



SUPREME COURT REVIEW

2018–2019

Third Edition

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Editor's Note

Steven D. Schwinn*

We're thrilled to bring you our third edition of the *American Constitution Society Supreme Court Review*, covering the 2018-2019 Term. This volume collects an outstanding series of articles from some of the nation's top constitutional scholars, covering the cases, themes, and trends from the Court's last Term. Professor Neil S. Siegel graciously agreed to write our foreword this year. He provides an excellent overview of the Term and a preview of each of our articles.

As usual, this was a team effort. I'd like to thank our very talented and thoughtful authors and Professor Siegel for their contributions. I'd like also to thank Caroline Fredrickson, president emerita; Zinelle October, our interim president; and Kara Stein, vice president of policy and program for their ongoing support for this project. I'd like to thank Tom Wright, assistant director of strategic engagement, and Violet S. Rush, law fellow, for their truly outstanding and meticulous editorial work. And most especially I'd like to thank Christopher Wright Durocher, senior director of policy and program, for his all-around dogged efforts and his unwavering faith, support, and patience as we put this together.

I'm genuinely honored to share this year's *Review* with you. I hope you enjoy the articles as much as I have.

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Foreword

The October 2018 Term: Leaving Things Undecided— and Non-Partisan—For Now

Neil S. Siegel*

We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.¹

– Chief Justice John Roberts

The October 2018 Term of the Supreme Court of the United States was not one for the history books, and that was likely, at least in part, by design. The Court appeared self-consciously to avoid taking cases that would have further propelled it into the national spotlight soon after the uncommonly divisive confirmation hearings of Justice Brett Kavanaugh. During those hearings, Justice Kavanaugh was perceived by many to have

*David W. Ichel Professor, Duke Law School. For useful feedback or conversations about the October 2018 Term of the Supreme Court of the United States, I thank Curt Bradley, Erwin Chemerinsky, Michael Dorf, Craig Green, David Strauss, the judges on the Arkansas Judicial Council, and the attorneys, summer associates, and alumni of Simpson Thacher & Bartlett LLP in New York City. The title of this *Foreword* is partly an homage to Cass Sunstein's famous *Foreword*. See Cass R. Sunstein, *Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

¹See Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018) (quoting the response of Chief Justice John Roberts to President Donald Trump's characterization of a judge who had ruled against his administration's asylum policy as "an Obama judge").

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behaved like a political partisan in response to explosive sexual assault allegations dating back to high school that Dr. Christine Blasey Ford made against him.² The hearings likely raised concerns among at least some of the justices—especially Chief Justice John Roberts—about preserving the Court’s reputation as not just another partisan institution.

The Term also featured a public disagreement between Chief Justice Roberts and President Donald Trump over whether there were “Obama judges or Trump judges, Bush judges or Clinton judges” in the federal judiciary.³ One way to adjudicate that disagreement, at least as far as the last Term is concerned, is to look at how the cases fractured the Court: How often, and in which cases (some are more important than others), were the five Republican appointees on one side and the four Democratic appointees on the other? A second way to evaluate the disagreement between the chief justice and the president is to examine the relationship of the newly reconstituted Court to precedent: Are the five Republican appointees throwing caution to the wind and overruling numerous significant precedents over the objections of the four Democratic appointees? A third way is to analyze the Court’s reaction to pretextual justifications for prominent actions taken by the Trump administration, a situation especially likely to divide “Obama judges and Trump judges” if the president’s claim is correct: Did the five Republican appointees side with the president’s position in the Census case, *Department of*

² See, e.g., Robert Post, *Brett Kavanaugh Cannot Have It Both Ways*, POLITICO MAG. (Oct. 6, 2018) (“With calculation and skill, Kavanaugh stoked the fires of partisan rage and male entitlement.”).

³ See Liptak, *supra* note 1. For a comparison of John Roberts and Donald Trump along a different dimension of difference, see Michael Dorf, *Two Branches, Two Leaders, Two Speeches to Adolescent Boys*, DORF ON L. (Aug. 7, 2017).

Commerce v. New York,⁴ and did the four Democratic appointees reject that position?

I take on those questions in this *Foreword* to the third edition of the *Supreme Court Review Journal* of the American Constitution Society. Overall, I conclude that the past Term rebutted the president's claim more than it validated it. I also conclude, however, that one term does not a reputation make, especially when the term is a transitional one—which the October 2018 Term likely was. The big question in the years ahead will be what the Court is transitioning to.

Part I of this *Foreword* documents the Court's prudence in maintaining a relatively low profile during the past Term. Part II begins to evaluate the president's charge of a politically identifiable federal judiciary by examining the vote splits generated by the cases decided during the Term. Part III further assesses the president's claim by discussing the Court's approach to precedent last Term, which is also a good place to look for storm clouds if the Court is indeed in transition. Part IV turns to the problem of pretext by focusing on the Court's response to the Census case, which (along with the two partisan gerrymandering cases, decided together as *Rucho v. Common Cause*),⁵ was the most important decision of the October 2018 Term. Part V closes by introducing this volume's treatments of particular decisions from the October 2018 Term—analyses that reflect the formidable expertise of their authors.

I. The Pervasiveness of Prudence

Among the most striking aspects of the October 2018 Term

⁴ *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

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are all of the issues that the Court declined to decide for the time being. The justices denied certiorari on the question of whether a state may prohibit the knowing provision of sex-, race-, or disability-selective abortions by abortion providers.⁶ The Court sent back to the Oregon courts an appeal from bakery owners who were fined for refusing to make a wedding cake for a gay couple.⁷ The justices postponed until next Term the momentous question of whether discrimination on the basis of sexual orientation and gender identity qualify as sex discrimination under Title VII of the Civil Rights Act of 1964.⁸ The Court also postponed until next Term the question of whether the Trump administration can end an Obama administration program (called Deferred Action for Childhood Arrivals or DACA) that has insulated young, undocumented immigrants from deportation.⁹ And the justices postponed until next Term the constitutionality of a New York City ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside the city.¹⁰ The Court considered those three cases, among other important ones, at its private conference on January 11, 2019, when eight slots were still unfilled on the April oral argument calendar.¹¹

The Court did decide an Establishment Clause case, but arguably not in a way that substantially changed the law. In

⁶ See *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780 (2019) (upholding an Indiana law concerning the disposition of fetal remains but otherwise denying certiorari).

⁷ *Klein v. Oregon Bureau of Labor & Indust.*, No. 18-547, 2019 WL 2493912 (U.S. June 17, 2019); see Adam Liptak, *Supreme Court Won't Rule on Clash Between Another Bakery and Gay Couple*, N.Y. TIMES (June 17, 2019).

⁸ *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. Apr. 22, 2019); *Bostock v. Clayton Cty., Ga.*, No. 17-1618 (U.S. Apr. 22, 2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. Apr. 22, 2019).

⁹ *McAleenan v. Vidal*, No. 18-589 (U.S. June 28, 2019).

¹⁰ *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280 (U.S. Jan. 22, 2019).

¹¹ See Erwin Chemerinsky, *A Look Back at the Supreme Court's October 2018 Term*, A.B.A.J. (July 2, 2019).

American Legion v. American Humanist Association, the Court held that the Bladensburg Cross, a ninety-three-year-old memorial to soldiers who perished in World War I, does not violate the Establishment Clause.¹² Seven justices (all but Justices Ginsburg and Sotomayor) agreed that the Bladensburg Cross can permissibly remain in place. Justice Alito’s majority opinion, among other things, distinguished the question of whether the government may allow longstanding religious monuments to stay put (presumptively, yes) from the question of whether the government has the authority to erect new ones,¹³ which is a distinction reflecting concerns about social balkanization over religion that Justice Breyer drew in a previous case.¹⁴

Also illuminating is the nature of the most significant cases that were decided by the Court during the Term. The partisan gerrymandering cases, in which the Court held that partisan gerrymandering claims present nonjusticiable political questions and so are beyond the reach of the federal courts, were mandatory appeals from three-judge district courts.¹⁵ In other words, the justices had no legal choice but to take those cases. Moreover, it would have been irresponsible for the Court to have postponed consideration of the Census case, given the need for an expeditious resolution so that the Census forms could be printed by the federal government in time for the Census to be conducted.

¹² *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

¹³ *See id.* at 2085 (“The passage of time gives rise to a strong presumption of constitutionality.”).

¹⁴ *See Van Orden v. Perry*, 545 U.S. 677, 702–03 (2005) (Breyer, J., concurring in the judgment). In potentially reflecting a constitutional commitment to reduce social balkanization over salient dimensions of difference, the Establishment Clause may be like the Equal Protection Clause. *See generally, e.g.*, Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 *DUKE L.J.* 781 (2006).

¹⁵ *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

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Of course, one cannot know with certainty why the Court appeared determined to leave weighty matters undecided during this past Term. But it seems plausible to suspect that the bitterly divisive Kavanaugh hearings had something to do with it. Among other controversies, then-Judge Kavanaugh was perceived by many to have acted like an enraged partisan during his confirmation hearings.¹⁶ In response to Dr. Christine Blasey Ford’s allegations that he sexually assaulted her during high school, he characterized the accusations against him as “a calculated and orchestrated political hit” designed to exact “revenge on behalf of the Clintons” and fueled by “millions of dollars in money from outside left-wing opposition groups.”¹⁷ Chief Justice Roberts, who understands that judges are well-advised to take some account of the conditions of their own public legitimacy, may have concluded that it would be best for the Court to keep a relatively low profile during the October 2018 Term.¹⁸

II. The Paucity of Party

The Court issued sixty-six decisions with signed opinions during the Term,¹⁹ and twenty of them were resolved by a vote

¹⁶ See, e.g., Post, *supra* note 2 (“He had apparently concluded that the only way he could rally Republican support was by painting himself as the victim of a political hit job. He therefore offered a witches’ brew of vicious unfounded charges, alleging that Democratic members of the Senate Judicial Committee were pursuing a vendetta on behalf of the Clintons.”).

¹⁷ See Emily Birnbaum, *Kavanaugh Says He’s Victim of ‘Revenge on Behalf of the Clintons’*, HILL (Sept. 27, 2018) (“This whole two-week effort has been a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups.”).

¹⁸ For a discussion, see generally Neil S. Siegel, *More Law than Politics: The Chief, the “Mandate,” Legality, and Statesmanship*, in *THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS* (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013); Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

¹⁹ SCOTUSblog, [FINAL STAT PACK FOR OCTOBER TERM 2018 1](#) (2019) [hereinafter *FINAL STAT PACK FOR OCTOBER TERM 2018*].

of five to four.²⁰ But in contrast to last Term (which was Justice Kennedy’s final), during which the five Republican appointees were in the majority in fourteen of the nineteen five-to-four decisions,²¹ this past Term the five Republican appointees voted together in fewer than half of the five-to-four (or five-to-three) decisions—specifically, seven of them.²² Moreover, there were another nine decisions in which the four Democratic appointees (Justices Ginsburg, Breyer, Sotomayor, and Kagan) were in the majority and were joined by one of the Republican appointees—specifically, four times by Justice Gorsuch²³ twice by Chief Justice Roberts,²⁴ and once each by Justices Thomas,²⁵ Alito,²⁶ and Kavanaugh.²⁷ There were fewer five-to-four decisions in which the five Republican appointees were in the majority than there were in which the four Democratic appointees were in the majority.

What is one to make of those data? The Court was as divided as ever, but it was not especially divided based on the party affiliation of the appointing president. Accordingly, at least limiting one’s gaze to the October 2018 Term, Chief Justice Roberts and not President Trump would seem to have the

²⁰ *Id.* at 19. Following SCOTUSblog, the analysis in the text assumes that Justice Kavanaugh would have dissented in *Madison v. Alabama*, 139 S. Ct. 718 (2019), and *Gundy v. United States*, 139 S. Ct. 2116 (2019), which were both five-to-three decisions in which oral argument occurred before Kavanaugh’s confirmation. FINAL STAT PACK FOR OCTOBER TERM 2018, *supra* note 19, at 5.

²¹ *Id.* at 19.

²² See *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019); *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

²³ See *Wash. State Dep’t of Licensing v. Cougar Den Inc.*, 139 S. Ct. 1000 (2019); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *United States v. Davis*, 139 S. Ct. 2319 (2019); *United States v. Haymond*, 139 S. Ct. 2369 (2019).

²⁴ See *Madison v. Alabama*, 139 S. Ct. 718 (2019); *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

²⁵ See *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743 (2019).

²⁶ See *Gundy v. United States*, 139 S. Ct. 2116 (2019).

²⁷ See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

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better of the argument that there are not Republican judges and Democratic judges, but just judges, on the U.S. Supreme Court.

Of course, one term is just that—one term. And a transitional term, which the past Term may well have been, is especially unlikely to be generalizable. In addition, cases do not all warrant equal weight in assessing the validity of the president’s charge. For example, the five Republican appointees voted in the best interests of the Republican Party in the partisan gerrymandering cases, and the four Democratic appointees voted in the best interests of the Democratic Party in those cases. Both political parties engage in partisan gerrymandering, but Republican-controlled legislatures do it more.²⁸

On the other hand, the Census case offers something for both President Trump and Chief Justice Roberts. Eight justices voted in the best interests of the parties that appointed them, but one justice—the decisive one—did not do so in dispositive part. In that case, which is discussed further in Part IV, Roberts was his own best evidence for his characterization of the federal judiciary as nonpartisan.

III. The Practice of Precedent

Another way to assess the disagreement between President Trump and Chief Justice Roberts—and to consider what a Court in transition may be transitioning to—is to examine the Court’s treatment of precedent during the October 2018 Term. The Court overruled two precedents, both in decisions dividing the five Republican appointees and the four Democratic

²⁸ See, e.g., Dahlia Lithwick, *The Supreme Court’s Partisan Gerrymandering Ruling Is a Body Blow to Our Democracy*, SLATE (June 27, 2019) (“In an effort to appear as though it hovers permanently above the partisan fray, the Supreme Court . . . delivered perhaps the most staggering win to the Republican Party since *Bush v. Gore*.”).

appointees. In *Knick v. Township of Scott*, the Court held that a government violates the Takings Clause when it takes property without providing just compensation, and a property owner may bring a Fifth Amendment claim under 42 U.S.C. § 1983 at that time.²⁹ In so holding, the Court overruled the requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* that property owners follow state compensation procedures before bringing federal takings claims.³⁰

Whereas *Knick* will have major practical implications, the other overruling will have few given the infrequency with which private litigants have sued states in the courts of sister states. In *Franchise Tax Board of California v. Hyatt*, the Court held that states retain their sovereign immunity from private suits brought in courts of other states.³¹ In so holding, the Court overruled *Nevada v. Hall*, which permitted a state to be sued by private parties in the courts of another state without its consent.³² The disagreement between the majority and the dissent on the question presented in *Hyatt* was relatively toned down; Justice Breyer's dissent appeared far more worried about the future. "Today's decision can only cause one to wonder which cases the Court will overrule next,"³³ he wrote, twice citing the stare decisis passages of *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³⁴ the 1992 decision in which the Court both reaffirmed and narrowed the core of the constitutional right to abortion first vindicated by the justices

²⁹ *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

³⁰ *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

³¹ *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

³² *Nevada v. Hall*, 440 U.S. 410 (1979).

³³ *Hyatt*, 139 S. Ct. at 1506 (Breyer, J., dissenting).

³⁴ *Id.* at 1504–05, 1506 (first citing and later quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992)).

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in *Roe v. Wade* in 1973.³⁵ The Kagan dissent in *Knick* was also very strongly worded (and included warnings about where the Court was heading), especially considering that *Williamson County* was not obviously correct when it was decided.³⁶

Yet it is not at all clear that *Hyatt* or *Knick* tells us anything about how the Court will respond to abortion cases; for example, Justice Kennedy likely would have been in the majority in *Hyatt*, and he refused to overrule *Casey*.³⁷ That is not to say the current Republican appointees will be prepared to invalidate any abortion restrictions. But at least the October 2018 Term closed without huge changes in the law. Notably, the Court retained two precedents that are more significant than the ones it overruled. In *Gamble v. United States*, the Court reaffirmed, by a vote of seven to two, the dual-sovereignty doctrine, according to which two offenses are not the “same offence” for purposes of the Double Jeopardy Clause if prosecuted by separate sovereigns.³⁸ And in *Kisor v. Wilkie*,³⁹ the Court declined to overrule *Auer v. Robbins*⁴⁰ and *Bowles v. Seminole Rock & Sand Company*,⁴¹ which direct courts to defer to an agency’s reasonable interpretation of its own genuinely ambiguous regulation.⁴²

On the other hand, Justice Kagan’s majority opinion in *Kisor* arguably “clarified” *Auer* deference by cutting back

³⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁶ See *Knick v. Township of Scott*, 139 S. Ct. 2162, 2190 (2019). (Kagan, J., dissenting) (“Just last month, when the Court overturned another longstanding precedent, Justice BREYER penned a dissent. He wrote of the dangers of reversing legal course ‘only because five Members of a later Court’ decide that an earlier ruling was incorrect. He concluded: ‘Today’s decision can only cause one to wonder which cases the Court will overrule next.’ Well, that didn’t take long. Now one may wonder yet again.”) (citations omitted).

³⁷ See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

³⁸ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

³⁹ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

⁴⁰ *Auer v. Robbins*, 519 U.S. 452 (1997).

⁴¹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

⁴² See *Kisor*, 139 S. Ct. at 2414–15.

on it. Among other things, she emphasized that the agency regulation at issue must be *genuinely* ambiguous.⁴³ Moreover, there were ominous signals sent by the four conservative justices who participated in *Gundy v. United States*,⁴⁴ a case that was implicitly about whether to overrule precedent with regard to the non-delegation doctrine. The Court declined to do so by a vote of five to three (Justice Kavanaugh did not participate because he had not yet been confirmed when the case was argued). Justice Kagan’s plurality opinion read 34 U.S.C. § 20913(d) as requiring the U.S. attorney general to apply the registration requirements of the Sex Offender Registration and Notification Act as soon as feasible to offenders convicted before the statute’s enactment. So read, she concluded, the provision was not an unconstitutional delegation of legislative authority to the attorney general. The fifth vote was provided by Justice Alito, who concurred in the judgment only in an opinion that signaled a willingness to revisit the Court’s approach to non-delegation questions should a majority of justices—that is, with the participation of Justice Kavanaugh—prove willing to do so.⁴⁵ One should probably expect a reinvigoration of the non-delegation doctrine in the years ahead.

Still, so far there do not appear to be anywhere near five votes for Justice Thomas’s striking—and curiously timed⁴⁶—declaration this past Term that stare decisis should hold no

⁴³ *Id.*

⁴⁴ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

⁴⁵ *Id.* at 2130, 2131 (Alito, J., concurring in judgment) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.”).

⁴⁶ Why did Justice Thomas wait until this point in his judicial tenure to write such an opinion? And why did he do so in a case in which he agreed with the Court that the precedent at issue should be retained, thereby offering what is akin to an advisory opinion?

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independent weight when a past decision is “demonstrably erroneous” from an originalist perspective.⁴⁷ The number of times over the course of the Term that Justice Thomas called for overruling longstanding—and, in some cases, revered—precedents is jaw-dropping: *Powell v. Alabama*,⁴⁸ *Gideon v. Wainwright*,⁴⁹ *New York Times v. Sullivan*,⁵⁰ *Roe v. Wade*,⁵¹ all of the Court’s substantive due process decisions,⁵² *Batson v. Kentucky*,⁵³ and all of the Court’s Establishment Clause precedents involving state and local governments.⁵⁴ It is as if he cannot imagine a future time in which the question will be whether a differently composed Court should respect precedents that reflect his own interpretive and ideological commitments. Five justices who held such views would likely have a radically destabilizing effect on the path of the law.

IV. The Problem of Pretext

We are living in a period of pretext. For example, laws aimed at making it harder for Democratic-leaning voters to vote are defended as preventing the (effectively non-existent) problem of in-person voter fraud.⁵⁵ Or, to take another example, laws intended to make it harder for women to exercise their constitutional right to abortion are defended as protecting

⁴⁷ *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

⁴⁸ *Powell v. Alabama*, 287 U.S. 45 (1932); see *Garza v. Idaho*, 139 S. Ct. 738, 756–58 (2019) (Thomas, J., dissenting).

⁴⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963); see *Garza*, 139 S. Ct. at 756–58 (Thomas, J., dissenting).

⁵⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); see *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in denial of certiorari).

⁵¹ *Roe v. Wade*, 410 U.S. 113 (1973); see *Timbs v. Indiana*, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in judgment).

⁵² See *Timbs*, 139 S. Ct. at 691–92 (Thomas, J., concurring in judgment).

⁵³ *Batson v. Kentucky*, 476 U.S. 79 (1986); see *Flowers v. Mississippi*, 139 S. Ct. 2228, 2252–56 (2019) (Thomas, J., dissenting).

⁵⁴ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094–95 (2019) (Thomas, J., concurring in judgment).

⁵⁵ See generally, e.g., LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

the physical health of those very women.⁵⁶ Accordingly, a basic question confronting the Court is when it is prepared to credit pretextual justifications for governmental action. More precisely, the question is when the justices should focus on the *actual* purpose of government action—especially actions of the current administration—and when a *conceivable*, permissible purpose suffices to survive a legal challenge. That question arises in many areas of law, and the context obviously matters in answering it well.

Last term ended with the Court, in a majority opinion authored by the chief justice, applying rational basis review and so upholding an immigration executive order that the Trump administration claimed had been issued by the president in order to protect national security. In *Trump v. Hawaii*,⁵⁷ the five Republican appointees, in contrast to the four Democratic appointees, refused to consider the extraordinary nature and number of bigoted public statements about Muslims that Trump had made—and had never disavowed—in publicly proclaiming the need for the order. Perhaps Justice Sotomayor’s charge in dissent that the Court had committed another *Korematsu* stung the chief justice because there was truth in her words:⁵⁸ Rational basis review disables judges from distinguishing genuine national security concerns from unconstitutional bigotry, and no amount of protesting—perhaps too much—that “*Korematsu* was gravely wrong the

⁵⁶ See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁵⁷ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁵⁸ *Id.* at 2448 (Sotomayor, J., dissenting) (“By blindly accepting the Government’s misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one ‘gravely wrong’ decision with another.”) (quoting *Hawaii*, 138 S. Ct. at 2423).

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day it was decided” is responsive to that basic objection.⁵⁹ To be sure, it helped the majority that the Court was reviewing the third iteration of the executive order at issue, one that had been more properly vetted and regularized by professionals in the executive branch. But it is not clear why those facts should make a decisive difference when the basic conclusion had been preordained by the president.

This Term told a different story, one that did not corroborate the president’s claim about Obama judges and Trump judges. In *Flowers v. Mississippi*, Chief Justice Roberts joined Justice Kavanaugh’s majority opinion for seven justices declaring that “[w]e cannot just look away” from very strong evidence of racial discrimination in jury selection.⁶⁰ *Flowers* was an easy case because racial discrimination triggers strict scrutiny, the most demanding level of judicial review known to constitutional law. More challenging was a case in which the partisan stakes were high: the profoundly important Census litigation. In response to a lawsuit filed under the Administrative Procedure Act, Justice Kavanaugh (as well as Justices Thomas, Alito, and Gorsuch) did “just look away” from the untenable assertion of the Trump administration that it wanted to add a citizenship question to the Census in order to better enforce the Voting Rights Act.⁶¹ By contrast, Chief Justice Roberts wrote the Court’s opinion politely portraying that purpose as pretextual. In the years ahead, whether the chief justice responds consistently across administrations to

⁵⁹ *Id.* at 2423 (majority opinion). For a good discussion, see generally Jamal Greene, *Is Korematsu Good Law?*, 128 *YALE L.J.F.* 629, 629 (2019), critiquing the *Hawaii* Court’s claim of overruling *Korematsu* as “empty” because the Court did not specify which legal propositions it was repudiating and “grotesque” because “its emptiness means to conceal its disturbing affinity with that case.”

⁶⁰ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2250 (2019).

⁶¹ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

pretextual justifications for government action may go a long way toward determining whether he or President Trump is correct about the nature of the institution that is now firmly the Roberts Court in more than name.

To be clear, the point is not that pretext analysis has a particular ideological or partisan valence—it likely does not. For example, pretext analysis could be (mis)used by conservative judges to, among other things: reinvigorate economic substantive due process (by requiring actual, not conceivable, governmental interests to support economic regulations); end affirmative action in higher education (by rejecting the diversity rationale as disingenuous); gut remaining campaign finance regulations (as really about equality and not corruption); and invalidate or stall actions by administrative agencies during Democratic administrations (as supported only by pretextual justifications).⁶² The point, rather, is that if Chief Justice Roberts (as well as some of his colleagues) disciplines himself to the virtue of consistency, the Court will be less likely to flip-flop from Republican to Democratic administrations in the way that it often appears to on issues of executive power.⁶³

V. The Pieces of the Puzzle

The balance of this volume is devoted to more detailed assessments of particular decisions from the October 2018 Term. Proceeding in the order in which their articles appear,

⁶² For a sobering argument that judicial review of agency action for pretext should be limited to blatant lies—to material misrepresentation of critical facts—see Samuel Estreicher, *“Pretext” and Review of Executive Decisionmaking in the Citizenship Census Question Case*, VERDICT (July 9, 2019).

⁶³ For discussion of judicial inconsistency on questions of presidential authority based on the party affiliation of the President whose conduct is under review, see DANIEL FARBER & NEIL S. SIEGEL, UNITED STATES CONSTITUTIONAL LAW 184 (2019).

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Richard Schragger and Micah Schwartzman argue that the decision in *American Legion v. American Humanist Association*⁶⁴ represents a significant development in the dismantling of Establishment Clause jurisprudence. In their view, the Court has been consistently undermining precedent that restricts the government from providing material and expressive support for religion. Although *American Legion* could be read narrowly as part of the ongoing death of the separation of church and state, they believe the decision amounts to an actual *inversion* of disestablishment principles. That is because the Court did not use the Establishment Clause as a shield to protect vulnerable minorities, but instead as a sword against them. The authors argue that in upholding the Bladensburg Cross, and in declaring that its removal would exhibit hostility toward religion, the Court entrenched the beliefs of past religious majorities and opened the door to Christian preferentialism. As ethno-religious nationalism is on the rise in our nation and around the globe, they warn, *American Legion* participates in the weakening of constitutional protections against the integration of church and state.

Justin Levitt analyzes the Census decision, *Department of Commerce v. New York*.⁶⁵ He makes two main analytical points. First, he argues that presidential administrations are generally granted broad discretion to change course on matters of policy, but that the grant of such discretion is conditional on agencies possessing and bringing to bear experience and expertise, as opposed to simply imposing a naked policy preference. Second, he argues that the Court's decision in the Census case illustrates the more general relevance of motive in assessing legality.

⁶⁴ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

⁶⁵ *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

Imre Szalai examines the three new arbitration decisions—*Henry Schein Inc. v. Archer & White Sales Inc.*, *Lamps Plus, Inc. v. Varela*, and *New Prime Inc. v. Oliveira*⁶⁶—which he collectively calls the Court’s “2018 Arbitration Docket.” After considering each decision, he concludes that the Federal Arbitration Act (FAA) is badly in need of reform by Congress because the Court’s current, largely harsh framework for arbitration collapses upon serious scrutiny of the text, history, and purpose of the FAA.

In her analysis of *Manhattan Community Access Corporation v. Halleck*,⁶⁷ Genevieve Lakier assesses the conventional wisdom that the Court is especially protective of free speech rights. The case involved a First Amendment challenge to viewpoint discrimination by a private nonprofit corporation in its operation of a public access channel, based in part on the claim that the corporation qualified as a state actor. In what Lakier characterizes as an overly-narrow application of the state-action doctrine, the Court held that the corporation was not a state actor and therefore was not bound by the First Amendment. Citing that holding and related previous decisions, Lakier concludes that while there are many areas in which the Court vigorously protects free speech rights, those rights are frequently undercut when they conflict with property rights.

Steven Schwinn examines the Court’s decision in *Kisor v. Wilkie*.⁶⁸ As noted, the majority declined to overturn—at least formally—the Court’s prior decision in *Auer v. Robbins*, which grants administrative agencies judicial deference when

⁶⁶ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

⁶⁷ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

⁶⁸ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

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agencies interpret their own ambiguous regulations. While *Auer* deference has survived for the time being, he warns that the fractured decision in *Kisor* portends the possible end to both *Auer* deference and the related doctrine of *Chevron* deference, which instructs courts to defer to reasonable agency interpretations of ambiguous statutory language that the agency is charged with administering.⁶⁹ In Schwinn’s view, the end of such deference would mark an ominous step in the direction of what some observers fear will be the Court’s dismantling of the modern administrative state.

William Araiza focuses on what he calls “the near-miss” in *Gundy v. United States*.⁷⁰ He first suggests that progressives need to get serious about engaging with calls by legal conservatives such as Justice Gorsuch to rethink the non-delegation doctrine. Araiza further argues that there may be room for a consensus position that focuses on delegations implicating individual liberty and involving delegations of “incongruous” power to executive branch officials—specifically, delegations to the attorney general of the power to declare criminal law. Finally, he contends that such a position, while not ideal from a progressive perspective, could advance the progressive objectives of protecting human liberty and ensuring the fidelity of the executive branch to law, all without seriously damaging the capacity of the modern administrative state to execute its vital responsibilities.

Carol Steiker and Jordan Steiker turn to the Court’s death penalty decisions from the past Term, *Madison v. Alabama*⁷¹ and *Bucklew v. Precythe*.⁷² They initially observe that, with

⁶⁹ *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁷⁰ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

⁷¹ *Madison v. Alabama*, 139 S. Ct. 718 (2019).

⁷² *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

Justice Kennedy's departure, those decisions exposed a major shift in tone regarding the appropriate role of federal courts in adjudicating the claims of death-row inmates. Their central claim is that the new conservative majority reinforced the constitutionality of capital punishment and restricted end-stage litigation, while the new "swing" justices in death cases—Chief Justice Roberts and Justice Kavanaugh—joined the four liberals to police outlying practices that tend to undermine the legitimacy of the death penalty. The Court's approach, they conclude, suggests that capital defendants will make no new inroads against capital punishment with the current Court, so that the continued withering away of the death penalty in America will likely occur primarily through the actions of prosecutors, legislators, executive officials, and state judges.⁷³

Finally, in their assessment of *Rucho v. Common Cause* and *Lamone v. Benisek*, a pair of partisan gerrymandering cases, Guy-Uriel Charles and Luis E. Fuentes-Rohwer argue that the Court failed to make a persuasive argument for the non-justiciability of partisan district line drawing. Rather, the majority was committed to finding partisan gerrymandering non-justiciable because of "its lack of comfort with some modern conceptions" of representative democracy, namely "proportionality; non-partisanship; and cleanliness." As a result, Charles and Fuentes-Rohwer find it difficult to take the decisions "seriously as doctrine."

* * *

⁷³ For an extended argument to that effect, see BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (2017).

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The October 2018 Term may have been more of a transitional term than one for the history books. In the wake of the divisive Kavanaugh hearings and the president's public questioning of judicial impartiality, the Court left things relatively undecided and relatively non-partisan—at least for now. But the justices issued some significant decisions. They may also have dropped some hints along the way about the kind of tribunal that the Roberts Court is transitioning to. We shall soon begin to see.

Establishment Clause Inversion in the Bladensburg Cross Case

Richard Schragger* and Micah Schwartzman**

One of the most memorable exchanges in the recent history of U.S. Supreme Court oral arguments happened in *Salazar v. Buono*.¹ The case involved an Establishment Clause challenge to a Latin cross displayed on public land in the Mojave National Preserve. The cross was built in the 1930s as a memorial to soldiers who died in World War I.² During argument in the case, Peter Eliasberg, an attorney for the ACLU whose father and grandfather were Jewish war veterans,³ said that he did not think the Latin cross represented soldiers who were not Christian. That statement provoked a sharp response from Justice Antonin Scalia, and the following exchange ensued:

JUSTICE SCALIA: The cross doesn't honor non-Christians who fought in the war? Is that – is that –

MR. ELIASBERG: I believe that's actually correct.

JUSTICE SCALIA: Where does it say that?

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¹ *Salazar v. Buono*, 559 U.S. 700 (2010).

² *Id.* at 706.

³ Dahlia Lithwick, *Cross-Eyed: The High Court Looks Again at Religious Symbols on Public Lands*, SLATE (Oct. 7, 2009, 7:14 PM); see also Bill Mears, *Justices Weigh Constitutionality of War Memorial Cross*, CNN (Oct. 8, 2009).

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MR. ELIASBERG: It doesn't say that, but a cross is the predominant symbol of Christianity and it signifies that Jesus is the son of God and died to redeem mankind for our sins, and I believe that's why the Jewish war veterans –

JUSTICE SCALIA: It's erected as a war memorial. I assume it is erected in honor of all of the war dead. It's the – the cross is the – is the most common symbol of – of – of the resting place of the dead, and it doesn't seem to me – what would you have them erect? A cross – some conglomerate of a cross, a Star of David, and you know, a Moslem half moon and star?

MR. ELIASBERG: Well, Justice Scalia, if I may go to your first point. The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.

(Laughter.)⁴

The laughter recorded in the official transcript of the oral argument was from the courtroom audience, which perhaps recognized both the obviousness of Mr. Eliasberg's point and the absurdity of Justice Scalia's claim to the contrary. Justice Scalia was apparently angered by this reaction⁵ and continued the argument by saying: "I don't think you can leap from that to the conclusion that the only war dead that that cross honors are the Christian war dead. I think that's an outrageous conclusion."⁶

⁴ Transcript of Oral Argument at 38–39, *Buono*, 559 U.S. 700 (No. 08–472).

⁵ See Adam Liptak, *Religion Largely Absent in Argument About Cross*, N.Y. TIMES (Oct. 7, 2009).

⁶ Transcript of Oral Argument at 40, *Buono*, 559 U.S. 700 (No. 08–472).

A decade later, and a few years after Justice Scalia's death, the Supreme Court has revisited the question of whether a Latin cross is predominantly the symbol of Christianity or whether it can also be used as a universal symbol to represent soldiers, including non-Christians, who died fighting for our country.⁷ In *American Legion v. American Humanist Ass'n*,⁸ the Court rejected an Establishment Clause challenge to a forty-foot tall Latin cross, publicly owned and maintained as a World War I memorial in Bladensburg, Maryland. In upholding the constitutionality of the Bladensburg Cross,⁹ seven justices accepted Justice Scalia's view—that it is outrageous to claim that the Latin cross fails to represent all the war dead—and made it the law of the land.¹⁰ An argument that was sufficiently "off-the-wall"¹¹ to prompt ridicule in the courtroom is now a matter of precedent in the Supreme Court's interpretation of the Establishment Clause.

In this article, we focus on how this constitutional change occurred and what it means for the Establishment Clause going forward. We argue that *American Legion* represents a significant development in the dismantling of Establishment

⁷ The Court had to return to this question because *Salazar v. Buono* did not resolve it. The Court instead remanded for further proceedings on whether a federal statute transferring the Mojave Desert Cross onto private property violated the Establishment Clause. *Buono*, 559 U.S. at 722.

⁸ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

⁹ We also follow the Court's practice of referring to this particular monument as the "Cross." *Id.* at 2074.

¹⁰ *Id.* at 2089–90 ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.").

¹¹ Jack Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012) ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law The history of American constitutional development, in large part, has been the history of formerly crazy arguments moving from off the wall to on the wall, and then being adopted by courts. In the process, people who remember the days when these arguments were unthinkable gape in amazement; they can't believe what hit them.").

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Clause jurisprudence. The Court has been chipping away steadily on precedent that restricts the government from providing material and expressive support for religion. *American Legion* could be read narrowly as part of the ongoing demise of the separation of church and state, which has been underway since the Rehnquist Court. But in our view, the decision amounts to something more, namely, an *inversion* of disestablishment principles. The Court did not use the Establishment Clause as a shield to protect vulnerable minorities, but rather as a sword against them. In upholding the Bladensburg Cross, and in declaring that its removal would show hostility toward religion, the Court has entrenched the views of past religious majorities and opened the way toward Christian preferentialism. In the midst of rising ethno-religious nationalism in the United States, and around the world, *American Legion* participates in undermining constitutional safeguards against the integration of church and state.

I. The Demise of Disestablishment

We start by putting *American Legion* in the context of a decades-long trend of undoing the separationist interpretation of the Establishment Clause, which restricted various forms of government aid to religion.¹² In the areas of 1) public funding of religious institutions, 2) government religious speech, and 3) religious accommodations, the Court has taken an increasingly deferential view toward government acts and expression that support religious beliefs, practices, and institutions.

First, in terms of funding, the Rehnquist Court was already

¹² See Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 21–26 (2007); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 280–82 (2001); Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 237–49 (1994).

pushing the doctrine toward permitting government funding of religious schools and social service organizations from the mid-1980s through the early 2000s.¹³ This line of decisions culminated in the 2002 decision *Zelman v. Simmons-Harris*,¹⁴ which held that a voucher program that included private religious schools was constitutional so long as parents and children had a genuine choice of where to attend school. *Zelman*¹⁵ was the last in a line of cases that ultimately rejected a no-aid principle that the Court had applied, however unevenly, since the 1950s.¹⁶ The replacement for the no-aid principle was “neutral aid.”¹⁷ That principle permitted government to fund religious entities, but did not require it. State constitutional provisions that had more restrictive no-aid requirements could still be interpreted to prevent the funding of religious schools.¹⁸

More recently, however, the Roberts Court has held that neutral aid is not only permissible but, in some cases, required. In *Trinity Lutheran Church of Columbia v. Comer*,¹⁹ the Court ruled that a state government violated the Free Exercise Clause by excluding religious organizations from equal access to a public

¹³ See *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000).

¹⁴ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

¹⁵ *Id.* at 653 (“[T]he program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.”).

¹⁶ See 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 405–14 (2008).

¹⁷ *Zelman*, 536 U.S. at 652 (holding “that where a government aid program is neutral with respect to religion . . . the program is not readily subject to challenge under the Establishment Clause”); see also Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 140 (2017) (“The tide turned in 1986, and for more than thirty years now, the Court has been moving toward the view that government funding of secular services, including education, can flow to religious providers so long as it is distributed in religiously neutral ways.”).

¹⁸ See Nelson Tebbe, *Excluding Religion*, 156 U. PENN. L. REV. 1263, 1285–86 (2008) (discussing exclusions of religious organizations from public funding programs, including vouchers).

¹⁹ *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017).

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funding program.²⁰ Applying a non-discrimination principle that borrows from equal protection and free speech doctrine,²¹ the Court concluded that the government cannot impose special disabilities on an organization because of its religious status.²² This shift from a no-aid to a “compulsory-aid” principle represents a dramatic change in the interpretation of the Establishment Clause over the course of the last half century.²³

Second, as the Court has retreated from Establishment Clause restrictions on funding, it has also withdrawn limits on government religious speech. While on the Court, Justice O’Connor had interpreted the Establishment Clause to forbid government speech that endorses a particular religious perspective.²⁴ Her test, which the Court adopted and applied over the span of two decades,²⁵ asked whether a government-sponsored religious display “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”²⁶ In recent cases, however, the Court has

²⁰ *Id.* at 2024–25.

²¹ See e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); see also 2 GREENAWALT, *supra* note 16, at 196–206 (discussing equal access cases).

²² *Trinity Lutheran*, 137 S. Ct. at 2021–22. The Court left open whether the government can exclude religious organizations when public funds are used to support religious activities. See *id.* at 2024 n.3 (“This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”).

²³ See *Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer: Paradigm Lost?*, 1 AM. CONST. SOC’Y SUP. CT. REV. 131, 133 (2017) (“[*Trinity Lutheran*] represents a stunning and thoroughly unacknowledged move from the religion-distinctive principle of ‘no funding’ to one of nondiscrimination.”).

²⁴ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring).

²⁵ See *County of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989); *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000); *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 866 (2005).

²⁶ *Lynch*, 465 U.S. at 688.

refused to apply the endorsement test and is much more likely to permit specifically sectarian speech in public settings. In *Town of Greece v. Galloway*,²⁷ the Roberts Court upheld a town's practice of commissioning ministers to offer prayers at the openings of town council meetings. The prayers offered were overwhelmingly Christian and sectarian in nature.²⁸

A majority of the Court now appears to reject the endorsement test. Some justices have previously advocated for a coercion test, which would prevent the Establishment Clause from being applied to non-coercive symbolic expression.²⁹ Others have advocated an historical approach that permits a wide range of public religious endorsements, though not ones that would represent an "establishment" in eighteenth-century terms.³⁰ It is unclear which non-coercive practices would be impermissible if such a test were applied, though it seems many if not most would survive such an historical review.

Third, in addition to loosening restrictions on government funding and expression, the Roberts Court has read the Establishment Clause narrowly to permit a significant expansion of constitutional and statutory religious accommodations, including to large, for-profit corporations.³¹ In *Cutter v. Wilkinson*, which involved a facial challenge to the Religious Land Use and Institutionalized Persons Act

²⁷ *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

²⁸ *Id.* at 573; see also Caroline Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 451, 455–56 (2019).

²⁹ See *County of Allegheny*, 492 U.S. at 661–63 (Kennedy, J., dissenting).

³⁰ See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 790 (1984); *McCreary Cty.*, 545 U.S. at 886–94 (Scalia, J., dissenting); *Town of Greece*, 572 U.S. at 603 (Alito, J., concurring).

³¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). For discussion of *Hobby Lobby* and its implications, see Chad Flanders, Micah Schwartzman & Zoë Robinson, *Introduction to THE RISE OF CORPORATE RELIGIOUS LIBERTY* xiii (Micah Schwartzman et al. eds., 2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1457 (2015); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

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(RLUIPA), the Court held that exemptions for religious entities “need not come packaged with benefits to secular entities.”³² The Court also held that, in granting exemptions, the government cannot favor particular religious denominations over others, and it must give adequate consideration to burdens that such exemptions impose on third parties.³³ But these rules set outer limits on religious accommodations, and it is unclear whether the Supreme Court will apply them in a meaningful way.³⁴ The issue is pressing, as religious organizations, including for-profit corporations, seek expansive exemptions from federal and state civil rights laws.³⁵

Looming over all these areas of doctrine is a general question about how the Supreme Court interprets the meaning of the Establishment Clause. Starting in the early 1970s, the Court consolidated its approach under the well-known *Lemon* test, which holds that government action must have a secular purpose, that it must not have a primary effect of advancing or inhibiting religion, and that it must not foster excessive

³² *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (internal quotations omitted).

³³ *Id.* at 720 (2005). See Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 Ky. L. J. 781 (2018) (discussing limits on religious exemptions based on third-party harms).

³⁴ Some lower courts have rejected exemptions that impose significant burdens on third parties, especially in cases involving for-profit corporations. See, e.g., *Pennsylvania v. Trump*, 930 F.3d 543, 574 (3d Cir. 2019) (affirming preliminary injunction in part because the Trump administration’s contraception exemption would “impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care”); *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267, 1295–96 (N.D. Cal. 2019) (relying on *Cutter’s* requirement to consider third-party harms in granting a preliminary injunction against religious exemption to the contraceptive mandate). Some members of the Supreme Court have expressed skepticism about limiting religious exemptions on the basis of third-party harms. See *Hobby Lobby*, 573 U.S. at 729 n.37 (Alito, J.). But cf. Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328, 340–45 (Susanna Mancini & Michel Rosenfeld eds., 2018) (discussing Justice Alito’s treatment of third-party harms in *Hobby Lobby*).

³⁵ See Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 154–62 (2018) (discussing religious exemptions from civil rights laws after *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018)).

entanglement between church and state.³⁶ Justice O'Connor's endorsement test, mentioned above, was initially presented as a gloss on the purpose and effects inquiries under *Lemon*.³⁷ But over the years, many justices have expressed dissatisfaction and severe criticisms of these tests. In some cases, the Court has sharply limited application of these tests, and in others, it has altogether ignored them.³⁸

The jettisoning of Establishment Clause doctrine is thus occurring both in the formulation of specific rules for regulating government funding, speech, and accommodations,³⁹ and at the level of providing a larger framework within which such rules are determined. The entire edifice of the Establishment Clause has been collapsing, with the result that principles of disestablishment are becoming increasingly irrelevant.⁴⁰ They are either ignored or replaced by principles of neutrality and non-discrimination, on the one hand, and demands for special solicitude and public recognition of religion, on the other.⁴¹

II. American Legion and Government Religious Speech

American Legion continues the process of narrowing Establishment Clause jurisprudence. There was never any

³⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

³⁷ *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

³⁸ See *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (collecting Establishment Clause cases in which the Court “declined to apply the [*Lemon*] test or simply ignored it”).

³⁹ The Court has also cut back significantly on taxpayer standing to raise Establishment Clause challenges. See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc., and the Future of Establishment Clause Adjudication*, 2008 B.Y.U. L. REV. 115 (2008); William P. Marshall & Gene R. Nichol, *Not a Winn-Win: Misconstruing Standing and the Establishment Clause*, 2011 SUP. CT. REV. 215, 216 (2011).

⁴⁰ See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583 (2011).

⁴¹ There is a deep tension between the neutrality principles that the Court holds applicable in the funding and speech contexts and the special treatment it provides to religious entities in accommodation cases. See Richard Schragger & Micah Schwartzman, *Religious Antiliberalism and the First Amendment*, 103 MINN. L. REV. (forthcoming 2019).

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doubt about the outcome of the case. Given recent changes in the Court's personnel, including the appointments of Justices Gorsuch and Kavanaugh, the Court was expected to affirm the constitutionality of the Bladensburg Cross.⁴² The question was how the justices would do it, and whether they would provide guidance with respect to larger questions about the meaning of the Establishment Clause. The answer turned out to be highly fractured. The justices produced seven opinions—eight if one counts Justice Alito as having written both a majority for the Court and, in parts, a plurality for himself and three other justices.⁴³ These opinions reveal a Court sharply divided about the meaning of the Establishment Clause. It is nevertheless possible to distinguish a few main strategies used to affirm the government's religious expression.

The most minimal approach, adopted by the Court, holds that the Bladensburg Cross is constitutional because it has taken on secular meaning as a war memorial.⁴⁴ Writing for the majority, Justice Alito enumerates various problems with interpreting the meaning of longstanding monuments: first, it can be difficult to identify the purposes for which they were created;⁴⁵ second, even if those purposes can be determined and even if they were religious, they may be obscured or proliferated over time as the government acquires secular purposes for maintaining old monuments;⁴⁶ third, the messages

⁴² See, e.g., Garrett Epps, *Why Is this Cross-Shaped Memorial Constitutional?*, ATLANTIC (Feb. 19, 2019) (“Barring the unlikely event—one hesitates to use the word *miracle* in this context—of a decision against the cross, the Court has a lot of paths through this litigation, and the question is how far the new majority wants to go.”).

⁴³ *Am. Legion*, 139 S. Ct. at 2068–74. In Parts I, II-B, II-C, III, and IV, Justice Alito wrote for a majority, including Chief Justice Roberts and Justices Breyer, Kagan, and Kavanaugh. But Justice Kagan refused to join Parts II-A and II-D, which represent a plurality of the remaining four justices.

⁴⁴ *Id.* at 2089.

⁴⁵ *Id.* at 2082.

⁴⁶ *Id.* at 2082–83.

conveyed by monuments can also change over time;⁴⁷ and fourth, removing religiously expressive monuments that have taken on historical significance may convey hostility toward religion.⁴⁸ These considerations lead the majority to distinguish between old religious monuments and news ones. The Court holds that “[t]he passage of time gives rise to a strong presumption of constitutionality.” It then applies that presumption, along with the enumerated considerations, to find that the Bladensburg Cross is constitutional.⁴⁹

A plurality of four justices—Justice Alito, joined by Chief Justice Roberts and Justices Breyer and Kavanaugh—would abandon the application of the *Lemon* and endorsement tests in cases involving religious symbols.⁵⁰ Justice Alito claims to apply “a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”⁵¹ The benchmarks for this approach are the Court’s legislative prayer decisions,⁵² which give the government wide latitude in promoting religious speech. The plurality claims that the practice of legislative prayer “stands out as an example of respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.”⁵³ And it would hold that any well-established government religious speech or practice that fits this description is constitutional.⁵⁴

⁴⁷ *Id.* at 2084–85.

⁴⁸ *Id.* at 2085.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2087.

⁵¹ *Id.*

⁵² *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

⁵³ *Am. Legion*, 139 S. Ct. at 2089 (plurality opinion).

⁵⁴ *Id.*

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The plurality's emphasis on historical practice is open to various interpretations. In his concurring opinion, Justice Kavanaugh reads the plurality as moving toward a more comprehensive rejection of *Lemon* and as accepting an approach based on "history and tradition."⁵⁵ In an ambitious interpretation of the Court's recent Establishment Clause jurisprudence—perhaps of the type that the plurality otherwise cautions against in its criticism of *Lemon*—Justice Kavanaugh formulates "an overarching set of principles" according to which:

If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.⁵⁶

This multi-part test is certain to be the subject of much discussion and, we expect, confusion. For example, to the extent the government has nearly unfettered discretion to engage in secular speech, it would seem that any comparable treatment of religious expression would fall within category (ii) of Justice Kavanaugh's "safe harbor."⁵⁷ Perhaps the constitutionality of all, or nearly all, non-coercive government religious expression is an intended consequence of this test.

Justices Breyer and Kagan are more circumspect about the plurality's appeal to "history and tradition." In his concurring

⁵⁵ *Id.* at 2092 (Kavanaugh, J., concurring).

⁵⁶ *Id.* at 2093.

⁵⁷ *Id.* at 2093 n.*.

opinion, Justice Breyer explains that, in his view, the Court did not adopt a “history and tradition test” that would allow for the construction of new religious monuments;⁵⁸ rather, the majority placed significant weight on the age and “historical context” of the Bladensburg Cross.⁵⁹ Old monuments are one thing, but new ones, even if they reflect some historical practice, are another matter. For her part, in addition to joining both the majority opinion and Justice Breyer’s concurrence, Justice Kagan also writes separately to explain that she refused to join parts of Justice Alito’s opinion because, in her view, the *Lemon* test’s “focus on purposes and effects is crucial in evaluating government action in this sphere—as this very suit shows.”⁶⁰

For those counting, however, it is clear that the majority of justices—all but Justices Kagan, Ginsburg, and Sotomayor—are prepared to reject *Lemon*, at least with respect to cases involving religious symbols. Piling on to the extensive criticisms from the four-justice plurality, Justices Thomas and Gorsuch write separate opinions concurring in the judgment, both of which indicate their eagerness to overrule *Lemon* in its entirety.⁶¹ In his opinion, Justice Thomas reiterates his opposition to the incorporation of the Establishment Clause against the states. He would hold that the Establishment Clause simply does not apply to actions by state and local governments that promote religion.⁶² And even if it did apply, Justice Thomas would

⁵⁸ *Id.* at 2091 (Breyer, J., concurring).

⁵⁹ *Id.*

⁶⁰ *Id.* at 2094 (Kagan, J., concurring in part).

⁶¹ See *id.* at 2097–98 (Thomas, J., concurring in the judgment); *id.* at 2101 (Gorsuch, J., concurring in the judgment).

⁶² *Id.* at 2095. See also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring in the judgment); *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring).

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reject challenges to any noncoercive government speech, both because “[t]he *sine qua non* of an establishment of religion is actual legal coercion”⁶³ and because the idea that such speech must remain religiously neutral “is inconsistent with our Nation’s history and traditions.”⁶⁴

Yet another strategy for rejecting Establishment Clause challenges would be to deny standing to those who observe the government’s expression. Justice Gorsuch elaborates this view in his concurrence, joined by Justice Thomas.⁶⁵ Thus, in addition to disincorporating the Establishment Clause, or applying it only to coercive acts and never to state-sponsored sectarian speech, Justice Gorsuch would also hold that no one has standing as an “offended observer” to object to even the most blatant government endorsements of religion.⁶⁶

Against all this, Justice Ginsburg responds with a beleaguered but powerful dissent, joined only by Justice Sotomayor. Applying a principle of religious neutrality, and relying on the endorsement test to articulate that principle, Justice Ginsburg argues that the Bladensburg Cross is a clear violation of the Establishment Clause.⁶⁷ “As I see it,” she writes, “when a cross is displayed on public property, the government may be presumed to endorse its religious content.”⁶⁸ According to Justice Ginsburg, that presumption is not overcome by viewing the Cross as a war memorial, because the history of memorializing the war dead shows that “[t]he cross was never perceived as an appropriate headstone or memorial for Jewish

⁶³ *Am. Legion*, 139 S. Ct. at 2096 (internal quotation marks omitted) (Thomas, J., concurring in the judgment).

⁶⁴ *Id.*

⁶⁵ *Id.* at 2098–03 (Gorsuch, J., concurring in the judgment).

⁶⁶ *Id.* at 2098–01.

⁶⁷ *Id.* at 2113 (Ginsburg, J., dissenting).

⁶⁸ *Id.* at 2106.

soldiers and others who did not adhere to Christianity.”⁶⁹ For the dissenters, the meaning of the Bladensburg Cross has not changed over time. It was and remains an affirmation and endorsement of Christianity.⁷⁰

III. Establishment Clause Inversion

How does the cross, the predominant and exclusive symbol of Christianity, become more entrenched as a civic marker rather than less as a matter of Establishment Clause doctrine? The *American Legion* majority concludes that ordering the removal of the Cross would not be “a neutral act but . . . the manifestation of a hostility to religion that has no place in our Establishment Clause traditions.”⁷¹ In this way, the Court arrives at a doctrinal position in which maintaining the central symbol of Christianity as opposed to taking it down is necessary to vindicate Establishment Clause values. A remarkable inversion occurs in *American Legion*: The central religious symbol of the dominant, majority religion must remain in place because its continuous presence for so many years represents “a society in which people of all beliefs can live together harmoniously” and to remove it would suggest otherwise.⁷²

This inversion occurs in two steps.⁷³ First, the Court has to empty the Bladensburg Cross of its religious significance and meaning. Second, it has to credit the religious and civic majority’s understanding of what removing the Cross means

⁶⁹ *Id.* at 2109.

⁷⁰ *Id.* at 2106–07.

⁷¹ *Id.* at 2074 (internal quotation marks omitted) (majority opinion).

⁷² *Id.*

⁷³ See Richard Schragger, *Of Crosses and Confederate Monuments: Considering the Constitutional Limits on Majoritarian Control of the Public Square* (unpublished manuscript) (on file with authors).

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over and above religious and civic minorities' understanding of what the existing Cross represents. In this way, the Establishment Clause becomes a shield for existing civic-religious practices, and perhaps for future ones as well.

A. The Cross Is Not Religious

The first step requires the Court to engage in the semiotics of the Latin cross, even as it insists that meaning is uncertain and unstable. The majority spends a great deal of time discussing both the intent of those who created the Bladensburg Cross and the contemporary meaning of the memorial. The cross, asserts the Court, came into “widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today.”⁷⁴ But there are also instances in which the cross has attained a secular meaning and, indeed, “instances in which its message is now almost entirely secular.”⁷⁵ The Court’s investigation into the cross’s meaning in the first part of its opinion could fit comfortably into a Justice O’Connor-style endorsement analysis—with likely the same outcome.

Indeed, Justice Alito begins with a discussion of the “indisputably secular” use of the cross as a trademark by businesses and secular organizations.⁷⁶ He refers to the use of the cross by the International Committee of the Red Cross and to its appearance on the Swiss flag. While the cross was originally used by the Swiss for religious reasons, he notes, it is no longer so viewed. Thus, “an image that began as an expression of faith was transformed.”⁷⁷ This same

⁷⁴ *Am. Legion*, 139 S. Ct. at 2074.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2075.

⁷⁷ *Id.*

transformation happened in Bladensburg after World War I—when “a plain Latin cross . . . also took on new meaning.”⁷⁸ To determine that meaning, Justice Alito discusses the use of crosses in military cemeteries, the association of the cross with World War I dead, and the use of the cross in contemporaneous literature, poetry, and art.⁷⁹ This deep dive into the cultural history of the World War I-era cross is not gratuitous; the entire point of the exercise is to show that the Bladensburg Cross was and is primarily a symbol of the war dead and not primarily of Christianity or Christian superiority.

This discussion matters, even as some of the justices insist that it does not. As we have seen, after establishing the secular meaning of the cross, the Court describes various difficulties with applying the *Lemon* and endorsement tests. There are the usual problems of determining the intentions of state actors, along with the proliferation of public purposes over time, and the different meanings that may come to be associated with government-sponsored religious symbols.⁸⁰ Famous cathedrals, religiously-infused place-names, and other religious expressions become embedded in the cultural landscape and “[f]amiliarity itself can become a reason for preservation.”⁸¹

The Court raises these as objections to a meaning-based judicial doctrine for all long-standing government religious symbols. But one can ask why these problems cannot be overcome. All the examples the Court offers are relatively uncontroversial; they sometimes read as a parade of horrors, but none of the examples are particularly difficult. The secular-purpose prong of *Lemon* and the endorsement test, for all their

⁷⁸ *Id.*

⁷⁹ *Id.* at 2075–77.

⁸⁰ *Id.* at 2082–85.

⁸¹ *Id.* at 2084.

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flaws, provided a standard by which judges could assess the meaning of government speech, some of which did and would violate the Establishment Clause.⁸²

And in fact, the Court applies a meaning-based analysis in the very case in which it eschews it, beginning its opinion by draining the Bladensburg Cross of its primary religious meaning. On an endorsement analysis, the case could have ended there. If the Bladensburg Cross is a mostly secular symbol of the war dead, then it likely does not convey a message of outsider status and, on that view, would not violate the Establishment Clause.⁸³

B. Switching Perspectives

The Court takes a second step, however, shifting the perspective from which the Cross should be assessed. Once the Cross is drained of its religious purpose and meaning, the Court turns to assessing the meaning of removing the Cross from the perspective of those who would favor keeping it. This is the moment of Establishment Clause inversion. In a striking passage, Justice Alito writes:

[W]hen time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious

⁸² For qualified defenses of *Lemon* and the endorsement test as reflecting sensible approaches to government religious speech, see 2 GREENAWALT, *supra* note 16, at 158–81; see also NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 98–112 (2017) (defending a principle of government nonendorsement).

⁸³ Of the opinions offered in *American Legion*, Justice Kagan's seems nearest to this view. See *Am. Legion*, 139 S. Ct. at 2094 (Kagan, J., concurring in part).

symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive.⁸⁴

This rhetoric, involving the government “roam[ing] the land,” “tearing down monuments,” and “scrubbing away” references to the divine, is provocative and purposefully so. The reference to “militantly secular regimes” is meant to put the challengers to public religious symbols on the defensive. This language turns a disagreement about public meaning into a conflict over ideologies, with “militants”—presumably radical secularists—representing those who would insist on erasing public references to the divine.

Who exactly would be disturbed by the potential removal of the Cross? The endorsement test has generally been applied from the perspective of the reasonable observer, with some debate about whether that perspective should be defined in terms of a representative member of the political community or by the views of religious (or non-religious) minorities.⁸⁵ In either case, the endorsement inquiry concerns the meaning of the contested government symbol itself—in *American Legion*, what message the Cross conveys to those who observe it. But in Justice Alito’s inverted Establishment Clause, the government act under review is not display of the Cross, but rather the possibility that the Court might order its removal. The majority

⁸⁴ *Id.* at 2084–85 (majority opinion).

⁸⁵ See B. Jessie Hill, *Anatomy of the Reasonable Observer*, 79 *BROOK. L. REV.* 1407, 1416–17 (2014); Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Observer*, 57 *UCLA L. REV.* 1545, 1596–97 (2010).

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emphasizes the message being sent to those who support the Cross. Instead of asking what message the government sends by displaying the Cross, the Court asks what message it would send if it held that the Cross is unconstitutional.

This inversion of the Establishment Clause in *American Legion* is inconsistent with a central purpose of the First Amendment, which is to protect religious minorities from being subject to majoritarian religious practices. Those practices, including symbolic speech, are not supposed to signal the lesser status of nonadherents. There are many reasons we might be concerned about government symbolic speech that has this social meaning. Such speech might cause the government or other citizens to treat nonadherents differently in providing access to material, economic, or social benefits.⁸⁶ Government speech that endorses a particular religion (or religion generally) might also induce a sense of alienation among nonadherents, or it might stigmatize them, causing psychic harm.⁸⁷ Government actions, including symbolic speech, that convey a message of exclusion might also be wrong because they violate a constitutional requirement of treating all citizens with equal concern and respect.⁸⁸

These are constitutional harms that follow from the government's endorsement of religious symbols. But we do not often ask about the harms that might result if the government never engages in, or is forbidden from engaging

⁸⁶ See Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 392–99 (2012).

⁸⁷ See Marshall & Nichol, *Not a Winn-Win*, *supra* note 39, at 232–46 (arguing that a purpose of the Establishment Clause is to protect citizens from psychic harms).

⁸⁸ See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 122–27 (2007); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2012); Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267 (2011); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000).

in, religious speech. And why would we? Presumably, the harm of removing the Cross would be experienced by those who favor the government's display of it. But a central idea of disestablishment is that there should be no favored religion. Messages of insider status are constitutionally inappropriate. Of course, those who enjoy such a message will be harmed when the government withdraws that message or is disallowed from expressing it in the first place. But if those harms count, then what becomes of disestablishment? As opposed to a check on religious favoritism, the Establishment Clause becomes a way of entrenching that preference.

In assessing the expressive effects of removing the Cross, *American Legion's* majority starts down this path. The Court could have held that the Bladensburg Cross had a legitimate secular purpose and that it was not an endorsement of religion. It also could have held that the Cross is a de minimis establishment; perhaps regretful, but not so egregious as to require constitutional invalidation. Instead, the Court ruled that Establishment Clause principles require that the Court not order its removal, or for that matter, not order the removal of any long-standing monuments. For those with a favorable view of both the Cross and the meanings that it conveys, "destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment."⁸⁹

This statement echoes Justice Breyer's concern with religious divisiveness, most fully articulated in *Van Orden v. Perry*, which upheld the display of a large Ten Commandments monument on state-owned property.⁹⁰ But the application here

⁸⁹ *Am. Legion*, 139 S. Ct. at 2090.

⁹⁰ *Van Orden v. Perry*, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring in the judgment).

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goes one step further. In *Van Orden*, Justice Breyer asserted that a central purpose of the Establishment Clause is to prevent religious conflict.⁹¹ In assessing the constitutionality of the Ten Commandments display in that case, he balanced the harms of the religious display against the harms of an order to remove it. In light of the potential political backlash that might follow from removal, he concluded that such an order would do more harm than good. He made a political calculation.

Justice Alito's argument in *American Legion* appears to be different. If the Establishment Clause requires religious neutrality and removing the Cross would not be neutral, then it is possible that Bladensburg would be barred under the Establishment Clause from removing the Cross, even absent a court order. Perhaps those who favor the display have some right against government interference with it, such that any deviation from the existing baseline would express hostility toward them. Therefore, existing religious monuments *must* remain. Another possibility is that neutrality requires equal expressive treatment in the public square. Cities and towns across the nation cannot remove those monuments that already exist. But must they also build religious monuments when they put up secular ones, and would failure to do so show hostility toward religion?

The Court has already moved sharply in the direction of equal treatment in the area of religious funding, holding that neutrality demands equal access for equivalent secular and religious entities.⁹² That neutrality principle has also been applied to private religious speech in public forums.⁹³ Of

⁹¹ *Id.* at 698 (“[The Religion Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike.”).

⁹² See *supra* Part I.

⁹³ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

course, the Court does not hold that the state must preserve the Cross in *American Legion*. In his concurring opinion, Justice Kavanaugh makes this point explicitly.⁹⁴ The majority's reasoning, however, raises the question of whether a voluntary decision by the state to remove the Cross would convey hostility toward religion. The Court's holding—that removing the Cross would violate religious neutrality—turns the Establishment Clause on its head, and its logic points toward an even more complete and radical inversion.

C. Neutrality as Hostility

What is clear from *American Legion* is that government messages *matter*. The government conveys a message when it puts up a cross. It also conveys a message when it takes one down. Presumably the neutral position is for the government not to say anything about religion. But that is not how the *American Legion* majority sees it. The government cannot be neutral. Even when it says nothing, it might be conveying a message. Does the government exhibit hostility to religion when it refuses to erect a cross or a Christmas tree or a creche, or stops doing so after many years? These are the types of questions about social meaning that the Court's decision raises.

In *American Legion*, Justice Alito mistakes the concept of neutrality for hostility toward religion. This is an ongoing theme in the rhetoric and doctrine of Establishment Clause jurisprudence. The rhetoric originates in early Burger Court cases in which the Court upheld religious displays in part on grounds that an aggressive judicial stance could be interpreted

⁹⁴ *Am. Legion*, 139 S. Ct. at 2094 (Kavanaugh, J., concurring) (“The Court’s ruling *allows* the State to maintain the cross on public land. The Court’s ruling does not *require* the State to maintain the cross on public land.”).

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as hostility to religion; the state should instead exhibit a supportive relationship to religion, without running afoul of the Establishment Clause.⁹⁵

This trope has been common among religious conservatives, who have long argued that separationist judicial decisions evince hostility to religion, and that religious entities, practices, and messages should receive treatment at least as favorable as their secular analogues. Certainly, any lesser treatment, they argue, is both denigrating of religion and non-neutral.⁹⁶

What concept of neutrality is doing the work here? Disestablishment imposes special disabilities on religion that do not apply to many secular beliefs and practices. Some have argued that a principle of disestablishment should extend further to cover certain secular doctrines,⁹⁷ though the Court continues to treat religion as special for purposes of government speech, at least currently. But if neutrality means that the government must, even in its own speech, give equally favorable treatment to religion, then we have come a long way from the idea of disestablishment.

Some of Justice Alito's rhetoric sounds in the cultural and political register of victimization.⁹⁸ Consider the "War

⁹⁵ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

⁹⁶ See, e.g., *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 900–01 (2005) (Scalia, J., dissenting); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 124–27 (1992); cf. Frank S. Ravitch, *The Supreme Court's Rhetorical Hostility: What Is "Hostile" to Religion Under the Establishment Clause*, 2004 BYU L. REV. 1031 (2004) (discussing uses of the concept of hostility in Establishment Clause jurisprudence).

⁹⁷ See Tebbe, *Government Nonendorsement*, *supra* note 88, at 657–92; Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1421–25 (2012).

⁹⁸ Cf. Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 282 ("The oppressed victim of discrimination is no longer the 'discrete and insular minorities' contemplated in *Carolene Products*, but rather religious objectors who were once trumpeted as a 'moral majority,' but now cloak themselves as 'religious minorities' in need of state protection.").

on Christmas.”⁹⁹ Instead of being understood as an effort to be inclusive, non-specific holiday greetings are targeted for their hostility to Christians. “Neutral” greetings are suddenly non-neutral. In other areas, too, religious conservatives have argued that laws requiring neutrality instead evince hostility toward or discriminate against them. Anti-discrimination laws that protect LGBT people, for example, are challenged as hostile to traditional believers.¹⁰⁰ Similarly, removing a cross in order to be more inclusive of non-Christians is reinterpreted as animosity toward Christians.

Perhaps this reflects a transitional moment. In a society dominated by a particular religious outlook, namely one in which Christians exercise cultural, political, and social power, Establishment Clause doctrine could reflect a clear sense of who constitutes the majority and who constitutes the minority and how the practices of the former might fuel alienation in the latter. In a society in which Christians are less dominant, or which is conceived of as dominated by a “religion” of secularism, the alienation might run in the other direction. From Justice Alito’s perspective, by imposing its will on the public square, a secular majority is signaling its disapproval of traditional believers, and of Christians, in particular. The majority becomes the minority. And neutrality becomes hostility.

⁹⁹ See, e.g., JOHN GIBSON, *THE WAR ON CHRISTMAS: HOW THE LIBERAL PLOT TO BAN THE SACRED CHRISTIAN HOLIDAY IS WORSE THAN YOU THOUGHT* (2005).

¹⁰⁰ See, e.g., *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1735–40 (2018) (Gorsuch, J., concurring); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 725–27 (2010) (Alito, J., dissenting); STEVEN D. SMITH, *PAGANS AND CHRISTIANS IN THE CITY: CULTURE WARS FROM THE TIBER TO THE POTOMAC* 341–43 (2018); Michael McConnell, *Dressmakers, Bakers, and Equality of Rights*, in WILLIAM N. ESKRIDGE, JR. & ROBIN FRETWELL WILSON, *RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND* 381–82 (2019).

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The assumed dominance of a secularist majority seems overstated. Traditional believers, including conservative Christians, do not appear to be a particularly weak or insular minority, despite what some have asserted. The deference to long-standing religious symbols that the Court adopts in *American Legion* instead seems to be responsive to a political problem, and that should be cause for regret. Justice Breyer's *Van Orden* concurrence is an acknowledgement of the Court's limited capacity to act effectively as a counter-majoritarian force. A decision against exclusionary government speech risks a political backlash, increasing religious polarization, and consequently less toleration of minorities. On Justice Breyer's account, the Establishment Clause needs to be read so as to manage religious strife.¹⁰¹

Turning this political concern into a substantive argument for neutrality, as Justice Alito does, is a mistake, however. The move to equate non-neutrality with hostility advances a radical vision of the Establishment Clause, in which anything less than favorable treatment of religion constitutes an attack by "militant" secularists. The Establishment Clause thereby becomes an instrument for requiring that the government support and endorse religious activities, practices, and symbolic speech, where before it had served as a limit on that support and endorsement.

IV. After Endorsement

In light of the Court's criticism of *Lemon* and the endorsement test, and despite its engaging in a similar meaning-laden analysis, it is fair to ask what limits the Court

¹⁰¹ Schragger, *The Relative Irrelevance of the Establishment Clause*, *supra* note 40, at 617–18.

would impose on the government's religious speech after *American Legion*, and what criteria courts should use to set those limits.

One possibility is that there are no limits. If judicial constraints on government religious symbols and practices evince hostility toward religion, government religious speech may be protected by the Establishment Clause, not threatened by it. The majority could also adopt Justice Gorsuch's or Justice Thomas's respective approaches. Recall that Justice Gorsuch argues that "observer standing" under the Establishment Clause is an anomaly and that noncoercive government speech should not be vulnerable to constitutional challenge.¹⁰² Justice Thomas argues that the Establishment Clause does not apply to the states and that, even if it were applicable, it would only prohibit coercive government acts, not symbolic ones.¹⁰³

The Court does not seem inclined to embrace these views. Most of the justices appear to contemplate at least some circumstances in which noncoercive government religious speech would violate the Establishment Clause. What the Court does state, repeatedly, is that there is a presumption of constitutionality for "longstanding" monuments, and perhaps for other traditional state-sponsored religious practices as well.¹⁰⁴

What constitutes "longstanding" will be an on-going issue, of course. "Longstanding" might have two components. It seems to refer to those religiously-infused government practices that have 1) shed any primary sectarian meaning and have become so embedded in the civic fabric that 2)

¹⁰² *Am. Legion v. Am. Humanist Soc'y*, 139 S. Ct. 2067, 2100–04 (2019) (Gorsuch, J., concurring).

¹⁰³ *Id.* at 2096–97 (Thomas, J., concurring).

¹⁰⁴ *Id.* at 2082, 2085, 2089 (plurality opinion).

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striking them down would convey a message of hostility toward religion. The old/new distinction seems intended to prevent the erection of new monuments or the adoption of new religiously-infused practices. But it is not entirely clear if “longstanding” refers to *actual* existing monuments or practices, or to government monuments and practices that have some grounding in historical practice. If the government has historically invoked the divine at town council meetings or during Thanksgiving celebrations, may it continue to do so next year? Presumably. But can it also erect new monuments, as long as those monuments do not depart from norms that have been historically accepted?

Justices Breyer and Kagan signal that they would resist new construction.¹⁰⁵ Perhaps some other justices would as well. The majority seems nervous that its opinion could be read to authorize a spate of cross building across the country. Perhaps the Court has an image of crosses on top of courthouses, in courtrooms, or on classroom walls.¹⁰⁶ Former Alabama Supreme Court Chief Justice Roy Moore’s placement of a two-ton Ten Commandments monument in the Alabama state courthouse still seems to be constitutionally out-of-bounds, even for some of the conservative justices.¹⁰⁷

Nevertheless, state and local legislators regularly propose new laws for the display of the Ten Commandments in schools,

¹⁰⁵ *Id.* at 2091 (Breyer, J., concurring) (“Nor do I understand the Court’s opinion today to adopt a ‘history and tradition test’ that would permit any newly constructed religious memorial on public land.”).

¹⁰⁶ *Cf. Salazar v. Buono*, 559 U.S. 700, 715 (2010) (“[T]he [Establishment] Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall . . . because such an obtrusive year-round religious display would place the government’s weight behind an obvious effort to proselytize on behalf of a particular religion.” (quoting *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989))).

¹⁰⁷ See Frederick M. Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W. VA. L. REV. 275, 289–90 (2007); Steven Lubet, *The Ten Commandments in Alabama*, 15 CONST. COMMENT. 471 (1998).

courtrooms, and on other government property.¹⁰⁸ Several states have proposed laws that would require government buildings to post displays stating, “In God We Trust.”¹⁰⁹ That state and local officials choose these particular symbols and messages is neither accidental nor surprising. Those pursuing a public religious agenda are aware of the Supreme Court’s decisions, and they know that certain symbols and messages may be constitutionally permissible, at least in certain contexts.¹¹⁰ The Court is right to worry about new crosses. Political entrepreneurs are happy to push the boundaries of acceptable religious speech once the Court has given them an opening.

The old/new distinction is not going to end the religious culture wars, despite what may be an effort by the Court to withdraw from them, at least in the context of government religious speech. Justices Breyer and Kagan, who joined the conservatives in the majority, must know this. They both dissented in *Town of Greece v. Galloway*, which upheld a town council’s practice of commissioning mainly Christian prayers to open its meetings.¹¹¹ This prayer practice was new, though the practice of opening a legislative session with prayers is quite old, as the majority noted.¹¹²

Justice Kagan’s dissent in *Town of Greece* makes clear what is at stake in these cases of state-sponsored religious expression. Though she does not explicitly invoke the endorsement test,

¹⁰⁸ See, e.g., Bill Chappell, *Arkansas Installs A New Ten Commandments Monument At Its Capitol*, NPR (April 26, 2018, 1:19 PM); Julius L. Lasin, *Alabama Amendment Allows Display of Ten Commandments*, MONTGOMERY ADVERTISER (Nov. 7, 2018, 1:02 AM).

¹⁰⁹ Moriah Balingit, *Does ‘In God We Trust’ Belong in Schools? More and More States Say Yes.*, WASH. POST (Dec. 1, 2018).

¹¹⁰ See Jeremy W. Peters, *Alabama Revisits Ten Commandments, Hoping for Help From Kavanaugh*, N.Y. TIMES (Sept. 25, 2018).

¹¹¹ *Town of Greece v. Galloway*, 572 U.S. 565 (2014).

¹¹² *Id.* at 575.

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her argument sounds in the same expressive register.¹¹³ The state must not convey a message of exclusion that denies equal citizenship to those of different faiths. “A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country,” she writes, “[s]o that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.”¹¹⁴ Government religious speech, especially when overwhelmingly sectarian, undermines that relationship of political equality.¹¹⁵

The justices in *Town of Greece* disagreed about the meaning and effects of the prayer practices in that case. But whether the justices agree on the particular facts, this *form* of analysis—taking into account the social meaning of religious expression—seems unavoidable. If the Court is going to strike down some types of government religious speech, it cannot avoid analyzing the meaning of the speech and the message it conveys to the reasonable citizen.¹¹⁶ Roy Moore’s Ten Commandments monument sends a message that the Alabama Supreme Court is aligned with a particular religious faith to the exclusion and subordination of religious and nonreligious minorities. Otherwise, why treat it differently from the Ten Commandments frieze in the U.S. Supreme Court? Some of the justices, perhaps a majority, seem to believe that new crosses convey different messages than old ones. Though the Court

¹¹³ See *id.* at 632–33, 637 (Kagan, J., dissenting).

¹¹⁴ *Id.* at 615.

¹¹⁵ *Id.* at 621 (“And so a civic function of some kind brings religious differences to the fore: That public proceeding becomes (whether intentionally or not) an instrument for dividing her from adherents to the community’s majority religion, and for altering the very nature of her relationship with her government.”).

¹¹⁶ See Hill, *Anatomy of the Reasonable Observer*, *supra* note 85, at 1408 (arguing that even if the Court rejects the endorsement test, it must still determine the social meaning of government speech based on the perspective of a reasonable observer).

disavows inquiries into the meaning of government symbols, it is difficult to imagine how else the justices could make these distinctions.

V. Christian Preferentialism?

Of course, it is possible that the Court's reticence to police the public square will result in the proliferation of government religious expression, presumably in ways that endorse Christianity or certain forms of Christianity. This outcome is not predicted by the conventional political economy story of the Establishment Clause, which asserts that as the country becomes more religiously diverse, state-sponsored religious symbols that appear to favor one religion over others become less acceptable. Consider John Jeffries's and James Ryan's *A Political History of the Establishment Clause*.¹¹⁷ They cite increasing religious pluralism and the decline of Protestant-Catholic tensions for the shift from a no-aid to a neutral-aid principle. As long as the government is even-handed, it should be able to fund religious organizations as it funds secular ones. At the same time, Jeffries and Ryan argue that increasing pluralism coupled with rising religious non-affiliation means that a return to a more assertive public cultural Christianity is unlikely.¹¹⁸ In other words, increasing pluralism tends to support government funding of religious institutions, but not government-sponsored religious speech. Ryan and Jeffries thus predicted that the corresponding aspects of Establishment Clause doctrine would eventually diverge.¹¹⁹

¹¹⁷ Jeffries and Ryan, *supra* note 12.

¹¹⁸ *Id.* at 366–68; see also Gey, *supra* note 12, at 42–47 (arguing that religious pluralism will limit the rise of Christian preferentialism).

¹¹⁹ Jeffries and Ryan, *supra* note 12, at 368.

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The terrain of the religious culture wars has shifted considerably in the last few decades, however. The pluralism narrative does not account for two phenomena that have characterized politics in the early twenty-first century: the robust alliance of religious conservatives against the secular state and the rise of ethno-religious populism on a global scale. These forces may push church-state relations in the U.S.—as they have elsewhere—in a reactionary direction, leading to more preferentialism in the public square rather than less.¹²⁰

A. The Attack on Secularism and the Rise of Christian Nationalism

The Catholic-Protestant tensions that characterized the early-to-mid-twentieth century church-state settlement have been replaced by alignment of religious conservatives, on one side, and liberal or progressive religious minorities and nonbelievers, on the other.¹²¹ Traditional believers—mainly evangelical Protestants and conservative Catholics—have found common cause in their opposition to the sexual revolution. The LGBT civil rights movement, in particular, has mobilized an inter-denominational conservative coalition that had already been unified by opposition to abortion and contraception.¹²² The Supreme Court's decision to constitutionalize same-sex marriage in *Obergefell*, the expansion of civil rights laws to protect LGBT persons, and federal regulations mandating contraceptive coverage under the Affordable Care Act—these developments have led many religious conservatives to believe that they are culturally

¹²⁰ See Schragger & Schwartzman, *Religious Antiliberalism*, *supra* note 41.

¹²¹ See JAMES DAVIDSON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991); *see also* NOAH FELDMAN, *DIVIDED BY GOD* (2006).

¹²² See NeJaime & Siegel, *Conscience Wars*, *supra* note 31, at 2544–52.

and politically under siege.¹²³ On the religious right, there is a shared sense of victimization at the hands of a relentlessly aggressive secular culture, leading conservatives to position themselves as oppressed minorities.¹²⁴ And for some, the proper response to these perceived threats is a more forceful public assertion of traditional forms of Christianity.¹²⁵

This religious polarization coincides with rising ethno-nationalism, both in the United States and abroad. President Trump's anti-immigrant policies and rhetoric, which target Latinos, Muslims, and other minorities,¹²⁶ have much in common with the programs of other ethno-religious populist movements.¹²⁷ In response to Muslim immigration and the perceived threat of Islam, countries like Hungary and Poland are promoting the practices and institutions of so-called "illiberal democracy."¹²⁸ There, opposition to Islam has become a defining characteristic of religious, ethnic, and political identity. Islamophobia has been accompanied by a resurgence of Christian nationalism. Religious conservatives, or at least

¹²³ See Various, *Against the Dead Consensus*, FIRST THINGS (March 21, 2019); Ross Douthat, *What are Conservatives Actually Debating*, N.Y. TIMES (June 4, 2019).

¹²⁴ See, e.g., SMITH, PAGANS AND CHRISTIANS IN THE CITY, *supra* note 100, at 360–61; Adrian Vermeule, *As Secular Liberalism Attacks the Church, Catholics Can't Afford to Be Nostalgic*, CATHOLIC HERALD (Jan. 5, 2018); but cf. Murray, *Inverting Animus*, *supra* note 98, at 282–83 (criticizing the inversion of antidiscrimination law that occurs when Christian conservatives are considered "a beleaguered minority religious sect subject to invidious discrimination").

¹²⁵ See, e.g., R. R. RENO, RESURRECTING THE IDEA OF A CHRISTIAN SOCIETY (2016); Sohrab Ahmari, *Against David French-ism*, First Things (May 29, 2019); see also Alexander Zaitchik, *Is Josh Hawley For Real?*, NEW REPUBLIC (July 25, 2019) (discussing the rise of "post-liberal" conservative populists).

¹²⁶ Cf. Corbin, *Christian Legislative Prayers*, *supra* note 28, at 467–70.

¹²⁷ See generally WILLIAM A. GALSTON, ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY (2018); ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018).

¹²⁸ See Zack Beauchamp, *It Happened There: How Democracy Died in Hungary*, VOX (Sept. 13, 2018, 9:30 AM); Jan-Werner Müller, *The Problem with Poland*, N.Y. REV. OF BOOKS (Feb. 11, 2016).

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a significant subset of them, have become chief defenders of nativist regimes.¹²⁹

This latter impulse suggests how the pluralism thesis might be mistaken, and how increasing religious diversity in Western nations may lead to a resurgence of populist Christianity. The perceived Islamic (and non-white) threat has led to calls for banning religious sites, outlawing Islamic law, enforcing restrictions on religious dress, and requiring outward assertions of fealty to Christian symbols.¹³⁰ Instead of resulting in less public support for official displays of Christianity, existing forms of pluralism have led to a popular backlash in the form of a more full-throated defense of Christian (or “Judeo-Christian”¹³¹) values, including efforts to coerce compliance with traditional religious norms.

President Trump’s travel ban is an assertion of Christian nationalism, in parallel with the practices of right-wing parties throughout Europe to restrict or eliminate immigration from the Middle East and to shut the door to Muslim refugees and asylum seekers. His repeated statements denigrating Muslims and his stoking of anti-Islamic sentiments in the larger public play on the fears of white Christians for their safety and

¹²⁹ See Andrew Whitehead et al., *Making America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election*, 79 SOC. OF RELIGION 147 (2018); Harry Bruinius, *Why Evangelicals Are Trump’s Strongest Travel-Ban Supporters*, CHRISTIAN SCI. MONITOR (Mar. 3, 2017); Robert Duncan, *Limiting Muslim Immigration Is Patriotic, U.S. Cardinal Says*, NAT’L CATH. RPTR. (May 20, 2019); Aleksandra Wróbel, *Orbán Pledges to Keep Hungary Safe and Christian*, POLITICO (May 7, 2018, 1:49 PM).

¹³⁰ See, e.g., Dan Bilefsky, *Quebec Bans Religious Symbols in Some Public Sector Jobs*, N.Y. TIMES (June 17, 2019); Ed Pilkington, *Anti-Sharia Laws Proliferate as Trump Strikes Hostile Tone Toward Muslims*, GUARDIAN (Dec. 30, 2017, 11:35 AM); Nick Cumming-Bruce & Steven Erlanger, *Swiss Ban Building of Minarets on Mosques*, N.Y. TIMES (Nov. 29, 2009).

¹³¹ We are skeptical of the term. See Richard Schragger & Micah Schwartzman, *Jews, Not Pagans*, 56 SAN DIEGO L. REV. 497, 509 (2019); Anna Gryzmala-Busse, *Once, the ‘Judeo-Christian Tradition’ United Americans. Now It Divides Them.*, WASH. POST (April 17, 2019); Kevin M. Schultz, *Arguing in Bad Faith: The Curious Appropriation of “Judeo-Christian” Values on the Right*, NEW REPUBLIC (May 9, 2019).

cultural security. Controlling entry is a way of short-circuiting pluralism and is part of a larger agenda of preserving an imagined racial, ethnic, and religious American identity.¹³²

B. The Supreme Court's Role

What role is the Court playing in this cultural and political environment? The Roberts Court is continuing a revolution that began with the Rehnquist Court. The narrowing of the Establishment Clause and the expansion of free exercise—at least as applied to traditional believers—has been a goal of conservatives for some time. These doctrinal changes seem in some ways disconnected from global conflicts over ethno-religious identity. And though the Supreme Court is often sharply divided on matters of religious freedom, a number of recent decisions have enjoyed solid majorities, including members of the Court's liberal wing. Certainly, the Court is on a conservative trajectory, slowly dismantling Establishment Clause restrictions that have characterized the last half-century of church-state jurisprudence. Nevertheless, one could view these shifts in doctrine as a relatively minor departure, an appropriate corrective, or part of the inevitable swings that accompany changes in the Court's personnel.

A more skeptical view—and one we share—is that the Court's doctrine is paving the way for a certain kind of religious preferentialism. Before his death, Justice Scalia was explicit about this agenda. He believed that legislatures could adopt laws that reflect particular religious commitments and

¹³² See Corbin, *Christian Legislative Prayers*, *supra* note 28, at 472–73; Christopher Stroop, *White Evangelicals Have Turned on Refugees*, FOREIGN POL'Y (Oct. 29, 2018, 8:56 AM).

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that the government could promote religious speech.¹³³ His preferred Establishment Clause doctrine rejected the principle of neutrality among religious denominations. He would have permitted the state to favor monotheistic religions over non-monotheistic ones, and Christian (or “Judeo-Christian”) public practices over others.¹³⁴ He rejected the *Lemon* test’s “secular purpose” requirement¹³⁵ and would have replaced the endorsement test with an interpretation of the Establishment Clause that prohibited only government coercion of religious practices and perhaps proselytization.¹³⁶

Justice Scalia’s views have now moved much closer to the center of the Court, as we have seen. Though the Court is not yet willing to adopt an explicit preference for monotheism, it is willing to permit a larger range of preferential government religious practices. Sometimes the Court does so after paying lip service to the demands of nondiscrimination and denominational neutrality,¹³⁷ or by invoking private choice as a way to insulate the government from directly supporting particular religious groups.¹³⁸ In other cases, the Court has

¹³³ See *McCreary Cty. v. ACLU*, 545 U.S. 844, 900 (2005) (“[I]n the context of public acknowledgments of God there are legitimate *competing* interests: On the one hand, the interest of that minority in not feeling ‘excluded’; but on the other, the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*, and with respect to our national endeavors. Our national tradition has resolved that conflict in favor of the majority.”).

¹³⁴ *Id.* at 893 (“If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all. . . . With respect to public acknowledgment of religious belief, it is entirely clear from our Nation’s historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”); see Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097 (2006).

¹³⁵ *McCreary Cty.*, 545 U.S. at 900–02.

¹³⁶ See *id.* at 908–9; *Lee v. Weisman*, 505 U.S. 577, 631, 640–41 (Scalia, J., dissenting).

¹³⁷ *Town of Greece v. Galloway*, 572 U.S. 565, 585–86 (“So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.”).

¹³⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002).

adopted more rigorous standing requirements that make it increasingly difficult to bring Establishment Clause challenges in the first place.¹³⁹

While the Court's conservative majority may not be actively promoting an ethno-religious vision, its decisions have opened the door for political constituencies pressing in that direction. The Court cannot by itself advance the cause of religious preferentialism. But its decisions can permit religiously-aligned political majorities to achieve aims consistent with such preferentialism, freed from the constraints of the Establishment Clause. As conservative political discourse moves away from pluralism and toward ethno-religious nationalism, the Court has signaled its retreat from requirements of religious neutrality, except insofar as the government appears hostile to religion.

* * *

When the courtroom audience in *Salazar v. Buono* laughed after Mr. Eliasberg said that there is never a cross on a Jewish tombstone, it was an appropriate response. Both the laughter and the observation that provoked it reflected a common understanding about the meaning of the cross. The suggestion that a cross can be a universal symbol is both offensive—to many Christians and non-Christians—and, more importantly, a statement of civic exclusion. But that view—our view—is now a dissenting perspective. It is remarkable that within a few short years, the absurdity of treating the cross as a secular

¹³⁹ *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011); *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007).

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symbol has become Supreme Court precedent, entrenched by an inversion of the Establishment Clause that equates religious neutrality with hostility to religion.

If Justice Scalia had lived so long, he would have had the last laugh.

Nonsensus: Pretext and the Decennial Enumeration

Justin Levitt*

It is impossible to overstate the importance of the Census. The obligation to conduct a decennial enumeration of the population appears in the sixth sentence of the Constitution, as the very first duty given to the new federal government: before the enumeration of legislative power, before the power to declare and wage war, before the resolution of federal judicial cases.¹ The Census enjoys this primacy because it is, logically, antecedent to the construction of a federal government that ostensibly obtains its power from the people. From the Founding, legislative representation in the federal government has always depended on knowing how many people live where.

Today, the Census continues to drive the allotment of congressional representation to various states, but it also does so very much more.² After the *reapportionment revolution* of the 1960s, our decennial population count determines the allocation of representation for federal, state, and local offices

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¹ See U.S. Const. art. I, § 2, cl. 3.

² U.S. Const. amend. XIV, § 2; *id.* art. II, § 1, cl. 2; 2 U.S.C. § 2a(a).

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across the country.³ The Constitution demands that districts foster equal representation. Whenever we take the Census to learn how many people are where, we redraw districts to recalibrate the representation we receive. Elections are the way Americans build the world we want to live in, together. The Census is the way we know who we are.

And the Census is also more than just the foundation of all government. It has also always been connected to funding: As early as 1798, it drove the apportionment of a new federal tax to backstop the federal government's over-reliance on tariffs in the event of a coming war with France.⁴ In the modern era, it is used more for giving than receiving: Hundreds of billions of federal dollars are distributed based on counts in the Census.⁵ And it provides our national informational infrastructure: The reason we know that a survey or poll is representative, the way that local governments target policy interventions, one of the ways businesses decide to locate or relocate to a community with particular economic habits or characteristics—it all has the Census at its core.

I. The Controversy

In March of 2018, Secretary of Commerce Wilbur Ross

³ In the 1960s, the Court ruled that constitutional claims challenging legislative districts that were unequal in population were justiciable. *Baker v. Carr*, 369 U.S. 186 (1962). The Court went on to demand rough equality of representation, based on roughly equal headcount, from legislative districts at every level of government. *See Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (applying the equal representation principle to congressional districts); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (applying a similar principle to state legislative districts); *Avery v. Midland Cty.*, 390 U.S. 474, 484–86 (1968) (applying a similar principle to local government districts).

⁴ *See* U.S. CONST. art. I, § 2, cl. 3; Act of July 14, 1798, ch. 75, 1 Stat. 597; Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 24 & n.86 (1999).

⁵ *See* MARISA HOTCHKISS & JESSICA PHELAN, U.S. CENSUS BUREAU, [USES OF CENSUS BUREAU DATA IN FEDERAL FUNDS DISTRIBUTION 3–10](#) (2017); ANDREW REAMER, THE GEORGE WASHINGTON INST. OF PUB. POLICY, [COUNTING FOR DOLLARS 2020: THE ROLE OF THE DECENNIAL CENSUS IN THE GEOGRAPHIC DISTRIBUTION OF FEDERAL FUNDS 5 tbl.2](#) (2017).

determined that, for the first time in the country's history,⁶ the Census Bureau would ask every household about the citizenship of its residents.⁷ To be sure, the Census Bureau has asked questions about citizenship before, of greater or lesser slices of the public. Right now, the public is asked about their citizenship on the American Community Survey (ACS), a survey designed to reach an average of 0.2% of households each month.⁸ The question sits in a twenty-eight page instrument including seventy-one inquiries (some with subparts) and designed to take about forty minutes.⁹

Adding a question about citizenship to the ten basic questions asked of every household in the country dramatically elevates the question's prominence. The last time we asked a significant portion of the American population about their citizenship in the basic enumeration conducted door-to-door was 1950.¹⁰ At the time, about seventy-three percent of the public trusted the federal government to do what is right.¹¹ As of December 2017, that number was eighteen percent.¹²

Secretary Ross's decision was immediately and enormously controversial. Career officials at the Census Bureau (and a succession of former Bureau directors) had long warned

⁶ See Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEO. L.J. ONLINE 1 (2019).

⁷ Letter from Wilbur Ross, Sec'y of Commerce, U.S. Dep't of Commerce, to Karen Dunn Kelley, Under Sec'y for Econ. Affairs, U.S. Dep't of Commerce (Mar. 26, 2018) [hereinafter Ross, Decision Letter].

⁸ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *AMERICAN COMMUNITY SURVEY: INFORMATION GUIDE 6* (2017).

⁹ U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *THE AMERICAN COMMUNITY SURVEY 28* (2018).

¹⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *1950 CENSUS OF POPULATION AND HOUSING* (1950).

¹¹ *Public Trust in Government: 1958–2019*, PEW RESEARCH CTR. (Apr. 11, 2019). The earliest records date back to 1958, the first year that the National Election Study began reporting "trust in government" figures for the federal government in a manner comparable to the way the question is asked today. *Id.*

¹² *Id.* Similarly, 74.5% of Americans in 2017 reported being "afraid" or "very afraid" of corrupt government officials, making it the single largest source of fear among the population. See *America's Top Fears 2017*, CHAPMAN UNIV. (Oct. 11, 2017).

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that asking questions about citizenship in the decennial enumeration itself would compromise the enumeration's accuracy.¹³ On the one hand, there were serious concerns that the prospect of a question on citizenship in a house-to-house enumeration would cause people to decline to respond to the Census at all, or to omit people in the household. On the other, there were concerns that, administered in this fashion, the question would cause noncitizens to falsely claim citizenship status, distorting the information collected.¹⁴

Those concerns were only magnified in recent years, given the increasingly toxic political climate around immigration and the consequent spread of fear in minority communities.¹⁵ As early as 2015, Census officials noted decreased ACS response rates, disproportionately large in tracts with substantial concentrations of noncitizens, and an *additional* growing refusal to answer citizenship questions even when responding to

¹³ Letter from Vincent P. Barabba et al., Former Dirs., U.S. Census Bureau, to Wilbur L. Ross, Sec'y of Commerce, U.S. Dep't of Commerce 1–2 (Jan. 26, 2018); Fed'n for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564, 568 (D.D.C. 1980).

¹⁴ In assessing the likely quality of the data to be gained from asking about citizenship in the enumeration, the Census Bureau compared answers given by individual respondents on the ACS against administrative data, and found that “nearly one third of [individuals listed as] noncitizens in the administrative data respond to the questionnaire indicating they are citizens.” Summary Analysis of the Key Differences Between Alternative C and Alternative D, Joint Appendix 145, at 147, Dep't of Commerce v. New York, 139 S. Ct. 2551 (2019) (No.18-966), 2019 WL 1114907. That is, about one-third of individuals listed as noncitizens in bureaucratic administrative data said in response to the ACS—an instrument on which the question is *less* salient than the enumeration—that they were citizens. *Id.*; see also J. David Brown et al., *Understanding the Quality of Alternative Citizenship Data Sources for the 2020 Census* 21, 23 (Ctr. for Econ. Studies, Working Paper No. CES 18-38, 2018) (finding a 37.6% discrepancy). It is possible that the administrative data are outdated and do not capture more recent naturalization, and it is possible that the administrative data are incorrect (or incorrectly linked to census responses). But it seems at least as likely that some of the respondents were falsely presenting themselves as citizens in their responses to the questionnaire.

¹⁵ See Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1363-67 (2019).

the remainder of the survey.¹⁶ An internal qualitative survey reported “[f]indings across languages [and] regions of the country, from both pretesting respondents and field staff[, that] point to an unprecedented ground swell in confidentiality and data sharing concerns, particularly among immigrants or those who live with immigrants.”¹⁷ It also found that unprecedented groundswell represented the reaction to a citizenship question in a *less* prominent context than the door-to-door enumeration.

The precise magnitude of the new question’s impact was difficult to assess. Normally, one would expect studies by the Census Bureau itself to provide a sense of the consequences for a change of this nature: If this were a movie, the Census Bureau would be the team of lab-coated, white-bootied scientists titrating the antidote or prepping the space probe. They undertake even the most modest adjustments with exceptional care and ample testing and retesting. But the Census Bureau was offered no opportunity to evaluate the potential impact through quantitative tests of its own, in real-world context, before Secretary Ross made his decision.¹⁸ Indeed, Secretary Ross cited the absence of “definitive, empirical” evidence of the potential impact as additional support *for* his decision.¹⁹

In the absence of meaningful testing in a real-world context, the Census Bureau estimated the extent of damage

¹⁶ See, e.g., Brown et al., *supra* note 14, at 8–12; WILLIAM P. O’HARE, CTR. ON POVERTY AND INEQUALITY, *CITIZENSHIP QUESTION NONRESPONSE* 11–12 (2018). The rates at which individuals refused to respond to the American Community Survey were higher in 2015 and 2016 than ever before in the survey’s history. See *American Community Survey: Response Rates*, U.S. CENSUS BUREAU (last visited July 23, 2019). This effect was broadly distributed: In twenty-nine different states, the rate at which individuals refused to respond to the ACS was higher in 2016 than ever before; in forty-four different states, the rate at which individuals refused to respond to the ACS was higher in either 2015 or 2016 than ever before. *Id.*

¹⁷ MIKELYN MEYERS, U.S. CENSUS BUREAU, *RESPONDENT CONFIDENTIALITY CONCERNS AND POSSIBLE EFFECTS ON RESPONSE RATES AND DATA QUALITY FOR THE 2020 CENSUS 15* (2017).

¹⁸ See Levitt, *supra* note 15, at 1369–70.

¹⁹ See Ross, Decision Letter, *supra* note 7, at 4.

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the question would cause as precisely as it could. It compared the drop-off in response rates from the (short) enumeration to the (long) survey in households without a noncitizen and in demographically similar households with a noncitizen; in 2010, that comparative incremental drop-off rate was identified as approximately 5.1%.²⁰ The chief scientist of the Census Bureau stressed that this was a “lower bound” and a “conservative estimate,” and that the real rate of nonresponse to the decennial enumeration “could be much greater” than 5.1% of households with noncitizens, itself a sizable number.²¹ For that reason, among others, the career officials at the Census Bureau suggested collecting the information through administrative records, rather than through a question on the enumeration that could damage the enumeration itself.²² Secretary Ross rejected the suggestion.²³

Indeed, there is plentiful reason to believe that the real rate of damage *would* be much greater. The conservative estimate assumes that nonresponse rates for a citizenship question on the house-to-house enumeration would be no larger than nonresponse rates for the relatively below-the-radar survey, despite the increased prominence of the decennial enumeration; that nonresponse driven by the question should be expected only of households containing at least one noncitizen, despite fear within the broader community; and that nonresponse for a 2020 Census would be no larger than

²⁰ Memorandum from John M. Abowd, Chief Scientist and Assoc. Dir. for Research and Methodology, U.S. Census Bureau, to Wilbur L. Ross, Jr., Sec’y of Commerce (Jan. 19, 2018) [hereinafter Abowd Memorandum, Joint Appendix], Joint Appendix 104, at 111, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No.18-966), 2019 WL 1114907.

²¹ *Id.* at 115–16.

²² Questions on the Jan 19 Draft Census Memo on the DOJ Citizenship Question Reinstatement Request no. 21, Joint Appendix 123, at 137, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No.18-966), 2019 WL 1114907.

²³ Ross, Decision Letter, *supra* note 7, at 4.

nonresponse rates in the 2010 Census, despite the substantial difference in overall political climate. There are substantial reasons to doubt *each* assumption.²⁴ A private study conducted after the decision was announced, and credited in litigation, predicted a reduced response rate—not just among households with noncitizens, but total—of 6.3% to 8.0% nationally and 10.5% to 14.1% in California.²⁵

II. The Ostensible Rationale

At the time, Secretary Ross attempted to justify his decision to add a question on citizenship to the decennial enumeration by claiming a desire to assist the Department of Justice (DOJ) with its enforcement of the Voting Rights Act (VRA).²⁶ The DOJ had in late 2017 purported to need the extra information for extra enforcement: Data from the ACS, it claimed, were insufficient for the purpose.²⁷ Yet simply on its face, there was substantial reason to doubt the legitimacy of that need.

In theory, there are three primary instances in which better citizenship data might assist VRA enforcement, all in the redistricting arena. Among the threshold elements of one type of VRA redistricting case is the need to prove that a minority group (or groups) is sufficiently large enough to have its voting power diluted by the absence of responsive districts.²⁸ This element has been interpreted to require a showing that the minority community could comprise at least half of the electorate of a district-sized population.²⁹ Another threshold

²⁴ See Levitt, *supra* note 15, at 1367–68.

²⁵ See *California v. Ross*, 358 F. Supp. 3d 965, 984–85 (N.D. Cal. 2019).

²⁶ Ross, Decision Letter, *supra* note 7, at 2.

²⁷ Letter from Arthur E. Gary, Gen. Counsel, Justice Mgmt. Div., U.S. Dep't of Justice, to Dr. Ron Jarmin (Dec. 12, 2017) [hereinafter DOJ Letter].

²⁸ *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

²⁹ *Bartlett v. Strickland*, 556 U.S. 1, 14–15, 18–20 (2009) (plurality opinion).

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element requires a showing that the electorate is polarized based on race; these assessments hinge on nuanced evaluations of electoral patterns calculated from data including, *inter alia*, the demographic composition of voters within each precinct.³⁰ And when liability is found, remedial measures must allow equitable opportunities for minorities to elect candidates of their choice, which also requires an assessment of local electoral power, similarly drawn from calculations using data including (but not limited to) the same demographic information above.³¹ Each of these elements relies on information about the electorate—or, as a proxy, the citizen voting-age population.³²

To date, each and every VRA case using information about the electorate has drawn its data from the existing decennial enumeration or—when citizenship has been implicated—from surveys, like the data in the ACS. Since the VRA’s passage in 1965, no case had ever been brought using data on citizenship from the decennial enumeration, because in fifty years, the decennial enumeration had not asked for that data. To my knowledge, before December 2017, no DOJ official had requested citizenship data from the decennial enumeration to enforce the VRA.³³ To my knowledge, no proponent or opponent of asking the question has identified even one concrete circumstance in which a potential VRA case failed or was not brought for want of citizenship data from the decennial enumeration.³⁴

³⁰ *Gingles*, 478 U.S. at 51–53.

³¹ *See, e.g.*, *United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006).

³² Demographic information is necessary, but in no way sufficient, for the assessment of electoral power. *See generally* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573 (2016).

³³ *See* Levitt, *supra* note 15, at 1375.

³⁴ *Id.* at 1380–82.

Indeed, there is only one case that has emerged even potentially implicating a role for citizenship data on the decennial enumeration—and that case demonstrates why such data are unnecessary. In 2010, Latino plaintiffs claimed that the at-large election system in Farmers Branch, Texas, unlawfully diluted their right to vote.³⁵ They presented evidence, from the ACS, showing that Latino citizens could meet the VRA's litigation thresholds.³⁶ But ACS data have several limitations in small jurisdictions with growing minority populations.³⁷ So plaintiffs *also* utilized data directly from the voter files, tallying voters with surnames highly likely to be Latino; this is a method not only used by the DOJ in its own litigation,³⁸ but also validated in the legislative history of the VRA itself.³⁹ The court found that the plaintiffs had met their burden under the VRA.⁴⁰ Without the need for citizenship data collected in the decennial enumeration.

It is true that better data might hypothetically yield better enforcement. Though no case has been identified thus far, circumstances can be imagined in which better data would make the difference. But the key relevant insight is that in this climate, collecting citizenship data on the decennial enumeration would *not* yield better data. It would yield data

³⁵ *Fabela v. City of Farmers Branch*, No. 3:10-cv-01425, 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012).

³⁶ *Id.* at *4–5.

³⁷ These limitations include the margin of error in any survey, and the fact that ACS data are most accurate when collected over a five-year span, which necessarily underestimates the size of populations that are swiftly growing. See Levitt, *supra* note 15, at 1378–80.

³⁸ See, e.g., *United States v. Alamosa County*, 306 F. Supp. 2d 1016, 1022 (D. Colo. 2004); see also *United States' Brief in Opposition to Defendants' Motion to Exclude Bayesian Improved Surname Geocoding (BISG) Evidence*, *United States v. City of Eastpointe*, 378 F. Supp. 3d 589 (E.D. Mich. 2019) (No. 4:17-cv-10079), 2018 WL 4144225.

³⁹ Congress explained, when it expanded VRA coverage to include language minorities, that “persons . . . of Spanish heritage” under the statute, 52 U.S.C. § 10310(c)(3), included “persons of Spanish language” as well as “persons of Spanish surname” in Arizona, California, Colorado, New Mexico, and Texas.” S. Rep. No. 94–295, at 24 n.14 (1975).

⁴⁰ *Fabela*, 2012 WL 3135545, at *8.

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that is ostensibly more precise, but actually less accurate, in a direction disfavoring enforcement. More precise data could help only in marginal cases, where the population is actually sufficiently large or robust to create liability, but statistical uncertainty precludes the predicate proof. But collecting data on citizenship in a door-to-door enumeration will only depress participation by exactly the minority populations in need of protection, leaving an inevitable undercount.

In other words, better data would help populations just on the margin of enforcement. But door-to-door enumeration data would not be better: It would drive down response rates precisely in those populations, turning uncertainty about reaching litigation thresholds into ostensible certainty of falling short of litigation thresholds. And that ostensible certainty would be false.

Perhaps this is why the DOJ had never before requested citizenship data from the decennial enumeration. Perhaps this is why every single one of the nonprofit groups engaged in vigorous private enforcement of the VRA met the Census Bureau's decision with condemnation and not applause.⁴¹

If the proffered justification of VRA enforcement appeared odd at the time, on the face of the request, the administrative record revealed in litigation firmly exposed it as a sham. It emerged that as early as February 2, 2017, officials in the Department of Commerce were "very interested" in the topics for the decennial Census,⁴² and in May, months before any request from the DOJ, Secretary Ross became agitated

⁴¹ *140+ Civil Rights Groups Call on Commerce Department to Strike Unnecessary Citizenship Question*, THE LEADERSHIP CONFERENCE ON CIVIL & HUMAN RIGHTS (Aug. 1, 2018); Nick Brown, *U.S. Census Citizenship Question Panned by Scientists, Civil Rights Groups*, REUTERS (Aug. 9, 2018).

⁴² *Email* from Ellen Herbst, CFO & Ass't Sec'y for Admin., U.S. Dep't of Commerce, to David Langdon, Senior Policy Advisor, U.S. Dep't of Commerce (Feb. 2, 2017).

about his “months old request that we include the citizenship question.”⁴³ Earl Comstock, his director of the Office of Policy and Strategic Planning at Commerce, responded that “we will get that in place. . . . We need to work with Justice to *get them to request* that citizenship be added back as a census question I will arrange a meeting with DOJ staff this week to discuss.”⁴⁴ Commerce shopped the desire for a question to DOJ, which declined any interest, then to DHS, which also declined interest, and then back to DOJ, before a discussion between Secretary Ross and Attorney General Sessions spurred DOJ to make its VRA request in December of 2017.⁴⁵ The process looked emphatically like a decision in search of a reason.

We may never know the real source of Secretary Ross’s strong interest in placing a citizenship question on the decennial enumeration as early as 2017, well before any request from DOJ. It is possible that the likely statistical impact was its own reward: Depressed participation among noncitizens would (inaccurately) show fewer noncitizens in the country, which would support the administration’s appeal among both nativists and proponents of expansive immigration enforcement.⁴⁶ It is possible that the real motive lay in hoping that reduced participation would yield comparative geographic, racial, or partisan gains, when (inaccurate) Census data were used to distribute funding and political power in familiar ways.⁴⁷ It is possible that the real motive lay in creating the data environment for restructuring political power in

⁴³ Email from Earl Comstock to Wilbur Ross (May 2, 2017, 02:19 PM), Joint Appendix 276, at 276, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019) (No.18–966), 2019 WL 1470266.

⁴⁴ *Id.* (emphasis added).

⁴⁵ See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019).

⁴⁶ See Levitt, *supra* note 15, at 1388.

⁴⁷ See *id.* at 1388–90.

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unfamiliar ways, building a legally questionable redistricting base predicated on the exclusionary representation only of citizens (or voting-age citizens) rather than representation of the population as a whole.⁴⁸ It is possible there was another motive entirely.

III. The Litigation

Everybody sued. The State of California filed the first complaint on the day that Secretary Ross announced his decision,⁴⁹ and five other primary cases followed shortly thereafter, joined or consolidated in three venues: the Southern District of New York, the Northern District of California, and the District of Maryland.

One of the New York cases would become the lead case in the set, with two principal claims.⁵⁰ First, a set of state and

⁴⁸ See *id.* at 1390–97. Evidence discovered quite dramatically in mid-2019 lends incremental support to this latter possibility. Longtime Republican redistricting consultant Thomas Hofeller passed away in 2018. There were contested proceedings concerning his surviving spouse and the estate; and in the course of a conversation with Common Cause about a referral for those proceedings, Hofeller’s estranged daughter mentioned that she’d found hard drives among his effects. Charles Bethea, *A Father, A Daughter, and the Attempt to Change the Census*, NEW YORKER (July 12, 2019); Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019). Common Cause subpoenaed the hard drives for North Carolina redistricting litigation and found, *inter alia*, a 2015 Hofeller study concluding that drawing districts based on citizen voting-age population—a “radical departure” from the status quo—“would be advantageous to Republicans and Non-Hispanic Whites,” but that it would be necessary to ask a citizenship question on the enumeration in order to get the data to make that change. *NYIC Plaintiffs’ Motion for Sanctions* exh. 6 at 8–9, New York v. U.S. Dep’t of Commerce, No. 1:18-cv-02921 (S.D.N.Y. July 16, 2019). Hofeller had spoken about adding a citizenship question to the enumeration with Secretary Ross’s advisor Mark Neuman, who had in turn delivered a draft letter concerning the need for data to the DOJ official actually drafting the request for citizenship data; a paragraph in Hofeller’s files concerning the Voting Rights Act justification for asking the question was incorporated verbatim in the draft letter Neuman gave to DOJ. See *Kravitz v. U.S. Dep’t of Commerce*, 382 F. Supp. 3d 393, 398–99 (D. Md. 2019). The variance between the Commerce Department’s origin story of the question, including in litigation, and the story suggested by these documents has become the subject of a motion for sanctions. *NYIC Plaintiffs’ Motion for Sanctions*, *supra*.

⁴⁹ Complaint, *California v. Ross*, No. 3:18-cv-01865 (N.D. Cal. Mar. 26, 2018).

⁵⁰ See Second Amended Complaint, *New York v. U.S. Dep’t of Commerce*, No. 1:18-cv-02921 (S.D.N.Y. July 25, 2018).

local government plaintiffs alleged that the inclusion of the citizenship question violated the Constitution’s “Enumerations Clause”—the provision establishing the Census’s only constitutional duty, the decennial requirement to conduct an “actual Enumeration” of the “whole number of persons” in the country.⁵¹ According to the plaintiffs, the presence of the citizenship question would cause an undercount, predictably impeding the enumeration itself.⁵² Second, plaintiffs alleged violations of the Administrative Procedure Act (APA), including that the decision defied longstanding agency data-quality standards, that it was made without sufficiently complete or reasoned explanation, and that the rationale offered was pretextual.⁵³

A second case, consolidated with the first, was brought on behalf of nonprofit groups. In addition to echoing the claims of the governmental plaintiffs above, these plaintiffs added equal protection claims based on intentional discrimination against immigrant communities of color and APA claims predicated on violations of specific additional statutory provisions governing Census Bureau procedures.⁵⁴

Other sets of cases were lodged in California and Maryland, mostly with claims overlapping those brought in New York.⁵⁵ One, brought in California by the City of San Jose and the Black

⁵¹ *Id.* at 54; U.S. Const. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

⁵² Second Amended Complaint at 54-55, *New York v. U.S. Dep’t of Commerce*, No. 1:18-cv-02921.

⁵³ *Id.* at 56-57.

⁵⁴ Complaint at 61-66, *N.Y. Immigration Coal. v. U.S. Dep’t of Commerce*, No. 1:18-cv-05025 (S.D.N.Y. June 6, 2018). Because the claims ran against the federal government, the equal protection claims were Fifth Amendment claims predicated on reverse incorporation. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

⁵⁵ *See, e.g.*, First Amended Complaint at 13-15, *California v. Ross*, No. 3:18-cv-01865 (N.D. Cal. May 4, 2018); Third Amended Complaint at 52-59, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041 (D. Md. Dec. 28, 2018); Second Amended Complaint at 37-39, *NAACP v. Bureau of the Census*, No. 8:18-cv-00891 (D. Md. Apr. 1, 2019).

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Alliance for Just Immigration, added a claim that the inevitable undercount would violate the Fourteenth Amendment's clause requiring the apportionment of congressional seats according to the enumeration of population.⁵⁶ Another, brought in Maryland by a group of nonprofits, individuals, and caucuses of minority legislators, added a claim based on a conspiracy to interfere with civil rights—a claim originally codified in the Ku Klux Klan Act of 1871.⁵⁷

In addition to the litigation above, two additional sets of plaintiffs lodged related suits. In Washington, D.C., the Electronic Privacy Information Center (EPIC) alleged that the Department of Commerce unlawfully failed to conduct full and complete Privacy Impact Assessments prior to announcing its decision to add the citizenship question to the enumeration.⁵⁸ And in New York, the NAACP Legal Defense and Educational Fund (LDF) initiated a Freedom of Information Act (FOIA) suit against the DOJ for records relating to the DOJ's review of the citizenship question before issuing its December 2017 request.⁵⁹

Litigation proceeded most quickly in New York, up against a June 30, 2019, deadline for determining the content of the

⁵⁶ Complaint at 29–30, *City of San Jose v. Ross*, No. 5:18-cv-02279 (N.D. Cal. Apr. 17, 2018).

⁵⁷ First Amended Complaint at 106–09, *La Unión del Pueblo Entero*, No. 8:18-cv-01570 (D. Md. July 9, 2018); see 42 U.S.C. § 1985(3); Enforcement Act of 1871, Pub. L. No. 42-22, § 2, 17 Stat. 13 (1871).

⁵⁸ Complaint at 24–26, *Elect. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, No. 1:18-cv-02711 (D.D.C. Nov. 20, 2018). The suit was dismissed in June 2019 for lack of standing, *Elect. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95 (D.C. Cir. 2019).

⁵⁹ Complaint at 13–16, *NAACP Legal Def. & Educ. Fund, Inc., v. U.S. Dep't of Justice*, No. 1:18-cv-09363 (S.D.N.Y. Oct. 12, 2018). As of publication, this litigation continues. Separately, Alabama has sued based not on what the Department of Commerce *did* do, but what it has *not* done. Alabama sued in order to force the Department to exclude from the enumeration undocumented individuals, as allegedly not “persons in each State.” U.S. CONST. amend. IV, § 2; Complaint, *Alabama v. U.S. Dep't of Commerce*, No. 2:18-cv-00772 (N.D. Ala. May 21, 2018).

Census forms to be printed.⁶⁰ In July 2018, the court dismissed claims brought under the Enumeration Clause, reasoning that the Clause permitted the government to ask demographic questions beyond a spare enumeration and that the Clause did not itself restrict the secretary's discretion regarding which questions to ask.⁶¹ But the court declined to dismiss the APA and equal protection claims.⁶²

Over the government's strenuous objection, the court granted discovery beyond the administrative record, including a September 2018 order permitting the deposition of Secretary Ross.⁶³ In part, the APA claims turned on whether Ross's presented rationale fit the mustered evidence, was beyond the authority conveyed by Congress, or was pretextual. The equal protection claims turned, in part, on whether the rationale was discriminatory.⁶⁴ And though depositions of high-ranking government officials are permissible only in extraordinary circumstances, the court found that the unusual path to the decision and Secretary Ross's increasingly questionable testimony, under oath to Congress, regarding the origin of the decision amounted to extraordinary circumstances warranting direct inquiry.⁶⁵ The Supreme Court first stayed the deposition of Secretary Ross and then agreed to take up the question of

⁶⁰ See Plaintiffs' Memo. of Law in Support of their Motion to Amend Judgment on Remand Pursuant to Rule 59(E), or for Injunctive Relief Pursuant to the All Writs Act at 11–15, *New York v. U.S. Dep't of Commerce*, No. 1:18-cv-02921 (S.D.N.Y. July 5, 2019) [hereinafter Motion to Amend Judgment].

⁶¹ *New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 774–75 (S.D.N.Y. 2018).

⁶² *Id.* at 775.

⁶³ *New York v. U.S. Dep't of Commerce*, 333 F. Supp. 3d 282 (S.D.N.Y. 2018), *vacated as moot* by 351 F. Supp. 3d 502, 680 (S.D.N.Y. 2019).

⁶⁴ *Id.* at 286.

⁶⁵ *Id.* at 286–90.

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extra-record discovery more generally, though events would soon overtake this particular branch of the controversy.⁶⁶

Meanwhile—despite eleven failed governmental applications for stays from various tribunals in the hierarchical chain⁶⁷—a trial was held. On January 15, 2019, the court issued a 277-page opinion, vacating the decision to place the citizenship question on the enumeration.⁶⁸

The court rejected the equal protection claim, finding insufficient evidence of intentional discrimination (even while acknowledging that the plaintiffs had not been able to depose the primary decisionmaker).⁶⁹ But it found violations of several technical statutory provisions governing the conduct of the Census.⁷⁰ And more sweepingly, the court found that Secretary Ross’s decision was unlawfully “arbitrary and capricious” under the APA—the “explanations for his decision were unsupported by, or even counter to, the evidence before the agency,”⁷¹ the decision departed from established statistical quality standards without justification,⁷² and “[f]inally, and

⁶⁶ See *In re Dep’t of Commerce*, 139 S. Ct. 16 (2018); *In re Dep’t of Commerce*, 139 S. Ct. 566 (2018). The Court never substantively addressed the propriety of the Ross deposition: the deposition order was vacated after the trial court issued its substantive decision, *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d at 680, and the Supreme Court vacated the remaining underlying disputes after issuing *its* substantive decision. See *Dep’t of Commerce v. U.S. Dist. Ct. S.D.N.Y.*, No. 18–557, 2019 WL 2649788 (U.S. June 28, 2019).

⁶⁷ See *New York v. U.S. Dep’t of Commerce*, No. 18–CV–2921, 2018 WL 6060304 (S.D.N.Y. Nov. 20, 2018).

⁶⁸ *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d at 679. Given the pending Supreme Court review of the propriety of extra-record evidence, the court carefully justified its opinion on the administrative record alone—but then also noted the consonance of the accumulated extra-record evidence. *Id.* at 635–36.

⁶⁹ *Id.* at 669–71.

⁷⁰ These included the requirement for the Census to seek information from sources other than direct inquiries where possible, like the administrative records career Census staff had recommended, see *supra* text accompanying note 22, and the requirement to present topics to Congress at least two years before the Census date itself. See *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d at 636–47.

⁷¹ *Id.* at 647–54.

⁷² *Id.* at 654–60.

perhaps most egregiously, the evidence is clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts."⁷³

Representing that the content of the Census was a matter of national importance, and that time was of the essence given the need to "finalize the decennial census questionnaire for printing by the end of June 2019," the government sought Supreme Court review before Second Circuit proceedings.⁷⁴ The Court granted review and heard argument on the case in April.⁷⁵

While Supreme Court review of the New York case was pending, litigation proceeded in California and Maryland. On March 6, 2019, the California federal court enjoined the secretary from adding a citizenship question to the Census; the court found statutory violations similar to those found in New York, but also granted relief on the Enumeration Clause claim, on the basis that including the question "will materially harm the accuracy of the census without advancing any legitimate governmental interest."⁷⁶ On April 5, the Maryland court did likewise.⁷⁷ And between these two decisions, given the California judgment, the Supreme Court asked its New York litigants to brief the Enumeration Clause question as well.⁷⁸

⁷³ *Id.* at 660; *see also id.* at 660–64.

⁷⁴ Pet. for Writ of Certiorari before Judgment at *13–*14, *U.S. Dep't of Commerce v. New York*, No. 18–966 (U.S. Jan. 25, 2019), 2019 WL 338906.

⁷⁵ *Dep't of Commerce v. New York*, 139 S. Ct. 953 (2019).

⁷⁶ *California v. Ross*, 358 F. Supp. 3d 965, 1048–49 (N.D. Cal. 2019). As in New York, the government petitioned for certiorari before judgment, and the Court ultimately vacated the trial court's decision in light of its final decision in the New York litigation. *Ross v. California*, No. 18–1214, 2019 WL 1243674 (U.S. June 28, 2019).

⁷⁷ *Kravitz v. U.S. Dep't of Commerce*, 366 F. Supp. 3d 681 (D. Md. 2019). As in New York, the Maryland court rejected the equal protection (and conspiracy) claim, finding insufficient evidence of the intent to discriminate. *Id.* at 752–54.

⁷⁸ *Dep't of Commerce v. New York*, 139 S. Ct. 1316 (2019).

IV. The Supreme Court

On June 27, 2019, the last day of the 2018 Term, the Court handed down a split opinion with shifting majorities, affirming in part and reversing in part.⁷⁹ First, the Court addressed an important dispute over standing. The government contended that any harm to the plaintiffs occasioned by the citizenship question depended on the actions of individuals unlawfully refusing to respond to the Census, and that those independent legal violations broke any chain of causation tying Secretary Ross's decision to the plaintiffs' alleged harms.⁸⁰ The Court unanimously rejected that contention. It credited the trial court's finding that individual nonresponse, while unlawful, was also predictable rather than speculative and that the injury required for Article III standing demanded no more.⁸¹

On the merits, the Court's more conservative justices rejected the Enumeration Clause claim, agreeing with the trial court that the government had the *constitutional* authority to ask demographic questions—including a question on citizenship, if it chose—along with a headcount.⁸² Unlike the trial court, however, the same bloc of justices also rejected the APA claim that Secretary Ross's decision was not supported by the evidence before him.⁸³ Taking the secretary at his word that more precise data on citizenship were desirable for enforcing the VRA, the Court found that the secretary evaluated various means to get more precise data and selected a final approach consonant with, if not required by, the available evidence of

⁷⁹ *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019).

⁸⁰ *Id.* at 2565–66; *see also* 13 U.S.C. § 221.

⁸¹ *Dep't of Commerce v. New York*, 139 S. Ct. at 2566.

⁸² *Id.* at 2566–67.

⁸³ *Id.* at 2569–71. The same justices also reversed the trial court's holdings with respect to the other claimed statutory violations. *Id.* at 2571–73; *see supra* note 70.

likely harm and the merits and drawbacks of alternatives.⁸⁴ That is, the Court determined that the administrative record showed enough homework to justify the decision, even if it meant considering and rejecting the recommendations of career officials the secretary supervised.

A different majority of the Court, however, refused to take the secretary at his word as to the real reason for the decision. Chief Justice Roberts, joining the four more progressive justices, found that the evidence—the full administrative record and the extra-record discovery justified by the irregularities in the full administrative record—revealed that the secretary’s proffered explanation was a pretext.⁸⁵ Per the Court:

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.⁸⁶

⁸⁴ Dep’t of Commerce v. New York, 139 S. Ct. at 2569–71. Curiously, the Court misstated the evidence of harm even in validating the secretary’s reliance on it. Following the misrepresentation of the Solicitor General, Transcript of Oral Argument at 89, Dep’t of Commerce v. New York, No. 18–966 (U.S. Apr. 23, 2019), 2019 WL 1778161, the Court stated that “[t]he Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated.” Dep’t of Commerce v. New York, 139 S. Ct. at 2570. This is untrue. As mentioned above, the Bureau found that it was likely that *at least* 5.1% of households with noncitizens would decline to respond, but that this was a “lower bound” and a “conservative estimate,” and that the real rate “could be much greater.” See *supra* text accompanying notes 20–21; Brief for Gov’t Respondents 10, Dep’t of Commerce v. New York, 18–966 (U.S. Apr. 1, 2019), 2019 WL 1468270.

⁸⁵ Dep’t of Commerce v. New York, 139 S. Ct. at 2574–76.

⁸⁶ *Id.* at 2574.

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That is, the Court found that the secretary provided an explanation for his action “incongruent with what the record reveals about the agency’s priorities and decisionmaking process.”⁸⁷ And the absence of a genuine justification for the decision violated the APA.⁸⁸

V. The Aftermath

The Supreme Court’s June 27 opinion affirmed the vacatur of Secretary Ross’s decision and returned the matter to the trial court for remand back to the agency under the APA. Separately, the Maryland court had enjoined adding a citizenship question to the enumeration—*independent of the cure for any APA violation*—based on its interpretation of the Enumeration Clause.⁸⁹ And the government had repeatedly insisted in the courts, including in the filing convincing the Supreme Court to take up the case directly, that June 30 was the practical deadline for any decision on the content of the enumeration.⁹⁰ Though the secretary of Commerce had the legal authority to place a citizenship question on the enumeration given a plausible rationale and sufficient homework, the government was simply out of time to redo that process for 2020.

And so it was not terribly surprising when government attorneys said on July 2 that “the decision has been made to print the 2020 Decennial Census questionnaire without a citizenship question, and that the printer has been instructed

⁸⁷ *Id.* at 2575.

⁸⁸ *Id.* at 2576.

⁸⁹ *Kravitz v. Dep’t of Commerce*, 366 F. Supp. 3d 681, 755–56 (D. Md. 2019). Though the Supreme Court’s decision on the Enumeration Clause, *Dep’t of Commerce v. New York*, 139 S. Ct. at 2566–67, likely rendered that injunction voidable, no filing had requested that relief before the end of June.

⁹⁰ *See* Motion to Amend Judgment, *supra* note 60, at 11–15.

to begin the printing process.”⁹¹ The same day, Secretary Ross confirmed the start of printing without a citizenship question.⁹²

The president, however, was not on the same page. On July 3, the president tweeted that news reports about dropping the question were “FAKE!” and declared that the Department of Commerce would be moving forward.⁹³ Later that day, government attorneys reported that they had been asked to reevaluate all available options to include the citizenship question in the enumeration questionnaire.⁹⁴ Four days later, DOJ announced that it would be replacing all of the attorneys on the case, swapping out an expert team specialized in defending federal agencies with a hodgepodge of attorneys from elsewhere in the Department. Such a move is highly unusual at best and strongly suggests attorneys’ desire to avoid potential allegations of misconduct.⁹⁵ When DOJ attempted to effectuate the change, courts in New York and Maryland declined to execute the swap without a statement of sworn reasons for the wholesale removal and assurances that the change would not prejudice the continuing litigation schedule.⁹⁶

⁹¹ *Id.* at 8.

⁹² *Id.*

⁹³ Donald Trump (@realdonaldtrump), TWITTER (July 3, 2019, 11:06 AM), <https://twitter.com/realdonaldtrump/status/1146435093491277824>.

⁹⁴ Motion to Amend Judgment, *supra* note 60, at 9–10.

⁹⁵ See Katie Benner, *Barr Says Legal Path to Census Citizenship Question Exists, But He Gives No Details*, N.Y. TIMES (July 8, 2019); Michael Wines et al., *Justice Dept. to Replace Lawyers in Census Citizenship Question Case*, N.Y. TIMES (July 7, 2019); Marty Lederman (@marty_lederman), TWITTER (July 8, 2019, 3:31 PM), https://twitter.com/marty_lederman/status/1148358851378524160.

⁹⁶ Memorandum Opinion and Order, *New York v. U.S. Dep’t of Commerce*, No. 1:18-cv-02921, 2019 WL 2949908 (S.D.N.Y. July 9, 2019); *Memorandum Opinion and Order*, *Kravitz v. U.S. Dep’t of Commerce*, No. 8:18-cv-01041 (D. Md. July 10, 2019). It appears that the effort to swap out the attorneys was abandoned; though new attorneys entered appearances in the cases, the government did not pursue withdrawal orders for those who had been representing the Department of Commerce since the inception of the litigation.

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That particular chaos lasted only a few days. On July 11, 2019, the president issued Executive Order 13,880, declaring that he acknowledged that there was “no practical mechanism for including the question on the 2020 decennial census” and instead directing federal government agencies to supply the Census Bureau with administrative records concerning citizenship and immigration status.⁹⁷ As with other demographic characteristics, the Census Bureau already collects some administrative data with respect to citizenship; the efficacy of incremental efforts described in the Executive Order in improving the coverage or accuracy of existing records for various purposes is as yet unknown. Both the New York and Maryland courts have entered permanent injunctions reflecting the Executive Order’s representation that there is no practical mechanism for including the question on the enumeration in 2020.⁹⁸

VI. The Upshot

The scramble described immediately above reveals one takeaway from the combat: We survived a near miss of a real constitutional crisis.⁹⁹ We are perhaps too quick to brand a dispute a constitutional crisis these days, when what we are really describing is a social crisis or policy crisis or yawning chasm where political leadership should be; invaluable norms and operative systems that we used to take for granted and

⁹⁷ Exec. Order 13,880, 84 Fed. Reg. 33,821 (July 16, 2019). The Executive Order describes several reasons to pursue these additional administrative records beyond the Voting Rights Act rationale found to be pretextual; none of these reasons appears to warrant the collection of citizenship data with sufficient precision to justify the inclusion of the question in the decennial enumeration. Justin Levitt, *Trump’s Executive Order on the Census*, ELECTION L. BLOG (July 12, 2019).

⁹⁸ *Order*, New York v. U.S. Dep’t of Commerce, No. 1:18-cv-02921 (S.D.N.Y. July 16, 2019); *Order*, Kravitz v. U.S. Dep’t of Commerce, No. 8:18-cv-01041 (D. Md. July 16, 2019).

⁹⁹ See, e.g., Linda Greenhouse, *A ‘Train Wreck’ Was Averted at the Supreme Court, but for How Long?*, N.Y. TIMES (July 18, 2019).

that we may never recover are fraying and tearing,¹⁰⁰ but the institutional structures to rein in the wrongs exist, if only enough of the public cared to make it happen. When we the people are divided, our representatives reflect that divide. And many of the outrages of the day reflect broken policy and broken politics—or even a broken underlying order¹⁰¹—more than the broken execution of the governmental order the current Constitution bequeaths us. It is not that those other problems are less serious. They can be deadly. It is that they represent pilot error or design error rather than a gremlin pulling apart the wing of the plane.¹⁰²

Direct attacks on the rule of law are different: They are threats to the system that live outside of problems with the political order and outside of problems of constitutional design. Two weeks after the Court handed down its opinion, the attorney general of the United States declared that he “agree[d] with [the president] that the Supreme Court decision was wrong,” and seemed to be searching for a new pretext to force a do-over, rather than demonstrating compliance with the principle the Court established.¹⁰³ The administration appeared to be seeking to place a question on the Census despite a voidable but still valid injunction from a federal court.¹⁰⁴ And the DOJ seemed to be asking government attorneys to violate their oaths as civil servants and as officers of the court in pursuit of their goal. It is possible that all of these appearances were misleading. But it looked very scary for a moment.

¹⁰⁰ See generally Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177 (2018); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018).

¹⁰¹ See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2008).

¹⁰² Cf. *The Twilight Zone: Nightmare at 20,000 Feet* (CBS television broadcast Oct. 11, 1963).

¹⁰³ Mike Balsamo, *Barr Sees A Way for Census to Legally Ask About Citizenship*, AP NEWS (July 8, 2019).

¹⁰⁴ See *supra* note 89.

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And then the moment was gone, which should come as a real relief. The president blinked. And no direct confrontation between the executive and the judiciary provided a twenty-first-century reboot of Andrew Jackson’s apocryphal aphorism.¹⁰⁵

Another takeaway from the combat is that there may yet be an opportunity to save the accuracy of the 2020 Census. We are in no way out of the woods. The immigration environment remains toxic,¹⁰⁶ large segments of the public remain both afraid and confused about the content of the Census,¹⁰⁷ and serious logistical and budgetary hurdles remain.¹⁰⁸ But the fact that the citizenship question will not be included in the enumeration allows advocates for a complete count to reassure a nervous public that the instrument itself is safe, in a way that would not have been possible had Secretary Ross prevailed. There are statistical methods to compensate for errors and gaps in survey responses, but few permissible means to correct the enumeration that anchors them all. We have one opportunity to get it right, or as right as possible, every ten years.¹⁰⁹ The Court’s decision makes it more likely that we will be successful.

¹⁰⁵ In response to *Worcester v. Georgia*, 31 U.S. 515 (1832), regarding tribal sovereignty, President Andrew Jackson is often quoted as saying, “Marshall has made his ruling, now let him enforce it!” The remark is likely apocryphal. See, e.g., Matt Ford, *When the President Defies the Supreme Court*, NEW REPUBLIC (Apr. 24, 2018).

¹⁰⁶ See, e.g., Gwendolyn Wu et al., *Few ICE Raids, But Much-Hyped Plans Stoke Fears in Immigrant Communities*, S.F. CHRON. (July 14, 2019); Lindsay M. Harris, *Trump’s New Asylum Rule Will Guarantee More Separated Families*, WASH. POST (July 17, 2019); Ted Hesson, *Trump Officials Pressing to Slash Refugee Admissions to Zero Next Year*, POLITICO (July 18, 2019).

¹⁰⁷ See, e.g., Alexis Dominguez, *Scam or Not: Census Test Mailed Out May Seem Fake, But It’s Legitimate*, KRDO (July 12, 2019) (describing a test of the decennial enumeration containing the citizenship question, mailed out while the Supreme Court case was pending and still in the field after the Court’s decision).

¹⁰⁸ See, e.g., Caitlin Emma, *Budget Gridlock Imperils 2020 Census*, POLITICO (July 15, 2019); Jeffrey Mervis, *Census Citizenship Question is Dropped, but Challenges Linger*, 365 SCIENCE 211 (2019); U.S. GOV’T ACCOUNTABILITY OFFICE, *2020 CENSUS: ACTIONS NEEDED TO ADDRESS KEY RISKS TO A SUCCESSFUL ENUMERATION* GAO-19-588T (2019).

¹⁰⁹ See, e.g., David Russell, *‘We Get One Chance Every 10 Years,’* QUEENS CHRON. (July 18, 2019).

A third takeaway from the decision concerns administrative law and our expectations of the administrative state—here, the mood should be less joyful. It is to be expected that new administrations arrive with distinct preferences and priorities, and it is to be expected that agency approaches to the same substantive statutes will shift with changes in leadership. In partial dissent from the Court’s opinion, Justice Thomas said that “there is nothing even unusual about a new cabinet secretary coming to office inclined to favor a different policy direction, soliciting support from other agencies to bolster his views, disagreeing with staff, or cutting through red tape.”¹¹⁰ On that we agree. Elections have consequences. And in a republic premised on at least a modicum of responsiveness to the electorate, that’s a good thing.

But administrative agencies may not create or change policy based on pure ideological preference divorced from evidence. The pursuit of pure ideology implicates a deep separation-of-powers concern: Pure policy preference is acceptable in government, but it is the province of the legislature. As directly representative bodies, we allow legislatures in the normal course to act with flawed, incomplete, or contradictory logic,¹¹¹ on flawed, incomplete, or contradictory evidence. Absent some other constitutional restriction, courts will invent plausible hypothetical support for legislative action, testing only for imagined potential rationality.¹¹² Congress may choose option X over option Y simply because it prefers X, as long as it is possible to conjure a legitimate goal that X might further. Because legislators are the elected mechanism for channeling

¹¹⁰ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2580 (2019) (Thomas, J., concurring in part and dissenting in part) (internal quotation marks omitted).

¹¹¹ *Cf. Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (noting that legislatures “need not carry things to their logical conclusion”).

¹¹² *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297, 303–05 (1976).

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public will, we normally accept what emerges from the black box of legislative process as legitimate, even without double-checking that the reasoning was sound.

In the exercise of its constitutional prerogative to legislate, Congress has often given the executive branch broad, but not unending, discretion. In particular, Congress has not wholly delegated its sole authority to act purely on policy preferences. The fundamental predicate for the administrative state is that agencies are properly granted a modicum of policy discretion because they possess valuable experience and expertise. The APA stands as the leading congressional requirement that agencies actually use that experience and expertise in the course of exercising the discretion they are given.

That is, Congress has demanded that agencies give reasons for their action and do at least some degree of public homework showing that the extant evidence indicates that taking the action will help accomplish the proffered reason.¹¹³ Even the most sweeping substantive delegation arrives with this procedural limitation, tying agency action to at least a thread of experience and expertise over and above pure preference.

Congress may constitutionally act based on nothing more than “because I said so,” as long as the outcome is capable of being explained by some *post hoc* logic. Agencies may not. And in preserving pure policy preference as a legislative

¹¹³ Hence the requirement, made clear in the Senate Report to the APA, that “[t]he agency must analyze and consider all relevant matter presented,” and that “[t]he required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule.” S. REP. NO. 752, at 201 (1945).

prerogative, the APA helps to maintain the constitutional separation of powers.¹¹⁴

Even without accounting for real motive, Secretary Ross's decision on the citizenship question came *awfully* close to pure policy preference. It is unremarkable for cabinet members to have instincts for policy change within the bounds of discretion granted by Congress, test those instincts, and arrive at conclusions ultimately in line with those instincts. It is unremarkable for evidence to be equivocal or uncertain and for decisionmakers to evaluate the evidence and arrive at a contested but reasoned outcome based on the weight or importance assigned to particular pieces of the puzzle that others might prioritize differently. It is a different matter entirely to have the answer first and attempt to build a record to support the preconceived answer, ignoring evidence that contradicts the predetermined solution.

Justice Breyer's dissent in the recent litigation catalogs the evidence available to Secretary Ross and convincingly demonstrates that the evidence that was not inexplicably short-circuited by the secretary's decision actually pointed overwhelmingly against it.¹¹⁵ He concluded that the agency decided to add the question to the decennial enumeration "on the ground that it will *improve* the accuracy of citizenship data, when in fact the evidence indicates that adding the question will *harm* the accuracy of citizenship data."¹¹⁶ The majority

¹¹⁴ Cf., e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2432 (Gorsuch, J., concurring in the judgment) ("Some have even described [the APA] as a kind of constitution for our 'administrative state.'"); Todd David Peterson, *Procedural Checks: How the Constitution (and Congress) Control the Power of the Three Branches*, 13 DUKE J. CONST. L. & PUB. POL'Y 209, 251–59 (2017) (describing the APA as a means of enforcing the separation of powers, albeit without focus on the function of the APA in requiring deployment of experience and expertise).

¹¹⁵ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2587–93 (2019) (Breyer, J., concurring in part and dissenting in part).

¹¹⁶ *Id.* at 2592.

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on this point accused the dissent of substituting its judgment for that of the secretary.¹¹⁷ But the dissent was not improperly re-weighing controverted evidence; it was merely noting that there was no meaningful evidence of benefit to controvert the evidence of harm.¹¹⁸

The majority's review of the administrative record is considerably more forgiving. It does not represent the absolute maximum of deference to administrative discretion: Justice Alito, for example, would have found the decision wholly insulated from APA review.¹¹⁹ And it is admittedly difficult in the abstract to determine the precise point at which a political appointee swimming against the facts amounts to a departure from the proper administrative role rather than a permissible judgment call. But the majority's decision here nevertheless blesses as sufficient some exceedingly shoddy homework. For members of the Court particularly concerned about administrative self-aggrandizement,¹²⁰ the thin review put forth by the majority is a lost opportunity.

Yet the final takeaway from the Census opinion—the dispositive takeaway in the legality of the secretary's decision—is important, and it shows that this Court is not wholly prepared to abdicate its role as a check on the executive branch. Tests of fit between means and ends like heightened scrutiny, or even loose tests like arbitrary and capricious review, represent both a direct review of process and an indirect review of motive. A sufficiently poor fit between articulated ends and chosen means may indicate that the decisionmaker's expressed intent was not the real reason for

¹¹⁷ *Id.* at 2571 (majority opinion).

¹¹⁸ *Id.* at 2592–93 (Breyer, J., concurring in part and dissenting in part).

¹¹⁹ *Id.* at 2596–2606 (Alito, J., concurring in part and dissenting in part).

¹²⁰ *See, e.g.,* *Gundy v. United States*, 139 S. Ct. 2116, 2133–35 (2019) (Gorsuch, J., dissenting); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2425–42 (Gorsuch, J., concurring in the judgment).

action.¹²¹ Here, what the Court refused to do indirectly, it did directly. Though the Court blessed Secretary Ross's evidentiary record as sufficient, it also found that he lied about his reason for acting.

It was hardly a foregone conclusion that administrative motive would matter. Three justices would have upheld the secretary's action as consistent with the APA because the agency had "articulate[d] a satisfactory explanation for its action," and would apparently have accepted that explanation even if it were acknowledged to be false.¹²² Moreover, recent controversies in other contexts gave some support to the notion that the Court might prove all too willing to duck any serious examination of executive motive. Just a few weeks earlier, the Court seriously limited the availability of First Amendment claims for retaliatory arrests.¹²³ And in the final week of last year's Term, the Court shut down meaningful inquiries into government purpose in the context of the Trump administration's travel ban.¹²⁴

But these decisions did not stand for a global retreat from consideration of motive. The Court's retaliatory arrest decision was steeped in the practicalities of policing, and even then it did not shut the door entirely: Claims may proceed even in the presence of probable cause to arrest when a litigant can present "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been,"¹²⁵ or when he can "prove

¹²¹ See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 453–55 (1996).

¹²² *Dep't of Commerce v. New York*, 139 S. Ct. at 2577–79 (Thomas, J., concurring in part and dissenting in part) (determining that "ordinary arbitrary-and-capricious review," on the face of the materials presented, should end the inquiry).

¹²³ See *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

¹²⁴ See *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Abbott v. Perez*, 138 S. Ct. 2305 (2018).

¹²⁵ *Nieves*, 139 S. Ct. at 1727.

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the existence and enforcement of an official policy motivated by retaliation.”¹²⁶ And the strikingly constrained review in *Trump v. Hawaii* was expressly predicated on a level of extreme deference due executive action affecting the entry of foreign nationals into the country.¹²⁷ These cases seem to represent exceptions from the judicial capacity to examine the reasons for executive action, rather than a new normal.¹²⁸

Serious second-guessing of governmental motive *should* be rare and subject to a high standard of proof. There are legitimate concerns about the intrusive nature of fact-finding coerced in the name of the judicial process when determining why government officials acted as they did, with opportunities for potential abuse by partisan opponents.¹²⁹ And there are legitimate concerns that judges overly eager to strike policies they view as unwise may turn to skepticism about motive as convenient cover.

But both of these concerns are inherent in the judicial review of governmental action. They do not imply that it is necessary to throw the baby out with the bathwater, disarming

¹²⁶ *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1954 (2018).

¹²⁷ *See Hawaii*, 138 S. Ct. at 2418–20.

¹²⁸ Though government action enjoys the *presumption* of regularity, *see, e.g.*, *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2577 (2019) (Thomas, J., concurring in part and dissenting in part), many legal doctrines turn on the assessment of an executive actor’s impetus for action, and the Court will set aside that presumption of regularity where it feels the evidence so warrants. *See, e.g.*, *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019) (racial discrimination); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (gender discrimination); *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (religious discrimination); *Crawford-El v. Britton*, 523 U.S. 574 (1998) (First Amendment); *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (Fourth Amendment); *Missouri v. Siebert*, 542 U.S. 600 (2004) (Fifth Amendment); *Michigan v. Bryant*, 562 U.S. 344 (2011) (Sixth Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment).

¹²⁹ *See, e.g.*, *Dep’t of Commerce v. New York*, 139 S. Ct. at 2583 (Thomas, J., concurring in part and dissenting in part) (warning that “the Court’s decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction”); *cf. Clinton v. Jones*, 520 U.S. 681, 719–24 (1997) (Breyer, J., concurring in the judgment) (describing the potential for legal proceedings to distract from the time and energy of the president).

judicial response when irregularities are abundantly apparent. Discovery can (and should) be managed, and evidentiary thresholds can (and should) be adjusted to guard against renegade invalidation. What we gain in exchange is a measure of judicial protection against the *ultra vires* application of government power.

Agencies owe Congress, and the public, an explanation for their actions. To ensure adequate accountability, the explanation provided must be the real explanation.¹³⁰ Courts are not particularly well equipped to assess the *full* veracity of the explanation provided—to determine whether the explanation offered by an agency represents the truth, the whole truth, and nothing but the truth. But they can evaluate whether the explanation provided is, in context, reasonably plausible. And by refusing to accept explanations that are not, courts provide a valuable service in policing the extreme boundaries of agency accountability. It is not necessary for courts to be able to detect every half-truth in order to provide a service in calling out obvious lies.

That is precisely what happened in the Census case. The notion that Secretary Ross decided to include a question about citizenship in the decennial enumeration in order to allow the DOJ to better enforce the Voting Rights Act simply could not hold water as the real reason for his action. As the majority explained, “Our review is deferential, but we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”

¹³⁰ The Senate Report for the APA makes plain what should otherwise be obvious: “The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the *actual* basis and objectives of the rule.” S. REP. NO. 752, at 201 (1945) (emphasis added); see also H.R. REP. NO. 1980, at 259 (1946); Peterson, *supra* note 114, at 254; cf. KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 184 (3d ed. 1995) (highlighting the APA as a source of accountability).

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United States v. Stanchich, 550 F.2d 1294, 1300 (CA2 1977) (Friendly, J).¹³¹

Had the secretary offered his real reason or reasons, Congress would have been able to determine whether the agency's experience and expertise were used appropriately, in the service of the authority the legislature delegated or at odds with that delegation. The pretext deprived Congress of that opportunity. And so the Court found, correctly, that the resulting action could not stand. The outcome of the case is, let us hope, unusual. But the legal principle is hearteningly sound.¹³²

¹³¹ Dep't of Commerce v. New York, 139 S. Ct. at 2575. The quotation—and, more vital, the sentiment—was perhaps particularly notable to Chief Justice Roberts, who specifically left the reference as denoted in the text. *Stanchich* was a unanimous appellate panel opinion, and its author would normally go unmentioned in a citation—but Roberts clerked for Judge Friendly two years after *Stanchich* was issued. See Todd S. Purdum et al., *Court Nominee's Life is Rooted in Faith and Respect for Law*, N.Y. TIMES (July 21, 2005). The quote also echoes the wisdom of an earlier court, almost 100 years before: “Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men” *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879).

¹³² There are cases ahead that will further develop the limits on pretextual explanations for executive action. Just one day after its decision in the Census case, the Court granted certiorari in *Kelly v. United States*, concerning the Bridgegate scandal in New Jersey, and criminal fraud prosecutions for the pretextual execution of a “traffic study” that was actually conducted purely for raw political payback. See, e.g., *Kelly v. United States*, No. 18–1059, 2019 WL 588845 (U.S. June 28, 2019); Respondent William Baroni's Brief in Support of the Petition for a Writ of Certiorari, *Kelly v. United States*, No. 18–1059 (U.S. Mar. 15, 2019), 2019 WL 1240050. It will be interesting to see whether the Court expands, maintains, or constricts its vision of proper inquiry into the rationale for executive conduct in this substantially different context.

The Supreme Court's Arbitration Docket

Imre S. Szalai*

During the October 2018 Term, the Supreme Court issued opinions in three cases interpreting the Federal Arbitration Act (FAA),¹ the main federal statute governing arbitration: *Henry Schein, Inc. v. Archer & White Sales, Inc.*,² a unanimous decision and Justice Brett Kavanaugh's first opinion on the Court; *New Prime Inc. v. Oliveira*,³ a landmark, unanimous decision representing the first time in decades the Court has rejected an expansive view of arbitration law and ruled in favor of workers; and *Lamps Plus, Inc. v. Varela*,⁴ a splintered five-to-four decision involving class procedures and another nail in the coffin of class actions.

The Court's decisions regarding the FAA warrant careful study because the Court's development and interpretation of arbitration law can limit access to the civil justice system, which in turn can impact the enforcement of virtually every area of law in America. America's system of private arbitration now involves more than sixty million American workers and more than 826 million consumer arbitration agreements (more than every man, woman, and child in America), and more than eighty percent of America's largest companies have used

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¹ Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. § 1 *et seq.*).

² *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

³ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

⁴ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

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arbitration for consumer and employment disputes in recent years.⁵ With this expansive system of arbitration currently in place and the willingness of courts to compel arbitration where meaningful consent is lacking, corporate America and parties with disproportionate bargaining power can unilaterally and easily remove themselves from the traditional justice system through the use of arbitration clauses. The average person in America has lost access to the courthouse, and in its place, a virtually unregulated, unreviewable, expansive system of privatized justice now exists.

This article has three main goals. First, examining these cases on a narrow plane, I summarize the holdings and legal doctrines arising from these three new arbitration cases, which I collectively refer to as the Court's 2018 Arbitration Docket. Second, taking a broader view, I situate these cases within the larger arc of the prior development of arbitration law in America. Finally, I explore the potential impact of these three cases going forward, and how each case leaves undecided other important issues involving arbitration law.

As explained in more detail below, these three cases leave in place a vast legal framework, developed by the Court over the years, strongly supportive of arbitration. Continuing a broader trend of pro-business, pro-arbitration decisions, *Henry Schein* strengthens the power of arbitrators while leaving courts with the ministerial task of rubber-stamping orders compelling arbitration. This rubber-stamping role by the judiciary is leading to the disappearance of meaningful supervision of the

⁵ ALEXANDER COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION* (2017); Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019) [hereinafter Szalai, *Prevalence of Consumer Arbitration*]; IMRE STEPHEN SZALAI, THE EMPS. RIGHTS ADVOCACY INST. FOR LAW AND POLICY, *THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES* (2018) [hereinafter SZALAI, *WIDESPREAD USE OF WORKPLACE ARBITRATION*].

expansive system of arbitration. Also, continuing the Court's prior trend of hostility to class procedures, *Lamps Plus*, in a nutshell, is a class action killer. The most unusual case from the Supreme Court's 2018 Arbitration Docket is *New Prime*. Compared to prior decisions of the Court from the last several decades, *New Prime* arguably represents a shift in how the Court interprets the FAA. With *New Prime*, the Court has adopted a more textualist and originalist approach when interpreting the FAA, and there is a potential that future courts may rely on this new approach in FAA cases to reshape the development of arbitration law going forward.

I. Legal Doctrines Arising from the Arbitration Docket

A. *Henry Schein* Strengthens the Power of Arbitrators

The FAA, as a statute designed to facilitate arbitration, helps allocate decision-making authority between the courts and arbitration tribunals in connection with disputes. The Supreme Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the first decision written by Justice Kavanaugh, addresses a technical aspect of this relationship or allocation of decision-making authority and ultimately strengthens the power of an arbitrator. In short, the Court in *Henry Schein* held that arbitrators, not courts, must resolve "wholly groundless" arbitrability arguments if the parties' agreement delegates arbitrability questions to the arbitrator.⁶

Henry Schein involved a distribution contract for dental equipment. After the relationship between the distributor and manufacturer deteriorated, the distributor filed an antitrust

⁶ *Henry Schein*, 139 S. Ct. at 531.

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lawsuit against the manufacturer. The manufacturer asked the court to enforce an arbitration clause, which contained an exemption regarding injunctive relief: “Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association.”⁷ The scope of this arbitration clause, with its exemption for injunctive relief, raised several problems in the *Henry Schein* case.

One can identify at least three different levels of dispute in *Henry Schein*. First, there is the underlying merits fight between the distributor and manufacturer involving antitrust laws, and the parties’ dispute whether the manufacturer violated antitrust laws.⁸

Second, the parties disagreed about whether the scope of the arbitration clause, with its exemption regarding injunctive relief, covered the distributor’s antitrust lawsuit, which included a request for injunctive relief, among other things.⁹ This second-level of disagreement involving the scope of the arbitration clause raised a host of sub-issues. For example, does the exemption for injunctive relief apply if a party asserts a claim for injunctive relief, mixed together with requests for other forms of relief, such as monetary relief? Or should the exemption be construed more narrowly, as applicable when a party is seeking only injunctive relief and no other form of relief? Furthermore, if the exemption covers a situation where a party is seeking mixed injunctive and monetary relief, would the request for injunctive relief proceed in court, while the requests for other relief would be subject to arbitration? Or

⁷ *Id.* at 528.

⁸ *Id.*

⁹ *Id.* at 527–28.

would the entire action (seeking both injunctive relief and other relief) proceed in court? There were multiple sub-issues regarding the interpretation of the scope of the particular arbitration clause in *Henry Schein*.

Third, dealing with the allocation of authority between a court and arbitrator, who resolves the disputes and sub-issues in the second level of disputes listed above?¹⁰ In other words, who interprets the scope of the arbitration clause, a court or an arbitrator? The *Henry Schein* decision helps allocate this authority between the court and arbitrator.

The Court had established certain rules governing the allocation of decision-making authority between a judge and arbitrator in two cases prior to *Henry Schein*, *First Options of Chicago, Inc. v. Kaplan*¹¹ and *Rent-A-Center, West, Inc. v. Jackson*.¹² As a general rule, a judge typically resolves issues regarding the enforceability and scope of an arbitration clause. However, there is a special exception for this general rule. The Supreme Court in *Rent-A-Center* recognized that if the arbitration clause contains a delegation provision (whereby the arbitrator is delegated the power to rule on his or her own jurisdiction), the arbitrator, instead of the judge, decides disputes about the enforceability and scope of an arbitration clause.¹³ As explained below, *Henry Schein* addressed a court split that developed surrounding *Rent-A-Center* and the allocation of power between a judge and arbitrator.

Consider the pro-arbitration impact of *Rent-A-Center*: A court facing an arbitration agreement containing delegation language is likely to rubber-stamp an order compelling

¹⁰ *Id.* at 528.

¹¹ *First Option of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

¹² *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

¹³ *See id.*

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arbitration, *even in the face of arguments that the arbitration agreement is invalid for some reason*. For example, in the case of *Brumley v. Austin Centers for Exceptional Students Inc.*,¹⁴ an autistic student filed suit against a school when a school employee used excessive force to make the student board a bus and broke the student's wrist. The arbitration clause in the student's enrollment form contained harsh, one-sided terms, such as a provision limiting an arbitration award to "actual expenses" and an abbreviated statute of limitations period requiring all claims to be filed within 90 days of any alleged wrongdoing. Furthermore, there were some arguments that the scope of the school's arbitration clause did not cover the student's tort claims. Because of the harsh terms and the problematic scope of the arbitration clause, a court would arguably be justified in denying the school's motion to compel arbitration and in finding that the arbitration clause is not enforceable. However, because of delegation language in the arbitration clause, the district court in *Brumley* could not consider these arguments against the enforceability of the arbitration clause.¹⁵ Instead, the court in *Brumley* had to ignore obvious flaws with the harsh arbitration clause and rubber-stamp an order compelling arbitration.¹⁶ It is therefore up to the arbitrator to determine his or her own jurisdiction and the enforceability of the arbitration clause. Note that the arbitrator's decision is virtually unreviewable because of the extremely deferential judicial review of arbitral awards, despite the arbitrator's possible financial self-interest in finding a dispute to be arbitrable.

¹⁴ *Brumley v. Austin Ctrs. for Exceptional Students Inc.*, No. CV-18-00662, 2019 WL 1077683 (D. Ariz. Mar. 7, 2019).

¹⁵ *Id.* at *3-4.

¹⁶ *Id.* at *3.

The end result of *Rent-A-Center* is that many courts, like the district court in *Brunley*, simply rubber-stamp orders compelling arbitration if the arbitration agreement contains a delegation clause. To counter the rubber-stamping effect of the Court's *Rent-A-Center* decision, some state and lower federal courts developed a safety-valve or exception: Delegation clauses are not enforceable in connection with wholly groundless arguments.¹⁷ In other words, a court will not delegate wholly groundless arguments to an arbitrator. For example, suppose that a customer purchases cell-phone service with AT&T and agrees to arbitrate all disputes with AT&T related to the cell-phone account, and the arbitration clause contains a delegation provision whereby the arbitrator is supposed to resolve all disputes about the enforceability or validity of the arbitration clause. Further suppose that the customer is involved in a car accident with an AT&T truck that handles installation of equipment for satellite television services. If the customer files a lawsuit involving the car accident, and if AT&T seeks to compel arbitration in connection with such claims, then under the delegation provision, the arbitrator would decide whether the negligence claims from the accident are covered by the arbitration clause.

However, instead of wastefully sending baseless, frivolous arguments to an arbitrator, some courts have held that judges could address, and reject, wholly groundless arguments regarding the enforceability of an arbitration clause. The lower court opinions in the *Henry Schein* case adopted this "wholly

¹⁷ See, e.g., *Galen v. Redfin Corp.*, No. 14-CV-05229-TEH, 2015 WL 7734137, at *5 (N.D. Cal. Dec. 1, 2015) (noting that some courts had recognized a "wholly groundless" exception to arbitrability).

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groundless” exception to delegation.¹⁸ Because the arbitration clause in *Henry Schein* excluded claims for injunctive relief, and because the plaintiff’s lawsuit included a claim for injunctive relief, it would seem that the plaintiff’s lawsuit could proceed in court because of the carve-out for injunctive relief in the arbitration clause. The lower courts in *Henry Schein* thought that the arguments in favor of arbitration were baseless or wholly groundless in light of this carve-out in the arbitration clause, and thus the court could immediately consider and reject these baseless arguments, without having to send the parties to an arbitrator to rule on these baseless arguments regarding arbitrability.

However, a circuit split had developed regarding the “wholly groundless” exception to *Rent-A-Center*.¹⁹ While some courts, like the lower courts in *Henry Schein*, were willing to hear and reject wholly groundless arbitrability arguments, other courts continued to rubber-stamp orders compelling arbitration whenever a delegation clause was involved, even if the arguments in favor of arbitration were “wholly groundless.” The Supreme Court in *Henry Schein* addressed this circuit split over the existence of the “wholly groundless” exception to delegation.²⁰

In Justice Kavanaugh’s first decision, the Court in *Henry Schein* unanimously held that the “wholly groundless”

¹⁸ See *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 878 F.3d 488 (5th Cir. Dec. 21, 2017); *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 2:12-cv-572-JRG, 2017 WL 3193260 (E.D. Tex. July 26, 2017).

¹⁹ Compare *Archer & White Sales, Inc.*, 878 F.3d at 488, *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 877 F.3d 522 (4th Cir. 2017), *Douglas v. Regions Bank*, 757 F.3d 460 (5th Cir. 2014), *Turi v. Main Street Adoption Servs., LLP*, 633 F.3d 496 (6th Cir. 2011), and *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006), with *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017), *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017), and *Douglas*, 757 F.3d at 464 (Dennis, J., dissenting).

²⁰ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528–30 (2019).

exception to delegation does not exist.²¹ If an arbitration agreement delegates threshold arbitrability issues to an arbitrator, such as the interpretation of the scope of an arbitration clause, then a court may not override the arbitration agreement, even if the court believes that the arbitrability arguments are wholly groundless. Instead, arbitration must be compelled, and it is up to the arbitrator to consider and rule on the wholly groundless arguments. The Court reasoned that the parties bargained for an arbitrator to rule on enforceability issues, and under the FAA, courts must honor the parties' agreement.²² Moreover, the FAA does not contain an exception regarding wholly groundless arguments,²³ and arbitrators are qualified to deal with frivolous arguments.²⁴

To illustrate the Court's ruling in *Henry Schein*, suppose an arbitration clause provides that all disputes regarding one's wages must be arbitrated, and the arbitration clause also contains a delegation provision whereby the arbitrator decides all issues regarding the enforceability and scope of the arbitration clause. Imagine that the arbitration clause also contains harsh terms such as a requirement that all claims must be submitted to arbitration in a distant state within thirty days before an arbitrator selected by the employer. Suppose that an employee files sexual harassment and assault claims in court against the employer because a manager sexually assaulted the employee, and in response, the employer raises a wholly groundless argument in favor of arbitration, such as the employee's assault and harassment claims must be arbitrated pursuant to the arbitration clause (which narrowly covers only

²¹ *Id.* at 531.

²² *Id.* at 529.

²³ *Id.* at 530.

²⁴ *Id.* at 531.

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wage disputes). Before *Henry Schein*, courts could address and reject such a wholly groundless arbitrability argument and retain jurisdiction to hear the lawsuit in court, skipping the step of sending the groundless argument to an arbitrator. But now, after *Henry Schein*, courts must rubber-stamp an order compelling arbitration, leaving it up to the arbitrator to decide his or her own jurisdiction, including the enforceability of the harsh arbitration clause and the arbitrability of the dispute. Consequently, *Henry Schein* strengthens the power of arbitrators and continues the Supreme Court's pro-arbitration trend of the delegation doctrine from *Rent-A-Center*. As a result, courts are less able to police or monitor arbitration clauses for harshness or fairness concerns; courts in effect are forced to rubber-stamp arbitration clauses as long as the clause includes an extra sentence delegating authority to an arbitrator.

B. New Prime's Construction of the Transportation Worker Exemption

Section 1 of the FAA contains definitions of certain terms, as well as an exemption stating that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”²⁵ As a result of this exemption, certain workers are not covered by the FAA and are not bound to arbitrate under the statute. A circuit split had developed concerning whether the exemption covered independent contractors,²⁶ and the Supreme Court granted certiorari in *New Prime Inc. v. Oliveira* to interpret the meaning of this exemption. The Court in *New Prime* ultimately held that the workers

²⁵ 9 U.S.C. § 1.

²⁶ Compare *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017), and *In re Van Dusen*, 654 F.3d 838 (9th Cir. 2011), with *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011).

covered by this exemption included both employees and independent contractors.²⁷

New Prime involved the trucking industry. The plaintiff trucker, Dominic Oliveira, filed a class-action lawsuit in federal court against New Prime Inc., an interstate trucking company, for failure to pay minimum wage under state and federal law and violations of other laws. Whether these claims could proceed in court depended on the enforceability of an arbitration clause in the plaintiff's contract with New Prime.

As mentioned above, the first section of the FAA contains an important exemption for certain workers. In 2001, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court construed this exemption narrowly to refer to contracts of employment of transportation workers, not all types of workers.²⁸ As a result of *Circuit City*, the FAA generally covers all workers, but "transportation workers" are carved out and exempt from the FAA's arbitration requirement.²⁹

Following *Circuit City*, lower courts disagreed regarding the meaning of the phrase "contracts of employment" in the FAA's transportation worker exemption. Several courts had held this exemption applied to transportation workers who are employees, but not independent contractors.³⁰ However, the First Circuit in its *New Prime* decision reached the opposite result and held that the exemption broadly covered

²⁷ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543–44 (2019).

²⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). *Circuit City's* holding is deeply flawed. Based on archival materials, my historical research regarding the drafting of the FAA demonstrates that Congress originally intended to exclude all types of workers, not just transportation workers, from the scope of the FAA. See generally IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013) [hereinafter SZALAI, *OUTSOURCING JUSTICE*].

²⁹ *Circuit City Stores*, 532 U.S. at 119.

³⁰ See, e.g., *Performance Team Freight Sys., Inc. v. Aleman*, 194 Cal. Rptr. 3d 530 (Cal. Ct. App. 2015).

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all transportation workers, including both employees and independent contractors.³¹

Furthermore, another related court split developed about the correct decision-maker for the transportation-worker exemption. Some courts, including the First Circuit in *New Prime*, held that only a court could apply the exemption.³² However, other courts allowed the parties to delegate to the arbitrator whether the transportation-worker exemption applied.³³ As demonstrated above with the *Henry Schein* case, the allocation of authority between courts and arbitrators is a continuing issue regarding the legal framework facilitating arbitration.

In a unanimous decision written by Justice Gorsuch (Justice Kavanaugh did not participate), the Supreme Court in *New Prime* held that courts must decide whether the transportation-worker exemption applies in a given case.³⁴ Using a textualist and originalist approach and examining materials from the time period of the FAA's enactment, the Court construed the phrase "contract of employment" to include both employees as well as independent contractors.³⁵ The Court reasoned that the phrase "employment" is synonymous with work, without distinguishing among different classes of workers, and the FAA's exemption also uses the broad term "worker," a term that is broad enough to include independent contractors.³⁶ Because the FAA's transportation-worker exemption applied to all transportation workers, without distinguishing between independent contractors and employees, the Supreme Court

³¹ *Oliveira v. New Prime Inc.*, 857 F.3d 7, 22 (1st Cir. 2017).

³² *Id.* at 24.

³³ *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011).

³⁴ *New Prime Inc. v. Olivera*, 139 S. Ct. 532, 537–38 (2019).

³⁵ *Id.* at 539–41.

³⁶ *Id.* at 539–43.

ultimately held there was no authority under the FAA to compel arbitration of Mr. Oliveira's wage claims.

C. Hostility to Class Procedures in *Lamps Plus*

Lamps Plus, Inc. v. Varela involved a data breach of tax information for about 1,300 employees of Lamps Plus.³⁷ A few weeks after the data breach, a fraudulent tax return was filed with the IRS in the name of Frank Varela, a Lamps Plus employee. Varela then filed a putative class-action lawsuit in federal court on behalf of a class of employees whose tax information had been disclosed in the data breach. Varela had previously signed an arbitration agreement with his employer, which did not contain a class action waiver. In response to the class action lawsuit, Lamps Plus asked the court to compel arbitration on an individual basis. The district court compelled arbitration and authorized arbitration on a classwide basis.³⁸ The Ninth Circuit affirmed, reasoning that the arbitration clause was ambiguous regarding class arbitration.³⁹ Relying on California contract law, which requires that ambiguities be construed against the drafter, the employer in this case, the Ninth Circuit found the ambiguity should be resolved in favor of the employee, and class arbitration should therefore be allowed.⁴⁰

The Supreme Court's majority opinion, written by Chief Justice Roberts, first addressed an issue involving the appellate jurisdiction of the Ninth Circuit. To help promote a pro-arbitration scheme, § 16(b)(2) of the FAA provides that a district court order compelling arbitration is generally not appealable.

³⁷ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019).

³⁸ *Varela v. Lamps Plus, Inc.*, No. ED CV 16-577 DMG (KSx), 2016 WL 9211655, at *3 (C.D. Cal. Dec. 27, 2016).

³⁹ *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 673 (9th Cir. 2017).

⁴⁰ *Id.* at 673.

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Thus, it would appear that the order compelling arbitration on a classwide basis in this case could not be appealed. However, the majority relied on a different provision of the FAA, § 16(a)(3), which states that an appeal may be taken from “a final decision with respect to an arbitration that is subject to this title.”⁴¹ Relying on an older FAA decision involving prohibitive arbitral costs, the majority explained that an order compelling arbitration and dismissing all claims counts as final and thus appealable for purposes of § 16(a)(3).⁴²

After addressing the appellate jurisdiction issue, the majority held that an ambiguous arbitration agreement cannot provide the required contractual basis for compelling class arbitration under the FAA.⁴³ Borrowing from earlier cases like *AT&T Mobility v. Concepcion*,⁴⁴ the majority reasoned that class arbitration is fundamentally different from individual arbitration and undermines the benefits of arbitration. According to the majority, application of California’s *contra proferentem* doctrine in this case to authorize classwide arbitration would undermine a fundamental attribute of arbitration—its bilateral, simplified nature. As a result, such an application of state law would be inconsistent with the FAA, and under the reasoning of *Concepcion*, preempted. According to the majority, the FAA requires “more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis.”⁴⁵

Although Justice Thomas joined the majority opinion in *Lamps Plus*, he issued a separate, concurring opinion raising concerns about the majority’s use of a broad purposes-and-

⁴¹ *Lamps Plus*, 139 S. Ct. at 1414 (quoting 9 U.S.C. § 16(a)(3)).

⁴² *Id.*

⁴³ *Id.* at 1415.

⁴⁴ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

⁴⁵ *Lamps Plus*, 139 S. Ct. at 1415.

objectives preemption test, just like he did in *Concepcion*. Instead of finding ambiguity with the arbitration clause, Justice Thomas was willing to construe the arbitration clause at issue as requiring bilateral arbitration because of explicit references in the clause to “the Company and I.”⁴⁶

Justices Ginsburg, Breyer, Sotomayor, and Kagan each wrote strong dissenting opinions. Justice Ginsburg, joined by Justices Breyer and Sotomayor, explained that the FAA was not designed for contexts where one party lacks equal bargaining power.⁴⁷ She also emphasized the irony in the majority’s focus on the company’s lack of consent for class procedures when meaningful consent is often lacking from the perspective of a consumer or employee. Justice Ginsburg also noted the harms arising from the Court’s decisions blocking collective action.

Justice Breyer wrote a separate dissent regarding the appellate jurisdiction of the Ninth Circuit. He argued that the FAA blocks appeals of court orders compelling arbitration, and because the district court’s order compelled arbitration here (albeit class arbitration), the order was not appealable.⁴⁸

Justice Sotomayor wrote that class arbitration does not fundamentally change the nature of arbitration.⁴⁹ According to Justice Sotomayor, the parties agreed to arbitrate according to the rules of an arbitral forum, which in turn provided for class arbitration, and the contract was at least ambiguous. Justice Sotomayor believed that the Court should not easily override California’s neutral contract rule of *contra proferentem*.

Similarly, Justice Kagan, joined by Justices Ginsburg, Breyer, and (in part) Sotomayor, believed that the FAA would not

⁴⁶ *Id.* at 1419–20 (Thomas, J., concurring).

⁴⁷ *Id.* at 1420 (Ginsburg, J., dissenting).

⁴⁸ *Id.* at 1422 (Breyer, J., dissenting).

⁴⁹ *Id.* at 1427 (Sotomayor, J., dissenting).

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preempt the neutral state contract rule of *contra proferentem*.⁵⁰ She strongly criticized the majority for using its policy view (that class arbitration fundamentally changes the nature of arbitration) to engage in an “extraordinary displacement” of state law.⁵¹ She asserted that the majority would always prohibit class arbitration, regardless of what state law or a contract may require.

II. How the Arbitration Docket Fits Within the Larger Arc of Arbitration Law Developments

Over the last few decades, the Supreme Court has expanded the FAA far beyond its original intent. Consequently, the enforceability of arbitration agreements, the scope of arbitrable claims, and the power of an arbitrator have grown significantly. With these expansions of arbitration law, the number of arbitration agreements has likewise exploded in American society. This section of the article situates the three arbitration cases of the October 2018 Term within this broader context of the FAA’s development. The *Henry Schein* and *Lamps Plus* decisions can be understood as continuing the arc of expansion. But as explained below, the Court finally hit a wall—the text of the FAA—in the *New Prime* case, where the Court rejected an expansive interpretation of the FAA.

The FAA was originally designed to be narrow in scope and applicability. The FAA, in part, helped fill a gap within a growing national economy during the early 1900s. Merchants at the time may have been hesitant to do business with other merchants in distant states because of concerns of having to litigate in a distant courthouse if disputes about interstate

⁵⁰ *Id.* at 1431–33 (Kagan, J., dissenting).

⁵¹ *Id.* at 1434 n.8.

shipments were to arise. Before the FAA's enactment in 1925, arbitration certainly occurred in the United States (arbitration occurred in America prior to the founding of our country); however, courts would not enforce pre-dispute arbitration agreements prior to the 1920s.⁵² The drafters of the FAA wanted to make arbitration agreements enforceable, but not more enforceable than other contracts, and the law they created was not intended to incorporate a national preference for arbitration over litigation.⁵³ At the time of its enactment, the FAA was designed with a simple goal in mind: to reverse the prior judicial hostility against the enforcement of pre-dispute arbitration clauses and to make such clauses as enforceable as other contract terms, like price and delivery terms.⁵⁴ Under the FAA, arbitration would be compelled only when the parties choose arbitration.⁵⁵ In other words, the statute does not express or embody a preference in favor of arbitration; the statute simply declared that an arbitration agreement is enforceable when the parties voluntarily entered into such an agreement. Also, fitting with the narrow scope of the statute,

⁵² IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 19–20* (1992).

⁵³ The legislative history of the FAA recognizes the need to reverse the prior judicial hostility against the enforcement of arbitration agreements by making such agreements as enforceable as other contracts. Nowhere in the legislative history is there any expression of a national policy in favor of arbitration over litigation or of making arbitration agreements more enforceable than other agreements. See generally *Bills To Make Valid And Enforceable Written Provisions Or Agreements For Arbitration Of Disputes Arising Out Of Contracts, Maritime Transactions, Or Commerce Among The States Or Territories Or With Foreign Nations, Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess.* (1924); *A Bill Relating to Sales and Contracts to Sell in Interstate and Foreign Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations, Hearings on S. 4213 and S. 4214 Before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong.* (1923) [hereinafter 1923 Hearings].

⁵⁴ *Id.*

⁵⁵ 1923 Hearings, *supra* note 53, at 10 (in response to questioning from a senator, one of the FAA's drafters explained that the FAA was not intended to apply to non-negotiable, take-it-or-leave-it contracts).

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§ 2 of the FAA provides for the enforcement of an arbitration clause in a contract to settle “a controversy thereafter arising out of such contract.”⁵⁶ As a result, not every type of claim was intended to be covered by the FAA. Only contractually-based claims arising out of an agreement, such as disputes regarding delivery terms, prices, and the condition of shipped goods, were supposed to be covered by the statute.⁵⁷

The Supreme Court has been erroneously expanding and rewriting the FAA since the 1980s. The last few decades of the FAA’s development in the Supreme Court can be characterized as an absurd, pro-arbitration lovefest. The Court’s interpretations of the FAA since the 1980s generally have no basis in the history or text of the statute, and are instead motivated by the Court’s wholly manufactured strong federal interest in favor of arbitration and docket-clearing.⁵⁸ Today, arbitration agreements are more enforceable than other contracts and benefit from special preferences and rules written not by Congress, but by the Court.⁵⁹ Instead of applying the FAA’s clear text, which limits coverage of the statute to claims that arise out of a contract, the Court has expanded the FAA to cover all types of claims, including claims that may have no relationship to a contract, such as statutory claims or tort claims.⁶⁰ Also, the statute was never designed to apply in the employment context, but the Court has expanded the statute

⁵⁶ 9 U.S.C. § 2.

⁵⁷ For a more detailed exploration of the history of the FAA’s enactment, please see SZALAI, *OUTSOURCING JUSTICE*, *supra* note 28.

⁵⁸ *Cf. Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Blackmun, J., dissenting) (the majority’s decision to expand the FAA is “no doubt animated by its desire to rid the federal courts of these suits”).

⁵⁹ For example, the presumption of arbitrability when interpreting the scope of an arbitration clause is not discussed anywhere in the FAA; instead, the Court created this special presumption in *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

⁶⁰ *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

to cover the vast majority of employment claims.⁶¹ Despite the clear purpose, history, and text of the FAA, with its several explicit references to federal courts, the Court has expanded the statute so that it applies in state courts as well.⁶² Although the statute was never designed for take-it-or-leave-it consumer or employment contracts,⁶³ the Court now routinely applies the FAA in these contexts, where meaningful consent is often lacking. As Justice O'Connor once rebuked her colleagues, "the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."⁶⁴

The *Henry Schein* decision fits this broader trend in the Supreme Court's pro-arbitration march. The *Henry Schein* decision closed a loophole that developed in the wake of the Court's 2010 decision in *Rent-A-Center*,⁶⁵ and further reinforced that earlier decision. When the drafting party includes an arbitration clause within an arbitration clause, whereby the parties purportedly agree to arbitrate whether they agreed to arbitrate, *Henry Schein* directs courts to send even baseless arguments into arbitration, thus strengthening the power of the arbitrator. Over the years, the Court has shifted the legal framework for arbitration to a model where courts no longer engage in meaningful supervision or monitoring of the fairness of arbitration clauses, and instead, courts are merely rubber-stamping arbitration clauses.

⁶¹ See generally SZALAI, *OUTSOURCING JUSTICE*, *supra* note 28.

⁶² See generally MACNEIL, *supra* note 52.

⁶³ 1923 Hearings, *supra* note 53, at 10 (in response to questioning from a senator, one of the FAA's drafters explained that the FAA was not intended to apply to non-negotiable, take-it-or-leave-it contracts).

⁶⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

⁶⁵ *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

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Henry Schein is part of this broader, disturbing pro-arbitration trend in the Court that has become the norm since the 1980s. However, on a spectrum of controversial decisions, with gun rights and abortion being some of the most high-profile, *Henry Schein* falls near the opposite end of the spectrum as a relatively obscure decision on a technical issue of arbitration law, which would not attract much negative public attention. In other words, considering public perception, the unanimous *Henry Schein* case seems like the ideal case to assign to Justice Kavanaugh, who was writing his first opinion for the Court, particularly after his contentious confirmation hearings. *Henry Schein* involves a focused, narrow, and relatively obscure point of mind-numbing arbitration law (whether the parties agreed to arbitrate whether they agreed to arbitrate a baseless claim). The facts of this particular case involve a business-to-business distribution contract between two sophisticated parties, and application of the FAA is less controversial in this context. In sum, *Henry Schein* is part of a troubling, pro-arbitration trend in the Supreme Court, but unsurprising and niche enough to serve as an ideal, non-controversial case to assign to a new justice.

Similarly, the majority decision in *Lamps Plus* also fits very well within the Supreme Court's recent FAA cases. Considering the last few decades of FAA cases in general and the Court's prior FAA decisions involving class actions, such as *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*,⁶⁶ *AT&T Mobility v. Concepcion*,⁶⁷ *American Express Co. v. Italian Colors Restaurant*,⁶⁸

⁶⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

⁶⁷ *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

⁶⁸ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

and last Term's *Epic Systems Corp. v. Lewis*,⁶⁹ it is obvious that a majority of the Court is infatuated with arbitration, as long as it does not involve class procedures. The *Lamps Plus* decision and the Court's other class arbitration cases are not really about arbitration at all; instead, these cases are best understood as reflecting the desire of certain justices to dismantle class actions.⁷⁰ Just like the *Henry Schein* decision, *Lamps Plus* perfectly fits the Court's troubling, pro-arbitration trend, but the decision itself was unsurprising in light of the Court's prior decisions on class arbitration.

While *Henry Schein* and *Lamps Plus* fit the mold of the Court's prior arbitration cases, *New Prime* is a potentially game-changing, unexpected, landmark decision signaling a limit to the Court's expansion of the FAA. As mentioned before, *New Prime* is the first decision in decades where the Court rejected an expansive view of the FAA and ruled in favor of workers. The decision in *New Prime* could have easily turned out the other way, with the worker being forced to arbitrate. Relying on the delegation doctrine from *Rent-A-Center*, the Court could have easily kicked the can down the road and sent the entire dispute to the arbitrator because of a delegation clause within the arbitration agreement. In other words, the Court could have easily found that the parties in *New Prime* had agreed to arbitrate everything, including arbitrability, and thus whether the trucker's claims are arbitrable would be sent to the arbitrator to decide. Or in a Scalia-esque manner and as a tribute to the late justice, a majority of the justices could have

⁶⁹ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); see also Charlotte Garden, *Epic Systems v. Lewis: The Return of Freedom of Contract in Work Law?*, 2 AM. CONST. SOC'Y SUP. CT. REV. 137 (2018).

⁷⁰ Cf. *American Express*, 570 U.S. at 252 (Kagan, J., dissenting) ("To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

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claimed that the trucker's arguments of non-arbitrability were "pure applesauce" considering the text of the FAA.⁷¹ With a faux-textual analysis, the Court could have ignored certain language of the FAA while focusing on other language in a self-serving manner by emphasizing that the text of the FAA does not include a specific exception for independent contractors. Thus, Mr. Oliveira would have to arbitrate his wage claims. The Court could have also supported a result in favor of the employer by deflecting attention from the FAA and stating that all claims are generally arbitrable today, unless Congress says otherwise, and there is nothing in the Fair Labor Standards Act, the statutory foundation for the claim at issue in *New Prime*, preventing such claims from being arbitrated. Through a variety of different arguments based on its prior decisions, the Court could have easily justified the opposite result in *New Prime* and found in favor of the employer.

In light of the Supreme Court's strong, pro-arbitration views in the last few decades, how can the victory in favor of the workers in *New Prime* be explained? Perhaps the *New Prime* decision reflects the current socio-political environment. The legal framework supporting arbitration has evolved into something so extreme, expansive, and untethered to the text, purpose, and history of the FAA that we are now seeing a stronger public backlash against the broad use of arbitration in American society compared to prior years. In the wake of the #MeToo movement, it has been recognized that arbitration in the employment context helped conceal acts of sexual harassment. Because of strong confidentiality terms and other procedural limitations often associated with arbitration agreements, it may be difficult or impossible for a victim of

⁷¹ King v. Burwell, 135 S. Ct. 2480, 2501 (2015) (Scalia, J., dissenting).

sexual harassment to speak to colleagues to gather information, evidence, or testimony about a hostile work environment. As a result, there has been greater public debate about curtailing the use of arbitration in recent years. Furthermore, the oral argument in *New Prime* occurred immediately after the contentious confirmation hearings of Justice Brett Kavanaugh, with allegations that he had sexually assaulted Dr. Christine Blasey Ford.⁷² The #MeToo movement and related accountability issues became part of the public discussion surrounding Justice Kavanaugh's confirmation hearings. Against the backdrop of the #MeToo movement, there have been stronger calls for reforming America's arbitration laws, with unprecedented bipartisan support for bills in Congress to amend the FAA as well as bills in state legislatures to cut back on arbitration.⁷³ Also, private, high-profile employers such as Google have announced that they will no longer require arbitration for their employees, and with pressure from law students, some major law firms have cut back on their use of arbitration as well.⁷⁴

The justices are likely aware of the current socio-political environment and the increasing backlash against arbitration. In her dissent in *Lamps Plus*, Justice Ginsburg acknowledged the "recent steps to counter the Court's current jurisprudence [involving arbitration],"⁷⁵ such as the initiatives of private employers and pending legislation to cut back on arbitration.

⁷² Christine Hauser, *The Women Who Have Accused Brett Kavanaugh*, N.Y. TIMES (Sept. 26, 2018).

⁷³ See, e.g., *Ending Forced Arbitration of Sexual Harassment Act of 2017*, S. 2203, 115th Cong. (2017); A.B. 3080, 2018 Leg., Reg. Sess. (Cal. 2018).

⁷⁴ *Google Will No Longer Require Arbitration to Resolve Worker Disputes*, MARKETWATCH (Feb. 21, 2019); Angela Morris, *Why 3 BigLaw Firms Ended Use of Mandatory Arbitration*, A.B.A. J. (June 1, 2018); Karen Sloan, *Big Law Is Targeted—In Person—By Law Students Opposing Mandatory Arbitration*, LAW.COM (Mar. 26, 2019).

⁷⁵ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting).

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Being aware of the current environment, the justices may have decided to scale back on their prior aggressive, erroneous interpretations of the FAA, resulting in the aberrant decision in *New Prime*.

To summarize, *Lamps Plus* and *Henry Schein* were unsurprising in light of prior Supreme Court decisions, and these two cases can be viewed as a natural extension of existing and expansive (but flawed) Supreme Court interpretations of the FAA. However, *New Prime* suggests that the Court may be willing to put the brakes or at least a temporary pause on further expansion of the FAA.

III. How Will the Arbitration Docket Shape the Future of Arbitration and Access to Courts?

This final section explores the potential impact of these three arbitration cases. As explained below, each case leaves to be sorted out in the future other issues involving arbitration. Ultimately, the 2018 Arbitration Docket maintains a vast legal framework strongly supportive of arbitration. The widespread uses of arbitration in American society are not likely to dramatically disappear anytime soon unless Congress substantially amends and curtails the scope and power of the FAA. However, the Court's interpretative approach in *New Prime* represents a more literal, textual shift that could potentially be used in future cases to reject expansive interpretations of the FAA.

A. Henry Schein

Over the years, the Supreme Court's rulings on the FAA have created a system where courts in effect rubber-stamp orders compelling arbitration, particularly where the arbitration clause contains a delegation provision. *Henry Schein*

continues and strengthens this rubber-stamping framework. As a result, more power has shifted to private arbitrators, whose decisions are in effect unreviewable, and courts must still compel arbitration, even in the face of baseless claims regarding the enforceability of arbitration clauses.

The rubber-stamping of arbitration agreements by the judiciary raises concerns, particularly when vulnerable parties and a lack of bargaining power are involved. Who is now guarding the entrance to the system of private arbitration, making sure that agreements to arbitrate are not unduly harsh or unconscionable? *Henry Schein* did not start this trend, but the decision weakens the power of courts to serve as gatekeepers to the expansive private system of arbitration.

Furthermore, the ruling in *Henry Schein* applied to a contractual relationship between two relatively sophisticated parties: a manufacturer and a distributor. Consider the impact of *Henry Schein* in other arbitration settings, such as an employee-employer relationship or customer-company relationship, involving a stark imbalance in bargaining power between the parties. A consumer or employee who is attempting to assert a legitimate consumer-protection or civil-rights claim may now be forced to pay for an arbitration so that the arbitrator can consider (and hopefully reject) a clearly baseless arbitrability claim. But whatever the arbitrator decides is largely unreviewable, and the arbitrator may have a financial self-interest to find the matter to be arbitrable. Perhaps in these hypothetical scenarios with a consumer or employee and a baseless arbitrability claim raised by the stronger party, an arbitrator could allocate all fees to the employer or company raising the baseless arguments, but such an allocation of fees is not guaranteed. As a result, the threat or possibility of having to pay for an arbitration hearing to reject baseless

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arbitrability arguments may burden some weaker parties who have legitimate claims on the merits and possibly even discourage them from pursuing their underlying merits claims at all. Baseless claims about arbitrability arguably deserve to be considered and quickly rejected in public court proceedings. However, after the *Henry Schein* decision, a defending party in a lawsuit can, in effect, impose a baseless procedural hurdle involving fake arbitrability arguments, and the injured victim must now cross this arbitral hurdle (and maybe even pay for the arbitral proceeding) before the legitimate claims on the merits will hopefully proceed in court.

Another problem with the Court's decision in *Henry Schein* involves the strong displacement of judicial power, the scope of which will very likely be the subject of future litigation. For example, if a party files a motion to enforce an obviously defective arbitration clause using baseless arbitrability arguments, judges under *Henry Schein* have no power to resolve and reject the arbitrability disputes when the language of the defective arbitration clause delegates arbitrability questions to an arbitrator. Additionally, the decision in *Henry Schein* may undermine courts' power to sanction baseless arguments. Federal courts generally have an inherent power to control proceedings before them and issue sanctions, as well as a sanctioning power found in Rule 11 of the Federal Rules of Civil Procedure and a sanctioning power found in 28 U.S.C. § 1927. While *Henry Schein* did not discuss whether the FAA has displaced these federal powers, rules, or statutes governing sanctions, it suggests that courts may be powerless when faced with baseless arbitrability arguments that are supposed to be addressed by an arbitrator.

Finally, the *Henry Schein* decision leaves open an important issue regarding the power of an arbitrator. Under the *First*

Options framework, threshold arbitrability issues can be sent to an arbitrator if there is “clear and unmistakable” evidence the parties agreed to do so.⁷⁶ Currently, there is a court split regarding whether the mere incorporation of the arbitration rules of a provider like the American Arbitration Association (whose rules grant an arbitrator power to decide the arbitrator’s own jurisdiction) counts as “clear and unmistakable” evidence of delegation. Some courts believe that merely incorporating the arbitration rules of the American Arbitration Association can qualify as a clear, unmistakable delegation of authority to an arbitrator,⁷⁷ but other courts require arbitration agreements to contain a more explicit delegation of authority to an arbitrator.⁷⁸ At the very end of the Court’s opinion in *Henry Schein*, the Court stressed that it was “express[ing] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator.”⁷⁹ Thus, it is not clear whether the mere reference to certain arbitral rules qualifies as a proper delegation of authority to an arbitrator.

B. *Lamps Plus*

With its hostility toward class procedures, *Lamps Plus* follows in the vein of several cases, like *Stolt-Nielsen*, *Concepcion*, *American Express*, and *Epic Systems*, to have a deleterious impact on class actions. It is important to note that the majority of America’s largest companies draft consumer arbitration agreements with explicit class-action waivers but less frequently include class-action waivers in the employment

⁷⁶ *First Option of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

⁷⁷ *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018) (holding that incorporation of AAA rules clearly and unmistakably delegates arbitrability issued to the arbitrator).

⁷⁸ *Chesapeake Appalachia v. Scout Petroleum*, 809 F.3d 746 (3d Cir. 2016).

⁷⁹ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019).

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context.⁸⁰ The most direct impact of *Lamps Plus* will be in cases where an arbitration clause does not contain an explicit class-action waiver. According to *Lamps Plus*, in situations where a court is faced with an arbitration clause that is silent or ambiguous regarding the availability of class procedures, a court should compel arbitration on a bilateral basis. *Lamps Plus* continues the problem that arbitration can be used to eliminate class-action liability, which is probably a core reason why so many corporate parties utilize arbitration clauses in their customer contracts.

After *Lamps Plus*, class arbitrations may still occur, but the door may be shutting. The Court in *Lamps Plus* seems to have left undisturbed its prior decision in *Oxford Health Plans v. Sutter*.⁸¹ Unlike in *Lamps Plus*, in *Oxford Health Plans*, an *arbitrator*, not a judge, construed the arbitration clause as providing for class arbitration, and the Court held that the arbitrator's decision, even if erroneous, may still stand in light of the narrow and extremely deferential judicial review of arbitral awards. In other words, if an arbitrator finds that class arbitration should occur and the arbitrator grounds his or her decision on a reading of the contract, the protective veil of arbitration will likely shield the arbitrator's determination, even if a court finds that the arbitrator made a serious error in interpretation. But if the arbitration clause contains an explicit class-action waiver, this issue is not likely to arise. And given the Court's demonstrated disfavor of class actions, the days of an arbitrator being allowed to construe an arbitration clause for the availability of class procedures may, too, be numbered.

When an arbitration clause does not contain a class-action

⁸⁰ See generally Szalai, *Prevalence of Consumer Arbitration*, *supra* note 5; SZALAI, WIDESPREAD USE OF WORKPLACE ARBITRATION, *supra* note 5.

⁸¹ *Oxford Health Plans v. Sutter*, 569 U.S. 564 (2013).

waiver, who decides whether the clause allows for class arbitration? A footnote in the majority opinion in *Lamps Plus* mentions that this issue of who is the correct decision-maker has not been decided, and, in fact, heavily split the Court in the case of *Green Tree Financial Corp. v. Bazzle*.⁸² The justices in the majority in *Lamps Plus* are not fans of class procedures. Consequently, they probably do not want arbitrators to make this determination, because under *Oxford Health Plans*, an arbitrator's decision in favor of class arbitration will be somewhat insulated from judicial review, even if the arbitrator's decision is seriously erroneous. As a result, I expect that a majority of justices in the future will hold that a court, and not the arbitrator, is generally the correct decision-maker to construe whether an arbitration clause authorizes class procedures.

C. New Prime

New Prime recognizes that transportation workers are not covered by the FAA, regardless of whether the worker is an employee or independent contractor. Going forward, there are likely to be fights over the contours of who counts as a transportation worker for the purposes of the FAA exemption. A recent decision found that Amazon delivery drivers qualify for the FAA's transportation-worker exemption, and based on briefing in the case, it appears that some or possibly all of these Amazon drivers were local drivers who made intrastate deliveries.⁸³ However, there are other decisions suggesting that local delivery drivers will not fall under the transportation-

⁸² *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

⁸³ See *Rittmann v. Amazon.com, Inc.*, No. C16-1554-JCC, 2019 WL 1777725, at *7 (W.D. Wash. Apr. 23, 2019).

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worker exemption.⁸⁴ Lower courts will have to sort out who counts as a transportation worker for the purposes of the exemption.

Furthermore, what happens once a worker qualifies for the transportation-worker exemption? It is clear that the FAA does not apply to such a worker. However, can *state law*, such as state arbitration law or state contract law, fill in the gap, and can such a worker still be compelled to arbitrate pursuant to state law? Before *New Prime*, the Third Circuit, in *Palcko v. Airborne Express, Inc.*,⁸⁵ held that transportation workers may still be compelled to arbitrate pursuant to state laws. However, the Court in *New Prime* stated that the different sections of the FAA should be read together as “integral parts of a whole.”⁸⁶ As a result, § 1 of the FAA (which contains the transportation-worker exemption) and § 2 (which declares that arbitration agreements are binding) must be construed together. Because § 2 applies in the states, according to the Supreme Court’s decision in *Southland Corp. v. Keating*,⁸⁷ and § 1 is inseparable from § 2, according to *New Prime*, § 1 should also govern in the states. Consequently, it appears that states must also honor the transportation-worker exemption, calling into question the Third Circuit decision in *Palcko*. Thus, going forward, courts will have to sort out the role of state law in connection with the transportation-worker exemption.

Out of the three cases from the Supreme Court’s 2018 Arbitration Docket, the most unusual or surprising was *New Prime*. As noted above, the justices could have crafted an

⁸⁴ *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899 (N.D. Cal. 2018) (“[Plaintiff] does not allege that he ever crossed state lines as part of his work. As such, there is no allegation that he engaged in interstate commerce . . .”).

⁸⁵ *Palcko v. Airborne Express, Inc.*, 372 F.3d 588 (3d Cir. 2004).

⁸⁶ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019).

⁸⁷ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

entirely different result in *New Prime* in favor of the employer. Instead, the justices all appeared to search for the original meaning of the FAA, and they adopted a more textualist and originalist approach compared to prior FAA cases, examining what the language in the statute would have meant back in the 1920s. If the Supreme Court had undertaken an originalist approach when interpreting the FAA in prior decisions from the last few decades, we would have a very different and more limited legal framework today governing arbitration, where employment, consumer, and statutory claims would not be arbitrated under the FAA, and the FAA would not be applicable in state courts.⁸⁸ The originalist and textualist approach in *New Prime* is striking when compared to prior Supreme Court cases involving the FAA. In fact, the approach was so striking that it prompted Justice Ginsburg to write a concurring opinion noting that such a strong, textualist, originalist approach may not be appropriate in all settings.⁸⁹ She was probably concerned about the use of such an approach in more controversial areas, such as abortion cases or in connection with the interpretation of the Constitution.

This textualist, originalist approach from *New Prime*, if and when it is used in future cases, can reshape arbitration law. For example, through the *Mitsubishi* trilogy from the 1980s, the Court has repeatedly held that statutory claims are generally arbitrable pursuant to the FAA, unless there is something in the text, history, or policy of the statute showing that Congress intended to preclude a waiver of judicial remedies for that particular statutory claim.⁹⁰ But, the Court is ignoring the text of the FAA with this test. With a bit of smoke and mirrors,

⁸⁸ See generally MACNEIL, *supra* note 52.

⁸⁹ *New Prime*, 139 S. Ct. at 544 (Ginsburg, J., concurring).

⁹⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

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the Court in the *Mitsubishi* trilogy adopted an arbitrability test which re-directs our gaze away from the FAA to focus exclusively on the text, history, and purpose of the statutory merits claim to be arbitrated. As a result of the *Mitsubishi* trilogy, virtually every claim is now arbitrable.

Justice Blackmun in dissent in one of the *Mitsubishi* trilogy cases bluntly observed that these cases were being driven more by policy than the text of the FAA. He explained that “[the majority’s decision is] no doubt animated by its desire to rid the federal courts of these suits.”⁹¹ The Court’s preference for arbitration, motivated by a desire or policy for docket clearing, helped drive the holdings in the *Mitsubishi* trilogy. However, thirty years later, a unanimous Court in *New Prime* cautioned against the use of policy to “pave over” or rewrite the text of a statute. Applying this approach broadly would basically overturn the last few decades of the Court’s FAA decisions.⁹²

If one puts aside flawed reading of the FAA as expressing a pro-arbitration policy and instead engages in the textualist, originalist approach found in *New Prime*, one would see that statutory claims are *not* covered by the FAA. The FAA’s coverage is limited to written provisions in a contract “to settle by arbitration a controversy thereafter arising out of such contract.”⁹³ This key limitation regarding the coverage of the FAA, which the Court willfully ignored in the *Mitsubishi* trilogy, means the FAA was not supposed to apply to tort claims or statutory claims that can be asserted without reference to a contract. For example, the right to be free from bodily harm or the right to be free from discrimination, or more generally

⁹¹ Shearson/ Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Blackmun, J., dissenting).

⁹² *New Prime*, 139 S. Ct. at 543.

⁹³ 9 U.S.C. § 2.

rights that arise from a statute, do not necessarily depend on or arise out of a contract. From a pure textual perspective, personal injury and tort claims, employment discrimination claims, civil rights claims, and other statutory claims were simply not intended to fall within the coverage of the FAA. Moreover, an examination of the legislative history confirms this textual, more limited reading of the FAA. The legislative history is filled with examples of contractual disputes about shipped goods, not statutory or tort claims.

Going forward, it is not likely that the justices will use the textualist, originalist approach in all FAA cases, particularly where the Court has already spoken about an issue and *stare decisis* rears its head. In other words, the justices are unlikely to dramatically rewrite the last 40 years of expansive FAA cases. However, they could chip away at prior holdings with more textual readings, and there are many court splits involving the FAA that the Court has not expressly addressed yet, such as splits involving the meaning of arbitration, jurisdiction in connection with motions to vacate or confirm arbitral awards, subpoena powers under the FAA, waiver, the availability of preliminary relief from a court, and many other arbitration-related topics. There are many unanswered questions in arbitration law. To the extent that the Court or lower courts utilize the textualist, originalist approach from *New Prime*, there could be more restrained, limited interpretations of the FAA in the future. I do not expect the existing broad legal framework supporting arbitration or the number of arbitration clauses to dramatically shrink in the foreseeable future unless Congress takes action, but *New Prime* could impact the judicial fine-

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tuning of the FAA going forward. Such a textual, originalist approach utilized in *New Prime* probably reflects or resonates with the Court's conservative majority, especially with the addition of Justices Gorsuch and Kavanaugh.

* * *

The FAA, enacted in 1925, is fast approaching its one-hundredth anniversary. It is a relatively sparse statute, originally designed for a limited scope and purpose. However, since the 1980s, the Supreme Court has erroneously expanded and completely transformed the statute. This judicial expansion of the FAA, led by the Supreme Court, has given rise to many conflicting decisions in state courts and lower federal courts. As illustrated by the Supreme Court's 2018 Arbitration Docket, there can be significant, time-consuming litigation about arbitration, fighting over where the parties may ultimately fight, without even reaching the merits of an underlying dispute. The Supreme Court's 2018 Arbitration Docket serves as a reminder that the FAA is badly in need of reform. The current legal framework for arbitration, a framework which is harsh in many respects, collapses upon serious scrutiny of the text, history, or purpose of the FAA. Currently pending in Congress are bills to amend the FAA, such as the Forced Arbitration Injustice Repeal Act,⁹⁴ and it is the author's hope that Congress will turn to arbitration reform, which can impact the enforcement of virtually every substantive area of law in America.

⁹⁴ Forced Arbitration Injustice Repeal Act. S. 610, 116th Cong. (2019).

***Manhattan Community Access Corp. v. Halleck:* Property Wins Out Over Speech on the Supposedly Free-Speech Court**

Genevieve Lakier*

It is a widely shared view among First Amendment scholars that we have today the “most speech-protective [U.S. Supreme] Court in a generation, if not in our history.”¹ Supporters of the Court praise its libertarian zeal when it comes to speech. Critics, meanwhile, bemoan the Court’s tendency to rigorously scrutinize the regulation of commercial advertising and corporate speech and many other kinds of speech that in earlier decades were considered beyond the scope of the First Amendment. They argue that this phenomenon of “First Amendment imperialism” or “First Amendment expansionism” threatens effective democratic government,

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¹ Joel Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & Pol’y 63, 64 (2016).

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not to mention the health of the regulatory state.² What both supporters and critics agree on, however, is that this is a time of First Amendment ascendancy—at least in the federal courts.

In some respects, this is true. It is certainly true that in recent decades the Court has extended First Amendment protection to not only commercial advertising and corporate speech but also violent video games, depictions of animal cruelty, lies, and many other kinds of formerly-unprotected speech.³ It is also true that, in its constitutional jurisprudence, the Court has tended to weigh free speech interests more heavily than many countervailing interests—interests such as equality or privacy, for example. In this respect, the contemporary First Amendment is very strong.

In other respects, however, the contemporary First Amendment is very weak. As I have argued in other work, although the Court has tended to prioritize the expressive freedom of the speaker over countervailing goods such as equality and privacy, it has generally treated free speech interests as second fiddle to property interests.⁴ When speech and property interests coincide, the Court strongly protects them. When speech interests come into conflict, property interests win out. The result is that contemporary free speech

² See, e.g., Daniel J.H. Greenwood, *First Amendment Imperialism*, 1999 UTAH L. REV. 659, 659 (1999) (“The First Amendment threatens to swallow up all politics. . . . Increasingly, it acts as a bar to governmental action not just with regard to the issues of conscience and religious practice with which it began, but far into the realm of economic regulation we thought the courts had abandoned to the legislatures after the *Lochner* disaster.”); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 137 (2016) (“Courts’ growing protection of commercial speech threatens to revive a sort of *Lochnerian* constitutional economic deregulation embedded not in substantive due process but the First Amendment.”). The phrase “First Amendment expansionism” was coined by Leslie Kendrick. See Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

³ See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

⁴ See Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. (forthcoming); Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117 (2018) [hereinafter Lakier, *Antisubordinating First Amendment*].

law vigorously safeguards the right of property owners to use their property for whatever expressive purposes they desire but only weakly protects speakers who wish to participate in public debate but need to use public property to do so, or to otherwise speak on property they do not own. As a result, it fails to meaningfully protect many kinds of speech—political protests, for example—that have traditionally been considered a core First Amendment concern.⁵ By allowing inequalities in property and wealth to limit who can participate in public life, contemporary free speech law also fails to ensure the “uninhibited, robust, and wide-open” public debate that the Court has insisted for decades is one of the First Amendment’s central goals.⁶

Last term’s decision in *Manhattan Community Access Corporation v. Halleck* demonstrates quite vividly—and in an unusually explicit manner—the Court’s tendency in recent years to weigh property interests over speech interests.⁷ The case involved a First Amendment challenge to the decision by a private nonprofit corporation known as the Manhattan Neighborhood Network (MNN) to deny two documentary producers access to the public access channels that New York law requires cable companies that operate in the state to dedicate to non-discriminatory public use. In 1991, MNN was tasked by the Manhattan Borough president with the job of managing the public access channels in Manhattan for the

⁵ For more discussion of this point see Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006).

⁶ See, e.g., *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 755 (2011); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁷ *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

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cable company Time Warner.⁸ The plaintiffs argued that MNN denied them access to the channels it managed because of their viewpoint, in violation of their First Amendment right to freedom of speech, and filed suit against the corporation, as well as the City of New York, seeking declaratory and injunctive relief.⁹ The district court dismissed their complaint, however, and although the Second Circuit reversed that decision, the Supreme Court in a five-to-four decision reaffirmed it.¹⁰

The Court held that the plaintiffs' lawsuit had to be dismissed because MNN is not a state actor to whom the First Amendment's non-discrimination obligations apply.¹¹ In reaching this conclusion, the majority rejected the possibility that New York's public access channels are a designated public forum—that is to say, a forum for speech that the government has dedicated to non-discriminatory public use.¹² It insisted that because public access channels are privately-owned, they cannot be a public forum.¹³ As a result, the Court concluded that MNN does not play a sufficiently important governmental role to qualify as a state actor.

As I argue in what follows, this conclusion is difficult to defend or, for that matter, understand. This is because it utterly

⁸ See *id.* at 1935 (Sotomayor, J., dissenting). A detailed history of the organization can be found in the Brief of the New York County Lawyers Association as Amicus Curiae in Support of Respondents, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 913829.

⁹ *Halleck v. City of New York*, 224 F. Supp. 3d 238, 239 (S.D.N.Y. 2016). The plaintiffs did not seek monetary damages because federal law precludes the award of any monetary damages in cases asserting constitutional violations “arising from the regulation of cable television.” *Id.* at 239 n.1.

¹⁰ *Id.* at 247, *aff'd in part, rev'd in part sub nom.* *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300 (2d Cir. 2018), *rev'd in part*, 139 S. Ct. 1921 (2019).

¹¹ *Halleck*, 139 S. Ct. at 1934.

¹² *Id.* at 1930–31.

¹³ *Id.* at 1931–33.

fails to promote either of the purposes the Court has invoked in recent years to justify the state-action requirement. It certainly does not promote any First Amendment values. Nor does it promote any other significant constitutional interest. In his majority opinion, Justice Kavanaugh (writing, notably, his first free-speech opinion as a member of the Court) argued that the Court's holding was necessary to protect the ability of private property owners like Time Warner to shape the speech forums they created with their property as they desired.¹⁴ But under New York law, owners of public access channels like Time Warner do *not* possess any freedom to "exercise . . . editorial discretion within [those speech] forum[s]."¹⁵ The opinion protects a freedom, in other words, that does not exist.

Rather than the vindication of individual liberty it purports to be, what the decision in *Halleck* appears to vindicate is what Justice Marshall once described, in a related context, as the "formalities of title."¹⁶ Alternatively, the decision might be interpreted as a sign that the conservative majority on the Court is no longer as comfortable as it once was with the constitutionality of regulatory regimes like the one in New York, which requires cable operators to give up control of some portion of their cable channels in an effort to promote

¹⁴ *Id.* at 1930–31.

¹⁵ *Id.* at 1931.

¹⁶ *Hudgens v. NLRB*, 424 U.S. 507, 538 (1976) (Marshall, J., dissenting) (arguing that, when determining whether the First Amendment grants speakers a right of access "to streets, sidewalks and other public places, courts ought not to let the formalities of title put an end to analysis").

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the public good.¹⁷ Although the Court did not address the underlying constitutionality of New York's public access television regulations in *Halleck*, Justice Kavanaugh appended a footnote to his opinion, making clear that nothing in the opinion precluded the Court from doing so later.¹⁸ The fact that he felt the need to so include that footnote certainly suggests that some members of the Court are interested in revisiting the question of whether legislatures can constitutionally require cable operators to cede editorial control of the content of some of their channels in an effort to promote a more robust and inclusive public sphere. *Halleck* might therefore be interpreted as the first step towards a doctrinal arrangement that does in fact protect individual liberty—albeit the liberty of the property owner to make whatever use of its property it desires, rather than the liberty of the speaker to participate in public debate. Either way, the decision is a depressing, but not terribly surprising, reminder of the Roberts Court's tendency to prioritize property over speech interests and, consequently, the strongly anti-redistributive tendencies of its free speech jurisprudence.

In what follows, I first lay out the doctrinal background of the decision and the narrow state-action test under which it was resolved before examining the arguments that the plaintiffs made to explain why MNN should be considered a state actor,

¹⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (upholding the constitutionality of a federal law that required cable operators to devote a certain number of channels to transmitting local broadcast stations after finding that it furthered important governmental interests by "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming").

¹⁸ *Halleck*, 139 S. Ct. at 1931 n.2 (noting that the question of to what "degree . . . the First Amendment protects private entities such as Time Warner or MNN from government legislation or regulation requiring those private entities to open their property for speech by others" is a "distinct question not raised here").

and the very unpersuasive arguments that Justice Kavanaugh relied on in his majority opinion to justify the Court's rejection of those arguments. I also briefly examine the attempt by Justice Sotomayor in her dissenting opinion (which Justices Breyer, Ginsburg, and Kagan joined) to translate the plaintiffs' argument into a language of property that the majority might appreciate—to no avail. Finally, I conclude by sketching out the implications of the decision, including what it tells us about the future of free-speech jurisprudence from a Court in which Justice Kavanaugh is a member and Justice Kennedy is not. The bottom line is that the news is bad for those of us (like myself) who think the First Amendment should be interpreted to protect more than the expressive freedom of powerful property owners.

I. The Doctrinal Background of the Case

In *Halleck*, the Court was faced with the kind of question it has had to answer in state-action cases for over 140 years. Ever since the Court declared in the late nineteenth century that the rights guaranteed by the Fourteenth Amendment (including the right to freedom of speech) prohibit “State action of a particular character” but not the “[i]ndividual invasion of individual rights,” courts have had to figure out when rights-violating behavior is the product of “state action of a particular character” and when it is not.¹⁹

This has not proven to be a simple question to answer. In its first important state-action decision, the *Civil Rights Cases*, the Court made clear that the state acts for Fourteenth Amendment purposes not only when its agents or institutions directly

¹⁹ The Civil Rights Cases, 109 U.S. 3, 11 (1883).

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violate the constitutional rights of its citizens themselves, but also when it provides support “in the shape of laws, customs, or judicial or executive proceedings” to the “wrongful acts of [private] individuals,” or otherwise provides “[s]ome shield of State law or State authority” that allows the wrongful private conduct to occur.²⁰ Since then, the Court has continued to recognize that the wrongful acts of private individuals can, when supported by state action of some kind, violate the Fourteenth Amendment.

The Court has been unwilling, however, to conclude that the state-action requirement is satisfied whenever government institutions, agents, and officers provide support of any kind whatsoever to private wrongdoing, even if this is what Justice Bradley’s opinion in the *Civil Rights Cases* appears to suggest. One can understand why: Were courts to understand state action in this way, the result would be to obliterate the state-action requirement as a meaningful limit on the Constitution’s reach. This is because there is virtually no private activity that is not enabled in some way by state laws, customs, or executive or judicial proceedings. (This is what critics of the state-action doctrine mean when they claim that state action is omnipresent.²¹)

In order to preserve the meaningfulness of the state-action requirement as a limit on the Constitution’s reach, the Court has instead insisted that where the government is accused of violating the Fourteenth Amendment by aiding and abetting private conduct, it must have done more than merely support the private conduct; it must have “to some significant extent . . . been found to have become involved in it.”²² What the Court

²⁰ *Id.* at 17–18.

²¹ See e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 522 (1985).

²² *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

has understood this to mean has changed considerably over time, however.

During the 1940s, 1950s, and 1960s, the Court tended to construe this requirement expansively. It found that the state had sufficiently involved itself in private wrongdoing to satisfy the state-action requirement when its courts helped enforce racially discriminatory private contracts or mobilized the coercive machinery of the government to enforce other kinds of private discriminatory conduct.²³ The Court also found the requirement satisfied when government officials approved, or at least failed to object to, allegedly wrongful private conduct that they had the power to prevent.²⁴

Even in cases where state actors neither enforced nor approved harmful private conduct, the Court found the state-action requirement satisfied when the government vested the private actor with power or status that ordinary private citizens did not possess. For example, in *Burton v. Wilmington Parking Authority*, the Court found that the government's failure to prevent a private restaurant that leased space in a publicly-owned parking garage from denying service to

²³ See, e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953) (concluding that a court order of damages for the violation of a racially restrictive covenant constitutes state action); *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (concluding that a court order enjoining the sale of a home because it violates the terms of a racially restrictive covenant is "state action . . . in the full and complete sense of the phrase" insofar as "but for the active intervention of the state courts, supported by the full panoply of state power, [the buyers] would have been free to occupy the properties in question without restraint"); *Marsh v. Alabama*, 326 U.S. 501 (1946) (assuming there to be state action when a court imposes criminal punishment on a speaker who attempts to distribute religious literature on the streets of a privately owned town contrary to the wishes of town management, in violation of a state trespass law).

²⁴ *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 462 (1952) (finding there to be state action when a government agency investigated, and refused to do anything about, the allegedly harmful conduct of a private transport company); see also *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 172 (1970) (concluding that a petitioner denied service in a restaurant because she was in a mixed-race group could make out a viable Fourteenth Amendment claim if she could show that local police enforced a custom of segregation by "intentionally tolerat[ing] violence or threats of violence directed towards those who violated the practice of segregating the races at restaurants").

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African-American customers constituted state action because, by leasing the restaurant space in a building that was dedicated to public use, and by using the money from the lease to keep the parking garage running, the government had “place[d] its power, property and prestige behind the [restaurant’s] admitted discrimination.”²⁵ Several years later, in *Evans v. Newton*, the Court similarly concluded that the decision by a city government to transfer a public park’s title to private trustees so that they could operate it in the whites-only fashion demanded by the original property owner’s will constituted state action in violation of the Fourteenth Amendment.²⁶ The Court argued that, by transferring to private trustees title to a property that “like a fire department or [a] police department . . . traditionally serve[d] the [entire] community,” the city government “endowed [those trustees] with powers [and] functions [that were] governmental in nature.”²⁷ This was sufficient, the Court held, to establish constitutional liability for whatever discriminatory acts those trustees engaged in, even acts that city officials did not help enforce, or specifically approve.²⁸

With the emergence of the Burger Court in the 1970s, the Court veered sharply away from the expansive conception of state action articulated in *Burton*, *Evans*, and many other mid-twentieth century opinions. Although the Court did not deny that state support for private wrongdoing could in some cases violate the Fourteenth Amendment, it applied a very different test than it previously had. Rather than assuming that the state-

²⁵ *Burton*, 365 U.S. at 725.

²⁶ *Evans v. Newton*, 382 U.S. 296, 302 (1966).

²⁷ *Id.* at 299, 302; *see also id.* at 302.

²⁸ *Id.* at 302 (“Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.”).

action requirement was satisfied whenever the government *empowered* wrongful private conduct—by enforcing it, tolerating it, or placing its property, power, and prestige behind it—the Court now insisted that the requirement was satisfied only when “there [wa]s a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”²⁹ This may sound like a small change, but in fact it was substantial. It meant that the Fourteenth Amendment would no longer protect individuals against harmful acts perpetrated by private actors except when those private actors were so closely linked to governmental power that when they acted, they more or less *were* the government in all but name.³⁰

The result was to make state action much more difficult to establish in cases in which the government provided permission or support to private persons who intruded on the rights of other private persons. Indeed, if during the 1940s, 1950s, and 1960s, the Court very rarely found there *not* to be state action in cases of this sort, in the subsequent decades, the reverse turned out to be true. Since 1970, the Court has found state action in cases involving allegedly unconstitutional behavior performed by someone other than a government official or employee on no more than a half-dozen occasions. In all these cases, the private actor was either directly controlled

²⁹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

³⁰ See Larry W. Yackle, *The Burger Court, State Action, and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 521–22 (1975) (noting that, for the Burger Court, it was not sufficient to show that “the state . . . has brought about or permitted conduct in circumstances that justify the invocation of constitutional limitations”; instead, one must have shown “that the private actor involved is the state for purposes of [F]ourteenth [A]mendment analysis”; and noting that this is “an exceedingly narrow construction [of the state action doctrine], especially in light of the development of the . . . doctrine over the last 3 decades”).

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by or primarily composed of government agents,³¹ or engaged in its allegedly unconstitutional behavior in close coordination with government officials,³² or committed the wrongful acts while performing a function that was traditionally (and the Court elsewhere explained, *exclusively*) performed by the government.³³

When none of these conditions were met, the Court refused to find state action—even when the government approved the actions of the private wrongdoer and even when the private actor provided an important public service. For example, in *Jackson v. Metropolitan Edison Company*, the Court concluded that the decision by an electrical utility to deny service to a

³¹ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290, 299–300 (2001) (finding a “statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools” to be a state actor because eighty-four percent of its members are public schools, “represented by their officials acting in their official capacity” and because it is treated as a part of government by the state insofar as “ministerial employees [of the organization are considered] state employees” for retirement purposes, and state officials populate its board); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995) (finding Amtrak to be a state actor because it was “established and organized under federal law for the very purpose of pursuing federal governmental objectives, [and operated] under the direction and control of federal governmental appointees” and in that respect as much a part of the federal government as “so-called independent regulatory agencies such as the Federal Communications Commission or the Securities Exchange Commission”); *see also West v. Atkins*, 487 U.S. 42, 54 (1988) (reaffirming that government employees are state actors for constitutional purposes).

³² *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 487 (1988) (finding state action when a probate court “pervasive[ly] and substantial[ly]” aided the enforcement of an allegedly unconstitutional procedure for informing creditors to a decedent’s estate about the timeline for filing claims); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 (1982) (finding the same in a case involving an allegedly unconstitutional deprivation of the due process right to a hearing).

³³ *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (holding that the use of peremptory challenges by private litigants in civil suits constitutes state action because “[t]hough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body” and that when the government grants private parties the right to make peremptory challenges it therefore delegates to them a “traditional” and “critical” governmental function); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (“[O]ur holdings have made clear that the relevant question is not simply whether a private group is serving a ‘public function.’ We have held that the question is whether the function performed has been ‘traditionally the *exclusive* prerogative of the State.’”) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

customer in alleged violation of her due process rights did not constitute state action, even though the utility provided a public service, just as a fire department or police department did—it was the only company to provide electricity to consumers in the area—and even though state regulators had approved, or at least failed to object to, the specific termination procedures challenged in the case.³⁴ Because the furnishing of electricity was not a function that was “traditionally associated with sovereignty” and because the state regulators had not specifically *ordered* the utility to utilize those termination procedures, the Court concluded that the “State [government] [wa]s not sufficiently connected [to the challenged practices] so as to make [the] respondent’s conduct . . . attributable to the State for purposes of the Fourteenth Amendment.”³⁵

A few years later, the Court reached a similar conclusion in *Blum v. Yaretsky*.³⁶ In that case, a class of Medicaid patients claimed that their constitutional due process rights were violated when the private nursing homes in which they were residing either discharged them or transferred them to nursing homes that provided less intensive medical care without giving them notice or a hearing.³⁷ The Court concluded that the state-action requirement was not satisfied, even though the state not only subsidized the operating and capital costs of the nursing homes involved in the suit and paid the medical expenses of more than ninety percent of the patients in the facilities, but also provided the diagnostic criteria the nursing homes relied on when making the transfer and discharge decisions, *and* used its power of the purse to strongly encourage nursing

³⁴ *Jackson*, 419 U.S. at 345.

³⁵ *Id.* at 353, 358–59.

³⁶ *Blum v. Yaretsky*, 457 U.S. 991 (1982).

³⁷ *Id.* at 993.

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homes to use these diagnostic criteria when deciding what level of patient care was appropriate.³⁸ Because the government did not make the nursing homes execute the discharges and transfers, and because the provision of medical care was not “traditionally the exclusive prerogative of the State,” the Court concluded that the nursing homes were not state actors for Fourteenth Amendment purposes.³⁹

The narrow test of state action that the Court relied upon in *Jackson* and *Blum* remains the prevailing test of state action today. This explains why the plaintiffs in *Halleck* could not satisfy the state-action requirement merely by showing that New York City denied the claim of viewpoint discrimination they raised in the administrative proceedings the city provided to users of the public access channels.⁴⁰ Although this decision provided a “shield of State law” that allowed MNN’s alleged wrongful viewpoint discrimination to continue to occur, this was far from sufficient under contemporary precedents to establish state action. Indeed, plaintiffs did not even bother making this state-action argument at the district or appellate courts, despite the fact that it is an argument that Justice Bradley’s opinion in the *Civil Rights Cases* appears to specifically approve. Nor did the plaintiffs argue that MNN was a state actor because the New York City government had placed its “power[] and prestige,” if not its property, behind the corporation when it designated it the entity responsible

³⁸ *Id.* at 1014–27 (Brennan J., dissenting).

³⁹ *Id.* at 1011–12.

⁴⁰ See Brief for Respondents at 58 n.24, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (No. 17–1702), 2019 WL 259745.

for managing access to public access cable channels in Manhattan.⁴¹

Instead, the plaintiffs made (as they had to) a much narrower argument: namely, that, unlike the electrical utility in *Jackson* or the nursing home in *Blum*, MNN exercised a traditionally and exclusively governmental power and therefore could be “fairly treated” as a state actor even when its actions were not directly controlled or coerced by the government, as was true in this case.⁴² As I explore in the next section, this is a test that is intended to be difficult to satisfy. Nevertheless, the plaintiffs had very good reason to believe that MNN was one of the rare private actors that qualifies as a state actor under this prong of the contemporary state-action test, because of the role it plays in the regulation of public speech under New York state law.

II. The Fight Over What Counts as a Traditional and Exclusive Governmental Function

Since at least its 1972 decision in *Lloyd Corp. v. Tanner*, the Court has recognized that private persons may qualify as state actors when they exercise the traditional and exclusive functions of the government.⁴³ In such cases, it has explained, private entities qualify as state actors because they “st[an]d in

⁴¹ As MNN pointed out, the city did not fund MNN. Its funds were paid for by Time Warner, albeit in a deal that the Manhattan Borough president played a very active role in negotiating. Brief for Petitioners at 7–8, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2018 WL 6503534; see also Brief of the New York County Lawyers Ass’n as Amicus Curiae in Support of Respondents at 21–25, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 913829.

⁴² Plaintiffs did not allege that any government officials approved, or even knew about, MNN’s decision to deny them access to the public access channels until after the fact. Brief for Petitioners at 47–48, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2018 WL 6503534.

⁴³ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) (asserting that a private company that owns and operates a company town “functions as a delegate of the State” because it “perform[s] the full spectrum of municipal powers and st[ands] in the shoes of the State”).

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the shoes of the State"; they act as if they are the government even when they have no ties to the government per se, and do so presumably with the approval of government officials.⁴⁴ It is for this reason that the Court has found it appropriate to impose on private persons who exercise these kinds of functions obligations that otherwise would belong only to government officials or employees, or those who are agents of government in all but name.

Although this prong of the state-action test is a well-established part of Fourteenth Amendment jurisprudence, the Court has never precisely delineated its limits. The Court has noted, for example, that running a town is a traditional and exclusive prerogative of government, but in the early twentieth century there were thousands of privately-owned towns in the United States.⁴⁵ In what way then is the exercise of municipal powers an exclusive prerogative of the state? The Court has not said. Similarly, the Court has identified the holding of elections as a traditional and exclusive government power.⁴⁶ But in fact, primary elections were for most of the nineteenth century not only an integral part of the democratic political process but events that were entirely organized by private political parties, with minimal state intervention or control.⁴⁷ Today, although there is extensive regulation of political primaries, it remains the case that these incredibly important elections are

⁴⁴ *Id.*

⁴⁵ See generally HARDY GREEN, *THE COMPANY TOWN: THE INDUSTRIAL EDENS AND SATANIC MILLS THAT SHAPED THE AMERICAN ECONOMY* (2012); see also *Marsh v. Alabama*, 326 U.S. 501, 508 n.5 (1946) (noting that "[i]n the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922–23.").

⁴⁶ *Halleck*, 139 S. Ct. at 1929.

⁴⁷ See, e.g., Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 876–77 (2000).

typically organized by private parties.⁴⁸ In what sense then is the running of an election *either* a traditional or an exclusive prerogative of the government? The cases provide no answer to these questions.

The lack of clarity that bedevils this area of state-action jurisprudence can be blamed, at least in part, on the fact that the traditional and exclusive prerogatives-of-government prong of the state-action test did not emerge organically from the cases. It was instead invented by the Burger Court as a means of integrating into its new state-action jurisprudence decisions that were handed down during a very different era but that the Court did not simply want to overrule. Indeed, prior to *Lloyd Corp.*, there is no hint whatsoever in the cases that a private entity—the trustees in *Evans*, for example, or the restaurant in *Burton*—had to perform not only a governmental function, but an *exclusively* governmental function in order to qualify on that basis as a state actor. But by reading this requirement back in time, the Court was able to significantly limit the precedential reach of those and other early- and mid-twentieth century state-action cases.

This effort was remarkably successful. Today, *Evans* is frequently cited as an example of the traditional and exclusive prerogatives state-action test—although nothing in the opinion suggests that the Court that decided it believed its logic applied only in contexts where the government delegated to a private party a power that was exclusively governmental.⁴⁹ The reach

⁴⁸ Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 282–83 (2001).

⁴⁹ See, e.g., *Halleck*, 139 S. Ct. at 1929; *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1456 (10th Cir. 1995); *Max v. Republican Comm. of Lancaster Cty.*, 587 F.3d 198, 200 (3d Cir. 2009).

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of many other early- and mid-twentieth century state-action decisions has been similarly cabined as well.⁵⁰

What the Court's rather aggressive re-reading of its earlier precedents has produced, however, is a body of law in which the cases invoked most often as applications of the traditional and exclusive governmental-functions test do not in fact employ its logic, nor necessarily involve private entities that exercised a power that was otherwise only exercised by the government. What this means is that it is often very difficult to reach definite conclusions about whether a particular exercise of power is a traditional and exclusive government function. It is simply too unclear what the test means to conclude much about it definitively.⁵¹

That said, the plaintiffs in *Halleck* had a very good argument for why, notwithstanding the indeterminacy—as well as the narrowness—of the test, MNN did in fact exercise a power that was traditionally and almost exclusively wielded by the government. The plaintiffs' claim was that MNN exercised a traditionally and almost-exclusively governmental power

⁵⁰ As I have noted elsewhere, by re-reading it as an example of the traditional prerogatives-of-government test, the Court has been able to significantly limit the precedential reach of its decision in *Marsh v. Alabama*, 326 U.S. 501 (1946), which struck down the conviction on state trespass grounds of a Jehovah's Witness who attempted to hand out religious materials on the sidewalk of a company-owned town against the wishes of the town's management. Lakier, *Antisubordinating First Amendment*, *supra* note 4, at 2140–43. The Court has similarly limited the reach of *Smith v. Allwright*, which found that the decision by the Democratic Party of Texas to deny African Americans the right to vote in the party primary constituted state action. On its face, the decision appears to stand for the broad proposition that when the state delegates an important public function to a private party, and subsequently “endorses, adopts, and enforces” the discriminatory choices it happens to make, the state action requirement is satisfied. *Smith v. Allwright*, 321 U.S. 649, 663–64 (1944). Today, however, it is generally cited for the much narrower proposition that when private political parties run primary elections, the Fourteenth Amendment applies. *See, e.g., Halleck*, 139 S. Ct. at 1929.

⁵¹ This helps explain why cases that turn on this prong of the state-action test have tended to be so divisive. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 640 (1991); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 549–52 (1987) (Brennan, J., dissenting); *Rendell-Baker v. Kohn*, 457 U.S. 830, 849–50 (1982) (Marshall, J., dissenting).

insofar as its job—the job given it by the New York City government—was to regulate speech in a public forum. The New York legislature created that public forum when it enacted a law requiring all cable companies operating in the state to dedicate one or more of their television channels to “noncommercial use by the public on a first-come, first-served, nondiscriminatory basis.”⁵²

This argument was strong because, as the plaintiffs pointed out, First Amendment cases had long assumed that the job of managing speech in the public forum is a fundamentally governmental responsibility.⁵³ The Court had occasionally recognized—most notably, in *Marsh v. Alabama* in 1946—that it is not always the government that regulates speech in streets and parks and other important sites of public expression. For the most part, however, the Court has assumed that it is the government that is primarily responsible for ensuring that all ideas and viewpoints have equal access to the public forum.⁵⁴ The Court has also assumed—in fact, insisted—that only the government can *create* a public forum by dedicating either real or abstract property to non-discriminatory public use.⁵⁵

The case for treating the regulation of speech in a public forum as a traditional and exclusive government power was, in other words, as strong if not stronger than the case for

⁵² N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4.

⁵³ Brief for Respondents at 54–56, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 259745.

⁵⁴ *Marsh*, 326 U.S. at 507 (holding that residents of a privately-owned town possess essentially the same First Amendment rights of access to its streets, sidewalks, and parks as do residents of a publicly owned town). *But see* Police Dep’t of City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) (assuming that it is the government that guarantees “equality of status in the field of ideas” by “afford[ing] all points of view an equal opportunity to be heard” in the public forum).

⁵⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (defining public forums to include property that has traditionally been used by the public for expressive purposes and “property which the state has opened up for use by the public as a place for expressive activity”).

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treating the regulation of elections or the regulation of a town as traditional and exclusive government power. And indeed, multiple lower courts, prior to *Halleck*, had expressly held that the regulation of speech in a public forum satisfies this prong of the state-action test.⁵⁶

MNN, perhaps for this reason, did not contest the plaintiffs' claim that regulating speech in a public forum was a traditional and exclusive governmental function. What it contested was the claim that New York's public access channels *were* a public forum. MNN argued that because the public channels are privately owned, they cannot, by definition, qualify as a public forum.⁵⁷

But here too, the plaintiffs had a strong argument. Although it is true that the phrasing in the Court's public-forum cases often suggested that public forums only occurred on publicly owned land, at no point prior to *Halleck* had the Court held that they had to be.⁵⁸ Quite the opposite. Perhaps the most important public-forum opinion ever written—Justice Roberts's plurality opinion in *Hague v. CIO*—makes clear that property rules do *not* determine the scope of speakers' First Amendment rights of access to the public forum.⁵⁹ Justice Black's opinion

⁵⁶ *United Church of Christ v. Gateway Econ. Dev. Corp. of Greater Cleveland*, 383 F.3d 449, 454–55 (6th Cir. 2004); *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002); *Pindak v. Dart*, 125 F. Supp. 3d 720, 746 (N.D. Ill. 2015).

⁵⁷ Brief for Petitioners at 30, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2018 WL 6503534.

⁵⁸ *See, e.g., Perry*, 460 U.S. at 45 (defining designated public forums as “public property which the state has opened for use by the public”) (emphasis added).

⁵⁹ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515–16 (1939) (plurality opinion) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”) (emphasis added).

seven years later in *Marsh* asserted the same thing.⁶⁰ And while both of these opinions concerned traditional public forums—forums that have “from time out of mind” been considered important sites of public expression—in later cases, the Court strongly suggested that the same was true of public forums that the state created, or “designated,” for public use.⁶¹ In *U.S. Postal Service v. Council of Greenburgh Civic Associations*, for example, the Court noted that public forums could exist on property that the government either “owned or controlled.”⁶² Similarly, in *Cornelius v. NAACP Legal Defense and Educational Fund*, the Court appeared to take for granted that designated public forums exist when the government dedicates *either* public or private property to public use.⁶³

Two decades ago, in his concurring opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, Justice Kennedy relied on these earlier precedents to make, quite forcefully, the same argument that the *Halleck* plaintiffs now made.⁶⁴ When the government mandates that access to public access television channels be made available to members of the public on a non-discriminatory basis, Justice Kennedy argued, what it creates is a “designated public forum, of unlimited character.”⁶⁵ This is because what the government does, when it demands that “cable operator[s] surrender [their] power to

⁶⁰ *Marsh v. Alabama*, 326 U.S. 501, 507 (1946) (“We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”).

⁶¹ *Hague*, 307 U.S. at 515 (plurality opinion).

⁶² *USPS v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981).

⁶³ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801–05 (1985).

⁶⁴ *Denver Area Edu. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 791–94 (1996) (Kennedy, J., concurring).

⁶⁵ *Id.* at 791.

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exclude” speakers from public access channels is to “dedicate [that] property to public expressive activities.”⁶⁶ This act, Justice Kennedy insisted, inevitably has constitutional implications, even if it is not constitutionally compelled.⁶⁷

Although Justice Ginsburg was the only member of the Court to join Justice Kennedy’s opinion, the four members of the Court who signed on to the plurality opinion in *Denver Area* made clear that they did not necessarily disagree with the conclusion Justice Kennedy reached. They merely deemed it imprudent to reach a definitive conclusion about the constitutional status of public access cable channels at that time.⁶⁸ Only Justice Thomas (joined by Justice Scalia) disagreed. In a separate concurrence, he argued, contra *Hague*, that title does in fact determine First Amendment rights of access to publicly-important speech forums.⁶⁹

There was thus good, although certainly not uncomplicated, precedential support for the conclusion that the channels that MNN managed were public speech forums even though they were privately owned. Just like other designated public forums of “unlimited character,” the public access channels at issue in *Halleck* were clearly dedicated by the New York legislature to non-discriminatory public use.

There was, moreover, no principled reason to treat the public access channels differently than other kinds of property that the government dedicated to public use because they

⁶⁶ *Id.* at 794.

⁶⁷ *Id.* (“When property has been dedicated to public expressive activities, by tradition or government designation, access is protected by the First Amendment. Regulations of speech content in a designated public forum, whether of limited or unlimited character, are ‘subject to the highest scrutiny’ and ‘survive only if they are narrowly drawn to achieve a compelling state interest.’”) (quoting *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992)).

⁶⁸ *Id.* at 742 (plurality opinion) (“We . . . think it premature to . . . decid[e] . . . the extent to which private property can be designated a public forum.”).

⁶⁹ *Id.* at 827–31 (Thomas, J., concurring).

happened to be privately owned. Doing so was not necessary to protect the property rights of their owners. In earlier cases, the Court had invoked the constitutional importance of private property rights to justify denying public forum status to privately owned shopping malls.⁷⁰ Treating privately owned malls as public forums would result, the Court argued, in “an unwarranted infringement of property rights” by requiring the mall owner to give up their right to exclude speakers from their property, even when those speakers possessed “adequate alternative avenues of communication.”⁷¹ In this case, however, the conclusion that the public access channels were public forums would not require the cable companies to give up any property rights they previously possessed, even assuming that those who sought to use the public-access cable channels had adequate alternative means of communicating their message to the public (a by-no-means obvious assumption). This is because, unlike the shopping mall owners, the cable companies are already required by state law to provide rights of access to their property. Construing the public access channels as public forums would therefore do nothing more than vest with constitutional status the diminution in property rights that companies like Time Warner already agreed to when they signed franchise agreements with local governments that complied—as they had to—with the 1990 law. It would not take from them any property right they actually had the right to exercise.⁷²

⁷⁰ *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972).

⁷¹ *Lloyd Corp.*, 407 U.S. at 567.

⁷² Justice White, who dissented from an earlier opinion in which the Court concluded that a privately owned shopping mall *was* a public forum, noted specifically that, had the relevant law required public right of access to the property—as it does in New York—his view of the constitutional status of the property might have changed for this reason. See *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 340 (1968) (White, J., dissenting).

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Nor would such a conclusion impede the ability of the cable companies to decide what kinds of speech to host, or not to host, on their property. In earlier cases, the Court had made clear that the First Amendment strongly protects the ability of property owners to make editorial decisions of this kind.⁷³ In this case, however, the cable companies had no editorial freedom to speak of—it was foreclosed to them by the 1990 law and by the franchise agreements they signed to operate in New York.⁷⁴ This meant that the only expressive interests at stake in the case were those of the plaintiffs and of speakers like them who wished to access the public access channels. Obviously, those interests would not be threatened were the Court to find that the public-access channel constituted a public forum. To the contrary: They would be better protected than they previously were, by allowing those who were improperly denied access to the channels to enforce their rights in federal court, as well as in the administrative proceedings that state law happened to provide (and that the state could take away at any moment). First Amendment interests—in particular, the strong First Amendment interest in protecting a “diverse and antagonistic” public sphere—thus *supported* the conclusion that the private property at issue in this case was a public forum, in marked contrast to earlier cases.⁷⁵

⁷³ See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁷⁴ N.Y. COMP. CODES R. & REGS. tit. 16, §§ 895.4(c)(4), (c)(8); see also *id.* § 895.4(c)(3) (requiring the “entity responsible for administering and operating the public access channel [to] provide notice to the general public of the opportunity to use such channel . . . includ[ing] the name, address and telephone number of the entity to be contacted for use of the channel”).

⁷⁵ See *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (noting that the “[First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public” and concluding that “[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests”).

Neither MNN’s property or speech interests would be threatened if it were treated as a state actor, nor would any of the interests the Court had invoked in recent decades to justify its narrow state-action rule. The Court had argued that construing the scope of state action narrowly helps “preserve an area of individual freedom by limiting the reach of federal law.”⁷⁶ It also “avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed.”⁷⁷

In this case, however, treating MNN as a private actor would not “preserve an area of individual freedom.” This is because, as the previous paragraphs make clear, under New York law MNN possessed virtually no individual freedom to speak of when it came to deciding who could use the public access channels it managed. It was instead obligated, by both its contractual agreement with Time Warner and by New York law, to provide first-come, first-served access. Of course, MNN possessed some discretion in how it carried out these statutory and contractual duties. Its agreement with Time Warner specifically vested the corporation with the power to make reasonable rules and regulations for providing open and non-discriminatory access to the channels it managed.⁷⁸ But those rules and regulations served merely as the means to a government-mandated end that it was not within MNN’s power to reject or amend. This utterly distinguishes the facts of the case from earlier cases, such as *Jackson* and *Blum*—cases in which the Court concluded that the private entities were not

⁷⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 191 (1988)).

⁷⁷ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

⁷⁸ *See Grant and Use Agreement Between Time Warner Entertainment Company L.P. and Manhattan Community Access Corporation d/b/a Manhattan Neighborhood Network* § 3.3.

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state actors in large part because they furthered ends that were a product of private judgment and volition, not government mandate.⁷⁹

Nor would denying MNN state-actor status prevent “the State, its agencies or officials [from being held] responsib[le] for conduct for which they cannot fairly be blamed.” As a practical matter, there was no chance that any state agency or officials *would* be held responsible for MNN’s conduct, no matter what the Court concluded about the constitutional status of the corporation. This is because, although the plaintiffs originally named New York City as a defendant in their suit, the district court dismissed the city from the case after finding that the plaintiffs had not alleged a sufficiently direct link between a municipal policy and MNN’s allegedly unconstitutional acts to render it liable under 42 U.S.C. § 1983, and the Second Circuit affirmed this portion of the district court decision.⁸⁰ The plaintiffs did not challenge this aspect of the lower courts’ rulings in their brief to the Court. As a result, the only entity that could be held responsible for MNN’s allegedly unconstitutional conduct was MNN.

Even assuming that the municipal defendants were still on the hook—or could be, in another case in which the municipal liability rules were somehow different—it is very difficult to see why it would be unfair to hold the city responsible for the

⁷⁹ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (concluding that the pro forma approval by the regulatory agency of the electrical utility’s decision to terminate service did not transform that decision into state action because, although the utility “exercise[d a] choice allowed [it] by state law . . . the initiative c[a]me[] from it and not from the State”); *Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (concluding that the transfer and discharge decisions made by the nursing homes were not state action because they “ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State”).

⁸⁰ *Halleck v. City of New York*, 224 F. Supp. 3d 238, 242–43 (S.D.N.Y. 2016); *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 308 (2d Cir. 2018) (relying on *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978), to dismiss the city from the case).

unconstitutional conduct of an entity to whom it delegated a responsibility that was otherwise imposed on it by state law.⁸¹ After all, had the Manhattan Borough president not vested MNN or some other private organization with the responsibility of managing the public access channels, that responsibility would have fallen on city officials, and the decisions those officials made in carrying out this responsibility would certainly have been considered state action under prevailing rules.⁸² What then does it matter that in one case the wrongdoers are government employees and in the other case private citizens who act in its stead? In both cases, the wrongdoer exercises power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁸³ Certainly the early twentieth century cases strongly suggest that we should be wary of any notion of fairness that allows government officials to too easily evade their constitutional non-discrimination obligations by handing off important government functions to private actors.⁸⁴

The constitutional calculus therefore appeared in this case (and quite unusually, given the narrowness of contemporary state-action rules) to strongly support the conclusion that MNN was a state, not a private actor. Indeed, the only constitutional interest that pushed to any degree in the other direction was the constitutional interest in federalism. This is because recognizing MNN as a state actor would inevitably

⁸¹ N.Y. COMP. CODES R. & REGS. tit. 16, §§ 895.4(c)(4), (c)(1) (imposing on the municipality the responsibility of designating the entity responsible for operating and administering public access channels in its jurisdiction).

⁸² See *West v. Atkins*, 487 U.S. 42, 49–50 (1988) (reaffirming that “state employment is generally sufficient to render the defendant a state actor” even when “he abuses the position given to him by the State”) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982)).

⁸³ *United States v. Classic*, 313 U.S. 299, 326 (1941).

⁸⁴ See, e.g., *Terry v. Adams*, 345 U.S. 461, 469 (1953); *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

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transfer power from state to federal institutions by divesting state agencies—in particular, New York’s Public Service Commission—of the exclusive authority they previously enjoyed to determine the legality of the corporation’s conduct.⁸⁵ The threat to federalist values was a relatively weak one, however. After all, the non-discrimination obligations that state law imposed on MNN were essentially the same as the non-discrimination obligations that the First Amendment imposed. By asking the federal courts to intervene, the *Halleck* plaintiffs were not therefore attempting to *undermine* the New York legislature’s decision to create a space for public expression on cable television that was open to all voices and viewpoints; they were merely trying to enforce that decision more effectively.

On the whole, then, both precedent and policy appeared to strongly support the conclusion that the public access channels in New York were a public forum, and that MNN was, for that reason, a state actor. And yet, despite this fact, the five conservative members of the Court unequivocally rejected the notion that MNN was a state actor. In the next Section, I explore the rather unsatisfying arguments Justice Kavanaugh made in his majority opinion to explain the majority’s holding, the dissent’s response, and the implications of the decision going forward.

III. The Opinion and Its Implications

In his majority opinion in *Halleck*, Justice Kavanaugh persuasively defended against an argument that the plaintiffs simply did not make. He argued that MNN could not be

⁸⁵ Brief for Petitioners at 59–60, *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019) (No. 17–1702), 2018 WL 6503534 (describing the role played by the Public Service Commission).

considered a state actor merely because it regulated speech on private property that had been opened up to public expressive activity because if it were, by implication, “all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum.”⁸⁶ The result, Justice Kavanaugh argued, would be a less interesting and robust marketplace of ideas, not a richer one.⁸⁷ Hence, Justice Kavanaugh concluded, MNN should be understood, for constitutional purposes, to be a heavily regulated, but nevertheless private actor—just like the electrical utility in *Jackson* or the nursing homes in *Blum*.⁸⁸

Justice Kavanaugh is absolutely correct that an interpretation of the state-action requirement that imposed on every private property owner the same non-discrimination obligations imposed on the government when it regulates the public forum would undermine the vitality of the marketplace of ideas by preventing those who run websites, or host political events, or otherwise use their property to promote some ideas but not others, from doing so. The Court has long recognized, as Fred Schauer notes, that a “private person participates in [the marketplace of ideas] when he contributes the use of his property to the proponents of certain ideas; that is an act of advocacy as surely as if he were disseminating the ideas himself.”⁸⁹ Construing the state-action requirement to prevent

⁸⁶ *Halleck*, 139 S. Ct. at 1930–31.

⁸⁷ *Id.* at 1931 (“Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.”).

⁸⁸ *Id.* at 1932 (“This case closely parallels *Jackson*. Like the electric utility in *Jackson*, MNN is ‘a heavily regulated, privately owned’ entity. As in *Jackson*, the regulations do not transform the regulated private entity into a state actor.”) (citations omitted).

⁸⁹ Frederick F. Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 449 (1977).

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all viewpoint discrimination in the use of private property would therefore, as Justice Kavanaugh argued, subvert seven decades or more of free speech jurisprudence, to bad effect.

But this, quite patently, is *not* the interpretation of the state-action requirement that the plaintiffs in *Halleck* were advocating for, or that recognizing MNN as a state actor required. The plaintiffs' argument was a much narrower one: namely, that MNN was a state actor not just because it regulated speech on property that was open to some amount of public expressive activity. MNN was a state actor because it regulated speech on property that the *government* had opened to public expressive activity and opened to such a degree that the owner of that property lost virtually all ability to make editorial decisions about its use.⁹⁰

As a result, a finding for the plaintiffs in the case would not require crafting a rule that imposed First Amendment non-discrimination obligations on all private property owners who opened their property up to others' speech. It wouldn't even require imposing First Amendment obligations on the private entities that manage public access cable television in the vast majority of states that do not deprive cable companies of all power to decide what can and cannot be broadcast on the public access channels they own. Certainly, the plaintiffs took pains in their brief to limit the implications of their argument to New York and to the tiny handful of other states that, like New York, prohibit those who own and operate public access channels from exercising any meaningful control over the content of those channels.⁹¹ Nevertheless, at no point in his

⁹⁰ Brief for Respondents at 30, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 259745.

⁹¹ *Id.* at 30–31 (identifying only Hawaii and Rhode Island as states that have “comparable first-come, first-served laws” and that consequently, like New York, “render [public access] channels public forums”).

opinion did Justice Kavanaugh engage the narrow argument that the plaintiffs made. The closest he came was to insist that the mere fact that MNN was a heavily regulated entity did not transform it into a state actor under contemporary precedents.⁹² True enough, but of course the plaintiffs were not arguing that MNN was a state actor because it was heavily regulated. They were arguing that MNN was a state actor because the ends it furthered were, unlike the electrical utility in *Jackson*, not its own.⁹³

The fact that Justice Kavanaugh spent his entire opinion passionately defending against an argument that the plaintiffs did not make, and warning about consequences of the plaintiffs' argument that were extremely unlikely to come to pass, makes it difficult to know why the majority actually rejected the argument that the plaintiffs did make. It is virtually impossible to believe that the majority simply misunderstood it. Both during oral argument and in their written briefs, the plaintiffs—to their credit, given the difficult doctrinal territory in which they operated—went to great lengths to make clear to the Court how narrow their state action argument actually was.⁹⁴

One possible explanation for the majority's total failure to engage with the argument that the plaintiffs did in fact make is that it simply did not believe that it could, or in practice, would, have as limited an impact as plaintiffs claimed. The majority may have simply disbelieved that a meaningful

⁹² *Halleck*, 139 S. Ct. at 1932.

⁹³ Brief for Respondents at 36, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 259745. (arguing that MNN's job is to "administer[] a publicly-owned right to public access channels").

⁹⁴ See e.g., Transcript of Oral Argument at 46–49, *Halleck*, 139 S. Ct. at 1921 (arguing that if MNN had "discretion so it can exercise editorial control, then it would not be [the administrator of] a public forum"); Brief for Respondents at 30–32, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 259745 (making the same point).

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distinction either could or would be drawn in future cases between regulatory regimes like the one in New York, which require that those who regulate public access channels provide first-come, first-served access to members of the public, and regulatory regimes like the one in California, which grant the private bodies that regulate public access television significant editorial discretion.⁹⁵

This explanation is far from satisfying, however, insofar as the distinction that the plaintiffs drew—between public access regulatory regimes that require first-come, first-served access and public access regulatory regimes that do not—seems pretty clear-cut and therefore easy for courts to manage. And if it were in fact worried about the slippery slope, the majority could have written an opinion that recognized MNN as a state actor in such a way as to make clear the limited reach of its holding. It did not. Instead, Justice Kavanaugh wrote, and the other members of the majority signed, an opinion that strongly suggests that public forums can *never* exist on property that is privately owned, except when the private entity that owns that property exercises the full panoply of municipal functions and, for that reason, stands in the shoes of the State.⁹⁶ This suggests that something deeper than a fear of the slippery slope must have been driving the majority. But what?

⁹⁵ See Brief for Respondents at 31, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2019 WL 259745 (describing the California regime).

⁹⁶ This is what Justice Kavanaugh appears to have meant by “reaffirm[ing the] holding” in *Hudgens v. NLRB.* *Halleck*, 139 S. Ct. at 1931. *Hudgens* did not hold that public forums could never exist on private property. It did hold, however, that First Amendment constraints could not apply to the owner of a shopping mall because the owner of the mall did not “perform[] the full spectrum of municipal powers” and for that reason “st[an]d in the shoes of the State.” *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976) (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972)). See also *Halleck*, 139 S. Ct. at 1930 (“[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor . . . The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.”).

One possibility is that the Court failed to engage with the plaintiffs' argument because of its underlying skepticism towards the doctrinal framework that the plaintiffs relied on when making that argument—namely, the traditional and exclusive government functions prong of the state-action test. As I noted in the previous Section, the test was invented in the early 1970s as a means of making sense of New Deal precedents such as *Marsh v. Alabama* that the Rehnquist Court did not want to overturn but that did not easily fit into its new state-action jurisprudence. Since then, the Court has recognized only one new traditional and exclusive governmental function—the use of a peremptory challenge by a private party in a civil suit—and that was quite a long time ago.⁹⁷ The current Supreme Court majority may simply not believe that private entities can ever be state actors except when they are directly controlled by or composed of government actors or, perhaps, exercise the “the full spectrum of municipal powers” like the corporation in *Marsh*. The majority may nevertheless have found it simpler, or more expedient, to reject the plaintiffs' argument for failing to satisfy the traditional and exclusive governmental functions test than to have to revise the numerous opinions in which it had insisted that, yes, private entities can be state actors even when they are not directly connected to the government and even when they do not exercise the full spectrum of municipal powers, when they perform a function that is traditionally associated with sovereignty.

What the opinion in *Halleck* may reflect, in other words, is the majority's exceedingly narrow view of what was already

⁹⁷ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991). It is worth noting that Justice Scalia, Chief Justice Rehnquist, and Justice O'Connor dissented from the majority opinion in *Edmonson* because they did not believe that the exercise of a peremptory challenge was a traditional and exclusive government function. *Id.* at 640 (O'Connor, J., dissenting).

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an exceedingly narrow state-action test and, underlying this, its very rigid and formalistic view of the public/private divide. If so, this is very much in keeping with the formalism that characterizes a great deal of the Roberts Court's constitutional jurisprudence.⁹⁸

Alternatively, the majority's failure to pay any attention to the distinction the plaintiffs drew between public access channels in states like New York and public access channels in states like California may reflect its underlying skepticism towards the constitutionality of regulatory schemes like the one in New York. The Internet and Television Association of America ("NCTA"), the principle trade association for cable television companies in the United States, filed an amicus brief in *Halleck* in which they urged the Court to use the case as an opportunity to strike down, on free speech grounds, the New York statutory provisions that mandated that cable companies open a portion of their property up to public access.⁹⁹ NCTA argued that these laws violate the First Amendment rights of cable operators by requiring them to relinquish control over the expressive uses to which their property was put—indeed, by requiring them to “retransmit speech with which they may vehemently disagree.”¹⁰⁰ Essentially, the NCTA asked the Court to overrule its 1994 decision in *Turner v. FCC*, which Justice Kennedy authored and which upheld the constitutionality of a federal law that, like the New York law, required cable

⁹⁸ For more discussion of Roberts Court formalism, see Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343 (2014); Jean Galbraith, *The Roberts Court and the Brink*, 109 AM. SOC'Y INT'L L. PROC. 46 (2015); Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS J. 1173, 1204 (2007).

⁹⁹ Amicus Curiae Brief of NCTA In Support of Neither Party, *Halleck*, 139 S. Ct. at 1921 (No. 17–1702), 2018 WL 6650091.

¹⁰⁰ *Id.* at 3.

companies to devote a limited number of channels to expressive uses they did not control.¹⁰¹

The Court did not in fact end up ruling on the constitutionality of New York’s public access cable system. Its holding nevertheless preserved the possibility of a later, more squarely-presented challenge to the constitutionality of those regulations. A contrary holding—one that found that the public access channels in New York were a public forum, to which speakers had a constitutionally-protected right of access—would have largely foreclosed such a challenge, by validating the regulatory framework that created that public forum. One can therefore read Justice Kavanaugh’s stirring invocation in his opinion of the importance of preserving a “robust sphere of individual liberty” in which private persons are free to make choices for themselves as a paean to a freedom that under current New York law does not exist, but that the conservative majority on the Court might someday soon bring into being by preventing governments like New York from forcing private property owners that happen to own important sites of public expression from having to devote a portion of their property to non-discriminatory public use.¹⁰² Either way, the opinion demonstrates, rather starkly, the Roberts Court’s tendency to value property over speech interests, *even when those property interests are little more than formalities*.

In her dissenting opinion, Justice Sotomayor attempted to appeal to the property-protective tendencies of the majority by arguing that, in this instance, there was no conflict between speech and property rights because under New York law the public access cable channels are not in fact solely the

¹⁰¹ *Id.* at 12–13 (arguing that changes in the nature of the media environment meant that the rationale the Court relied on in *Turner* “no longer applies”).

¹⁰² *Halleck*, 139 S. Ct. at 1934.

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property of the cable companies. Instead, Justice Sotomayor argued, New York law creates a kind of public easement to the public access cable channels that vests the government with a significant property interest in their use.¹⁰³ The result, she claimed, was that even if one believes, as Justice Thomas argued in his *Denver Area* concurrence, that public forums can only exist on property over which the government “has taken a cognizable property interest,” the public access cable channels still qualified.¹⁰⁴

This argument entirely failed to convince the five justices who joined the majority opinion, even if it was essentially the same argument that Justice Kennedy made in his concurring opinion in *Denver Area*.¹⁰⁵ The fact that the city lacked any “formal easement or other [recognized] property interest in [the cable access] channels,” meant, Justice Kavanaugh concluded, that the cable channels were private property and MNN a private actor.¹⁰⁶ Formalities mattered, in other words, to the majority, even if Justice Kavanaugh’s opinion did not bother to explain why.

In its unequivocal rejection of an argument that Justice Kennedy first made twenty years earlier, the opinion also provides powerful evidence that Justice Kavanaugh’s addition to the Court, and Justice Kennedy’s departure from it, will have a significant impact on the shape of the Court’s free speech

¹⁰³ *Id.* at 1937–39 (Sotomayor, J., dissenting).

¹⁰⁴ *Id.* at 1939; *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 829 (1996) (Thomas, J., concurring).

¹⁰⁵ See *Denver Area*, 518 U.S. at 793–94 (Kennedy, J., concurring) (arguing that local governments have a property interest in public access channels akin to an easement and that “no particular formalities” are required to create an easement, and that public access channels can therefore be understood to involve “a local government’s dedication of its own property interest to speech by members of the public”). See *Halleck*, 139 S. Ct. at 1937 (Sotomayor, J., dissenting) (quoting copiously from Justice Kennedy’s opinion in *Denver Area*, 518 U.S. at 793–94).

¹⁰⁶ *Halleck*, 139 S. Ct. at 1933.

jurisprudence. Indeed, it is very difficult to see how, were Justice Kennedy still on the Court, he would have agreed with the four other conservative members that MNN is not a state actor, given his opinion in *Denver Area*. It is exceedingly likely, in other words, that if Justice Kennedy were still on the Court, the opinion would have come out the other way.

As a practical matter, this fact is not terribly significant—except, of course, to the *Halleck* plaintiffs. Because the plaintiffs’ state-action argument was so narrow, even had the Court been persuaded that MNN was a state actor, it is unlikely that its decision would have impacted many other cases. How often, after all, do users of public access channels in New York—or Hawaii or Rhode Island or the very few other states that have a similar regulatory scheme to the one in New York—raise constitutional challenges to their regulation?

As evidence of the direction of the Court’s free speech jurisprudence, however, the Court’s decisive rejection of the argument that Justice Kennedy made in his *Denver Area* opinion is significant. What it suggests is that the Court’s tendency in recent years to conflate property and speech interests is only going to intensify now that the one member of the conservative majority who believed that free speech interests sometimes had to trump private property rights is no longer on the Court.

In this respect, it is worthwhile to compare Justice Kennedy’s majority opinion in *Turner v. FCC* to Justice Kavanaugh’s opinion in *Halleck*. In *Turner*, Justice Kennedy argued that a federal law that required cable operators to devote a portion of their channels to the transmission of local broadcast television was constitutional because it furthered important free speech interests. After noting that, in most locales, cable operators possess “bottleneck, or gatekeeper,

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control over most (if not all) of the television programming that is channeled into the subscriber's home," Kennedy asserted:

The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.¹⁰⁷

Compare this to Justice Kavanaugh's assertion, in the second-to-last paragraph of his opinion in *Halleck* that "[i]t is sometimes said that the bigger the government, the smaller the individual," and that interpreting the state-action doctrine as plaintiffs argued it should be interpreted would only "expand governmental control while restricting individual liberty and private enterprise." Justice Kennedy's assessment reflects an awareness of the fact that "big government" can sometimes promote individual liberty, by restricting the abuse of private power. Justice Kavanaugh's assertion, like the rest of his opinion in *Halleck*, quite plainly does not.

For those who believe that the First Amendment guarantees—to both the propertied and the propertyless alike—a right to participate in a public sphere that is genuinely diverse and inclusive, the gulf between Justice Kennedy's opinion in *Turner* and Justice Kavanaugh's opinion in *Halleck* should be deeply troubling. Certainly, the decision in *Halleck* should remind us all of how very far free speech jurisprudence has come from the days when the Court insisted that the

¹⁰⁷ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 656–57 (1994).

constitutional rights “of press and religion . . . occupy a preferred position” when balanced against “the Constitutional rights of owners of property.”¹⁰⁸ These days, *Halleck* suggests, property interests occupy a preferred position when compared to speech interests, even when those rights are of the weakest, thinnest sort.

What this means is that, far from being the most speech-protective Court in history—or even in a generation—the protection that the Roberts Court provides to speech, unclothed from property, is paltry indeed. *Halleck* is a minor case, but its implications should be taken seriously.

¹⁰⁸ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946).

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***Kisor* and the Piecemeal Dismantling of the Modern Administrative State**

Steven D. Schwinn*

The administrative state is under attack. We see this nearly every day in a president who regularly and brazenly slams the administrative state and administrative actors, including his own appointees. We see it in an administration that seems to work overtime to undermine and obstruct the expert work of administrative agencies and their longtime professionals. And we see it from a White House that moves at every chance to consolidate executive power and to politicize the agencies, putting politics above the agencies' law-enforcement priorities.

In addition to these blatant *political* attacks, the administrative state is under assault in another, less palpable way: It is under *constitutional* attack. While perhaps less public than the political attacks, the constitutional assault on the administrative state is far more dangerous. That's because a constitutional assault could produce lasting, even permanent, changes to the bureaucracy—changes that could bring the administrative state directly and solely under the political wing of the White House, thus threatening agency independence, agency expertise, and, ultimately, the agencies' apolitical enforcement of the laws.

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The constitutional assault on the administrative state comes in four parts. First, opponents attack independent agencies. Drawing on Justice Scalia's sole dissent in *Morrison v. Olson*,¹ opponents of the administrative state increasingly argue that any measure of independence within the executive branch impermissibly encroaches upon the president's unitary executive power in violation of the separation of powers. This argument is gaining traction, and the Court may soon reevaluate its holding in *Morrison*. If so, this could deal a significant blow to independence within the executive branch.

Second, opponents attack broad congressional delegations of power to administrative agencies under the nondelegation doctrine. The Court's current approach to the nondelegation doctrine allows nearly any congressional delegation, no matter how broad, to stand up to a separation-of-powers challenge. This approach empowers the administrative state, because it allows agencies to regulate under even the most sweeping congressional delegations. In this way, it also recognizes the comparative advantage that expert agencies have in regulating the details in any given policy area.

Just this Term, the Court rebuffed a challenge to a congressional delegation under the nondelegation doctrine.² But three justices—Chief Justice Roberts and Justices Thomas and Gorsuch—argued that the act at issue *did* delegate too much authority to an agency,³ and a fourth, Justice Alito, indicated that he would be willing to reevaluate the Court's hands-off approach to the nondelegation doctrine if a majority

¹ *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

² *Gundy v. United States*, 139 S. Ct. 2116 (2019). For analysis of *Gundy*, see William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, AM. CONST. SOC'Y S. CT. REV. 211 (2019).

³ *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

on the Court were willing.⁴ Justice Kavanaugh could well provide a fifth vote for that majority. (Justice Kavanaugh did not participate in the decision because he was not confirmed in time for oral arguments.) If so, we can expect a revitalized nondelegation doctrine, restricting agencies' powers by limiting their ability to regulate under broad congressional delegations.

Third, opponents attack agencies' expansive authority to interpret vague laws and the courts' deference to the agencies' interpretations when they do. Under "*Chevron* deference," courts defer to an agency's interpretation of a vague statute.⁵ Restricting *Chevron* deference would therefore deal a sharp blow to agencies' regulatory powers (and at the same time enhance the powers of the courts). Challenges to *Chevron* deference are gaining steam, with a majority on the Court now apparently open to reconsidering *Chevron*.

Finally, opponents attack agencies' expansive authority to interpret their own vague regulations, and the courts' deference to the agencies' interpretations when they do. This is called "*Auer* deference."⁶ And it came before the Court this Term.

To appreciate the importance of *Auer* deference, it helps to understand that federal administrative agencies issue thousands of regulations on matters that span a truly mind-boggling range of topics. As a result, agency regulations can be highly specialized, obscure, and even arcane. They can also be vague. When courts are called upon to interpret and apply those regulations, they sometimes understandably have a hard time.

⁴ *Id.* (Alito, J., concurring).

⁵ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁶ *Auer v. Robbins*, 519 U.S. 452 (1997).

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Auer deference can help. Under *Auer* deference, a court defers to an agency's interpretation of its own ambiguous regulations unless that interpretation is "plainly erroneous or inconsistent with the regulation."⁷ It's based on the simple idea that an administrative agency is best suited to interpret its own regulations. That's so for two reasons. First, the agency wrote its own regulations and, as author, has the best insight into what those regulations mean. Next, the agency has experience and expertise that others (in particular, judges) don't have, and that experience and expertise can often inform an interpretation of otherwise ambiguous regulations. As Justice Breyer wryly observed during oral argument in *Kisor*, the Court in a prior case had "deferred to the understanding of the FDA that a particular compound should be treated as a single new active moiety, which consists of a previously approved moiety, joined by a non-ester covalent bond to a lysine group. Do you know how much I know about that?"⁸

Auer deference is not only an important tool to help the courts interpret and apply ambiguous agency regulations. It's also a powerful tool for the agencies themselves to define those regulations. In other words, *Auer* deference empowers the expert agencies in enforcing the law.

But that empowerment was threatened when the Court took up *Kisor v. Wilkie*.⁹ In that case, opponents of *Auer* deference argued that *Auer* ought to be overturned. The Court rejected that challenge, and *Auer* survived—but just barely, and probably not for long. In short, the Court held on to a scaled-back *Auer* deference under *stare decisis*. But a

⁷ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

⁸ Transcript of Oral Argument at 10, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–15).

⁹ *Kisor*, 139 S. Ct. 2400.

majority of justices couldn't agree on much else. Coming out of *Kisor*, we now have four justices (Justices Ginsburg, Breyer, Sotomayor, and Kagan) who think that *Auer* deference is consistent with the Administrative Procedure Act (APA) and the separation of powers, and four (Justices Thomas, Alito, Gorsuch, and Kavanaugh) who think that it violates the APA and the separation of powers. The fifth, Chief Justice Roberts, merely said that the difference between the two camps was not that great, suggesting that there's little left to *Auer* deference, that it may as well be overruled, and that the Court will apply it sparingly, if at all, in the future. As Justice Gorsuch put it, "today's decision is more a stay of execution than a pardon."¹⁰

This doesn't bode well for the future of *Auer* deference. And, along with the other three lines of attack, it doesn't bode well for the future of the administrative state.

This article will first trace the history of *Auer* deference. Next, it will describe some of the criticisms of *Auer* deference and how we arrived at *Kisor's* challenge to it. It will then examine the highly fractured *Kisor* ruling and try to make sense of the various opinions. Finally, this article will offer some predictions about what *Kisor* could mean for the future of *Auer* deference, and for the future of the administrative state.

I. The History of *Auer* Deference

The idea that the courts should defer to an agency's interpretation of its own regulations traces back to the late

¹⁰ *Id.* at 2425 (Gorsuch, J., concurring).

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nineteenth century, and maybe even earlier.¹¹ For example, in a case that many point to as the one setting this principle, the Court in *United States v. Eaton* appeared to defer to an agency's interpretation of its own regulation, even if only as an alternative basis for affirming the agency's interpretation, in a dispute over the emergency appointment of a vice consul of Siam by the consul general.¹² A State Department regulation authorized "the diplomatic representative" to appoint an emergency vice consul when the incumbent could not fulfill the duties of the office,¹³ as here. But there was a glitch: The consul general himself had obtained a leave of absence from the president because he was sick and unable to discharge his duties.¹⁴ So the question arose: If the consul general was unable to discharge his duties, did the regulations authorize him to appoint a vice consul (which, of course, was an exercise of his duties)? The State Department itself impliedly answered yes, by recognizing the appointment of the vice consul.

The Court in *Eaton* agreed. It surveyed the purpose and text of the regulation and concluded that the regulation authorized the consul general to make the emergency appointment.¹⁵ The Court then wrote, "The interpretation given to the regulations by the department charged with their execution . . . is entitled

¹¹ See Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Neither Party at 8–9, *Kisor*, 139 S. Ct. 2400 (No. 18–15) (tracing judicial deference to an agency's interpretation of its own regulations even earlier, to the early- and mid-nineteenth century). Justice Sotomayor at oral argument pointed to "cases in the early 1800s" as the starting point. Transcript of Oral Argument at 23–25, *Kisor*, 139 S. Ct. 2400 (No. 18–15). At least four justices on the Court dispute this. In *Kisor*, Justice Gorsuch, joined by Justices Thomas, Alito, and Kavanaugh, wrote that "*Eaton* . . . simply followed the well-worn path of acknowledging that an agency's interpretation of a regulation can supply evidence of its meaning." *Kisor*, 139 S. Ct. at 2427 (Gorsuch, J., concurring).

¹² *United States v. Eaton*, 169 U.S. 331 (1898).

¹³ *Id.* at 338.

¹⁴ *Id.* at 340.

¹⁵ *Id.* at 337–42.

to the greatest weight, and we see no reason in this case to doubt its correctness.”¹⁶

The Court refined its approach to agency deference in 1944, in *Skidmore v. Swift & Co.*¹⁷ In that case, seven employees of the Swift & Company packing plant sought to recover overtime pay for staying on premises after hours, in the company’s fire hall or within hailing distance, several nights a week in order to answer fire alarms.¹⁸ The Fair Labor Standards Act (FLSA) required employers to pay their employees overtime pay for overtime work, but it did not say whether on-call duties, like those of the plaintiffs, counted as overtime work. In resolving the question, the Court looked to the agency’s interpretation of the FLSA, in an interpretative bulletin and the agency’s amicus brief in the case.¹⁹ In language worth quoting at length—and notably bereft of citation—the Court wrote that agency interpretations

are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court’s processes, as an authoritative pronouncement of a higher court might do. But the Administrator’s policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy

¹⁶ *Id.* at 342–43.

¹⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁸ *Id.* at 135.

¹⁹ *Id.* at 138.

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which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.²⁰

Today, we call this sliding-scale deference to an agency's interpretation "*Skidmore* deference."

The Court once again refined its approach to deference the following Term, and this time took it in a new direction,

²⁰ *Id.* at 139–40. *Skidmore* isn't the only case in this post-*Eaton* period in which the Court applied deference to an agency's interpretation of its own regulations. See Brief of Administrative Law Scholars in Support of Affirmance at 5 n.3, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–15).

in *Bowles v. Seminole Rock & Sand Co.*²¹ In *Seminole Rock*, the administrator of the Office of Price Administration brought a claim against Seminole Rock & Sand Company to enjoin it from selling crushed stone in violation of Maximum Price Regulation No. 188.²² That regulation created a price ceiling for certain building materials and consumer goods as part of a larger regulatory effort to set maximum prices across the nation's economy in order "to combat wartime inflation."²³ In particular, the regulation provided that "the maximum price for any article which was delivered or offered for delivery in March, 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in [Section] 1499.163) for the article."²⁴ Section 1499.163(a)(2) in turn defined the "[h]ighest price charged during March, 1942" as "[t]he highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March, 1942"²⁵ The administrator argued that the provision applied to Seminole Rock, because Seminole Rock *actually delivered* covered articles in March 1942. Seminole Rock, on the other hand, argued that the regulation didn't apply, because it didn't *charge* for those articles in March 1942.

The Court first noted the significance of the agency's interpretation. In a brief passage, without citation or meaningful analysis, the Court explained:

²¹ *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Importantly, *Seminole Rock* did not cite *Skidmore*, but was nevertheless supported by a substantial body of precedent. See Brief of Administrative Law Scholars in Support of Affirmance at 5 n.3, *Kisor*, 139 S. Ct. 2400 (No. 18–15) (noting that the brief for the United States in *Seminole Rock* invoked these cases).

²² *Seminole Rock*, 325 U.S. at 412.

²³ *Id.* at 413.

²⁴ *Id.* at 414.

²⁵ *Id.*

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Since this involves an interpretation of an administrative regulation *a court must necessarily look to the administrative construction of the regulation* if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. *But the ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation.*²⁶

Looking at the language, the Court noted that the regulation itself “recognizes the fact that more than one meaning may be attached to the phrase ‘highest price charged during March [sic], 1942’” and that it was reasonably susceptible to the two very different interpretations offered by the parties.²⁷ But using a textual analysis, the Court went on to hold that the administrator’s interpretation was the right one: “the highest price charged for an article delivered during March, 1942, is the seller’s ceiling price regardless of the time when the sale or charge was made.”²⁸ The Court then wrote that “[a]ny doubts concerning this interpretation . . . are removed by reference to the administrative construction of this method of computing the ceiling price.”²⁹ The Court referenced the administrator’s interpretation in a bulletin that was available to manufacturers, wholesalers, and retailers; in a quarterly report to Congress; and through the uniform position of the Office of Price Administration “in the countless explanations and interpretations given to inquirers affected

²⁶ *Id.* at 413–414 (emphasis added).

²⁷ *Id.* at 415 (“The phrase might be construed to mean only the actual charges or sales made during March, regardless of the delivery dates. Or it might refer only to the charges made for actual delivery in March.”).

²⁸ *Id.* at 416.

²⁹ *Id.* at 417.

by this type of maximum price determination.”³⁰ The Court concluded that its “reading of the language of [the regulation] and the consistent administrative interpretation of the phrase ‘highest price charged during March, 1942’ thus compel[led]” its decision in favor of the administrator of the Office of Price Administration.³¹ Given the Court’s strong language on deference, its equally important independent textual analysis, and its conclusion that seems to merge the two, it’s not entirely clear how much the Court actually relied on deference to the agency in that case.

Over twenty years later, the Court clarified its position on deference—and underscored the primacy of deference—in *Auer v. Robbins*.³² In *Auer*, sergeants and lieutenants of the St. Louis Police Department sued for overtime pay that they claimed the department owed them under Section 7(a)(1) of the FLSA.³³ That provision requires employers to pay their employees at least time-and-a-half overtime for work beyond a forty-hour workweek, with certain exceptions.³⁴ U.S. Department of Labor regulations define one such exception—to an “employee [who] earn[s] a specified minimum amount on a ‘salary basis.’”³⁵ Under the regulation, an employee is paid on a salary basis “if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.”³⁶ The plaintiffs

³⁰ *Id.* at 418.

³¹ *Id.* at 418.

³² *Auer v. Robbins*, 519 U.S. 452 (1997).

³³ *Id.* at 455 (citing 29 U.S.C. § 207(a)(1)).

³⁴ 29 U.S.C. § 207(a)(1).

³⁵ *Auer*, 519 U.S. at 455 (citing 29 C.F.R. §§ 541.1(f), 541.2(e), and 541.3(e) (1996)).

³⁶ 29 C.F.R. § 541.118(a).

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claimed that they were not paid “on a salary basis,” because the department’s police manual authorized the department to take certain disciplinary actions that would reduce an officer’s pay, and because one “sergeant was actually subject[] to [such] a disciplinary deduction.”³⁷ If the plaintiffs were right—and they were “subject to reduction because of variations in the quality or quantity of the work performed”—they would not have been exempt, and they would have been entitled to overtime pay under the FLSA.

The Court asked the secretary of Labor to weigh in on the question at the petition stage (before the Court agreed to hear the case). The secretary filed an amicus brief that, apparently for the first time ever, offered the secretary’s interpretation of the regulatory language:

Although petitioners’ interpretation of the regulation is not implausible, the Secretary does not interpret the “subject to” language in that way. An employee who is otherwise paid on a salaried basis does not lose that status simply because he is *theoretically* “subject to” an unpaid suspension of less than one week for violating a rule that is not a major-safety rule. Rather, salaried status is lost under the regulations only when employees are “subject to” such a disciplinary suspension *as a practical matter*. Thus, where no deductions have actually been made, or where there have been only isolated instances in which disciplinary suspensions have occurred, or where suspensions have occurred only under

³⁷ *Auer*, 519 U.S. at 460.

unusual circumstances, employees who are not themselves suspended do not lose their salaried status.³⁸

Importantly, the government provided no citation, no history, and no other basis for the secretary's reading. Again, the government apparently stated this reading for the first time in its amicus brief at the petition stage in the very case in which it asked the Court to adopt its preferred reading.³⁹

Still, the Supreme Court deferred to the secretary's reading. In a shockingly brief paragraph, without significant analysis, and quoting *Seminole Rock*, Justice Scalia, writing for a unanimous Court, explained why: "Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.' That deferential standard is easily met here."⁴⁰ Underscoring the extreme deference that the Court gave to the secretary's interpretation, the Court was utterly unconcerned with the fact that the secretary only offered his interpretation in a legal brief for the Court in this very case. Justice Scalia explained, again without significant analysis, in another astonishingly brief and telling passage, that the secretary's interpretation of the regulation "is in no sense a '*post hoc* rationalizatio[n]'" advanced by an agency seeking to defend past agency action against attack There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered

³⁸ Brief for the United States as Amicus Curiae at 9–10, *Auer*, 519 U.S. 452 (No. 95–897). The government went on to provide "factors relevant to determining whether the exemption is lost for employees who are covered by the terms of a manual that on its face permits disciplinary suspensions . . ." *Id.* at 10.

³⁹ The government reiterated its interpretation in its amicus brief on the merits. Brief for the United States as Amicus Curiae at 21–22, *Auer*, 519 U.S. 452 (No. 95–897).

⁴⁰ *Auer*, 519 U.S. at 461 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

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judgment on the matter in question.”⁴¹ In response to the petitioner’s assertion that the FLSA’s exemptions must be “narrowly construed against . . . employers,” Justice Scalia concluded, “A rule requiring the Secretary to construe his own regulations narrowly would make little sense, since he is free to write the regulations as broadly as he wishes, subject only to the limitations imposed by the statute.”⁴²

Today, we call this rigid and fixed-level deference to an agency’s interpretation “*Seminole Rock/Auer* deference,” or merely “*Auer* deference.” And we distinguish it from the sliding-scale (and lower level) *Skidmore* deference discussed above.

II. Issues with *Auer* Deference

In the years following *Auer*, the Court refined and even scaled back its approach to deference. But its rulings left some confusion as to the precise contours of *Auer* deference and thus opened *Auer* deference up to attack. Four lines of criticism emerged.⁴³ First, critics argued that the scope of *Auer* deference

⁴¹ *Id.* at 462 (citations omitted).

⁴² *Id.* at 462–63 (citations omitted).

⁴³ These are the four principal lines of critique that seem to have gained traction with some justices and several scholars. But there’s another line of critique—that *Auer* is wrong because it was based on a faulty reading of *Seminole Rock*. See generally Jeffrey A. Pojanowski, *Revisiting Seminole Rock*, 16 GEO. J. L. & PUB. POL’Y 87 (2018) (arguing that *Seminole Rock* was simply based on a routine application of (the weaker) *Skidmore* deference and thus does not support the (mightier) *Auer* deference). At the same time, *Auer* deference certainly had its defenders. See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297 (2017) (defending *Auer* deference against many of the attacks described below); Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49 (2000) (defending *Auer* deference).

was uncertain and indeterminate.⁴⁴ They claimed that the Court itself, let alone lower courts,⁴⁵ could not apply it in a consistent, sensible way. Justice Thomas summarized this critique:

[*Auer* deference] has even been applied to an agency’s interpretation of another agency’s regulations. And, it has been applied to an agency interpretation that was inconsistent with a previous interpretation of the same regulation. It has been applied to formal and informal interpretations alike, including those taken during litigation. Its reasoning has also been extended outside the context of traditional agency regulations into the realm of criminal sentencing.

The Court has even applied the doctrine to an agency interpretation of a regulation cast in such vague aspirational terms as to have no substantive content.⁴⁶

Next, critics argued that *Auer* deference encouraged agencies to write vague regulations, so that they could write

⁴⁴ See, e.g., Kristin E. Hickman & Mark R. Thomson, *The Chevronization of Auer*, 103 MINN. L. REV. HEADNOTES 103, 105 (2019) (arguing that *Auer* deference is of “uncertain scope and application”); cf. Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47 (arguing that the courts have transformed *Seminole Rock* from its origins and that *Auer* deference is an unwarranted expansion of *Seminole Rock*); Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011) (arguing for a more limited domain for *Seminole Rock* deference).

⁴⁵ See, e.g., Hickman & Thomson, *supra* note 44 at 111 (noting “the glut of recent cases in which members of the same court are openly divided on the proper application of *Auer*” and citing *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018); *United States v. Havis*, 907 F.3d 439 (6th Cir. 2018); *Marsh v. J. Alexander’s LLC*, 905 F.3d 610 (9th Cir. 2018) (en banc); *Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 878 F.3d 725 (9th Cir. 2017); *Real Alternatives, Inc. v. Sec’y Dep’t of Health & Human Servs.*, 867 F.3d 338 (3d Cir. 2017); and *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017); Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the Seminole Rock Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787 (2014) (describing the inconsistencies in application and confusion in understanding *Auer* deference in the federal appellate courts).

⁴⁶ *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1214 (2015) (Thomas, J., concurring in the judgment) (citations omitted).

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new rules under the guise of interpretation, and thus evade judicial review. According to critics, this gave agencies expansive and unchecked power to effectively issue new regulations without subjecting them to judicial scrutiny, or any other democratic scrutiny for that matter.⁴⁷ Justice Scalia summarized this critique:

But when an agency interprets its *own* rules—that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a “flexibility” that will enable “clarification” with retroactive effect. “It is perfectly understandable” for an agency to “issue vague regulations” if doing so will “maximiz[e] agency power.” . . . *Auer* deference encourages agencies to be “vague in framing regulations, with the plan of issuing ‘interpretations’ to create the intended new law without observance of notice and comment procedures.”⁴⁸

⁴⁷ See generally Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449, 1459–66 (2011) (arguing for limits to *Auer* deference based on separation-of-powers concerns). But see Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85 (2019) (concluding, based upon an empirical study of federal rules from 1982 to 2016, that agencies did not measurably increase the vagueness of their regulations).

⁴⁸ *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (citations omitted); see also John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 95 COLUM. L. REV. 612, 617 (1996) (arguing that *Auer* deference “also contradicts a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties”). Justice Scalia, of course, wrote *Auer*. Yet in the years following *Auer*, he became one of its most vocal opponents. He explained that he changed his position because he had “become increasingly doubtful of its validity,” for separation-of-powers and other reasons. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring).

Third, critics argued that *Auer* violated the APA.⁴⁹ They claimed that judicial deference to an agency's interpretation of its own regulation violated the judicial-review provision in the APA,⁵⁰ and that deference violated the APA's requirement for notice-and-comment rulemaking.⁵¹ As to judicial review, Justice Scalia argued that the Court had ignored the APA's "directive that the 'reviewing court . . . interpret . . . statutory provisions [and] determine the meaning or applicability of the terms of an agency action,'" and had instead held that *agencies* may resolve ambiguities in statutes and regulations.⁵²

As to notice-and-comment rulemaking, Justice Scalia argued,

By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.⁵³

⁴⁹ See generally Jonathan H. Adler, *Auer Evasions*, 16 GEO. J.L. & PUB. POL'Y 1 (2018) ("*Auer* deference undermines—and facilitates the evasion of—basic administrative law principles"); Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 8 (1996) (arguing that *Auer* deference violates the judicial-review provision, the notice-and-comment requirement, and "the spirit of the APA").

⁵⁰ 5 U.S.C. § 706 (providing for judicial review of certain agency actions).

⁵¹ 5 U.S.C. § 553 (requiring agencies to notify the public of a proposed new rule and to accept and consider public comments on a proposed new rule).

⁵² *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (citations omitted).

⁵³ *Id.* at 1211–12 (Scalia, J., concurring in the judgment).

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Finally, critics argued that *Auer* deference violated the separation of powers in (at least) three ways. First, critics argued that *Auer* deference impermissibly put both the *lawmaking* and the *law-executing* power in the same hands. As Justice Scalia explained, “when an agency promulgates an imprecise rule, it leaves to *itself* the implementation of that rule, and thus the initial determination of the rule’s meaning.” He continued that “[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well,” and that to do so threatens liberty, “because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”⁵⁴

Second, critics argued that *Auer* deference impermissibly restricted the courts’ power to interpret and apply the law. Justice Thomas critiqued *Auer* deference as “a transfer of the judge’s exercise of interpretative judgment to the agency,” and noted that an administrative agency “lacks the structural protections for independent judgment adopted by the Framers, including the life tenure and salary protections of Article III.”⁵⁵ Justice Thomas concluded that because “the agency is thus not properly constituted to exercise the judicial power under

⁵⁴ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (citation omitted); see also *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. 597, 621 (2013) (Scalia, J., concurring in part and dissenting in part) (“In any case, however great may be the efficiency gains derived from *Auer* deference, beneficial effect cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes the law must not adjudicate its violation.”); Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After Seminole Rock and Auer*, 45 HARV. J.L. & PUB. POL’Y 625, 627–29 (arguing that *Auer* deference “effectively empowers one party to a lawsuit—a federal agency—to decide a legal issue in any case where the federal government is a party” in violation of the maxim that “[a] judge must hear both sides of a case before deciding it” and the related “adversarial system of adjudication” developed by the English courts).

⁵⁵ *Mortg. Bankers Ass’n*, 135 S. Ct. at 1219–20 (Thomas, J., concurring in the judgment).

the Constitution, the transfer of interpretive judgment raises serious separation-of-powers concerns.”⁵⁶

Finally, critics argued that *Auer* deference “undermines the judicial ‘check’ on the political branches.”⁵⁷ As Justice Thomas asserted, the Court has “repeatedly declined to exercise independent judgment” in the face of challenges to agency interpretations, “[i]nstead, [deferring] to the executive agency that both promulgated the regulations and enforced them.”⁵⁸ Justice Thomas warned, “When courts refuse even to decide what the best interpretation is under the law, they abandon the judicial check. That abandonment permits precisely the accumulation of governmental powers that the Framers warned against.”⁵⁹

All this meant that the Court became more skeptical of *Auer* deference, and even declined to apply it in certain cases. *Christopher v. SmithKline Beecham Corporation*, a 2012 case, illustrates this. In *Christopher*, the Court declined to apply *Auer* deference to an agency’s interpretation of its own regulations that the agency only announced in litigation—and then offered shifting reasons.⁶⁰ The case arose when pharmaceutical sales representatives sued their employer for overtime pay under the FLSA and Department of Labor regulations. The FLSA generally requires employers to pay time-and-a-half to

⁵⁶ *Id.* at 1219–20. Taking a somewhat different tack, Professor Molot argues that: [A] tension emerges between judicial practice under *Chevron* and *Seminole Rock* and the judiciary’s original role in our constitutional framework. If we gain something in dispute resolution by shifting authority to resolve legal ambiguity from judges to agencies, we also lose an influence over lawmaking that was an important component of the Founders’ constitutional design.

Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 *STAN. L. REV.* 1, 8 (2000).

⁵⁷ *Mortg. Bankers Ass’n*, 135 S. Ct. at 1220 (Thomas, J., concurring in the judgment).

⁵⁸ *Id.* at 1221.

⁵⁹ *Id.*

⁶⁰ *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 153–59 (2012).

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their employees for any work over forty hours a week. But it exempts workers “employed . . . in the capacity of outside salesman.”⁶¹ So the question for the Court was whether the plaintiffs, whose job entailed calling on physicians and obtaining nonbinding commitments to prescribe the corporation’s drugs in appropriate cases, “sold” a product.

The Department of Labor issued regulations and guidance that touched upon the issue, but did not firmly settle it, at least not in this particular context.⁶² When other similar cases started percolating in the lower courts, the department, starting in 2009, filed amicus briefs arguing that representatives are not exempt. But its reasons changed. Initially, the department argued that “a ‘sale’ for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.”⁶³ After the Court granted certiorari, however, the department refined the “consummated transaction” requirement and argued that “[a]n employee does not make a ‘sale’ for purposes of the ‘outside salesman’ exemption unless he actually transfers title to the property at issue.”⁶⁴ Still, the petitioners and the Department argued that its new interpretation was entitled to controlling deference.

The Court disagreed. The Court first noted that *Auer* deference is inappropriate in cases when an agency’s interpretation is “plainly erroneous or inconsistent with

⁶¹ 29 U.S.C. § 213(a)(1).

⁶² See *Christopher*, 567 U.S. at 148–49 (describing the Department’s regulations and guidance).

⁶³ *Id.* at 153–54 (quoting Brief for Secretary of Labor as Amicus Curiae at 11, *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010) (No. 09–0437)).

⁶⁴ Brief for the United States as Amicus Curiae at 12–13, *Christopher*, 567 U.S. 142 (No. 11–204).

the regulation,”⁶⁵ when it “does not reflect the agency’s fair and considered judgment on the matter in question,”⁶⁶ or when it is a “‘*post hoc* rationalization[n]’ advanced by an agency seeking to defend past agency action”⁶⁷ or merely a “convenient litigating position.”⁶⁸ It then ruled that *Auer* deference was inappropriate in this case for a related reason: The department’s interpretation failed to give “fair warning of the conduct [a regulation] prohibits or requires.”⁶⁹ The Court warned that *Auer* deference “creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby ‘frustrat[ing] the notice and predictability purposes of rulemaking,’”⁷⁰ and suggested that the department’s late-breaking interpretation in this case actualized that risk. It concluded that while *Auer* deference was inappropriate, “[w]e instead accord the department’s interpretation a measure of deference proportional to the ‘thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade’”⁷¹—in other words, *Skidmore* deference.

⁶⁵ *Christopher*, 456 U.S. at 155 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

⁶⁶ *Id.* (quoting *Auer*, 519 U.S. at 462).

⁶⁷ *Id.* (quoting *Auer*, 519 U.S. at 462 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988))).

⁶⁸ *Id.* (quoting *Bowen*, 488 U.S. at 213).

⁶⁹ *Id.* at 156 (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)). The Court went on: “Indeed, it would result in precisely the kind of ‘unfair surprise’ against which our cases have long warned.” *Id.* (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144 (1991); and *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)).

⁷⁰ *Id.* at 158 (quoting *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 69 (2011) (Scalia, J., concurring)).

⁷¹ *Id.* at 159 (quoting *United States v. Mead Corp.*, 533 U.S. 213, 223 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

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But while *Auer* deference came under increasing fire, and while the Court continued to refine it and scale back in reaction, objections to the doctrine itself never gained the attention of a majority on the Court. Only Justices Scalia and Thomas were openly hostile to it. Chief Justice Roberts and Justice Alito wanted to wait for an appropriate case in which to review it.⁷² That case came in *Kisor*.

III. *Kisor's* Challenge to *Auer* Deference

The case arose when James Kisor first applied for Veterans Affairs (VA) disability benefits in 1982.⁷³ Kisor claimed that he suffered from post-traumatic stress disorder (PTSD) based on his service as a U.S. Marine from 1962 to 1966, including service in the Vietnam War, where he experienced intense and deeply traumatic combat.⁷⁴ In support of his claim, Kisor offered a letter by a counselor at the Portland Veterans Center identifying “concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdraw[a]l.”⁷⁵ The counselor wrote that “[t]his symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder.”⁷⁶ Nevertheless, the VA Regional Office in Portland denied Kisor’s claim, concluding that “posttraumatic stress neurosis, claimed by vet”

⁷² See, e.g., *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring) (“It may be appropriate to reconsider [*Auer* deference] in an appropriate case. But this is not that case.”).

⁷³ As a general matter, a veteran qualifies for VA disability benefits if the veteran (1) suffered from a disability (2) in the line of duty. 38 U.S.C. § 1110 (“For disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty . . .”). The VA refers to this as a “service-connected” disability. See 38 C.F.R. § 3.303 (stating the factors the VA uses to determine whether a disability is “service-connected”). The VA pays compensation “from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated . . .” 38 U.S.C. § 1110.

⁷⁴ Brief of Petitioner at 13–14, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18–15).

⁷⁵ *Id.* at 15.

⁷⁶ *Id.*

was “not shown by evidence of record.”⁷⁷ (In evaluating Kisor’s claim, the VA failed to request his service personnel records, as required by VA regulations.⁷⁸ These records could have connected any disability to Kisor’s service. But the decision denying benefits did not even address service-connection; instead, the VA simply concluded that Kisor did not have PTSD at all.)

On June 5, 2006, Kisor moved to reopen his claim. In support, he submitted new evidence, including an extensive report by a psychiatrist who concluded that it was “clear that the claimant was evincing symptoms of P.T.S.D. back in the 1980’s.”⁷⁹ In addition, the VA requested and obtained Kisor’s service personnel records in order to determine whether any disability was service-connected. Based on the new evidence, the VA reversed course and determined that Kisor suffered from PTSD and that his PTSD was service-connected. It assigned a disability rating of fifty percent and awarded him benefits, including retroactive benefits as of June 5, 2006.⁸⁰

Kisor appealed the decision, arguing that he was entitled to a higher disability rating and retroactive benefits as of the date of his original claim. In March 2009, a decision review officer at the VA regional office concluded that Kisor was entitled to a disability rating of seventy percent, but that he was not entitled to retroactive benefits back to the date of his original claim. As to retroactivity, the VA reasoned that “[a]t the time of the [original] decision the veteran did not have a clinical diagnosis of post traumatic stress disorder.”⁸¹

⁷⁷ *Id.* at 16–17.

⁷⁸ *Id.* at 16.

⁷⁹ *Id.* at 17 n.4.

⁸⁰ *Id.* at 17.

⁸¹ *Id.* at 18.

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The Board of Veterans Appeals affirmed and similarly denied retroactive benefits. The Board pointed to the VA regulation on new evidence, which states,

[A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the claim, VA will reconsider the claim Such records include, but are not limited to: (i) Service records that are related to a claimed in-service event, injury, or disease⁸²

The Board read “relevant” to mean only those records that “would suggest or better yet establish” the component of the claim that the VA found missing in the prior judgment.⁸³ The Board said that the component of the claim found missing in the 1983 denial was Kisor’s PTSD, not its connection to his service. But the Board ruled that Kisor’s new evidence (his service personnel records) went to service-connection, not to his PTSD. As a result, the Board concluded that Kisor’s new evidence would *not* “suggest or better yet establish” the component of the claim found missing in the earlier judgment (PTSD). The Board explained that the new evidence was thus not “outcome determinative” and “not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service.” The Board thus rejected Kisor’s claim for retroactive benefits.

⁸² 38 C.F.R. § 3.156(c)(1)(i) (emphasis added).

⁸³ The Board’s reasoning is set out in *Kisor v. Shulkin*, 869 F.3d 1360, 1364 (Fed. Cir. 2017), *vacated sub nom.* *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

The Veterans Court denied his claims, too, for substantially similar reasons.⁸⁴

Kisor appealed to the U.S. Court of Appeals for the Federal Circuit. He argued that the Board and the Veterans Court “mistakenly interpreted the term ‘relevant’ . . . as related only to service department records that countered the basis of the prior denial.”⁸⁵ Kisor claimed that the term applied more broadly, to any record that has “any tendency to make the existence of *any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.” Under this interpretation,⁸⁶ Kisor said that his new evidence (the service personnel records) was relevant, because the records “demonstrate that he was subjected to the trauma of combat, thereby establishing his exposure to an in-service stressor.”⁸⁷

The Federal Circuit rejected that argument. The court first noted that it would apply *Auer* deference to the VA’s interpretation of its own regulation: “As a general rule, we defer to an agency’s interpretation of its own regulation ‘as long as the regulation is ambiguous and the agency’s interpretation is neither plainly erroneous nor inconsistent with the regulation.’”⁸⁸ The court ruled that the term “relevant” was, indeed, ambiguous, and that the VA’s interpretation satisfied this test. In particular, the court said that “[t]he Board’s ruling was thus based upon the proposition that . . . ‘relevant’ means noncumulative and pertinent to the matter at issue in the case”—an interpretation that was neither “plainly erroneous

⁸⁴ *Shulkin*, 869 F.3d at 1364–65.

⁸⁵ *Id.* at 1366 (quoting Brief of Appellant at 5, *Kisor*, 139 S. Ct. 2400 (No. 18–15)).

⁸⁶ *Id.* (quoting Brief of Appellant at 9–10, *Kisor*, 139 S. Ct. 2400 (No. 18–15)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1367 (quoting *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 836 (Fed. Cir. 2006)).

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[n]or inconsistent with the VA's regulatory framework."⁸⁹ The court affirmed the Veterans Court and rejected Kisor's claim for retroactive benefits.

Kisor appealed to the Supreme Court, arguing that the Court should overturn *Auer* and *Seminole Rock* and reverse the Federal Circuit's deference to the VA's reading of its own regulation.

Kisor argued first that *Auer* deference is inconsistent with the APA.⁹⁰ Kisor claimed that *Auer* deference violates the APA's judicial-review provision, because it requires courts to defer to an agency's interpretation of the agency's own regulations—and not interpret those regulations for itself.⁹¹ Kisor contended that *Auer* deference also violates the APA's requirement for notice-and-comment rulemaking, because it allows an agency effectively to make new rules (by interpreting existing ones) without notifying the public and considering public comments.⁹² Kisor said that *Auer* deference is in tension with the APA's treatment of agency interpretive rules, which the APA exempts from notice-and-comment requirements but which, as a result, get no special deference in the courts.⁹³

Kisor argued next that *Auer* deference injects unpredictability into agency action, in tension with the principles behind the APA. In particular, he claimed that *Auer* deference "invites vague regulations, which limit the public's

⁸⁹ *Id.* at 1368.

⁹⁰ Kisor noted that Congress enacted the APA in 1946, the year after the Court decided *Seminole Rock*, but thirty-one years before the Court ruled in *Auer*. He argued that "[w]hatever could have been said about *Seminole Rock* prior to 1946, the deference doctrine should not have survived the APA's enactment." Brief of Petitioner at 26, *Kisor*, 139 S. Ct. 2400 (No. 18–15).

⁹¹ Brief of Petitioner at 27, *Kisor*, 139 S. Ct. 2400 (No. 18–15). Kisor noted that the statute authorizing the Federal Circuit to review decisions of the Court of Veterans Claims contains language similar to the APA's judicial-review provision. *Id.*

⁹² Brief of Petitioner at 28–31, 33–36, 45–47, *Kisor*, 139 S. Ct. 2400 (No. 18–15).

⁹³ *Id.* at 31–33.

ability to conform conduct to law.”⁹⁴ Quoting Justice Scalia, he explained,

Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.⁹⁵

Kisor contended that this problem was especially acute when a new administration seeks to enforce its own new priorities,⁹⁶ and when an agency is self-interested.⁹⁷ He claimed that the policy justifications for *Auer* deference—that the agency has special insight into its own rules and a special expertise in its own regulatory programs—are not strong enough to overcome these problems.⁹⁸ He said that if those policy justifications carry any weight, they support only a lesser *Skidmore* deference.⁹⁹

For largely the same reasons, Kisor argued that *Auer* deference violates the separation of powers. Here, he added only that *Auer* deference impermissibly mixes the law-making authority with the law-executing authority, making it “incompatible with the separation-of-powers principles that animate the Constitution. To conclude otherwise ‘would violate a fundamental principle of separation of powers—that the

⁹⁴ *Id.* at 37.

⁹⁵ *Id.* at 37–38 (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1212 (2015) (Scalia, J.)).

⁹⁶ *Id.* at 39.

⁹⁷ *Id.* at 40.

⁹⁸ *Id.* at 41–43.

⁹⁹ *Id.* at 43.

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power to write a law and the power to interpret it cannot rest in the same hands.”¹⁰⁰

Finally, Kisor argued that stare decisis cannot save *Auer*. He claimed that *Seminole Rock* was poorly reasoned (or relied on no reasoning at all), and that *Auer* has produced all the problems described above.¹⁰¹ He contended that *Auer*, as a judicially (not legislatively) created doctrine, has less staying power under stare decisis, and that, as a “deference regime,” may in fact have *no* staying power under stare decisis.¹⁰² And he asserted that private parties’ reliance interests on *Auer* are low, “because it does not authorize any particular result with respect to any particular rule. Indeed, one of *Auer*’s principal effects is to promote legal instability. At its core, *Auer* deference gives the force of law [even] to an agency’s interpretation of a regulation adopted *after a dispute begins*.”¹⁰³

The Court declined to outright overturn *Seminole Rock* and *Auer*. In a sharply divided and highly fractured ruling, the Court held by a five-to-four margin that *Seminole Rock* and *Auer* survived under principles of stare decisis. Justice Kagan penned the majority opinion, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor. Justice Gorsuch wrote the principal minority opinion, arguing that the Court should overrule *Seminole Rock* and *Auer*. But at the same time, the Court (by the same five-to-four margin) sharply curtailed *Auer* deference in the interest of giving lower courts more determinate guidance about how to apply it. The Court then divided four-to-four over interpretations of *Auer*’s history, and whether *Auer* deference violates the APA and the separation

¹⁰⁰ *Id.* at 45 (quoting *Decker v. Nw. Env’tl. Def. Ctr.*, 568 U.S. at 619 (Scalia, J.)).

¹⁰¹ *Id.* at 47–48.

¹⁰² *Id.* at 48–51.

¹⁰³ *Id.* at 51 (citations omitted).

of powers. (Chief Justice Roberts did not join either faction on these questions.) The only thing that all the justices agreed on was this: The Federal Circuit mis-applied *Auer* deference to Kisor's case and should take another crack at it.

Justice Kagan's majority opinion first explained some of the problems with the Court's prior treatment of *Auer* deference, and how to clean them up.¹⁰⁴ Specifically, she wrote that the Court has sent "mixed messages" with regard to *Auer* deference, sometimes applying it "without significant analysis" or "careful attention to the nature and context of the interpretation."¹⁰⁵ In order to address these problems and to provide guidance to lower courts for future applications of *Auer* deference, her opinion sought to "reinforce[] some of the limits inherent in the *Auer* doctrine."¹⁰⁶

As an initial matter, Justice Kagan wrote that "a court should not afford *Auer* deference unless the regulation is genuinely ambiguous."¹⁰⁷ In making this determination, the Court held that courts must use all their tools of construction, including "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."¹⁰⁸ "Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference."¹⁰⁹

Next, if a genuine ambiguity remains, the Court held that the courts must determine if the agency interpretation of its regulation is "reasonable."¹¹⁰ This means that an interpretation "must come within the zone of ambiguity the court has

¹⁰⁴ *Kisor*, 139 S. Ct. at 2414–18. Chief Justice Roberts *did* join this portion of the opinion, making it the Court's opinion.

¹⁰⁵ *Id.* at 2414–15.

¹⁰⁶ *Id.* at 2415.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

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identified after employing all its interpretive tools.”¹¹¹ The Court noted that at this stage some courts have granted greater deference to agency interpretations to their own rules than to agency interpretations of statutes.¹¹² But the Court said that this was wrong: The standard for both kinds of deference is whether an agency’s interpretation falls “within the bounds of reasonable interpretation.”¹¹³ And the Court was clear that this “is a requirement an agency can fail.”¹¹⁴

Finally, the Court held that, even if an agency interpretation clears these first two hurdles, *Auer* deference is only appropriate in certain circumstances. Rather than specifying a test, the Court “laid out some especially important markers”¹¹⁵ that derive from and support the purposes of *Auer* deference in the first place.

For one, the agency interpretation “must be the agency’s ‘authoritative’ or ‘official position,’ rather than any more ad hoc statement not reflecting the agency’s views.”¹¹⁶ That does not mean that an agency must have subjected its interpretation to formal notice-and-comment rulemaking. But it does mean that “[t]he interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context.”¹¹⁷

For another, “the agency’s interpretation must in some way implicate its substantive expertise.”¹¹⁸ The Court held that this could be quite broad, including all those policy areas that Congress has delegated to an agency. But at the same time, it

¹¹¹ *Id.* at 2416.

¹¹² *Id.*

¹¹³ *Id.* (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2417.

has limits. Thus, “deference ebbs when ‘[t]he subject matter of the [dispute is] distan[t] from the agency’s ordinary’ duties or ‘fall[s] within the scope of another agency’s authority.’”¹¹⁹ Moreover, the Court noted that “[s]ome interpretive issues may fall more naturally into a judge’s bailiwick.”¹²⁰ In such a case, a court should look to comparative institutional competence: “When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.”¹²¹

For a third, “an agency’s reading of a rule must reflect ‘fair and considered judgment’ to receive *Auer* deference.”¹²² The Court held that this rules out deference for an agency’s “convenient litigating position” and “*post hoc* rationalizatio[n].”¹²³ It also rules out deference for a “new interpretation . . . that creates an ‘unfair surprise’ to regulated parties.”¹²⁴

The Court summarized its holding: “When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase ‘when it applies’ is important—because it often doesn’t.”¹²⁵ The decision “maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.”¹²⁶

¹¹⁹ *Id.*

¹²⁰ *Id.* Justice Kagan provided two examples: “one requiring the elucidation of a simple common-law property term . . . or one concerning the award of an attorney’s fee.” *Id.* (citations omitted).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2418.

¹²⁵ *Id.*

¹²⁶ *Id.*

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Having so clarified *Auer* deference, the Court went on to hold that stare decisis “cuts strongly against” overruling *Auer*.¹²⁷ The Court held that a long line of Court cases reaffirms *Auer*; that lower courts have applied *Auer* or *Seminole Rock* thousands of times; and that overruling *Auer* would therefore “cast doubt on many settled constructions of rules,” and would even “allow relitigation of any decision based on *Auer*, forcing courts to ‘wrestle [with] whether or not *Auer*’ had actually made a difference.”¹²⁸ “It is the rare overruling that introduces so much instability into so many areas of law, all in one blow.”¹²⁹ Moreover, the Court held that whatever the Court has said about *Auer* deference, because *Auer* is not a “constitutional case” Congress could change it.¹³⁰ The Court noted that Congress “could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that *Kisor* favors.”¹³¹ Congress, however, has allowed the Court’s “deference regime [to] work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent.”¹³² The Court held that given this history, “we would need a particularly ‘special justification’ to now reverse *Auer*”—a justification that *Kisor* simply could not provide.¹³³

Finally, in applying *Auer* to *Kisor*’s case, the Court vacated the Federal Circuit’s judgment and remanded the case. (The Court was unanimous in its final judgment, although

¹²⁷ *Id.* at 2422.

¹²⁸ *Id.* (quoting Transcript of Oral Argument at 30, *Kisor*, 139 S. Ct. 2400 (No. 18–15)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 2422–23 (citations omitted).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2423.

Justices Thomas, Alito, Gorsuch, and Kavanaugh did not specifically join this portion of the Court's ruling.) The Court held that "the Federal Circuit jumped the gun in declaring the regulation ambiguous," because it failed to grapple with the "text, structure, history, and purpose" of the rule.¹³⁴ And it held that the lower court too quickly assumed that *Auer* deference should apply even if the regulation were ambiguous. In particular, the Court held that the Federal Circuit failed to consider that a single Board member's reading of the regulation "reflects the considered judgment of the agency as a whole."¹³⁵ The Court vacated the judgment of the Federal Circuit and remanded the case for reconsideration of whether and how *Auer* deference applies.¹³⁶

From there, the Court split even more sharply—four-to-four, without a majority holding, and with Chief Justice Roberts declining to join either faction—over the history and purposes of *Auer* deference, and over whether *Auer* deference violates the APA and the separation of powers.

The disagreement about *Auer*'s history and purposes is significant, because the doctrine's evolution helps explain whether it violates the APA and the separation of powers, and even its durability under principles of *stare decisis*. Justice Kagan started her assessment of history and purpose by noting that judicial deference to an agency's interpretation of its own regulations is a practical and sensible solution to the problem that "[f]or various reasons, regulations may be genuinely

¹³⁴ *Id.* at 2423–24.

¹³⁵ *Id.* at 2424.

¹³⁶ *Id.*

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ambiguous.”¹³⁷ She argued that deference to an agency’s interpretation of its own rules traces back to 1898, when the Court in *United States v. Eaton* wrote that “[t]he interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight.”¹³⁸

Justice Kagan then argued that “*Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities.”¹³⁹ In other words, *Auer* deference is a result of congressional intent (and not merely judicial say so): “we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.”¹⁴⁰ In a passage worth quoting at length, she went on to explain the familiar reasons for *Auer* deference, and the related reasons why the Court has presumed that Congress intends it:

In part, that is because the agency that promulgated a rule is in the “better position [to] reconstruct” its original meaning. Consider that if you don’t know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same

¹³⁷ *Id.* at 2410. Justice Kagan set out five examples of such regulations and the interpretation problems they raise. Here’s one that perhaps best illustrates the problem:

An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain “no active moiety that has been approved by FDA in any other” new drug application. Has a company created a new “active moiety” by joining a previously approved moiety to lysine through a non-ester covalent bond?

Id. (citations omitted). Justice Kagan asked, “To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?” *Id.* at 2411.

¹³⁸ *Id.* at 2412 (quoting *United States v. Eaton*, 169 U.S. 331, 343 (1898)).

¹³⁹ *Id.* at 2412.

¹⁴⁰ *Id.*

reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that “wrote the regulation” will often have direct insight into what that rule was intended to mean. . . .

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often “entail[s] the exercise of judgment grounded in policy concerns.” . . .

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have “unique expertise,” . . . can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. . . .

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules.¹⁴¹

In sum, according to Justice Kagan, there are good and long-standing reasons for the courts to defer to an agency’s interpretation of its own regulations, that is, to apply *Auer* deference. These include the comparative institutional competence between agencies and the courts, and the need

¹⁴¹ *Id.* at 2412–13 (citations omitted).

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for consistency in regulatory interpretation. Congress has recognized this, and has given its consent to *Auer* deference.

Justice Gorsuch expressed a very different view, in an opinion joined by Justices Thomas, Alito, and Kavanaugh (but not Chief Justice Roberts). He argued that before 1945 the Court treated an agency's interpretation of its own regulations merely as *evidence* of the law (and not the law itself), using a sliding scale of deference.¹⁴² He wrote that this approach is reflected in *Skidmore*, where the Court held that "an agency's interpretation of the law is 'not controlling upon the courts' and is entitled only to a weight proportional to 'the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'"¹⁴³ He argued that *deference* to an agency's interpretation only arose in 1945, in *Seminole Rock*, where "the Court declared—for the first time and without citing any authority—that 'if the meaning of [the regulation were] in doubt,' the agency's interpretation would merit 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"¹⁴⁴ Justice Gorsuch argued that *Auer* deference, as we know it today, only arose when, "[f]rom the 1960s on, this Court and lower courts began to cite the *Seminole Rock* dictum with increasing frequency and in a wider variety of circumstances, but still without much explanation. They also increasingly divorced *Seminole Rock* from *Skidmore*."¹⁴⁵ In short, according to Justice Gorsuch, *Auer* deference came about

¹⁴² *Id.* at 2426–29 (Gorsuch, J., concurring). Contrary to Justice Kagan, Justice Gorsuch argued that the *Eaton* Court applied deference to the agency's interpretation only *after* it decided for itself the meaning of the regulation based upon a textual analysis. *Id.* at 2427.

¹⁴³ *Id.* at 2427 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

¹⁴⁴ *Id.* at 2428 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Even then, he argued, it wasn't entirely clear what this meant. *Id.* 2428–29.

¹⁴⁵ *Id.* at 2429.

only because the courts misread earlier precedent and let their misreading snowball.

Justice Gorsuch argued that because of this slipshod and careless evolution, modern courts have “‘mechanically applied and reflexively treated’ *Seminole Rock*’s dictum ‘as a constraint upon the careful inquiry that one might ordinarily expect of courts engaged in textual analysis.’”¹⁴⁶ Moreover, he argued that the doctrine is hopelessly indeterminate, and that lower courts don’t know how to apply it.¹⁴⁷

As to *Auer*’s consistency with the APA, Justice Kagan argued that the now-clarified *Auer* deference is perfectly consistent, and she flatly rejected Kisor’s arguments to the contrary. She argued first that *Auer* deference (again, as clarified) allows for plenty of room for independent judicial review, consistent with the APA’s judicial review provision. She noted that in determining whether to apply *Auer* deference, courts must initially “‘apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover.”¹⁴⁸ And even then, courts must still “‘determine whether the nature or context of the agency’s construction reverses the usual presumption of deference . . . and whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties.”¹⁴⁹ Justice Kagan argued that all of this constitutes “‘meaningful judicial review.”¹⁵⁰ She also noted that the APA’s judicial-review provision does not specify a particular standard of review, and she argued therefore that the Court’s presumption

¹⁴⁶ *Id.* (quoting Knudsen & Wildermuth, *Unearthing the Lost History of Seminole Rock*, 65 EMORY L.J. 47, 53 (2015)).

¹⁴⁷ *Id.* at 2430.

¹⁴⁸ *Id.* at 2419 (Kagan, J., plurality opinion).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

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that Congress intended to delegate to agencies “considerable latitude to construe its ambiguous rules” does not run afoul of it.¹⁵¹

Justice Kagan also argued that *Auer* deference does not circumvent the APA’s notice-and-comment rulemaking requirements. Justice Kagan wrote that an agency’s “interpretive rules, even when given *Auer* deference, do *not* [impermissibly] have the force of law,”¹⁵² and that for all the reasons described above, *Auer* deference still gives the courts (and not the agency) the final authority to determine the legality of an agency’s reading of its own rules. Moreover, Justice Kagan noted that under its clarifications to the *Auer* doctrine, “an agency has a strong incentive to circulate its interpretations early and widely.”¹⁵³ According to Justice Kagan, that means that “the doctrine of *Auer* deference reinforces, rather than undermines, the idea of fairness and informed decisionmaking at the core of the APA.”¹⁵⁴ Finally, she flatly rejected Kisor’s argument, echoing Justice Scalia, that *Auer* deference encourages agencies to issue vague regulations.¹⁵⁵

Again, Justice Gorsuch took a very different view. He argued that *Auer* deference flies in the face of the APA’s judicial-review provision. He noted that this provision requires reviewing courts to “decide all relevant questions of law” and to “set aside agency action . . . found to be . . . not in accordance

¹⁵¹ *Id.*

¹⁵² *Id.* at 2420 (citing *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1208 & n.4 (2015)).

¹⁵³ *Id.* at 2421.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (“But the claim has notable weaknesses, empirical and theoretical alike. . . . No real evidence—indeed, scarcely an anecdote—backs up the assertion. . . . [And] strong (almost surely stronger) incentives and pressures cut in the opposite direction.”).

with law,”¹⁵⁶ and that this review should be *de novo*.¹⁵⁷ Yet according to Justice Gorsuch, *Auer* deference means that the courts do *not* independently “decide all questions of law”; instead, the courts cede that responsibility to the agencies:

A court that, in deference to an agency, adopts something other than the best reading of a regulation isn’t ‘decid[ing]’ the relevant ‘questio[n] of law’ or ‘determin[ing] the meaning’ of the regulation. Instead, it’s allowing the agency to dictate the answer to that question. In doing so, the court is abdicating the duty Congress assigned to it in the APA.¹⁵⁸

Moreover, Justice Gorsuch argued that *Auer* deference violates the APA’s notice-and-comment requirement. He claimed that *Auer* deference erases the distinction between a formal agency regulation (which requires notice-and-comment rulemaking and carries the force of law) and an agency interpretation of an existing regulation (which does not require notice and comment and does not carry the force of law). That’s because “[u]nder *Auer*, courts must treat as ‘controlling’ not only an agency’s duly promulgated rules but also its mere interpretations—even ones that appear only in a legal brief, press release, or guidance document issued without affording

¹⁵⁶ *Id.* at 2432 (Gorsuch, J., concurring) (quoting 5 U.S.C. § 706).

¹⁵⁷ *Id.* at 2433.

¹⁵⁸ *Id.* at 2432.

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the public advance notice or a chance to comment.”¹⁵⁹ Thus, *Auer* deference circumvents the APA’s notice-and-comment requirement.

Justice Gorsuch also disputed Justice Kagan’s argument that *Auer* deference conforms to a presumption about congressional intent. He claimed that Congress never expressed this intent, and the APA suggests the opposite.¹⁶⁰ Moreover, he contended that the APA, which came just one year after *Seminole Rock*, was designed to *expand* judicial review of agency action, not *restrict* it (as *Auer* deference does).¹⁶¹ And as described above, *Auer* deference was not a part of the firmly established background common law when *Seminole Rock* came down—indeed, judicial deference to an agency’s interpretation of its own regulations “was in a confused state”—so the APA cannot represent a codification of that (not-yet-existing) common law.¹⁶²

Finally, Justice Kagan argued that *Auer* deference does not violate the separation of powers. In a brief analysis, drawing in part on her arguments why *Auer* deference doesn’t violate the APA, Justice Kagan wrote that courts still “retain a firm grip on the interpretive function” by deciding whether and how *Auer* deference applies, so that agencies do not usurp the role of

¹⁵⁹ *Id.* at 2434. He argued, contrary to certain amici in the case, that it didn’t matter that the VA’s interpretation in this case came about in an adjudicative proceeding: whether an agency’s interpretation comes from an adjudicative proceeding, a press release, or some other source, it is not binding upon the courts. *Id.* at 2435. He also argued, contrary to Justice Kagan, that under *Auer* deference agency interpretations *do* have the force of law: “While an agency interpretation, just like a substantive rule, ‘must meet certain conditions before it gets deference,’ ‘once it does so [Auer makes it] every bit as binding as a substantive rule.’” *Id.* (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211–12 (2015) (Scalia, J., concurring)).

¹⁶⁰ *Id.* at 2435.

¹⁶¹ *Id.* at 2435–36.

¹⁶² *Id.* at 2436–37.

the judiciary.¹⁶³ In other words, *Auer* deference is simply a rule of interpretation, not a requirement that courts mechanically adopt an agency's interpretation wholesale. Moreover, she noted that the Court has long rejected claims that modest comingling of legislative and executive functions—including the kind of comingling that may arise under *Auer* deference, where executive agencies play a modest role in lawmaking by interpreting their own regulations—do not violate the separation of powers.¹⁶⁴

Again, Justice Gorsuch took a dramatically different view. He argued that *Auer* deference “sits uneasily with the Constitution,” because it outsources to executive agencies the judicial function of interpreting the law in violation of the separation of powers.¹⁶⁵ In short, “*Auer* tells the judge that he must interpret these binding laws to mean not what he thinks they mean, but what an executive agency says they mean.”¹⁶⁶ Worse, Justice Gorsuch added that agencies (unlike judges) are often self-interested, and therefore likely to interpret their regulations according to their interests (and not according to the best reading of the law).¹⁶⁷ He argued that under longstanding principles, Congress cannot direct the courts to interpret the law in a particular way, and, by analogy, neither can the executive branch.¹⁶⁸ In sum,

¹⁶³ *Id.* at 2421 (“If [Kisor’s separation-of-powers] objection is to agencies’ usurping the interpretive role of the courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function.”).

¹⁶⁴ *Id.* at 2421–22 (plurality opinion).

¹⁶⁵ *Id.* at 2437 (Gorsuch, J., concurring).

¹⁶⁶ *Id.* at 2439; see also *id.* at 2440 (“Under *Auer*, a judge is required to lay aside his independent judgment and declare affirmatively that a regulation *means* what the agency *says* it means—and, thus, that the law *is* what the agency *says* it is.”).

¹⁶⁷ *Id.* at 2439.

¹⁶⁸ *Id.* In a related vein, Justice Gorsuch also argued that if *Auer* were a congressionally enacted statute, it would impermissibly encroach upon the judicial function in violation of the separation of powers. *Id.* at 2440.

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When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power.¹⁶⁹

Justice Gorsuch went on to contest Justice Kagan’s policy arguments in support of *Auer* deference.¹⁷⁰ Justice Gorsuch argued that Justice Kagan was wrong to say that regulatory interpretation is a matter of what the agency intended. Instead, he claimed that *courts* should interpret what the regulatory text means.¹⁷¹ And he contended that Justice Kagan was also mistaken when she argued that agencies’ expertise supports *Auer* deference, because “even agency experts ‘can be wrong . . .’”¹⁷² Justice Gorsuch argued that agencies are therefore only entitled to the lesser *Skidmore* deference.¹⁷³ Moreover, Justice Gorsuch argued that Justice Kagan was wrong to say that consistency in regulatory interpretation justifies *Auer* deference; instead, he claimed that the courts, without applying *Auer* deference, could promote a durable and consistent interpretation of an agency’s regulations just as well as, or better than, the agency.¹⁷⁴

¹⁶⁹ *Id.*

¹⁷⁰ Only Justices Thomas and Kavanaugh joined this portion of Justice Gorsuch’s opinion; Justice Alito did not.

¹⁷¹ *Kisor*, 139 S. Ct. at 2441–42.

¹⁷² *Id.* at 2443 (quoting Larkin & Slattery, *The World After Seminole Rock and Auer*, 42 HARV. J. L. & PUB. POL’Y 625,647 (2019)).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Finally, Justice Gorsuch argued (with only Justices Thomas and Kavanaugh joining) that *stare decisis* did not justify upholding *Auer*. As an initial matter, he claimed that *stare decisis* might not apply at all, because *Auer* does not merely settle a particular case; it “prescribe[s] an interpretive methodology governing every future dispute over the meaning of every regulation.”¹⁷⁵ He then claimed that *Auer* has “no persuasive rationale,” fails as a “workable standard,” and is “out of step with how courts normally interpret written laws.”¹⁷⁶ Furthermore, “the explosive growth of the administrative state over the last half-century has exacerbated [its] potential for mischief.”¹⁷⁷ Finally, he asserted that *Auer* “has generated no serious reliance interests.”¹⁷⁸

Justice Gorsuch concluded by claiming that under the majority’s limits, “courts may find that [*Auer* deference] does not constrain their independent judgment any more than *Skidmore*.” And then in an ominous warning about *Auer*’s future he wrote:

But whatever happens, this case hardly promises to be this Court’s last word on *Auer*. If today’s opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.¹⁷⁹

¹⁷⁵ *Id.* at 2444.

¹⁷⁶ *Id.* at 2446.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2447.

¹⁷⁹ *Id.* at 2448.

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In separate concurrences, Chief Justice Roberts and Justice Kavanaugh (joined by Justice Alito) echoed Justice Gorsuch's premonition. All three agreed that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear,"¹⁸⁰ suggesting that the majority's restrictions on *Auer* deference may all but neuter it, and even that the Court may soon outright overrule *Auer*. And all three agreed that the majority's holding says nothing about the "distinct" question of judicial deference to an agency's interpretation of statutes enacted by Congress,¹⁸¹ suggesting that *Chevron* deference may be next on the chopping block.

IV. *Auer*'s Future and the Future of the Administrative State

Although the Court in *Kisor* declined to overturn *Auer*, the future of *Auer* deference is nevertheless bleak, for two reasons. First, the Court so sharply curtailed *Auer* deference that it is not obvious how and when it will apply, if ever. As to the Supreme Court, *Kisor*'s highly fractured ruling gives credence to Justice Gorsuch's prediction that "today's decision is more a stay of execution than a pardon."¹⁸² Remember that three justices—Chief Justice Roberts and Justices Kavanaugh and Alito—agreed that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."¹⁸³ Remember, too, that Justices Alito and Kavanaugh joined most of Justice Gorsuch's opinion. This all suggests that a five-justice majority (the conservatives) will continue to narrow *Auer* deference, until the doctrine as a practical matter disappears. In

¹⁸⁰ *Id.* at 2424 (Roberts, C.J., concurring in part); *id.* at 2448 (Kavanaugh, J., concurring).

¹⁸¹ *Id.* at 2425 (Roberts, C.J., concurring in part); *id.* at 2449 (Kavanaugh, J., concurring).

¹⁸² *Id.* at 2425 (Gorsuch, J., concurring).

¹⁸³ *Id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Kavanaugh, J., concurring).

other words, future disputes over *Auer's application* will simply be proxy disputes over its *validity*, with a five-justice majority in effect ruling that it is invalid. Whether the Court reevaluates *Auer* yet again in future Terms, or not, the doctrine appears to be on the way out.

In the meantime, as to the lower courts, *Kisor's* limits on *Auer's* application serve not only as guideposts, but also as warnings: Apply *Auer* deference rarely, and only in a narrow band of cases. Even in that band, lower courts may shy away from *Auer* deference out of an abundance of caution, reading the handwriting on the wall. In short, *Auer* deference will likely all but disappear in the lower courts.

Second, given the line-up and the various opinions, it's possible that the Court will reevaluate *Auer* in coming Terms, and outright overrule it. Recall that the Court split four-four on the substantive questions (whether *Auer* deference violates the APA or the separation of powers), with only Chief Justice Roberts declining to opine on those questions. (He only agreed to uphold *Auer* under principles of *stare decisis*.¹⁸⁴) If, as predicted, *Kisor's* limits on *Auer* deference mean that the doctrine in effect goes away, Chief Justice Roberts may decide in a future case that *stare decisis* alone can no longer support the case. If so, then five justices would hold the view that *Auer* deference violates the APA and the separation of powers, and the Court would overrule *Auer*. In this way, *Kisor* is less a familiar "landmine" for a future Court to overrule *Auer*, and more a spot of cancer that will continue to grow until it destroys *Auer* itself.

If the future of *Auer* deference looks bleak, so too does the future of the administrative state, or at least one other critical

¹⁸⁴ *Id.* at 2424–25 (Roberts, C.J., concurring).

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aspect of it—*Chevron* deference. That’s because the opinions in *Kisor* suggest that *Chevron* deference could be next on the Court’s chopping block. Many of the reasons why four justices argued that *Auer* deference violates the APA and the separation of powers also apply to *Chevron* deference. And Chief Justice Roberts had only this to say about it: “Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress.” A five-justice majority now seems primed to reconsider *Chevron*.

* * *

Critics of the modern administrative state have moved to dismantle key aspects of it by fashioning constitutional arguments to challenge four of its key features: executive agency independence; executive agency authority to regulate under broad congressional delegations; judicial deference to executive agencies’ interpretations of ambiguous statutes; and judicial deference to executive agencies’ interpretations of their own regulations. *Kisor* goes to the fourth feature. And while the case didn’t accept the constitutional challenge, it didn’t fully reject it, either. Instead, the Court sharply limited the doctrine, and probably marked the beginning of its end. Taken together with other recent Court rulings, *Kisor* is an important step in the judicial piecemeal dismantling of key features of the modern administrative state.

Toward a Non-Delegation Doctrine That (Even) Progressives Could Like

William D. Araiza*

Today, scholars often view the non-delegation doctrine, which, in its simplest terms, would prohibit Congress from delegating its legislative power to administrative agencies or other entities, as a moribund relic of a pre-1937 U.S. Supreme Court that was hostile to the modern administrative state and the New Deal that built it.¹ Even if that view is mistaken,² it is undeniable that the doctrine's fall into desuetude has made it easier for the modern regulatory state to grow to its current size and complexity, with all the public benefits that growth has allowed.³ Thus, many progressives were dismayed when the Court granted a writ of certiorari in *United States v. Gundy*, a case that raised a non-delegation challenge to the

* Professor of Law, Brooklyn Law School. Thanks to Louis Virelli for comments on an earlier draft of this article. Thanks also to Catherine Cazes, Cody Laska, and Izaak Orlansky for fine research assistance. The author submitted an amicus brief in *United States v. Gundy*. See *infra* note 79.

¹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133 (1980) (stating that the decline of the non-delegation doctrine after 1935 was a case of "death by association" with the Court's struggle against the New Deal).

² See, e.g., Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 482 n.298 (1987) ("The demise of the nondelegation doctrine has been described [by Professor ELY] as a 'death by association,' but the description is misleading.") (internal citation omitted); see also Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) [hereafter Sunstein, *Nondelegation*] ("[i]t is . . . misleading to suggest that the nondelegation doctrine was a well-entrenched aspect of constitutional doctrine, suddenly abandoned as part of some post-New Deal capitulation to the emerging administrative state."); cf. ELY, *supra*. note 1 (quoting Professor Ely).

³ See, e.g., Nadja Popovich, *America's Skies Have Gotten Clearer, but Millions Still Breathe Unhealthy Air*, N.Y. TIMES (June 19, 2019) (attributing the increased healthfulness of American air to four decades of federal air pollution regulation).

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Sexual Offender Registration and Notification Act (SORNA).⁴ Coming when other constitutional foundations of the modern administrative state have faced attack from the judiciary,⁵ it is easy to understand the concern.

In *Gundy*, the Court, by a fractured five-to-three majority, rejected the non-delegation claim.⁶ However, one member of the majority, Justice Alito, all but announced his amenability to reconsidering the basics of the current non-delegation doctrine.⁷ When combined with the three *Gundy* dissenters, who spoke through Justice Gorsuch's sharply-worded attack on current doctrine,⁸ at least four justices seemed likely to favor that reconsideration.⁹ Thus, the real news from *Gundy* is not the rejection of the non-delegation challenge to SORNA, but rather the possible amenability of a majority of the justices to reopening a question that many had considered settled for nearly a century. At the very least, the prospect of even possibly reopening the non-delegation issue will surely prompt litigators to test the Court's new interest.

⁴ *United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), cert. granted, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17-6086).

⁵ Among other issues, judges and justices have questioned the deference that agencies enjoy when they interpret their own regulations. Compare, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (majority opinion) (reaffirming, within limits, such deference), with *id.* at 2425 (Gorsuch, J., concurring, joined by Thomas and Kavanaugh, JJ. and in relevant part by Alito, J.) (calling for the overruling of the case mandating such deference). They have also questioned the "*Chevron*" deference agencies enjoy when they interpret their authorizing legislation. See, e.g., *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("Given the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.") (citations omitted); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.) (holding unconstitutional an independent agency because of its leadership structure), vacated, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

⁶ See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

⁷ See *id.* at 2130 (Alito, J., concurring).

⁸ See *id.* at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J. and Alito and Thomas, JJ.).

⁹ The potential fifth justice, Justice Kavanaugh, did not participate in *Gundy*. See *id.* at 2130. Whether he would be willing to participate in such a reconsideration is unclear. See *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (describing *Schechter* and *Panama Refining* as "discarded . . . relics of an overly activist anti-New Deal Supreme Court").

Could such a reconsideration redound to the benefit of progressive constitutionalism? The good (and perhaps surprising) news is that the answer is yes—albeit a qualified and contingent yes. There is a history of progressive interest in non-delegation principles. A list of justices calling for sharper non-delegation scrutiny since 1937 includes not just conservatives such as Justices Rehnquist and Burger,¹⁰ but also jurisprudential progressives such as Justices Brennan and Douglas, and proponents of a muscular administrative state, such as Justice Black.¹¹ Excavating those latter justices' concerns may help progressives craft an approach to non-delegation that both blunts any deleterious impact on government's power to regulate for the public good and affirmatively furthers the interlocking projects of guarding personal liberty and ensuring executive branch fidelity to law. Of perhaps more immediate concern, while one should not lightly toy with constitutional doctrine in response to the conduct of any particular president, a revived non-delegation doctrine may help rein in any future administration that follows the current one in its questionable emergency declarations and extravagant claims of executive power.

This article acknowledges the real concerns progressives have with the non-delegation doctrine but urges them to consider the risks presented by a complete abandonment of any limits on Congress's power to delegate power. Today, a broad grant of discretionary power to an administrative agency is just as likely to lead to regulatory inaction as to aggressive and appropriate regulation. Moreover, since 2017, existing broad

¹⁰ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting joined by Burger, C.J.); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., dissenting).

¹¹ See *infra* text accompanying notes 101–102.

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delegations—for example, under many federal environmental laws—have been subject not just to regulatory inaction but regulatory rollbacks. Thankfully, courts have blocked much of that backsliding.¹² But those decisions have rested, at least in part, on the agency’s failure to comply with statutory mandates. For these reasons, today it might be imperative for Congress to insist on such mandates.¹³ Of course, those mandates require political support to be enacted. But in a world of “presidential administration,”¹⁴ in which the president places a heavy hand on how the bureaucracy implements legislation, statutory requirements that agencies at least consider particular factors or regulatory options may be necessary to help ensure executive fidelity to law.

To be sure, this argument consists, in part, of a call to Congress to change how it legislates. But courts retain a role in enforcing this principle. Most relevantly, it bears remembering Justice Brennan’s admonition, a generation ago, that agencies may not impair personal liberty absent at least relatively clear statutory authority.¹⁵ While this concern transcends any particular presidential administration, one need only think

¹² See, e.g., *Roundup: Trump Era Deregulation in the Courts*, INST. FOR POL’Y INTEGRITY, (last updated July 12, 2019) (finding, as of June 13, 2019, that Trump administration attempts to roll back regulations have failed in over ninety percent of the court challenges filed in response).

¹³ To be sure, a surprising number of the current administration’s regulatory losses in court have derived from the agency’s own procedural incompetence. See, e.g., *Becerra v. U.S. Dep’t of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017) (holding that the agency violated the Administrative Procedure Act by failing to seek public comment on the proposed delay of a rule). But even such procedural missteps can trace their origins, at least in part, to inconvenient (to the administration) mandates that have prompted the ill-fated procedural moves.

¹⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (laying out and defending the phenomenon she calls “presidential administration,” which involves unusually close direction of the administrative process by the president, and which she identifies with the governing style prevalent during the Clinton administration).

¹⁵ *United States v. Robel*, 389 U.S. 258, 269 (1967) (Brennan, J., concurring).

about the current administration's use of broad statutory authority in the immigration context to realize that liberty is directly at stake in the non-delegation discussion. If nothing else, that realization might make progressives more accepting of a non-delegation doctrine that did not try to do too much but aspired to do something.

But even if these arguments do not convince progressives of the benefits of reconsidering the non-delegation principle, the signals sent in *Gundy* nevertheless suggest the wisdom of that project. In *Gundy*, four justices either called for or expressed a willingness to rethink Congress's power to delegate legislative power. A fifth, Justice Kavanaugh, did not participate in *Gundy* but could very well supply the final vote needed to create a majority committed to such a reexamination. In light of that reality, progressives may need to debate and persuade their colleagues, not about whether the doctrine should be rethought, but how. In other words, progressives may not have the luxury of sitting out this fight by clinging to the status quo. When the time comes, they should be ready.

This article proceeds in four parts. Part I lays out the basics of the non-delegation doctrine and traces its evolution up to *Gundy*. Part II explains the justices' competing applications of the doctrine in *Gundy* and their implications. Part III offers alternative approaches for a modestly revitalized non-delegation doctrine—approaches that further progressive commitments or at least mitigate any harm to them. Part IV summarizes and concludes, reprising the title of the article but converting it into a question. That conversion accounts for the reality that, for many progressives, any re-engineering of the non-delegation doctrine is a fraught enterprise that carries risks for progressive priorities. But given the winds blowing from

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the Supreme Court, progressives may have no choice but to embark on it.

I. Non-Delegation Basics

A. The Doctrine

If lawyers and law students remember one thing about the non-delegation doctrine, it is probably that it was used twice in 1935 (what Cass Sunstein called the doctrine's "one good year"¹⁶) to strike down provisions of the National Industrial Recovery Act,¹⁷ but was never used again. A slightly fuller recollection might view the supposed demise of the doctrine as part of the Court's retreat from its struggle against the New Deal.¹⁸

These understandings reveal the truth of the adage that "a little bit of knowledge is a dangerous thing." The most problematic feature of this basic understanding relates to the doctrine's supposed death after 1935. Only one year after the doctrine's "one good year," six justices agreed in *Carter v. Carter Coal* that the Bituminous Coal Conservation Act of 1935 was unconstitutional. The decision rested, in part, on the Act's delegation to mine operators to establish wage and

¹⁶ Sunstein, *Nondelegation*, *supra* note 2, at 322.

¹⁷ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

¹⁸ See ELY, *supra* note 1. Whether the converse is true—that is, whether the doctrine's *rise* was similarly a function of the Court's commencement of a struggle against the New Deal—is a difficult question. Cass Sunstein deems it worthy of note that 1935 marked the first uses of the non-delegation doctrine to strike down a federal law, despite "a number of previous opportunities." Sunstein, *Nondelegation*, *supra* note 2, at 322. Thus, he states that "[i]t is . . . misleading to suggest that the nondelegation doctrine was a well-entrenched aspect of constitutional doctrine, suddenly abandoned as part of some post-New Deal capitulation to the emerging administrative state." *Id.* On the other hand, from the early years of the Republic, the Court considered challenges that have since been understood as raising non-delegation issues. See, e.g., WILLIAM D. ARAIZA, *CONSTITUTIONAL LAW: CASES, APPROACHES, AND APPLICATIONS* 153–154 (Carolina Academic Press 2016) (briefly discussing some of these cases). A resolution of this question is unnecessary to this article's argument and is thus bracketed.

other working conditions, which would then have the force of federal law. This, the Court concluded, constituted “legislative delegation in its most obnoxious form.”¹⁹ Concededly, that majority consisted of the “Four Horsemen” of the pre-1937 Court, along with their sometime fellow-travelers Justices Owen Roberts and Charles Evans Hughes;²⁰ thus, one might think that *Carter Coal*’s application of the non-delegation doctrine simply constituted the last gasp of the Old Court’s struggle against the modern administrative state. But several times since the 1970s the Court has narrowed statutory language delegating power to agencies on the ground that broader constructions would raise non-delegation concerns.²¹ This phenomenon reveals the doctrine’s continued existence, if not its full-blown vitality. But any claim that the doctrine has suffered the fate of, say, the *Lochner*-era liberty of contract is surely overstated.²²

The standard theory of the non-delegation doctrine is straightforward, if nevertheless contested. As Justice Scalia

¹⁹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). To be sure, some scholars question whether *Carter Coal* was really a decision based on the non-delegation doctrine. See, e.g., Alexander Volokh, *The Shadow Debate Over Private Delegation in DOT v. Association of American Railroads*, 2015 CATO SUP. CT. REV. 359 (2014–2015).

²⁰ Justice Roberts joined the majority opinion. Chief Justice Hughes concurred separately in *Carter Coal*, but he agreed with the majority’s conclusion on the non-delegation issue. See *Carter Coal*, 298 U.S. at 317–18 (Hughes, C.J., concurring) (“I . . . agree [with the majority] that subdivision (g) of part 3 of the prescribed [coal] Code is invalid upon three counts: (1) It attempts a broad delegation of legislative power to fix hours and wages without standards of limitation.”) (citation omitted).

²¹ See, e.g., *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 543 (1980) (Rehnquist, J., dissenting, joined by Burger, C.J.); *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring); *Nat’l Cable Television Ass’n, Inc. v. United States*, 415 U.S. 336 (1974). In *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001), the Court embraced a narrower reading of the relevant statutory language, which then allowed it to uphold the law against a non-delegation challenge, although the Court did not explicitly state that that narrower construction was compelled by the prospect of a non-delegation strike-down.

²² Cf. Sunstein, *Nondelegation*, *supra* note 2, at 315 (“Reports of the death of the nondelegation doctrine have been greatly exaggerated. Rather than having been abandoned, the doctrine has merely been renamed and relocated.”).

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explained in *Whitman v. American Trucking Ass'ns*, the last major pre-*Gundy* non-delegation case, “Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers”²³ Thus, according to Justice Scalia’s explanation, the non-delegation doctrine rests on Article I’s Vesting Clause, which, by reflecting “We the People[’s]” decision to vest Article I’s “legislative powers” in Congress, implicitly precluded Congress from delegating (or, more precisely, re-delegating) those powers to another body.²⁴

To be sure, Justice Scalia followed this explanation with a statement of the modern “intelligible principle” standard.²⁵ The combination of this explanation of the non-delegation doctrine with the restatement of the intelligible principle standard implies that congressional delegations satisfying that standard do not amount to delegations of actual “legislative power.”²⁶ Some, including Justice Stevens in that same case, have questioned that logic. In his short concurrence in *American Trucking*, he called for the Court to acknowledge that constitutionally-valid delegations can nevertheless involve delegations of legislative power. Some scholars have ventured

²³ *American Trucking*, 531 U.S. at 472.

²⁴ Again, this explanation is not merely idiosyncratic to Justice Scalia. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 21–33 (Gorsuch, J., dissenting) (“Through the Constitution . . . the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement.”); see also, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2104 (2004) (“One significant recent development is that the nondelegation doctrine has become firmly implanted in the Vesting Clause of Article I.”).

²⁵ See *American Trucking*, 531 U.S. at 472 (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the United States.’ This text permits no delegation of those powers, and so we repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).”).

²⁶ See *id.* at 487 (Stevens, J., concurring in part and concurring in the judgment).

even further, arguing that a statutory delegation of power, even out-and-out legislative power, is itself a legislative act that by its terms satisfies any constitutional non-delegation requirement.²⁷ Nevertheless, the statement Justice Scalia offered in *American Trucking* remains the standard explanation for the doctrine.

B. The Policy

Despite the continued existence of the non-delegation doctrine at the federal level,²⁸ the standard narrative of its decline (though not its death) remains essentially accurate. Today, the doctrine remains largely dormant, serving mainly as a justification for narrower statutory interpretations that thereby avoid the non-delegation issue.²⁹ Good reasons account for that relative decline. First, judges and scholars have long recognized that the complexity of modern regulatory issues demands a degree of substantive expertise that Congress generally lacks.³⁰ The problem also goes beyond expertise, to

²⁷ See Eric Posner & Adrian Vermeule, *Interring the Non-Delegation Doctrine*, 69 U. CHICAGO L. REV. 1721, 1723 (2002). To be clear, Posner and Vermeule do argue that “[n]either Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other de jure powers of federal legislators.” *Id.*

²⁸ By contrast to its desuetude at the federal level, according to two scholars the doctrine is alive and well in state constitutional law. See Keith Whittington & Jason Iuliano, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017).

²⁹ See *supra* note 21.

³⁰ See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2151–52 (2004) (“Perhaps the argument most commonly invoked in support of broad delegation is the desirability of having policy formulated by persons who have expertise in the subject matter. Administrative agencies typically have large professional staffs, protected by civil service laws, who have specialized training and extensive experience with particular regulatory issues. Congress has a much smaller staff, which tends to be selected under pressure from interest groups and party members rather than on the basis of expertise. Thus, to the extent we want policy made by persons who know what they are doing, it is better that policymaking be centered in the administrative agencies rather than in Congress.”) (footnote omitted). It remains true that Congress could theoretically create an expertise capacity for itself. But such an expert institution, presumably advising Congress, would simply raise the question of representatives’ ability to make appropriate use of such expert information. See sources cited *infra* note 31.

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encompass concerns about Congress's relative institutional inflexibility, which would make it difficult for it to respond nimbly and with nuance to the inevitable follow-on detail questions that arise from foundational policy decisions.³¹

These phenomena create tension between any requirement of increased congressional specificity and many progressive policy preferences. A constitutional requirement that legislation be more specific would make it more difficult for Congress to legislate.³² This increased difficulty would flow from both the increased technical difficulty Congress would confront in making more detailed regulatory choices and the increased political difficulty it would encounter when seeking consensus on those questions. The result would likely be less legislation, and thus fewer delegations of regulatory power to agencies, completely separate from whatever would be the direct effect of the increased specificity requirement.³³ Less legislation, of course, means less regulation—a result that has a clear policy valence, usually against progressive values.

³¹ See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (“The legislative process would frequently bog down if Congress were constitutionally required to appraise before-hand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules.”); see also, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1695 (1975) [hereafter Stewart, *Reformation*] (“Detailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized and complex issues. Such a task would require resources that Congress, has, in most instances, been unable or unwilling to muster.”) (emphasis added); Merrill, *supra* note 30, at 2153 (“Closely associated with expertise, but conceptually distinct, is the idea that broad delegation is necessary if government is to realize the ambitious agenda it has set for itself. The focus here is not on the technical complexity of issues, but the scale of government operations.”).

³² See *supra* note 31.

³³ See, e.g., Merrill, *supra* note 30, at 2146 (“Strict nondelegation . . . would impose a significant chokehold on federal policymaking relative to current arrangements and would constrict the total volume of new federal regulation.”); Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 331 (1987) [hereafter Stewart, *Beyond Delegation*] (“[R]equiring that all regulatory statutes contain detailed rules of conduct would increase substantially the costs and difficulty of legislative agreement and greatly reduce the amount of legislation enacted.”).

Progressives might also have reason to worry about the substance of the more detailed choices that a revived non-delegation doctrine would demand from Congress. Speaking very broadly, one might view expertise and political responsiveness as alternative justifications for administrative action. To the extent the political marketplace is thought to reflect an inappropriately strong concern for the interests of concentrated and powerful economic interests at the expense of a more diffuse public interest, progressives might prefer a decision-making forum that mitigates the worst effects of self-interested groups dominating the legislative process.³⁴ This dynamic leads progressives to favor the administrative model, with its public interest/technocratic focus, mandated procedural regularity and open access, and judicial review for both substantive rationality and procedural fairness. Of course, nobody familiar with the administrative process would deny the influence powerful groups exert within the bureaucracy.³⁵ Comparatively, however, progressives have good reason to favor agencies over Congress when allocating authority to make detailed policy choices.

Indeed, scholars have argued that the administrative process, when compared to its congressional analogue, is particularly well-suited to receive and process political inputs. For example, in a now-canonical 1985 article, Jerry Mashaw argued that the president's ability to influence the policy choices agencies made rendered administrative action more

³⁴ Indeed, the effect may be even greater to the extent that a requirement of more detailed legislation would likely increase the importance of the relevant congressional committees, which would serve as even more convenient forums for concentrated interest group rent-seeking. See, e.g., Stewart, *Reformation*, *supra* note 31, at 1695–96 (suggesting this possibility); Stewart, *Beyond Delegation*, *supra* note 33, at 331–32 (making this suggestion more explicitly).

³⁵ See, e.g., THEODORE LOWI, *THE END OF LIBERALISM* 87–89 (1969).

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politically accountable than legislation.³⁶ That seemingly counter-intuitive conclusion, in turn, renders broad statutory delegations more politically legitimate than narrower ones that leave open less room for administrative interpretation.³⁷ Writing a decade and a half later, then-Professor Elena Kagan echoed and amplified that point, although with qualifications.³⁸

While this article has framed these pro-delegation arguments in terms of progressives' policy preferences, the post-1937 Court has embraced analogous justifications as part of its constitutional acceptance of broad delegations. Most notably, the Court has recognized that Congress can legitimately decide that it lacks the capacity for making the sheer number of detailed and technically-complex decisions it would have to make were it forbidden from delegating many important decisions to administrative agencies.³⁹ An additional doctrinal reason for allowing broad delegations is the inevitable subjectivity of a judgment that a statute fails

³⁶ Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L., ECON., & ORG. 1 (1985).

³⁷ See Kagan, *supra* note 14, at 2333 ("In defending broad delegations, [Professor] Mashaw contended that more extensive bureaucratic, as opposed to legislative, decisionmaking actually would improve the connection between governmental action and electoral wishes.").

³⁸ See *id.* at 2331–37.

³⁹ See, e.g., *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.").

or satisfies the intelligible principle standard.⁴⁰ To be blunt, just how “intelligible” would a statute’s “principle” have to be in order to survive stringent non-delegation review? No objective metric guides such a judgment.⁴¹ Given that reality, courts—especially those already resigned to accommodating the modern administrative state—may well have simply given up on enforcing the doctrine except as an interpretive canon militating in favor of narrow statutory interpretations, and perhaps as a guardrail preventing inappropriate delegations to private institutions.⁴² Regardless of the particular reasons, it is a fair statement that, at least until now, the non-delegation doctrine’s relative modern insignificance has been part and

⁴⁰ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (stating that the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law”) (internal quotation omitted).

⁴¹ See, e.g., Stewart, *Reformation*, *supra* note 31, at 1696–97 (noting this difficulty); see also Stewart, *Beyond Delegation*, *supra* note 33, at 325 (reviewing the previously cited source thirteen years later and finding that the “reasons why I believed that the difficulties in devising a satisfactory juridical [sic] answer to [the question ‘[h]ow much delegation is too much?’] [were] virtually insurmountable . . . [and] seem to me as strong or even stronger today”); Merrill, *supra* note 30, at 2156–57 (“The basic problem is that the partisans of strict nondelegation have been unwilling to say that all legislative rulemaking by executive branch agencies is unconstitutional. . . . The result is that strict nondelegation partisans are forced to draw a line within a general phenomenon—agency legislative rulemaking—past which there is too much discretion, too much controversy, too much importance, etc., to allow the agency to make the judgment alone.”).

⁴² See *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1237–38 (2015) (Alito, J., concurring) (expressing particular concern about delegations to private entities).

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parcel of the modern Court's near⁴³ full-blown acceptance of the administrative state.⁴⁴

And then the Court granted certiorari in *Gundy*.⁴⁵

II. *United States v. Gundy*

A. The Background

Gundy involved a non-delegation challenge to the so-called “pre-Act offender” provision of the Sexual Offender Registration and Notification Act (SORNA).⁴⁶ Congress enacted SORNA to solve the problem of the patchwork character of state sexual offender notification laws, which Congress believed allowed convicted sexual offenders to fall off law enforcement's radar by moving across state lines and exploiting the states' inconsistent registration requirements. SORNA imposed a detailed set of reporting and registration requirements on sexual offenders who were convicted after SORNA's 2006 enactment date. However, its application to

⁴³ *But see* *INS v. Chadha*, 462 U.S. 919, 985–87 (1983) (White, J., dissenting) (disagreeing with the majority's decision striking down the legislative veto, given Justice White's understanding that the legislative veto had come to play a crucial role in the modern administrative state, especially considering the phenomenon of broad congressional delegations to administrative agencies).

⁴⁴ *See, e.g.*, M. Elizabeth Magill, *The Revolution That Wasn't*, 99 *Nw. L. Rev.* 47, 68 (2004) (identifying as a subject of study “the [Supreme] Court's acceptance [during the Rehnquist Era] as a constitutional matter of the administrative state”); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 *Colum. L. Rev.* 665, 702 (2012) (concluding that the Court's willingness, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), to assume the independence of the commissioners of the Securities and Exchange Commission led to a situation in which “the Court's opinion wound up . . . seeming completely to accept the constitutional validity of the modern administrative state”).

⁴⁵ *United States v. Gundy*, 695 F. App'x 639 (2d Cir. 2017), *cert. granted*, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17–6086).

⁴⁶ 34 U.S.C. § 20901 *et seq.*

offenders convicted *before* that date (set forth in the law’s pre-Act offender provision) was governed by this simple—and broad—delegation of power to the attorney general: “The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders”⁴⁷

This authority comes uncabined by any limitations or specifications particular to it, or even any criteria guiding the attorney general’s selection of any such specifications. On its face, it seemingly allows him to apply all, none, or some of the statute’s requirements for post-enactment offenders. Indeed, in *Reynolds v. United States*, a 2012 case construing this authority without passing on its constitutionality, the majority suggested that it would allow him to prescribe different sets of registration and notification requirements for different categories of pre-Act offenders.⁴⁸ The Court’s decision in *Reynolds* that offenders were not automatically subject to federal registration and notification requirements—that is, the Court’s decision that the attorney general needed to act in order to subject pre-Act offenders to any notification requirements—led Justice Scalia, joined by Justice Ginsburg, to warn that the provision, thus construed, was “sailing close to the wind”⁴⁹ with regard to the non-delegation principle.

⁴⁷ 34 U.S.C. § 20913(d).

⁴⁸ See *Reynolds v. United States*, 565 U.S. 432 (2012), 440–41 (“[P]ractical problems arising when the Act sought to apply the new registration requirements to pre-Act offenders . . . might have warranted different federal registration treatment of different categories of pre-Act offenders.”).

⁴⁹ *Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting).

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Despite the extraordinary breadth of the discretion the pre-Act offender provision granted the attorney general, every federal appellate court to consider the issue rejected non-delegation challenges.⁵⁰ These courts often found the requisite intelligible principle in the statute's stated overall goal of establishing a "comprehensive"⁵¹ sex offender registry in

⁵⁰ *United States v. Nichols*, 775 F.3d 1225, 1231 (10th Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 1113 (2016); *United States v. Richardson*, 754 F.3d 1143, 1146 (9th Cir. 2014); *United States v. Cooper*, 750 F.3d 263, 271–72 (3d Cir. 2014); *United States v. Goodwin*, 717 F.3d 511, 516–17 (7th Cir. 2013); *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013); *United States v. Sampsell*, 541 F. App'x 258, 259–60 (4th Cir. 2013); *United States v. Parks*, 698 F.3d 1, 7–8 (1st Cir. 2012); *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman*, 591 F.3d 83, 92–93 (2d Cir. 2010); *United States v. Whaley*, 577 F.3d 254, 262–64 (5th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1212–14 (11th Cir. 2009). To be sure, at times individual judges—not to mention Justice Scalia, joined by Justice Ginsburg—had suggested that SORNA's pre-Act offender provision raised serious non-delegation concerns. *See, e.g., Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting) (arguing that Congress's decision to "leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals" was "sailing close to the wind with regard to the principle that legislative powers are nondelegable"); *United States v. Fuller*, 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring) ("The Attorney General could simply flip a coin, and thereby make the more than 500,000 persons convicted of sex offenses before July 27, 2006, subject to SORNA's registration requirements—or not."); *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring) (commenting on the attorney general's "unfettered discretion to determine both how and whether SORNA [is] to be retroactively applied") (alteration in original) (quoting *United States v. Madera*, 528 F.3d 852, 858 (11th Cir. 2008) (*per curiam*)) (all cited in *United States v. Cotonuts*, 633 F. App'x 501, 538 (10th Cir. 2016)); *see also United States v. Nichols*, 784 F.3d 666, 667 (Gorsuch, J., dissenting from denial of rehearing en banc); *id.* at 667 (Lucero, J., dissenting from denial of rehearing en banc) (expressing agreement with then-Judge Gorsuch in that same case). It is true that some of these decisions were handed down before *Reynolds* established the discretionary nature of registration requirements for pre-Act offenders. Thus, some of these non-delegation challenges were rejected under a circuit court regime in which the attorney general had no discretion whether to require pre-Act offenders to register, and if so, how. But some of these cases post-date *Reynolds*.

⁵¹ 34 U.S.C. § 20901.

order to “protect the public”;⁵² its specification of registration and notification requirements for offenders convicted after SORNA’s enactment date; and its identification of the attorney general as the official responsible for making decisions about the required rules in what one court described as “one of the few areas in which the Attorney General exercises discretion”—the applicability of those registration and notification requirements to pre-Act offenders.⁵³ Several cases also rejected calls for a more stringent standard than the intelligible principle requirement, which defendants made in light of the criminal consequences of any decisions made by the attorney general with regard to registration and notification requirements.⁵⁴

While he was serving on the Tenth Circuit, then-Judge Neil Gorsuch twice questioned whether an interpretation of the pre-Act offender provision that made pre-Act offenders subject to federal requirements only if the attorney general so specified would (before *Reynolds* resolved the issue)⁵⁵ or did (after *Reynolds*)⁵⁶ satisfy non-delegation scrutiny. Nevertheless, it was

⁵² *Id.*; see also *United States v. Terrell*, 632 Fed. App’x 881, 883 (8th Cir. 2015) (acknowledging that the court in *Kuehl* found an intelligible principle in the fact that “one of the Act’s purposes is to ‘establish[] a comprehensive national system for the registration’ of sex offenders ‘[i]n order to protect the public from sex offenders and offenders against children. . . .’” (quoting 42 U.S.C. § 16901)); *Nichols*, 715 F.3d at 1231 (citing and relying on *Kuehl*); *Richardson*, 754 F.3d at 1145 (adopting a similar approach based on earlier circuit court opinions adopting that approach); *Cooper*, 750 F.3d at 271–72 (similar); *United States v. Rogers*, 468 F. App’x 359, 362 (4th Cir. 2012) (relying on the statute’s overall statement of purpose as providing the required intelligible principle); *Whaley*, 577 F.3d at 263–64 (same). Other courts have employed much more summary reasoning. See, e.g., *Felts*, 674 F.3d at 606 (“[I]n light of post-New Deal cases . . . Congress’s delegations under SORNA possess a suitable ‘intelligible principle’ and are ‘well within the outer limits of [the Supreme Court’s] nondelegation precedents.’”) (citations omitted; second set of brackets in original); *Guzman*, 591 F.3d at 93 (relying on the fact that the authority delegated to the attorney general involved “the limited class of individuals who were convicted of covered sex offenses prior to SORNA’s enactment”).

⁵³ *Goodwin*, 717 F.3d at 516; see also, e.g., *Ambert*, 561 F.3d at 1214 (similar).

⁵⁴ See, e.g., *Cooper*, 750 F.3d at 270–71.

⁵⁵ See *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring).

⁵⁶ See *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (en banc) (Gorsuch, J., dissenting from denial of rehearing en banc).

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still a surprise—indeed, “shock” would not be too strong a term—when the Court granted certiorari in *Gundy* and singled out Mr. Gundy’s non-delegation argument as the claim it wished to review.⁵⁷ The Court’s decision to hear the case came during a period marked by percolating uncertainty over other foundational elements of the administrative state. The Court had been signaling its discontent with *Auer* deference,⁵⁸ and, with the addition of Justice Gorsuch, even *Chevron* deference was seen as possibly ripe for a reconsideration.⁵⁹ Moreover, Justice Kavanaugh, while on the D.C. Circuit, had authored a panel opinion (vacated by the en banc court) that struck down the constitutionality of the Consumer Financial Protection Board given its status as an independent agency headed by a single person rather than a multi-member body.⁶⁰ More generally, anxiety about the Trump administration’s supposed interest in “deconstructing” the administrative state⁶¹ caused observers to wonder whether, if the non-delegation doctrine’s demise was in fact a case of “death by association,”⁶² the Court’s seeming new interest in it represented the leading edge of a resurrection of classical jurisprudence that would impose significant restrictions on the national state the New Deal built.

⁵⁷ See *United States v. Gundy*, 695 F. App’x 639 (2d Cir. 2017), cert. granted, 86 U.S.L.W. 3438 (U.S. Mar. 5, 2018) (No. 17–6086) (granting cert. limited to the non-delegation issue).

⁵⁸ Compare *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (reaffirming, within limits, such deference), with *id.* at 2425 (Gorsuch, J., concurring, joined by Thomas and Kavanaugh, JJ. and in relevant part by Alito, J.) (calling for the overruling of the case mandating such deference).

⁵⁹ See, e.g., Eric Citron, *The Roots and Limits of Gorsuch’s Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM) (discussing the views Justice Gorsuch expressed on *Chevron* during his tenure on the Tenth Circuit); see also *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (calling for a reconsideration of *Chevron* “[g]iven the concerns raised by some Members of this Court”).

⁶⁰ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.) (holding unconstitutional an independent agency because of its leadership structure), vacated, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

⁶¹ See, e.g., *We the People, Deconstructing the Administrative State*, NAT’L CONST. CTR. (Nov. 2, 2017).

⁶² See sources cited *supra* notes 1–2.

B. The Court's Decision

In *Gundy*, a five-justice majority of an eight-justice Court⁶³ rejected the non-delegation argument. However, those five justices split badly in their reasoning. Writing for a four-justice plurality, Justice Kagan concluded that the pre-Act offender provision “f[ell] well within”⁶⁴ the non-delegation doctrine’s requirements. But in order to reach that conclusion, she had to conclude that the provision, as construed in *Reynolds*,⁶⁵ significantly limited the attorney general’s discretion regarding whether and how to apply SORNA’s requirements to pre-Act offenders. In particular, she read *Reynolds* as concluding that the pre-Act offender provision mandated the attorney general to require pre-Act offenders to register as soon as it was feasible, with the limited discretion implicit in the feasibility criterion simply reflecting the practical difficulties that would attend a rigid requirement that all such offenders immediately register.⁶⁶

Justice Kagan’s plurality opinion took a well-trod path in considering, and rejecting, the non-delegation challenge. By reading the statute narrowly, as providing little discretion to the attorney general,⁶⁷ Justice Kagan was able to frame the non-delegation issue in a way that inevitably pointed toward

⁶³ Justice Kavanaugh did not participate. See *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

⁶⁴ *Id.* at 2124.

⁶⁵ *Reynolds v. United States*, 565 U.S. 432 (2012). For an explanation of *Reynolds*, see text accompanying supra notes 47–49.

⁶⁶ While the *Gundy* plurality concluded that *Reynolds* had indeed settled on this understanding of the statute, see *Gundy*, 139 S. Ct. at 2124–26, it went on to provide additional reasons for adopting that understanding. See *id.* at 2126–29; see also *id.* at 2125–26 (“[A]s the next part of this opinion shows, in somewhat greater detail than *Reynolds* thought necessary, we read the statute in the same way [as *Reynolds* did].”); *id.* at 2129 (after considering the statutory interpretation question in more detail, “[w]e thus end up, on close inspection of the statutory scheme, exactly where *Reynolds* left us”).

⁶⁷ Cf. *id.* at 2123 (plurality opinion) (explaining that “a nondelegation inquiry always begins (and often almost ends) with statutory interpretation”).

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upholding the law.⁶⁸ In so doing, her plurality opinion followed the path marked by Justice Scalia's opinion for the majority in *American Trucking*. In that opinion, the Court, after rejecting the court of appeals' suggestion that the agency itself could cure a non-delegation problem by promulgating limiting regulations, began its conventional non-delegation analysis by construing the Clean Air Act narrowly. In turn, Justice Scalia then observed that the narrower reading brought the statute within the bounds of previous non-delegation cases.⁶⁹

But in all this conventional analysis Justice Kagan spoke only for herself and Justices Ginsburg, Breyer, and Sotomayor. Justice Alito, the fifth vote for rejecting Gundy's argument, concurred only in the judgment.⁷⁰ He conceded that he "cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years."⁷¹ On that basis he "vote[d] to affirm."⁷² However, he also stated that he would support a reconsideration of "the

⁶⁸ Cf. *id.* (plurality opinion) ("The [pre-Act offender] provision, in Gundy's view, grants the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time. If that were so, we would face a nondelegation question. But it is not.") (internal quotation and citation omitted).

⁶⁹ See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001) ("We agree with the Solicitor General that the text of § 109(b)(1) of the [Clean Air Act] at a minimum requires that '[f]or a discrete set of pollutants and based on published air quality criteria that reflect the latest scientific knowledge, [the] EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air.' Requisite, in turn, 'mean[s] sufficient, but not more than necessary.' These limits on the EPA's discretion are strikingly similar to the ones we approved in *Touby v. United States*, 500 U.S. 160 (1991), which permitted the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was 'necessary to avoid an imminent hazard to the public safety.' They also resemble the Occupational Safety and Health Act of 1970 provision requiring the agency to 'set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer any impairment of health'—which the Court upheld in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).") (citations and parallel case citations omitted).

⁷⁰ See *Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring in the judgment).

⁷¹ *Id.* at 2131.

⁷² *Id.*

approach we have taken for the past 84 years” (that is, since 1935) “[i]f a majority of th[e] Court were willing” do to so.⁷³ Given that the three dissenters in *Gundy* called for exactly that reconsideration, and given that Justice Kavanaugh did not participate in *Gundy*, Justice Alito all but invited a new non-delegation challenge in a case featuring a full court.

Justice Gorsuch was unwilling to wait.⁷⁴ In an opinion joined by Chief Justice Roberts and Justice Thomas, he delivered a rhetoric-heavy argument against the dangers to individual liberty arising from combining legislative and executive powers in a single branch.⁷⁵ When he turned to doctrine, he argued that subsequent Court opinions had transformed *J.W. Hampton*’s intelligible-principle standard into a much broader license for Congress to delegate power than the *J.W. Hampton* Court had intended.⁷⁶ He suggested that the intelligible-principle idea should be understood as simply describing rulings that had come before it. Justice Gorsuch portrayed those rulings as allowing Congress to delegate when the delegation merely: 1) required the delegee to “fill up the details” to implement a policy decision Congress had made by statute;⁷⁷ 2) required the delegee to find facts that would trigger the congressional decision that was made contingent on those findings; or 3) gave the delegee a power that it already

⁷³ *Id.*

⁷⁴ *See id.* (Gorsuch, J., dissenting) (“Justice Alito supplies the fifth vote for today’s judgment and he does not join either the plurality’s constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.”).

⁷⁵ *See id.* at 2133–45.

⁷⁶ *See id.* at 2138–39 (“This Court first used th[e] intelligible principle] phrase in 1928 in *J. W. Hampton, Jr., & Co. v. United States*, where it remarked that a statute ‘lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform’ satisfies the separation of powers. No one at the time thought the phrase meant to effect some revolution in this Court’s understanding of the Constitution.”) (footnote omitted; first set of brackets added).

⁷⁷ *See id.* at 2136 (Gorsuch, J., dissenting).

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possessed in part by virtue of its location in either the executive branch or the Article III judiciary.⁷⁸

While this description theoretically leaves significant room for Congress to delegate, the tone of Justice Gorsuch's dissent should worry those who favor allowing broad congressional delegations. Justice Gorsuch's descriptions of the delegations the Court had previously upheld feature strikingly vague language that could be used against not just the arguably-standardless discretion the pre-Act offender provision provided,⁷⁹ but also more conventional economic and health legislation. At the very least, that language could seriously destabilize current doctrine and invite adventurous litigators to request, and lower court judges to apply, stringent review of foundational regulatory legislation.

III. Alternative Non-Delegation Paths

Gundy thus gives progressives reason for concern. Not so much for its result—although one can fairly question Justice Kagan's statutory interpretation as pushing the limits of how far statutory language can be massaged to provide the guidance even the standard form of the non-delegation doctrine requires. Rather, *Gundy's* far more troubling feature is the message sent by Justice Alito's willingness to join in a fundamental reconsideration of the non-delegation principle and the potential stringency of Justice Gorsuch's proposed

⁷⁸ See *id.* at 2136–39.

⁷⁹ The author of this article submitted an amicus brief in *Gundy*, arguing that the Court could find the pre-Act offender provision to violate the non-delegation doctrine using the prevailing doctrinal standard and without disturbing any precedents. See Brief of William D. Araiza and 14 Other Constitutional, Criminal, and Administrative Law Professors as Amici Curiae in Support of Petitioner, *Gundy*, 139 S. Ct. 2116 (No. 17–6086).

alternative.⁸⁰ If Justice Kavanaugh would support such a reconsideration,⁸¹ then the template Justice Gorsuch offered in his *Gundy* dissent would surely be a leading candidate for a new, more muscular version of the doctrine.

That more muscular version could threaten the type of proactive and effective regulation progressives favor. While Justice Gorsuch insisted that his understanding of the intelligible-principle standard would not cripple the administrative state,⁸² that assurance presumed that Congress could muster a “social consensus”⁸³ on legislative policy sufficiently precise to satisfy Justice Gorsuch’s requirement that such delegations give agencies the power merely to “fill up the details”⁸⁴ or find facts.⁸⁵ Perhaps many statutory foundations of the modern regulatory state—environmental, securities, worker and product safety, and economic regulation statutes, to name but a few—could survive such scrutiny. Or perhaps not. And perhaps Chief Justice Roberts might find himself unwilling to join a bare majority of the Court in striking down these

⁸⁰ Justice Alito wrote that “If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.” *Gundy*, 139 S. Ct. at 2131 (Alito, J., concurring). Presumably, he would include himself in the number of justices needed to make a majority—that is, presumably he would “join four” to embark on such a reconsideration. If instead he literally means that he would “support” an effort made by “a majority of the Court” to reconsider its non-delegation jurisprudence—that is, if he would “join five” in such an effort—then the threat his opinion poses is much reduced, given the willingness of four justices to adhere to the standard approach exemplified by Justice Kagan’s plurality opinion. See Michael Herz, *Symposium: In “Gundy II,” Auer Survives By a Vote of 4.6 to 4.4*, SCOTUSBLOG (June 27, 2019, 11:30 AM) (presuming the “join four” understanding of Justice Alito’s language).

⁸¹ Whether in fact Justice Kavanaugh would support such a reconsideration is an open question. See discussion *supra* note 9.

⁸² See *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (“Nor would enforcing the Constitution’s demands spell doom for what some call the ‘administrative state.’ The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation’s course on policy questions like those implicated by SORNA.”).

⁸³ *Id.*

⁸⁴ *Id.* at 2136.

⁸⁵ See *supra* note 82.

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foundational laws. But today, reason for worry exists that did not before *Gundy* was decided.

Along with that reason for worry, however, comes an opportunity. Regardless of progressives' concerns about a revitalized non-delegation doctrine, it is important to note and, if possible, promote the good that a modestly revived doctrine could accomplish. The first challenge arises from what a *modestly* revived doctrine would look like. How would such a doctrine be articulated to ensure it was more amendable to objective judicial application than any other mid-way point between the current regime and one that required courts to decide whether Congress had made every significant (or even every) policy choice? Having determined that point, what good could the resulting doctrine accomplish?

A. Standards—Of Any Sort

One way to think about crafting such a mid-way point for a non-delegation test is through the simple expedient of requiring that at least some standard accompany any delegation of power. For example, then-Judge and later Justice Gorsuch criticized SORNA's pre-Act offender provision because it failed to provide any standard at all. In his view, the provision was a pure grant of power uncabined by any legislative principle, intelligible or otherwise.⁸⁶

One might think that courts would find it easy to manage and apply such a constitutional requirement. But problems would immediately cloud it. First, in some situations a question might arise whether some policy judgment did in fact accompany the challenged grant of power. For example, one

⁸⁶ See *United States v. Nichols*, 784 F.3d 666, 668–669 (10th Cir. 2015) (en banc) (Gorsuch, J., dissenting from denial of rehearing en banc); *Gundy*, 139 S. Ct. at 2132 (Gorsuch, J., dissenting).

could conceivably view SORNA's pre-Act offender provision as expressing a view that only sex offenders, as the statute defined the term, should be included in the group of persons the attorney general was granted the power to regulate.⁸⁷ In other words, the grant of authority itself could be viewed, if one so chose, as incorporating a value judgment by virtue of the scope of the authority it granted. But a non-delegation standard that is satisfied by the statute's identification of the regulated group is hardly a standard at all—at least not one that would likely be acceptable to a broad coalition of justices.

Second, one could widen the focus and locate the required congressional policy judgment not in the grant of the specific authority, but in the statute as a whole. As noted earlier,⁸⁸ many appellate courts that rejected non-delegation challenges to SORNA's pre-Act offender provision cited the statute's overall goals, stated (quite broadly and cursorily) in its introduction. Those goals—to “establish[] a comprehensive national system for the registration of sex offenders,” “[i]n order to protect the public from sex offenders and offenders against children”⁸⁹—apply to SORNA in its entirety. Justice Kagan relied heavily on that introductory purpose when finding a standard that sufficiently cabined the attorney general's discretion, rejecting Gundy's claim that the requisite standard had to be “tied” to the specific grant of authority over pre-Act offenders.⁹⁰

Whether those broad statutory purposes adequately cabin the attorney general's discretion to impose registration

⁸⁷ See, e.g., *United States v. Guzman*, 591 F.3d 83, 93 (2nd Cir. 2010) (rejecting the nondelegation argument on the ground that the authority delegated to the attorney general involved “the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment”).

⁸⁸ See *supra* note 52.

⁸⁹ 42 U.S.C. § 16901.

⁹⁰ *Gundy*, 139 S. Ct. at 2127 (quoting Brief for the Petitioner at 46).

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requirements on pre-Act offenders is not a question that can be answered objectively. That subjectivity is a problem. It is hard to imagine any federal statute of any significance that lacks a preliminary statement of its general goals. If one accepts such statements as furnishing principles governing every delegation of power the statute accomplishes, then either nearly every statute necessarily satisfies this supposedly-strengthened non-delegation review or we are thrown back into the subjective “how intelligible does the principle have to be?” inquiry.⁹¹ The first of these possibilities again fails to provide a meaningful standard that might form the basis of a consensus among the justices, while the latter introduces a troubling elasticity that could be used against important regulatory legislation.

But neither would it be satisfactory to require standards and criteria—of any sort—to explicitly accompany each individual statutory grant of power. Given the vast number of specific subjects in any major piece of legislation, and the equally large number of statutory directives for agency action, a requirement that each such directive be accompanied by its own standard(s) would mean either that Congress would have to go through the meaningless formality of including in each such directive a reference to the statute’s overall goals, or that it prescribe unique standards for each such grant. The former would constitute a pointless formality, while the latter could easily hamstring Congress’s ability to delegate statutory-implementation decisions to agencies, by requiring Congress

⁹¹ See text accompanying *supra* note 41; see also *Gundy*, 139 S. Ct. at 2146 (Gorsuch, J., dissenting) (arguing that SORNA’s overall purpose to establish a “comprehensive national system” requiring sex offender registration and notification remained sufficiently vague so as to not provide the requisite standard).

to specify standards and criteria for every grant of delegated power, however trivial.⁹²

This is not an auspicious start for a revived non-delegation doctrine that promises to do something, but not too much, and to do it in a judicially-manageable way.

B. Different Directives/Different Requirements

Given the difficulties attending any focus on the standards themselves, an alternative approach would focus on the nature of the authority Congress delegates. The Court itself has acknowledged the relevance of this factor for non-delegation analysis. In *American Trucking*, Justice Scalia wrote that “[i]t is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”⁹³ Justice Scalia used the example of the Clean Air Act’s conferral of authority on the EPA to define “country elevators” that would be exempt from the pollution control requirements otherwise governing grain elevators—a grant, he implied, that was sufficiently trivial to not require the same level of statutory specificity that would be required for grants of more far-reaching power.⁹⁴ Justice Scalia’s statement suggests that a grant of power to an agency to wield an unusually broad or fraught power might require comparatively more precise standards.

⁹² *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (“It is true enough that the degree of agency discretion that is acceptable [for nondelegation purposes] varies according to the scope of the power congressionally conferred. While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, it must provide substantial guidance on setting air standards that affect the entire national economy.”) (citations omitted).

⁹³ *See id.*

⁹⁴ *See id.*

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Nevertheless, Justice Scalia's seemingly common sense observation that the more trivial the delegation the fewer standards that should be required threatens to devolve into yet another round of subjective judicial decision-making, now focusing on both how trivial a given delegation is and how standardless such a delegation can be.⁹⁵ But when one looks more closely at the two cases he cited for that observation, a surer path emerges; *Loving v. United States*⁹⁶ and *United States v. Mazurie*⁹⁷ stand for the proposition that Congress is allowed to provide less of a standard when delegating to an entity (in both of these cases, the president) who possesses some measure of independent constitutional authority to act in that area.⁹⁸

Combining Justice Scalia's statement in *American Trucking* and the statements in the cases he cited to support it, one can glean the outlines of a claim that more specific standards should apply when the delegee—for example, in *Gundy*, the attorney general—is granted authority that is inconsistent with one of his constitutionally-mandated

⁹⁵ See sources cited *supra* note 41.

⁹⁶ *Loving v. United States*, 517 U.S. 748 (1996).

⁹⁷ *United States v. Mazurie*, 419 U.S. 544 (1975).

⁹⁸ See *Loving*, 517 U.S. at 772 ("Perhaps more explicit guidance [to the President] as to how to select aggravating factors [applicable to a court-martial] would be necessary if delegation were made to a newly created entity without independent authority in the area. The President's duties as Commander in Chief, however, require him to take responsible and continuing action to superintend the military, including the courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter.") (internal quotation and citation omitted); *Mazurie*, 419 U.S. at 556-57 ("This Court has recognized limits on the authority of Congress to delegate its legislative power. Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.") (citation omitted).

functions, and thus creates a constitutional anomaly.⁹⁹ In *Gundy*, this approach would have required Congress to specify standards for the attorney general's use of the discretion that the pre-Act offender provision gives him because that discretion—to specify who would be criminally liable under what circumstances—stands in serious tension with his constitutional authority to enforce the laws.¹⁰⁰

This suggestion is related to, but distinct from, the claim that the delegated power to declare criminal liability—or any liability that would effectively impair one's fundamental liberty—must be accompanied by unusually specific statutory standards. This latter claim is substantial in its own right. It grounded Justice Brennan's contention in *United States v. Robel* that a statutory grant of discretion to the Department of Defense to specify those workplaces sensitive enough to require dismissals of employees who belonged to the Communist Party had to include more standards than normally

⁹⁹ Cf. *Loving*, 517 U.S. at 772 (“We think . . . that the question to be asked [in a non-delegation challenge to the President's authority to decree aggravating factors for a military justice capital case] is not whether there was any explicit principle telling the President how to select aggravating factors, but whether any such guidance was needed, given the nature of the delegation *and the officer who is to exercise the delegated authority.*”) (emphasis added). See also *Morrison v. Olson*, 487 U.S. 654, 676 (1988) (recognizing that Congress's power to provide for interbranch appointments may not be used in a way creating an “incongru[ity]” between the appointment power thus provided and “the functions normally performed” by the branch to which Congress gives that power).

¹⁰⁰ Justice Gorsuch's dissent in *Gundy* adopts both sides of this analysis. Among his categories of types of delegations he considers encompassed within the intelligible principle concept are those that delegate authority to a branch that already possesses some measure of independent constitutional authority to act in that area. See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting). By contrast, Justice Gorsuch focused much of his rhetorical fire in *Gundy* on the fact that SORNA's pre-Act offender provision granted to the attorney general, the nation's chief law enforcement officer, the power to define what conduct would be criminal. See, e.g., *id.* at 2148 (“[W]hile Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That ‘is delegation running riot.’”) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

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required under the non-delegation doctrine.¹⁰¹ Liberty concerns appeared, as well, to be at least one of the motivations behind Justice Douglas's dissent in *United States v. Sharpnack*. Justice Douglas, joined by Justice Black, would have found a non-delegation violation in a federal law that incorporated the criminal law of the state surrounding any federal enclave as the law of that enclave, even as that state law evolved in the future.¹⁰² In 1991, the Court acknowledged that it had not definitively resolved whether a delegated power to declare conduct criminal requires more by way of legislative standards.¹⁰³

Still, these latter arguments focus on the importance of the right *simpliciter*. By contrast, the claim currently on the table maintains that what is relevant is the incongruousness of the grant—in *Gundy*, the grant to a law-enforcer to make the law that he would then be empowered to enforce. To be sure, that incongruousness implicates the liberty concerns that motivated the framers to separate powers: If the combination of powers

¹⁰¹ *United States v. Robel*, 389 U.S. 258, 269 (1967).

¹⁰² *United States v. Sharpnack*, 355 U.S. 286, 297–98 (1958) (Douglas, J., dissenting) (“The power to make laws under which men are punished for crimes calls for as serious a deliberation as the fashioning of rules for the seizure of the industrial plants involved in the Youngstown case. Both call for the exercise of legislative judgment; and I do not see how that requirement can be satisfied by delegating the authority to the President, the Department of the Interior, or, as in this case, to the States.”); see also *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 352, 352–53 (1974) (Marshall, J., concurring and dissenting joined by Brennan, J.) (“The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes, at least in the absence of a delegation creating ‘the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of (constitutionally) protected freedoms.’”) (quoting *Robel*, 389 U.S. at 272 (Brennan, J., concurring)) (footnote omitted).

¹⁰³ *Touby v. United States*, 500 U.S. 160, 165–66 (1991) (“Petitioners suggest . . . that something more than an ‘intelligible principle’ is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions. They contend that regulations of this sort pose a heightened risk to individual liberty and that Congress must therefore provide more specific guidance. Our cases are not entirely clear as to whether more specific guidance is in fact required. We need not resolve the issue today.”) (citations omitted).

risks tyranny, presumably that risk is magnified when the combined powers are those to declare what shall be criminal and enforce that criminal prohibition.¹⁰⁴ But nonetheless it is a worry distinct from the pure liberty concern that drove Justice Brennan.

Several insights justify this proposal that more specific standards must accompany delegations of incongruous power to an administrative agency. First, such delegations involve grants of power to entities that have no plausible justification for free-standing authority in that area. For example, a delegation to a law-enforcer such as the attorney general to declare the substance of criminal law is a delegation to a person lacking any plausible claim to any part of that power except for the delegation itself. One can contrast such a delegation to the one in *Loving*. That delegation authorized the president to make rules dealing with military justice—a congressional delegation on an issue on which the Court recognized some measure of independent, Article II-based, presidential authority, a fact the Court recognized as relevant to the non-delegation analysis.¹⁰⁵ By contrast, the lack of any independent authority for the attorney general to declare the substance of criminal liability might justify a requirement of increased congressional specificity. This would ensure that the delegee's role is truly limited to implementing the legislature's will, in a

¹⁰⁴ Cf. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (holding that it violated due process when a judge did not recuse himself when he “earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case”).

¹⁰⁵ See case cited, *supra* note 98; cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (recognizing areas where Congress and the president “may have concurrent authority”).

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context in which the Constitution, by hypothesis, clearly denies the delegee any claim that his conduct rests on free-standing constitutional authority.¹⁰⁶

At this point it becomes appropriate to incorporate into the analysis the concern that motivated Justice Brennan in *Robel* and to recognize that this proposal would have an impact on delegations implicating serious individual liberty concerns. As such, it is justified by functional considerations about the most appropriate locus for decisional authority in matters implicating liberty. Justice Souter recognized those functional considerations in his concurring and dissenting opinion in *Hamdi v. Rumsfeld*.¹⁰⁷ In *Hamdi*, Justice Souter disagreed with the majority's conclusion that the post-9/11 Authorization for Use of Military Force (AUMF) constituted the congressional authorization to detain U.S. citizens that an earlier statute¹⁰⁸ had required for such detentions. Explaining his insistence that such congressional authorization be explicit, he wrote that,

deciding finally on what is a reasonable degree of guaranteed liberty . . . is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. . . . A reasonable balance is more likely to be reached on the judgment of a different branch,

¹⁰⁶ The lack of such freestanding constitutional authority referenced here relates not to the rulemaking function per se, but rather the rulemaking function as applied to a rule declaring the substance of the criminal law, promulgated by the nation's chief criminal law prosecutor. So understood, in a case such as *Gundy* the lack of such authority would flow from the inherent incompatibility between declaring the substance of the criminal law and prosecuting violations of such law. By contrast, an agency's power to engage in more generic rulemaking rests, of course, in part on a statutory delegation but also on the agency's inherent power, as an Article II institution, to implement the law.

¹⁰⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2003) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

¹⁰⁸ See 18 U.S.C. § 4001(1) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

just as Madison said in remarking that ‘the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.’ Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.¹⁰⁹

For Justice Souter, then, the incongruousness of a delegation to the president of the power to deprive a citizen of liberty—a delegation the government claimed Congress made in the AUMF—raised particular concerns not because of the lack of any independent Article II-based authority over the subject, but because of the reality that the executive could not be trusted to resolve the “constant tension between security and liberty, serving both by partial helpings of each.”¹¹⁰

To be sure, in *Hamdi* Justice Souter was dealing with a question of statutory *authorization*—whether the AUMF furnished the statutory authority a previous statute required in order to justify detentions of American citizens—rather than a question of statutory *specification*—whether a statutory delegation sufficiently guides the delegee’s actions. But his insistence that that authorization be clear rested on a concern that also speaks to the requirement of statutory specification. The parallel insistence on both congressional clarity and

¹⁰⁹ *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed. 1961)). To be sure, Justice Souter was discussing an issue of national security (the extent to which the post-9/11 AUMF authorized detention of American citizens accused of being enemy combatants). Nevertheless, he explicitly included peace- and war-time within his observations. See *id.*

¹¹⁰ *Id.*

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precision reflects the realization that the executive branch, as the nation's law enforcer, cannot be trusted appropriately to balance liberty and security. In both cases, Congress must "resol[ve] . . . the competing claims," by providing either clear statutory authority (*Hamdi*) or reasonably precise statutory standards (*Gundy*).

Concededly, when confronted with a non-delegation claim focusing on the alleged unconstitutionality of Congress delegating criminal law-declaring power to the attorney general, the Court rejected it.¹¹¹ Interestingly, though, the Court did not reject the somewhat related argument that delegations of criminal law-declaring power should be reviewed pursuant to more stringent non-delegation standards.¹¹² Given Justice Gorsuch's heavy focus on both the liberty implications of a toothless non-delegation doctrine¹¹³ and the incongruity argument,¹¹⁴ the way may be open for a consensus among the justices that would insist on increased statutory specificity when a delegation directly implicates liberty concerns by placing criminal law-declaring power in the hands of a law enforcer. After all, if a future majority does indeed reconsider the basics of non-delegation, there's no reason the Court's rejection of this latter principle should be immune from

¹¹¹ See *Touby v. United States*, 500 U.S. 160, 167–68 (1991).

¹¹² See *supra* note 103.

¹¹³ See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) ("The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens.").

¹¹⁴ See *id.* at 2137 ("While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'") (footnotes omitted); see also David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1260 (1985) ("Legislation that leaves the Executive Branch with discretion does not delegate legislative power where the discretion is to be exercised over matters already within the scope of executive power.").

reconsideration.

C. To the Border and Beyond

This approach, of course, would have directly applied to *Gundy*. (Indeed, the application of this approach sketched out above focuses heavily on the situation *Gundy* presented.) Failure to comply with whatever registration and notification requirements the attorney general might impose under the pre-Act offender provision subjects pre-Act offenders to significant criminal penalties. As explained earlier, that fact should matter in any nondelegation challenge, given the doctrine's foundation in the liberty-impairing potential of combined powers. The incongruousness of delegating such criminal law-declaring power to a law enforcer only increases the separation-of-powers anxiety in SORNA's particular context. But legitimate concerns about overbroad delegations potentially extend farther.

It is by now broadly acknowledged that the Trump administration has shattered many heretofore widely accepted governance norms. One area where the current administration has distinguished itself from its predecessors is in its unusually aggressive use of emergency declarations to achieve policy goals in situations that feature only tenuous claims to constituting real emergencies, sometimes in the teeth of direct congressional rejection of those policies. Congressional oversight over the current omnibus authorization to declare emergencies—the National Emergencies Act (NEA)—has been crippled by Congress's failure to replace the legislative veto that, before such tools were struck down by the Court in *INS v. Chadha*,¹¹⁵ was its primary mechanism for restraining

¹¹⁵ *INS v. Chadha*, 462 U.S. 919 (1983).

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inappropriate presidential emergency declarations.¹¹⁶

Enthusiastic use of the power delegated by the NEA would allow the president to become a de facto lawmaker, ruling by decree. To be sure, one cannot fairly describe the current situation in such terms. But the president's use of the NEA power, and analogous powers under other statutes, raises serious questions whether Congress should—or should be constitutionally compelled to—impose conditions on such open-ended delegations of power to bypass the legislative process and make federal government policy on his own.¹¹⁷ To be sure, Congress can solve any problems caused by such open-ended delegations simply by amending the relevant statutes, or, more speculatively, by insisting on controls of currently doubtful constitutionality, such as legislative vetoes, and inviting legal challenges.¹¹⁸ But the existence of political pathologies preventing such congressional action is the entire reason the nondelegation doctrine has been deployed to begin with. If the current president's willingness to press his emergency powers to the brink becomes the new normal in the post-Trump era, and if Congress remains unable or unwilling to shoulder its policy-making responsibility, then the resulting

¹¹⁶ See Richard Pildes, *The Supreme Court's Contribution to the Confrontation Over Emergency Powers*, LAWFARE (Feb. 19, 2019) (*Chadha* “decimated the policy scheme Congress had created for overseeing the president's declaration of emergency powers”).

¹¹⁷ For example, in 2019, the Court of International Trade rejected a non-delegation challenge to the president's decision to impose steel tariffs pursuant to his authority under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. *Am. Inst. for Int'l Steel v. United States*, 376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019). Section 232 authorizes the president to impose trade restrictions for national security reasons. While the Court of International Trade, relying on Supreme Court precedent, unanimously rejected the nondelegation argument, one judge concurred “dubitante,” expressing serious concern on the nondelegation issue. See *id.* at 1345 (Katzmann, J., dubitante).

¹¹⁸ See Geoffrey Manne & Seth Weinberger, *Time to Rehabilitate the Legislative Veto: How Congress Should Rein in Presidents' 'National Emergency' Powers*, JUST SECURITY (Mar. 13, 2019) (calling for Congress to amend the NEA to reinstate the legislative veto that was removed after *Chadha*, and to test that enactment in court).

presidential lawmaking may trigger additional calls to resurrect a meaningful non-delegation principle.

IV. Toward a Non-Delegation Doctrine (Even) Progressives Could Like?

The above analysis sketches out the vague outlines of a non-delegation doctrine that progressives might find at least tolerable and perhaps even welcome. But even the likelihood of the former, more tepid of these two reactions justifies progressives taking a closer look at the non-delegation issue. The signal sent by four of the conservative justices in *Gundy*, and the possibility that Justice Kavanaugh might endorse it, alters the field on which progressives must fight the battle for an administrative state capable of confronting modern regulatory challenges. But that fight could be more than a defensive action if an approach to non-delegation can be developed that would serve progressive ends not just regarding the appropriate powers of government but also the appropriate protections for personal liberty. Such a program could conceivably become a consensus position on the Court, especially if Chief Justice Roberts decides that he'd prefer not to preside over a Court that, by five-to-four majorities, strikes down broad swaths of the administrative state—i.e., a Court that resembles its predecessor circa 1935.

This consensus position could feature several components. First, it could emphasize the importance of liberty concerns when congressional delegations threaten to combine legislative and executive power in particularly fraught contexts. Given Justice Gorsuch's emphasis on this aspect of the issue, both in

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his *Gundy* dissent¹¹⁹ and his discussion of SORNA while on the Tenth Circuit,¹²⁰ this aspect of the non-delegation calculus could easily appeal to justices on both wings of the Court.¹²¹ This focus would have the subsidiary benefit of turning attention away from the less liberty-implicating delegations that comprise the bread and butter of the modern regulatory state, including both economic regulation and the health and safety regulations that rose to prominence in the 1960s and 1970s and remain prevalent today.

That position could also focus on the extent to which the delegation reflects a functional congruence with the free-standing Article II powers the delegee already possesses. This element of a modified approach to non-delegation issues reflects the necessarily functional nature of any coherent approach to non-delegation, given the well-recognized (including by Justice Gorsuch)¹²² impossibility of precisely distinguishing between policy-making and policy-implementation. It also has the benefit of constraining extravagant presidential claims of power over spending,

¹¹⁹ See *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. . . . But if a single executive branch official can write laws restricting the liberty of [a half-million pre-Act offenders], what does that mean for the next?”).

¹²⁰ See *United States v. Nichols*, 784 F.3d 666, 671 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc) (“At stake [in the nondelegation doctrine] is the principle that the scope of individual liberty may be reduced only according to the deliberately difficult processes prescribed by the Constitution . . .”).

¹²¹ To be sure, this analysis uses Justice Gorsuch’s *Gundy* opinion as the position of the Court’s conservative wing. It may be that Justice Thomas would advocate for an even more radical revision of the non-delegation principle. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 486 (2001) (Thomas, J., concurring) (expressing doubt about the intelligible principle standard itself). Nevertheless, a search for a consensus on a given issue amounts to a search for middle ground, which in this case would mean common ground between justices who have not expressed more extreme views.

¹²² See *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 37, at 228 (James Madison) for the proposition that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary”).

given Article I's clear grant of authority to Congress, not the president, to appropriate money.¹²³ In a presidency marked by attempts to reshuffle appropriations to suit the president's own preferred policies, an insistence, via the non-delegation doctrine, that Congress limit blank-check grants of such purely legislative power to the president may have salutary effects, both in the short term and, if such an insistence disciplines Congress, going forward.

At the same time, a focus on the compatibility of a broad delegation with the delegee's free-standing constitutional authority could *buttress*, rather than limit, Congress's power to delegate if challenged delegations could be seen as implicating the executive's inherent expertise and flexibility in implementing complex regulatory schemes—that is, the executive's power to execute the laws. In other words, a focus on the congruence between the delegation and the inherent authority and expertise of the delegee could help immunize regulatory delegations of the type the modern federal government relies on to accomplish progressive regulatory ends.

This idea finds very approximate analogues in existing separation-of-powers doctrine. Recall *Stern v. Marshall*.¹²⁴ In that case, Chief Justice Roberts applied a highly formalistic separation-of-powers analysis in the course of striking down a delegation of *adjudicative* authority to Article I bankruptcy courts. But in so doing, he distinguished the far more relaxed analysis set forth in *Commodity Futures Trading Commission v. Schor*,¹²⁵ on the ground that the agency in *Schor* had been

¹²³ Cf. *Nat'l Cable Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) (identifying the taxing power, which appears in the same clause of Article I as the spending power, as one that must be exercised by Congress).

¹²⁴ *Stern v. Marshall*, 564 U.S. 462 (2011).

¹²⁵ *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

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given broad, expertise-based regulatory power over the field of commodities transactions.¹²⁶ Thus, the expertise-based delegation in *Schor* justified a more relaxed separation-of-powers analysis. The same might also hold true in the *legislative* non-delegation context, when the delegations in question require complex, expertise-grounded judgments we normally think of when we think of implementation of complex regulatory schemes. Indeed, even Justice Gorsuch's *Gundy* dissent conceded that the Court "has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct"¹²⁷ without casting doubt on those precedents. To the extent that filling in such "highly consequential details" reflects implementation of a statutory mandate, an analysis focused on this sort of congruence buttresses such delegations as consistent with Article II entities' core functions. Such delegations, of course, are the exact sort progressives should be most concerned with protecting.

* * *

To be clear, this proposal is far from perfect. But, even from a progressive standpoint, broad delegations of power are also imperfect, unless one possesses either the naive faith in the administrative state or the skepticism of classic conceptions of individual liberty more reminiscent of progressives of 1935

¹²⁶ See *Stern*, 564 U.S. at 494 ("This is not a situation in which Congress devised an expert and inexpensive method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task.") (citing *Schor*) (internal quotation omitted).

¹²⁷ *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting).

than progressives of 2019.¹²⁸ And again, at the very least, the winds blowing from the Supreme Court render it prudent for progressives to start thinking seriously about the kind of non-delegation doctrine they could live with, not the kind of non-delegation doctrine they would embrace if given the luxury of complete choice in the matter.

¹²⁸ Cf. Thomas Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1104 (1997) (“James Landis, in his paeon to government by agency experts, characterized separation of powers doctrine as an anachronism; in an era that largely concurred in this assessment, one would not expect to see robust enforcement of a principle that might inhibit the granting of broad discretionary powers to agencies.”) (footnote omitted).

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Capital Punishment in the Supreme Court 2018 Term

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Outside of the courts, the American death penalty is dying. The United States is an extraordinary outlier among Western, developed democracies in its retention and use of the death penalty, and many signs point to its increased marginalization within the United States. With New Hampshire's recent abolition of the death penalty, nine states have abandoned capital punishment over the past fifteen years; several others, including Colorado, are on the cusp of doing so. Capital sentencing, perhaps the best indicator of contemporary support for the American death penalty, remains remarkably low, with fewer than fifty death sentences a year nationwide over the past four years (compared to more than 300 a year in the mid-1990s).¹ The decline is most striking in those jurisdictions constituting the heartland of the American death penalty. Twenty-five years ago, Georgia, Texas, Alabama, North Carolina, Virginia, and Florida together accounted for 284 death sentences in the two-year span 1994–95.² In the most recent two-year period, 2017–18, they collectively produced

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¹ [*Death Sentences in the United States Since 1977*](#), DEATH PENALTY INFO. CTR. (last visited Aug. 14, 2019).

² *Id.*

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only twenty-six death sentences (with Georgia, North Carolina, and Virginia producing none), representing a more than ninety percent decline.³ This year, these six states are on pace for about sixteen death sentences, with a total of eight at mid-year.⁴ With only fourteen death sentences nationwide recorded by the end of June, we may see the fewest number of death sentences in the modern era of the American death penalty, stretching back to the early 1970s.⁵ Executions, too, have declined to about twenty-three a year nationwide over the past three years, down over seventy-five percent from the high of ninety-eight in 1999.⁶ The executions have been concentrated in just a handful of states, with Texas, Alabama, Georgia, and Florida accounting for over seventy-five percent of the executions since 2016.⁷ Apart from these raw numbers, a host of developments point to the diminished status of the American death penalty, including gubernatorial moratoria on executions in several states, the recent state judicial invalidation of the death penalty in Washington on grounds of racial discrimination, and successful electoral efforts to oust zealous pro-death penalty prosecutors in a number of counties.

Four years ago, Justice Breyer, joined by Justice Ginsburg, argued in a lengthy dissent from a lethal-injection challenge that the evident decline in the American death penalty justified revisiting its constitutionality as a punishment under the Eighth Amendment.⁸ At the outset of his dissent, Justice Breyer insisted, in line with the Court's longstanding Eighth

³ *Id.*

⁴ *DPIC Mid-Year Review: At Midpoint of 2019, Death Penalty Use Remains Near Historic Lows*, DEATH PENALTY INFO. CTR. (July 1, 2019).

⁵ *Id.*

⁶ *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (last visited Aug. 14, 2019).

⁷ *Id.*

⁸ *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

Amendment jurisprudence, that the constitutionality of the death penalty turns on whether it remains consistent with contemporary standards of decency.⁹ He then sought to show how prevailing capital practices render the punishment both “cruel” and “unusual.” According to Justice Breyer, the ever-expanding time between sentence and execution makes the death penalty “cruel” in two senses: Lengthy death-row incarceration, often in solitary confinement, amounts to a separate and inhumane punishment apart from death itself, and delays between sentencing and execution undermine the deterrent and retributive justifications for capital punishment, such that subsequent executions could be viewed as pointlessly extinguishing human life.¹⁰ Highlighting the shrinking footprint of the American death penalty, Justice Breyer claimed that the punishment is now truly “unusual”—with a substantial majority of Americans living in jurisdictions that have moved away from death sentences and executions.¹¹

Although several justices had raised doubts about the constitutionality of the American death penalty in the decades following its reinstatement in 1976, Justice Breyer’s dissent seemed different in ambition and scale. Some observers read his dissent as an invitation to litigators to bring a global challenge to the Court, viewing his opinion as a signal that five members of the Court were prepared to invalidate the death penalty. Others urged more caution, noting that only Justice Ginsberg had joined the dissent and worrying that a premature challenge could undermine and prolong the effort to secure judicial abolition.

⁹ *Id.*

¹⁰ *Id.* at 2764–70.

¹¹ *Id.* at 2772–77.

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Four years later, no one thinks the current Court is inclined to declare the death penalty unconstitutional. With Justice Kavanaugh's replacement of Justice Kennedy (following Justice Gorsuch's replacement of Justice Scalia), the center of the Court is now occupied by Chief Justice Roberts. This Term's capital cases reflect an overall sensibility to preserve the constitutional status of the death penalty. In *Bucklew v. Precythe*, the conservative bloc on the Court went out of its way to affirm the constitutionality of the death penalty by implicitly challenging the basic premise of Justice Breyer's dissent—that evolving standards of decency determine whether the death penalty may be imposed. The same bloc expressed frustration with end-stage litigation seeking stays of execution, making it unlikely that inmates will secure stays based on challenges to various state protocols. At the same time, in other cases the Court continued to police outlying capital practices, such as the use of racially discriminatory peremptory challenges and the failure to give effect to the Court's prohibitions against executing incompetent persons and persons with intellectual disabilities. In these decisions, the Court did not broaden the rights of capital defendants so much as insist on compliance with prior Court decisions. As a whole, this Term's capital decisions seem designed to stabilize and entrench the American death penalty as a permissible practice, clearing potential obstacles to its administration while also condemning wayward state practices that tend to undermine its legitimacy.

I. *Bucklew v. Precythe*

The most potentially significant capital case this Term was *Bucklew v. Precythe*,¹² involving an as-applied challenge to

¹² *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

Missouri's lethal injection protocol. Death-sentenced inmates have never won a challenge to execution methods in the U.S. Supreme Court. In the nineteenth century, the Court rejected a challenge to execution by firing squad in the Utah Territory.¹³ Citing scholars of military law, the Court found "the authorities . . . quite sufficient to show that the punishment of shooting as a mode of executing the death penalty" did not constitute cruel and unusual punishment as proscribed by the Eighth Amendment.¹⁴ A little over a decade later, the Court likewise rejected the claim that New York's adoption of the electric chair violated the Constitution, although the decision rested in part on its view that New York—as opposed to the Utah Territory—was not a federal entity and thus not clearly bound by the Eighth Amendment¹⁵ (which the Court did not incorporate and apply against the states via the Fourteenth Amendment until 1962¹⁶). In 1947, the Court rejected a challenge to Louisiana's effort to execute an inmate following the state's botched electrocution attempt¹⁷—an effort the dissenting justices derided as "death by installments."¹⁸ Noting that "[a]ccidents happen for which no man is to blame," the Court declared that the "cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."¹⁹ The lack of success in these cases accounted in part for the diversity of execution methods in the U.S. throughout the first half of the twentieth century, with

¹³ *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878).

¹⁴ *Id.* at 134–35.

¹⁵ *See In re Kemmler*, 136 U.S. 436 (1890).

¹⁶ *See Robinson v. California*, 370 U.S. 660 (1962).

¹⁷ *See Louisiana v. Resweber*, 329 U.S. 459 (1947).

¹⁸ *Id.* at 474.

¹⁹ *Id.* at 462, 464.

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jurisdictions using hanging, firing squads, electrocution, and lethal gas to perform executions (and each of these methods has been implemented over the past forty years).

In the early 1970s, the Court invalidated prevailing statutes and suggested that the death penalty might itself no longer comport with prevailing morality, which the Court viewed as the appropriate gauge of the Eighth Amendment.²⁰ After the Court upheld new capital statutes in 1976,²¹ finding sufficient indications of contemporary support for the punishment, states began to gravitate toward lethal injection as the primary means of execution. Lethal injection was widely welcomed by states because it promised to reduce the visible violence of executions, especially in comparison to the use of the electric chair, and many states believed it would be more humane to the condemned.

But lethal injection presented its own problems. The protocol for executions by lethal injection was developed in a haphazard way, with Oklahoma hastily creating a three-drug protocol in 1977 that became the nationwide standard within two decades.²² That protocol included pancuronium bromide, a paralytic, which was included in order to shield observers of executions from witnessing involuntary movements of the condemned. But if an inmate were insufficiently sedated by the first drug in the protocol (sodium thiopental, a barbiturate anesthetic), the paralytic could cause the inmate to experience suffocation, followed by intense pain upon administration of the final drug, potassium chloride, which induces cardiac

²⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

²¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

²² See, e.g., Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L. J. 1331, 1340 (2014).

arrest.²³ Worse still, the paralytic would prevent anyone observing the execution from detecting the inmate's agony.

Eleven years ago, in *Baze v. Rees*,²⁴ a fractured Supreme Court upheld the three-drug protocol against an Eighth Amendment challenge brought by Kentucky death-row inmates. Chief Justice Roberts, writing for a three-justice plurality, began with the premise that "capital punishment is constitutional."²⁵ Accordingly, he argued "it necessarily follows that there must be a means of carrying it out."²⁶ The chief justice identified two requirements for a successful Eighth Amendment challenge to an execution method: The inmate must show that the challenged method presents a "substantial" or "objectively intolerable" risk of "serious harm," and the inmate must identify a "feasible, readily implemented" alternative execution procedure that would significantly reduce that risk.²⁷ Finding that neither requirement was met, the plurality denied relief, with four other justices concurring in the result.

Perhaps the most important and remarkable opinion among the seven issued in *Baze* was Justice Stevens's concurrence. Justice Stevens took the occasion to announce his conclusion that the American death penalty was no longer constitutional (though he indicated he would continue to adhere to decisions sustaining the death penalty as a matter of *stare decisis* until the Court revisited them). He argued that the move to lethal injection and the corresponding effort to make executions

²³ *Id.* at 1333–34.

²⁴ *Baze v. Rees*, 553 U.S. 35 (2008).

²⁵ *Id.* at 47.

²⁶ *Id.*

²⁷ *Id.* at 50, 52.

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painless undercut the retributive value of the death penalty.²⁸ He also offered a scattershot critique of prevailing capital practices, including the death qualification of jurors, the risk of wrongful convictions, the use of victim impact evidence, and racial discrimination.²⁹ Although three other justices previously had registered their constitutional opposition to capital punishment (Justices Brennan, Marshall, and Blackmun), Justice Stevens had been one of the architects of the modern doctrine as part of the plurality sustaining three of the newly enacted capital statutes in 1976. Importantly, Justice Stevens concluded his concurrence by making clear his view that the constitutionality of the death penalty turned on a contemporary evaluation of its effectiveness, including whether it made any “marginal contribution to any discernible social or public purposes.”³⁰ He noted that “[n]ot a single Justice in *Furman* concluded that the mention of deprivation of ‘life’ in the Fifth and Fourteenth Amendments insulated the death penalty from constitutional challenge.”³¹

Despite the Court’s lack of solicitude toward the lethal injection protocol challenge in *Baze*, problems with lethal injection contributed significantly to the decline in executions over the next decade. One major difficulty states faced was the declining availability of sodium thiopental, as the primary domestic manufacturer (Hospira) ceased production and European countries sought to clamp down on exports destined for U.S. execution chambers. States began to quickly (and often haphazardly) change their protocols, using different drugs, such as pentobarbital and midazolam. States’ efforts to design

²⁸ *Id.* at 80–81.

²⁹ *Id.* at 84–86.

³⁰ *Id.* at 86 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

³¹ *Id.* at 86 n.19.

new protocols led to extensive litigation, not only under the Eighth Amendment, but under state law as well. Botched executions in Ohio, Arizona, and Oklahoma in a seven-month span in 2014, all of which included midazolam in the protocol, heightened public awareness of the potential hazards of lethal injection.

In 2015, in *Glossip v. Gross*,³² the Court addressed the claim of death-row inmates in Oklahoma objecting to the use of midazolam in executions. Justice Alito's majority opinion applied the *Baze* plurality approach and rejected the claim on both prongs: The inmates had not demonstrated "that Oklahoma's use of a massive dose of midazolam . . . entails a substantial risk of severe pain," and they "failed to identify a known and available alternative method of execution that entails a lesser risk of pain."³³ Justice Sotomayor dissented from this holding, arguing that the record supported a finding that midazolam might not function as an adequate sedative even at high doses (referencing, among other things, the botched execution in Arizona, in which the inmate had received a high dose of midazolam). She also insisted that *Baze* should not be read to impose the requirement of pleading a known and available alternative execution method as a precondition to preventing the state from using a cruel means of execution.

As in *Baze*, the most dramatic opinion in *Glossip* was not in the debates over the dangers of the challenged protocol or over the appropriate elements of an Eighth Amendment challenge to a mode of execution. It was Justice Breyer's lengthy and impassioned call to revisit the constitutionality of the death penalty. Why might Justice Breyer have chosen

³² *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

³³ *Id.* at 2731.

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to write his global attack against the death penalty in *Glossip* (later published as a free-standing book under the title *Against the Death Penalty*³⁴)? Perhaps, as in *Baze*, the structure of the Court's analysis—since the death penalty is constitutional, there must be a permissible means of carrying it out—naturally elicited reflection on the Court's crucial premise, and both Justice Stevens and Justice Breyer did not want that premise to go unexamined. Or perhaps it was the accelerated decline of the death penalty in the seven years spanning *Baze* and *Glossip*, as the struggle over lethal injection revealed the increasingly weakened (and geographically concentrated) support for capital punishment; during that period, only a handful of states, mostly in the Deep South, aggressively sought to surmount the legal, political, and public-relations obstacles to conduct executions. Despite *Baze*'s high legal burden for challenging execution methods, by 2015 executions nationwide had declined to their lowest point in almost a quarter century, falling below thirty executions for the first time since 1991.³⁵ After *Glossip*, executions remained at their recent lows, falling to twenty nationwide in 2016 (and they have not climbed above thirty in any of the last three years).³⁶

Bucklew involved a more modest challenge to lethal injection. Bucklew did not claim that Missouri's pentobarbital-based lethal injection protocol *generally* entails a substantial risk of severe pain; rather, Bucklew argued that his particular medical condition—a congenital disease that produced vascular tumors in his head, neck, and throat—makes lethal injection a riskier execution method for *him* because his tumors could hemorrhage

³⁴ STEPHEN BREYER, *AGAINST THE DEATH PENALTY* (2016).

³⁵ *Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR. (last visited Aug. 14, 2019).

³⁶ *Id.*

(which in turn would fill his mouth and airway with blood, potentially leading to suffocation and prolonged, excruciating pain during the execution). Much of the litigation focused on whether Bucklew's as-applied challenge was subject to the requirement of identifying a readily-available alternative to the challenged protocol—essentially requiring him to plan his own execution through other means. Bucklew argued against that requirement on the ground that its purpose was to ensure that successful execution-method claims would not effectively abolish capital punishment in a jurisdiction altogether; because Bucklew challenged the protocol only as it applied to his unusual and rare circumstances, it did not threaten Missouri's ability to continue to execute (though it would obviously make executing him more difficult).

Justice Gorsuch's opinion for the five-justice majority aims to solidify the constitutional status of the death penalty. Like *Baze* and *Glossip*, *Bucklew* started with the premise that the death penalty is constitutional (and therefore there must be a permissible means of implementing it). But unlike the plurality opinion of Chief Justice Roberts in *Baze* and the majority opinion of Justice Alito in *Glossip*, Justice Gorsuch's opinion rested not on the doctrinal fact that the Court upheld the death penalty as a permissible punishment in *Gregg v. Georgia* in 1976,³⁷ but on his view that the death penalty is invulnerable to constitutional attack in accord with his originalist/textualist methodology. Justice Gorsuch began his analysis by noting that the death penalty was the standard punishment at the time of the founding and that the addition of the Eighth Amendment did not change that practice (the First Congress had made a

³⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976).

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number of crimes punishable by death).³⁸ He also observed that the Fifth Amendment specifically contemplates the availability of the death penalty both in the grand jury clause (applicable to “capital, or otherwise infamous crime[s]”) and due process clause (applicable to deprivations of “life, liberty, or property”)³⁹—though he interestingly omitted reference to the double jeopardy provision, which is triggered by repeated threats to “life or limb.” Based on these facts, he insisted, it follows “that the judiciary bears no license to end a debate reserved for the people and their representatives.”⁴⁰

This portion of Justice Gorsuch’s opinion is in direct conversation with Justice Stevens and Justice Breyer: It rejects the possibility that changing attitudes and practices bear on the constitutionality of the death penalty given the Constitution’s text and history. The opinion did not come out of the blue. In *Glossip*, Justice Scalia had made a similar argument in his concurring opinion joined only by Justice Thomas. There, Justice Scalia insisted that if the Court were to revisit the constitutionality of the death penalty, it should also revisit its prevailing approach to the Eighth Amendment—that a practice should be deemed “cruel and unusual” if it is contrary to “evolving standards of decency.”⁴¹ According to Justice Scalia, *Trop v. Dulles*,⁴² which announced the evolving-standards approach over six decades ago, was not only wrongly decided but “has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.”⁴³ What wreckage had *Trop* left in its wake? Most

³⁸ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

³⁹ *Id.*

⁴⁰ *Id.* at 1123.

⁴¹ *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., dissenting).

⁴² *Trop v. Dulles*, 356 U.S. 86 (1958).

⁴³ *Glossip*, 135 S. Ct. at 2749 (Scalia, J., dissenting).

notably, the evolving standards approach had led the Court to invalidate the death penalty as applied to persons with intellectual disabilities,⁴⁴ juveniles,⁴⁵ and offenders convicted only of rape⁴⁶ (including the rape of a child⁴⁷) but not murder. It also had been employed in the non-capital sphere to shield juveniles convicted of non-homicidal offenses from sentences of life without the possibility of parole (“LWOP”)⁴⁸ and to preclude the *mandatory* imposition of LWOP against juveniles convicted of homicide.⁴⁹ As it announced these decisions, the Court’s methodological approach to “evolving standards” itself evolved: The Court broadened its view of appropriate indicia of contemporary attitudes, looking not only at legislative enactments and sentencing practices, but also to professional opinion, religious opinion, world views and practices, and opinion polls. Perhaps even more dangerous from Justice Scalia’s perspective, Justice Kennedy was an enthusiastic adherent to the more capacious Eighth Amendment approach, having authored the Court’s opinions invalidating the death penalty for juveniles and for offenders convicted of the rape of a child.

In some respects, Justice Gorsuch’s opinion in *Bucklew* tries to accomplish *sub silentio* and in dicta what Justice Scalia sought to address directly—the jettisoning of *Trop*. It is certainly significant in *Bucklew* that five justices signed on to an opinion defending the death penalty’s constitutionality as an originalist/textualist matter, without regard to contemporary support or its present ability to serve important penological

⁴⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁵ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁴⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴⁷ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

⁴⁸ *Graham v. Florida*, 560 U.S. 48 (2010).

⁴⁹ *Miller v. Alabama*, 567 U.S. 460 (2012).

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purposes. But no future Court inclined to invalidate the death penalty will view *Bucklew*—as opposed to the many decisions applying *Trop* (including *Furman*, *Gregg*, *Atkins*, and *Simmons*)—as the appropriate starting point for its constitutional analysis. The constitutionality of the death penalty was not before the Court in *Bucklew*, and the Court made no mention of the continuing vitality of *Trop*. That said, *Bucklew* makes clear that advocates seeking constitutional abolition of the death penalty would act at their peril in bringing that claim to the Court as presently constituted.

Justice Gorsuch’s originalism was further deployed as the Court addressed the central doctrinal question raised in the case—whether *Bucklew* must plead a “readily available” alternative means of execution if he is to avoid the execution method he challenged. On this question, Justice Gorsuch argued that “the original and historical understanding of the Eighth Amendment” focused not on whether a punishment was painful in itself, but on whether “the punishment ‘superadds’ pain well beyond what’s needed to effectuate a death sentence.”⁵⁰ Hangings were deemed acceptable even though they presented a risk of pain, because they did not involve “the infliction of pain for pain’s sake.”⁵¹ The best way to assess whether an execution involves gratuitous pain, in Justice Gorsuch’s account, is to see whether the State is refusing to employ a method of execution with a substantially lower risk of serious pain. Given his view that “the alternative-method requirement is compelled by our understanding of the Constitution,”⁵² Justice Gorsuch dismissed as a mere “policy concern” the contention that as-applied challenges need not

⁵⁰ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1126–27 (2019).

⁵¹ *Id.* at 1127.

⁵² *Id.*

include an alternative means of execution because they do not threaten the State's general ability to execute.⁵³

The Court's sole concession to Bucklew was its holding that the "feasible and readily implemented" alternative need not be "presently authorized by a particular State's law."⁵⁴ Bucklew argued for execution by nitrogen hypoxia, which was not among Missouri's execution protocols (though Missouri does authorize execution by "lethal gas"). According to the Court, the fact that state law does not sanction a proposed method should not be an obstacle to an inmate's claim ("the comparative assessment" required by the Eighth Amendment "can't be controlled by the State's choice of which methods to authorize"⁵⁵), a point echoed by Justice Kavanaugh in his concurring opinion. Nonetheless, the Court concluded that Missouri was not unreasonable in refusing to shift to nitrogen gas, because Bucklew's proposed use of nitrogen gas was not sufficiently detailed and tested: No jurisdiction has carried out an execution using nitrogen gas, and Missouri would have to design and study the protocol before proceeding. The novelty of the proposed method of execution was itself a sufficient basis for deeming it not "readily" implementable.⁵⁶

Even this small apparent concession might not help future litigants. The Court nodded to "many legitimate reasons"⁵⁷ for refusing to adopt a well-established protocol from another State, including the amorphous concern of "preserving the dignity of the procedure,"⁵⁸ which was invoked by Justice Alito in *Baze* to justify the continued use of a paralytic despite its

⁵³ *Id.*

⁵⁴ *Id.* at 1128.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1129–30.

⁵⁷ *Id.* at 1125.

⁵⁸ *Id.*

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risks in masking an inmate's pain. Suppose an inmate proposes execution by firing squad, a "readily implemented" method given its longstanding use and well-established protocols. The "dignity-of-the-procedure" justification could be invoked to deny an inmate's preference for this form of execution on the grounds that witnesses to the execution might be uncomfortable observing the visible destruction of the body that death by firing squad entails. It is not enough, then, for an inmate to show that the state can avoid a substantial risk of pain through a well-established, "readily implemented" execution method; the inmate must also hope that the state lacks some *other* reason for declining to reduce the inmate's risk of pain, such as protecting the sensibilities of those present during the execution.

The possibility that states could choose not to shift from risky execution methods because of "dignity-of-the-procedure" concerns reveals a tension within the originalist position. The originalist asserts that the Eighth Amendment is violated whenever states have "superadded" a significant risk of pain that can be avoided through an available execution method. But the majority's acknowledgment of a strong state interest in the "dignity of the procedure" is a tacit embrace of "evolving standards of decency" as an appropriate concern limiting the choice of execution methods. If states will not embrace potentially "safer" execution methods (such as the firing squad or lethal injection without a paralytic) because prevailing standards of decency cannot abide them (they are too gruesome to observe), a thoroughgoing originalist should reject that choice. But the majority, despite claiming the originalist mantle, grafts on a non-originalist "dignity" exception to accommodate

evolving sensibilities. In such circumstances, states are able to retain the death penalty only because its violence remains unseen by observers, and the cost of this compromise is borne entirely by condemned inmates, who are denied a “safer” death to avoid transgressing community standards. Justice Alito’s “dignity-of-the-procedure” proviso, by implicitly recognizing the salience of evolving standards, calls into question the majority’s overarching framework. Instead of concluding that there must be a constitutionally acceptable method of execution because “the death penalty is constitutional,” the Court should consider the possibility that the absence of a safe method of execution acceptable to the community renders the death penalty unconstitutional.

In light of the Court’s rejection of execution by nitrogen hypoxia as not “readily implementable,” it really didn’t matter whether Bucklew was correct in claiming that lethal injection posed a substantial risk of causing him significant pain. As Justice Sotomayor argued in *Glossip* when she objected to the Court’s endorsement of the alternative method requirement, “it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake,”⁵⁹ because the petitioners had not shown that the one-drug protocol they sought was readily available. Nonetheless, the Court considered and rejected Bucklew’s assertion that lethal injection posed an excessive risk of pain, a conclusion disputed by Justice Breyer’s dissent, as the two opinions diverged in their assessments of the meaning and significance of the testimony of Bucklew’s expert witness, an anesthesiologist.

⁵⁹ *Glossip v. Gross*, 135 S. Ct. 2726, 2795 (2015) (Sotomayor, J., dissenting).

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The Court's rejection of Bucklew's challenge is perhaps less significant than the overall tone of its opinion, with its manifest disdain and hostility toward end-stage litigation generally and Bucklew's execution-method challenge in particular. The Court described Bucklew's losses on direct appeal, state postconviction, and federal habeas, and observed, "[a]fter a decade of litigation, Mr. Bucklew was seemingly out of legal options."⁶⁰ But then "Mr. Bucklew's case soon became caught up in a wave of litigation over lethal injection procedures."⁶¹ Though the Court had dealt a blow to lethal injection challenges in *Baze*, "that still was not the end of it."⁶² As Bucklew sought to challenge Missouri's protocol, "anti-death penalty advocates"⁶³ sought to interfere with the supply of lethal injection drugs. When the drugs became available in Missouri, "Mr. Bucklew filed yet another lawsuit."⁶⁴ After *Glossip* was decided, and the Court embraced the alternative execution method requirement, Bucklew "still refused to identify an alternative procedure" despite "the Eighth Circuit's express instructions" that he do so.⁶⁵

After rejecting his claim, the majority lamented how Bucklew "managed to secure delay through lawsuit after lawsuit."⁶⁶ It warned that the "Courts should police carefully against attempts to use [method-of-execution] challenges as tools to interpose unjustified delay," noting that the "people of Missouri, the surviving victims of Mr. Bucklew's crimes, and others like them deserve better."⁶⁷ Sending a message to the

⁶⁰ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119 (2019).

⁶¹ *Id.*

⁶² *Id.* at 1120.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 1121.

⁶⁶ *Id.* at 1133–34.

⁶⁷ *Id.* at 1134.

lower courts, the majority declared that “[l]ast minute stays should be the extreme exception, not the norm.”⁶⁸

On this last point, the majority sought to defend its widely criticized decision earlier in the Term vacating a stay in the case of Domineque Ray. Ray had challenged Alabama’s policy permitting a Christian chaplain to be present in the execution chamber to minister to (presumably) Christian inmates while denying Muslim inmates a corresponding right to have an imam present in the chamber. The Eleventh Circuit had granted a stay the day before Ray’s scheduled execution, concluding that there was a substantial likelihood that Alabama’s policy violated the Establishment Clause. The same five justices in the *Bucklew* majority supplied the votes in *Dunn v. Ray*⁶⁹ to vacate the stay in a two-paragraph order, noting that a “court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”⁷⁰ Four dissenting justices chastised the majority for refusing to prevent an obvious denial of religious equality on the ground of the “last-minute nature” of Ray’s application, noting that Ray filed his complaint within five days of the warden’s denial of his request to have his imam present.⁷¹ In *Bucklew*, the majority dropped a footnote defending the reasonableness of its denial, arguing that Ray should not have waited until only fifteen days from his execution before seeking clarification of Alabama’s policy.⁷² Justice Sotomayor’s dissent in *Bucklew* objected to the Court’s dismissive posture toward *Bucklew*’s litigation efforts, disagreeing with the Court’s implication that he sought to

⁶⁸ *Id.*

⁶⁹ *Dunn v. Ray*, 139 S. Ct. 661 (2019).

⁷⁰ *Id.* at 661 (quoting *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992)).

⁷¹ *Id.* at 662 (Kagan, J., dissenting).

⁷² *Bucklew*, 139 S. Ct. at 1134 n.5.

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“manipulat[e] the judicial process.”⁷³ She viewed as “ominous” and “troubl[ing]” the Court’s “extreme exception” language,⁷⁴ imploring lower courts not to mistakenly read it as a new restrictive overlay on courts’ equitable power to grant stays in capital litigation. Whether or not the language amounts to a new legal standard, it certainly reflects a jaundiced judicial attitude toward last-minute stay applications.

II. *Flowers v. Mississippi*

In *Flowers v. Mississippi*,⁷⁵ a different dynamic emerged among the justices. Instead of a five-to-four vote for the state along the prevailing conservative / progressive divide, the Court’s judgment was in favor of the capital defendant by a seven-to-two vote, with Chief Justice Roberts joining the majority opinion authored by Justice Kavanaugh, and Justice Alito concurring separately. *Flowers* is the latest in a line of *Batson* decisions in capital cases in which the Court has rhetorically embraced its role as enforcer of rules against intentional racial discrimination in the trial process while failing to address or even acknowledge systemic racial bias in that process. Although the left wing of the Court always joins these *Batson* enforcement decisions, it is notable that all three such opinions thus far by the Roberts Court—*Snyder v. Louisiana*,⁷⁶ *Foster v. Chatman*,⁷⁷ and *Flowers*—have been authored by justices from the Court’s conservative majority (Justices Alito, Roberts, and Kavanaugh). These opinions all have the same general format: They each painstakingly

⁷³ *Id.* at 1146 (Sotomayor, J., dissenting).

⁷⁴ *Id.*

⁷⁵ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁷⁶ *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

⁷⁷ *Id.*

chronicle and sanctimoniously condemn intentional discrimination by prosecutors in the exercise of their peremptory strikes, while at the same time emphasizing the unusualness of the underlying facts and the narrowness of the holding—issuing what appears to be a ticket “for this train only.”

In *Flowers*, the Court addressed a black capital defendant’s *Batson* claim of intentional discrimination by the state in the exercise of its peremptory strikes in the sixth trial arising out of the murder of four people (three of them white) in a small town in Mississippi. All six trials were tried by the same (white) prosecutor. The first three trials, which resulted in death verdicts, were all reversed by the Mississippi Supreme Court, the first two for prosecutorial misconduct and the third for a *Batson* violation. The fourth and fifth trials (the only ones in which the jury had more than one black member) resulted in mistrials due to hung juries. The sixth trial resulted in a death verdict that was affirmed by the Mississippi Supreme Court. The U.S. Supreme Court reversed the conviction on the ground that “the trial court committed clear error in concluding that the State’s peremptory strike of black prospective juror Carolyn Wright was not ‘motivated in substantial part by discriminatory intent.’”⁷⁸

Although the Court based its ruling on the strike of a single black prospective juror in the sixth trial, it based its conclusion of discriminatory intent in part on the prosecutor’s conduct over the course of the previous trials. The Court noted that for the five trials for which there was evidence of the race of struck jurors, the state “employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could

⁷⁸ *Flowers*, 139 S. Ct. at 2235 (quoting *Foster*, 136 S. Ct. at 1754).

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have struck.”⁷⁹ The Court also cited the Mississippi Supreme Court’s assessment of the strength of the *Batson* claim that led it to reverse the conviction in the third trial: “The instant case presents us with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.”⁸⁰ The rest of the U.S. Supreme Court’s opinion relied on the prosecutor’s conduct in the sixth trial alone—the prosecutor’s pattern of strikes (eliminating five out of six black prospective jurors), the prosecutor’s “dramatically disparate questioning” of black and white prospective jurors, and the implausibility of the prosecutor’s supposedly race-neutral reasons for striking Carolyn Wright, “who was similarly situated to white prospective jurors who were not struck by the State.”⁸¹

Despite its distinctive facts (six trials!), *Flowers* shares a number of key features with the other Roberts Court *Batson* cases (*Foster* and *Snyder*). All three cases addressed capital verdicts against black defendants in states in the Deep South (Louisiana, Georgia, and Mississippi). Moreover, while all three cases presented compelling *Batson* claims on their facts, the Court’s decision to review them ran counter to the Court’s typical avoidance of fact-bound claims and mere error correction. None of the three cases presented legal issues of the type that usually prompt Supreme Court review. Rather, the claim to the Court’s attention was the extremity of the evidence presented by the defendants of intentional racial discrimination—what Jeffrey Toobin, writing about *Flowers* for the *New Yorker*, described as the “almost cartoonishly racist” conduct of the prosecutor.

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting *Flowers v. State*, 947 So. 2d 910, 935 (Miss. 2007)).

⁸¹ *Id.*

The prosecutorial behavior in *Foster*, decided three years earlier, was of a similar magnitude. The *Foster* case involved the discovery many years after the trial of contemporaneous jury selection notes from the prosecutor's office that were clearly never intended to see the light of day. The notes undermined, to say the least, the state's claim that its elimination of all black prospective jurors from the pool was not racially motivated. Among other things, the notes explained that the bright green highlighting of the names of certain prospective jurors "represents Blacks," labeled three of the black prospective jurors as "B #1," "B #2," and "B #3," and included a list of "definite NO's" containing the names of all of the qualified black prospective jurors.⁸² As *Foster*'s lawyer, Stephen Bright, noted without overstatement during oral argument, "We have an arsenal of smoking guns in this case."⁸³ And as Justice Kagan asked, rhetorically, "Isn't this as clear a *Batson* violation as a court is ever going to see?"⁸⁴

In *Snyder*, the defendant was similarly convicted and sentenced to death by an all-white jury after the prosecutor used peremptory strikes to eliminate all of the qualified black prospective jurors. The added drama in *Snyder*'s prosecution for a knife attack on his estranged wife and her date was the prosecutor's repeated inflammatory references, before and during the trial, to the O.J. Simpson murder trial, which had concluded less than a year previously. In asking the all-white jury to return a death sentence at the penalty phase, the prosecutor likened *Snyder*'s prosecution to the Simpson trial, which he described as "the most famous murder case in the last, in probably recorded history, that all of you all are aware

⁸² *Foster*, 136 S. Ct. at 1744.

⁸³ [Transcript of Oral Argument](#) at 25, *Foster*, 136 S. Ct. at 1737 (No. 14–8349)

⁸⁴ *Id.* at 39.

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of” and claimed was “very, very, very similar” to Snyder’s case.⁸⁵ The dissenting justices on the Louisiana Supreme Court, who would have set aside Snyder’s conviction, concluded: “The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury’s passion to sentence this defendant to death. Such tactics leave no doubt . . . that the prosecutor had a racially discriminatory purpose for excluding the African American jurors.”⁸⁶

The majority opinions in *Flowers*, *Foster*, and *Snyder* have similar structures. Each of them carefully documents the Court’s reasons for rejecting the state courts’ determinations that the prosecutors had race-neutral reasons for striking black prospective jurors, despite the deference that the law accords to state trial judges in these matters. A centerpiece of the analysis in each case is a side-by-side comparison of black and white jurors to test whether the prosecutors applied their stated reasons for striking black jurors to similarly situated white jurors. Often, the Court’s tone is high-minded and stern—celebratory of American legal commitments to racial justice and admonishing of discriminatory and deceitful prosecutorial behavior.

For example, Justice Kavanaugh’s opinion in *Flowers* is the epitome of high-minded celebration: It quoted at length from the Equal Protection Clause of the federal Constitution and the Civil Rights Act of 1875 and cited to the famous anti-discrimination holdings of *Strauder v. West Virginia*⁸⁷ and *Brown v. Board of Education*,⁸⁸ as well as a slew of other anti-

⁸⁵ Brief of Petitioner at 16–17, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06–10119), 2007 WL 2605447 (citing the Joint Appendix at 606, 607).

⁸⁶ *State v. Snyder*, 942 So. 2d 484, 506 (La. 2006) (Johnson, J., dissenting).

⁸⁷ *Strauder v. West Virginia*, 100 U.S. 303 (1879).

⁸⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

discrimination cases.⁸⁹ This history lesson culminated in a lengthy discussion of *Batson v. Kentucky*,⁹⁰ which the Court triumphantly declared “immediately revolutionized the jury selection process . . . throughout the United States” in that it “ended the widespread practice in which prosecutors could (and often would) routinely strike all black prospective jurors in cases involving black defendants.”⁹¹ As for sternness, Chief Justice Roberts’s opinion in *Foster* took a brusque, almost contemptuous tone toward some of the prosecutor’s behavior. In response to the prosecutor’s claim that he struck one black juror because that juror’s son had been convicted of a crime (stealing hubcaps) that was “basically the same thing that this defendant is charged with” (rape and murder), the chief justice wrote simply, “Nonsense.”⁹² As for other various justifications for striking black jurors that were offered by the prosecutor, the Chief Justice deemed them, respectively, a “mischaracterization of the record,” “not true,” and “pretextual,” adding generally, “[m]any of the State’s secondary justifications similarly come undone when subjected to scrutiny.”⁹³

The overall impression left by reading the Roberts Court’s *Batson* cases sequentially is of the Court’s strenuous attempt to demonstrate its commitment to identifying, condemning, and remedying racial discrimination in jury selection. This implicit claim to vigilance is paradoxically only strengthened by the vehement dissents of Justice Thomas (joined by at most

⁸⁹ *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238–39 (2019).

⁹⁰ *Batson v. Kentucky*, 476 U.S. 79 (1986).

⁹¹ *Flowers*, 139 S. Ct. at 2242–43.

⁹² *Foster v. Chatman*, 136 S. Ct. 1737, 1752 (2016).

⁹³ *Id.* at 1753. In contrast to the rhetorical flourishes in *Foster* and *Flowers*, Justice Alito’s opinion in *Snyder* is rhetorically more muted, choosing to focus on how the prosecutor’s claimed justification for striking a black juror could not hold up after a side-by-side comparison of similarly situated white jurors, without addressing at all the inflammatory references to the O.J. Simpson trial that the dissenting state court justices had found so compelling. See *Snyder v. Louisiana*, 552 U.S. 472 (2008).

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one other justice) in all three cases. Justice Thomas thundered with outrage against what he sees as the Court's nitpicking attempts to find evidence of racial discrimination despite its clear absence. He suggested that the Court is doing a version of rounding up the usual suspects by focusing on the treatment of black defendants in Southern state courts.⁹⁴ In *Flowers*, Thomas insisted that *Flowers* presented "no evidence whatsoever of purposeful race discrimination by the State" and that the Court's contrary conclusion is "manifestly incorrect."⁹⁵ These objections make it seem as if the Court routinely leans over backwards to ensure that even tenuous claims of discriminatory state action are vindicated.

Nothing could be further from the truth. Despite their rhetorical displays of attentiveness to racial justice, the Court's recent *Batson* cases fail to acknowledge the broader context of systemic racial bias in the capital and criminal justice processes. In *Batson* itself, the Court explained that racially discriminatory jury selection procedures are constitutionally objectionable because they "undermine public confidence in the fairness of our system of justice."⁹⁶ Presumably, evidence that the justice system sentences classes of defendants differently because of their race would undermine public confidence in the fairness of the system to an even greater degree. But the Court's decision in *McCleskey v. Kemp* held that proof of such differential treatment over time, even in capital cases, does not give rise to a constitutionally cognizable claim.⁹⁷ The Court's vociferous

⁹⁴ "Flowers' case . . . comes to us from a state court in the South. The courts are 'familiar objects of the Court's scorn,' especially in cases involving race." *Flowers*, 139 S. Ct. at 2254 (Thomas, J., dissenting) (citation and footnote omitted).

⁹⁵ *Id.* at 2255.

⁹⁶ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

⁹⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

condemnation of egregious prosecutorial discrimination in jury selection fails to come to terms with the lack of constitutional remedies for the much bigger game of discrimination in actual case outcomes.

Moreover, the focus in the *Batson* cases on intentional discrimination leaves unacknowledged and untouched the even more intractable problem of unconscious bias. The *Batson* cases give the impression that discrimination is something that people are aware they are doing (because they lie about it) and that it is therefore something we can identify through “smoking gun” written evidence, careful parsing of questions asked during *voir dire*, and side-by-side juror comparisons. But it is increasingly apparent that biases on the part of prosecutors, judges, and jurors (as well as police officers, prison officials, and parole boards) are not always susceptible to such proof. Individuals are not always (or maybe not even usually) lying when they deny that they are acting with racial bias. Racially biased perceptions and motivations are often opaque not only to the courts, but also to the very people who experience them.⁹⁸ Yet these subterranean biases affect the perceptions and decision-making of actors throughout the criminal justice process, without much likelihood of detection or any hope of constitutional remedy.

Beyond failing to acknowledge the broader context of systemic racial bias, the Court’s *Batson* cases may actively undermine the recognition of systemic issues by holding up easy examples of “cartoonishly racist” behavior for all to condemn. The cases that the Court has chosen to review seem to suggest that the problem of racism in Southern criminal

⁹⁸ There is a large literature on implicit bias and its potential effects within the criminal justice system. For a good illustrative example, see Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007).

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courts (or any other courts, for that matter) is one of a few egregiously bad apples, rather than a less dramatic—and less remediable—everyday reality. That may explain why the Court is repeatedly attracted to cases of transparent racism in the criminal justice process even beyond the context of jury selection.⁹⁹ Such cases offer a tidy story of villains who get their comeuppance, rather than a messy story of problems that have no easy solutions.

Even at the *non*-systemic level of jury selection, the Court's *Batson* rulings do little to solve the intractable persistence of racial discrimination in the exercise of challenges to jury service. First, the Court has consistently declined to develop rules that lower courts can easily apply and that might deter future *Batson* violations. In *Flowers*, Justice Kavanaugh repeatedly made the point that “we need not and do not decide that any one of [the four facts that support the Court's ruling] alone would require reversal.”¹⁰⁰ Justice Alito concurred separately to underscore that “this is a highly unusual case . . . likely one of a kind.”¹⁰¹ The treatment of such cases as *sui generis* renders them weak precedents, with little helpful guidance for the future. Moreover, the Court fails to recognize that the “lesson” that prosecutors (or defense lawyers) with a mind to discriminate might take from its cases is that they just need to be smarter about offering race-neutral explanations—in particular, by offering explanations based on juror demeanor. In the Court's opinion in *Snyder*, Justice Alito practically wrote

⁹⁹ See, e.g., *Buck v. Davis*, 137 S. Ct. 759 (2017) (reversing capital sentence because expert witness testified that the defendant was more likely to commit acts of violence in the future because he was black); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (creating an exception to the rule against impeaching jury verdicts in cases where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant).

¹⁰⁰ *Flowers*, 139 S. Ct. at 2251.

¹⁰¹ *Id.* (Alito, J., concurring).

a roadmap for such tactics, explaining that the Court would have upheld the trial judge's acceptance of the prosecutor's race-neutral explanation if only the prosecutor had limited that explanation to the juror's "nervousness" and the judge had explicitly stated that he credited the prosecutor.¹⁰² Finally, the *Batson* cases offer a remedy only for intentional discrimination in the use of peremptory challenges; they fail to recognize the extent to which disparate questioning of black and white prospective jurors is undertaken to pursue disparate challenges for cause, which are unlimited in number. Thomas Frampton has reviewed the trial court records in the Court's recent *Batson* cases and found that "the lion's share of racial exclusion in the jury selection process occurred through challenges for cause."¹⁰³

The Court's decision in *Flowers* successfully does what it claims on its face to do—it polices an egregious instance of malfeasance in the jury selection process in an individual capital case. At the same time, however, the Court's capital *Batson* cases subtly and not-so-subtly work to stabilize the death penalty by underplaying intractable systemic bias and promoting undeserved public confidence in the fairness of the overall system and the jury selection process alike.

III. *Moore v. Texas*

This Term's decision in *Moore v. Texas (Moore II)*¹⁰⁴ was Bobby James Moore's second victory in the U.S. Supreme Court. Two years ago, in *Moore v. Texas (Moore I)*,¹⁰⁵ the Court reversed a decision by the Texas Court of Criminal Appeals

¹⁰² *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

¹⁰³ Thomas Frampton, *What Clarence Thomas Gets Right About Batson*, STAN. L. REV. ONLINE (forthcoming) (citing Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 117 MICH. L. REV. (forthcoming 2020)).

¹⁰⁴ *Moore v. Texas*, 139 S. Ct. 666 (2019).

¹⁰⁵ *Moore v. Texas*, 137 S. Ct. 1039 (2017).

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(CCA) denying Moore’s claim to exemption from the death penalty based on intellectual disability. The Supreme Court’s decision rested in large part on the CCA’s outlier approach to discerning whether an inmate has an intellectual disability. All states acknowledge three essential components for a diagnosis of intellectual disability: significantly subaverage intellectual functioning (usually reflected in an IQ score two standard deviations from the mean); deficits in adaptive behavior; and onset during the developmental period. Most jurisdictions focus on whether an inmate meets clinical criteria for these components as set forth by expert organizations, such as the American Psychiatric Association and the American Association on Intellectual and Developmental Disabilities. Unlike these jurisdictions, though, the CCA, in response to the Court’s decision in *Atkins*¹⁰⁶ (exempting persons with intellectual disabilities from the death penalty), invented its own, non-clinical set of considerations (the “*Briseno* factors”) to assess the second component, adaptive deficits.¹⁰⁷ The *Briseno* factors were a hodge-podge of issues that deployed stereotypes of intellectual disability (whether the person is “coherent” or “rational”) and inappropriately invited consideration of the facts of the crime, which could lead judges or jurors to nullify and reject a finding of intellectual disability that was otherwise warranted.¹⁰⁸ Perhaps even more problematic, the CCA had not concealed its reason for inventing its non-clinical criteria: The CCA openly doubted whether *Atkins* should be read to exempt *all* persons with intellectual disability from the death penalty, as opposed to only those offenders “a consensus of Texas citizens”

¹⁰⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁰⁷ *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

¹⁰⁸ Hensleigh Crowell, *The Writing is on the Wall: How the Briseno Factors Create an Unacceptable Risk of Executing Persons with Intellectual Disability*, 94 TEX. L. REV. 743, 769–81 (2016).

would deem sufficiently impaired to warrant exemption.¹⁰⁹ The CCA colorfully added that average Texans might agree that the fictional character Lennie in Steinbeck's novel *Of Mice and Men* should be spared death, but the court was not so sure that Texans would feel similarly about offenders who merely satisfy the longstanding clinical definition of intellectual disability.¹¹⁰

In *Moore I*, the Court was emphatic about the inappropriateness of the CCA's invented criteria for adaptive deficits, stating that "[b]y design and in operation [they] create an unacceptable risk that persons with intellectual disability will be executed."¹¹¹ Even though the Court was divided five-to-three in its decision to reverse the CCA's judgment, the Court was unanimous about the incompatibility of the *Briseno* factors with *Atkins* and the Eighth Amendment. The Court also highlighted numerous other ways in the which the CCA's analysis departed from clinical diagnostic norms, including its excessive focus on Moore's strengths rather than his deficits, its overemphasis on Moore's behavior in the controlled environment of prison, its suggestion that a diagnosis of intellectual disability was less appropriate because of Moore's abused background, and its requirement that Moore demonstrate that his deficits were not the product of a personality disorder (as opposed to intellectual disability).

On remand, in a remarkable development, the Harris County district attorney joined Moore's lawyers in determining that Moore was exempt from the death penalty in light of the Supreme Court's opinion. But the CCA refused to embrace this joint position and plowed forward, rehashing much of

¹⁰⁹ *Ex parte Briseno*, 135 S.W.3d at 6.

¹¹⁰ *Id.*

¹¹¹ *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (internal quotation marks and citation omitted).

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the same analysis from its earlier decision. The CCA once more overturned the trial court's recommendation that Moore prevail on his *Atkins* claim. When Moore filed for review in the Supreme Court, the district attorney again did not oppose relief, leading to an effort by the Texas attorney general (AG) to intervene so that there would be a voice before the Court defending the CCA decision. The AG had some reason for hope: By the time *Moore II* reached the Court, only four of the five justices supporting the judgment in *Moore I* remained on the Court, and Justices Gorsuch and Kavanaugh did not seem like sure bets to defend the Court's prior decision.

Nonetheless, *Moore II* summarily reversed the CCA decision. The *per curiam* decision observed that it found in the CCA opinion "too many instances in which, with small variations, it repeats the analysis we previously found wanting" and that "these same parts are critical to its ultimate conclusion."¹¹² Chief Justice Roberts was the lone dissenter in *Moore I* who agreed with the summary reversal (Justices Alito and Thomas again voted to affirm the CCA). Chief Justice Roberts had authored the dissent in *Moore I*, lamenting the absence of firm guidance in the *per curiam* decision for assessing intellectual disability. But "putting aside the difficulties of applying *Moore* in other cases," he found it "easy to see that the Texas Court of Criminal Appeals misapplied it here."¹¹³

Notably, of the two new justices, only Justice Gorsuch joined Justice Alito's dissent. Justice Alito attributed the conflict between the Court and the CCA in this case to the absence of adequate guidance in *Moore I*. He also lamented the Court's mere error correction, noting that the Court "rarely grant[s]

¹¹² *Moore v. Texas*, 139 S. Ct. 666, 670 (2019) (Roberts, C.J., concurring).

¹¹³ *Id.* at 672.

review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case.”¹¹⁴ Fair enough, though here the “settled rule of law” was the Court’s decision reversing the CCA in the very same case. Justice Alito also objected to the Court’s decision to reach the ultimate conclusion that Moore is exempt under *Atkins*,¹¹⁵ suggesting that the ordinary course for the Court when a state court has misapplied federal law is to reverse and remand so that the state court can have the opportunity to apply the correct legal standard (what could possibly go wrong on remand?), a path the majority seemed unwilling to risk.

Moore II is of a piece with *Flowers*. Both cases involved an important institutional actor repeatedly flouting Court precedent (though here it is a state court rather than a county prosecutor). Like *Flowers*, *Moore II* makes no discernable new law. Indeed, it’s fair to say that *Moore II* says less about the Court’s death penalty jurisprudence than about its willingness to enforce its own decisions. It is unsurprising that, among the conservative members of the Court, Chief Justice Roberts would be the least inclined to tolerate a state court’s not-particularly-clever effort to evade the manifest consequences of a recent decision of the Court—a point underscored by the unwillingness of the Harris County District Attorney’s Office to continue to defend Moore’s death sentence. That said, the importance of *Moore II* should not be understated. Justice Kennedy’s departure from the Court left fewer than five adherents not only to *Moore I* but possibly to *Atkins* itself. Had the Court tolerated the CCA’s nonadherence to *Moore I*, many lower courts and prosecutors would have sensed

¹¹⁴ *Id.* at 673 (Alito, J., dissenting) (internal quotation marks and citation omitted).

¹¹⁵ *Id.* at 673–74.

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an opportunity to revisit *Atkins*. In an indirect way, though, *Moore II* can be understood as protecting the legitimacy of the death penalty—by protecting the legitimacy of the *Court* as it increasingly sides with states against death-sentenced inmates.

IV. *Madison v. Alabama*

In *Madison v. Alabama*,¹¹⁶ the Court gave another win to a capital defendant, but once again offered little that will aid future capital defendants as a class (or even Madison himself on remand). The case dealt with the Court's Eighth Amendment doctrine banning the execution of inmates who lack competency to be executed as a result of their mental state. In the litigation leading up to the Court's decision, both the prosecution and the defense urged approaches that arguably would have changed the scope of the doctrine—the prosecution's by narrowing the availability of the ban and the defense's by widening it. The Court was having none of it. In a careful opinion for a five-to-three majority made up of the chief justice and the rest of the liberal wing of the Court, Justice Kagan treated the case as a straightforward application of the doctrine as elucidated in the Court's most recent and complete (if not clearest) statement on the matter a dozen years earlier. In doing so, the Court sought a conservative (as in preserving the status quo) middle ground, rejecting, like the bears in Goldilocks's house, interpretations of its precedents that it deemed both too big and too small.

The constitutional ban on executing the incompetent was first announced in *Ford v. Wainwright* in 1986, when the Court explained that the Eighth Amendment prohibits the execution of "the insane" on the grounds that executing a

¹¹⁶ *Madison v. Alabama*, 139 S. Ct. 718 (2019).

person “who has no comprehension of why he has been singled out and stripped of his fundamental right to life” and “who has no capacity to come to grips with his own conscience or deity” offers little “retributive value” and “simply offends humanity.”¹¹⁷ More recently, the Court elaborated on the *Ford* standard in *Panetti v. Quarterman*, noting that *Ford* “did not set forth a precise standard for competency” and holding that a condemned prisoner lacks competency to be executed if he is mentally impaired such that “he cannot reach a rational understanding of the reason for the execution.”¹¹⁸ The Court in *Panetti* held that a prisoner’s formal ability to “identify the stated reason for his execution” was not sufficient; rather, competency requires that the prisoner have a more nuanced ability to “comprehend[] the meaning and purpose of the punishment to which he has been sentenced.”¹¹⁹

Although it could fairly be said that *Panetti*, too, failed to offer a “precise standard” for competency to be executed,¹²⁰ the Court in *Madison* took a straightforward approach that did not seek to find or resolve complexities in the doctrine. Rather, the Court remanded the case to the Alabama courts to clarify whether the state court’s determination that Madison “did not provide a substantial threshold showing of insanity[] sufficient to . . . stay the execution”¹²¹ reflected an accurate understanding of the Court’s holdings in *Ford* and *Panetti*. Unlike the defendants in these earlier cases, Madison did not suffer from gross delusions as a result of schizophrenia. Rather,

¹¹⁷ *Ford v. Wainwright*, 477 U.S. 399, 408–09 (1986).

¹¹⁸ *Panetti v. Quarterman*, 551 U.S. 930, 957–58 (2007).

¹¹⁹ *Id.* at 959–60.

¹²⁰ See generally Carol S. Steiker, *Panetti v. Quarterman: Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285 (2007) (describing the many questions left open by *Panetti* about competency to be executed).

¹²¹ *Madison*, 139 S. Ct. at 726.

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after more than thirty years on Alabama's death row, Madison suffered from significant cognitive decline as a result of a series of strokes and vascular dementia. He claimed to no longer be able to remember committing the crime for which he was sentenced to death, and his lawyers argued that his memory impairment and dementia prevented him from having the rational understanding of the reason for his execution required by the Court's doctrine. The state, for its part, argued that only prisoners suffering from delusional disorders could qualify as incompetent. At oral argument before the Court, Madison's counsel conceded that a prisoner's inability to remember committing the crime for which he was sentenced to death does not alone render him incompetent, while counsel for the state conceded that dementia as well as psychotic delusions could preclude the necessary "rational understanding" required for competency to be executed.¹²² The *Madison* Court ratified both of these concessions and held that the only question left to be answered was whether the state court's use of the term "insanity" in its terse rejection of Madison's claim of incompetency reflected the incorrect view that only delusions could impair competency.

The decision in *Madison* protected the Court's standard for competency to be executed from being narrowed to the particular facts of the two main cases in which it had been elucidated (*Ford* and *Panetti*). True, both of these cases involved prisoners suffering from gross delusions. But the announced standard for competency—the requirement that a prisoner have a rational understanding of the reasons for his execution—does not limit itself to such situations. As the Court explained,

¹²² *Id.* at 726–27.

[The] standard focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. Conversely, that standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.¹²³

Madison held the constitutional line in demanding that the state court demonstrate compliance with the Court's previously announced competency standard. However, the *Madison* Court also declined to interpret that standard more broadly. Until oral argument before the Court, Madison had argued that his inability to remember committing the crime for which he was sentenced deprived him of the ability to rationally understand the reason for his execution. The *Madison* opinion treats this claim as self-evidently wrong, invoking some common-sense examples:

Do you have an independent recollection of the Civil War? Obviously not. But you may still be able to reach a rational—indeed, a sophisticated—understanding of that conflict and its consequences. Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story.¹²⁴

Quite apart from the dubious connection between memory and rationality, however, the Court may have had unstated

¹²³ *Id.* at 728 (reference omitted).

¹²⁴ *Id.* at 727.

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practical reasons to reject a pure memory test for competency—reasons that may have been key to the chief justice’s crucial fifth vote. As counsel for Madison implicitly recognized at oral argument, if lack of memory of the offense alone were sufficient to establish incompetency to be executed, many more prisoners would likely claim such a lack, leading to extended and expensive litigation. And given that memory problems increase with age, such claims may well multiply in the future, given the ever-growing lengths of time that prisoners spend on death row. By holding merely that dementia as well as delusions may undermine a prisoner’s “rational understanding,” the Court was able to stand firm on its *Ford/Panetti* standard without giving capital defendants a powerful new weapon to challenge or delay their executions.

Indeed, the Court’s ruling may well not benefit even Madison himself, as the Court’s remand sends the question back to the same Alabama court that has twice already affirmed Madison’s competency to be executed. The *Madison* decision’s most substantial import may be as a shot across the bow. It is a warning to state courts, just as the Court’s *Batson* cases serve as warnings to state prosecutors, that the Court will police bold outliers and obvious bad actors. Such policing helps the death penalty save face as an institution—but without actually changing the nature of the underlying practice to any substantial degree.

* * *

Over the past almost-fifty years since *Furman*, the Court has operated under the assumption that the death penalty is constitutional so long as the American people have not decisively rejected it. As the death penalty withered

dramatically in recent decades, several justices have insisted that it is time for the Court to reevaluate whether the practice remains consistent with prevailing standards of decency. The present Court seems intent on deflecting that challenge, not by documenting continued support for the punishment, but through an appeal to a mix of originalism and textualism that would permanently insulate capital punishment from Eighth Amendment review. From that premise, the Court also seeks to sweep end-stage litigation aside, because if capital punishment is (forever) constitutional, states should not be impeded from carrying it out. At the same time, a broader coalition on the Court seems committed to policing particularly egregious state capital practices, especially those—like transparent racism—that undermine the legitimacy of the overall capital system. But in so doing, the Court is reluctant to demand broader changes that would measurably improve capital practices on the ground.

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Dirty Thinking About Law and Democracy in *Rucho v. Common Cause*

Guy-Uriel E. Charles* &
Luis E. Fuentes-Rohwer**

In *Rucho v. Common Cause*, and its companion *Lamone v. Benisek*, a sharply divided Supreme Court declined the opportunity to set constitutional limits on partisan manipulation of electoral district lines.¹ Writing for a five-justice majority, Chief Justice John G. Roberts concluded that “partisan gerrymandering claims present political questions beyond the reach of the federal courts” because “[f]ederal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.”² Consequently, because the federal courts “have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide [them] in the exercise of such authority,” he concluded that these cases were non-justiciable.³

Rucho is not an easy case to take seriously as doctrine. Chief Justice Roberts’s opinion is more redolent of a debater’s brief

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¹ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

² *Id.* at 2506–07.

³ *Id.* at 2508.

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than a judicial opinion. *Rucho* deploys a series of arguments against the justiciability of political-gerrymandering claims, relying on no single argument and committed to nothing but the conclusion of non-justiciability. Critically, the opinion is an amalgam of misdirections, distortions, and less-than-pellucid thinking about the constitutionalization of political-gerrymandering claims. This is what the Court's inexorable fealty to non-justiciability gets us.

Consider, for example, Chief Justice Roberts's conclusion that the Constitution does not authorize federal judges to reallocate power between the two major political parties. As the chief justice well knows, or as he certainly ought to know, the plaintiffs were not asking the Court to "reallocate political power between the two major political parties."⁴ That way of framing the problem presents it as a structural claim, which, in the domain of law and democracy, the Court has rejected every single time.⁵ Rather, the plaintiffs were asking the Court to do what it has done for over half a century, since the landmark reapportionment case of *Baker v. Carr*—to protect the individual right to vote by limiting the power of government officials to intentionally dilute the individual's vote when it draws voting districts.⁶ Framing election law claims as purely structural, and thus dismissing them, is a time-honored device.⁷ It ignores the fact that law-and-democracy claims are dualistic: Individual and structural rights are two sides of the same law-and-politics

⁴ *Id.* at 2507.

⁵ See generally Guy-Uriel E. Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005).

⁶ See Amicus Brief of Mathematicians, Law Professors, and Students in Support of Appellees and Affirmance at 4, *Rucho*, 139 S. Ct. 2484 (Nos. 18–422, 18–726); see also Charles, *supra* note 5, at 1128.

⁷ See generally Charles, *supra* note 5.

claim.⁸ The distortion of the question presented, to present the opponent's claim in its most unfavorable light, is a clever debater's trick.⁹ But it is a distortion; it fails to respond to the plaintiffs' actual claim.

Reasonable minds can disagree about the necessity of judicial supervision of partisan line-drawing. And one could imagine a persuasive doctrinal argument counseling against judicial supervision. But one would have to imagine that argument, as it was not offered in *Rucho*. This is because *Rucho* is not about doctrine. As Justice Kagan shows in her powerful dissent, there are easy responses to the majority's contentions.¹⁰ By way of example, responding to the majority's argument that judicial supervision in this area can only mean that the federal courts would endeavor to allocate political power between the two major parties, she notes, matter-of-factly, that the lower federal courts in the very cases before the Supreme Court have done what the majority said could not be done.¹¹ These lower courts have adjudicated these cases pursuant to recognizable legal standards and vindicated individual constitutional rights. Betraying her annoyance with the majority, Justice Kagan calls the majority's lack of engagement with the lower courts' substantive legal analysis "discomfiting."¹² The ease with which Justice Kagan was able to refute the majority's doctrinal

⁸ As a general matter, structural claims must be converted to an individual rights framework to make the claims justiciable, which is how the Court has historically resolved election law claims. Charles, *supra* note 5, at 1102.

⁹ It is notable that Justice Kagan, in her dissenting opinion, articulates the harm of partisan gerrymandering in both structural and individual rights terms. See *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting) (arguing that partisan gerrymandering "subverts democracy" and "violates individuals' constitutional rights").

¹⁰ *Rucho*, 139 S. Ct. at 2509.

¹¹ *Id.* at 2516 ("But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done.").

¹² *Id.* at 2517.

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arguments is indicative of the limited role played by legal doctrine in the majority's constitutional analysis.

In the course of wrapping up her dissent, after refuting each aspect of the majority's arguments against justiciability, Justice Kagan offers a tantalizing set of observations that invite further reflection. She notes that the gerrymandering claims at the heart of this litigation "imperil our system of government."¹³ This is where the Court must step in, she writes, because "[p]art of the Court's role in [our constitutional] system is to defend its foundations."¹⁴ And importantly, she argues that no foundation "is more important than free and fair elections."¹⁵

We'd like to pick up where Justice Kagan left off. The concluding paragraph in her dissent raises a critical question: Why are the conservative justices in the *Rucho* majority uninterested in defending the foundations of American Democracy? To phrase the question differently, why is there such a divide on the Court about whether it is appropriate for the Court to safeguard the fundamental rules of representative democracy? This ought to be the central question for scholars of law and politics. The importance of the question reaches beyond *Rucho* and the issue of political gerrymandering. It is the core question, for example, in *Baker v. Carr*,¹⁶ the case that frames the field of law and politics to this day. It is also the question in *Shelby County v. Holder*,¹⁷ the case that struck down a significant part of the Voting Rights Act of 1965. If the Court is not defending the foundations of representative democracy, what is it defending?

¹³ *Id.* at 2525.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Baker v. Carr*, 369 U.S. 186 (1962).

¹⁷ *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

We argue that Chief Justice Roberts and the *Rucho* majority's commitment to non-justiciability of partisan gerrymandering claims is a function of the majority's attachment and normative commitment to a particular understanding of politics in a representative democracy. For the majority, politics is sordid, partisan, and unfair. For the conservatives on the Court, political-gerrymandering claims ask the Court to perform a task that courts are ill-equipped to perform, which is to clean up a process that is inherently dirty and to make fair a process that is inherently partial. Consequently, *Rucho* is not simply an affirmation of a traditional conception of politics; it is also a rejection of a more modern conception that is beginning to find a foothold in American politics—with roots in the Court's malapportionment jurisprudence—about how representative democratic institutions ought to operate. This more modern approach reflects the beliefs that representative electoral structures and American politics more generally ought to include some basic notion of fairness: a commitment to the public good without the hindrance of partisanship and a conception of fair play that constrains the behavior of those who design electoral structures. In contrast to the majority in *Rucho*, proponents of the modern conception envision a role for the Court in enforcing basic rules of fairness and fair play while at the same time indirectly promoting a particular vision of the public good that is not filtered through partisan identity in the design of structures of representation.

In order to understand the division in *Rucho* and, as importantly, to understand why the plaintiffs in *Rucho* failed to win over the conservatives on the Court, we have to come to terms with these different worldviews on the Court. Is sordid politics an inherently necessary and arguably normatively good

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part of the political process, and thus a necessary part of our representative institutions? Relatedly, do substantive fairness principles exist—outside of race and the equal-population principle—that constrain political actors when they design electoral structures to favor themselves at the expense of their opponents? We take up these questions in the pages that follow.

Part I discusses the majority's reasoning in *Rucho*. Part II suggests that *Rucho* reflects a traditional understanding of politics in which dirty partisan politics is rightly a part of the political process. By way of conclusion, the article offers thoughts on the shift from normative theorizing to empiricism in the field of law and politics and, more importantly, why we remain optimistic even in the wake of *Rucho*.

I. *Rucho's* Reasoning: The Inevitably of Non-Justiciability

In *Rucho*, Chief Justice Roberts offers three arguments in favor of non-justiciability. The opinion does not engage seriously with any single argument and generally deploys the arguments as foils to prop up its conclusion of non-justiciability. Consider Chief Justice Roberts's first objection, the contention that the Framers intended to resolve political-gerrymandering claims through the political process. Chief Justice Roberts notes that these claims are at least as old as, perhaps older than, the Republic. "The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution."¹⁸ The Framers addressed the prospect of partisan gerrymandering, Chief Justice Roberts argues, through the Constitution's penchant for addressing structural

¹⁸ *Rucho*, 139 S. Ct. at 2494.

problems with structural devices.¹⁹ Article I, section 4, clause 1 of the Constitution, the Elections Clause, delegates to state legislatures the primary responsibility for arranging the “Times, Places and Manner of holding Elections” for federal representatives. But the Framers also provided through the Elections Clause that “Congress may at any time by Law make or alter such Regulations.” And, Chief Justice Roberts contends, Congress has taken its supervisory authority seriously. For example, relatively early on, in 1842, Congress adopted a statute requiring single-member districts for elections for the House of Representatives.²⁰ The implication from that part of Chief Justice Roberts’s analysis is that the Framers devised a workable and working solution to the problem. Originalism carries the day.

But it is unclear from Chief Justice Roberts’s opinion what work his reliance on originalism is doing in the analysis. On the one hand, he concedes that the originalism analysis cannot support a conclusion that “the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve.”²¹ This is because the argument that the federal courts cannot address claims that the government unconstitutionally manipulated electoral lines proves too much. “In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.”²²

¹⁹ *Id.* at 2494–95; *id.* at 2496 (“The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress.”).

²⁰ *Id.* at 2495.

²¹ *Id.*

²² *Id.* at 2495–96.

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On the other hand, notwithstanding that concession, Chief Justice Roberts argues that “the history is not irrelevant.”²³ The historical evidence matters because it shows that “[a]t no point [in the historical record] was there a suggestion that the federal courts had a role to play.”²⁴ And from his search of the historical record, Chief Justice Roberts concludes that there was not “any indication that the Framers had ever heard of courts” addressing partisan gerrymandering claims.²⁵

Chief Justice Roberts seems to be looking for evidence that the Framers assigned the resolution of partisan gerrymandering claims to the federal courts if he is to entertain the prospect of judicial review of line-drawing claims. This analytical posture presupposes the unavailability of judicial review, as a general matter, unless proponents of judicial review prove otherwise. That is, unless proponents of judicial supervision find proof positive in the historical record that the Framers intended to delegate the resolution of these issues to the federal courts, they are out of luck. Chief Justice Roberts uses the originalism argument to create a presumption in favor of non-justiciability and to place the burden of proof on supporters of justiciability. This newly-created presumption is doing all of the work in the analysis.

However, the presumption of non-justiciability—the assumption that the Court will find that electoral-structure cases are non-justiciable unless otherwise proved—appears to be a change of the current doctrine. With the exception of cases arising under the Guarantee Clause,²⁶ the Court has not, up until now, placed a category of cases outside of judicial

²³ *Id.* at 2496.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See, e.g.,* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849, 864 (1994).

review unless proponents can prove otherwise by citing the words and ideas of the founding generation. At the very least, prior to *Rucho*, justiciability has seemed to be an open question, and one might go so far as to argue that the Court generally assumes justiciability unless there is affirmative evidence, in the constitutional text, history, or structure, that the matter was committed to another branch.²⁷

But more importantly, and to reiterate a point noted above, Chief Justice Roberts's originalism analysis is not squarely relevant to the resolution of the cases before the Court. To be sure, it might have been relevant if these were cases of first impression. But they are not. The Court has already determined that electoral-structure claims are justiciable. This was *Baker v. Carr*.²⁸ (And crucially, the Court has also created judicial standards out of whole cloth. This was *Reynolds v. Sims*.²⁹) To be sure, it is also conceivable that the presumption of non-justiciability might be determinative in future law-and-democracy cases. That is, *Rucho* might stand for the proposition that future plaintiffs must affirmatively show that the Framers intended a judicial resolution of these cases. But as to *Rucho*, it is immaterial what the Framers thought about the justiciability of political-structure claims generally; what matters is whether the types of political-structure claims that the Court has previously found to be justiciable can be distinguished from the claim before the Court.

²⁷ In the landmark political question case, *Baker v. Carr*, 369 U.S. 186 (1962), the Court stated, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." *Id.* at 209. The Court further stated: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. *Baker* seems to imply, if not explicitly provide, that non-justiciability must be affirmatively demonstrated by showing that the issue was assigned to a political branch.

²⁸ *Id.*

²⁹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

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This leads to Chief Justice Roberts's second argument. He appears to be boxed in by two sets of cases that the Court has previously determined to be justiciable—one-person, one-vote and racial-gerrymandering claims. Chief Justice Roberts initially attempts to distinguish malapportionment and racial-gerrymandering claims from political-gerrymandering claims on the ground that “while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting,” political gerrymandering is not illegal.³⁰ But of course, it is no answer to distinguish political-gerrymandering claims from malapportionment or racial-gerrymandering claims on the ground that the Constitution prohibits state actors from engaging in the underlying conduct that gives rise to those claims. Malapportionment claims were once legal, just like political-gerrymandering claims, and the Court was not always of the view that federal courts were capable of remedying racial discrimination in the exercise of political rights.³¹ Chief Justice Roberts is simply begging the question, which is whether it should be illegal for state actors to undermine the individual's right to vote by manipulating electoral lines for partisan gain. This is the same question, in slightly different form, that the Court asked generations ago: whether it is illegal for the government to manipulate electoral lines through malapportionment. The Court answered the second question in *Baker v. Carr*.³² As it did then, the least the Court could do today is take up the question, rather than profess the inability to decide it.

³⁰ *Rucho*, 139 S. Ct. at 2497.

³¹ See generally Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018).

³² *Baker*, 369 U.S. at 237 (holding malapportionment claims justiciable).

Chief Justice Roberts distinguishes the justiciable electoral-structure cases from the political-gerrymandering cases in two ways. First, he turns to a classic move in the case law and argues that partisanship in the construction of electoral structures is not *per se* unconstitutional. “To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”³³ Thus, he counsels that “[t]he ‘central problem’ [in the partisan gerrymandering cases] is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is ‘determining when political gerrymandering has gone too far.’”³⁴ The federal courts have no basis for determining how much partisanship is too much without making judgments, political judgments, about the allocation of political power. These are the types of judgments that are solely the responsibility of the political branches.

Second, partisan gerrymandering cases are about group rights and the allocation of group political power; partisan-gerrymandering claims assume a constitutional violation on the basis of the inability of a group, in this case a political party, to translate electoral support into legislative power.³⁵ As such, and to turn once again to an old canard, partisan-gerrymandering claims “invariably sound in a desire for proportional representation.”³⁶ The essence of a partisan-gerrymandering claim is that dramatic departures from proportionality are

³³ *Rucho*, 139 S. Ct. at 2497.

³⁴ *Id.* at 2499 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (plurality opinion)).

³⁵ *Id.* (“Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence.”).

³⁶ *Id.* Roberts explicitly relies on a critique raised by Justice Sandra Day O’Connor over thirty years ago in the Court’s first explicit confrontation with the issue of political-gerrymandering cases. See *Davis v. Bandemer*, 478 U.S. 109, 145 (1986).

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indicative of the state's alleged unconstitutional manipulation of electoral lines in the pursuit of partisan advantage.

However, Chief Justice Roberts argues that neither historical practices nor the Court's precedents requires proportional representation. "For more than 50 years after ratification of the Constitution," he writes, "many States elected their congressional representatives through at-large or 'general ticket' elections."³⁷ Additionally, when Congress legislated the use of single-member districts in congressional elections, it did not do so in the service of proportionality, but because the Whig Party assumed, wrongly as it turned out, that switching from at-large to single-member districts would provide Whigs with a partisan advantage.³⁸

Given that the Constitution does not require proportionality, Chief Justice Roberts concludes that courts have no basis for adjudicating these claims other than some vague notion of fairness. In his words, "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so."³⁹ To determine what is "fair," federal courts would need to make numerous political decisions,⁴⁰ decisions that trade off different conceptions of "fairness," none of which are constitutionally required. For example, designers of electoral structures can decide to crack and pack voters in districts to reflect the underlying distribution of the parties' relative electoral strengths, or they can make districts as competitive

³⁷ *Rucho*, 139 S. Ct. at 2499.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ This is because, as a point of departure, single-member districts are themselves somewhat unfair as compared to proportional systems. For instance, single-member districts tend to overrepresent the majority party and allow a plurality winner to capture one hundred percent of the seat. *Id.* at 2500.

as possible.⁴¹ Either option can be defended on normative “fairness” grounds.⁴² “Deciding among . . . these different visions of fairness,” Chief Justice Roberts argues, “poses basic questions that are political, not legal.”⁴³ More importantly, “[t] here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.”⁴⁴

Moreover, Chief Justice Roberts argues that the malapportionment cases are not a useful guide. This is because the equal-population principle, one-person, one-vote, “is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.”⁴⁵ Crucially, there is no conceptual and legal equivalent to the equal-population principle in the context of partisan gerrymandering. One-person, one-vote does not lead to proportionality; “[i]t does not mean that each party must be influential in proportion to its number of supporters.”⁴⁶

For somewhat analogous reasons, the racial-gerrymandering cases are also inapposite. Echoing Justice Frankfurter, Chief Justice Roberts notes that the racial-gerrymandering cases are about race and the country’s history of racial discrimination, not about the design of electoral structures. This is why the racial-gerrymandering cases do not raise the “justiciability conundrums” raised

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 2501.

⁴⁶ *Id.*

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by the political-gerrymandering cases.⁴⁷ “Unlike partisan gerrymandering claims, a racial-gerrymandering claim does not ask for a fair share of political power and influence.”⁴⁸ Thus, racial-discrimination claims do not ask courts to make political judgments, which courts are unfit to make. Instead, racial-gerrymandering claims ask whether the government has classified on the basis of race and seek the “elimination of a racial classification,” which is presumptively illegal.⁴⁹ This is why the “predominant purpose test” used in the racial-gerrymandering cases cannot be deployed in the partisan-gerrymandering context; the test seeks to identify an impermissible classification, and because partisanship is not impermissible, partisan-gerrymandering claims “cannot ask for the elimination of partisanship.”⁵⁰

To the *Rucho* majority, the conclusion is inescapable: Since the plaintiffs’ position is not supported by the constitutional text, by historical practices, or by the Court’s precedents, the Constitution does not authorize the federal courts to adjudicate their claims.

II. Dirty Politics as Tradition

Rucho follows a line of cases where the Court rejects the invitation to supervise various fundamental aspects of democratic politics.⁵¹ Just like these prior cases, *Rucho* offers a set of standard objections, what we have called a narrative of non-intervention, to justify its conclusion of non-justiciability. When the Court decides not to intervene in a law-and-democracy case, it tells us a story, a narrative, embedded in

⁴⁷ *Id.* at 2502.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2502–03.

⁵¹ Charles & Fuentes-Rohwer, *supra* note 31.

a set of standard objections about why judicial supervision is not appropriate. The narrative of non-intervention has four intertwined standard moves. That is, when the Court holds that a law-and-democracy case is non-justiciable, it generally provides a combination of four related reasons for staying on the sidelines. One reason offered by the Court, sometimes the first reason offered, is that the Court should not involve itself in what are essentially political disputes. The role of Article III courts is to decide issues of law but not politics, which are the proper domain of the political process. The Court should refrain from adjudicating these types of cases because to do so would be to make political and not legal judgments. This is the law-politics distinction.⁵²

Second, federal courts should only decide individual-rights cases, and not cases about the distribution of power between groups. Electoral-structure cases are the latter; they force federal courts to make judgments about the appropriate distribution of power among political groups. These are judgments that courts are not competent to make, so they ought not intervene. This is the rights-structure distinction.⁵³

Third, the fact that the Court can intervene to protect racial groups from discrimination in the political process does not provide a justification to intervene to protect other groups. The race cases vindicate individual rights protected by the Constitution, in particular, the Fourteenth Amendment. Those cases are therefore inapposite. This is the race-politics distinction.⁵⁴

Last, federal courts should not decide political-structure cases unless they have a judicially-manageable standard—an

⁵² *Id.* at 246.

⁵³ *Id.* at 247.

⁵⁴ *Id.* at 248.

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ex ante rule derived from traditional sources of constitutional authority designed to cabin judicial discretion by separating unconstitutional from constitutional behavior. Given the absence of a judicially-manageable standard, the Court should not intervene. This is the rules-standards distinction.⁵⁵

Chief Justice Roberts deploys each of these arguments in *Rucho*. From an analytical perspective, there is nothing new in *Rucho*; Chief Justice Roberts basically sings from the standard hymnal. He begins by framing the inquiry using the law-politics distinction. As he writes: “The question here is whether there is an ‘appropriate role for the Federal Judiciary’ in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their solutions elsewhere.”⁵⁶ Claims of legal right are legal claims appropriately decided by the federal courts. By contrast, political-gerrymandering claims, Chief Justice Roberts argues, while relying on the rights-structure distinction, force courts as a matter of necessity to determine the appropriate division of power between political groups. This is because these claims “rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence.”⁵⁷ This is a problem because federal judges “are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.”⁵⁸ Chief Justice Roberts then goes on to distinguish the racial-gerrymandering cases, which, at least at

⁵⁵ *Id.* at 249.

⁵⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019).

⁵⁷ *Id.* at 2499.

⁵⁸ *Id.*

first blush, seem to be about apportioning political power as a matter of fairness. He argues that racial gerrymandering is illegal, and adjudicating racial-gerrymandering claims does not require federal judges to determine the appropriate level of group political power and influence.⁵⁹ Finally, Chief Justice Roberts uses the rules-standards distinction, which is the core of his argument. His objection in *Rucho* comes down to the view that the Court does not have a legal rule—a rule derived from its traditional methods of constitutional interpretation—that can “reliably differentiate unconstitutional from ‘constitutional political gerrymandering.’”⁶⁰ In the absence of such a rule, there is no appropriate role for the Court to play.

The narrative of intervention is like a fairytale. It is not to be taken too seriously or at face value. As Justice Kagan’s dissent demonstrates, there are clear and easy responses to the majority’s objections. For example, Chief Justice Roberts’s argument that the malapportionment cases are distinguishable from the partisan-gerrymandering cases because “it is illegal for a jurisdiction to depart from the one-person, one-vote rule,”⁶¹ and these cases are “relatively easy to administer as a matter of math,”⁶² is either misleading or simply wrong. It was not inexorable that the constitutional concept of political equality would lead to the rule of strict population equality that is the one-person, one-vote principle.⁶³ The Court made a conscious choice, in the face of other options, to translate the

⁵⁹ *Id.* at 2502–03.

⁶⁰ *Id.* at 2499 (citing *Hunt v. Cromartie*, 526 US 541, 551 (1999)).

⁶¹ *Id.* at 2497.

⁶² *Id.* at 2501.

⁶³ See, e.g., Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045, 1063–64 (2008) (noting that “the Court in *Reynolds* pulled its standard of choice essentially out of a hat.”); Luis Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POL’Y 423, 435 (2005).

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constitutional concept of political equality into a strict rule of mathematical equality, at least in the context of congressional districts. With respect to state legislative districts, the Court adopted a less strict standard, permitting deviations from population equality up to ten percent. One would be hard-pressed to come up with a compelling argument that the Constitution requires strict population equality in congressional apportionment but substantial population equality in state legislative districts.

Moreover, and as importantly, the equivalent to the equal-population principle in the context of political gerrymandering is non-partisanship, the conclusion that partisan considerations should play no role in redistricting. Indeed, there is at least as strong of an argument, if not a stronger argument, that the First Amendment prohibits the government from drawing district lines in a manner that burdens the individual's exercise of a constitutional right—the right to vote because of the voter's partisan identity—as there is an argument that the Fourteenth Amendment prohibits the government from drawing malapportioned districts. The majority's refusal to conclude that partisanship is unconstitutional—that the government cannot dilute the individual's vote because the government does not like the individual's expression of her political identity—enabled it to create a conundrum to bamboozle the plaintiffs. The problem with the plaintiffs' claim, the majority argues, is that they cannot tell us how much partisanship is too much.⁶⁴ But that problem is of the majority's own making. Chief Justice Roberts's contention that prohibiting legislators

⁶⁴ *Rucho*, 139 S. Ct. at 2497. (“The ‘central problem’ is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is ‘determining when political gerrymandering has gone too far.’” (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (plurality opinion))).

from taking “partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities,”⁶⁵ does not, and cannot, address why that same argument does not apply in the malapportionment context. Thus, the difference between the constitutional status of malapportionment claims as against political-gerrymandering claims is simply the Court’s decision to police the former but not the latter.

Good fairytales are fictitious and far-fetched narratives that tell stories to illustrate a larger point. To focus on the far-fetched details is a category error. The moral of the story is the point of the fairytale; it is the broader lesson that we are supposed to learn about our world. And sometimes, even in a good fairytale, the moral of the story is not facially evident. Like a good fairytale, the narrative of non-intervention is valuable, not for the details of the narrative, which are admittedly hyperbolic and cannot be taken at face value, but for the purported universal truth that it contains. Moreover, as we sometimes must do with fairytales, we must dig deeper to understand the moral of the story.

Though not facially evident, we argue here that Chief Justice Roberts employs the narrative of non-intervention to (re)affirm a traditional understanding of representative politics. The fundamental question presented in *Rucho* is whether constitutionally enforceable fairness norms exist in the design of structures of representation, or whether politicians can construct electoral institutions to advantage their side and their own voters at the expense of the other side and the other side’s voters. *Rucho* (and *Benisek*) were thought to be, from the

⁶⁵ *Id.*

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perspective of the plaintiffs at least, the perfect vehicles for presenting this question about constitutional fairness. Their facts offer clear and extreme examples of politicians seeking a political advantage by selecting some voters for disfavor—by diluting their votes—because of the voters’ political identity.

As Justice Kagan writes in her dissent, judges should intervene “in only egregious cases,”⁶⁶ and the facts in these cases speak for themselves.⁶⁷ In *Rucho*, Republicans in North Carolina admitted straightforwardly that they drew the lines to advantage their voters and themselves at the expense of the Democrats and their voters. For example, State Representative David Lewis, co-chair of the state’s legislative body’s redistricting committee, instructed his redistricting specialist “to create a new map that would maintain the 10–3 composition of the State’s congressional delegation come what might.”⁶⁸ Justice Kagan quotes Representative Lewis’s infamous admission that his committee drew “the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [I] d[o] not believe that it[’s] possible to draw a map with 11 Republicans and 2 Democrats.”⁶⁹ Representative Lewis then went on to justify the map on the ground that “electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.”⁷⁰ And, Justice Kagan relays, the map performed as designed. In both the 2016 election cycle and the 2018 election

⁶⁶ *Id.* at 2516.

⁶⁷ *Id.* at 2509 (“As I relate what happened in those two States, ask yourself: Is this how American democracy is supposed to work?”) (Kagan, J., dissenting).

⁶⁸ *Id.* at 2510.

⁶⁹ *Id.*

⁷⁰ *Id.*

cycle, the Republicans won ten of the thirteen seats.⁷¹ Justice Kagan relays a similar tale in the *Benisek* case, which involved gerrymandering by the Democrats.⁷²

After laying out these ghastly facts, Justice Kagan asks, almost rhetorically: “Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.”⁷³ She then remarks: “The majority disputes none of this. I think it is important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy.”⁷⁴ The ineluctable answer to Justice Kagan’s inquiry—given these undisputed facts, is this how democracy is supposed to work?—ought to lead to an affirmation of the presumption implied in the question: American democracy is not supposed to work this way because there are constitutional rules of fairness that constrain political actors.

But of course, the majority does not find the answer ineluctable, and it certainly does not share the assumption that democracy is not supposed to work this way. From the majority’s perspective, the extent of partisanship in the design of structures of representation is endogenous to the political process; the level of partisanship depends upon what the polity wants, and the political process is free to choose whatever it wants because the appropriate level of partisanship is a political judgment. Chief Justice Roberts quotes *Gaffney v. Cummings* for the proposition that politics and partisanship

⁷¹ Matthew Bloch & Jasmine C. Lee, *North Carolina Special Election Results: Ninth House District*, N.Y. TIMES (Sept. 11, 2019, 12:59 PM). The election for the thirteenth seat in the 2018 cycle was not officially filled until 2019. The election was delayed because fraud tainted the initial election results. The seat was won by the Republican candidate Dan Bishop.

⁷² *Rucho*, 139 S. Ct. at 2511.

⁷³ *Id.*

⁷⁴ *Id.* at 2512.

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are “inseparable from districting and apportionment.”⁷⁵ What is fairness, Chief Justice Roberts asks. Are at-large districts, which can award a party with all of the seats even though it received a bare majority of electoral support, inherently unfair? This means “that a party could garner nearly half of the vote statewide and wind up without any seats.”⁷⁶ What about districts that are gerrymandered for the purpose of reflecting the polity’s distribution of political power? Are those inherently unfair? Is it inherently unfair to gerrymander a district to protect an incumbent or to maintain communities of interest? These “basic questions,” the majority contends, “are political, not legal.”⁷⁷ They involve first-order questions that raise trade-offs among important values and principles. These are not the type of trade-offs that the federal courts can make or ought to make. Is this how a democracy is supposed to work? Well, yes, if that is what the democracy wants.

Rucho often reads like a descriptive account of American representative politics. But of course, the majority’s opinion cannot work simply as description. The question presented in *Rucho* is not whether politicians manipulate electoral lines; as Justice Kagan underscores in her dissent, everyone agrees that they do. The question is whether they ought to. And as Justice Kagan clearly and forcefully shows, the doctrine, particularly as applied by the lower courts below, can easily be read and applied to prohibit the practice, at the very least to prohibit the worst form of it. The conclusion is thus inescapable: *Rucho* must be understood as a normative defense of the practice of partisanship.

⁷⁵ *Id.* at 2497 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)).

⁷⁶ *Id.* at 2499.

⁷⁷ *Id.* at 2500

Rucho reflects a traditional portrayal of American representative democracy as—rightly or inevitably—partisan, unfair, and dirty. And given these unavoidable features, it is futile and unbecoming for federal courts to try to remove the lifeblood of the process, which is its partisanship, its sordidness, and its own conception of what is fair or unfair. If the polity is unsatisfied with the sordid nature of its politics, the Constitution has provided a structural political process solution. This defense of traditional politics is the best way to understand *Rucho*.

* * *

If we are right that *Rucho* represents a normative defense of dirty politics, of the legitimacy of employing partisanship to acquire political power so that politicians may advance their particular views of the common good, what does *Rucho* mean for the future of political-gerrymandering claims? American representative democracy has been on a slow march toward greater fairness, equality, and openness. Progress in this domain has not always been inevitable and, to be sure, we have sometimes taken some significant steps backwards. Notwithstanding these backward steps, American democracy is more representative today than it has been in any time in our history. To the extent that *Rucho* reflects a clash of normative visions about fairness, and to the extent that a traditional Darwinian view of politics prevailed in *Rucho*, the traditionalists are increasingly in the minority. Recent polls have shown that the American public is supportive of judicial

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limits on political gerrymandering.⁷⁸ Moreover, we are seeing a growing receptiveness in the United States to alternative voting systems, to semi-proportional systems, and to more electoral innovation.⁷⁹ Thus, while proportional representation is currently a dirty word in the Court's jurisprudence, it might come to be viewed in the United States as the *de facto* standard of fairness for judging electoral systems. And while partisanship is now viewed as inevitable, it might come to be viewed as constitutionally unacceptable. Change will come, if it comes, as a consequence of a change in our normative vision. If this is right, it is not inconceivable that we will come to see *Rucho* as we now look at *Colegrove v. Green*. And thus, it won't be long before this generation gets its very own *Baker v. Carr*.

If this is right, it also raises a note of caution for scholars of election law. Election law scholars and election law scholarship was once significantly oriented around doctrinal, theoretical, and normative arguments about how to think about various law and democracy questions. This doctrinal, normative, and theoretical orientation allowed legal academics to make use of their comparative advantage. In the last few years, the scholarship in the field has taken a significant empirical turn, which in many respects is a useful development. But that empirical turn seems to have come at the expense of the focus on understanding the doctrine, theory, and the normative trade-offs that are inevitable in this domain. For example, in the domain of political gerrymandering, scholars have misunderstood the term of art, judicially manageable standards, to mean an empirical or mathematical standard. This misunderstanding is particularly encapsulated by the

⁷⁸ *Americans Are United Against Partisan Gerrymandering*, BRENNAN CTR. FOR JUSTICE (Mar. 15, 2019).

⁷⁹ *Ranked Choice Voting/Instant Runoff*, FAIR VOTE (last visited Sept. 16, 2019).

excessive focus on the ill-fated efficiency gap. If our account of *Rucho* is correct, that it was decided on normative and theoretical grounds, the field of election law might need to figure out how to privilege once more the doctrinal, theoretical, and normative approaches that are the staple of legal scholars in the face of legal problems.



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