2016–2017, Wade Mullen, the director of the Masters of Divinity program at Capital Seminary and Graduate School, gathered 192 reported instances of a leader from a Protestant church being publicly charged with sex offenses against a minor.[71] This number does not include the crimes committed by other adults and elders in the church or the vast number of crimes that go unreported.[72] "The causes [of the abuse] are manifold: authoritarian leadership, twisted theology, institutional protection, obliviousness about the problem and, perhaps most shocking, a diminishment of the trauma sexual abuse creates — especially surprising in a church culture that believes strongly in the sanctity of sex."[73] Many churches do so much good: providing for the sick, comforting the hurting, "nourishing the soul," and demonstrating "Jesus's example."[74] Yet, the failures to report sexual abuse, respond lovingly to victims, and change the institutional structures that enabled the abuse[75] have led to a distrust of Protestant churches and serious mental and spiritual harm to victims.

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[67] Virginia law still allows this confidential communications exception to the mandatory reporter statute. VA. CODE ANN. § 63.2-1509(A)(19) (LEXIS through 2023 Spec. Sess. I).

[68] *See* Stanley, *supra* note 66.

[69] *Id.*; *Doe v. Sovereign Grace Ministries, Inc.*, 94 A.3d 264, 268–69 (Md. Ct. Spec. App. 2014).

[70] *See, e.g.*, Andrew S. Denney, *Child Sex Abusers in Protestant Christian Churches: An Offender Typology*, 12 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 42, 43 (2023) (examining 326 alleged instances of sexual abuse in Protestant Christian churches); Nette Noestlinger, *Over 2,000 People Abused in German Protestant Church – Study*, REUTERS (Jan. 25, 2024, 10:55 AM EST), https://www.reuters.com/world/europe/over-2000-people-abused-german-protestant-church-study-2024-01-25/.

[71] Joshua Pease, *The Sin of Silence: The Epidemic of Denial About Sexual Abuse in the Evangelical Church*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/05/31/feature/the-epidemic-of-denial-about-sexual-abuse-in-the-evangelical-church/.

[72] *See id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

IV. CLERGY PRIVILEGE

Even if the statute of limitation was longer for these claims of failed reporting, states' adoption of clergy-penitent privilege works to abrogate mandatory reporting requirements. This Section discusses the background of clergy privilege, analyzes how clergy privilege intersects with mandatory reporting requirements, and dissects how state statutes differ regarding clergy-penitent privilege.

A. Background

Clergy-penitent privilege developed in the mid-1900s when the Uniform Rules of Evidence were accepted by the states, but it was not until 1972 that the U.S. Supreme Court adopted clergy-penitent privilege as a federal communications privilege.[76] Today, every state recognizes clergy privilege to protect confidential communications made with pastors or clergy members within the confines of their roles as spiritual advisors.[77] The rationale of this privilege is threefold: (1) to foster communication in the clergy-confider relationship, (2) to protect the privacy of a deeply intimate relationship, and (3) to protect the free exercise of religion from state involvement.[78]

Although every state recognizes this privilege, the information regarded as confidential is dependent on the state.

> Twenty states currently define the privilege as protecting communications with a clergy member in their capacity as a spiritual advisor,[79] twelve states define the privilege as protecting

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[76] Mitchell, *supra* note 34, at 738–39 (discussing the slow development of the federal communications privilege beginning in 1875 until its adoption by an eight-to-one vote in 1972).

[77] R. Michael Cassidy, *Sharing Sacred Secret: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?*, 44 WM. & MARY L. REV. 1627, 1639 (2003).

[78] Mitchell, *supra* note 34, at 762, 768, 776.

[79] *See* ALA. R. EVID. 505(b); ARK. R. EVID. 505(b); DEL. R. EVID. 505(b); FLA. STAT. ANN. § 90.505(1)(b) (West, Westlaw through the 2023 Spec. B and C Sess. and the 2023 1st reg. sess.); GA. CODE ANN. § 24-5-502 (LEXIS through the 2023 Reg. Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 626-1(b) (LexisNexis, LEXIS through 2023 Legis. Sess.); KAN. STAT. ANN. § 60-429(b) (West, Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.); LA. CODE EVID. ANN. art. 511(B) (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.); ME. R. EVID. 505(b); MASS. GEN. LAWS ANN. ch. 233, § 20A (West, Westlaw through Ch. 76 of the 2023 1st Ann. Sess.); MISS. CODE. ANN. § 13-1-22(2) (LEXIS through the 2023 Reg. Sess. including changes and corrections authorized by the Joint Legis. Comm. on Compilation, Revision and Publication of Legis.); NEB. REV. STAT. ANN. § 27-506(2) (LexisNexis, LEXIS through all Acts of the 1st Reg. Sess. of the 108th Leg. (2023) and 2022 ballot propositions); N.M. R. EVID. 11-506(B); N.C. GEN. STAT. § 8-53.2 (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.); N.D. R. EVID. 505(b); S.D. CODIFIED LAWS § 19-19-505(b) (Westlaw through the 2023 Reg. Sess. & Supreme Court Rule 23-17); TENN. CODE ANN. § 24-1-206(a)(1) (LEXIS through the 2023 1st

> communications relating to confession and in communications with clergy members in their capacity as spiritual advisors,[80] eight states define the privilege as covering any confidential communication with a clergy member,[81] and ten states and the District of Columbia define the privilege as covering "any confession made to him in his character as clergyman or priest in the course of discipline enjoined by the church to which he belongs"[82] or other similarly worded legislation.[83]

Based on this overview, most states "broadly" construe what information is considered confidential and thus protected under the clergy-penitent

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Extraordinary Sess.); VA. CODE ANN. § 8.01-400 (LEXIS through 2023 Spec. Sess. I); W. VA. CODE ANN. § 48-1-301(a)(1) (West, Westlaw through the 2023 Reg. Sess. and 1st Spec. Sess.); WIS. STAT. ANN. § 905.06(2) (West, Westlaw through 2023 Act 39, published Nov. 17, 2023).

[80] *See* ALA. CODE § 12-21-166(b) (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); 735 ILL. COMP. STAT. ANN. § 5/8-803 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.); IND. CODE ANN. § 34-46-3-1(3) (LexisNexis, LEXIS through all legis. (P.L.255-2023) of the 1st Reg. Sess. of the 123d Gen. Assemb.); MD. CODE. ANN., CTS. & JUD. PROC. § 9-111 (West, Westlaw through 2023 Reg. Sess. of the Gen. Assemb.); MINN. STAT. ANN. § 595.02(c) (West, Westlaw through all legis. from the 2023 Reg. Sess.); MO. ANN. STAT. § 491.060(4) (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102d Gen. Assemb.); N.H. R. EVID. 505; N.J. STAT. ANN. § 2A:84A-23 (West, Westlaw through L.2023, c. 171 and J.R. No. 15); N.Y. C.P.L.R 4505 (McKinney through L.2023, chs. 1 to 774); OHIO REV. CODE ANN. § 2317.02(C)(1) (LexisNexis, LEXIS through File 13 of the 135th Gen. Assemb. (2023-2024)); 9 R.I. GEN. LAWS § 9-17-23 (LEXIS through Ch. 4 of the 2024 Sess.); TEX. R. EVID. 505(b).

[81] *See* COLO. REV. STAT. § 13-90-107(1)(c) (LEXIS through all legis. from the 2023 Reg. and 1st Extraordinary Sess.); CONN. GEN. STAT. ANN. § 52-146b (West, Westlaw through all enactments of the 2023 Reg. Sess. and the 2023 Sept. Spec. Sess.); IOWA CODE ANN. § 622.10(1) (West, Westlaw through legis. effective July 14 from the 2023 Reg. Sess., and the 2023 1st Extraordinary Sess.); KAN. STAT. ANN. § 60-429(a)(5)–(b) (West, Westlaw through laws enacted during the 2023 Reg. Sess. of the Kan. Leg.); OKLA. STAT. ANN. tit. 12, § 2505(A)–(B) (West, Westlaw through legis. of the 1st Reg. Sess. of the 59th Leg. (2023) and the 1st Extraordinary Sess. of the 59th Leg. (2023)); OR. REV. STAT. ANN. § 40.260(2) (West, Westlaw through laws of the 2023 Reg. Sess. of the 82d Legis. Assemb.); 42 PA. STAT. AND CONS. STAT. ANN. § 5943 (West, Westlaw through 2023 Reg. Sess. Act 66); S.C. CODE ANN. § 19-11-90 (LEXIS through 2023 Reg. Sess. Act No. 66, and Act No. 88, not including changes and corrections made by the Code Commissioner).

[82] *See* ARIZ. REV. STAT. ANN. § 12-2233 (Westlaw through legis. of the 1st Reg. Sess. of the Fifty-Sixth Leg. (2023)); CAL. EVID. CODE §§ 1032, 1033 (West, Westlaw through Ch. 1 of 2023–2024 1st Ex.Sess., and all laws through Ch. 890 of 2023 Reg. Sess.); D.C. CODE § 14-309 (LEXIS through Dec. 7, 2023); IDAHO CODE § 9-203(3) (LEXIS through all legis. from the 2023 Reg. Sess.); MICH. COMP. LAWS ANN. § 600.2156 (West, Westlaw through P.A.2023, No. 321, of the 2023 Reg. Sess., 102d Leg.); MONT. CODE ANN. § 26-1-804 (West, Westlaw through chs. effective Jan. 1, 2024 of the 2023 Sess.); NEV. REV. STAT. ANN. § 49.255 (LexisNexis, LEXIS through the end of legis. from the 82d Reg. Sess. (2023), 34th and 35th Spec. Sess. (2023)); UTAH CODE ANN. § 78B-1-137(3) (LexisNexis, LEXIS through the 2d Spec. Sess. laws of 2023); VT. STAT. ANN. tit. 12, § 1607 (LEXIS through all legis. from the 2023 Reg. Sess.); WASH. REV. CODE ANN. § 5.60.060(3) (West, Westlaw through all legis. from the 2023 Reg. and 1st Spec. Sess. of the Wash. Leg.); WYO. STAT. ANN. § 1-12-101(a)(ii) (LEXIS through 2023 Gen. Sess.).

[83] DeRitis, *supra* note 12, at 289–90.

privilege.[84] However, the differing generalized statutes from state to state often make it difficult to understand what relationships and communications fall within the privilege. Most states indicate that for the privilege to apply, the cleric must be affiliated with a religious organization, must act within his professional capacity of giving spiritual guidance, and the communication must have been made with a reasonable expectation of confidentiality.[85] Therefore, casual communications made to a cleric acting as a friend are not privileged.[86] But, most state statutes do not detail specifics on who must initiate communication.[87] This leads to ambiguity as to whether the communicant must be a member of the church. Further, the presence of a third party often destroys the confidentiality of the communication, making it uncertain whether the privilege would apply in cases where a married couple seeks counsel together.[88] Although there is some ambiguity on what communications are privileged, case law makes it clear that a cleric's observation of symptoms or scenarios indicative of abuse does not fall within the clergy-penitent privilege.[89]

B. Clergy Privilege and Mandatory Reporting

States differ on how this privilege affects mandatory reporter requirements. Most states that enumerate clergy as mandatory reporters allow clergy privilege to prohibit disclosure of confidential communications regarding alleged child abuse.[90] New Hampshire and West Virginia are the only two states that specifically enumerate clergy

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[84] *Id.*

[85] *See, e.g.*, ALA. CODE § 12-21-166(a)(1) (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.); LA. CODE EVID. ANN. art. 511(A)(1) (Westlaw through the 2023 1st Extraordinary, Reg., and Veto Sess.); MO. ANN. STAT. § 491.060(4) (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102nd Gen. Assembl.) (asserting that clergy privilege applies to communications made in "professional capacity as a spiritual advisor, confessor, counselor or comforter").

[86] Mitchell, *supra* note 34, at 745 (asserting that clergy privilege does not apply when the cleric is acting as a "friend, business associate, public official, or fortuitous bystander" (footnotes omitted)).

[87] *See, e.g.*, GA. CODE ANN. § 19-7-5(g) (LEXIS through the 2023 Reg. Sess. of the Gen. Assembl.) (mandating in passive voice the clergy privilege exception without addressing who the discloser must be); COLO. REV. STAT. § 13-90-107(c) (LEXIS through all legis. from the 2023 Reg. and 1st Extraordinary Sess.) (allowing any confidential communication made to the religious leader in his or her professional capacity to fall under the clergy privilege exception without distinguishing who must initiate the communication).

[88] Mitchell, *supra* note 34, at 751–53 (asserting that the presence of a spouse should not waive the privilege due to the same expectation of privacy).

[89] *See, e.g.,* State v. Kurtz, 564 S.W.2d 856, 861 (Mo. 1978) (establishing that personal observations may be admissible under clergy-penitent privilege).

[90] *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CLERGY AS MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2–3 (Children's Bureau 2023), https://www.childwelfare.gov/resources/clergy-mandatory-reporters-child-abuse-and-neglect/ [hereinafter CHILD WELFARE].

as mandatory reporters but abrogate clergy-penitent privilege in situations of child abuse.[91] Four additional states enumerate clergy as mandatory reporters under the "any person" standard and deny clergy privilege in child abuse cases.[92] The result of abrogating clergy privilege is that clergy must report known or suspected child abuse even when it is disclosed during confidential communications made to the clergyman while acting in his professional role of administering spiritual guidance.[93]

For the rest of the states, the extent to which the privilege abrogates mandatory reporting requirements and in what circumstances it applies has been unclear. For example, some statutes are worded so narrowly that they only apply to clergy testimony at trial, and they suggest that the privilege would not shield the clergyman from reporting requirements.[94] Other statutes are worded more broadly to allow clergy privilege to extend during any civil or criminal proceeding, yet still seem to prohibit the privilege from applying to mandatory reporting.[95] The coverage of these broader statutes depends on the interpretation of the word "proceeding" which appears to limit reporting actions taken before a proceeding is initiated.[96] By contrast, Illinois's clergy privilege statute easily extends to abrogate state-mandated reporting requirements stating that "[a] clergyman . . . shall not be compelled to disclose in any court, or to any administrative board or agency, or to any public officer, a confession or admission made to him or her in his or her professional character or as a spiritual advisor . . . ."[97] Extending the privilege to prohibit disclosures to boards and officers seemingly abrogates mandatory reporting

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[91] *See* N.H. REV. STAT. ANN. § 169-C:32 (Westlaw through Ch. 243 (end) of the 2023 Reg. Sess.); W. VA. CODE ANN. § 49-2-811 (West, Westlaw through legis. of the 2023 Reg. Sess. and 1st Spec. Sess.).

[92] *See* N.C. GEN. STAT. § 7B-301(a) (LEXIS through Sess. Laws 2023-151 of the 2023 Reg. Sess. of the Gen. Assemb.); OKLA. STAT. tit. 10A, § 1-2-101(B)(1), (4) (West, Westlaw through legis. of the 1st Reg. Sess. of the 59th Leg. (2023) and the 1st Extraordinary Sess. of the 59th Leg. (2023)); 40 R.I. GEN. LAWS § 40-11-3(a) (LEXIS through Ch. 4 of the 2024 Sess.); TEX. FAM. CODE ANN. § 261.101(a), (c) (West, Westlaw through the end of the 2023 Reg., 2d and 3d Called Sess. of the 88th Leg., and the Nov. 7, 2023 gen. election).

[93] *See* DeRitis, *supra* note 12, at 298.

[94] *See, e.g.*, TENN. CODE ANN. § 24-1-206(a)(1) (LEXIS through the 2023 1st Extraordinary Sess.) (limiting the extent of the privilege to "giving testimony as a witness in any litigation"); 9 R.I. GEN. LAWS § 9-17-23 (LEXIS through Ch. 4 of the 2024 Sess.) (designating that the privilege only applies "[i]n the *trial* of every cause, both civil and criminal") (emphasis added).

[95] *See, e.g.*, ALA. CODE § 12-21-166 (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.) (discussing that the privilege applies in "[a]ny proceeding, civil or criminal, in any court"); D.C. CODE § 14-309 (LEXIS through Dec. 7, 2023) (listing that the privilege applies "in any civil or criminal proceedings").

[96] *Contra* Mitchell, *supra* note 34, at 788–89 (asserting that a report of child abuse commences a proceeding, and thus would fall within the reporting requirements).

[97] 735 ILL. COMP. STAT. ANN. 5/8-803 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.).

requirements for a clergyman if the disclosure was received during a confidential communication for the purpose of spiritual guidance.[98] Despite this, "clergy privilege statutes mostly fail to state or even imply whether the privilege could be properly invoked to excuse a failure to report abuse."[99] These gaps in the drafting of the clergy-penitent privilege statutes make it unclear whether the state legislatures intended clergy members to be prohibited from only testifying at trial about confidential communications with their parishioners or from even reporting confidential communications to authorities when a crime is involved.

V. NEW HAMPSHIRE'S STATUTORY SCHEME

New Hampshire's statutory scheme surrounding mandatory reporting requirements not only gives more guidance about the applicability of the clergy-penitent privilege, but it also specifically abrogates clergy privilege in cases of child abuse. New Hampshire's mandatory reporter statute reads:

> Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, *priest, minister, or rabbi* or *any other person* having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter.[100]

Clergy members clearly fall within this list of individuals required to report known or suspected child abuse. In fact, New Hampshire not only specifies clergy as mandatory reporters, but it also adheres to the "any person" standard to contain individuals not listed. In addition to this, New Hampshire's religious leaders' privilege statute reads, "A priest, rabbi or ordained or licensed minister of any church or a duly accredited Christian Science practitioner shall not be required to disclose a confession or confidence made to him in his professional character as spiritual adviser, unless the person confessing or confiding waives the privilege."[101] Thus, clergy members, defined as "any minister, priest, rabbi, Christian Science practitioner, or any other similar religious counselor," are prohibited from disclosing confidential communications made to them in their roles as

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[98] *Id.* 735 5/8-803; *see* Mitchell, *supra* note 34, at 788.

[99] Mitchell, *supra* note 34, at 789.

[100] N.H. REV. STAT. ANN. § 169-C:29 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.) (emphasis added).

[101] *Id.* § 516:35.

spiritual advisors.[102] The privilege holder is the parishioner, meaning that the communication can only be revealed if the person confessing or confiding in the clergy member waives the privilege.[103]

However, when it comes to mandatory reporting requirements, New Hampshire abrogates this privilege, stating that "[t]he privileged quality of communication between husband and wife and any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter."[104] In cases of mandatory reporting of child abuse, all privileges to withhold confidential communications are abrogated except for those between attorneys and their clients. Any reporter not adhering to these requirements is guilty of a misdemeanor.[105]

VI. PROPOSAL TO ADOPT NEW HAMPSHIRE'S SCHEME

This Note proposes that every state should adopt a similar statutory scheme to New Hampshire's because it not only provides an exemption for child abuse cases but also maintains clergy privilege in all other scenarios. It is an effective way to combat child abuse while still maintaining evidentiary and constitutional concerns regarding clergy privilege.

A. Comparison to Other Statutory Schemes

The results in states that use clergy privilege to abrogate mandatory reporting requirements are vastly different than the results in states like New Hampshire that maintain reporting requirements in cases of abuse.[106] The following demonstrates how the different mandatory reporting statutes—enumerating clergy but abrogating clergy privilege, containing clergy within the "any person" standard but abrogating clergy privilege, and listing clergy but revoking clergy privilege in cases of abuse—affect the outcome of the circumstance. For instance, consider a hypothetical situation in which a parishioner meets with his pastor for a weekly counseling session in the pastor's office. During the session, the parishioner breaks down weeping and confesses that he has been molesting a ten-year-old boy in the church when the boy comes over for play dates with his own son. In Illinois, clergy members are specifically enumerated as mandatory reporters of child abuse.[107] However, Illinois

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[102] *Id.* §§ 330-C:2(v), 516:35.

[103] *Id.* § 516:35.

[104] *Id.* § 169-C:32.

[105] *Id.* § 169-C:39.

[106] *Compare id.* (punishing a failure to report as a misdemeanor), *with* 325 ILL. COMP. STAT. ANN. 5/4(a)(9), (g) (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.) (maintaining clergy privilege in cases of child maltreatment).

[107] 325, 5/4(a)(9), (e).

revoked mandatory reporting requirements for clergy members if the communication was disclosed during a confession to a pastor.[108] There is no exception or abrogation for cases of abuse.[109]

Thus, in the aforementioned situation, the pastor would not be required to report the disclosed child abuse because: (1) the conversation took place in the pastor's office, which has a reasonable expectation of privacy (assuming the door was shut); (2) the conversation was a communication; and (3) the purpose of the meeting and confession was spiritual counseling by the pastor acting in his professional capacity. Clergy privilege would apply and abrogate the reporting requirements. Similarly, Maryland enumerates clergy members as mandatory reporters under the "any person" standard.[110] However, Maryland abrogates reporting requirements through clergy privilege and provides no exception for cases of child abuse.[111] Thus, in the above situation, the result would be identical to Illinois in that the pastor would not be required to report the abuse.

By contrast, New Hampshire specifically enumerates clergy members as mandatory reporters and designates clergy privilege to protect confidential communications with pastors.[112] However, New Hampshire revokes clergy privilege in cases of child abuse, which means clergy are required to follow the mandatory reporting requirements even if the abuse was disclosed in a confidential communication.[113] Even though the requirements of clergy privilege are likely fulfilled because (1) the conversation took place in the pastor's office, which has a reasonable expectation of privacy (assuming the door was shut); (2) the conversation was a communication; and (3) the purpose of the meeting and confession was spiritual counseling by the pastor acting in his professional capacity, the pastor would be required to report the abuse to law enforcement as a mandatory reporter or be guilty of a misdemeanor.[114]

This scenario depicts the tension between clergy privilege and mandatory reporting requirements in states that have not adopted New Hampshire's statutory scheme. Although clergy are required to report in these states, the reality is that many of the scenarios that expose them explicitly to information of child abuse or information indicative of child

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[108] *Id.* 325 5/4(a)(9), (g), 735 5/8-803.

[109] *See id.* 735 5/8-803.

[110] MD. CODE ANN., FAM. LAW. § 5-705(a)(1) (West, Westlaw through all legis. from the 2023 Reg. Sess. of the Gen. Assemb.).

[111] *Id.* § 5-705(a)(3) (discussing that clergy are not required to provide notice of child abuse if "the notice would disclose matter in relation to any communication" that falls within clergy privilege).

[112] N.H. REV. STAT. ANN. §§ 169-C:29, 516:35 (Westlaw through Ch. 243 (End) of the 2023 Reg. Sess.).

[113] *Id.* § 169-C:32.

[114] *Id.* § 169-C:39.

abuse cannot be reported because it is barred by clergy privilege. The sad result is that many children are failed in these states because their disclosed abuse goes unreported.[115]

B. Revisiting Test Cases

This Section seeks to reexamine the three test cases that demonstrated the churches' continuing failure to report known instances of child abuse and discuss whether New Hampshire's statutory scheme would have changed the results in any of the cases.

In the Hillsong Church case, although the abuse was disclosed to the pastor, this disclosure likely would not be found to be confidential because the purpose of the disclosure was not to acquire spiritual guidance but rather to bring attention to the abuse suffered at the hands of the senior pastor.[116] Thus, because the disclosure was not a confidential communication for the purpose of counseling in the pastor's official capacity, clergy privilege likely would not apply.[117] The New Hampshire statutory scheme would be unlikely to affect the results in this case because it was a straightforward failure of a mandatory reporter to report known child abuse, and clergy privilege did not apply to abrogate the reporting requirement. Similarly, in the Village Church case, the abuse was disclosed to the child's parents, who took the information directly to the police before notifying the church, and the church cooperated with the investigation.[118] As such, New Hampshire's statutory scheme would not affect the results because there was no failure to report the abuse on the part of the church.

By contrast, in the Sovereign Grace Church case, the seven-year-old boy's parents disclosed the abuse to the pastor of the church in a privileged meeting.[119] The purpose of the meeting was to seek guidance regarding the alleged abuse and to inform the church of the alleged abuser.[120] Under

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[115] *See, e.g.*, DeRitis, *supra* note 12, at 296–97 (discussing New York's statutory scheme in which clergy privilege abrogates reporting requirements allowing many cases of abuse to go unreported).

[116] *Cf.* ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, REPORT OF CASE STUDY NO. 18, at 27 (2015) https://nla.gov.au/nla.obj-541683404/view (explaining that Brian Houston learned of the abuse from the Business Manager of Hills Christian Life Center, Mr. George Aghajanian, who himself learned about the abuse from Mr. Mudford, a Pastor at Hillsong Church).

[117] *See* Mitchell, *supra* note 34, at 747–49 (discussing the spectrum of what communications are protected by the clergy privilege with even the least restrictive statute still requiring the communication to be confidential).

[118] *See* Giatti, *supra* note 56.

[119] *Cf. Recalling*, *supra* note 63 (addressing how the parents of one of the abused children met with the employees of the church to reveal the abuse).

[120] *Cf. id.* (discussing how the church failed to act after learning about the abuse).

Virginia law, clergy members are enumerated as mandatory reporters of child abuse.[121] However, the clergy-penitent privilege statute reads:

> No regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years . . . shall be required to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity . . . wherein such person so communicating such information about himself or another is *seeking spiritual counsel and advice relative to and growing out of the information so imparted.*[122]

This statute revokes reporting requirements.[123] Thus, in the Sovereign Grace Church case, because the parents disclosed the information during a confidential meeting with the pastor to seek advice regarding the information, the pastor was not required to disclose the abuse because the information was protected under clergy privilege.[124] However, if Virginia adopted a statutory scheme similar to New Hampshire's, the results of the case would change drastically. Instead of abrogating the reporting requirement, the clergy privilege would not apply because the information would fall within the clergy privilege exception for information regarding child abuse.[125] Thus, the pastor in the Sovereign Grace Church case would have failed in his duty to report the alleged child abuse and would have been guilty of a Class 1 misdemeanor and subject to a fine of no more than $500.[126] It is interesting to note that even if Virginia had adopted New Hampshire's statutory scheme imposing a duty to report in this case, the result would likely be the same because the suit was barred by the one-year statute of limitations.[127]

VII. CONSTITUTIONAL CONSIDERATIONS

This Section analyzes how the Establishment Clause interplays with the constitutionality of the clergy-penitent privilege and how to draft a

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[121] *See* VA. CODE ANN. § 63.2-1509(A)(19) (LEXIS through 2023 Spec. Sess. I) (listing "[a]ny minister, priest, rabbi, imam, or duly accredited practitioner of any religious organization or denomination usually referred to as a church" as mandatory reporters).

[122] *Id.* § 8.01-400 (emphasis added).

[123] *Id.* (stating that religious ministers cannot be compelled to disclose confidential information that others have communicated to them in their professional capacity).

[124] *See* Stanley, *supra* note 66; CHILD WELFARE, *supra* note 90, at 2–3.

[125] *See* N.H. REV. STAT. ANN. § 169-C:32 (Westlaw through Ch. 243 of the 2023 Reg. Sess.) (abrogating clergy-penitent privilege in cases of abuse).

[126] *See* VA. CODE ANN. § 63.2-1509(D) (LEXIS through 2023 Spec. Sess. I) (designating the punishments for failure to report as a mandatory reporter).

[127] *Id.* § 19.2-8 (designating a one-year statute of limitations for misdemeanors).

statute abrogating clergy privilege in cases of abuse without violating free-exercise protections.

A. Establishment Clause

The Establishment Clause of the First Amendment reads, "Congress shall make no law respecting an establishment of religion."[128] Despite the Clause directly referencing Congress, the U.S. Supreme Court has incorporated the First Amendment and made it applicable not only to the federal government but to the states under the doctrine of textual substantive due process.[129] "Although the Supreme Court has never ruled directly on the constitutionality of the clergy privilege, in light of the Court's establishment cases, the constitutionality of the privilege seems open to question."[130]

From the Founding until the 1970s, establishing religion meant that the government could not use its coercive power to promote religion or force people to participate in religion.[131] Since the 1970s, the Court has used a variety of tests to determine whether there has been an Establishment Clause violation based on a governmental action.[132] Most frequently, the Court has used the non-coercion test and the *Lemon* test to determine whether there has been an Establishment Clause violation.[133] The non-coercion test mandates that the government may not use its coercive power to promote religion.[134] The primary focus of this test

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[128] U.S. CONST. amend. I.

[129] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 8, 15 (1947) (holding for the first time that the Fourteenth Amendment incorporates the Establishment Clause of the First Amendment).

[130] Mitchell, *supra* note 34, at 778 (footnote omitted).

[131] *See* Eugene Volokh, *Cleaning up the* Lemon *Mess*, VOLOKH CONSPIRACY (Feb. 28, 2019, 12:49 PM), https://reason.com/volokh/2019/02/28/cleaning-up-the-lemon-mess/ (discussing the six characteristics of establishment at the time of the founding according to Professor Michael McConnell, a leading Free Exercise scholar, which include: "(1) government control over the doctrine and personnel of the established church; (2) mandatory attendance in the established church; (3) government financial support of the established church; (4) restrictions on worship in dissenting churches; (5) restrictions on political participation by dissenters; and (6) use of the established church to carry out civil functions."); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (ignoring the traditional approach and implementing a new approach for evaluating Establishment Clause violations), *abrogated by* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022).

[132] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687–92 (1984) (O'Connor, J., concurring) (discussing the endorsement test and the equal protection test); *Lemon*, 403 U.S. at 612–13 (establishing the *Lemon* test); Lee v. Weisman, 505 U.S. 577, 587–88 (1992) (implementing the non-coercion test); *Everson*, 330 U.S. at 15–16, (stating that the purpose of the Establishment Clause is to erect a "wall of separation between church and State") (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

[133] *See, e.g.*, *Lemon,* 403 U.S. at 615; *Lee*, 505 U.S. at 587–88; *Everson*, 330 U.S. at 14–16.

[134] *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678).

is to prohibit laws that favor (or disparage) one religion over another.[135] The three-part *Lemon* test analyzes whether the statute has "a secular legislative purpose," whether the primary effect "neither advances nor inhibits religion," and whether the law "foster[s] 'an excessive government entanglement with religion.'"[136] The primary focus of this test is to prohibit laws that favor religion by granting special benefits to religious institutions.[137] Today, the Court seems to be moving back towards the non-coercion standard, focusing on a historical understanding of what establishment meant at the time of the founding. But, if prior case law demonstrates anything, the Court has been unwilling to be confined to one test.[138] However, under either test, there are concerns about how clergy privilege is affected.

1. The Non-Coercion Test

The Government may not promote one religion over another. This principle has been established since the Founding and has been demonstrated in many establishment cases.[139] In concept, the government must remain neutral with respect to religion and allow for all religions and denominations to receive the same benefits.[140] For example, in *Zorach v. Clauson*, the Court found that New York City's program, which permitted students to be released to religious centers during the school day, did not violate the Establishment Clause because no religious groups were excluded from the benefit.[141] Similarly, in *Town of Greece v. Galloway*, the Court found that a New York practice of allowing rotating chaplains to open legislative sessions with prayer did not violate the Establishment Clause because it did not coerce participation by non-adherents, and any faith was permitted to offer the prayer.[142] In both cases, the Establishment Clause was not violated as long as no religion was excluded from receiving the designated benefit.[143]

Clergy privilege statutes are not always neutral regarding religion. For instance, many statutes limit the privilege to only apply to "bona fide

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[135] *See* Mitchell, *supra* note 34, at 777.

[136] *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[137] Mitchell, *supra* note 34, at 778, 780–81.

[138] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 535–36, 543–44 (2022) (holding that a football coach's post-game silent prayers did not violate the Establishment Clause).

[139] *See, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899); Cnty. of Allegheny v. ACLU, 492 U.S. 573 (1989); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

[140] *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 14–16, 18 (1947) (holding that a state law funding private school transportation was neutral towards religion and thus did not violate the Establishment Clause).

[141] 343 U.S. 306, 308–09, 315 (1952).

[142] 572 U.S. 565, 587–88 (2014).

[143] *See id.* at 585–86; *Zorach*, 343 U.S. at 314–15.

established church[es]."[144] Some states limit the privilege to apply only to "priest[s]" or "minister[s] of the gospel."[145] Creating lines between religions and denominations results in establishment concerns. Under the non-coercion test, the state cannot give a benefit—in this instance, a privilege not to disclose confidential communications—to some religions and not others. Thus, in drafting a clergy privilege statute, the privilege must apply to clergy of all religions.

2. The *Lemon* Test

The Government may not promote religion. This second principle has been established since the Founding and has been demonstrated in many establishment cases.[146] The concept is that the government must remain neutral regarding religion and may not favor religion by providing a special benefit, even if it gives the benefit to all religions.[147] The Court articulated this concept in a landmark decision in 1971, which created a new establishment test.[148] Although modern Justices have disavowed the *Lemon* test,[149] the Court has frequently adhered to the tripartite test.[150] Should the Court decide to return to the *Lemon* standard, an analysis of clergy privilege under this establishment test is inexorable. In *Lemon v. Kurtzman*, the Court found that for a law to be constitutional, it must (1) have a "secular legislative purpose," (2) the primary effect "neither advances nor inhibits religion," and (3) it may not "foster 'an excessive government entanglement with religion.'"[151] In that case, the Court held that the statute giving government aid to private schools through reimbursement for salaries and textbooks violated the Establishment Clause because the state was monitoring how the money was used, which amounted to a government entanglement with religion.[152]

Clergy privilege statutes may be seen as promoting religion by giving a benefit solely to religious institutions. To escape these risks when

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144 *See* ALA. CODE § 12-21-166(a)(1) (Westlaw through the end of the 2023 1st Spec., Reg., and 2d Spec. Sess.).

145 *See* 9 R.I. GEN. LAWS § 9-17-23 (LEXIS through Ch. 398 of the 2023 Sess., including corrections and changes by the Dir. of L. Rev.).

146 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971); Zelman v. Simmons-Harris, 536 U.S. 639 (2002); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).

147 *See, e.g.*, Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 205, 222–23 (1963) (holding that requiring students to read daily bible verses violated the Establishment Clause because the state was promoting religion).

148 *Lemon*, 403 U.S. at 612–13.

149 Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022); *see* Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 69 (2019) (Kavanaugh, J. concurring) (asserting that the Lemon test has been abrogated or ignored by Court precedent for the past several decades).

150 *See supra* notes 142–45.

151 *Lemon*, 403 U.S. at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

152 *Id.* at 621–22, 625.

drafting a clergy-penitent privilege statute, the state must consider three things. First, a secular purpose may be demonstrated by state justification of the clergy privilege through a secular interest such as "protecting the privacy of intimate relationships."[153] Second, a state's contemporaneous recognition of other communications privileges for other private relationships nullifies the idea that the state is promoting religion.[154] Third, based on the precedent of what constitutes an excessive government entanglement, the clergy privilege does not foster such entanglement; thus, the drafters of a clergy privilege statute would not need to worry about this prong. Thus, if the Court were to readopt the *Lemon* test, and draft the clergy statute to promote a secular purpose alongside other communications privileges, there should not be an Establishment Clause violation. However, modern Justices are increasingly inclined to interpret the meaning of establishment based on its understanding at the time of the founding, using the noncoercion test.

B. Free Exercise

The Free Exercise Clause of the First Amendment reads, "Congress shall make no law . . . prohibiting the free exercise [of religion]."[155] Although this Clause is directed at the federal government specifically, it was incorporated to the states under the Fourteenth Amendment in the 1940s.[156] This Clause protects the individual right not to be compelled to act in a way that is offensive to one's religious belief or that infringes on the practices central to one's religion.[157] Many clergy object to compelled disclosure of confidential communications confided in them because they believe such disclosure will destroy the trust and confidence inherent in their position as a spiritual advisor.[158] Precedent shows that the clergy-penitent privilege is not directly protected under the Free Exercise Clause but merely a statutory provision that may be changed at the will of the state legislature.[159] As such, to abrogate the clergy privilege in cases of child abuse, the state would need to adhere to the test laid out in *Employment Division v. Smith*.[160] In *Smith*, the Court found that for a law to be constitutional under the Free Exercise Clause, it must be a neutral

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153 Mitchell, *supra* note 34, at 782.

154 *Id.* at 783–84.

155 U.S. CONST. amend. I.

156 *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

157 *See, e.g.*, United States v. Seeger, 380 U.S. 163, 169–70 (1965) (recognizing that it has long been acknowledged that the state shall not violate the conscience and religious beliefs of conscientious objectors).

158 Mitchell, *supra* note 34, at 794–95.

159 *See id.* at 798–99.

160 494 U.S. 872, 878–79 (1990) (stating that Free Exercise does not exempt religious individuals from complying with neutral and generally applicable laws).

law of general applicability, which means the law is neutrally applied to all groups and does not target religion.[161] If the law is not neutral, then the Court will apply strict scrutiny to determine whether a free exercise violation has occurred.[162]

To bring a free exercise claim under a statute that abrogates clergy privilege in cases of child abuse, the clergyman would need to demonstrate a sincerely held religious belief that has been infringed on due to this statutory change.[163] Likely, the Court would recognize that confidentiality is essential to the effectiveness of a ministry, and the abrogation infringes on this belief. Under *Smith*, clergy privilege statutes likely would not constitute a neutral law of general applicability because they are a protection solely for religious institutions.[164] As such, when analyzing the constitutionality of a clergy statute, the Court would apply strict scrutiny—that is, a compelling governmental interest furthered by the least restrictive means.[165] The state must demonstrate a compelling interest in the abrogation of the privilege—such as attempting to lessen the crisis of child sex offenses—furthered by the least restrictive means—namely, only abrogating the privilege in cases of child abuse. Demonstration of this would likely lead to success in constitutionally abrogating the clergy privilege in cases of abuse.

CONCLUSION

Child sex offenses are a pervasive problem in our society and, as such, occur far too often in our churches. State legislatures must find a way to combat this issue by requiring churches to implement reporting procedures rather than allowing them to be a haven for offenders. Although clergy are enumerated as mandatory reporters in many states due to their close contact with children, the penalties for failure to report are largely insufficient to make victims whole. Moreover, these penalties hinge on excessively short statutes of limitations, which negate filing suit in many cases. Exacerbating the problem, in many states, clergy-penitent privilege works to abrogate reporting requirements, making a clergyman innocent of failure to report if the abuse was disclosed during a confidential communication for the purpose of spiritual guidance.

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[161] *See id.* at 879–80.

[162] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

[163] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 218, 220, 234–35 (1972) (demonstrating that a mandatory school attendance law burdened the sincerely held religious beliefs of the Amish community).

[164] *See Smith*, 494 U.S. at 878 (asserting that a law only burdens religion if it is either not neutral or not generally applicable).

[165] *See, e.g.*, *Yoder*, 406 U.S. at 215 (holding that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (establishing strict scrutiny as the test for free exercise violations).

New Hampshire has taken progressive steps towards combating this pervasive problem by placing a duty on clergy members to report cases of abuse. This Note proposes that all states should adopt a similar statutory scheme to New Hampshire's by revoking clergy privilege in cases of child abuse. Although this would not be an immediate solution, it would be an effective way to combat child abuse while still maintaining evidentiary and constitutional concerns regarding clergy privilege. Let us not continue to help child sex offenders hide their sin but proactively adopt legislation that will effectively shine a light on these cases for the world to see. In so doing, we agree with God's powerful words, "you may be sure that your sin will find you out."[166]

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[166] *Numbers* 32:23 (New International Version).

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