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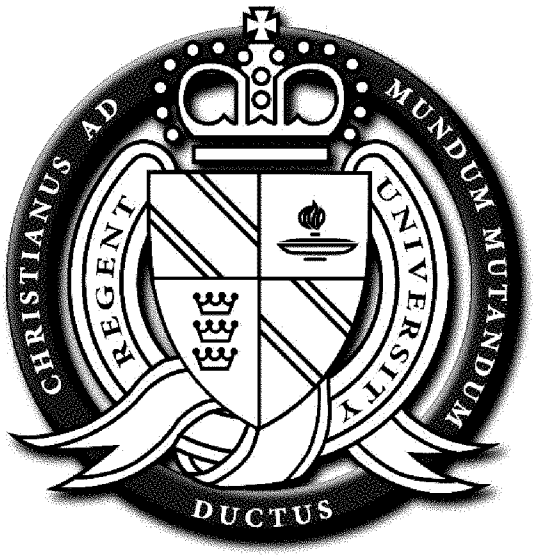

The seal of the Regent University Law Review symbolizes the Christian heritage of Regent University. The shield represents the shield of faith. The crown at the top of the crest declares the One we represent, our Sovereign King, Jesus Christ. The three crowns represent the Father, Son, and Holy Spirit. The flame and the lamp represent the lamp of learning and the fire of the Holy Spirit. Laced throughout the crest is a ribbon that signifies the unity Christians share. The mission of Regent University is embodied in the surrounding words "DUCTUS CHRISTIANUS AD MUNDUM MUTANDUM"— "Christian Leadership to Change the World."

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HAMILTON'S "WINNING" SHOT: A SHORT-TERM VICTORY

Tessa L. Dysart[*]

In 1788, Alexander Hamilton's shot hit home. While considering whether to ratify the United States Constitution, a duel raged between the Federalists (including Hamilton) and the Anti-Federalists over the role and influence of the judicial branch.[1] Hamilton's arguments, to borrow a phrase from Lin Manuel Miranda, were "not throw[n] away," but rather won the day by assuring the people of New York that "the Judiciary; from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[2] He explained that, unlike the other two branches of government, the judicial branch:

> has no influence, over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[3]

Mr. Hamilton was responding to Anti-Federalist criticisms of the Supreme Court.[4] That same year, Hamilton's counterpart in this duel, the

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[1] MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 129–39 (2d ed. 2010).

[2] LIN MANUEL MIRANDA, *My Shot*, *on* HAMILTON: ORIGINAL BROADWAY CAST RECORDING (Atlantic Records 2015); THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Glazier & Co., 1826).

[3] THE FEDERALIST NO. 78, at 433 (Alexander Hamilton) (Glazier & Co., 1826).

[4] Shlomo Slonim, *Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy*, 23 CONST. COMMENT. 7, 18–19 (2006) (discussing the responsive nature of Hamilton's Fed. 78 to Anti-Federalist criticism).

Anti-Federalist "Brutus," had written to the people of New York strongly attacking Article III of the Constitution and how it allocated jurisdiction and power to the Supreme Court. "Brutus" considered the Court "exalted above all other power in the government, subject to no controul."[5] Because the Constitution gave the Court the power to decide "all cases in law and equity arising under this constitution," the Court would have the power "to determine all questions that may arise upon the meaning of the constitution in law" and the power "to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter."[6] In exercising this power to give "legal construction" to the Constitution and interpreting the spirit of the document, the decisions of the Court, Brutus explained, "will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal."[7]

Nearly 230 years later, most people would probably say that Brutus's predictions were more accurate, at least with respect to how the Court would operate. Over the last two centuries, the Supreme Court has interpreted the letter and spirit of the Constitution in ways that people, regardless of interpretative methodology, believe to be untrue or unfaithful to the document. "Originalists" complain about the Court's opinions on issues like abortion, federal power, and marriage,[8] while "living constitutionalists" think that the Court has gotten it wrong on the death penalty,[9] campaign finance reform,[10] and gun rights.[11]

While criticism of and disagreement about the Court's role in our constitutional structure may seem of a more modern vintage, it actually has a long history. Less than four years after the Supreme Court assembled for the first time, it faced heavy criticism for its decision in

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[5] THE ANTI-FEDERALIST XIV PT. 2, 182 (Brutus) (Herbert J. Storing ed., 1985).

[6] THE ANTI-FEDERALIST XI, 164 (Brutus) (Herbert J. Storing ed., 1985).

[7] *Id.* at 164–65.

[8] Catherine Ho, *Scalia Stands by His 'Originalist' Views on Constitution*, WASH. POST (Jan. 23, 2012), https://www.washingtonpost.com/business/capitalbusiness/scalia-stands-by-his-originalist-views-on-constitution/2012/01/19/gIQA1Ny6IQ_story.html?utm_term=.a2c5d2459385.

[9] ACLU, *The Case Against the Death Penalty*, https://www.aclu.org/print/node/27229 (last visited Oct. 14, 2017).

[10] *See* Erwin Chemerinsky, *Symposium, The Distinction Between Contribution Limits and Expenditure Limits*, SCOTUSBLOG (Aug. 12, 2013 2:24 PM), http://www.SCOTUSblog.com/2013/08/symposium-the-distinction-between-contribution-limits-and-expenditure-limits/ (predicting the outcome of a campaign finance case, based on the interpretive ideologies of Roberts Court justices).

[11] District of Columbia v. Heller, 554 U.S. 570, 721 (2008) (Breyer, J., dissenting).

Chisholm v. Georgia,[12] which interpreted Article III of the Constitution to permit a citizen of South Carolina to sue the state of Georgia for breach of contract.[13] Noted legal scholar Charles Warren recounts in his Pulitzer Prize winning book, *The Supreme Court in United States History*, that "[t]he decision fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court."[14] According to Warren, the surprise was due to the fact that "the great defenders of the Constitution" had claimed during the debates over the adoption of the Constitution that the document, in fact, did not give the Court jurisdiction over the states.[15]

The disagreement with the Court's decision in *Chisholm* was so profound that the day following the decision, a resolution was introduced in Congress to amend the Constitution and make states not amenable to suits in federal court.[16] The Georgia House of Representatives was so enraged by the *Chisholm* decision that it passed a bill in November 1793 "providing that any Federal marshal or other person who executed any process issued by the Court in this case should be declared 'guilty of felony and shall suffer death, without benefit of clergy, by being hanged.'"[17] Two years after *Chisholm* was decided, the states ratified the Eleventh Amendment, which excludes from the federal judicial power, a suit against a state by a citizen of another state or foreign country, thus rendering the precedent in *Chisholm* void.[18]

While there are numerous examples of criticism of the Court and efforts to weaken it, in at least one instance Congress tried to gut it and shut it down. An early Congress voted to cancel the Supreme Court's term for fear of a future decision. After the contentious presidential election of 1800, the newly elected Republican Congress voted to repeal the Judiciary Act of 1801.[19] The act, which created a system of circuit courts and

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[12] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1922).

[13] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419–20, 479 (1793).

[14] WARREN, *supra* note 12, at 96.

[15] *Id.* at 96.

[16] *Id.* at 101.

[17] *Id.* at 100.

[18] Bradford R. Clark & Vicki C. Jackson, *Common Interpretation: The Eleventh Amendment*, NAT'L CONST. CTR., https://CONSTITUTIONCENTER.org/interactiveconstitution/amendments/amendment-xi.

[19] *See* FED. JUDICIAL CTR., *Landmark Legislation: Judiciary Act of 1801* https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-1 (providing that "[t]he newly-elected president, Thomas Jefferson, and the Republican majority in the Seventh Congress came into office intent on repeal.").

removed the requirement that Supreme Court justices ride circuit,[20] was passed by the lame-duck, Federalist-controlled Congress and signed by the lame-duck President John Adams.[21] Repealing the act forced the justices to return to the hazardous task of circuit riding[22] and removed from office the circuit court judges who had been appointed to the newly created courts.[23] Perhaps concerned that the Supreme Court would hold the repeal act unconstitutional, Congress passed a law canceling the Supreme Court's term.[24] As former federal judge Professor Michael W. McConnell noted, this action "forced each of the Justices to decide, individually, whether to comply with the new law and return to circuit duty."[25] In the end, Congress's fear of the Court was unfounded, or, perhaps, the action that it took had its intended effect. The justices did return to circuit duty, and they did not find the repeal act unconstitutional.[26] This history of undermining and hamstringing the Court no doubt played a part in shaping a not-quite-obscure case decided the following term, *Marbury v. Madison*.[27] In *Marbury*, the Court handed President Thomas Jefferson a victory in name only,[28] dismissing the case for lack of jurisdiction, while still opining on the impermissibility of Jefferson's actions and the importance of judicial review.[29]

Perhaps the best example of public concern surrounding the role of the judiciary is seen in the judicial nomination process. Under Article II of the Constitution, federal judges are nominated by the president, but

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[20] PAULSEN, *supra* note 1, at 140–41.

[21] *Id.* at 142.

[22] Scott Bomboy, *Drama, Controversy Marked the First Supreme Court Justices*, NAT'L CONST. CTR. (Sept. 24, 2016), _https://CONSTITUTIONCENTER.org/blog/drama-controversy-marked-the-first-supreme-court-justices/ (noting that "historians cite the rigorous job of 'riding circuit' as a cause of [Justice] Iredell's death").

[23] Michael W. McConnell, *The Story of* Marbury v. Madison*: Making Defeat Look Like Victory*, *in* CONST. LAW STORIES, 13, 21 (Michael C. Dorf ed., Foundation Press 2d ed. 2009).

[24] *Id.* As Professor McConnell noted:

> The disagreement over the judiciary went to the heart of American constitutionalism. Was the Constitution, as the Republicans believed, principally an instrument of popular government, in which the will of the people should control even the question of constitutional meaning? Or was the Constitution, as the Federalists believed, principally an instrument of the rule of law, to be enforced by independent judges even in the face of popular opposition?

Id. at 19.

[25] *Id.* at 21–22.

[26] *Id.* at 22, 31; *see* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 306 (1803).

[27] 5 U.S. (1 Cranch) 137, 138–39 (1803).

[28] *See* JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 52 (2007) (calling Jefferson's victory "Pyrrhic").

[29] *Marbury*, 5 U.S. (1 Cranch) at 137, 162, 170, 175–76 (1803).

may not be appointed until the president has secured the "Advice and Consent of the Senate."[30] While many view the battle over judicial nominations as something modern, the fight over who will serve on the Supreme Court has a long (and sometimes sordid) history.

For example, President James Madison's 1811 nomination of Alexander Wolcott to the United States Supreme Court was met with general amazement and criticism.[31] The nomination was called "abominable" by one correspondent,[32] while a Federalist paper wrote:

> We hope that even in the ranks of democracy, a man might have been found, whose appointment would have been less disgusting to the moral sense of the community, and whose private virtues or legal knowledge might have afforded some security from his political depravity . . . .[33]

While much of Wolcott's opposition stemmed from his "strong enforcement of the controversial embargoes against Great Britain and France,"[34] his "somewhat mediocre legal ability" did not help his case for confirmation.[35] He was ultimately rejected by the Senate on a vote of nine to twenty-four, which is still "the widest rejection in Supreme Court history."[36]

President John Tyler's Supreme Court nominees also faced "unprecedented" opposition.[37] In fact, eight of his nine Supreme Court nominations were either rejected by the Senate or the nominees withdrew,[38] which is the "largest number of unsuccessful Supreme Court nominations ever made by a single president."[39] After the death of Justice Baldwin created an additional vacancy on the Court, Justice Story wrote to former Chancellor James Kent:

> Poor Baldwin is gone. Another vacancy on the Bench. How nobly it might be filled! But we are doomed to disappointment . . . . What can we

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30 U.S. CONST. art. II, § 2.

31 WARREN, *supra* note 12, at 410.

32 *Id.* at 411.

33 *Id.*

34 David Holzel, *8 Nominees Who Didn't Go to the Supreme Court*, CNN (July 14, 2009), http://www.cnn.com/2009/LIVING/wayoflife/07/14/mf.supreme.court.rejections/index.html.

35 WARREN, *supra* note 12, at 410–11.

36 Holzel, *supra* note 34.

37 Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 587 (2015).

38 *Id.*; *see also* MICHAEL J. GERHARDT, THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY 58 (2013); *Supreme Court Nominations: present–1789*, UNITED STATES SENATE, https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm#23. (last visited Sept. 14, 2017).

39 GERHARDT, *supra* note 38, at 58.

> hope from such a head of an Administration as we now have but a total disregard of all elevated principles and objects? . . . Do you know (for I was so informed at Washington) that Tyler said he would never appoint a Judge "of the school of Kent"?[40]

Part of the opposition to President Tyler's nominees was because Tyler himself was unpopular with both major political parties, and the Whigs believed that their nominee, Henry Clay, would win the 1844 presidential election.[41] As one newspaper reported, "Better the Bench should be vacant for a year, than filled for half a century by corrupt or feeble men, or partisans committed in advance to particular beliefs."[42] After the Whigs lost the presidential election, Tyler was able to fill one of the vacancies on the Court.

John Tyler's experience bears some resemblance to a recent Supreme Court nomination battle. Following Justice Antonin Scalia's unexpected death on February 13, 2016, President Barack Obama nominated Judge Merrick Garland to the United States Supreme Court.[43] With the presidential election just eight months away, Republicans in the Senate refused to act on Garland's nomination, despite the fact that some Republicans had praised Garland in the past.[44] According to a statement by Senate Majority Leader Mitch McConnell shortly after Justice Scalia's death, "[t]he American people should have a voice in the selection of their next Supreme Court Justice . . . . Therefore, this vacancy should not be filled until we have a new president."[45] Although there were calls from at least one Republican senator on the Judiciary Committee to vote on Garland's nomination if Hillary Clinton won the presidential election,[46]

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[40] 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 116 (1937).

[41] *Id.* at 116–17.

[42] *Id.* at 117.

[43] Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), https://www.NYTimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html.

[44] Russell Berman, *Judge Merrick Garland Meets a Senate Blockade*, ATLANTIC (Mar. 16, 2016), http://www.theatlantic.com/politics/archive/2016/03/merrick-garland-meets-the-senate-blockade/474060/; Eugene Scott, *Republicans Have Repeatedly Praised Merrick Garland*, CNN (Mar. 16, 2016, 5:18 PM), http://www.cnn.com/2016/03/16/politics/merrick-garland-republicans-praise/index.html.

[45] Stephanie Condon, *Mitch McConnell: Senate Should Wait for Next President to Replace Antonin Scalia*, CBS NEWS (Feb. 13, 2016, 7:39 PM), http://www.CBSNEWS.com/news/mitch-mcconnell-senate-should-wait-for-next-president-to-replace-antonin-scalia.

[46] Burgess Everett, *Flake Says it Might Be Garland Time*, POLITICO (Oct. 20, 2016, 4:09 PM), http://www.politico.com/story/2016/10/jeff-flake-merrick-garland-vote-supreme-court-230109.

that scenario never played out, and other Republican leaders rejected that approach.[47]

In the end, President Donald Trump nominated Judge Neil Gorsuch to fill the vacancy on the Supreme Court created by Justice Scalia's death.[48] Gorsuch was ultimately confirmed, but not without a battle. The Judicial Crisis Network launched a $10 million campaign supporting Gorsuch's nomination, which included advertisements in states where Democrat Senators will be up for election in 2018.[49]

From fear of and action against Supreme Court rulings to the confirmation battles of the past and present, it is clear that Alexander Hamilton was too hasty in 1788 when he called the judiciary the "least dangerous" branch. While he did not "throw away his shot" at assuaging concerns about the role of the judiciary during the debates over the Constitution, the duel over federalism and separation of powers did not end with his untimely death.[50] The role of the Court in constitutional interpretation and the vastly disparate views on how that role should be undertaken made the Court a powerful and important institution 200 years ago, and make it still important today.

This thirtieth volume of the Regent University Law Review is dedicated to judges and their role in society. Three of the pieces contained in this issue are written by judges, while another focuses on the role of one influential jurist on issues of federalism and separation of powers. Two of the other articles relate to issues important to the judiciary and to the public, even though they might not always know it—*Chevron* deference and the federalization of criminal law.

For twenty-six years, the Regent University Law Review has sought to "present academically excellent scholarship on relevant issues facing

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[47] Mary Clare Jalonick, *If Clinton Wins, More in GOP Say No to Full Supreme Court*, PBS NEWS HOUR (Nov. 1, 2016 4:54 PM), https://www.PBS.org/newshour/politics/clinton-wins-gop-say-no-9-supreme-court.

[48] Press Release, The White House Office of the Press Sec'y, President Donald J. Trump Nominates Judge Neil Gorsuch to the U.S. Supreme Court (Jan. 31, 2017), https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-nominates-judge-neil-gorsuch-united-states.

[49] Daniel Bush & Geoffrey Lou Guray, *Conservative Group Launches Ad Blitz Pressuring Senate Dems to Back Neil Gorsuch*, PBS (Mar. 31, 2017, 5:44 PM), http://www.pbs.org/newshour/updates/conservative-group-launches-ad-blitz-pressuring-senate-dems-back-neil-gorsuch/.

[50] Ron Chernow, *Alexander Hamilton's Last Stand*, N.Y. TIMES (Jul. 11, 2014), http://www.NYTimes.com/2004/07/11/opinion/alexander-hamilton-s-last-stand.html (providing the circumstances of Hamilton's death in 1804); *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (revealing an ongoing debate over the allocation of powers between state and national governments and the limits of national legislative powers).

the legal community today from the perspective of a historic Christian worldview."[51] It has published articles by judges, including pieces by Justice Clarence Thomas,[52] Judge Richard L. Nygaard,[53] Judge Edith H. Jones,[54] Judge Pasco M. Bowman II,[55] Virginia Supreme Court Justice Leroy Rountree Hassell,[56] and Judge Henry Coke Morgan.[57] Most recently, on the occasion of its twenty-fifth anniversary, the Regent University Law Review published remarks by Wisconsin Supreme Court Justice Daniel J. Kelly,[58] who served as its first editor-in-chief.

Other Regent University Law Review alumni have risen to positions in the judiciary, including one of the authors for this issue, Judge Joseph Migliozzi. Other alumni have moved into positions to influence the judiciary, including Dale Schowengerdt, the Solicitor General of Montana, who successfully argued *Betterman v. Montana*[59] before the United States Supreme Court during the Court's October 2015 Term. Several alumni have clerked at the federal district court and circuit court level or for state court judges and justices. Many other Regent University Law Review alumni work for nonprofit legal advocacy organizations, litigating some of the most contentious constitutional questions facing our country. One Regent University Law Review alumnus, J. Caleb Dalton, participated in drafting the petition for a writ of certiorari in an important religious liberties case that the Supreme Court will hear during the October 2017 term, argued by a Regent Law School alumna.[60] Regent University School

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[51] *Regent Law Review*, REGENT UNIVERSITY SCHOOL OF LAW http://www.regent.edu/law/about/regent-law-student-organizations/law-review/ (last visited Oct. 9, 2017).

[52] Clarence Thomas, *Personal Responsibility*, 12 REGENT U. L. REV. 317 (2000).

[53] Richard Nygaard, *The Myth of Punishment: Is American Penology Ready for the 21st Century?*, 5 REGENT U. L. REV. 1 (1995).

[54] Edith H. Jones, *Justice Thomas and the Voting Rights Act*, 12 REGENT U. L. REV. 333 (1999).

[55] Pasco M. Bowman II, *Justice Clarence Thomas: A Brief Tribute*, 12 REGENT U. L. REV. 329 (1999).

[56] Leroy Rountree Hassell, Sr., *The Evolution of Virginia's Constitutions: A Celebration of the Rule of Law in America*, 20 REGENT U. L. REV. 1 (2007).

[57] Henry Coke Morgan, Jr., *Predictive Coding: A Trial Court Judge's Perspective*, 26 REGENT U. L. REV. 71 (2013).

[58] Daniel Kelly, *Remarks Upon the Occasion of the Regent University Law Review's 25th Anniversary*, 29 REGENT U. L. REV. 183 (2017).

[59] *Montana Solicitor General to Argue Before U.S. Supreme Court*, MONT. DEP'T OF JUST. (Mar. 24, 2016), https://dojmt.gov/montana-solicitor-general-to-argue-before-u-s-supreme-court; In Brief, *Regent Alumna Making a National Impact on Family Issues*, 5 REGENT U. L. REV. 1, 3, https://www.regent.edu/acad/schlaw/dean/docs/InBrief_Issue5.pdf.

[60] Masterpiece Cakeshop v. Colorado Civ. Rights Comm'n, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 2017 U.S. LEXIS 4226 (U.S., June 26, 2017) (No. 16-111); Masterpiece

of Law graduate David Cortman, though not a law review alum, has argued and won two influential First Amendment cases at the United States Supreme Court.[61]

Regent University School of Law has welcomed distinguished judges and justices to campus, including three Supreme Court justices, several state supreme court justices, federal court of appeals judges, and many federal district court judges. Regent University School of Law and the Regent University Law Review provide a diverse and important voice on legal issues and in the legal academy. Congratulations Regent University Law Review on thirty volumes and twenty-six years. May you continue to offer your perspective in the world of academic scholarship for many more issues to come.

Cakeshop v. Colorado Civ. Rights Comm'n, No. 16-111 (U.S. filed July 22, 2016); *Caleb Dalton Biography*, ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/details pages/biography-details/caleb-dalton (last visited Oct. 6, 2017).

[61] *David A. Cortman Biography,* ALLIANCE DEFENDING FREEDOM, https://www.adflegal.org/detailspages/biography-details/david-a.-cortman (last visited Sept. 23, 2017).

STANDING IN A POST-*SPOKEO* ENVIRONMENT

The Honorable Henry E. Hudson,[*] *Christopher M. Keegan,*[**] *and P. Thomas DiStanislao, III*[***]

INTRODUCTION

Periodically, a decision of the United States Supreme Court addressing a routinely encountered issue can spark reconsideration of enduring principles of jurisprudence. Few, however, have had the unsettling effect of *Spokeo, Inc. v. Robins.*[1] The Court in *Spokeo* concluded that Article III standing requires more than simply a claim of procedural violation of a statute: it requires pleading a fact-supported allegation of a concrete injury.[2] In other words, to survive Federal Rule of Civil Procedure 12(b)(1) review, the alleged injury must be "'real,' and not 'abstract.'"[3]

As Judge Wilkinson explained in *Ansley v. Warren*:

> The concept of standing finds its roots in the "idea of separation of powers." By confirming that the legal questions presented to the court are resolved "in a concrete factual context" rather than "in the rarefied atmosphere of a debating society," the doctrine ensures that "we act *as judges*, and do not engage in policymaking properly left to elected representatives."[4]

Any views or opinions expressed herein are solely those of the authors.

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[1] *See* Allison Grande, *Spokeo Split: How High Court's Ruling Is Being Interpreted*, LAW 360 (Dec. 02, 2016), https://www.LAW360.com/articles/865734/spokeo-split-how-high-court-s-ruling-is-being-interpreted (describing the varied conclusions reached in lower court decisions since *Spokeo* was decided); *see generally* Spokeo, Inc., v. Robins, 136 S. Ct. 1540, 1544–48 (2016) (explaining the standard for Article III standing).

[2] *Spokeo*, 136 S. Ct. at 1549.

[3] *Id.* at 1548 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).

[4] 861 F.3d 512, 517 (4th Cir. 2017) (alteration in original) (first quoting Allen v. Wright, 468 U.S. 737, 752 (1984); then quoting Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); and then quoting Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013)).

Standing is a key element of the case or controversy requirement of Article III, Section 2 of the United States Constitution.[5] It is a critical component of justiciability, a judicially created limitation on federal power, and must initially be determined from the pleadings.[6] Created by the United States Supreme Court, justiciability was conceived as a prohibition on federal courts issuing advisory opinions.[7] Therefore, Article III standing is a fundamental jurisdictional requirement that defines and limits a court's power to resolve cases or controversies.[8] Even when unchallenged by the parties, courts have an independent obligation to examine the record to ensure that the parties have requisite standing,[9] which the party invoking the court's authority has the burden of establishing.[10]

Standing ensures that a case is presented in an adversarial context, that the alleged injury is quantitatively sufficient, and that the plaintiff has personally suffered actionable harm.[11] Three elements form "the irreducible constitutional minimum of standing."[12] These include: (1) an "injury in fact" that is "actual or imminent," not merely speculative or hypothetical;[13] (2) an injury that is traceable to the defendant's conduct;[14] and (3) the likelihood that a favorable decision will redress the injury.[15] Of these three elements, the first and foremost is demonstration of injury

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[5] *See Spokeo*, 136 S. Ct. at 1549 (explaining the link between standing and the case or controversy requirement); *see also* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1375 (2014) (explaining that standing is required in order to fulfill the case or controversy requirement).

[6] Redish, *supra* note 5, at 1375–77 (explaining the role of Article III standing in balancing powers and resolving standing issues).

[7] Flast v. Cohen, 392 U.S. 83, 96–97 (1968).

[8] Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006); Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 298 (4th Cir. 2005).

[9] FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230–31 (1990).

[10] Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 133 (2011).

[11] Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 396 (4th Cir. 2011).

[12] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[13] Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011) (quoting *Lujan*, 504 U.S. at 560).

[14] Libertarian Party of Va. v. Judd, 718 F.3d 308, 315 (4th Cir. 2013).

[15] Allen v. Wright, 468 U.S. 737, 751 (1984).

in fact.[16] "[K]een interest in the issue" is insufficient by itself to meet Article III's requirements.[17]

> To establish injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." . . . For an injury to be "particularized" it "must affect the plaintiff in a personal and individual way."[18]

In other words, a plaintiff must have personally suffered some actual or threatened injury.[19] The injury must not only be particularized, but also concrete.[20] "A 'concrete' injury must be 'de facto'; that is, it must actually exist."[21] The Court in *Spokeo* amplified its definition of concrete as meaning "'real,' and not 'abstract.'"[22]

Writing for the majority, Justice Alito cautioned that "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."[23] The Court noted that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[24]

So, what constitutes a concrete particularized injury in fact in cases involving alleged violations of statutory rights? And, more practically, how should courts make this determination? Judges across the country are grappling with these questions post-*Spokeo*.

I. SPOKEO IN CONTEXT

"The modern law of Article III standing in federal courts constitutes an enduring conundrum"[25] that often "reduces [the issue] to a word game played by secret rules."[26] Although the Supreme Court has stated that

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[16] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998); *see also* Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970) ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise.").

[17] Hollingsworth v. Perry, 133 S. Ct. 2652, 2659 (2013).

[18] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560).

[19] United States v. Richardson, 418 U.S. 166, 177–78 (1974).

[20] *Spokeo*, 136 S. Ct. at 1548.

[21] *Id.* (emphasis omitted).

[22] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 472 (1971); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 305 (1967)).

[23] *Id.* at 1552 (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009)).

[24] *Id.* at 1549.

[25] Craig Konnoth & Seth Kreimer, *Spelling Out* Spokeo, 165 U. PA. L. REV. ONLINE 47, 47 (2016), https://www.PENNLAWREVIEW.com/online/165-U-Pa-L-Rev-Online-47.pdf.

[26] *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting)).

standing is not "an ingenious academic exercise in the conceivable,"[27] determining whether a plaintiff has suffered an injury in fact is often difficult for courts to clearly articulate, "[b]ut [they] know it when [they] see it."[28] This task has muddied in recent decades as a result of Congress's attempts to endow private individuals with statutory causes of action, empowering them to act as "private attorneys general" in enforcing federal law.[29] So, it was within this context twenty-five years ago that the Supreme Court attempted to shed some light into the murky waters of modern standing doctrine in *Lujan v. Defenders of Wildlife*.[30]

Lujan concerned the Endangered Species Act of 1973 ("ESA"),[31] which sought to protect and conserve species from threats against their continued existence. Section 7(a)(2) of the ESA provides, in pertinent part, that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species."[32]

As stated in *Lujan*:

> In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior . . . , promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend[ed beyond the borders of the United States] to actions taken in foreign nations [as well]. The next year, however, the Interior Department began to reexamine its position. A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States . . . [was] promulgated in 1986.[33]

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[27] United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 688 (1973).

[28] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also* Konnoth & Kreimer, *supra* note 25, at 47–48 ("Over one hundred Supreme Court cases turned on the presence or absence of 'injury in fact,' festooning the bedrock with adjectives: adequate 'injury in fact' was to be 'personal and tangible,' 'concrete and particularized,' 'actual or imminent,' and/or 'distinct and palpable.'").

[29] Konnoth & Kreimer, *supra* note 25, at 48. And the fact that most of these statutes also provide for attorneys' fees for successful litigants has made them equally popular for plaintiffs' attorneys and loathed by the defense bar. *Id.*; *see also* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 647 (2013), https://law.lclark.edu/live/files/15320-lcb173art1burbankpdf (recognizing that fee shifting favors prevailing plaintiffs).

[30] 504 U.S. 555, 558, 560–62 (1992).

[31] Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–44 (2006)).

[32] 16 U.S.C. § 1536(a)(2).

[33] *Lujan*, 504 U.S. at 558–59 (1992) (internal citations omitted) (citing 43 Fed. Reg. 870, 874 (Jan. 4, 1978)); 50 C.F.R. § 402.01 (2017).

Utilizing the ESA's citizen suits provision,[34] various wildlife conservation organizations sued the Secretary of the Interior seeking both a declaratory judgment that the new regulation limiting the geographic scope was issued in error and an injunction requiring the Secretary to promulgate a new regulation restoring the more expansive 1978 interpretation.[35]

Finding that the plaintiffs lacked standing, the Supreme Court held that "the irreducible constitutional minimum of standing"[36] consists of three elements:

> [(1)] the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" [(2)] there must be a causal connection between the injury and the conduct complained of . . . [and (3)] it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[37]

Writing for the Court, Justice Scalia reiterated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[38] Although the *Lujan* majority restated its prior holding, that the "injury required by Art. III may exist *solely by virtue of 'statutes creating legal rights, the invasion of which creates standing*,'"[39] it found that "public rights that have been legislatively pronounced to belong to each individual who forms part of the public," unless accompanied by an allegation of a particularized and concrete injury, are insufficient to confer Article III standing.[40] Therefore, because the plaintiffs' argument was based on sheer speculation and was in no way tied to any damage that they were either presently or imminently likely to suffer, the Supreme Court concluded that they lacked standing to bring the case.[41]

Despite the Court's attempt to clarify the standing doctrine, lower courts continued to struggle to grasp what impact Congress's ability to craft certain rights had on the determination of whether plaintiffs had

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[34] 16 U.S.C. § 1540(g) (authorizing "any person" to commence a civil suit on his own behalf to enjoin any person alleged to have violated the ESA).

[35] *Lujan*, 504 U.S. at 559.

[36] *Id.* at 560.

[37] *Id.* at 560–61 (internal citations omitted) (first quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); then quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

[38] *Id.* at 563 (quoting Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972)).

[39] *Id.* at 578 (emphasis added) (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

[40] *Id.*

[41] *Id.* at 566–67, 578.

suffered a cognizable injury in fact.[42] And so, in the decades that followed, the circuit courts of appeals were split in their decisions as to whether a freestanding statutory violation affecting private rights (instead of the public rights at issue in *Lujan*), divorced from any alleged harm, was sufficient in and of itself to confer Article III standing.[43]

In an attempt to level the legal landscape and provide much needed clarification, in 2016 the Supreme Court addressed the issue directly in *Spokeo, Inc. v. Robins*.[44] Spokeo operated a "people search engine," which allowed users to input "a person's name, a phone number, or an e-mail address" to search "a wide variety of databases" in order to obtain information on the subject of the search.[45] Thomas Robins learned that someone had searched his name on Spokeo, which yielded incorrect information about his marital status, age, employment, personal wealth, and education.[46] Consequently, he brought suit alleging that Spokeo had willfully failed to comply with the Fair Credit Reporting Act's ("FCRA") requirement that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" consumer reports."[47]

The District Court dismissed Robins's complaint with prejudice, finding that he had not properly pleaded an injury in fact to confer Article III standing.[48] The Ninth Circuit reversed, noting that "the violation of a statutory right is usually a sufficient injury in fact to confer standing."[49] The court observed that "the Constitution limits the power of Congress to confer standing,"[50] but held that those limits were not breached because Robins had alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people" and because his "personal interests in the handling of his credit information are individualized rather than collective."[51] The Ninth Circuit added that it did not need to reach the issue of "whether harm to [Robins's] employment prospects or related anxiety" as a potential consequence of the false information could qualify

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[42] Grande, *supra* note 1 (providing examples of district court cases in which courts struggle to decide whether plaintiffs have standing under FRCA and FACTA statutes).

[43] *Justiciability — Class Action Standing* — Spokeo, Inc. v. Robins, 130 HARV. L. REV. 437, 437 (2016) [hereinafter *Justiciability*]; *see* Grande, *supra* note 1 (explaining and illustrating the splitting effect of *Spokeo* on allegations of mere statutory violations).

[44] 136 S. Ct. 1540, 1549 (2016).

[45] *Id.* at 1544.

[46] *Id.* at 1546.

[47] *Id.* at 1545.

[48] *Id.* at 1546.

[49] Robins v. Spokeo, 742 F.3d 409, 412 (9th Cir. 2014), *vacated and remanded*, 136 S. Ct. 1540 (2016).

[50] *Id.* at 413.

[51] *Id.*

as an injury in fact because the violation of his statutory rights alone was sufficient to confer standing.[52]

The Supreme Court granted certiorari, vacated, and remanded.[53] Writing for the majority, Justice Alito restated the three elements of "the 'irreducible constitutional minimum' of standing" enumerated in *Lujan*.[54] Noting that the injury in fact requirement was the "'[f]irst and foremost' of standing's three elements,"[55] the Court emphasized that it had "made it clear time and time again that an injury in fact must be both concrete *and* particularized."[56]

Separating these requirements into two different analyses for the first time,[57] the *Spokeo* majority held that "[f]or an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'"[58] And for an injury to be "concrete," it must be "'de facto'; that is, it must actually exist."[59]

Recognizing that a concrete injury can take many forms, the Court reiterated the role that history and the judgment of Congress play in determining whether an intangible harm can constitute an injury in fact.[60] However, the Court definitively stated that "Congress' role in identifying and elevating intangible harms *does not mean* that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[61] The *Spokeo* majority thus concluded that "Article III standing requires a concrete injury even in the context of a statutory violation."[62] Consequently, "Robins could not . . . allege a bare

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[52] *Id.* at 414 n.3.

[53] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1550 (2016).

[54] *Id.* at 1547 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

[55] *Id.* (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998)).

[56] *Id.* at 1548.

[57] *Id.* at 1555 (Ginsburg, J., dissenting) ("The Court's opinion observes that time and again, our decisions have coupled the words 'concrete *and* particularized.' True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms 'concrete' and 'particularized.'" (quoting *id.* at 1548 (majority opinion))).

[58] *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1).

[59] *Id.* (emphasis omitted).

[60] *Id.* at 1549.

[61] *Id.* (emphasis added). This conclusion appears to extend *Lujan*'s holding beyond the previous scope of applicability to private causes of action stemming from public rights authorized by Congress as well. *See generally id.* at 1550 (Thomas, J., concurring) (explaining the history of courts' favor for suits in which private plaintiffs allege violations of their own rights rather than public rights).

[62] *Id.* at 1549.

procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."[63]

Regrettably, the Supreme Court in *Spokeo* failed to provide any substantial guidance to lower courts in distinguishing the subtle difference between an actionable injury in fact and a "bare procedural violation."[64] The nuanced language of *Spokeo* did more to illuminate the issue than guide the hand of trial judges.

Without a detailed analysis, the Court attempted to provide some markers identifying the boundary between those statutory violations sufficient to confer standing and those that are not.[65] Thus, it appears that a plaintiff may have standing in this context, even in the absence of a past or present tangible harm, if the statutory violation: (1) results in a risk of real harm, (2) has some relationship to an injury recognized at common law, or (3) provides a right to access specific information.[66]

The immediate impact of the Supreme Court's decision was to call into question the continued applicability of a number of statutes similar to the FCRA where enforcement is premised on suits by persons who allege that their individual, congressionally created rights have been violated.[67] These statutes include such frequently litigated provisions as the Telephone Consumer Protection Act ("TCPA")[68] and the Fair Debt Collection Practices Act ("FDCPA").[69]

II. *SPOKEO*'S WAKE

Unsurprisingly, *Spokeo* has resulted in lower courts reevaluating how they address standing issues in the context of statutory violations. Each appellate court appears to have fashioned its own interpretation of when a statutory violation alone is sufficient to confer standing, leading to inconsistent results.[70]

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63 *Id.*

64 *Id.*

65 *Id.* at 1548–49.

66 *Id.*

67 *Justiciability*, *supra* note 43, at 446.

68 47 U.S.C. § 227(b)(3) (2012).

69 15 U.S.C. § 1692k (2012).

70 *See* Crupar-Weinmann v. Paris Baguette Am., Inc., 861 F.3d 76, 77 (2d Cir. 2017) (finding no standing in Fair and Accurate Credit Transactions Act ("FACTA") case); Susinno v. Work Out World Inc., 862 F.3d 346, 348 (3d Cir. 2017) (finding standing in TCPA case); *In re* Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 629 (3d Cir. 2017) (finding standing in FCRA case); Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 340 (4th Cir. 2017) (finding no standing in FCRA case); Gubala v. Time Warner Cable, Inc., 846 F.3d 909, 909–12 (7th Cir. 2017) (finding no standing in Cable Communications Policy Act ("CCPA") case); Syed v. M-I, LLC, 853 F.3d 492, 495–96, 499 (9th Cir. 2017) (finding standing in FCRA case); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1040, 1042 (9th Cir.

As an example, the Third and Fourth Circuits have rendered opposing decisions in cases with nearly identical facts. Both matters involved laptops containing plaintiffs' personal identifying information.[71] The laptops in each case were stolen—one from an insurance company and the other from a hospital.[72] In both cases, the plaintiffs alleged violation of a federal statute safeguarding such information,[73] but neither pleaded an injury beyond the purported statutory violation and the resulting future risk of identity theft.[74] While the Third Circuit found that the plaintiffs had standing, the Fourth Circuit did not.

In *In re Horizon Healthcare Services Inc.*, the Third Circuit determined that Congress intended the FCRA to limit the unauthorized dissemination of personal information.[75] In its view, Congress, by enacting the FCRA, attempted to remedy an intangible harm that was closely related to a harm traditionally recognized at common law—invasion of privacy.[76] Therefore, the Third Circuit concluded that the plaintiffs' mere allegation of a violation of the FCRA was sufficient to confer standing.[77] In so doing, the court never reached the issue of whether the mere risk of harm from future identity theft could constitute a concrete injury.[78]

2017) (finding standing in TCPA case); Perry v. CNN, Inc., 854 F.3d 1336, 1341 (11th Cir. 2017) (finding standing in Video Privacy Protection Act case); Strubel v. Comenity Bank, 842 F.3d 181, 185 (2d Cir. 2016) (finding standing in Truth in Lending Act case); Lee v. Verizon Commc'ns, Inc., 837 F.3d 523, 529 (5th Cir. 2016) (finding no standing in Employee Retirement Income Security Act case); Soehnlen v. Fleet Owners Ins. Fund, 844 F.3d 576, 579 (6th Cir. 2016) (finding no standing in Employee Retirement Income Security Act case); Meyers v. Nicolet Rest. of De Pere, LLC, 843 F.3d 724, 725 (7th Cir. 2016) (finding no standing in FACTA case); Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 925–27 (8th Cir. 2016) (finding no standing in CCPA case); Nicklaw v. CitiMortgage, Inc., 839 F.3d 998, 1000 (11th Cir. 2016) (finding no standing in case involving alleged violation of New York statute requiring filing of mortgage discharge within thirty days).

[71] *See Horizon Healthcare*, 846 F.3d at 629 (holding that dismissal for lack of Article III standing was improper when the plaintiffs' personal information was allegedly disclosed); *see also* Beck v. McDonald, 848 F.3d 262, 267 (4th Cir. 2017) (holding that the plaintiffs failed to establish Article III standing after personal information was lost due to laptop theft).

[72] *Horizon Healthcare*, 846 F.3d. at 629; *Beck*, 848 F.3d at 267.

[73] *Horizon Healthcare* involved a claim for violation of the FCRA, 486 F.3d at 629, while *Beck* concerned alleged violations of the Privacy Act and the Administrative Procedure Act, 848 F.3d at 266.

[74] *See Horizon Healthcare*, 846 F.3d. at 634 (alleging harm based on plaintiffs' statutory right to have personal information secured and increased risk of identity theft); *see also Beck*, 848 F.3d at 266–67 (alleging harm based on the possibility of identity theft and cost of preventative measures).

[75] 846 F.3d. at 639.

[76] *Id.* at 638–40.

[77] *Id.* at 639–40.

[78] *Id.* at 634–35.

The Fourth Circuit, on the other hand, approached *Beck v. McDonald* from an inverse perspective.[79] Its analysis was focused solely on whether the plaintiffs had a plausible risk of future identity theft sufficient to be considered a concrete injury.[80] The court concluded that the mere risk of possible identity theft was purely speculative.[81] There was no evidence that any personal information had been misused or that the computers were stolen for that purpose.[82] The Fourth Circuit therefore determined that the "attenuated chain of possibilities" necessary for the plaintiffs to actually suffer from identity theft was insufficient to confer Article III standing.[83] Unlike *Horizon Healthcare*, the *Beck* court never considered the sufficiency of a statutory violation alone to satisfy the injury in fact requirement because the plaintiffs failed to raise that issue.[84]

The plaintiffs in *Horizon Healthcare* and *Beck* were victims of nearly identical circumstances. Their personal information was located on stolen laptops. How can one set of plaintiffs have standing to sue, but not the other? These types of inconsistencies are certain to reoccur unless the Supreme Court clarifies what types of statutory violations rise to the level of concrete injuries.

III. A THREE-STEP APPROACH FOR STATUTORY VIOLATIONS

Rather than permitting the circuit courts of appeals to employ ad hoc analyses when confronting issues of standing in the context of statutory violations, the Supreme Court should revisit the issue and announce a clear, methodological approach for lower courts to apply.

Before outlining a workable framework, however, it is prudent to detail those parts of *Spokeo* that are relatively uncontroversial. The first is *Spokeo*'s emphasis that plaintiffs must suffer a "particularized" injury.[85] Though separated from its previously conjoined modifier, "concrete," *Spokeo*'s particularization requirement finds its moorings in modern standing doctrine's general "aversion to adjudicating claims of 'generalized grievances.'"[86] Thus, little has changed in this regard.

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79 848 F.3d 262, 267 (4th Cir. 2017).

80 *Id.* at 272–75.

81 *Id.* at 274.

82 *Id.*

83 *Id.* at 275.

84 *Id.* at 278 n.4.

85 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016); *see also id.* at 1550 n.7 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance.").

86 Konnoth & Kreimer, *supra* note 25, at 50 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 575 (1992)).

And second is the Supreme Court's continued observation that intangible constitutional injuries are sufficient to confer Article III standing.[87] Though "not every constitutional provision will be held to import 'injury in fact,'"[88] the Court has found time and again that many do, even when divorced from a tangible harm.[89] Therefore, "lower courts—like a full complement of Supreme Court Justices—[have found] in *Spokeo* no limit on their degrees of freedom in regard to the justiciability of constitutional rights."[90]

Beyond these uncontroversial and consistent applications of long-settled precedent, there exists a true need for clarification of how courts should assess standing within the context of statutory violations. Fortunately, a close reading of *Spokeo* reveals that a framework is already in place for lower courts to apply a three-step approach when confronting this issue.[91]

At the first step, courts should assess whether the plaintiff has suffered a tangible harm as a result of the statutory violation. If the plaintiff has not alleged a tangible harm, courts should then inquire whether he has suffered one of the specific types of intangible harms sufficient to confer Article III standing.[92]

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[87] *Spokeo*, 136 S. Ct. at 1549 (first citing Pleasant Grove City v. Summum, 555 U.S. 460, 460, 464 (2009) (free speech); and then citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521, 524 (1993) (free exercise)).

[88] Konnoth & Kreimer, *supra* note 25, at 53 & n.56 (citing United States v. Richardson, 418 U.S. 166, 170–71, 176–77 (1974) ("holding that a taxpayer lacked standing to challenge the Central Intelligence Agency Act . . . because he was asserting a generalized grievance and could not show individual injury.")).

[89] *Id.* at 52–53 (first citing Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970) ("A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause."); then citing Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016) (addressing voting malapportionment claims on the merits); and then citing Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2214–15 (2016) (adjudicating on the merits claims of racial discrimination by a student who could not show that she would have been admitted to the University of Texas in the absence of an affirmative action program)).

[90] *Id.* at 53.

[91] Professors Craig Konnoth and Seth Kreimer provided an excellent summary of "the steps of *Spokeo*" in their recent essay, *Spelling Out* Spokeo. *See supra* note 25, at 50. Professors Konnoth and Kreimer furnished a broad overview of "the current metes and bounds of prerequisite Article III injury," *id.* at 50, which this Article attempts to expand upon by focusing solely on concrete injuries in the context of statutory violations.

[92] *Spokeo*, 136 S. Ct. at 1547–49 ("'Concrete' is not, however, necessarily synonymous with 'tangible.' Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."). It almost goes without saying that, after *Spokeo*, a Plaintiff must typically allege either a tangible or an intangible harm in conjunction with a statutory violation. *See id.* at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [plaintiffs cannot], for example, allege a bare procedural violation, divorced

Therefore, in the second step of the analysis, courts should determine whether the plaintiff has suffered an intangible harm that renders him susceptible to a risk of real harm that is likely to occur in the future.[93] If the second step is inconclusive, the third and final step requires courts to determine whether the alleged intangible harm "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[94]

If the answer to the third step is also "no," there is insufficient jurisdictional mooring upon which plaintiffs can anchor their claims, and, therefore, courts must dismiss the case for want of Article III standing.

A. Step One: Has the Plaintiff Suffered a Tangible Harm?

Outside a small realm of exceptions, the Supreme Court has held that "for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm."[95] "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."[96] Thus, it is axiomatic that alleging a real, tangible harm in the context of a statutory violation is sufficient to confer standing. After all, the harm itself is what Congress intended to remedy when it initially enacted the provision.[97] While "tangibility" may be a point of debate, at a minimum it encompasses what Justice Scalia referred to as "'Wallet Injur[ies]'[98] to the value of economic interests, including intellectual property rights, along with physical interference."[99]

A brief example within the context of a statutory violation may be illustrative. Suppose that defendant Debt Collection Company attempts to collect a debt from plaintiff Jane Doe. Plaintiff timely sends defendant a letter disputing the debt.[100] Several months later, plaintiff reads her credit report and notices that the debt has not been listed as "disputed by consumer."[101] In a fit of righteous anger, plaintiff immediately brings suit

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from any concrete harm, and satisfy the injury-in-fact requirement of Article III."). Complaints that simply state that the plaintiff has been "harmed" by a statutory violation, without more, miss the mark. *Id.*

93 *Id.* ("This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.").

94 *Id.*

95 Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

96 Diamond v. Charles, 476 U.S. 54, 62 (1986).

97 *Spokeo*, 136 S. Ct. at 1549–50.

98 Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 619 (2007) (Scalia, J., concurring in the judgment).

99 Konnoth & Kreimer, *supra* note 25, at 52.

100 5 U.S.C. § 1692g (2012) (providing consumers thirty days to dispute a debt).

101 *Id.* (explaining the legal process of disputing a debt).

under the FDCPA,[102] solely alleging the preceding facts and contending that she has been harmed as a result of defendant's actions. Conspicuously absent from her complaint, however, is any reference to a specific harm that she has suffered. Has she sufficiently pleaded that she has standing? After *Spokeo*, many courts are likely to find that she has not.[103]

But what if plaintiff had alleged something more? What if she asserted in her complaint that her credit score was lowered because of defendant's failure to list the debt as disputed and, as a result, she was denied a loan for a new house or was unable to obtain a security clearance? In that case, courts would likely find that plaintiff has pleaded a tangible injury, the exact type that Congress sought to give her a vehicle to redress through the FDCPA. And, perhaps more significantly, that harm would be real, not abstract.[104]

While this illustration may be more helpful in illuminating pleading deficiencies than highlighting what qualifies as a "tangible" injury, it demonstrates the significance of the first step of the proposed framework by highlighting *Spokeo*'s requirement that plaintiffs must plead more than just a statutory violation.[105] In light of the above, it should be self-evident that the clearest way to avoid a challenge for lack of standing is for plaintiffs to plead a specific, tangible harm that they have suffered.[106] However, if none exists, plaintiffs must plead an intangible harm in addition to the statutory violation in order to survive review. Should this be necessary, the road for prospective plaintiffs becomes steeper, and courts must turn to the next steps of the proposed analysis.

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[102] *Id.* § 1692e(8) ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. . . . [T]he following conduct is a violation of this section: . . . Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.").

[103] *See, e.g.*, Higgens v. Trident Asset Mgmt., LLC, No. 16-24035-Civ-Scola, 2017 WL 1230537 (S.D. Fla. Mar. 28, 2017) (holding that the plaintiff failed to establish standing because he did not describe any harm suffered).

[104] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016). Though not stated explicitly, the Supreme Court in *Spokeo* hinted that de minimis harms sustained from bare procedural violations are insufficient. For example, a consumer reporting agency may fail to provide the statutorily required notice to the user of consumer information, even if that information is entirely accurate. *Id.* at 1550. Or, the agency might provide some wholly inaccurate, yet benign, information, such as an incorrect zip code. *Id.* While both of these situations constitute statutory violations, the "victim" has no standing because the conduct does not "cause harm or present any material risk of harm." *Id.*

[105] *Id.* (finding that a violation of a statute may result in no harm).

[106] Konnoth & Kreimer, *supra* note 25, at 61.

1. If Plaintiff Has Not Suffered a Tangible Harm, Has He Suffered an Intangible One?

While standing's concreteness requirement demands that an injury be real, not abstract,[107] the Supreme Court has frequently recognized that it is possible for an intangible harm to be concrete in limited circumstances.[108] When determining whether such intangible harms are sufficiently concrete to satisfy Article III's requirements, "[Congress's] judgment is . . . instructive and important."[109]

In creating statutory rights of action, "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.'"[110] However, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[111] The Supreme Court has made clear that "Article III standing requires a concrete injury *even in the context of a statutory violation*."[112]

Indeed, the Supreme Court has previously recognized a number of intangible harms that it has determined are "capable of resolution through the judicial process,"[113] including, but not limited to:

> [I]njury to an individual's ability to: gather information about a political action committee's members, contributions, and expenditures; obtain the ABA's list of potential judicial nominees; live in a racially integrated community; market a product free from competition; receive benefits without regard to one's sex; compete for contracts and university admission on equal footing with minorities; and obtain truthful housing information despite a professed lack of intent to rent or purchase the home or apartment.[114]

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[107] *Spokeo*, 136 S. Ct. at 1548.

[108] In *Spokeo*, the Supreme Court cited multiple examples of these intangible injuries, including libel, slander, and violations of the constitutional rights to free speech and free exercise. *Id.* at 1549 (first citing Pleasant Grove City v. Summum, 555 U.S. 460, 460, 464 (2009) (free speech); then citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521, 524 (1993) (free exercise); and then citing RESTATEMENT (FIRST) OF TORTS §§ 569–70 (AM. LAW INST. 1938) (libel and slander)).

[109] *Id.*

[110] *Id.* (alteration in original) (emphasis omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992)).

[111] *Id.*

[112] *Id.* (emphasis added).

[113] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

[114] *Justiciability*, *supra* note 43, at 445 (first citing FEC v. Akins, 524 U.S. 11, 13–14 (1998); then citing Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 443, 449–51 (1989); then citing Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211–12 (1972); then citing

Perhaps because *Spokeo*'s analysis concerned standing solely within the context of statutory violations, the Supreme Court only addressed a few of these previously recognized intangible harms in its opinion. Nevertheless, some of these decisions may come under heightened scrutiny in future cases.

Regardless, it appears from Justice Alito's language in *Spokeo* that courts should ask two questions when assessing the sufficiency of an intangible harm within the context of a statutory violation: (1) Has the plaintiff suffered an intangible harm that renders him susceptible to a future risk of real harm?;[115] or (2) Has the plaintiff suffered an intangible harm that "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts[?]"[116] These questions make up the second and third steps of the proposed analytical framework.

B. Step Two: Has the Plaintiff Suffered an Intangible Harm That Renders Him Susceptible to a Future Risk of Real Harm?

As the Supreme Court noted in *Spokeo*, standing's concreteness requirement can be satisfied where the plaintiff faces a "risk of real harm" likely to occur in the future.[117] Therefore, if a plaintiff has not alleged that he suffered a tangible harm as a result of a statutory violation, it is reasonable for courts to examine whether the intangible harm alleged renders him susceptible to a "certainly impending"[118] future risk of real harm.

The leading decision on this issue is the Supreme Court's holding in *Clapper v. Amnesty International USA*.[119] At issue in *Clapper* was section 702 of the Foreign Intelligence Surveillance Act of 1978,[120] which allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by authorizing the surveillance of individuals who are not "United States persons" and are believed to be located outside of the United States.[121] The plaintiffs, United States citizens whose work "require[d] them to engage in sensitive international

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Hardin v. Ky. Utils. Co., 390 U.S. 1, 7 (1968); then citing Heckler v. Mathews, 465 U.S. 728, 738–39 (1984); then citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 200–01 (1995) and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978); and then citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 364 (1982)).

[115] *Spokeo*, 136 S. Ct. at 1548–49.

[116] *Id.* at 1549.

[117] *Id.*

[118] Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

[119] 133 S. Ct. 1138, 1146–47, 1152–53 (2013).

[120] 50 U.S.C. § 1881a(b) (2012).

[121] *Clapper*, 133 S. Ct. at 1142.

communications with individuals who they believe are likely targets of surveillance," brought suit challenging the provision.[122]

The plaintiffs asserted two separate theories of Article III standing: (1) they claimed "that there is an objectively reasonable likelihood that their communications will be acquired under [the Act] at some point in the future, thus causing them injury";[123] and (2) they maintained "that the risk of surveillance under [the Act was] so substantial that they ha[d] been forced to take costly and burdensome measures to protect the confidentiality of their international communications."[124] Rejecting both theories, the Supreme Court reiterated that any "threatened injury must be *certainly impending* to constitute injury in fact."[125] Because the plaintiffs' first theory was speculative in nature and "relie[d] on a highly attenuated chain of possibilities,"[126] the Court found it to be deficient. And the second argument fared no better, with the Court holding that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[127]

The Fourth Circuit's recent post-*Spokeo* decision in *Beck v. McDonald* shows that little has changed in this analysis.[128] In *Beck*, the Fourth Circuit consolidated two cases involving data breaches at the Dorn Veterans Affairs Medical Center ("Dorn VAMC") in Columbia, South Carolina.[129] The plaintiffs alleged that both data breaches constituted violations of the Privacy Act.[130] However, they did not "allege that Dorn VAMC's violations of the Privacy Act alone constitute[d] an Article III injury-in-fact."[131] Rather, the plaintiffs asserted that they suffered a concrete injury from the future risk of identity theft.[132]

What is most significant about the Fourth Circuit's decision is not that it found that the plaintiffs' speculative allegations were "insufficient to establish a 'substantial risk' of harm" necessary to show concrete injury.[133] After all, that conclusion tracks almost directly the holding in *Clapper*. Rather, the significance of the decision is the apparent

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[122] *Id.*

[123] *Id.* at 1146.

[124] *Id.*

[125] *Id.* at 1147 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).

[126] *Id.* at 1148.

[127] *Id.* at 1151.

[128] 848 F.3d 262, 266–67 (4th Cir. 2017).

[129] *Id.* at 266.

[130] *Id.* at 267.

[131] *Id.* at 271 n.4.

[132] *Id.* at 266–67, 274.

[133] *Id.* at 275.

recognition that an alleged violation of the Privacy Act, alone, likely would have fallen short of the mark. After *Spokeo*, plaintiffs must allege more than an unadorned statutory violation to satisfy Article III's standing requirements.[134]

So, at step two of the proposed analysis, courts should focus on whether, in the context of the alleged statutory violation, plaintiffs have pleaded additional facts sufficient to support a plausible claim that they face a "certainly impending"[135] future risk of real harm as a result of defendants' acts. In the absence of such a palpable contention, the only remaining recourse is the more abstract final step of the proposed framework.

C. Step Three: Has the Plaintiff Suffered an Intangible Harm That Has a Close Relationship to a Harm That Has Traditionally Been Regarded as Providing a Basis for a Lawsuit in English or American Courts?

In *Spokeo*, the Supreme Court noted that in some limited circumstances, merely pleading "the violation of a procedural right granted by statute" may be sufficient to satisfy concreteness.[136] "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles."[137] Therefore, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[138]

This issue is primarily encountered where the legislature has codified causes of action with intangible harms where recovery has been long permitted at common law.[139] "[A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."[140] This third step has also been triggered by some courts that have cited *Spokeo* to support their findings that plaintiffs have sufficiently pleaded Article

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[134] Konnoth & Kreimer, *supra* note 25, at 61.

[135] Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

[136] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1549–50 (citing RESTATEMENT (FIRST) OF TORTS §§ 569–70 (AM. LAW INST. 1938) (libel and slander); FEC v. Akins, 524 U.S. 11, 19–20 (1998) (access to public information); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449–51 (1989) (access to public information)).

[140] *Id.*

III standing where they have alleged that they have suffered an informational injury in the context of a statutory violation.[141]

However, absent these few exceptions, standing only exists within the context of a statutory violation where the plaintiff has also alleged an additional concrete harm—either tangible or a certainly impending future risk of one. Therefore, the last step in the proposed inquiry requires courts to examine the narrow group of historically recognized claims.

1. Does the Alleged Harm Have a Common Law Analog?

Assessing whether an alleged statutory violation has a common law analog often requires a close examination of common law jurisprudence. Reviewing courts should exercise caution not to expand or limit application of common law solely within the context of reviewing a challenge pursuant to Article III standing.[142]

Again, an illustration may be helpful. Suppose plaintiff John Doe discovers that a defendant company obtained his credit report from one of the "big three" credit reporting agencies,[143] despite the fact that he never had an account with the defendant. Plaintiff brings suit under the FCRA alleging that the defendant did not have a lawful or reasonable basis to believe that it had a permissible purpose to obtain and use his credit report. However, his complaint is devoid of any reference to a tangible injury that he has suffered as a result of this allegedly impermissible disclosure. Also absent is any factual allegation as to how the defendant allegedly used the credit report.

The complaint would fail under the first and second steps of the proposed analytical framework. Therefore, plaintiff's strongest argument would be to allege that the FCRA has codified a long-standing privacy right that in and of itself is sufficient to confer Article III standing. However, while the alleged harm may bear a passing resemblance to a classic invasion-of-privacy claim, courts after *Spokeo* should exercise caution in drawing that immediate conclusion. Instead, they should analyze the four distinct "invasion of privacy" wrongs typically recognized

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[141] *See, e.g.*, Clark v. Trans Union, LLC, No. 3:15cv391, 2016 WL 7197391, at *3, *6, *9 (E.D. Va. Dec. 9, 2016) (finding that a plaintiff who sought statutory damages for an informational injury violation of § 1681g(a)(2) satisfied the injury in fact analysis).

[142] *Compare* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273–81 (2008) (relying on English and early American case law when assessing whether an assignee, who would not receive any benefit from pursuing a claim, had standing), *with* Susinno v. Work Out World Inc., 862 F.3d 346, 351–52 (3d Cir. 2017) (conceding that the action would have been deficient at common law, but deeming it sufficient for the purposes of standing because Congress "sought to protect the same *interests* implicated in the traditional common law cause of action" (emphasis added)).

[143] Luke Herrine, *Credit Reporting's Vicious Cycles*, 40 N.Y.U. REV. L. & SOC. CHANGE 305, 313 & n.40 (2016) (defining the "Big Three" credit reporting agencies).

at common law—intrusion upon seclusion, appropriation of name or likeness, publicity given to private life, and publicity placing a person into false light[144]—and determine which, if any, most closely resembles the harm plaintiff suffered as a result of the alleged statutory violation. At that point, courts must align the facts of the plaintiff's claims with those recognized at common law to determine whether his injury is of a type previously deemed sufficient.

The required depth of this analysis recognizes the importance and limited application of this narrow exception.[145] It makes sound sense within the context of *Spokeo* since the Court appeared to recognize Congress's limited role in providing new statutory vehicles to redress injuries similar to those contemplated at common law.[146]

2. Is the Alleged Harm an Informational Injury?

Spokeo reiterated the Supreme Court's past holdings that the denial of access to information to which an individual is entitled by statute can be a concrete injury sufficient to confer standing.[147] While this seems like a straightforward bright-line rule, its application in the broader context of *Spokeo* is far from clear.

To support the proposition that denial of statutorily mandated information may constitute a cognizable injury, *Spokeo* cites two prior Supreme Court cases: *Federal Election Commission v. Akins* and *Public Citizen v. United States Department of Justice*.[148] In *Akins*, the Court concluded that a group of voters had standing to challenge a political committee's alleged violation of the Federal Election Campaign Act's requirement to disclose its contributions and expenditures.[149] *Akins* relied on the Court's reasoning in *Public Citizen* that two advocacy organizations had standing to sue to obtain information about potential judicial nominees, which they claimed access to pursuant to the Federal Advisory Committee Act.[150]

Spokeo highlights *Akins* and *Public Citizen* as examples of situations where a plaintiff "need not allege any *additional* harm beyond the one Congress has identified."[151] However, the Court appears to link these

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144 RESTATEMENT (SECOND) OF TORTS § 652B–652E (AM. LAW INST. 1976).

145 That is, historically recognized claims; *see Spokeo*, 136 S. Ct. at 1550 (Thomas, J., concurring).

146 *Id.* at 1549 (majority opinion).

147 *Id.* at 1549–50 (citing FEC v. Akins, 524 U.S. 11, 20–25 (1998); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 449 (1989)).

148 *Id.*

149 *Akins*, 524 U.S. at 13–14, 19–20.

150 *Pub. Citizen*, 491 U.S. at 451.

151 *Spokeo*, 136 S. Ct. at 1549–50.

informational injuries to a historically recognized, preexisting common law right.[152] It does not indicate whether all informational injuries can qualify per se as concrete or whether only a subset of informational injuries confers standing because it somehow satisfies the general concreteness test. In the wake of *Spokeo*, the full breadth of the informational injury rule is uncertain.

At first blush, *Havens Realty Corp. v. Coleman* seems to provide some clarity.[153] In that case, the plaintiff alleged a violation of the Fair Housing Act provision that prohibits landlords from inaccurately representing that a dwelling is unavailable because of the inquirer's race, religion, sex, or disability.[154] The Supreme Court found that the plaintiff had standing, despite the fact that he was merely a "tester" with no intention of actually renting the apartment about which he inquired.[155] This is the quintessential informational injury—the plaintiff experienced no harm except for the denial of information. Indeed, not only was the *Coleman* plaintiff uninterested in actually renting an apartment, but he also inquired about its availability for the sole purpose of creating the statutory violation for which he brought suit.[156] So, *Coleman* appears to stand for the proposition that any denial of statutorily guaranteed information will confer standing, regardless of how detached it may be from some other harm.[157]

The *Spokeo* majority did not overrule *Coleman*—or even cite it, for that matter.[158] In the absence of any analysis from *Spokeo*, lower courts are left adrift to speculate whether a denial of statutorily required information will always suffice in establishing standing, or whether those cases must also be moored to some additional concrete injury. The only two federal Courts of Appeal to directly address informational injuries in

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[152] *Id.* at 1549 ("Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.").

[153] 455 U.S. 363, 378–79 (1982).

[154] *Id.* at 366–67.

[155] *Id.* at 374.

[156] *Id.* at 368.

[157] *Id.* at 381–82.

[158] However, Justice Thomas's concurrence and Justice Ginsburg's dissent both did. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1553–55, 1555 n.3 (2016) (Thomas, J., concurring) (citing *Coleman* in finding that a plaintiff seeking redress for a statutory right "need not allege actual harm beyond the invasion of that private right"); *id.* at 1554–55 (Ginsburg, J., dissenting) (noting Congress's ability to confer enforceable rights to information). For a brief discussion on the majority's conspicuous omission of any reference to *Coleman*, see Konnoth & Kreimer, *supra* note 25, at 57–58.

the context of *Spokeo* have determined that a mere statutory violation is insufficient to confer standing.[159]

Two months after the Supreme Court decided *Spokeo*, the D.C. Circuit held that, in addition to the denial of statutorily guaranteed information, for a plaintiff to have standing, he must suffer "the type of harm Congress sought to prevent by requiring disclosure."[160] Shortly thereafter, the Fourth Circuit adopted the same reasoning.[161] Hewing closely to the D.C. Circuit's logic, the Fourth Circuit determined that the plaintiff in *Dreher v. Experian Information Solutions* had no standing to bring his FCRA claim.[162] The plaintiff had alleged that Experian violated the statute because it listed one of the plaintiff's credit card accounts under the name of a defunct credit card company instead of the newly appointed servicer who had actually reported the account to Experian.[163] The court determined that the fact that the account was identified by the former credit card company rather than the current servicer had no effect on the fairness or accuracy of the plaintiff's credit report.[164] Thus, despite the inaccuracy, the plaintiff did not experience the type of harm that Congress was trying to prevent in enacting the FCRA.[165]

The analysis applied by the D.C. Circuit and the Fourth Circuit appears to be sound, especially in light of *Spokeo*'s admonition that "Article III standing requires a concrete injury even in the context of a statutory violation."[166] However, they appear to conflict with *Coleman*'s rigid informational injury standing rule. So, despite what appears to be settled law after *Coleman*—namely, that a mere denial of statutorily required information is sufficient to confer standing—*Spokeo* muddied the informational injury waters.[167]

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[159] Dreher v. Experian Info. Sols., Inc., 856 F.3d 337, 347 (4th Cir. 2017); Friends of Animals v. Jewell, 828 F.3d 989, 995 (D.C. Cir. 2016).

[160] *Friends of Animals*, 828 F.3d at 992.

[161] *Dreher*, 856 F.3d at 345–46.

[162] *Id.* at 347.

[163] *Id.* at 340.

[164] *Id.* at 346.

[165] *Id.* at 347.

[166] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[167] The uncertainty surrounding standing in the context of informational injuries has expanded beyond a mere denial of information. Some courts have used the informational injury label to find standing in cases where the information that plaintiff was entitled to was in fact provided, but not in the specific form required by the statute. *See* Hargrett v. Amazon.com DEDC, 235 F. Supp. 3d 1320, 1325–26 (M.D. Fla. 2017) (finding standing where disclosure was not provided on a stand-alone form as required by the FCRA, but rather included with other information). *But see* Landrum v. Blackbird Enters., LLC, 214 F. Supp. 3d 566, 572–73 (S.D. Tex. 2016) (holding that a violation of the FCRA's stand-alone disclosure requirement, without more, is insufficient to confer standing).

CONCLUSION

Spokeo "answers some questions, but [its] analysis ultimately resembles its outcome—an unstable equilibrium—leaving courts"[168] in a state of flux when assessing standing in the context of statutory violations. Should the Supreme Court take up the issue again, the Justices would do lower courts a great service by announcing a clear framework for how they should conduct such an analysis.

Building off of the Court's language in *Spokeo*, assessing concreteness of an injury in fact should require courts to: (1) determine whether the plaintiff has suffered a tangible harm and, if not, inquire as to whether he has suffered an intangible one; (2) consider whether the plaintiff has suffered an intangible harm that renders him susceptible to a risk of real harm that is likely to occur in the future; and (3) evaluate whether the plaintiff has suffered an intangible harm that has its traditional and historical roots in English or American courts.

While there is still considerable "play in the joints"[169] at each step of the proposed framework where further instruction would be welcome, the Court, at a minimum, needs to establish a uniform analysis for courts to employ when confronting this significant issue. The proposed analysis here, which bears a close resemblance to that conducted by the Fourth Circuit in *Dreher*, would certainly suffice.

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[168] Konnoth & Kreimer, *supra* note 25, at 61.

[169] *Id.* at 48.

CRITIQUING THE CRITICS OF THE CRITICS: QUESTIONING THE EMPIRICAL BASIS FOR THE FEDERALIZATION OF CRIMINAL LAW

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INTRODUCTION

Scholars have long noted that the debate over the so-called federalization of criminal law, concerning "which criminal prosecutions, if any, ought to be lodged in federal rather than state courts," goes all the way back to the "inception of the union."[1] For most of the twentieth century, legal commentators writing on this subject have nearly unanimously decried Congress's continued enactment of criminal statutes that do little more than duplicate state criminal laws.[2] As for views from the bench, one scholar notes that, "despite deep political diversity, federal judges (at least those who have gone public) seem unanimous in their criticisms of and responses to federalization: close the federal courthouse doors and stop federalizing—indeed, defederalize—crime."[3] Other scholars on this subject have corroborated the dominance of this view,[4] which we will call the "anti-federalization" ("AF") view or position.

More recently, a handful of writers have challenged that long-standing, nearly universal conventional wisdom, arguing that the AF position lacks empirical support.[5] Some proponents of this new minority

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[1] Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1029–30, 1030–31 n.1 (1995) [hereinafter Little, *Myths and Principles*] (citing Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 548–55 (1925)) (noting that debate over "whether federal courts ought to have more, less, or concurrent jurisdiction over criminal offenses" took place as early as 1790–1802).

[2] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001) (noting that "for the past generation, virtually everyone who has written about federal criminal law has bemoaned its expansion").

[3] Little, *Myths and Principles*, *supra* note 1, at 1030.

[4] The AF position "has been endorsed by official organs of the federal judiciary, the [former] Chief Justice [Rehnquist], and individual federal judges," and "embraced in some fashion by every scholar who has addressed the matter." Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J. L. & PUB. POL'Y 247, 247–48 n.1 (1997) [hereinafter Stacy & Dayton, *Underfederalization*].

This view was perhaps most visibly highlighted in the Supreme Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court struck down a federal statute prohibiting mere gun possession in a school zone, because the statute "contain[ed] no jurisdictional element which would ensure . . . that the firearm possession in question affect[ed] interstate commerce." *Id.* at 561.

[5] These writers cite, among other data, national statistics of the workloads of federal courts over time to support their position. They argue that AF writers have neglected to carefully examine the data to see if their AF claims are borne out empirically. However,

view argue even further that, not only is there no empirical evidence of over-federalization of crime, but that the United States criminal justice system in fact suffers from the opposite predicament—namely, an "under-federalization" of crime.[6]

This Article weighs in on the federalization debate. Although writers on both sides of the debate marshal constitutional and public policy arguments to buttress their respective positions, this Article eschews discussing these more theoretical issues, and focuses instead on the empirical basis that the more recent "pro-federalization" ("PF") writers cite to defend their position. However, rather than taking either side in the debate, which we consider premature for lack of sufficient empirical data, our aim is to suggest how we might establish a stronger empirical basis to help determine which position is correct.

Originally, we had planned to present in this Article the results of an empirical analysis that we had done for one federal district court and replicated on a few other districts to see if the findings, which supported the PF position, were similar across these districts. We had intended to side with the PF writers, who claimed to partly ground their position on empirical data showing, on several fronts, the opposite of what the AF writers had claimed.

But after reading some of the AF writers' research, we saw that they too, though not as systematically or comprehensively as the PF writers, had cited empirical data to support their position. It was not, as we had originally thought, or as PF writers had claimed, that the PF position was supported empirically whereas the AF position was not. Rather, both sides had looked at empirical data, yet reached different conclusions. What explains the discrepancy?

As we reflected on the empirical data that the PF writers cited, we saw conceptual and measurement problems regarding the conclusions they drew from those data, despite their claims that the empirical data unequivocally supported their position. This led us to change the thrust of this Article to critiquing the empirical methodology of the PF writers. While we commend the PF writers for examining the empirical data, we argue that the data they marshal fail to persuasively support their claims. What we need are not only more empirical data, but also their proper

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although AF writers have also, while not as systematically or comprehensively as their recent critics, examined some empirical data, they still conclude that federalization of crime constitutes a serious logistical and constitutional problem for both the federal and state courts. In this paper, we will focus solely on examining and critiquing the empirical data cited by the recent critics. *See, e.g.*, Stacy & Dayton, *Underfederalization*, *supra* note 4, at 251; Little, *Myths and Principles*, *supra* note 1, at 1037, 1039–40; Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-federalization of Criminal Law*, 62 EMORY L.J. 1, 79 (2012) [hereinafter Klein & Grobey, *Debunking*].

[6] *See, e.g.*, Klein & Grobey, *Debunking*, *supra* note 5, at 252; Stacy & Dayton, *Underfederalization*, *supra* note 4, at 267–68.

analysis. An underlying problem is that the empirical measures used seem deficient to support the claims made by either side; gaps exist between the writers' concepts and the empirical indicators used to justify their position.[7]

In the next Part, we identify who these recent PF writers are and summarize the empirical claims they make to rebut the long-standing AF position. Then, in Part II, we discuss the conceptual and measurement problems inherent in the inferences that the PF writers draw from the empirical case data. We conclude by suggesting what data are needed to determine which side in the federalization debate is correct, and reminding scholars of the inherent problems in drawing inferences from empirical evidence.

I. THE PRO-FEDERALIZATION CRITIQUE OF THE ANTI-FEDERALIZATION POSITION

Against the backdrop of nearly unanimous support for the AF position among all scholars and federal judges, a handful of legal commentators began challenging the conventional wisdom in the federalization debate in the mid-1990s. The writers articulating what we call the pro-federalization ("PF") position comprise such a small group that we list all of them here: Rory Little,[8] Tom Stacy and Kim Dayton,[9]

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[7] For example, using the number of litigants involved in a case to measure the complexity of a case seems motivated by the relative ease of obtaining data for that variable. But the number of litigants in a case is not dispositive of the complexities relevant to comparing federal and state criminal cases. This is discussed further in this Article. *See infra* pp. 12–13.

[8] Little, *Myths and Principles*, *supra* note 1. Note that Stacy and Dayton place Little in the AF camp because "in the end [Little] effectively embraces the [AF] thesis, endorsing a strong presumption against concurrent federal criminal jurisdiction." Stacy & Dayton, *Underfederalization*, *supra* note 4, at 248 n.1 (citing Little, *Myths and Principles*, *supra* note 1, at 1070–81). We, however, place Little in the PF camp, because although he agrees in principle with the AF view's concerns with over-federalization, he is the first commentator to suggest that empirical data raise doubts about the claims made by AF writers.

[9] Stacy & Dayton, *Underfederalization*, *supra* note 4. Stacy and Dayton cite Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996) [hereinafter Litman & Greenberg, *Dual Prosecutions*] as the first writers to argue against AF. Stacy & Dayton, *Underfederalization*, *supra* note 4, at 247–48 n.1 (noting that "[t]he only published dissent from the overfederalization [i.e. AF] thesis has come from two federal prosecutors"). We, however, will not discuss Litman and Greenberg's article, because they cite no empirical data to support their position. The two prosecutors, like Little, do not disagree with the concerns articulated by AF writers, but rather suggest a proposal they think more adequately addresses those concerns than tackling it from a statutory-legislative approach. In the end, Litman and Greenberg actually presume (as does Little) that the AF position has legitimate concerns, but merely propose a different approach to address those concerns. *See* Litman & Greenberg, *Dual Prosecutions*, at 83–84 (explaining their discretion-based approach).

Neither will we discuss Thomas Maroney, *Fifty Years of Federalization of Criminal Law: Sounding the Alarm or "Crying Wolf?,"* 50 SYRACUSE L. REV. 1317 (2000) [hereinafter

and most recently, Susan Klein and Ingrid Grobey.[10] Because the PF writers cite similar data, we will identify the statistics they use to support their position, and then critique their inferences and conclusions based on those data.

Before we discuss the empirical claims of the PF writers, we first think it helpful to understand their aims and motivation for challenging the AF position. All of the PF writers express their conviction that the empirical data they cite will vindicate their position and show conclusively, almost as a matter of inescapable logic, that the long-standing AF position should be "debunk[ed]"[11] as a "myth."[12]

A. The Pro-federalization Writers

Little is the first writer to use empirical data to call into question the AF position. At the outset, his aim is to "sketch and probe the controversy historically, statistically, and theoretically."[13] He adopts an "attitude . . . of skepticism" toward the dominant AF position, "rather than an unquestioning acceptance of the idea that we are in the midst of a federal courts 'crisis.'"[14] While he does not reject every premise or conclusion made by AF writers, in his article, he describes "some of the commonly expressed presuppositions of the federalization debate," which he repeatedly calls "myths,"[15] as "less than firm."[16]

Little believes that "the 'crisis' of federalization appears to be overstated," and argues that "[r]ather than panic and close the federal courthouse doors against new federal crimes categorically, we ought to exercise federal authority in a principled manner, when states are

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Maroney, *Fifty Years of Federalization*]. Although Maroney critiques the AF position, he, as does Little, agrees with the thrust of the AF argument. To support his critique of the AF position, Maroney does not cite any empirical data besides that given in the 1998 ABA Task Force Report on the Federalization of Criminal Law, which argues for the AF position. Maroney explicitly states that his critique of the AF position is based entirely on "his varied professional experience." Maroney, *Fifty Years of Federalization*, at 1319 (citing Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1, 5–14 [hereinafter A.B.A. REPORT]).

[10] Klein & Grobey, *Debunking*, *supra* note 5. Klein and Grobey's article has been described as "the most thorough study of the issue of congressional federalization of state crimes." JOHN F. ZIMMERMAN, CONGRESS AND CRIME: IMPACT OF FEDERALIZATION OF STATE CRIMINAL LAWS 123 (2014). This paper will not discuss a shorter article published by Klein and Grobey that summarizes and incorporates data from their longer, original article. *See* Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It's a Myth*, 28 CRIM. JUST. 23, 23 (Spring 2013).

[11] *See* Klein & Grobey, *Debunking*, *supra* note 5.

[12] *See* Little, *Myths and Principles*, *supra* note 1, at 1034.

[13] *Id.* at 1032.

[14] *Id.*

[15] *Id.* at 1032, 1034.

[16] *Id.* at 1032.

demonstrably unable or unwilling to address criminal behavior that has reached some significant proportions."[17] This seems to be a more pragmatic position compared to the ostensibly more clearly delineated constitutional-law basis (e.g. defining what constitutes "interstate commerce") usually taken by AF writers.

Little does not reject outright the AF position, but merely seeks to give it a principled basis. He concedes that, "despite the absence of preliminary definition, large aspects of the federalization critique are valid. Recent decisions to 'federalize' certain crimes have surely been ad hoc and unprincipled."[18] He recognizes that "the people and the states have a right to demand a principled exercise of federal criminal authority, and may just as rightfully criticize unprincipled limitations as [well as] unprincipled extensions."[19] Despite Little's bottom-line agreement with the concerns that AF writers have long articulated, we include him on the PF side of the federalization debate because he is the first commentator to use empirical data to question the AF position.

Stacy and Dayton, on the other hand, are the first truly PF writers: not only do they critique the AF position, but they argue in favor of greater federalization of crime, contending that "crime has been underfederalized, not overfederalized" in the United States.[20] They attack the AF position for misusing statistics: "The image of a constantly growing national role has been created and maintained by ritualistic incantation of a few selected statistics."[21] In refuting the AF claim that federal criminal trials are unduly burdening the federal courts, Stacy and Dayton claim that "[t]his argument . . . rests on a use of statistics so selective that it borders on the disingenuous."[22] "In fact, the burden on federal judges is now considerably less than in prior decades and, in any event, state judges face far greater burdens."[23]

Klein and Grobey basically affirm Stacy and Dayton's thesis articulated seventeen years earlier, but update some of the data and make additional empirically based arguments. First, Klein and Grobey "demonstrate through empirical data that in spite of the large increase in the number of federal criminal statutes, this growth itself has caused

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17 *Id.* at 1085.

18 Little, *Myths and Principles*, *supra* note 1, at 1033.

19 *Id.* at 1085.

20 Stacy & Dayton, *Underfederalization*, *supra* note 4, at 250, 260, 311, 316.

21 *Id.* at 251.

22 *Id.*

23 *Id.* Stacy and Dayton obtain their figures from the following sources: "For the years since 1940, the annual report published by the Administrative Office of the United States Courts; for the years 1934–39, the Annual Report of the Attorney General; and for the years before 1933, Edward Rubin, *A Statistical Study of Federal Criminal Prosecutions*, 1 LAW & CONTEMP. PROBS. 494, 497 (1934)." *Id.* at 253 n.25.

almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts."[24] Further, they show that "[t]he percentage of criminal justice matters heard in federal court, when viewed as a fraction of all criminal matters prosecuted at both the state and federal level, has remained relatively constant from year to year, in spite of numerous new criminal enactments at the federal level."[25] They cite these statistics to show that federalization of criminal law has not become worse since the early twentieth century.[26]

B. Empirically-based Challenges to the Anti-federalization Position

Many of the arguments made by PF writers overlap with each other, and more recent PF writers tend to merely update the data cited by earlier PF writers. Therefore, we consolidate PF writers' empirically-based objections to AF claims into six counter-arguments, and then discuss in Part II the problems with each PF counter-argument. All of the objections made by PF writers are meant to rebut the main contention of AF writers, namely that criminal law in the United States is "over-federalized": i.e. federal courts have been handling more criminal prosecutions, whether measured in terms of cases filed or trials heard, than they ought. A summary of the PF counter-arguments to why criminal law in the United States is not over-federalized—and perhaps is even under-federalized—are as follows:

(1) The dramatic increase in the number of federal criminal statutes over the last several decades has not led to more criminal cases being filed so as to burden federal district judges more than they were burdened in the past;

(2) The average number of criminal cases filed per federal district judge has decreased over time, thus easing the relative burden on federal judges as compared to previous decades;

(3) PF writers reject the claim proffered by AF writers' that the complexity of federal criminal cases has increased so as to neutralize the relative ease of federal district judges handling fewer cases as compared to previous decades;

(4) Likewise, PF writers reject AF claims that the increase in the length of federal criminal trials is sufficient to counteract the

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[24] Klein & Grobey, *Debunking*, *supra* note 5, at 5. We will see later that this fact was not overlooked by the ABA Task Force on the Federalization of Criminal Law, which acknowledged the same 5% statistic in its report. *See* A.B.A. REPORT, *supra* note 9, at 20 (noting that "many other recently enacted federal criminal statutes have been used rarely or not at all").

[25] Klein & Grobey, *Debunking*, *supra* note 5, at 5.

[26] *Id.* Klein and Grobey "focus[] primarily on analysis of federal caseload statistics and related data (including sentencing data, prison population data, and analysis of frequently used federal criminal statutes) to draw conclusions about how federal prosecutorial resources are actually being expended, regardless of the size of the code." *Id.*

relative ease of federal district judges handling fewer cases as compared to previous decades;
(5) The number of criminal cases filed in federal courts is but a fraction of the number of cases filed in state courts; further, criminal case filings in state courts are increasing at a higher rate than those in the federal courts;
(6) The ratio of federal criminal cases to federal civil cases has not increased significantly so as to burden federal district judges any more with handling criminal cases relative to civil cases than they had been burdened in the past.

In Part II, we address each of these empirically-based counter-arguments proffered by PF writers to rebut AF claims. For each of these arguments, we first summarize the empirical evidence cited by PF writers to support their argument, and then identify the conceptual and measurement problems implicated in the inferences that they draw from these data which they use to show that there is no over-federalization.

II. PRO-FEDERALIZATION COUNTER-ARGUMENTS TO AF CLAIMS

Contrary to AF claims that federal judges are overburdened with handling more criminal cases than they should be handling, PF writers cite statistics to show that the workload of federal court judges has not increased but decreased over time. These longitudinal statistics show changes over time in terms of the average number of cases filed, the complexity of the cases, number of trials handled, and other case variables.

As one PF writer concludes, "the federal criminal workload problem is not really as 'nightmarish' as some critics make it out to be."[27] Little explains: "Federalization workload concerns are founded on the idea that too many criminal cases can hinder the exercise of careful judgment and threaten a reduction in the quality of justice in the federal system."[28] Likewise, Stacy and Dayton acknowledge that handling "federal criminal cases, especially the ones involving routine street crime, detract from the federal courts' specialized role of handling complex litigation and deciding civil cases that involve nationally important issues of federal constitutional and statutory law."[29]

No PF writers deny the importance or legitimacy of safeguarding federal court resources to handle only appropriate cases (i.e. those

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[27] Little, *Myths and Principles*, *supra* note 1, at 1046.

[28] *Id.*

[29] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 312 (citations omitted).

involving a "legitimate federal interest").[30] But notwithstanding their validation of that concern, these PF writers conclude that, based on their examination of the empirical data, and contrary to the claims made by AF writers, there is no problem with the federalization of criminal law at this time.

A. Counter-argument #1: The Non-impact of the Increasing Number of Federal Criminal Statutes Enacted

An empirically-based argument that PF writers have used to counter the AF claim that federal judges are overburdened with handling criminal cases is that, despite the dramatic increase in the number of federal criminal statutes over the last several decades, federal judges are not more burdened today than in the past. This increase in federal crimes was a major concern of the members of the 1998 ABA Task Force on the Federalization of Criminal Law, who cited "a startling fact about the explosive growth of federal criminal law: *[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.*"[31]

Contrary to the over-federalization claimed by AF writers who highlight the increasing number of federal criminal laws enacted in recent decades, Klein and Grobey point out that "there is no causal connection (or even a correlation) between the number of federal criminal statutes and the annual number of federal criminal prosecutions."[32] Their data suggests that, "in spite of many new criminal proscriptions being added, federal prosecutors generally adopt a select few of these laws into their arsenals."[33] Nevertheless, the significance of this point was not lost on the Task Force members who also acknowledged this fact in their final report.[34] But they recognized that this statistic "may appear to cut in two different directions," possibly weakening their own AF position as well as supporting it.[35] Contrary to PF writers, the Task Force members interpreted that statistic as showing "the lack of actual gain [that federalization of criminal law] realistically can produce in combating crime,"[36] which in their view was cause for concern.

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[30] *See* Little, *Myths and Principles*, *supra* note 1, at 1046 (stating "it is important to recognize the legitimacy of the concern").

[31] A.B.A. REPORT, *supra* note 9, at 7. The task force report was published in 1998. Klein and Grobey additionally show that from 2000–2010, "[f]ewer than 50 major [federal criminal] statutes were enacted." Klein & Grobey, *Debunking*, *supra* note 5, at 14.

[32] Klein & Grobey, *Debunking*, *supra* note 5, at 17.

[33] *Id.* at 14.

[34] A.B.A. REPORT, *supra* note 9, at 2–3, 9, 24. *See also* Maroney, *Fifty Years of Federalization*, *supra* note 9, at 1333 (summarizing the findings and conclusions stated in the ABA Task Force Report).

[35] A.B.A. REPORT, *supra* note 9, at 36.

[36] *Id.* at 43.

Despite the fact that federal criminal prosecutions neither constituted a large percentage of all criminal filings in the United States nor increased with the dramatic increase in federal criminal statutes over the past few decades, the Task Force concluded that the AF concerns remained real and legitimate after examining "whether there are harmful effects from inappropriate federalization, even if such crimes are prosecuted in low numbers."[37] The Task Force members were cognizant of the double-edged nature of the empirical data, illustrating how the interpretation of empirical data is not always obvious or objective. This is our primary critique of the PF writers' empirically-based counter-arguments, which we reiterate below.

B. Counter-argument #2: The Decreasing Average Number of Criminal Cases Filed Per Federal District Judge

Another empirically-based argument that PF writers have used to counter the AF claim that federal judges are overburdened with criminal cases is that the average number of criminal cases filed per federal district judge has decreased, not increased, over time, thus easing the relative burden on federal judges. According to Little, "[o]ne measure of workload should be how many criminal cases each individual federal judge must handle on average."[38]

Citing federal district court statistics,[39] PF writers reject the AF claim that federal judges are overburdened with criminal cases: "As appealing as they might be, these arguments rest on incomplete and highly skewed presentations of the available empirical data."[40] Little points out that "[f]ederal criminal filings are in fact declining; they have been much higher in years past when analyzed on a per-judge basis."[41] Based on these statistics, "the per-judge workload of federal criminal cases was roughly 534 cases per judge in 1932, 115 in 1972, and only 73 in 1994."[42] During that sixty-year period, the average number of criminal cases handled by federal district judges dropped to almost one-sixth of what it used to be.

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[37] *Id.* at 24. The "harmful effects" examined by the Task Force concerned constitutional and public policy-related issues, which, as we said at the outset of this Article, we would not address, as this Article focuses on the PF writers' critique of the AF position based on empirical data. *Id.* at 24–43.

[38] Little, *Myths and Principles*, *supra* note 1, at 1040–41.

[39] It must be noted that the statistics cited by the PF writers are national-level, aggregated statistics, which seriously limit the precision of the inferences that can be drawn from such data, a point to which we will return below. *See infra* p. 11.

[40] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 312.

[41] Little, *Myths and Principles*, *supra* note 1, at 1039–40.

[42] *Id.* at 1041.

This decline in the average number of federal criminal case filings per judge resulted from, on one hand, a decrease in the number of criminal cases being filed, and, on the other hand, an increase in the number of federal court judgeships during the same time. Little notes that "the number of federal criminal cases filed today is far below equivalent filings of sixty years ago, yet today there are seven times as many federal judges."[43] Currently, there are over 670 federal district court judges authorized by Congress.[44] Little further notes that, "when one adds to the mix the additional 300-plus federal magistrates who have been authorized since 1976 to perform significant work in criminal cases, the claim of federal judicial overload caused by criminal cases appears even more debatable."[45] Since the publication of Little's article in 1995, the number of full-time magistrate judges has increased to over 534.[46]

Stacy and Dayton corroborate that "[n]either active-status senior district judges nor federal magistrate judges are counted in the Administrative Office [of the United States Courts] calculations of per judgeship caseloads, even though both categories of judges are responsible for the disposition of large numbers of criminal cases."[47] Because of that omission, AF writers' claims about unreasonable judicial workloads "would appear to be even more exaggerated."[48]

First, regarding this data, we do think it odd that the Administrative Office of the United States Courts would exclude magistrate and active-status senior judges when calculating the per-judge average for criminal case filings, which would definitely exaggerate the average number of criminal cases handled by each district judge. The averages calculated by Little and by Stacy and Dayton would indeed be higher than even what they themselves estimate. But if these more recent averages are actually lower, and perhaps substantially lower, than what federal judges handled in previous decades, then this raises the question of what today's federal judges are complaining about.

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[43] *Id.* at 1040. "Although the 1932 statistics included a large number of Prohibition cases," Little notes "that does not mean that federal judges [back then] could ignore those cases. *Id.* at 1041.

[44] *Introduction to the Federal Court System*, JUSTICE.GOV, https://www.justice.gov/usao/justice-101/federal-courts (last visited Sept. 6, 2017).

[45] Little, *Myths and Principles*, *supra* note 1, at 1041–42. Although Stacy and Dayton choose slightly different years in their examination of the statistics, their numbers basically corroborate Little's analysis. Stacy & Dayton, *Underfederalization*, *supra* note 4, at 313.

[46] *Appointments of Magistrate Judges – Judicial Business 2014*, ADMIN. OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/statistics-reports/appointments-magistrate-judges-judicial-business-2014 (last visited on Sept. 20, 2017).

[47] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 313 n.274.

[48] *Id.*

Over two decades ago, in 1995, Little acknowledged that "many federal judges say they have surpassed reasonable workload limits."[49] He quotes Judge Maryanne Barry, then-chair of the federal Judicial Conference's Criminal Law Committee, who opposed the 1994 federal Crime Bill for fear that its passage would "swamp the federal courts."[50] Little then cites survey data to support his contention: "Judge Barry's views appear to be quite representative of federal judges. For example, in a 1992 Federal Judiciary Center survey, 73% of all federal circuit judges and more than 57% of all federal district judges said that the volume of federal criminal cases was a 'large' or 'grave' problem."[51] Might there be something about the federalization of criminal law and the burden it is alleged to pose on federal court workload that is not revealed by the empirical data? The PF writers' findings present a puzzle: how do we reconcile the seeming plight of overworked federal judges with the declining average of criminal cases handled by federal courts? To presume that these federal judges are just being lazy or inefficient seems simplistic. Further empirical data is needed, and possibly qualitative data (e.g. interviews) to find out what is involved when federal judges handle criminal cases.

Second, PF writers estimate the average-per-district based on national-level, aggregated data, which seriously limits the inferences that can be drawn from these data. This statistic will necessarily obscure any variation in the cases-per-judge ratio within each of the ninety-four federal judicial districts. One cannot infer from a sample (i.e. national-level) that all subsets of that sample (i.e. districts) will reflect the same attributes of the larger sample, unless the subset is a truly randomized selection of the larger sample (which individual judicial districts are not). Their statistic will not hold true for many (and maybe even most) federal district courts: the actual case-per-judge ratio in many of these districts will exceed, with just as many districts falling below, that national-level average, precisely because it is an average. The bottom line is this: just because PF writers calculate that the federal court system as a whole does not seem to bear an inordinate burden of handling criminal cases in terms of a national average, it does not necessarily mean that individual federal districts may not be experiencing an inordinate burden from handling criminal cases because of over-federalization.

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[49] Little, *Myths* and *Principles*, *supra* note 1, at 1030.

[50] *Id.* at 1030 n.3 (citations omitted).

[51] *Id.*

C. Counter-argument #3: The Lighter Burden of Handling Fewer Cases Is Not Overcome by the Increasing Complexity of Federal Criminal Cases

The PF writers reject the AF claim that the complexity of federal criminal cases has increased sufficiently to overcome the relative ease of federal district judges handling fewer cases today than they did in the past. One measure of case complexity offered by AF writers is the number of defendants per criminal case.[52] According to Stacy and Dayton, to show that the complexity of federal criminal cases has increased, one prominent AF writer "has noted that the number of defendants prosecuted per case . . . has risen in recent years."[53]

While Stacy and Dayton do recognize that "an increase in complexity of federal criminal cases might compensate somewhat for the striking historical decrease in the numbers of filings per judge,"[54] based on their empirical analysis, they argue that "[c]laims of increased complexity . . . are at least exaggerated and quite probably wrong."[55] Likewise, Little, who also concedes that "criminal cases (both state and federal) are more procedurally complex today than in the 1930s," nevertheless raises the "legitimate[] question whether that increase in complexity overcomes the sevenfold decrease in the per-judge criminal caseload since 1932."[56] Stacy and Dayton point out that "in 1945, the number of defendants-per-case-filing was 1.6, and the fifty year average has been about 1.3. In this context, 1995's figure of 1.4 defendants prosecuted per case filing is hardly a deviation from historical norms, and its departure from the historical mean is not statistically significant."[57]

The first problem with Stacy and Dayton's claim is that, over a fifty-year period, variation from year-to-year is likely, yet Stacy and Dayton cite only 1995, which happens to be, in their view, close to the historical mean. We are left to rely on Stacy and Dayton's own conclusion, not only that "defendants prosecuted per case filing is hardly a deviation from historical norms,"[58] but also that 1995 is representative of most years, when in reality the rate of federalization may increase or decrease over time.

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[52] *See, e.g.*, Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 45 (1996) [hereinafter Beale, *Federalizing Crime*].

[53] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 314.

[54] *Id.*

[55] *Id.*

[56] Little, *Myths and Principles*, *supra* note 1, at 1041.

[57] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 314–15.

[58] *Id.*

Second, when Stacy and Dayton state that the deviation from the historical mean is not "statistically significant,"[59] they are not, as far as we can tell, making a statistical claim (e.g. the *p* value is below 0.05), but rather using statistical terminology to state their own conclusion: namely, the increase, in their opinion, is not that important. Stacy and Dayton explain that their method for determining "statistical significance" in this instance is "by averaging defendant- and trial-related statistics from the Administrative Office of the United States Courts Annual Report."[60] Although "statistical significance" is a term of art, and Stacy and Dayton are using that term in their analysis of descriptive statistics, they are not using that term in accordance with its proper nomenclature.[61] A 0.1 deviation from a historical mean may still be statistically significant, but it depends on various tests of statistical significance, not on the subjective judgment of the person interpreting the data.[62]

A different kind of puzzle or problem arises from the fact that Stacy and Dayton's statistic seems to directly contradict one prominent AF writer's claim that the complexity of federal criminal cases has increased, as measured by the number of defendants tried per criminal case.[63] How is it possible that, although federal criminal cases are becoming more complex, which even Stacy and Dayton and also Little concede, the complexity based on Stacy and Dayton's empirical analysis shows a decrease over fifty years from 1.6 defendants-per-case to 1.4 defendants-per-case? Although PF writers like Stacy and Dayton argue that AF writers have exaggerated the complexity issue, this analysis seems to show that federal criminal cases have actually become less complex over time.

Either both AF and PF writers are wrong to believe that criminal cases have become more complex, or else the statistic that Stacy and Dayton use is incorrect. The number of defendants per case, by itself, may be an invalid proxy for measuring case complexity. The length of a trial, which we discuss below, may be a better measurement of a case's complexity, rather than the number of defendants.

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[59] *Id.* at 315.

[60] *Id.* at 315 n.277.

[61] *Id.* at 314–15.

[62] A minor detail, but which will likely cause confusion, is that their graph (Figure 4) is labeled "Criminal Filings Per Judgeship," but what is ostensibly plotted on the graph is the total number of criminal cases filed over time. Stacy & Dayton, *Underfederalization*, *supra* note 4, at 314.

[63] *Id.* at 314 n.276 (citing Beale, *Federalizing Crime*, *supra* note 52, at 45).

D. Counter-argument #4: The Lighter Burden of Handling Fewer Cases Is Not Overcome by the Increased Duration of Federal Criminal Trials

PF writers are also skeptical that the increase in trial duration, an alternative measure of case complexity, has been sufficient to overcome the relative ease of federal judges handling fewer criminal cases today than they did in the past.

> In 1995, each federal judge, on average, conducted only seven criminal trials. This is the lowest number of almost any time in the last half-century and is roughly only one-third of the twenty criminal trials conducted per federal judgeship in 1945. That "the average length of a criminal jury trial has increased" matters little given the fact that each federal judge, on average, tries so many fewer criminal cases now.[64]

Although the PF writers acknowledge that the average length of criminal trials has increased, again, this statistic is meaningful only if we can compare it to something else. It would be helpful to know whether federal civil trials, as well as state criminal and civil trials, have also lengthened over the same period of time. The "Long Range Plan for the Federal Courts" adopted by the Federal Judicial Council in 1995, cited and critiqued by PF writers, states that "[s]ince 1970, the average length of a criminal jury trial has increased from 2.5 days to 4.4 days."[65] But that applies to only jury trials, which are extremely few.

But if we assume that bench trials, including all other criminal hearings that are not full-blown trials, are resolved more quickly, then the question arises: What are federal court judges doing in these criminal cases? If they are hearing a relatively small number of criminal cases each year (about a dozen), which Klein and Grobey attest to in their updated data, then again, what are these judges complaining about? It raises the question of how accurately these quantitative measurements are portraying the workload of the federal courts handling criminal cases.

E. Counter-argument #5: The Decreasing Number of Criminal Cases Filed Per Federal District Judge as Compared to State Court Judges

In addition to pointing out the decreasing number of criminal cases filed per federal district judge, PF writers also note that, relative to the criminal caseload of state court judges, "the federal courts handle only a small percentage—less than ten percent—of all criminal prosecutions in this country. The rest are in state courts."[66] Further, the increase in the sheer number of federal criminal cases (i.e. not the per-judge average) is slower than the increase in the sheer number of criminal cases filed in the

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[64] Stacy & Dayton, *Underfederalization*, *supra* note 4, at 315.

[65] JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 12 (1995), http://www.uscourts.gov/file/2826/download.

[66] Little, *Myths and Principles*, *supra* note 1, at 1031.

state courts. Klein and Grobey corroborate Little's findings in estimating, based on their data, that federal criminal cases comprise only 5% of all criminal cases in the United States.[67] Little concludes that "[f]ederal criminal filings are . . . simply dwarfed by the criminal case workload of state judges."[68]

> Not only is the average federal judge's criminal caseload down over the past sixty years, but the federal criminal caseload-per-judge is far lower than the same figure for state judges. Judge Schwarzer has noted this imbalance: he reports that in 1991 "criminal filings in the state courts were eighty-four times higher than those in federal district courts." Again, the argument that federal judges simply cannot handle more criminal cases is at least open to question in light of what state court judges are being asked to accomplish.[69]

Likewise, Stacy and Dayton, noting that these numbers "furnish[] one rough measure of the comparative shares of the national and state governments' efforts in combating crime,"[70] go on to "try to compare federal filings with state filings and compare trends over a longer period of time."[71] They find that, not only do federal courts handle fewer criminal cases on average compared to those handled by state courts, but also that the percentage of all criminal cases handled by federal courts has decreased over time.

> The data that permit a direct comparison of federal and state criminal case filings, although available only for 1984 and subsequent years, show a striking decline in the national share.[72] While federal felony filings increased by about 32% from 1984-94, felony filings in state courts increased by 64% for that period.[73] The share of the felony caseload borne by the federal courts declined from 2.15% to 1.78%.[74] The trend is slightly more pronounced if one compares the rates of growth in filings rather than the absolute numbers of filings. According to a comparative study by National Center for State Courts, the growth rate in felony filings in state courts was 70%—more than twice the growth rate in federal felony filings (33%).[75] In the ten years since 1984, which encompass much of the time period on which judges and academics rely to establish overfederalization, the data on criminal filings unequivocally show a declining national share.[76]

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67 Klein & Grobey, *Debunking*, *supra* note 5, at 7.

68 Little, *Myths and Principles*, *supra* note 1, at 1039–40.

69 *Id.* at 1042.

70 Stacy & Dayton, *Underfederalization*, *supra* note 4, at 252. *See also* Little, *Myths and Principles*, *supra* note 1, at 1038–47.

71 Stacy & Dayton, *Underfederalization*, *supra* note 4, at 253.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 254.

76 Stacy & Dayton, *Underfederalization*, *supra* note 4, at 253–54.

Based on the data Stacy and Dayton cite below, they conclude that "[c]riminal cases impose a much heavier burden on state judges than on federal judges."[77]

> According to the National Center for State Courts, the average criminal caseload for state judges in courts of general jurisdiction in 1990 was an extraordinary 406 criminal cases per judge, a caseload that was five times higher than the federal judiciary's in the same year. In 1994, the per-judge caseload in the state courts had increased to 417 criminal cases, while the federal per-judgeship caseload had dropped to 74. As the Center has noted, "[w]ith only 14 times as many judges as the federal judiciary, the state general jurisdiction judiciary handles 90 times as many criminal cases . . . ." Considering the far lighter and declining criminal caseloads of federal judges, the daunting caseloads already managed by state judges strongly suggest that federal courts are not doing their fair share and that crime has been underfederalized, not overfederalized.[78]

More recently Klein and Grobey cite data corroborating Stacy and Dayton and Little.

> An examination of recent state and federal felony caseloads (as opposed to the annual felony conviction figures discussed above) compels a similar conclusion. As Table 9-B reveals, in 2000, felony charges were commenced in state courts in approximately 2.2 million cases, while felony charges were commenced in federal court in just over 48,000 cases (representing 2% of all felony cases nationally). This trend held steady in 2009, when state court felony caseloads reached approximately 2.5 million, while federal court felony caseloads reached around 63,600 (2.5% of the total).[79]

First, whether using Little's estimate of "less than 10%" or Klein and Grobey's estimate of 5%, these numbers may sound like an extremely small share of all of the criminal cases filed each year in the United States, but those numbers are meaningless unless they can be compared to something else. Hypothetically, if we treat the federal courts as a single jurisdiction compared with fifty state court jurisdictions, then 5% exceeds the federal courts' straight numerical share of 2% (i.e. 1/50) of the total number of cases filed. Based on that crude comparison, the federal courts are handling 150% of their numerical share, and even more than that if their share is between 5% and 10%. Again, hypothetically, if we consider the federal courts as covering the same territorial jurisdiction as all of the fifty state jurisdictions combined, then 5–10% may be a very small portion of that total. But even based on that calculation, unless we can compare those statistics with at least historical ratios, those numbers by themselves tell us little about whether the federal courts are handling too

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[77] *Id.* at 316.

[78] *Id.*

[79] Klein & Grobey, *Debunking*, *supra* note 5, at 18.

many cases (or too few cases, as the PF writers argue) compared to the state courts. And unless we can specify a rationale for the comparison described above, a simple statistic by itself cannot provide much information. Whether 5% or 10% is a little or a lot depends on what those figures are compared to. Numbers do not interpret themselves.

Further, even if it were determined based on acceptable criteria for comparison that 5% of all criminal cases filed was indeed a very small portion for the federal courts to bear, AF writers are mainly concerned with whether any of those criminal cases that federal courts are handling ought to have been filed in state courts instead. Technically, if even one criminal case is heard by a federal court, which really should have been heard by a state court, then that is "improper federalization." Commentators who defend the AF position claim that such over-federalization has been around since the nineteenth century, long before the time for which PF writers collected their data.

Second, simply comparing the number of criminal cases handled by federal courts versus those handled by state courts also provides little information. We need to know to what extent federal criminal cases are comparable to state criminal cases. A relative decline both in numbers and percentage in federal criminal case filings cannot by itself show that criminal law is not over-federalized. Comparing what state courts do to what federal courts do is in many ways like comparing apples to oranges. We cannot logically conclude that, based on a simple count of the number of cases, no over-federalization problem exists. Over-federalization means that federal courts are handling cases that they ought not to handle. We must compare federal and state courts in terms of the specific charges brought, procedural norms, trial duration, and other factors.

Further, the fact that state courts handle eighty-four times as many criminal filings and ninety times as many criminal cases as federal courts boggles the mind! For such a wide disparity to be even conceivable, it seems likely that something must be missing from the PF writers' estimates. Based on that statistic alone, at least on a superficial analysis, federal and state criminal cases cannot possibly be comparable to one another.

Third, as stated with respect to a previous counter-argument, the numbers cited by Little and Klein and Grobey are based on national-level aggregated data, which obscure any variation across individual federal district courts. Just because PF writers conclude that federal courts as a whole do not seem to bear an inordinate burden of handling criminal cases based on their above estimates, that does not mean that individual federal districts may not be experiencing over-federalization (or under-federalization).

F. Counter-argument #6: The Ratio of Federal Criminal Trials to Federal Civil Trials Heard

Another empirically-based argument is that the ratio of federal criminal cases to federal civil cases has not increased significantly so as to burden federal district judges any more with handling criminal cases relative to civil cases than they had been burdened in the past. Little proffers this argument to counter the AF claim that "federal criminal trials . . . prevent[] federal judges in major metropolitan areas from scheduling civil trials."[80] In rebuttal, Little states that "no broad empirical data exists [sic] to support their claims."[81]

Individualistic anecdotal reports are generally the only support offered for the dire predictions of civil trial preclusion. There is substantial reason to believe that these claims are exaggerated and far from the norm in most federal districts. Before acting to close the federal courts to criminal cases based on open forum concerns, some broader and more scientific statistical work needs to be done.[82]

We heartily endorse Little's call for further statistical data collection and analysis. Little cites "the most recent Administrative Office report on *The Criminal Caseload* indicat[ing] that civil trials still occupy the majority of the trial time of all federal courts."[83] He then explains how the Administrative Office of Courts further over-counts criminal "trial[s]," which are defined as "any contested proceeding in which evidence is introduced"; thus, all evidentiary "hearings on contested motions are reported as trials,"[84] even if they are not full-blown trials.

> The present statistical comparison of "trials" in the civil and criminal contexts is thus misleading: it compares apples (civil cases that use a nonevidentiary pretrial disposition mechanism) with oranges (criminal cases that use contested pretrial hearings) and then calls only the latter "fruit."[85]

Based on this information, Little explains that "[t]he actual figure for true criminal trials is almost certainly far lower than is currently reported,"[86] which thereby increases the percentage of civil cases. He further points out that:

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[80] Little, *Myths and Principles*, *supra* note 1, at 1034 n.17 (quoting Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 686 (1992)).

[81] *Id.* at 1048.

[82] *Id.*

[83] *Id.* (citing ADMIN. OFFICE OF THE U.S. COURTS, THE CRIMINAL CASELOAD: THE NATURE OF CHANGE 12 (1995)).

[84] *Id.* (internal quotation marks omitted) (quoting JERROLD M. LADAR, NORTHERN DISTRICT OF CALIFORNIA STATISTICAL SUMMARY: TRIALS, CIVIL CASES, CRIMINAL CASES (FOR THE 12-MONTH PERIOD ENDING JUNE 30, 1994) 2, 8–9 (1994)).

[85] Little, *Myths and Principles*, *supra* note 1, at 1049.

[86] *Id.*

> Even if all criminal "trials" reported were actual trials, it remains the fact that more than fifty percent of the federal trial docket is devoted to civil trials. This hardly supports the claim that federal judges are not available to try civil cases because criminal cases are overwhelming them. Of course, sometimes a particular judge becomes mired in an unusually long trial that precludes almost all other matters. However, such cases are aberrational and individual, not district-wide. Moreover, such cases can also arise in civil trials, as well as in state cases. Therefore, it is a flaw of our legal system in general, not somehow specific to federal criminal legislation.[87]

Little also points out that no "federal district where the criminal dockets are abnormally large ever suspended all civil trials because of criminal caseload emergencies."[88] He further notes that "the Administrative Office reports that in [only] three districts (out of 94) in 1992, more than 80% of the trials conducted were criminal."[89]

The first problem with the PF writers' use of these statistics is that "the majority" or "more than fifty percent" or "80%" are arbitrary thresholds for determining an imbalance between the number of federal criminal cases and the number of civil cases. Why should those particular ratios serve to indicate whether there was a proper balance between the number of federal criminal and civil cases filed? Further, if Little is looking for instances where a federal court has "suspended all civil trials because of criminal caseload emergencies" as an alternative indication, that standard seems unreasonably high for determining whether a court may be hearing too many criminal cases.

Second, simply counting the number of criminal "trials," which need not be full-blown trials, relative to the number of civil trials, ignores differences in the duration of criminal versus civil trials. Not just the number of cases that a court hears should be considered, but also what types of legal issues those cases involve. Those data would also serve as a valuable indicator of a case's complexity relative to other cases.

Finally, although Little and other PF writers take AF writers to task for often relying on anecdotal evidence, Little himself relies on anecdotal evidence to support his position. While he concedes that "one swallow does not a summer make, and one day's experience cannot be generalized into a broad empirical statement," he still proceeds to draw generalizations based on his random observation of the number of civil and criminal trials that occurred on June 24, 1995, which he claims "appears to be accurate for the Northern District of California as a general matter."[90] He cites the 1993–1994 statistical report for that district as stating that "there is no

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87 *Id.* at 1049–50.

88 *Id.* at 1050.

89 *Id.* at 1050 n.98.

90 *Id.* at 1052.

empirical evidence that the present criminal caseload poses a problem for the civil docket."[91] He at least mentions in a footnote that "[o]ther districts, with abnormal criminal filings, have reported to the contrary."[92] At a minimum his concession raises the possibility that some federal district courts may experience what AF writers would describe as over-federalization, even if "no broad empirical data exists to support their claims."[93] Whether defending the AF or PF position in this debate, conjecture is no substitute for empirical evidence of either side's claims.

CONCLUSION

A. Pro-federalization Writers' Conclusions

The PF writers generally concur that the dominant AF position lacks empirical support. Stacy and Dayton conclude that the long-standing AF position "is not just misleading; it is essentially false."[94]

> The various statistical measures discussed above undermine a central empirical premise of the overfederalization position. The statistics furnish no support whatsoever for the claim that the national government's crime fighting role has grown, much less that the growth has been rapid and unrestrained. Taken together, these measures in fact compellingly demonstrate the opposite conclusion that the national government's crime fighting share has been declining for over sixty years. This decline strongly suggests that crime has been underfederalized, not overfederalized.[95]

Stacy and Dayton argue that, "[f]ar from justifying a shift of criminal cases from federal to state courts, the available data point the other way, suggesting that the federal criminal caseload could stand to be increased."[96] More recently, Klein and Grobey in 2012 concur with Stacy and Dayton's conclusion, and reiterate their empirical findings:

> [I]n spite of the large increase in the number of federal criminal statutes, this growth itself has caused almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts. The percentage of criminal justice matters heard in federal court, when viewed as a fraction of all criminal matters prosecuted at both the state and federal level, has remained relatively constant from year to year, in spite of numerous new criminal

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91 *Id.*

92 *Id.* at 1052 n.111 (citations omitted). *See* United States v. Mosquera, 813 F. Supp. 962, 965 (E.D.N.Y. 1993) (noting, in that district, "criminal filings have increased at a rate far greater than the national average" and reporting that an "[a]dvisory group has determined that the criminal docket is the principal cause of unnecessary delay and expense in the civil justice system within the Eastern District"). Little, *Myths and Principles*, *supra* note 1, at 1052 n.111.

93 Little, *Myths and Principles*, *supra* note 1, at 1048.

94 Stacy & Dayton, *Underfederalization*, *supra* note 4, at 252.

95 *Id.* at 260.

96 *Id.* at 316.

enactments at the federal level. Moreover, the types of cases that make up the bulk of the federal caseload are generally appropriate for federal intervention, as they reflect a careful consideration of federal interests. Finally, the federal law enforcement system continues to defer to states in areas of strictly local concern, such as violent crime and property crime.

B. Conceptual and Measurement Problems with Pro-federalization Conclusions

Our critiques of the PF writers' empirically-based counter-arguments can be divided into one of three categories: comparison issues, proxy (or measurement) issues, and aggregation issues.

One key issue of which both sides of this debate ought to be cognizant is to make sure that things are compared to other like things: arguably, comparing federal and state court cases—without knowing more about their respective features than what PF writers recount—is like comparing apples to oranges. To more accurately weigh the relative caseloads of federal and state courts, we need better measures of their respective complexity, length, functions, procedures, and charges filed against defendants. Just because one court system handles roughly on average more cases than another court system, does not, by itself, demonstrate that one system has a heavier caseload than the other.

Second, the conclusions drawn by PF writers based on the data they cite are limited by the gap between the concept of workload and the measures that can be extracted from court records (e.g. number of cases filed; ratios of cases to the number of judges; number of defendants). Each of these variables is a rough proxy for the more complex concept of workload, which is really what both sides in the debate are trying to get at. Better measures of court workload and case complexity (e.g. case duration) are needed to even determine how the current caseloads of federal district judges compare to their caseloads in the past.

Finally, a major point we have made with respect to some of the critiques discussed earlier, PF writers primarily draw on national-level aggregate data, which necessarily obscure any variation across individual federal districts. Even if the federal court system as a whole does not seem to be over-burdened with handling criminal cases, it would be wrong to conclude that, therefore, no individual federal court district is experiencing either over- or under-federalization. Only by examining data in individual federal district courts over time would we be able to assess more accurately each district's rate of federalization, which may (and is likely to) vary greatly across districts.

C. Possible Biases of the Writers

Given that some of the statistical data cited by the PF writers regarding the caseloads of federal versus state courts is so compelling, even overwhelming, it raises the question of how those data could seem to have been ignored by AF writers. Were AF writers simply ignorant of these data, or might they have been biased with an AF axe to grind? Or was their conclusion based on other factors besides the empirical data, much of which seem to fly in the face of AF claims? In light of the PF writers' empirical analyses, Little raises a fair question about the possible motivations behind the AF position: "[S]heer numbers of criminal cases do not appear to be a primary cause of perceived federal workload pressures. Based on the available empirical information, one may legitimately question whether some other concern actually drives the federalization critique."[97]

But, then, what about the near-unanimity among those federal judges and justices, all the way up to the former Chief Justice of the United States, William Rehnquist, who have publicly complained and denounced their being overburdened with criminal cases?[98] If the data the PF writers marshal to show that federal judges have nothing to complain about, compared to the relative workload of their state judge counterparts, are valid and sound, then are these federal judges just lazy or inefficient? Regardless, we should not be quick to assume that the AF writers or judges are either of those.

But for those who are open to attributing bias to AF writers, one should recognize the inescapable possibility that proponents on both sides of the federalization debate may each have his or her own bias, but in opposite directions. Stacy and Dayton do not think there is a problem with over-federalization, and argue in favor of more federalization, precisely because they do not think there is a problem with federalization. One might wonder, though, at what point would Stacy and Dayton think such a move might eventually reach a state of over-federalization? Likewise, when would AF writers think criminal law was no longer over-federalized? It would appear that, if either side in the debate suspected that federal courts handled even one case too many or too few, then each side would say, respectively, that there was either over-federalization or under-federalization. Each side's normative commitment to either limiting or expanding (for whatever reasons) federal power may be driving its interpretation of the empirical data. Indeed, none of us can escape the influence of our biases; rather, we can only do our best to be aware of them, and strive for what we might call a self-conscious objectivity.

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[97] Little, *Myths and Principles*, *supra* note 1, at 1046.

[98] *See id.* at 1030 n.3 (noting how one federal judge's published AF views "appear to be quite representative of federal judges").

D. Numbers Need Interpretation

When we began writing this Article, we had originally sided with the PF position on the assumption that their empirically-based counter-arguments had, up to now, simply been neglected by AF writers over the decades. But when we saw that AF writers themselves had cited empirical data to support their position, even looking at some of the same data that PF writers cited, it occurred to us that possibly the AF writers had chosen their position, not out of ignorance of these data, but after serious consideration of the data; nevertheless, they reached the opposite conclusion in the debate.

Our critique of the PF writers does not necessarily mean we intend to lend support to the conventional AF position, which we recognize has, for the most part, been based not on empirical data but on constitutional and public-policy arguments about the proper balance between federal and state power. We chose not to address those constitutional or policy-related arguments. Instead, because most PF writers based part of their arguments on empirical data, we sought to question their inferences from and conclusions based on those data.

The interpretation of the empirical case data, as they relate to the debate over criminal federalization, is not as clear cut as PF writers have claimed or portrayed it to be. We argue that, based on empirical evidence alone, the jury is still out on whether criminal law is over- or under-federalized. We certainly need more data (e.g. to compare rates of federalization among individual federal district courts, and to compare the relative workload of state versus federal courts). But perhaps even more importantly, we also need proper analysis of those data. If we do not keep in mind that aggregated data at the national level do not necessarily represent the distributions within individual districts, we may draw the dubious inference that under-federalization based on national level statistics represents under-federalization within all districts. Numbers do not speak for themselves; they also require proper interpretation. In the end, the debate may not be so much about *what* the data seem to show, but about *how to interpret the meaning* of what the data seem to show.

JUSTICE SCALIA ON FEDERALISM AND SEPARATION OF POWERS

2016 National Lawyers Convention*

Judge Pryor: Good afternoon. This Panel will discuss Justice Scalia on federalism and separation of powers. Now, Justice Scalia's views on this subject were fairly well known. In 2008, he authored a foreword to a symposium on the separation of powers as a safeguard of federalism in the Notre Dame Law Review.[1] His Foreword, entitled *The Importance of Structure in Constitutional Interpretation*, left no doubt what Justice Scalia's view on the subject was.[2] I'd like to read a couple of paragraphs of what Justice Scalia said in that foreword.

> In the days when I taught constitutional law, the University of Chicago Law School had two constitutional courses. One was entitled Individual Rights and Liberties and focused primarily upon the guarantees of the Bill of Rights. The other (I forget the title of it) focused upon the structural provisions of the Constitution, principally the separation of powers and federalism. That was the course I taught—and I used to refer to it as *real* constitutional law. The distinctive function of a constitution, after all, is to constitute the political organs, the governing structure of a state. Many of the personal protections against the state taught in constitutional law courses here—restrictions upon unlawful searches and seizures, for example—used to be taught in Europe as part of administrative law. They were, to be sure, made part of our Constitution (though most of them as an appendage to the original document). And that was no doubt desired. But it is a mistake to think that the Bill of Rights is the defining, or even the most important, feature of American democracy. Virtually all the countries of the world today have bills of rights. You would not feel your freedom secure in most of them . . . .

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* This Panel was held on November 17, 2016, during the 2016 National Lawyers Convention in Washington, D.C. The panelists included: Professor John S. Baker, Jr., Professor Emeritus at Louisiana State University Law School and a Visiting Professor at Georgetown University Law Center; the Honorable Ron DeSantis, U.S. House of Representatives, Florida 6th District; Mr. Roger Pilon, Vice President, Legal Affairs, Cato Institute; the Honorable Luther Strange III, Attorney General, Alabama; Professor Jonathan Turley, The George Washington University Law School; moderated by the Honorable William H. Pryor Jr., U.S. Court of Appeals for the Eleventh Circuit.

For an audio and video recording of the complete panel, please visit the Federalist Society's website. Justice Scalia on Federalism and Separation of Powers, Federalist Soc'y (Nov. 23, 2016), https://fedsoc.org/commentary/videos/justice-scalia-on-federalism-and-separation-of-powers-audio-video.

[1] Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1417 (2008) [hereinafter *The Importance of Structure*].

[2] *Id.*

Consider, for example, the following sterling provisions of a modern bill of rights:

> Every citizen . . . has the right to submit proposals to state bodies and public organizations for improving their activity and to criticize shortcomings in their work . . . Persecution for criticism is prohibited. Persons guilty of such persecution shall be called to account.
>
> [C]itizens . . . are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets, and squares at the disposal of the . . . people and their organizations, by broad dissemination of information, and by the opportunity to use the press, television, and radio.
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> . . . .
>
> Citizens . . . are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship, or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.[3]

Justice Scalia wrote:

> Wonderful stuff. These were provisions of the 1977 Constitution of the Union of Soviet Socialist Republics. They were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-life. They are what the Framers of our Constitution called "parchment guarantees," because the *real* constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything.[4]

Justice Scalia often said that while he always tried to get the Bill of Rights cases correct, he cared most about the constitutional structure cases.[5] He occasionally taught a course called "Separation of Powers."[6] His

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[3] *Id.* at 1417–18 (quoting KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] arts. 49–50, 52).

[4] *Id.* at 1418.

[5] *Nomination of Judge Antonin Scalia: Hearings Before the Comm. on the Judiciary*, 99th Cong. 32 (1986) (statement of Hon. Antonin Scalia, U.S. Court of Appeals for the District of Columbia Circuit).

[6] *See* Rosalie Berger Levinson, *Remembrances of Justice Scalia and Reflections on His Jurisprudence*, 50 VAL. U. L. REV. 619, 619 (2016) (discussing the author's memory of a Separation of Powers class she taught with Justice Scalia); Neil Siegel, *Is Judge Gorsuch an Originalist, or Is He (Like Justice Scalia) a Living Constitutionalist?*, AM. CONST. SOC'Y FOR L. AND POL'Y (Mar. 22, 2017), https://www.acslaw.org/acsblog/is-judge-gorsuch-an-originalist-or-is-he-like-justice-scalia-a-living-constitutionalist (discussing the author's memory of service as Justice Scalia's assistant in teaching a Separation of Powers class).

opinions on the structural issues of separation of powers and federalism often cited *The Federalist Papers*.[7] He routinely urged law students and lawyers to read the whole of *The Federalist*.[8] This Panel looks at Justice Scalia's federalist focus on the importance of separation of powers and federalism as structural protections of liberty. And, as usual, the Federalist Society has assembled a terrific panel to discuss these issues. I will introduce each of the panelists in the order in which they will speak. They will each speak about eight minutes, will then have some responses to each other, and then we'll begin entertaining questions from the floor.

Our first speaker, very fittingly, is Professor John Baker. Dr. Baker has been a visiting professor at Georgetown Law School and is a visiting professor at Peking University School of Transnational Law.[9] He is Professor Emeritus of Law at the Louisiana State University Law School.[10] He has also taught at a number of other law schools, I should note, including Tulane.[11] Professor Baker received his J.D. with honors at the University of Michigan Law School and his Bachelor of Arts Magna Cum Laude from the University of Dallas.[12] He also earned a Ph.D. from the University of London.[13] For several years, Professor Baker taught the course for the Federalist Society on separation of powers with the late Justice Scalia.[14]

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[7] *E.g.*, Printz v. United States, 521 U.S. 898, 913–14 (1997) (showing Scalia citing THE FEDERALIST NOS. 27, 36 (Alexander Hamilton), NO. 44 (James Madison)); Tafflin v. Levitt, 493 U.S. 455, 470 (1990) (Scalia, J., concurring) (showing Scalia citing THE FEDERALIST NO. 82 (Alexander Hamilton)); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (showing Scalia citing THE FEDERALIST NO. 47 (James Madison)); *see also* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 297 (2005) (stating that "Scalia cited *The Federalist* in twenty-two opinions").

[8] Antonin Scalia, *Q&A with Justice Antonin Scalia*, https://www.c-span.org/video/?307035-1/justice-antonin-scalia-19362016, 9:11–10:05 (C-SPAN television broadcast July 19, 2012) (expressing disapproval of students leaving school without having "read The Federalist Papers"); Antonin Scalia, *Constitutional Role of Judges*, https://www.c-span.org/video/?301909-1/constitutional-role-judges, 18:00–19:00 (C-SPAN 3 television broadcast Oct. 5, 2011) [hereinafter *Constitutional Role of Judges*] (expressing his disappointment that only around five percent of law students he has asked have "read the Federalist Papers cover to cover").

[9] *Visiting Faculty*, PEKING U. SCH. OF TRANSNAT'L L., http://stl.pku.edu.cn/faculty/visiting-faculty/ (last visited Aug. 20, 2017).

[10] *Id.*

[11] *Id.*

[12] *John S. Baker Biography*, LSU L., https://www.law.lsu.edu/directory/profiles/john-baker/ (last visited Aug. 20, 2017).

[13] *Id.*

[14] *Id.*

Our second speaker is Professor Jonathan Turley. It's going to be Tulane day. Professor Turley is a nationally recognized legal scholar, who has written extensively on a variety of subjects.[15] He began his teaching career at Tulane Law School and then joined the George Washington University faculty in 1990, and in 1998, became the youngest chaired professor in the school's history.[16] In addition to his teaching career, Professor Turley is the Founder and Executive Director of the Project for Older Prisoners.[17] He has written more than three dozen academic articles that have appeared in a number of leading law journals, including those of Cornell, Duke, Georgetown, Harvard, and Northwestern, among others.[18] Most recently, he completed a three-part study of the historical and constitutional evolution of the military system.[19] Because of his background, he has served as a consultant to Homeland Security on constitutional issues and is a frequent witness before the House and Senate.[20] Professor Turley received his undergraduate degree from the University of Chicago and his law degree from Northwestern University, and his first job out of law school was a law clerk on the United States Court of Appeals for the Fifth Circuit, where yours truly was clerking for a judge that year as well.[21] So we go way back.

Our next speaker is Luther Strange. He is the Attorney General of Alabama, a high post in government.[22] Before his election, General Strange practiced law in Birmingham, Alabama, and, before establishing his own law firm, was a partner with Bradley Arant Boult Cummings.[23] He is the Chairman of the Republican Attorneys General Association.[24] He also served as the court-appointed coordinating counsel for the Gulf

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[15] *Jonathan Turley Biography*, GW L., https://www.law.gwu.edu/jonathan-turley (last visited Aug. 20, 2017).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Aff. #1 of Jonathan Turley, 5–6, Oct. 20, 2010, No. S-097767, https://jonathanturley.files.WordPress.com/2010/11/turley-affidavit.pdf (showing that Professor Turley clerked in the Fifth Circuit from 1987 to 1988); *Hon. William H. Pryor Jr.*, U.S. CT. OF APPEALS FOR THE ELEVENTH CIR., http://www.ca11.uscourts.gov/judges/hon-william-h-pryor-jr (last visited Aug. 29, 2017) (showing that Judge Pryor clerked in the Fifth Circuit from 1987 to 1988).

[22] *Meet Luther*, ATT'Y GEN. LUTHER STRANGE, http://www.lutherstrange.com/meet-luther/ (last visited Aug. 20, 2017).

[23] *Id.*

[24] *Attorney General Luther Strange Becomes New Chairman of Republican Attorneys General Association*, ST. OF ALA. (Nov. 14, 2016), http://ago.state.al.us/news/944.pdf.

Coast States in the historic *Deepwater Horizon Oil Spill* litigation.[25] General Strange is well educated. He received both his undergraduate and law degrees from Tulane.[26] He was a scholarship basketball player while earning his undergraduate degree at Tulane.[27] In June of this year, he was inducted into the Tulane Law School Hall of Fame.[28]

We will then hear from Roger Pilon. He is the founding Director of Cato's Center for Constitutional Studies.[29] He is also the founding publisher of the *Cato Supreme Court Review* and the inaugural holder of Cato's B. Kenneth Simon Chair in Constitutional Studies.[30] Before joining Cato, Roger held several senior posts in the Reagan Administration, including at State and Justice, and was a national fellow at Stanford's Hoover Institution.[31] Roger holds a B.A. from Columbia University, an M.A. and Ph.D. from the University of Chicago, and a J.D. from the George Washington University School of Law.[32]

And, finally, we will hear from Congressman Ron DeSantis. Since being elected to the United States House in 2012, Congressman DeSantis of Florida has served on the Judiciary, Foreign Affairs, and Oversight and Government Reform committees.[33] He is the Chairman of the Oversight Committee's subcommittee on National Security and the Vice Chairman of the Judiciary Committee's subcommittee on the Constitution and Civil Justice.[34] He earned a Bachelor of Arts Magna Cum Laude and was the captain of the varsity baseball team at Yale, continuing the athletic theme.[35] He also graduated with honors from Harvard Law School.[36] While at Harvard, he earned a commission in the United States Navy as

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[25] *Alabama Attorney General Luther Strange Honored by Tulane Law School: Inducted into Tulane Law School Hall of Fame*, ST. OF ALA. (June 3, 2016), http://ago.state.al.us/news/847.pdf.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Roger Pilon: Vice President for Legal Affairs*, CATO INST., https://www.cato.org/people/roger-pilon (last visited Aug. 25, 2017).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *List of Standing Committees and Select Committee and Their Subcommittees of the House of Representative of the United States: One Hundred Fifteenth Congress*, U.S. HOUSE OF REPRESENTATIVES 21, 26, 30 (Aug. 1, 2017), http://clerk.house.gov/committee_info/scsoal.pdf.

[34] *Id.* at 26, 31.

[35] *Ron DeSantis: Full Biography*, U.S. HOUSE OF REPRESENTATIVES, https://desantis.house.gov/full-biography (last visited Aug. 25, 2017).

[36] *Id.*

a JAG Officer.[37] During his active duty Navy service, he served as a Military Prosecutor, supported operations at the Terrorist Detention Center in Guantanamo Bay, Cuba, and deployed to Iraq during the 2007 troop surge as an advisor to a United States Navy SEAL Commander in support of counterinsurgency operations in Iraq.[38] He has also performed duties as a Federal Prosecutor, taught courses on military law, and written on constitutional issues.[39] He's currently a Lieutenant Commander in the United States Navy Reserve.[40] Thank you for your service.

We will begin with Professor Baker.

Professor Baker: Thank you, Judge. During this convention, you will hear a number of references to Justice Scalia's lone dissent in the 1988 decision in the Independent Counsel case, *Morrison v. Olson*.[41] That dissent went from being largely dismissed to being universally celebrated.[42] Ed Whelan, in a piece in the *National Review* online last month in September, chronicled the movement of Linda Greenhouse to a conversion.[43] Ms. Greenhouse now describes Justice Scalia's dissent as "prescient"[44]—which means "apparent knowledge of things before they happen or come into being."[45] Similarly, liberal columnist Richard Reeves praised Justice Scalia for his foresight by dissenting in *Morrison*, back when Independent Counsel Ken Starr was investigating President

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[37] *Id.*

[38] *Id.*

[39] *Representative Ron DeSantis*, FIN. SERVS. INST., http://www.financialservices.org/uploadedFiles/FSI_Content/Events/Ron-DeSantis.pdf (last visited Aug. 25, 2017).

[40] *Id.*

[41] 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[42] *See* Terry Eastland, *Scalia's Finest Opinion: A Look Back at His Influential Dissent on the Independent Counsel Law*, WKLY. STANDARD (Mar. 21, 2016), http://www.weeklyStandard.com/scalias-finest-opinion/article/2001510 (explaining the shift in political support away from the independent counsel law and toward the stance taken by Scalia).

[43] Ed Whelan, *Greenhouse's Reversal of Judgment*, NAT'L REV. (Sept. 12, 2016, 1:37 PM), http://www.NATIONALREVIEW.com/bench-memos/439958/greenhouse-morrison-olson.

[44] Linda Greenhouse, *Reversal of Fortune for Bill Clinton and Kenneth Starr*, N.Y. TIMES (Sept. 1, 2016), https://www.NYTimes.com/2016/09/01/opinion/the-president-the-prosecutor-and-the-wheel-of-fortune.html.

[45] *Prescience*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1135–36 (4th ed. 1999) ("apparent knowledge of things before they happen or come into being").

Clinton.[46] I think there was a connection there: Starr's investigation seemed to cause some rethinking among liberals.

For the most part, however, liberal commentators have not praised Justice Scalia's opinions.[47] Most often, detractors have used the word "uncompromising" in a negative way to describe the Justice.[48] Of course, admirers, as you heard from Justice Alito this morning, use the word "uncompromising" in a very praiseworthy sense when talking about Justice Scalia.[49] What the usual detractors do not understand is that Justice Scalia was able to be prescient, farsighted, and prophetic, precisely because he was uncompromising in looking backwards.

Now, of course, virtually everyone knows that Justice Scalia looked back to the public meaning of the words of the Constitution as understood at the time they were drafted.[50] Also, most here in this convention will know that Justice Scalia's originalism was tied to constitutional structure, as Judge Pryor just talked about. But how many of you, even here, realize that his understanding of structure came largely from *The Federalist Papers*?[51] That's what I want to discuss, and I'll make three points: first, the importance Justice Scalia placed on *The Federalist Papers*; second, how Justice Scalia's understanding of the constitutional structure, primarily separation of powers, as explained in *The Federalist*, undergirds

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[46] Richard Reeves, *Let Us Praise Scalia and Condemn Starr*, BUFF. NEWS (Aug. 14, 1998), http://BUFFALONEWS.com/1998/08/14/let-us-praise-scalia-and-condemn-starr/.

[47] *See* Dhalia Lithwick, *Why Liberals Loved to Hate Antonin Scalia*, SLATE (Feb. 14, 2016, 11:00 AM), http://www.Slate.com/articles/news_and_politics/jurisprudence/2016/02/why_liberals_loved_to_hate_antonin_scalia.html (criticizing Scalia's opinions, including Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting)); Michael Tomasky, *That Antonin Scalia Dissent was Really Dumb*, DAILY BEAST (July 25, 2015, 5:25 AM), http://www.theDAILYBEAST.com/that-antonin-scalia-dissent-was-really-dumb (criticizing Scalia's opinion in King v. Burwell, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting)).

[48] *See, e.g.*, David G. Savage, *Scalia's Uncompromising Style at Times Limited His Impact on the Supreme Court*, L.A. TIMES (Feb. 20, 2016, 6:00 AM), http://www.LATimes.com/nation/la-na-scalia-legacy-20160220-story.html (criticizing Scalia's uncompromising positions as impeding his ability to make more influential majority opinions).

[49] Kevin Daley, *Justice Alito Calls the Late Scalia "Uncompromising,"* DAILY CALLER (Nov. 17, 2016, 11:57 AM), http://DAILYCALLER.com/2016/11/17/justice-alito-remembers-scalia-he-was-uncompromising/.

[50] Antonin Scalia, *Common-Law Courts in a Civil System: Federal Courts and the Law*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

[51] *See* Morrison v. Olson, 487 U.S. 654, 697 (1988) (citing THE FEDERALIST NO. 47 (James Madison)) (supporting his view of separation of powers); Scalia, *Constitutional Role of Judges*, *supra* note 8 (citing THE FEDERALIST generally in support of the idea that the Constitution was designed to prevent the legislature from excessively legislating).

his approach to the text of the Constitution; and third, time permitting, I'll mention something about federalism.

First, on the importance of *The Federalist*, as you've already heard,[52] Justice Scalia routinely asked students and lawyers in meetings or groupings, "Have you read *The Federalist*?" and then some hands would go up, and he would say, "No, I mean the whole *Federalist*!" and most of the hands would go down. His materials in the course that we taught together and that he also taught every summer on separation of powers always began with *The Federalist Nos. 47* and *48*. Those are the main ones on separation of powers, although separation of powers runs throughout the essays of *The Federalist*.[53] Usually after we got done with that, then he would go into an explanation and condemnation of the Progressives' attack on separation of powers. For example, he would deride a reference by Justice Cardozo to separation of powers as, "[a] fetich."[54] The last time we taught together, he made a sustained argument—one might say diatribe—against Woodrow Wilson who had dismissed separation of powers as being terribly outmoded.[55]

Early on in our relationship, I asked him when it was that he came to pay attention to *The Federalist*. He said it was when he headed the Justice Department's Office of Legal Counsel.[56] As he said, there was often no case law on some of the important issues he was dealing with during the Ford Administration.[57] Where would he turn? Well, like the Founders, the first generation, and the Marshall Court, Scalia turned to the text of the Constitution. In many ways, however, the text is like a building plan; it doesn't always explain exactly how things fit together. In reading certain texts, it may not always be obvious how they relate when they

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[52] *See* sources cited *supra* note 8.

[53] THE FEDERALIST NOS. 47–48 (James Madison); *see, e.g.*, THE FEDERALIST NO. 51, at 256 (James Madison) (Lawrence Goldman ed., 2008) (describing the importance of the separation of powers principle); THE FEDERALIST NO. 69, at 337 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (describing the powers of the executive); THE FEDERALIST NO. 78, at 379–80 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the importance of an independent judicial branch).

[54] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148–49 (1922).

[55] WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 54–57 (Columbia paperback ed. 1961).

[56] *Biographies of the Robes: Antonin Gregory Scalia*, PBS, http://www.pbs.org/wnet/supremecourt/future/robes_scalia.html (last visited Aug. 31, 2017).

[57] *See* Morrison v. Olson, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (showing influence of THE FEDERALIST on Scalia's view of executive power); *Nomination of Judge Antonin Scalia: Hearings Before the Comm. on the Judiciary*, 99th Cong. 77 (1986) (statement of Hon. Antonin Scalia, U.S. Court of Appeals for the District of Columbia Circuit) (explaining that during his time as the head of the Office of Legal Counsel, there was no case law concerning executive privilege).

could be viewed as fitting together in different ways. Understanding a text often requires relating it to the context. To understand the Justice's originalism and his textualism, one must realize it stands against the background of separation of powers as explained in *The Federalist*.

Justice Scalia would shred the understanding of *Marbury* as presented by some law professors. Such professors have taught over the years that judicial review is the great invention of Chief Justice Marshall in the course of figuring out very cleverly how to get around President Jefferson.[58] As Lee Otis has written about her class with then-Professor Scalia, he would explain how reading the text of the Constitution, which is declared to be the supreme law, requires judges to ignore laws that contravene the Constitution. Now, this explanation can give textualists some problems because there's nothing in the text that directly mentions judicial review or clearly enough suggests that this might be among the Courts' powers. Scalia's textualism involves putting together the pertinent parts of the Constitution, which regarding judicial review means looking at the supremacy clause[59] and the Court's jurisdiction.[60] Thus, judicial review does derive directly from the text. In our seminars, the Justice would make it even simpler. He would just say, "Marshall plagiarized *No. 78* of *The Federalist*."

In fact, you can take most of the landmark opinions of the Marshall Court, and see that even though they did not cite *The Federalist*, the opinions largely reflect *The Federalist* explanation of the Constitution. This question of whether judicial review is or isn't in the text as explained in *The Federalist* has to do with the legitimacy and limits of judging. Think about it. There are many conservatives who dispute that judicial review is legitimate. And if you believe that judicial review is not legitimate, then the choice you appear to have is between judges either being slightly illegitimate and restrained or being fully illegitimate and unrestrained.[61] You know, it's kind of like being pregnant; it is difficult to restrain from going from partially to fully pregnant. If, however, you understand separation of powers as the Justice did, then there are times when you are

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[58] *See* Glenn Harlan Reynolds, Marbury*'s Mixed Messages*, 71 TENN. L. REV. 303, 304 (2004) (explaining that law school professors generally teach that *Marbury* was "a bit of rather clever sleight-of-hand" in reliance on works such as William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1 (1969)).

[59] U.S. CONST. art. VI, cls. 2–3 (establishing the Constitution as "the supreme Law of the Land" and binding all federal and state officers to an oath to support the Constitution).

[60] U.S. CONST. art. III, § 2, cls. 1–3.

[61] *See* Robert H. Bork, *The End of Democracy?: Our Judicial Oligarchy*, FIRST THINGS (Nov. 1996), https://www.FIRSTTHINGS.com/article/1996/11/003-the-end-of-democracy-our-judicial-oligarchy (arguing that the Supreme Court is illegitimate due to a decaying tendency inherent in the power of judicial review).

forcefully, uncompromisingly, limiting the power of one of the other two branches. That doesn't make a judge an activist, and he really didn't use that term. For the Justice, it was a question of following the text—but the text as tied to the structure.

Two, his citations to *The Federalist* were not just window dressing. There was an article in the *William & Mary Law Review* in which a professor suggested that almost every time a Supreme Court Justice cites *The Federalist*, it's really much about nothing.[62] That was not the case with the Justice, which one can see by reading, analyzing, and comparing, for instance, the opinions in *Morrison v. Olson*—the majority opinion written by the Chief Justice versus the dissent by Justice Scalia.[63] What you will see—first of all, what's remembered—are all the great one-liners, and we heard this one at lunch: "[T]his wolf comes as a wolf."[64] He also said, "It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*."[65] He used those memorable phrases in order to grab the readers' attention in order for them to understand the seriousness of the issues. What stands out is that his arguments are so much more compelling as compared to the way other justices write.

In many ways, the Chief Justice in that case might seem to be more the "textualist," because he starts out with the Appointments Clause.[66] He doesn't start with the doctrine of separation of powers. He then goes on to the Executive's power of removal.[67] But there is no clause in the Constitution about removal of officers confirmed by the Senate. The traditional understanding of removal as stated in the *Myers* case,[68] but undermined in *Humphrey's Executor*,[69] goes back to what is known as the decision of 1789.[70] In Congress, James Madison objects to proposed language in the creation of an Executive branch position which would

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[62] *See* Melvyn R. Durchslag, *The Supreme Court and the Federalist Papers: Is There Less Here Than Meets the Eye?*, 14 WM. & MARY BILL RTS. J. 243, 313–15 (2005) (arguing that, though cited frequently, THE FEDERALIST rarely influences the outcome of cases).

[63] *Compare* 487 U.S. 654, 659–97 (1988) (failing to cite THE FEDERALIST in support of the majority opinion), *with id.* at 697–734 (Scalia, J., dissenting) (citing THE FEDERALIST eleven separate times as foundational support for his opinion).

[64] *Id.* at 699 (Scalia, J., dissenting).

[65] *Id.* at 726.

[66] *Id.* at 670 (majority opinion).

[67] *Id.* at 671.

[68] Myers v. United States, 272 U.S. 52 (1926).

[69] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[70] First Annals of Congress, 515 (June 17, 1789).

grant authority to the Senate to remove the appointee.[71] Madison does so in terms of separation of powers and he prevails.

Chief Justice Rehnquist, however, dismisses the importance of Madison's understanding. Only at the very end of his opinion, one for all of the justices except Scalia, does the Chief Justice raise the issue of "whether, taken as a whole, the Act violates the Separation of Powers [doctrine]."[72] Justice Scalia's dissent is the flip of that. He starts with the principle of separation of powers; then he works through it.[73] His is a completely different approach in terms of the starting point. Now, this approach may pose a problem for some textualists, because they might say: "Where is separation of powers even in the Constitution?" There's no such term there. That term does appear in the 1780 Constitution of Massachusetts.[74] It doesn't appear in our Constitution. The term doesn't appear because the text is a blueprint; it's not an explanation. Articles I to III begin by assigning to each branch one of the three powers: legislative, executive, or judicial, which collectively manifest the doctrine of separation of powers. *The Federalist* provides the explanation of the blueprint.[75]

I am not going to spend much time on federalism. Although the Justice cared about federalism—and I think generally got those decisions right—he didn't focus on federalism the way he did on separation of powers. Why? Well, he said one time that the Seventeenth Amendment, which allowed for the direct election of Senators, basically killed federalism.[76] He also said that if the American people won't protect—

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[71] *Id.* at 674–75 ("The August 6, 1787, draft of the Constitution reported by the Committee of Detail retained Senate appointment of Supreme Court Judges, provided also for Senate appointment of ambassadors, and vested in the President the authority to 'appoint officers in all cases not otherwise provided for by this Constitution.'" (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOL. 1, at 183, 185 (Max Farrand ed., 1911))).

[72] *Id.* at 685.

[73] *Id.* at 697–99 (Scalia, J., dissenting).

[74] *See* MASS. CONST. pt. 1, art. XXX (concerning the "Separation of legislative, executive and judicial departments").

[75] *See, e.g.*, THE FEDERALIST NO. 47, at 240–41 (James Madison) (Lawrence Goldman ed., 2008) (explaining that separation of powers requires that no one body or man should hold more than one branch of power at a time but does not require that branches may not have some control over one another); THE FEDERALIST NO. 48, at 245–46 (James Madison) (Lawrence Goldman ed., 2008) (explaining that merely separating the powers of government through drawing clear lines is not sufficient to prevent tyranny); THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (explaining that checks and balances between the separate branches is necessary to prevent the tyranny of any one branch).

[76] Robert P. George, FACEBOOK (Nov. 11, 2015), https://www.Facebook.com/robert.p.george.39/posts/10207209683733068.

meaning through their representatives—federalism, don't expect federal judges to preserve federalism.[77]

More importantly, some of the important federalism cases are also separation of powers cases. Think of the sovereign immunity Eleventh Amendment cases.[78] Those cases pit the states versus the federal government. Consider Congress' enactment of Obamacare. Federalism and the separation of powers are closely related to one another in these cases. If Congress exceeds its powers to the detriment of the states and the Supreme Court rules in favor of the states, the states may view the case as a victory for federalism, but it is also a case involving separation of powers as between the Congress and the Supreme Court.[79]

In conclusion, Justice Scalia's lone dissent in *Morrison*[80] against the dilution of presidential constitutional powers, as given in Article II,[81] ultimately has been vindicated. It will be interesting to see whether the constitutional limits on the expansion of presidential power will be vindicated. Although Justice Scalia died before the 4-4 split in *United States v. Texas*,[82] on the issue of President Obama's order allowing deferred action on the illegal aliens, I don't think that there's much doubt about how Justice Scalia would have voted in that case. I wouldn't be surprised to see certain justices, who have generally taken a "flexible approach" to separation of powers, suddenly become uncompromising about separation of powers as applied to limits on presidential power during the presidency of Donald Trump.

Thank you very much.

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[77] *See* Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG.: AEI J. ON GOV'T & SOC'Y (Dec. 6, 1979), http://www.aei.org/publication/the-legislative-veto-a-false-remedy-for-system-overload/ (arguing that it was when citizens stopped thinking of the federal government as one of limited, enumerated powers that the courts stopped doing so as well).

[78] *E.g.*, Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Hans v. Louisiana, 134 U.S. 1 (1890); *see also* RALPH A. ROSSUM, ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION 106–14 (2006) (discussing Justice Scalia's decisions and analysis of state sovereign immunity cases).

[79] *See* Scalia, *The Importance of Structure*, *supra* note 1, at 1418 (arguing that the separation of powers and federalism are both closely related in that both form the structure of the constitutional order and together provide protection for individual liberty).

[80] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

[81] U.S. CONST. art. II, §§ 1–3.

[82] *See* 136 S. Ct. 2271, 2271–72 (2016) (mem.) (per curiam) (affirming the lower court decision 4-4 on June 23, 2016); Rebecca Kaplan, *Supreme Court Justice Antonin Scalia Found Dead in Texas*, CBS NEWS (Feb. 13, 2016, 8:22 PM), https://www.CBSNEWS.com/news/supreme-court-justice-antonin-scalia-found-dead-in-texas/ (reporting that Antonin Scalia was found dead on Feb. 13, 2016).

Professor Turley: First of all, I'd like to thank the Federalist Society again for the honor to speak with you today. It's a particular honor to appear with my former co-clerk, Judge Pryor. You know, the strongest memory I actually have of him from when we clerked together on the Fifth Circuit is when my judge and his judge sat on the same panel, and there was one case that was just an unbelievably sexy constitutional case. John Minor Wisdom was already senior status, and so my judge technically was the head of the panel. My judge would often defer because he's a very, very, nice guy, and I spent the week saying, "You've got to grab the case. You're both going to be on the same side. Don't let Wisdom get the case. Just grab it. Please, for the love of God, please."

So I'm walking with him towards conference, and I'm saying, "All you need to do is grab the case. Just say you'll grab the case. He'll let you grab the case." I come around the corner, and there's Pryor talking to Wisdom feverishly, and Pryor looked up with the most menacing look I've ever seen in my life, and sure enough, they wrote the opinion, and I've been bitter about it ever since. So thank you for this cathartic moment.

Judge Pryor: Pure fiction.

Professor Turley: Yeah, anyway! It's a great honor to speak about Justice Scalia. You know, Scalia and I shared a Sicilian heritage.[83] I'm half Sicilian, half Irish, much like his kids, which I reminded him of when he would make fun of me. When Justice Scalia passed away, *The Washington Post* called me and said, "Do you have any memories you'd like to share?" And the only one that came to mind was when we were at this dinner for a Sicilian Senator, and we were standing by this bay window, and Justice Scalia was holding forth for us on a story, and the Sicilian security guards kept on trying to move us away from the window, and Scalia wouldn't move.[84] And the security guard, finally the guy turns to me and says, "Why won't he move? We're afraid there's a hit team that's looking for the Sicilian Senator, and we're afraid that they're in danger at this window." And I said, "You know, the reason is that Justice Scalia is telling a story, and I'm pretty sure that he'd rather die than end the story, but I know he'd rather one of us die."

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[83] *See* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 13 (1st ed. 2009); Jonathan Turley, *Scalia's Greatest Strength, His Steadfastness, Was Also His Greatest Weakness*, WASH. POST. (Feb. 14, 2016), https://www.WashingtonPost.com/posteverything/wp/2016/02/14/scalias-greatest-strength-his-steadfastness-was-also-his-greatest-weakness/?utm_term=.3089c2b73ce2 (noting that Jonathan Turley "was raised in a Sicilian family").

[84] Turley, *supra* note 83.

But the fact is I thought about that story only because people have been trying to move Scalia to the left or right his entire life. He never did move. He was one of the few justices that could honestly say that he changed the court more than the court changed him, and the reason is because he came to the court with a very profound sense of the Constitution and its history. One of the things that I think gave him that foundation, that legacy, was that he based his opinions heavily steeped in *The Federalist Papers*.[85] He also had a formalist approach to the Constitution, which I'm going to mention in a second. I share that approach. I'm sort of in a minority among academics in believing in a formalist approach to separation of powers. Most academics view that view as naïve and simplistic. In fact, I just gave a speech at Georgetown, where one of the questions was, "Well, you do accept, right, that words have no objective meaning?"[86] And there was a time when a statement like that would have left me entirely confused, but then I remembered I was at Georgetown. So the fact is that the original deal that was struck with the American people is those words did have meaning, and while some of my colleagues view it as a precious lie, it was the original lie that the American people were given. And Scalia saw it that way, and it added a depth and coherence to his opinions.

For me, the most indicative and profound opinion that he wrote was in *Printz*,[87] and that, of course, was an early methodological demonstration of what became quite familiar as Scalia's analysis. He famously said in that opinion, "Because there is no constitutional text speaking to this precise question, the answer to the . . . challenge must be sought in historical understanding and practice."[88] When you look back on that statement and you see what came after it, you realize how profound that was. He tended to run home. He tended to run home to *The Federalist Papers*.[89] He tended to run home to the texts and to the original meaning.

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[85] *See* sources cited *supra* note 7.

[86] *See Tara Smith to Discuss Objectivity in Judicial Review at Georgetown University Law Center,* AYN RAND INST. (Nov. 04, 2016), https://ari.aynrand.org/blog/2016/11/04/tara-smith-to-discuss-objectivity-in-judicial-review-at-georgetown-university-law-center (announcing a speaking event at Georgetown concerning objectivity in judicial review in which Jonathan Turley was a panelist on November 8, 2016, just nine days before this panel).

[87] Printz v. United States, 521 U.S. 898, 900 (1997).

[88] *Id.* at 905.

[89] *See, e.g.*, *id.* at 910–11, 913–15 (relying upon THE FEDERALIST as support for his understanding of the independence of state officers from federal control); Tafflin v. Levitt, 493 U.S. 455, 469–70 (1990) (Scalia, J., concurring) (relying upon THE FEDERALIST for support of his understanding of what is required to limit a state court's concurrent jurisdiction); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (relying upon THE FEDERALIST as a source for his understanding of the separation of powers).

And in that decision, of course, in *Printz*, you had this wonderful clash between Scalia and Souter over *The Federalist Papers*, and they debated the meaning of numbers *27*, *36*, *44*, and *45*.[90]

What was interesting is that even Souter acknowledged that the meaning within those *Federalist Papers* would or should be given great weight in the analysis of the case.[91] This case dealt with having state officials who would be required to carry out federal functions or duties.[92] So what happened was this wonderful exchange and, quite frankly, Scalia, in my view got the better of the exchange as to what was meant by this structure, and it was Scalia who would often talk about the dual sovereignty of federalism, this concrete notion of the relationship of the federal government to the states.[93] And that sense of clarity, that formalistic approach, was also evident in *Morrison*, as was just discussed.[94] I'm not going to discuss it further, since it was just discussed by John. But in that case, I'll simply note that once again, when he answered the question, which he said that opinion was one of his most difficult, he went back to *The Federalist Papers* and quoted *The Federalist No. 51*, when Publius said, "As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified."[95] And so he was very conscious of these lines, and that's one of reasons I like his work so much.

I happen to believe that words do have meaning in the Constitution, despite my own personal policies and interests. I think there are parts of the Constitution that have static meaning. They must have static meaning. There are others that might be a little more fluid, but when it comes to the separation of powers and federalism, those are static concepts that should not change through time. And in that sense, Scalia was the rock that would bring us back to that original meaning. And so Scalia did, in fact, refuse to compromise, because he had principles, and that's particularly why he will have a legacy. There are many justices that came before him and, I'm afraid, that could follow, that will not be able to make that claim. He was coherent and he was consistent, because he had

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[90] *Compare Printz*, 521 U.S. at 911–12, 914 (opinion of Scalia, J.) (arguing that those papers do not state that state legislatures and officers may be subject to federal direction), *with id.* at 970–75 (Souter, J., dissenting) (arguing that those papers do justify the government directing the actions of state officers and that they are bound to do so).

[91] *Id.* at 971 (Souter, J., dissenting).

[92] *Id.* at 902 (majority opinion).

[93] *E.g.*, Setser v. United States, 566 U.S. 231, 241 (2012); *Printz*, 521 U.S. at 918–19; Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991).

[94] *See supra* note 73 and accompanying text.

[95] Morrison v. Olson, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 51, at 257–58 (James Madison) (Lawrence Goldman ed., 2008)).

principles. People often criticized him as dogmatic, but you're supposed to be dogmatic on principles, because if you're not, you're what we call unprincipled.

So when he passed, I felt that not only did we lose a judicial icon, but also a wonderful human being. I don't know anybody that ever knew Scalia that didn't like him. He was remarkably likeable. He would try to get into a fight with anybody over any subject, because he really liked law students. If there was a pet in the room, he tried to argue with the pet, because he was vivacious. He was intellectually alive, and that's what comes out of these opinions. And he was a great believer in a formalist separation, not just in the separation of powers, but in terms of federalism.[96] And so when he left, I remember thinking about a wonderful Quaker saying that said, "I shall pass this way but once; any good that I can do, or any kindness . . . , let me do it now. Let me not defer or neglect it, for I shall not pass this way again."[97]

Scalia didn't wait. He didn't compromise. He did what he could. And he remained confident about it and committed to it, and because of that, his like may not come this way to pass for some time, but there are many people who do cherish the legacy that he left, respect the principles that he represented, and will carry on those very same principles in the future, I believe.

Thank you very much.

Alabama Attorney General Strange: Thank you, Jonathan. It's just an incredible honor to be here, and I want to thank the Federalist Society for inviting me, including me in this distinguished group of colleagues and friends and people I admire and people I've known for a long time. It's wonderful to be the Attorney General of the State of Alabama in this time in our nation's history—to be a conservative Attorney General from any state—and I get to follow in the footsteps in an office that was really formed by my close friend, Jeff Sessions, and my close friend, Bill Pryor, who really set an example that I have tried to follow in my years in the office, the six years that I've been there—six very active years.[98]

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[96] *See supra* notes 92–95 and accompanying text.

[97] JAMES KELLER, TO LIGHT A CANDLE: THE AUTOBIOGRAPHY OF JAMES KELLER, FOUNDER OF THE CHRISTOPHERS 257 (1st ed. 1963) (quoting Stephen Grellet) (internal quotation marks omitted); 1 STEPHEN GRELLET, MEMOIRS OF THE LIFE AND GOSPEL LABORS OF STEPHEN GRELLET 29 (Benjamin Seebohm ed., 1860) (establishing Grellet's affiliation with the Quaker religion).

[98] Strange was elected as Alabama's Attorney General in 2010 and won reelection in 2014. In 2016, he was appointed to fill the United States Senate seat vacated by Senator Jeff Sessions, who accepted appointment to the office of Attorney General of the United States.

I met Bill many years ago at the advice of Jeff Sessions. He said, "You need to encourage young conservatives who want to run for office and be involved in the debate," and I didn't know what that really meant. I had volunteered for Senator Sessions during a great political upset in Alabama, and so somehow or another, I guess nobody else would do it or could do it. I ended up being the chairman of Bill's election campaign when he took Jeff's place, and I will never forget walking the halls. We stayed up all night on election night, and the judge knows the exact total of his victory, but it was something like . . . how many votes was it?

Judge Pryor: 6,767.[99]

Alabama Attorney General Strange: 6,767 out of over . . . ?[100]

Judge Pryor: 1.2 million votes.[101]

Alabama Attorney General Strange: Suffice it to say, it was close. As a matter of fact, Associated Press hadn't called it. We were up literally all night, walking the back room of the ballroom, wringing our hands, and we just finally decided that we were going to declare victory and make them prove that we didn't win, and, of course, he did win, and the rest is history.

When Bill was Attorney General, when Judge Pryor was Attorney General, in this country not long ago, really, there were twelve Republican Attorneys General in the United States.[102] Now there are twenty-nine

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Luther Strange: United States Senator for Alabama, U.S. SENATE, https://www.strange.senate.gov/content/about-luther (last visited Aug. 17, 2017); Greg Garrison, *Luther Strange Stands Tall in U.S. Senate Race, Shadowed by Bentley Appointment*, AL.COM (June 9, 2017, 7:05 AM), http://www.AL.com/news/index.ssf/2017/06/strange_stands_tall_in_us_sena.html (last updated June 9, 2017, 5:11 PM).

[99] 642,403 votes were cast for Pryor and 635,636 for his opponent. Thus, Pryor defeated his opponent by a difference of 6,767 votes. *See 1998 Attorney General General Election Results—Alabama*, U.S. ELECTION ATLAS, http://uselectionatlas.org/RESULTS/state.php?fips=1&year=1998&f=0&off=9&elect=0 (last visited Aug. 18, 2017).

[100] *See id.*

[101] The actual number of votes cast was 1,278,071—642,403 for Pryor and 635,636 for his opponent. *See id.*

[102] Twelve states had a Republican Attorney General as of 1999. *See Republican Attorneys General Association*, BALLOTPEDIA, https://ballotpedia.org/Republican_Attorneys_General_Association#cite_note-video-3 (last visited Aug. 23, 2017).

after last Tuesday's election.[103] Twenty-nine conservative Republicans. I was proud to be elected the chairman of that group last week in our meeting at Austin. You know, two weeks ago—actually, the Thursday of the election—Kim Strassel, who is going to be here Saturday morning to sign her book, which I urge you to do, wrote an article in *The Wall Street Journal*, and talked about the conservative Republican Attorneys General of the United States being the "last line of defense" in the protection of the Constitution and the rule of law.[104] Of course, the world changed then, and frankly, my remarks today changed a little bit after that election. We're no longer the last line of defense. We're now the tip of the spear.

It's been a historic time to be an Attorney General. The oath we take—all elected officials take—is to uphold the Constitution of the United States, of your respective state, and to uphold the rule of law.[105] Politicians come and go—some we'd like to go sooner than others—but they all eventually go. It's what preserves our liberties, our freedoms, our rights, our opportunities, and our economy. Everything that we enjoy in this country is the Constitution and the rule of law. Mark Brnovich, in the previous panel said it very nicely. He discussed how we don't get to pick and choose the laws we like and don't like, the ones you want to enforce and not enforce; how there is a democracy set up for that purpose, and it works extraordinarily well, if we protect it and preserve it.[106]

Now, we're talking about federalism today, and we'll hear from Congressman DeSantis and others about what we understand about horizontal federalism, the balance of power in our country. One of the things that I've hoped, for quite some time now, is that Congress would reassert, find a way to reassert, its proper role in our balance of power here in Washington. I think a lot of power has been given away. That's led to a lot of problems that we've had to address. I have great hope about that, but there's also the vertical separation of the states versus the federal government, and that's where we Attorney Generals have been very active in the last six years—really eight years. I don't have the precise number, but dozens of lawsuits have been filed by conservative Attorneys General across this country against the Obama Administration over the last number of years for violating the rule of law, for exceeding

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[103] *About RAGA*, REPUBLICAN ATT'YS GEN. ASS'N, http://www.RepublicanAGs.com/about (last visited Aug. 18, 2017).

[104] Kimberley A. Strassel, *Conservatism's Last Line of Defense*, WALL ST. J. (Nov. 7, 2016), https://www.WSJ.com/articles/conservatisms-last-line-of-defense-1478565032.

[105] *E.g.*, U.S. CONST. art. II, § 1, cl. 8; ALA. CONST. art. XVI, § 279; 5 U.S.C. § 3331 (2017).

[106] *The Battle for the Gig Economy*, FEDERALIST SOC'Y (Nov. 23, 2016), http://www.fedsoc.org/multimedia/detail/the-battle-for-the-gig-economy-audiovideo.

the powers that Congress granted to them,[107] and we've stood in the breach, and we've won, and I mentioned the "last line of defense."[108]

I'll just mention three cases that sort of illustrate the point. One has to do with bathrooms.[109] I really never thought when I was elected Attorney General that I would be litigating in Federal Court about bathrooms, but the Department of Education in its wisdom decided that all schools should allow all people, depending on their own definition of their sexual orientation, to use the bathroom of their choice or face the loss of federal funds.[110] That was done on May 13th of 2016.[111] On May 25th, eleven states challenged that ruling in federal court,[112] and on August 21st, a nationwide injunction was secured,[113] three months after the initial action. I'll just editorialize here, because I was curious when that issue was brought to my attention, and I asked one of our school administrators, I said, "Is this a problem? Is this really a significant problem that requires a federal mandate?" You might not be surprised, if you live in the real world, that this supervisor said, "Actually, that's not a problem at all. This occasionally happens in our school systems, and we did something really revolutionary. We have the teachers, parents, students, and administrators all sit down and see if we can work out an accommodation that works for everyone—and that's exactly what we've done. It is not a problem. It is a problem for 99.9% of the other parents who don't understand this when the federal government mandates something like that."[114] So regardless of that, we were successful in that.

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[107] *About RAGA*, *supra* note 103.

[108] Strassel, *supra* note 104.

[109] Texas v. United States, 201 F. Supp. 3d 810, 815–16, 836 (N.D. Tex. 2016). The State of Alabama joined as a plaintiff in this lawsuit. *See also infra* note 110.

[110] Letter from Catherine E. Lahmon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, U.S. Dep't of Justice, to a Colleague (Mar. 13, 2016), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (on file with United States Department of Education); *see also Texas v. United States*, 201 F. Supp. 3d at 816 (discussing Texas's claims that the United States sent letters to schools nationwide, requiring schools to allow student access to facilities of their choosing, under the threat of losing Title IX funding); Mark Berman & Moriah Balingit, *Eleven States Sue Obama Administration Over Bathroom Guidance for Transgender Students*, WASH. POST (May 25, 2016), https://www.WashingtonPost.com/news/post-nation/wp/2016/05/25/texas-governor-says-state-will-sue-obama-administration-over-bathroom-directive/?utm_term=.ae494d35d957.

[111] *See* Lahmon, *supra* note 110.

[112] Complaint for Declaratory and Injunctive Relief at 1, *Texas v. United States*, 201 F. Supp. 3d 810 (No. 7:16-cv-00054-O), 2016 WL 3023276, at 1.

[113] *Texas v. United States*, 201 F. Supp. 3d at 836.

[114] Polls conducted in May 2016 showed that most Americans believed that either local or state governments should decide school bathroom policies. *See Most School Parents*

Immigration—it was mentioned earlier. The President issued his order in November of 2014 to legalize millions of immigrants in this country.[115] Less than two weeks later, seventeen states filed a lawsuit challenging that action,[116] and then on June 23rd of 2016, two years later, in a 4-4 tie, the Supreme Court put an end to the President's effort.[117]

And then the last one I'll mention, because it's particularly relevant to our discussion about Justice Scalia, the Clean Power Plan rule—tremendously important to my state, to many states in this country. The Environmental Protection Agency issued their rule in October of 2015.[118] On that same day, more than twenty-four states filed a challenge to that rule in federal court,[119] and on February 9th, the Supreme Court stayed

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Oppose Transgender Bathroom Policy, RASMUSSEN REP. (May 17, 2016), http://www.RASMUSSENREPORTS.com/public_content/lifestyle/general_lifestyle/may_2016/most_school_parents_oppose_transgender_bathroom_policy?utm_source=newsletter&utm_medium=email&utm_campaign=DailyNewsletter (only twenty-four percent thought the federal government should be responsible for setting bathroom policies in elementary and secondary schools); *see also* Nick Gass, *Poll: Transgender Bathroom Laws Split Americans*, POLITICO (May 19, 2016, 09:23 AM), http://www.POLITICO.com/story/2016/05/poll-transgender-bathroom-laws-223356 (revealing that a greater percentage of Americans believe that transgender people should be required to use the restroom corresponding to their genders at birth); CBS News Politics, *CBS-NYT Poll Toplines: Transgender Bathrooms, SCOTUS, Obama Approval*, SCRIBD (May 17, 2016), https://www.SCRIBD.com/doc/313143772/CBS-NYT-poll-toplines-Transgender-bathrooms-SCOTUS-Obama-approval (only thirty-five percent of Americans thought the federal government should decide which bathroom transgender student should use).

[115] Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Leon Rodriguez, Dir. of U.S. Citizenship and Immigration Servs., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the U.S. as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) (on file with U.S. Dep't of Homeland Sec.), *available at* https://www.DHS.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; *Departments of State, Homeland Security Launch Executive Action on Immigration*, DEP'T OF HOMELAND SEC. (Jan. 5, 2015), https://www.dhs.gov/news/2015/01/05/departments-state-homeland-security-launch-executive-action-immigration-know-facts.

[116] Complaint for Declaratory and Injunctive Relief at 1, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254), 2014 WL 6806231, at 1; Catalina Camia, *Texas Leads 17 States in Suing Obama Over Immigration,* USA TODAY (last updated Dec. 3, 2014, 8:24 PM), https://www.USATODAY.com/story/news/politics/2014/12/03/obama-immigration-lawsuit-texas/19851141/.

[117] United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam), *aff'g*, 809 F.3d 134 (5th Cir. 2015).

[118] Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

[119] Timothy Cama, *Two Dozen States Sue Obama over Coal Plant Emissions Rule*, THE HILL (Oct. 23, 2015, 08:51 AM), http://THEHILL.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule.

the Clean Power Plan rule,[120] which was quite extraordinary. That was the last vote, official act, of Justice Scalia, so it was critically important.[121]

We owe so much to his legacy. My final hope here that I'll express is that the Congress and the new administration will find a person who will fill the role that he has played in his shoes in the coming days, months, and, as they deliberate that, we Republican Attorneys General look forward to that, because I'll get back to where I started. Regardless of who the President is, or who is in Congress, we will continue to take our role seriously, which is to defend the Constitution and uphold the rule of law in this country. I really, again, appreciate this opportunity to be here, and I look forward to your questions in our discussion. Thank you.

Mr. Pilon: Well I, too, want to thank the Federalist Society for inviting me here to discuss Justice Scalia's views on federalism and the separation of powers. When Dean Reuter called me to see if I'd be interested in speaking, he said he wanted some balance on the panel. "Balance?" I thought. "Well you must have read my foreword to the new *Cato Supreme Court Review*, which was titled "*Justice Scalia's Originalism: Original or Post-New Deal?*"[122] Given that title, I think you know where that article went. So I'm going to bring something of a discordant note here. I hate to be the skunk at the garden party—well, actually, I don't, now that I think about it—but I loved Nino. Every time I ran into him, we got into an argument. He loved to argue—just loved it. If you took one position, he'd take the other, and then you'd flip sides. It was just great fun to argue with him.

But for our subject here today, which is *structural* protections for liberty, he was absolutely right that the structural protections are the main protections for liberty,[123] and he was correct also that the Bill of

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[120] The Supreme Court stayed the Clean Power Plan in multiple, separate rulings on the same day. Basin Elec. Power Coop. v. EPA, 136 S. Ct. 998, 998–99 (2016) (mem.); Murray Energy Corp. v. EPA, 136 S. Ct. 999, 999 (2016) (mem.); Chamber of Commerce v. EPA, 136 S. Ct. 999, 999 (2016) (mem.); North Dakota v. EPA, 136 S. Ct. 999, 999–1000 (2016) (mem.); West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016) (mem.).

[121] Ian Millhiser, *The Simply Breathtaking Consequences of Justice Scalia's Death*, THINKPROGRESS (Feb. 13, 2016, 11:27 PM), https://ThinkProgress.org/the-simply-breathtaking-consequences-of-justice-scalias-death-2ab3d3aa740/.

[122] Roger Pilon, *Foreword: Justice Scalia's Originalism: Original or Post-New Deal?*, 2016 CATO SUP. CT. REV. vii, vii (2016), https://object.cato.org/sites/cato.org/files/serials/files/supreme-court-review/2016/9/2016-supreme-court-review-foreword.pdf.

[123] SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE 3 (Kevin A. Ring ed., Regnery Publ'g, Inc. 2004) (a selection of Justice Scalia's most famous dissents with commentary by Kevin A. Ring).

Rights was "an afterthought," as he often said.[124] Unfortunately, however, he too often ignored the changes the Civil War Amendments made to the structural protections, because he too little regarded the theory that undergirds the Constitution, and that led him to place democracy over liberty.[125]

That undergirding theory, state-of-nature theory, can be seen in the Preamble,[126] before that in the Declaration,[127] and before that, of course, in Locke's *Second Treatise*.[128] But Scalia wouldn't go there. Ever the positivist, he dismissed it as "philosophizing,"[129] unlike what he called the Constitution's "operative provisions."[130]

His method was textualism, originalism, and structuralism—all salutary, if you follow it, which he didn't always do. But those tools, of course, are often insufficient when you get to broad or vague text. At that point, you have to have a *theory* of the matter; you have to know where you're going, and know in particular what the presumption is. A judge can't simply throw up his arms and say, "Let the people decide," unless the text clearly points that way. The Constitution, after all—*this* Constitution, which a judge takes an oath to uphold—was written not simply to empower officials, but to limit them as well toward liberty, not simply toward power, as the Preamble and the Declaration make clear.[131] The bedrock principle, in short, is liberty.

Reflecting the state-of-nature reasoning of the *Second Treatise* and the Declaration,[132] the Preamble begins by recognizing that sovereignty rests with the people.[133] Government doesn't give the people their

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[124] Antonin Scalia, Opening Statement on American Exceptionalism to a Senate Judiciary Committee (Oct. 5, 2011), http://www.AmericanRhetoric.com/speeches/antoninscaliaamericanexceptionalism.htm; *see also* Committee on the Judiciary, *Considering the Role of Judges Under the Constitution of the United States*, U.S. SENATE (Oct. 5, 2011, 02:30 PM), https://www.judiciary.senate.gov/meetings/considering-the-role-of-judges-under-the-constitution-of-the-united-states (exhibiting a video of Justice Scalia's opening remarks before the United States Senate).

[125] Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1967–70 (2017).

[126] U.S. CONST. pmbl.; Charles S. Desmond, *Natural Law and the American Constitution*, 22 FORDHAM L. REV. 235, 235–36, 239 (1953).

[127] Desmond, *supra* note 126, at 235–36.

[128] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 122–27 (Thomas Cook ed., Hafner Publ'g Co. 1947) (1690).

[129] Scalia, *supra* note 50, at 134.

[130] *Id.*

[131] *See* Pilon, *Justice Scalia's Originalism*, *supra* note 122, at ix–x.

[132] *Id.* at ix–xi.

[133] *Id.* at ix–x.

rights.[134] They already have rights, their natural rights.[135] They create government to secure those rights.[136] Toward that end, the Framers structured powers.[137] They divided powers between the federal and the state governments, leaving most power with the states;[138] and they separated powers functionally at the federal level, pitting power against power, as *The Federalist* shows throughout.[139] Most important, though, they limited federal power through the enumeration of Congress's legislative powers, aimed at a few national concerns.[140]

And to make that crystal clear, when they added the Bill of Rights, they concluded with the Ninth Amendment, which states plainly that we retained all the rights we never surrendered,[141] and the Tenth Amendment, which makes equally plain that the federal government has only the powers we gave it.[142] In a nutshell, the Constitution establishes a government of delegated, enumerated, and thus limited powers, further limited by our rights, both enumerated and unenumerated.[143]

For all its virtues, as we all know, the original design was seriously flawed by the document's oblique recognition of slavery. The Civil War Amendments fixed that by fundamentally changing, among other things, our federal-state relations. Of particular importance for our purposes, after defining federal and state citizenship, the Fourteenth Amendment's Privileges or Immunities Clause made rights good against the federal government,[144] including natural rights protected under the Ninth Amendment,[145] good against the states as well, save for those rights peculiarly related to distinct federal and state functions.[146]

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[134] *Id.* at ix.

[135] *Id.*

[136] *Id.* at x.

[137] U.S. CONST. pmbl.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[138] THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008).

[139] *Id.*; THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

[140] THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008).

[141] U.S. CONST. amend. IX.

[142] *Id.* amend. X.

[143] Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).

[144] U.S. CONST. amend. XIV, § 1; *see also Privileges or Immunities*, HERITAGE FOUND., http://www.Heritage.org/constitution/#!/amendments/14/essays/169/privileges-or-immunities (last visited Sept. 2, 2017) (explaining the different views of how the Privileges or Immunities Clause was meant to operate and its current meaning as interpreted by the Supreme Court in the *Slaughter-House Cases*).

[145] HERITAGE FOUNDATION, *supra* note 144.

[146] *See* Slaughter-House Cases, 83 U.S. 36, 79–80 (1873) (Suggesting that certain rights "which owe their existence to the Federal government" are peculiarly related to federal

But we all know what happened to that clause in the infamous *Slaughterhouse Cases*[147]—and what happened six decades later, when the New Deal Court turned that carefully wrought structure on its head by eviscerating the enumerated powers doctrine in 1937,[148] bifurcating the Bill of Rights and crafting a bifurcated theory of judicial review in 1938,[149] and jettisoning the non-delegation doctrine in 1943.[150] So rather than rehearse those developments here, I'll return to Justice Scalia's view.

A textualist cannot, of course, ignore the plain text, but Scalia does. I'll start with a few powers cases where he tends to be better than with rights cases. In fact, I'll start with an anecdote. I invited Nino over to Cato in 1993 with the idea of pressing him on the demise of the doctrine of enumerated powers.[151] Before we got into that, however, he said, "Where's the wine?" "This is lunch!" I said. "So?" he answered. So we had to send an intern out to get a bottle of wine, and that loosened our respective tongues, as if either of us needed it, and we proceeded from there. And I did say to him at one point, "Nino, when are you ever going to revive the doctrine of enumerated powers?" "Oh, Roger, we lost that battle a long time ago," he answered. "Well thank you for that counsel of despair," I laughed.

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functions, such as the right of access to seaports. Unfortunately, the *Slaughter-House* majority went little further, thus ignoring the main purport of the Privileges or Immunities Clause.).

[147] *Id.* at 77.

[148] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22, 25, 30–32 (1937) (upholding the National Labor Relations Act of 1935, which empowered the National Labor Relations Board to regulate unfair labor practices "affecting commerce," as a valid exercise of the federal power to regulate interstate commerce); *see also* Roger Pilon, *Madison's Constitutional Vision: The Legacy of Enumerated Powers*, *in* JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 25, 35–36 (John Samples ed., Cato Inst. 2002) (2003) (explaining the holding of *Jones & Laughlin* and its long-term effects).

[149] United States v. Carolene Prods. Co., 304 U.S. 144 (1938); Pilon, *Madison's Constitutional Vision*, *supra* note 148, at 36.

[150] *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (upholding the delegation of authority to the Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require); *see also* A.J. Kritikos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441, 454–56 (2017) (explaining that *Nat'l Broad. Co.* and an earlier case "wholly defanged" the non-delegation doctrine); Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L. J. 239, 264–65 (2005) ("Since 1936, the Supreme Court has not invalidated any federal legislation on the grounds that it violates the nondelegation doctrine.").

[151] Roger Pilon, *Scalia and the Supreme Court: What the Justice Would Want Now*, CATO INST. (Feb. 19, 2016), https://www.cato.org/publications/commentary/scalia-supreme-court-what-justice-would-want-now; *see generally* Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25, 26–27, 92 (2005) (arguing that the doctrine of enumerated powers has never been reflected in actual practice); Pilon, *Madison's Constitutional Vision*, *supra* note 148, at 25–26, 30–36 (explaining how the doctrine of enumerated powers has changed throughout different eras of United States history).

But two years later, when *Lopez*[152] came down, reviving the doctrine after fifty-eight years in the wilderness, he was on the right side,[153] as he was in *Morrison* when that decision came down five years later.[154] So too before that in *Printz*,[155] where he wrote for the Court, as Jonathan Turley said, holding that Congress had no power to dragoon state officials into carrying out federal functions.[156] But eight years later, in *Raich*, the California medical marijuana case,[157] he read the commerce power so broadly that Madison, in *The Federalist No. 42*,[158] and Marshall, in *Gibbons*,[159] would never have recognized it, as Justices Thomas and O'Connor made plain in their separate dissents.[160] But in *Sibelius* [161] and *King*,[162] the two big Obamacare cases, he redeemed himself again, albeit in dissent.[163]

Even in the correctly decided powers cases, however, the Court has only scratched the surface of the enumerated powers problem. We're far down the road of massive unconstitutional government, and I'm the last to think that the Court by itself is going to reverse that problem any time soon. But it can start, as at last it's doing.

In the rights cases, however, it's more promising, except that here, Scalia is altogether uneven. In the interest of time, I'll focus simply on the state police power cases, where most of the confusion arises. Consistent with the underlying theory of political legitimacy that I sketched earlier, the police power we enjoy in the state of nature—Locke's "Executive

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[152] United States v. Lopez, 514 U.S. 549 (1995).

[153] *See id.* at 550, 567 (Justice Scalia joined the majority opinion, which concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . requir[ing] us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.") (citations omitted).

[154] United States v. Morrison, 529 U.S. 598, 600–02 (2000) (Justice Scalia joined the majority opinion, which concluded under the rationale of *Lopez* that Congress lacked the authority to create a civil remedy for victims of gender-motivated violence).

[155] Printz v. United States, 521 U.S. 898, 902 (1997).

[156] *Id.* at 935.

[157] Gonzales v. Raich, 545 U.S. 1, 34–41 (2005) (Scalia, J., concurring).

[158] THE FEDERALIST NO. 42 (James Madison).

[159] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[160] *Raich*, 545 U.S. at 2220–29 (O'Connor, J., dissenting); *id.* at 2229–39 (Thomas, J., dissenting).

[161] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[162] King v. Burwell, 135 S. Ct. 2480 (2015).

[163] *Id.* at 2497–2507 (Scalia, J., dissenting); *Sebelius*, 132 S. Ct. at 2642–50 (Scalia, J., dissenting).

Power,"[164] which we delegate to government—is mainly there to secure our rights.[165] Thus, it's bounded by the rights that there are to be secured.[166] And the question then, from *Lochner* to *Lawrence* and many cases in between, is simply this: What rights, if any, are being secured by the statute at issue?[167] What rights are protected, for example, by a law criminalizing the sale and use of contraceptives, or marrying someone of another race?[168] If the state can point to no such rights, that settles it. The judge doesn't have to discover any *unenumerated* rights; it's the *state* that has to identify rights it's protecting under its police power.[169] If it can't make that case convincingly, it loses.

As with enumerated powers, then, where there is no power, by implication there is a right.[170] Hamilton, Wilson, and others objected to adding a Bill of Rights because they saw it was impossible to enumerate all of our rights and dangerous to enumerate only some.[171] Thus, *structural* limits were meant to secure our liberty: power pitted against

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[164] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 124–25 (Thomas Cook ed., Hafner Publ'g Co. 1947) (1690); *see also* Lee Ward, *Locke on Executive Power and Liberal Constitutionalism*, 38 CAN. J. POL. SCI. 719, 723 (2005) (examining Locke's "state of nature" principle).

[165] *See* LOCKE, *supra* note 164, at 124–25 (explaining that all people have, in a state of nature, a right to punish violations of the law of nature in order to protect their natural rights and restrain offenders).

[166] *See id.* (explaining that the executive power may be carried into effect in order to secure rights against a transgressor).

[167] At issue in *Lochner* was a New York labor law restricting the right of an employer and an employee to enter into a contract for labor. In particular, the law made it a misdemeanor for any baker to require an employee to work more than sixty hours per week. Lochner v. New York, 198 U.S. 45, 51–53 (1905). In *Lawrence*, the Court held that the Fourteenth Amendment protects the right of adults to engage in private, consensual sexual activity, and that therefore Texas's law criminalizing "deviate sexual intercourse with another individual of the same sex" was unconstitutional. Lawrence v. Texas, 539 U.S. 558, 562–64, 567, 578 (2003).

[168] *See* Eisenstadt v. Baird, 405 U.S. 438, 440–42 (1972) (distribution and use of contraceptives); Loving v. Virginia, 388 U.S. 1, 1–4 (1967) (interracial marriage).

[169] *See supra* notes 164–65 and accompanying text.

[170] *See* U.S. CONST. amend. IX–X (the Tenth Amendment reserves all powers not delegated to the federal government to the states or the people, and the Ninth Amendment acknowledges the existence of unenumerated rights; by implication from these two, where the federal government has no power, the people are free to do as they please unless regulated by the states).

[171] THE FEDERALIST NO. 84, at 475–76 (Alexander Hamilton) (Lawrence Goldman ed., 2008); 1 James Wilson, *State House Yard Speech* (1787), *reprinted in* COLLECTED WORKS OF JAMES WILSON 171, 171–72 (Kermit L. Hall & Mark D. Hall eds., 2007).

power;[172] the enumeration of federal powers;[173] and later, a narrow reading of the state police power consistent with the privileges or immunities we enjoyed as citizens of the United States.[174]

Indeed, did we have *no* rights prior to adding a Bill of Rights? Of course not. Again, where there is no power, there is a right. But did we then *lose* rights when we *added* a Bill of Rights—all the unenumerated rights we enjoyed prior to that? That's the implication if judges are to secure only enumerated rights, as many conservatives today—including Justice Scalia—have argued. The Ninth Amendment was written to dispel that reading. A textualist can hardly ignore it, or ignore its complement vis-à-vis the states, the Privileges or Immunities Clause of the Fourteenth Amendment.

So why do so many conservatives indulge that reading? Responding, understandably, to the perceived judicial activism of the Warren and Burger Courts, Bickel, Bork, Scalia, and others focused on the "counter-majoritarian difficulty" and the need, accordingly, for judges to indulge the "passive virtues." But in so doing, they ignored the *majoritarian* difficulty, which deeply concerned the Framers. The Framers stood for liberty first, majoritarianism second, as only one means toward liberty. Their main means was structure, including the revised principled federalism of the Civil War Framers.

We tend today to think of federalism as states protecting liberty vis-à-vis the federal government, but it cuts the other way, too: *federal* protection against *grassroots* tyranny. And that's what Justice Scalia too little appreciated. His work securing originalism was invaluable, and he will long be remembered for that. But let's secure the whole of originalism—including the revised federalism of the Civil War Framers.

Thank you.

Congressman DeSantis: Well, good afternoon. It's great to be here. You know, Judge Pryor came and visited the Harvard Law campus back in my day, and I don't think he was a judge yet.[175] I think it was

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[172] THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

[173] U.S. CONST. art. I, §§ 1, 8.

[174] *See* Lochner v. New York, 198 U.S. 45, 52–54, 56–58, 64 (1905) (prohibiting "unreasonable, unnecessary and arbitrary" exercises of state police power interfering with an employer or employee's right to contract for labor as violative of the "liberty of the individual" under the Fourteenth Amendment).

[175] President George W. Bush appointed then-Alabama Attorney General William Pryor to fill a vacancy on the Eleventh Circuit Court of Appeals in 2004. *Hon. William H. Pryor Jr.*, THE FEDERALIST SOC'Y, https://www.fed-soc.org/experts/detail/william-h-pryor-jr (last visited Sept. 17, 2017). Congressman DeSantis graduated from Harvard Law School in

controversial. A lot of the Harvard faculty thought he would commence a reign of terror on the bench. Once I heard that, it was probably the best seal of approval I could possibly imagine—short of an endorsement from Justice Scalia himself. Sure enough, he's proven to be a great judge, so it's an honor to be here with him.

You know, when I think about Congress's role in the constitutional system, I think of a little anecdote. A constituent asked me about an issue with municipal trash cleanup in her neighborhood, and I responded: "You know, it's an important issue, but I'm your federal representative in the United States Congress. We deal with federal issues." And she said, "Yeah, I know. I just thought I'd start at the bottom of the totem pole and work my way up." And the thing is, there's a truth to that, not just because Congress is a punching bag. I think Congress stands today as the weakest of the three branches in our constitutional system. I think Justice Scalia was always very, very, articulate about identifying the structural Constitution as the number one protector of individual liberty—that you would have these different branches; they would compete with one another; they would be zealous about guarding their powers; and that, even more than the Bill of Rights, would preserve and protect individual liberty.[176]

It's interesting to consider the Founders' views. If you read Madison and *The Federalist*, generally, we hear about three coequal branches of government.[177] The Founders didn't envision them necessarily to be equal—I think they envisioned them to compete.[178]But Madison said in republican government, "the legislative authority necessarily predominates."[179] In fact, although the Revolution was a revolt against executive authority, the impulse that inspired the Constitution was that the founders saw runaway legislatures in the states at the time. Therefore, they wanted to have a government of, by, and for the people.[180]

2005. *DeSantis, Ron, (1978 -)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000621 (last visited Sept. 17, 2017).

[176] Scalia, *The Importance of Structure*, *supra* note 1, *passim*.

[177] *E.g.*, Chuck Grassley, *Coequal Branches of Government*, SCOTUSBLOG (Mar. 1, 2016, 7:00 AM), http://www.SCOTUSblog.com/2016/03/coequal-branches-of-government/; *Branches of the Government*, THE WHITE HOUSE, https://clintonwhitehouse4.archives.gov/WH/New/html/branches.html (last visited Sept. 17, 2017); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 5, 12–14, 18 (2009).

[178] THE FEDERALIST NO. 51, at 256–57 (James Madison) (Lawrence Goldman ed., 2008).

[179] *Id.* at 257.

[180] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863); *see* THE FEDERALIST NO. 51, at 256–58 (James Madison) (Lawrence Goldman ed., 2008) (explaining

They didn't want it to simply be a tyranny of the majority. They knew that the Congress would be powerful, but they wanted to have other branches that would also check it.[181] But even with those checks, they just thought that the branch that was the closest to the people—at least the House—would have the most power.[182]

And, of course, if you look at the original constitutional design, just look at Congress's power: the power of the purse, and obviously the power to legislate.[183] You can prevent an administration from stocking the government with its choice of personnel by not confirming people.[184] You can impeach civil officers, the President, and the Vice President.[185] You can circumscribe the jurisdiction of the courts.[186] You don't even need to create lower courts; you can abolish them.[187] So they understood that the Presidency would be powerful, particularly in foreign affairs, but the powers of the presidency were really more of a check on the legislature considering how they envisioned it.[188] Yes, Hamilton said an executive can "undertake extensive and arduous enterprises for the public benefit,"[189] but if the Congress isn't providing funding for those enterprises, then they're going to amount to nothing.[190]

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that the legislature would be the most powerful branch and that therefore strong structural checks were needed to prevent legislative overreach).

[181] *See* THE FEDERALIST NO. 51, at 256–58 (James Madison) (Lawrence Goldman ed., 2008).

[182] *See* THE FEDERALIST NO. 58, at 289 (James Madison) (Lawrence Goldman ed., 2008) (describing the importance of the power of the purse in the hands of the House as the direct representatives of the people).

[183] U.S. CONST. art. I, § 1; *id.* art. I, § 7, cl. 1; *id.* § 8, cls. 1–2, 5.

[184] *See id.* art. II, § 2, cl. 2 (establishing the requirement of advice and consent by the Senate to presidential appointments).

[185] *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6.

[186] *Id.* art. I, § 8, cl. 9; *id.* art. III, §§ 1–2.

[187] *Id.* art. III, § 1; *see also Abolition of Courts*, JUSTIA US L., http://law.JUSTIA.com/constitution/us/article-3/02-inferior-courts.html (last visited Sept. 22, 2017) (explaining how Congress interpreted the power to create lower courts as implying the power to abolish them as early as 1802).

[188] *See* THE FEDERALIST NO. 73, at 360–61 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the importance of the veto power as a check on legislative overreach); THE FEDERALIST NO. 76, at 371–72 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (explaining the advantages of vesting the appointment power in the president as opposed to Congress).

[189] THE FEDERALIST NO. 72, at 354, 356 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[190] *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998) (recognizing Congress's broad power to set spending priorities even according to criteria that would be impermissible in other contexts); Act of Jan. 5, 1971, Pub. L. No. 91-652, §§ 3, 5, 7(a), 84 Stat. 1942, 1942–43 (1971) (limiting foreign assistance spending to specific purposes); Act of Nov. 19, 1969, Pub. L. No. 91-121, §§ 203, 401(a), 403, 405(b), 407(a),

The courts, of course, Hamilton said, were incontestably the weakest of the three branches of the government.[191] They have "neither force nor will but merely judgment."[192] An important role? Absolutely, but you're not able to legislate from the bench.[193] The current practice, I think, is that the executive by far is the most powerful. Then, the courts. The courts probably have as much legislative authority as we do.[194] Certainly they have more power over the Constitution.[195]

Part of the reason the executive has gained so much power is through congressional neglect.[196] Congress will legislate, and they'll say, "Well, we really can't deal with these thorny issues, so bureaucracy, you figure it out," and the bureaucracy effectively legislates very important policy determinations.[197] For example, the *Hobby Lobby* case went to the Supreme Court to challenge a requirement that was not written into the statute; that was a Department of Health and Human Services regulation.[198] And obviously I think congressional neglect has also paved the way for administrative overreach, so if a statute is ambiguous—or lengthy—and it's been on the books for decades—the administrative agencies, and executive branch going beyond that, have taken liberties to legislate vast new policies that have a tremendous effect on American society and the American economy.[199]

In my first State of the Union, when I was elected in 2012, President Obama came and told Congress that he wanted Congress to do what he

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409(b)–(f), 83 Stat. 206, 206–10 (1969) (limiting Vietnam-era defense appropriations to specific purposes).

[191] THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[192] *Id.*

[193] *See id.* at 382–83 (stating that courts may not substitute their will for judgment).

[194] *See* Geoffrey C. Hazard, Jr., *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978) (arguing that the Supreme Court is at times a sort of legislative body).

[195] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803) (holding that the court has judicial review over constitutional interpretation); *see also About the Court: The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited Sept. 25, 2017) (explaining that the Supreme Court has final judgment regarding constitutionality, thus affording the judicial branch supreme power in interpreting the constitution).

[196] A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169, 176 (2007).

[197] *See* Clyde Wayne Crews, Jr., *Mapping Washington's Lawlessness 2016: A Preliminary Inventory of "Regulatory Dark Matter"* 4 (Competitive Enter. Inst., Issue Analysis 2015 No. 6, Dec. 2015), https://cei.org/sites/default/files/Wayne%20Crews%20-%20Mapping%20Washington%27s%20Lawlessness.pdf (demonstrating this through an overview of the regulatory process).

[198] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2754 (2014).

[199] Crews, *supra* note 197, at 4.

said. If we didn't enact it, then he was going to do it on his own.[200] And, you know, we had just gotten sworn in a couple weeks before. I thought, "That's not exactly how it's written down in the Constitution," but the thing that bothered me the most about it was not that the President was asserting that authority, because the Founders presumed that each branch would try to exceed its constitutional limits.[201] What bothered me was when I looked to the left, every single Democrat in that chamber stood and cheered him when he said it,[202] so they were willing to put their personal political viewpoints ahead of their duty to defend their own institution, which I think is defending the Constitution.[203]

So it's a problem both ways. The executive branch overreach and congressional accountability; we did this with the Internal Revenue Service in terms of dealing with the targeting.[204] Obviously the Justice Department was not going to do anything; we knew that from the beginning. But at the least we could conduct oversight, at least get documents. The IRS destroyed emails that were subpoenaed.[205] The commissioner made multiple false statements.[206] He has admitted the statements were false.[207] They didn't do basic due diligence, like even look at Lois Lerner's Blackberry.[208]

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[200] *See* Brad Plumer, *READ: Obama's 2014 State of the Union Address*, WASH. POST (Jan. 28, 2014), https://www.WashingtonPost.com/news/wonk/wp/2014/01/28/read-obamas-2014-state-of-the-union-address/?utm_term=.392545275bcd (stating that "wherever and whenever I can take steps without legislation to expand opportunity for more American families, that's what I'm going to do").

[201] *See* THE FEDERALIST NO. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008) (stating that "you must first enable the government to control the governed; and in the next place oblige it to control itself").

[202] *See* Plumer, *supra* note 200 (showing the Democratic side applauding President Obama's remarks at timestamp 12:50).

[203] *See* U.S. CONST. art. VI, cl. 3 (requiring Congress to take an oath to defend the Constitution).

[204] Kelly Phillips Erb, *IRS Targeting Scandal: Citizens United, Lois Lerner and the $20M Tax Saga That Won't Go Away*, FORBES (June 24, 2016, 11:22 AM), https://www.Forbes.com/sites/kellyphillipserb/2016/06/24/irs-targeting-scandal-citizens-united-lois-lerner-and-the-20m-tax-saga-that-wont-go-away/#7f1b9775bcd1.

[205] Impeaching John Andrew Koskinen, Commissioner of the IRS, for High Crimes and Misdemeanors, H.R. Res. 828, 114th Cong. (2016).

[206] *Id.*

[207] *See* Debra Heine, *Koskinen Admits to Making False Statements About Email Destruction*, PJ MEDIA (Sept. 21, 2016), https://PJMEDIA.com/trending/2016/09/21/koskinen-says-false-statements-about-email-destruction-were-honest-mistake/ (admitting to making statements that later were proven false).

[208] H.R. Res. 828.

But what happens? Nothing! So to me, the lesson that the bureaucracy takes from Congress's fecklessness is "Destroy the stuff! Don't worry about it, because there's nothing that's going to happen to you if the head of the executive branch concurs in doing what you're doing." Of course the courts have also helped the executive become more powerful by deferring to what the administrative agencies do.[209] To me, I think you should apply the laws as written, not defer to the executive branch, because that allows the administrative state to get bigger.[210]

Regarding Justice Scalia, nobody has been more influential for law students, for lawyers, or for judges if you're on the center-right. I just wish his wisdom would make its way more into the halls of the United States Congress, because Scalia understood that you have to defend your own turf. One of the things that frustrates me is, some of my colleagues, if we're debating a bill, will answer the questions of "Is it constitutional? Do we have this power? Does it conflict with the Bill of Rights?" with "Well, we'll let the courts figure that out." You know, we do whatever we vote for, whatever we think is good, unless and until the courts stop us.

The problem with that is the courts can only decide cases or controversies,[211] so basically for anything that does not lead to a lawsuit, you're basically saying there's not going to be anyone that's going to stand up for the Constitution? Our duty is to defend the Constitution and to act in conformance with the Constitution.[212] I've always said if there's a bill that's not constitutional, my duty is to vote against it, regardless of what the courts may or may not do.[213] It's not just the Congress. I mean, President Bush when he signed McCain-Feingold, talked about how he felt it was unconstitutional, but he went on to say that it was up to the courts to figure that out.[214] That's not the way you're supposed to do it. If

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[209] David Kemp, Chevron *Deference: Your Guide to Understanding Two of Today's SCOTUS Decisions*, JUSTIA (May 21, 2012), https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/.

[210] Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and* Chevron *Deference*, HERITAGE FOUND. (May 7, 2015), http://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and.

[211] U.S. CONST. art. III, § 2, cl. 1.

[212] *Id.* art. VI, cl. 3.

[213] *See* Michael Stokes Paulson, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2714 (2003) (explaining the theory of constitutional supremacy, which argues that all three branches of government have equal authority to interpret the meaning of the Constitution).

[214] George W. Bush, *Statement on Signing the Bipartisan Campaign Reform Act of 2002*, AM. PRESIDENCY PROJECT (Mar. 27, 2002), http://www.Presidency.ucsb.edu/ws/?pid=64503.

you're not convinced it's constitutional, you've got to err on the side of exercising your authority to defend the Constitution.[215]

So I think Justice Scalia was kind of frustrated with Congress. The Obamacare program took funding that really was never appropriated.[216] So rather than Congress using our core power, the power of the purse,[217] what we did is we filed a lawsuit to try to vindicate that interest.[218] And, you know, we were able to move the ball forward a little bit. But I think Scalia would look at that and say, "Why are you running to the courts to do this? You guys should defend it yourself. You have the power. You have the power of the purse. You have the power to not confirm people. You have the power to impeach civil officers. Why don't you use those powers, rather than running for the court?" And I think at the end of the day, we're in this budget problem where we do these big omnibuses and we're not really able to solve that so we're not willing to take any political risk to really defend our turf. I think that is why we end up deciding, "Let's file a lawsuit, and let's do it."

It's an honor to be here. Justice Scalia really was a man for all seasons. He was one of the few people to really make an indelible mark not only on the law, but on political philosophy. I just wish everything that's been discussed on this panel and this conference could make its way into the halls of the Congress and that we'll reclaim our constitutional authority and get the constitutional system back into its proper form.

Thank you.

Judge Pryor: OK. I want to first invite our panelists to respond to each other from your seat. Hopefully your mics are now live for you to do that. I would expect that perhaps Professor Baker has some things he wants to say in response to Roger.

Professor Baker: Well, Roger thinks I'm going to attack him, but Roger and I debate every year. But I didn't find much to attack Roger on. But I want to follow up with what Jonathan Turley said about *Printz*.[219] It was really important that you did what you did on *Printz*, Jonathan. I just wanted to add that if you'd look at the separate opinion by Justice Breyer, the amazing thing is that Justice Breyer seems to be saying "Well, you know, I don't see why the federal government can't order local officials

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[215] *See* Paulson, *supra* note 213, at 2714.

[216] U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

[217] *See* U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cl. 7 (stating that Congress holds the exclusive power to tax).

[218] *Burwell*, 185 F. Supp. 3d at 174.

[219] Printz v. United States, 521 U.S. 898 (1997).

to do it. It's more efficient. In fact, they do it in Europe that way. It's more efficient."[220]

Now, if you read *The Federalist*, you will know that the crux of the whole problem and why we changed from a confederation is, in fact, in *The Federalist No. 15*—that whole point—you can't have one government telling another government what to do, because eventually it won't work.[221] See Brexit.[222]

Professor Turley: I was going to add, I don't disagree. Roger and I agree on most things anyways, so that's not a surprise, but the one area of Scalia's legacy which I do find problematic was his support for *Chevron*, that it was sort of anomalous.[223] He continued to support the idea of *Chevron*, even as we had this rise of sort of the Fourth Branch, the rise of the administrative state.[224] I think that he certainly indicated some misgivings about *Chevron*,[225] but that was always the one part of his legacy that was most sharply discordant with his views, particularly with regards to sort of formalism, but that's what I would add in terms of criticism.

Professor Baker: I would just say on that, as Justice Alito said this morning, he was actually changing on that—one. And two, Roger mentioned the quote "post-New Deal originalism."[226] Although he didn't specifically articulate it this way, once you have the Seventeenth Amendment, it changes.[227] The Senate is no longer a protector of the states. That's what built the administrative state, and he's trying to figure out "How do you deal with this? How do you draw lines? And will the

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[220] *See id.* at 976–78 (Breyer, J., dissenting) (examining and comparing the United States to other countries in the world).

[221] THE FEDERALIST NO. 15, at 76–77 (Alexander Hamilton) (Lawrence Goldman ed., 2008).

[222] The Data Team, *A Background Guide to "Brexit" from the European Union*, THE ECONOMIST (Feb. 24, 2016), www.Economist.com/blogs/graphicdetail/2016/02/graphics-britain-s-referendum-eu-membership.

[223] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839 (1984).

[224] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516–18, 521 (examining modern rationality of the presumption of agency discretion while discussing the rise of the administrative state).

[225] Adam White, *Scalia and* Chevron: *Not Drawing Lines, But Resolving Tensions*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 23, 2016), http://YaleJReg.com/nc/scalia-and-chevron-not-drawing-lines-but-resolving-tensions-by-adam-j-white/.

[226] *See* Pilon, *Justice Scalia's Originalism*, *supra* note 122, at xxxi (explaining that post-new deal originalists read the -Constitution "through the political prism that the New Deal justices . . . imposed on the document").

[227] *See infra* text accompanying notes 254–56.

courts then end up replacing the administrative agencies and running everything?"

What most people just don't understand, especially lay people, is that the original Senate was a real structural protection for federalism. The Seventeenth Amendment became the driver behind the administrative state and the uncontrollable budgets.[228] That is just not widely known. He understood that, and with that it is very difficult to reverse the dynamic, and he didn't think the courts were in the business of reversing that dynamic.

Judge Pryor: Roger?

Mr. Pilon: Yes, well the reason both John and Jonathan didn't find anything to attack in my remarks is because I spoke only true sentences!

Judge Pryor: Well, this is breaking down fast. I think we'll start with our questions from the floor. Now, I'm going to begin with my usual admonition. These are the panelists. They were invited to be our speakers today. We appreciate your presence here. We'd love to have your questions, but you weren't asked to be speakers today, so I want to ask for questions, and you can introduce it with a little bit, but please keep it as a question.

Audience Question 1: Ilya Shapiro from the Cato Institute, and to the extent you enjoyed Roger's essay on Scalia's originalism, I had to edit it, so you're welcome. Just kidding. I only had to introduce a couple of commas. It was very clear.

But anyhow, I'd like to invite speculation on Scalia's vote in *Raich*.[229] Was that his accommodation of the post-New Deal regulatory state? Was it the drug war exception to the Constitution? Something else?

Professor Baker: I think it was his failure to agree with Justice Thomas on how properly to read the Commerce Clause, and I don't think—

Judge Pryor: Or was it the Necessary and Proper Clause?[230]

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[228] *See* John S. Baker, Jr., *Federalism and the Administrative State*, WASH. TIMES (July 12, 2015), http://www.WashingtonTimes.com/news/2015/jul/12/celebrate-liberty-month-federalism-and-the-adminis/.

[229] Gonzales v. Raich, 545 U.S. 1, 33 (2005) (Scalia, J., concurring).

[230] U.S. CONST. art. I, § 8, cl. 18.

Professor Baker: Well, both of them. And I think that it goes back to what I said: the New Deal is a watershed, but it affects not just the interpretation, per se, but it affects the dynamic, and I think he felt that there was no way to undo that.[231] I mean, when we would bring this up at sessions, he would say, "the vast majority of that [wrongly decided] stuff is water under the bridge."[232]

Mr. Pilon: That's also what he said when I raised the issue at that Cato lunch, as I mentioned.[233] But while the issue may be "settled," in some sense, and while the Court cannot itself rectify the mistakes of the last eight decades, the Court can at least take note of those mistakes and of the difficulty of squaring modern "constitutional law" with the Constitution itself, because the problems that law has produced—starting with our out-of-control nearly twenty trillion dollar debt[234]—aren't going away. So the issues need to be addressed, which the Court can play its part in doing.

Professor Baker: Look, he fought more battles than anybody else, and I think that there were just some battles he didn't. I mean, early on, when we would cover *Flast*[235]—those of you who heard this morning—when you heard Justice Alito and how Justice Scalia excoriated him for not saying that *Flast* should be overruled.[236] Early on when we were teaching, I said, "Why don't you overrule *Flast*?" and he said, "Well, my colleagues will never do it," and he wasn't even arguing for it at that time, and then he changed over time, and he was starting to argue for it.

Look, it comes down to the votes on the court. If there aren't votes there to do something, it's not going to get done. I mean, one time I had a

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[231] *See Raich*, 545 U.S. at 33–43 (expressing misgivings about the expansiveness of the Commerce Clause power, yet not arguing to overturn Supreme Court precedent on the matter).

[232] Antonin Scalia, Address at the Federalist Society National Lawyers Convention at 36:39–36:43 (Nov. 22, 2008), https://www.fed-soc.org/multimedia/detail/address-by-justice-antonin-scalia-audiovideo.

[233] *Id* at 36:34–39:28 (referencing Scalia's remarks over lunch at Cato in 1993).

[234] *See The Daily History of the Debt Results*, TREAS. DIRECT (NOV. 16, 2016), https://treasurydirect.gov/NP/debt/search?startMonth=11&startDay=16&startYear=2016&endMonth=11&endDay=16&endYear=2016 (showing over 19.8 trillion dollars in outstanding debt).

[235] Flast v. Cohen, 392 U.S. 83 (1968).

[236] *See* Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 637 (2007) (Scalia, J., dissenting) (dissenting from Justice Alito's opinion and stating that "[w]e had an opportunity today to erase this blot on our jurisprudence but instead have simply smudged it").

case up there, and he said I could ask him afterwards why they didn't take it, and you know, the votes weren't there. That's what it came down to.

Mr. Pilon: Just a quick response to Ilya's question. It's hard to know what motivated Scalia in *Raich*, but if *The Federalist* is one of the central topics on this panel, if you're talking about the General Welfare Clause, the Commerce Clause, and the Necessary and Proper Clause, which are the three clauses through which the New Deal constitutional revolution took place, then you go back and look at *The Federalist Nos. 41, 42,* and *44* respectively.[237]

Professor Baker: And *45*.[238]

Mr. Pilon: Exactly—what Madison thought those clauses were all about.[239] They weren't about the decision that came about in *Raich*.[240]

Professor Baker: But when not just people on the left, but overwhelmingly people on the right do not understand our structure—I mean, the latest vote, the latest poll on the Electoral College is that the vast majority of American people want to throw it out.[241] They have no idea of what that will do.

Mr. Pilon: Well, most people can't even tell you when the War of 1812 was fought.

Professor Baker: And they don't know what it did.

Judge Pryor: We're going to take a question from the right, this side that's to my right.

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[237] THE FEDERALIST NOS. 41, 42, 44, (James Madison) (Lawrence Goldman ed., 2008).

[238] THE FEDERALIST NO. 45, (James Madison) (Lawrence Goldman ed., 2008).

[239] *See, e.g.*, THE FEDERALIST NO. 41, at 206–07 (James Madison) (Lawrence Goldman ed., 2008) (discussing the General Welfare Clause); THE FEDERALIST NO. 42, at 207–09 (James Madison) (Lawrence Goldman ed., 2008) (discussing the commerce clause), THE FEDERALIST NO. 44, at 224–26 (James Madison) (Lawrence Goldman ed., 2008) (discussing the Necessary and Proper Clause); THE FEDERALIST NO. 45, at 232 (James Madison) (Lawrence Goldman ed., 2008) (discussing powers left to the states).

[240] Gonzales v. Raich, 545 U.S. 1 (2005).

[241] Lydia Saad, *Americans Call for Term Limits, End to Electoral College*, GALLUP (Jan. 18, 2013), http://www.Gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx?g_source=electoral%20college&g_medium=search&g_campaign=tiles.

Audience Question 2: Todd Zywicki from the Antonin Scalia Law School, and if you know me, I will show restraint and not ask about the Seventeenth Amendment. What I will ask about, though, is I was struck by Congressman DeSantis's remarks on *The Federalist*, and I was thinking about *The Federalist No. 62*, where they made the argument for bicameralism premised on the idea that the legislature is the real threat, and the remedy for this is to break the legislature into two parts and use bicameralism. I'd just be curious about the panel's reflections on bicameralism in the modern age as it perhaps relates to *The Federalist No. 62*. It's not a well-formulated question. Maybe you can do something interesting with it.

Judge Pryor: Well, at least it was a question.

Congressman DeSantis: What I've seen, I think, that's been different in how Madison and Hamilton would have envisioned it is they really thought that Congress would side with its institution, but in some of the budget fights we've had—you know, Congress actually passed a unified budget last year, 2015, for the first time in, I think, six years.[242] We started to do appropriation bills in the House, and they got to the Senate, and Harry Reid would filibuster the bills even being brought up.[243] Basically no agencies were funded, we would go all the way to the funding deadline, and then the Senate would force some kind of omnibus or continued resolution. We had a minority in the Senate siding with the executive branch over a core power. The senators weren't able to figure that one out, but that is not what I think we should have been doing. The

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[242] S. Con. Res. 11, 114th Cong. (2015); *see also* Bill Heniff, Jr., *Congressional Budget Resolutions: Historical Information*, CONG. RES. SERV. (Nov. 16, 2015), https://www.senate.gov/CRSpubs/079ea4a5-491d-4ff0-933d-1e2eca3a4284.pdf (last visited Sept. 25, 2016).

[243] *See, e.g.*, Rachael Bade & John Bresnahan, *Reid to Block Spending Bills,* POLITICO (July 4, 2015, 11:02 AM), http://www.POLITICO.com/story/2015/06/senate-democrats-to-block-spending-bills-118641 (discussing Harry Reid's vow to block spending measures from reaching a floor vote); Burgess Everett, *Reid: McConnell a Filibuster 'Expert,'* POLITICO (June 17, 2015, 10:45 AM), http://www.POLITICO.com/story/2015/06/harry-reid-mitch-mcconnell-spending-bills-119104 (explaining that Democrats will continue to filibuster appropriations bills until they can get Republicans to sit down at the bargaining table); Cathy Burke, *GOP Skeptical of Harry Reid's 'Promise' to Paul Ryan,* NEWSMAX (Dec. 23, 2015, 12:42 PM), http://www.newsmax.com/Newsfront/harry-reid-gop-lawmakers-skeptical/2015/12/23/id/706931/ (explaining why Republicans are skeptical of Harry Reid's promise to cooperate on appropriations bills).

Senate should have been standing with the House to try to rein in the President. I think that is how it was originally designed.[244]

Professor Turley: Yeah, I would add that I think that many . . . I'm a Madisonian scholar, so it's hard for me to say he got anything wrong, but the one thing that I think he would have been astonished by, in fact, was the 2012 State of the Union that Congressman DeSantis was talking about. As a Madisonian scholar, I was in disbelief as the President stood up and said, you know, "because you've not carried out my reforms, I've decided to circumvent you and make you a functional nonentity,"[245] and he got rapturous applause from half the chamber, and I think that Madison truly believed that institutional interests would overcome political alliances in that sense.[246] I had the honor of representing the House of Representatives in the Affordable Care Act lawsuit, and I have to say I was surprised to see the level of democratic opposition. We were fighting over the power of the purse, the defining power of Congress, and so there is a strange thing going on that I think that Madison did not anticipate with regard to who the members are and how they've changed, and I think that is different.

You know, I went to Congress when I was a fourteen-year-old page, and there were people there—giants—who fought for the institution, not just people like Byrd and Javits and Moynihan. They often put away their political alliances and fought for the institutional integrity of both chambers. That's what's missing often today, and I hear that in your words.

Congressman DeSantis: Let's wait two months and see. I guarantee you'll have Democrats much more receptive to these arguments, and I think it's an open question about how Republicans are going to respond if there are similar actions taken. Are we going to defend the institution when the politically easy thing to do is probably just to fall in line behind the President? Hopefully the rubber doesn't meet the road on that and the President conducts himself in accordance, but I think that it will be interesting to see how it shakes out.

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[244] *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345, 1350 (1988) (arguing that if the executive is given spending authority, absent Congress allocating such funds, then the legislature will lose a primary check on the executive branch).

[245] *See* Plumer, *supra* note 200 (addressing his [Barack Obama's] decision to establish policies outside of the normal legislative process whenever possible).

[246] *See* THE FEDERALIST NO. 51, at 257–60 (James Madison) (Lawrence Goldman ed., 2008) (explaining that political ambition is counteracted by the separation of powers).

I will say, though, I think part of it is political. We saw with the election outcome, some people were shocked.[247] They thought the Democrats would never lose the White House again, so I think part of it was "Hey, you know, the Republicans are not going to be in that spot, so us doing this, it's not really setting bad precedent." Now what happens? You support the bad precedent, and who comes up President? Donald Trump, whom many of them are concerned about. So, be careful. Never invest power into a person that you would not be comfortable with if your greatest enemy exercised that power.

Professor Baker: On that point, I just want to add that Professor Turley was the one who warned liberals before a House committee that if you don't stop President Obama, you're going to get a Republican in here one day who is going to do the same thing.[248]

Judge Pryor: Question.

Audience Question 3: Thank you, your Honor. I want to reassure Professor Baker that Idaho loves the Electoral College. We don't want to give it up, but with a million and a half citizens, we have a problem with overregulation. We have 722 sets of regulations in Idaho that are pretty much strangling us, and so without the senatorial check, and given *Chadha*, which the case got rid of the legislative veto for a unicameral action,[249] Idaho just passed a constitutional amendment to have a bicameral legislative veto,[250] and so since we got the Seventeenth Amendment, is the legislative veto viable at the federal level on a bicameral basis? And I'm also wondering what Roger Pilon and Professor Baker in particular have to say about that.

Professor Baker: You want a legislative veto, two houses?

Audience Question 3: Oh, I would love to have it myself, but no. Yeah, the two houses together could get rid of executive branch overrules.

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[247] Anthony J. Gaughan, *Five Things That Explain Donald Trump's Stunning Presidential Victory*, CONVERSATION (Nov. 9, 2016, 8:31 AM), https://THECONVERSATION/five-things-that-explain-donald-trumps-stunning-presidential-election-victory-66891.

[248] *Authorization to Initiate Litigation for Actions by the President Inconsistent with His Duties Under the Constitution of the United States: Hearing on H.R. 313 Before the H. Comm. on Rules*, 114th Cong. 19–20 (2014) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University).

[249] INS v. Chadha, 462 U.S. 919, 959 (1983).

[250] H.J. Res. 5, 2016 Leg. (Idaho 2016).

Professor Baker: OK, but here's the problem with many people on the left and the right. They see a particular problem, and they look only at that problem, and they come up with a solution for that problem without thinking about the consequences, the new problems they're creating. You have to look at the whole body together and figure out what you're doing. Remember: the Seventeenth Amendment was passed with virtually no opposition by ordinary people on the right and the left,[251] except that the people on the left knew what they were doing. They were out to destroy separation of powers. Nobody made the arguments—structural arguments—and they made the same arguments that are today being made for term-limiting members of Congress, OK?[252] They thought it would make it bring Senators closer to the people.[253] Nothing could be further from the truth. So you have to know something about the Constitution before you keep changing things in it. It's a matter of looking at what worked and why it worked, or to borrow a phrase, what really did make us a great country.

Mr. Pilon: Justice Scalia often said that the Sixteenth and Seventeenth Amendments, both passed in 1913 at the height of the Progressive Era, were the key to understanding the emerging divide.[254] However, apart from the expanded power to tax afforded by the Sixteenth Amendment, neither of those amendments expanded the original enumerated powers of Congress. Congress didn't have a bit more power afterward than it had before, except as a practical and political matter due to those amendments, respectively.[255] But now you had more powerful political forces calling for the demise of the enumerated powers doctrine. It fell finally to the Court in 1937 to eviscerate that doctrine.[256]

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[251] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 501, 545–47 (1997) (showing the populace's mass support for the Seventeenth Amendment).

[252] Saad, *supra* note 241.

[253] *See* Bybee, *supra* note 251, at 535, 538 (explaining that the general public thought the direct election of senators would remove corruption and result in senators being more accountable to the people).

[254] Tony Mauro, *The 17th Amendment Under Attack*, NAT'L L.J. (Nov. 22, 2010), https://www.theusconstitution.org/news/17th-amendment-under-attack.

[255] *See* U.S. CONST. amend. XVI–XVII (showing that Congress gained the power to lay and collect taxes on income without apportionment from the states and that the people now have the right to directly elect senators).

[256] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36–37 (1937) (broadens the Commerce Clause by giving Congress the power to enact legislation when such legislation affects commerce, thus significantly expanding the scope of Congress's regulatory power).

Professor Baker: Right. But they would never have done it if senators were still protecting states, because they wouldn't have put up with it. The idea—

Mr. Pilon: That's a political point, not a legal one.

Professor Baker: No, but it changes the dynamic of power. What *The Federalist* explained is human nature and what motivates people. Today we think "policy." Well, wait a minute. Policies are executed by human beings, and what are their motives?

Mr. Pilon: True, but those structural changes do not alone explain the New Deal constitutional revolution. They gave the federal government the *means* for expanding, but not the *authority* to do so.[257] That would come with the demise of the enumerated powers doctrine. And it would be implemented through the bifurcation of both the Bill of Rights and judicial methods.[258]

Judge Pryor: I'll take another question.

Audience Question 4: Thank you. I used to be the Chief of Federal Litigation for Miami-Dade County, and I'm now a city attorney, and I teach state and local government law.

Judge Pryor: What's your name?

Audience Question 4: Craig Leen. One issue that I see related to federalism I wanted to ask you about, and what Justice Scalia thought about it is, you know, in the early 1900's there was a case, *Hunter v. City of Pittsburgh*, that talked about how states really have authority over their local governments,[259] and what's occurred to me and to many of my students when I teach them about state and local government laws is that the federal government exercises a lot of authority over counties and cities, both through 42 U.S.C. § 1983, through a number of other acts and

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[257] *See* Ronald Pestritto, *The Birth of the Administrative State: Where it Came from and What it Means for Limited Government*, HERITAGE FOUND. (Nov. 20, 2007), http://www.heritage.org/political-process/report/the-birth-the-administrative-state-where-it-came-and-what-it-means-limited (arguing that the birth of the administrative state and expansion of government came from the New Deal).

[258] *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 303–04 (1964); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942); United States v. Darby, 312 U.S. 100, 118 (1941).

[259] 207 U.S. 161, 178–79 (1907).

statutes, and through the administrative agencies,[260] which I'm not making a normative judgment on that, but I find it very interesting, because if you truly have federalism but the federal government really is the one, for example, regulating city police departments or county police departments and not the state, do you really have federalism?

Mr. Pilon: You do, because as I said in my formal remarks, federalism cuts both ways.[261] It's not simply: the federal government has limited power and the states have the balance of power—*The Federalist No. 45*;[262] it's rather that the Civil War amendments changed that arrangement fundamentally.[263] Now you've got federal power essentially to negate state actions that violate the rights of the state's own citizens.[264] That's altogether different from federal power to give us Obamacare and what not. It's federal power to check the states that are running amok, and that's the other side of federalism that the Civil War Amendments brought into being, and that's the side that so many conservatives find uncomfortable, because they think of it as empowering the Court to find unenumerated rights.[265] What I tried to argue was that, no, it empowers the court to ask the state, "What right is your police power protecting?" And when you look at everything from *Lochner*[266] to *Pierce v. Society of Sisters*,[267] *Meyer v. Nebraska*,[268] *Griswold*,[269] *Lawrence*,[270] and more, you find that these state laws are essentially based on morals; they're not defending the rights of anyone.

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[260] 42 U.S.C. § 1983 (2012); *see, e.g.*, Administrative Procedure Act, Pub. L. No. 404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); 20 U.S.C. § 6301 (2002); 20 U.S.C. § 1681(a), 1682 (1972).

[261] *See supra* notes 174–75 and accompanying text.

[262] THE FEDERALIST NO. 45, at 230–32 (James Madison) (Lawrence Goldman ed., 2008).

[263] *See* U.S. CONST. amends. XIII–XV (fundamentally altering the traditional balance of power by providing power to the federal government to check state police power).

[264] *See id.* amend. XIV, §§ 1 & 5 (authorizing courts and Congress to enforce the provisions of the amendment).

[265] *E.g.*, Allen Porter Mendenhall, *The Abuse of the Fourteenth Amendment*, IMAGINATIVE CONSERVATIVE (July 31, 2013), http://www.theimaginativeconservative.org/2017/07/abuse-fourteenth-amendment-allen-porter-mendenhall.html.

[266] Lochner v. New York, 198 U.S. 45 (1905).

[267] 268 U.S. 510 (1925).

[268] 262 U.S. 390 (1923).

[269] Griswold v. Connecticut, 381 U.S. 479 (1965).

[270] Lawrence v. Texas, 539 U.S. 558 (2003).

Audience Question 5: Thank you, Judge. My name is Justin Pearson, and I'm an attorney at the Institute for Justice.

Judge Pryor: OK. Could you speak a little closer to the microphone so we can hear you better?

Audience Question 5: Sure. I'm an attorney at the Institute for Justice. My name is Justin Pearson, and my question is directed at Congressman DeSantis, and I want to preface this by saying that, Congressman, I really appreciated what you said about the duty of elected officials to not support unconstitutional legislation. My question to you, Congressman, is whether you think that is mutually exclusive with the role of courts to use the Constitution to serve as an additional bulwark against legislative encroachments, as Hamilton promised in *The Federalist No. 78*,[271] when elected officials fail to fulfill that duty?

Congressman DeSantis: I think that—and Justice Scalia would say this—look, this idea of judicial review, it's not that that we're smart philosopher kings and know these great policy questions; this is a lawyer's job. You have a constitutional text, you have a statutory text, and if they are harmonious, then fine. If there's a conflict, then your job is to identify the conflict and, of course, prefer the fundamental laws represented in the Constitution over the transient impulses of the people as represented in the statutes.[272] So that is absolutely legitimate. But I would also say that just because a court has found something to be constitutional, if as a legislator you honestly believe it's not constitutional and the court got it wrong, I still think you have a duty to vote against the statute. Now, many people say, "Well, the court ruled; I'm fine," and you won't be criticized for that. But courts don't always get it right, and we have to render our own judgment. It doesn't mean you don't follow court decisions, but at the same time, we're not under any obligation to vote for statutes that we honestly don't believe are constitutional.

Professor Baker: I would just add that a lot of times, people don't realize that you can have two separate viewpoints altogether between the Congress and the court. That is, when the court rules on something as to whether it's necessary and proper, they're ruling as to whether the Congress could find this necessary and proper.[273] It doesn't mean as a

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[271] THE FEDERALIST NO. 78, at 383 (Alexander Hamilton) (Lawrence Goldman ed., 2008.

[272] Paulson, *supra* note 213, at 2714.

[273] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 324–25, 420–21 (1819).

member of Congress that you have to say it's necessary and proper, and that is a constitutional issue.

Judge Pryor: Next question.

Audience Question 6: Roman Buhler with the Madison Coalition. Twenty-five years ago, I was Newt Gingrich's first Committee Counsel, and we thought Congress could fix everything, but I'd be interested in the opinion of the panel about an effort that's now going on coming up from the states. There are 900 state legislators, six governors, nineteen state legislative chambers, and the Republican National Committee's unanimous endorsement in language in the Republican platform,[274] for a constitutional version of the Regulations from the Executive in Need of Scrutiny Act ("REINS Act"),[275] that almost every House Republican voted for.[276] It would require that Congress approve major new federal regulations, and the idea is that in the same way that states were able to force Congress to propose the Bill of Rights without a convention,[277] and more recently the Twenty-Second Amendment on presidential term limits,[278] that pressure from the states could persuade Congress to do what's in its own interest and reclaim the executive branch power, the Article I power that's been stolen by the executive branch. Your thoughts on Regulation Freedom Amendment and the strategy?

Professor Turley: You know, I'm generally against amending on issues like the REINS Act, because we should just pass the REINS Act.[279] I think that it's important to use the Constitution for stuff that we cannot achieve legislatively. I testified recently in Congress, asking them again to bring up the REINS Act.[280] I think the REINS Act is a very useful tool to get Congress back in the business of governing. I mean, there's a sort

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[274] *The Madison Coalition and the Regulation Freedom Amendment*, COLO. BUS. ROUND TABLE, (May 18, 2017), http://www.COBRT.com/smart-regulation/the-madison-coalition-and-the-regulation-freedom-amendment/5/18/2017 [hereinafter *The Madison Coalition*].

[275] Regulations from the Executive in Need of Scrutiny Act, H.R. Res. 427, 114th Cong. (2015).

[276] Final Vote Results for Roll Call 482, H.R. Res. 427, 114th Cong. (2015).

[277] *The Madison Coalition*, *supra* note 274.

[278] U.S. CONST. amend. XXII.

[279] H.R. Res. 427.

[280] *The* Chevron *Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. (2016) (written statement of Jonathan Turley, Shapiro Professor of Public Interest Law, George Washington University).

of not-so-noble lie that Congress is actually governing, when most, 99% of the agency decisions, are not being reviewed.[281] They're being increasingly done independently, and I think that is a serious danger for our democratic system. More and more of our decisions are being decided by an insulated group of agency officials where the public has no interaction with them, doesn't even know who they are. I mean, even trivial things like some unknown office declaring that the Redskins can't use the Redskins' name.[282] This is a raging debate. I'm not involved; I'm a Bears fan. But the fact is, you know, you had this unknown office step in and say: "All right. We're going to settle the question. You don't have trademark protections. You can't use that name."[283] It's an example of what we talk about with the Fourth Branch. Largely that's insulated from Congress. Congress doesn't have the ability, the staff, to seriously look at agencies. That would change if we had something like the REINS Act,[284] and I think you just pass the act or something like it, rather than amend the Constitution.

Mr. Pilon: I'd support a constitutional amendment of four words: "and we mean it."

Judge Pryor: Next question.

Audience Question 7: Hi, I'm Warren Belmar and I'm a recovering attorney with one question: is there any vitality left to *Schechter Poultry*,[285] and if not, why not?

Professor Baker: Well, according to Justice Scalia, there wasn't. He used to say that was the only case and its companion case in which they ever applied that, and that it wouldn't be applied again, but that's before he started rethinking *Chevron*.[286]

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[281] *IV Review of Agency Decisions*, U.S. CTS. FOR THE NINTH CIR. (May 2012), http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.pdf (showing the high level of deference federal courts will give to administrative agency decision).

[282] Blackhorse v. Pro-Football, Inc., 111 U.S.P.Q.2d (BNA) 1080, *1 (T.T.A.B. 2014).

[283] *Id.*

[284] H.R. Res. 427.

[285] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[286] Adam White, *More on Justice Scalia's Doubts About* Chevron, YALE J. ON REG.: NOTICE & COMMENT (Nov. 17, 2016), http://YaleJReg.com/nc/more-on-justice-scalias-doubts-about-chevron/.

Audience Question 7: Well, the only limit we had on delegations have brought general authority to the executive branch, and it's something that might still have some vitality.

Judge Pryor: Please join me in thanking this panel for a great discussion.

CHEVRON DEFERENCE: WHERE DO WE GO FROM HERE?

E. Duncan Getchell, Jr.[*] *and Michael H. Brady*[**]

INTRODUCTION

Although it has been hugely consequential for the consolidation of the administrative state, the doctrine announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[1] grew out of thin soil, both doctrinally and presidentially. The question presented in *Chevron* was prosaic: Does the statutory term in the Clean Air Act Amendments of 1977,[2] requiring the permitting of "'new or modified major stationary sources' of air pollution," empower the Environmental Protection Agency ("EPA") to adopt a plant-wide definition of stationary source through regulations?[3] Although finding that neither the text nor legislative history provided a clear answer, the United States Court of Appeals for the District of Columbia Circuit thought that a rule of decision could be derived from the purpose of the program and that the regulations should be set aside for insufficiently advancing that purpose.[4] In a 6-0 decision, with Justices Marshall, Rehnquist, and O'Connor recused, the Supreme Court reversed.[5]

"The basic legal error of the Court of Appeals," according to the Supreme Court, "was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[6] Of course, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."[7] But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[8]

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[1] 467 U.S. 837, 865 (1984).

[2] Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

[3] *Chevron*, 467 U.S. at 839–40.

[4] Natural Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726–28 (D.C. Cir. 1982).

[5] *Chevron*, 467 U.S. at 837, 866.

[6] *Id.* at 842.

[7] *Id.* at 843 n.9.

[8] *Id.* at 843.

Doctrinally, the analysis in *Chevron* depended upon the notion that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[9] *Chevron*'s statement that where the gap is explicit the resulting "legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute,"[10] rests on precedent from the late 1970s and early 1980s, with the exception of *American Telephone & Telegraph Co. v. United States*.[11] The statement in *Chevron* that when implicit gap-filling is in play "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency,"[12] is expressly supported only by *Immigration and Naturalization Service v. Jong Ha Wong*,[13] and *Train v. Natural Resources Defense Council, Inc.*[14] The statement that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,"[15] is followed by a string cite going back into the nineteenth century.[16] Nonetheless, the original tradition of deference explicitly rested upon long-standing and consistent, often contemporaneous, interpretations, frequently made by those who drafted the provisions.[17] These cases are a far cry from *Chevron*'s gap-delegation theory and the Court's tolerance of shifting agency interpretations, each entitled to deference. The cases cited for the proposition that "deference to administrative interpretations 'has been

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9 *Id.* at 843–44 (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

10 *Id.*

11 *Id.* at 844 (citing 299 U.S. 232, 235–37 (1936)).

12 *Id.*

13 450 U.S. 139, 144 (1981).

14 421 U.S. 60, 75 (1975).

15 *Chevron*, 467 U.S. at 844.

16 *Id.* at 844 n.14.

17 *See* McLaren v. Fleisher, 256 U.S. 477, 481 (1921) ("the practical construction . . . fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years, will not be disturbed except for cogent reasons."); Webster v. Luther, 163 U.S. 331, 342 (1896) (practical construction by agency not followed if it "defeat[s] the obvious purpose of a statute"); Brown v. United States, 113 U.S. 568, 571 (1885) (quoting *Darby* and *Moore* and relying on the principle that the construction was long-standing); United States v. Moore, 95 U.S. 760, 762–63 (1878) (citations omitted) ("The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently [sic] they are the draftsmen of the laws they are afterward called upon to interpret."); Edwards' Lessee v. Darby, 25 U.S. 206, 210 (1827) ("In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.").

consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation,'"[18] barely reach back to the Second World War. None of the strands of authority relied upon in *Chevron* compelled the departure from the famous statement in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[19] and certainly not to the extent reflected in *Chevron*. Indeed, some of the authorities cited in *Chevron* clearly left more for the reviewing courts to do than the Court in *Chevron* and the cases expounding upon it now permit.[20]

Without regard to how strongly or weakly the precedents support *Chevron*, there are several reasons to believe that now would be an apt and topical moment to reconsider the case. First, not only are all members of the *Chevron* Court gone from the Supreme Court bench, but in the closing years of the Obama Administration, the Court departed from the routine application of *Chevron* in important ways. Second, there is significant discontent with the standard delegation doctrine, a subject closely tied up with *Chevron*. Third, Professor Hamburger in his treatise, IS ADMINISTRATIVE LAW UNLAWFUL?, provides a trenchant critique of administrative law in general and of *Chevron* in particular—a

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[18] *Chevron*, 867 U.S. at 844 (quoting United States v. Shimer, 367 U.S. 374, 381–82 (1961)).

[19] 5 U.S. (1 Cranch) 137, 177 (1803).

[20] *See* Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31–32 (1981) (citation omitted) ("The interpretation put on the statute by the agency charged with administering it is entitled to deference, but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate, or that frustrate the policy that Congress sought to implement."); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (citations omitted) ("It is undisputed that the Treasury Department adopted the statutory interpretation at issue here less than a year after passage of the basic countervailing-duty statute in 1897, and that the Department has uniformly maintained this position for over 80 years. This longstanding and consistent administrative interpretation is entitled to considerable weight."); Batterton v. Francis, 432 U.S. 416, 424–25 (1977) ("Ordinarily, administrative interpretations of statutory terms are given important but not controlling significance" while express delegation to prescribe standards produces "regulations with legislative effect" committing "to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term."); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 63, 75 (1975) ("The case presents an issue of statutory construction which is illuminated by the anatomy of the statute itself, by its legislative history, and by the history of congressional efforts to control air pollution. . . . Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts."); NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 124 (1944) ("Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation.").

circumstance noticed in published opinions by Justice Thomas and then Judge Gorsuch, among others. Fourth, now-Justice Gorsuch was highly critical of *Chevron* when he was on the Tenth Circuit. Parts I–IV discuss those matters, with a conclusion to follow.

I. RECENT DEPARTURES FROM THE ROUTINE APPLICATION OF *CHEVRON*

In 2013, in *City of Arlington v. FCC*, Justice Scalia, joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, handed down a majority opinion describing the two-step *Chevron* test for evaluating agency statutory construction as a "now-canonical formulation."[21] The majority thought it was answering this single question: "Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction."[22] The majority thought it should. Justice Breyer, in a separate opinion, believed the question to be more complicated, "say[ing] that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant."[23] And so he wrote that before *Chevron* deference attaches, a "reviewing judge . . . will have to decide independently whether Congress delegated authority to the agency to provide interpretations of . . . the statute at issue."[24] Because Justice Breyer believed that affirmance of the lower court was appropriate, and because that is what the majority did, partly in agreement with his opinion, he concurred in part and concurred in the judgment.[25] Chief Justice Roberts, with Justices Kennedy and Alito in dissent, thought that the majority had misframed the issue. The true point at issue "is instead that a court should not defer to an agency on whether Congress has granted the agency interpretative authority over the statutory ambiguity at issue."[26] "You can call that 'jurisdiction' if you'd like," the dissenters said,[27] but in the end the dissenters would not countenance any decision that augmented the already broad powers of agencies "even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power."[28] They would not do this in part because "the danger posed by the growing power of the administrative state cannot be

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21 133 S. Ct. 1863, 1865, 1868 (2013).

22 *Id.* at 1867–68.

23 *Id.* at 1875.

24 *Id.*

25 *Id.* at 1875, 1877 (Breyer, J., concurring in part and concurring in the judgment).

26 *Id.* at 1879–80.

27 *Id.*

28 *Id.* at 1879.

dismissed."[29] Although the majority thought that the application of *Chevron* in *Arlington* was routine, there were significant questions and disagreement.

The next year saw a majority of the Court refuse *Chevron* deference to a construction of the Clean Air Act[30] advanced by the EPA. The *Chevron* issue in *Utility Air Regulatory Group v. E.P.A.*, was whether greenhouse gases are within the "any air pollutant" regulatory trigger for purposes of PSD or Title V permitting.[31] The majority concluded that including greenhouse gases in that definition "is not permissible."[32] This was so because "an agency interpretation that is 'inconsisten[t] with the design and structure of the statute as a whole' does not merit deference,"[33] and "EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design," by regulating too many small sources.[34] The Court went on to say:

> The fact that [the] EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. [The] EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in [the] EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance."[35]

This amounts to a too big and too consequential exception of the notion of congressionally intended gap-filling.

Again, in the following year, the Court in *King v. Burwell*, declined to give *Chevron* deference to an agency administering the Patient Protection and Affordable Care Act.[36] The Act "allows an individual to receive tax credits only if the individual enrolls in an insurance plan through 'an Exchange established by the State under [42 U.S.C. § 18031].'"[37] The IRS construed that language to also comprise an exchange established by the

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[29] *Id.*

[30] Clean Air Act §§ 101–618, 42 U.S.C. §§ 7401–7671(q) (1988 & Supp. II 1990).

[31] 134 S. Ct. 2427, 2438, 2450 (2014).

[32] *Id.* at 2442.

[33] *Id.* (citations omitted).

[34] *Id.* at 2442–43.

[35] *Id.* at 2444 (citations omitted).

[36] 135 S. Ct. 2480, 2485, 2488–89 (2015).

[37] *Id.* at 2480, 2489 (2015).

federal government under a different section.[38] In declining to give *Chevron* deference, the majority opinion, written by the Chief Justice and joined by five other Justices, employed this analysis:

> When analyzing an agency's interpretation of a statute, we often apply the two-step framework announced in *Chevron*. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency's interpretation is reasonable. This approach "is premised on the theory that the statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." This is one of those cases. The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort.[39]

Although the majority declined to take the *Chevron* road, it reached the same destination by employing a judicially crafted rule of decision based upon the structure and purpose of the law. Justices Scalia, Thomas, and Alito dissented from the conclusions reached by the majority in its de novo construction of the law.[40]

The Clean Air Act provides for regulation of emissions of hazardous air pollutants from power plants when the Agency finds such regulating to be "appropriate and necessary."[41] In *Michigan v. E.P.A.*, the Supreme Court was called upon to "decide whether it was reasonable for [the] EPA to refuse to consider cost when making this finding."[42] A five-Justice majority consisting of Justice Scalia, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito, held that it was not and refused deference.[43] In a concurrence, Justice Thomas noted that the EPA's "request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes" in light of the Vesting Clauses of Article I and Article III of the Constitution.[44] Article I, Sec. 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall

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38 *Id.* at 2487.

39 *Id.* at 2488–89 (citations omitted).

40 *See id.* at 2489, 2496.

41 42 U.S.C. § 7412(n)(1)(A).

42 135 S. Ct. 2699, 2704 (2015).

43 *Id.* at 2706–07.

44 *Id.* at 2712–13.

consist of a Senate and House of Representatives."[45] The *Chevron* concept of delegated legislative gap-filling powers is in substantial tension with the word "All." Article III, Section 1 provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[46] *Chevron's* deference to agency construction of statutes—historically a core judicial function—vests judicial power in the executive.

One final case deserves to be noticed. When the EPA promulgated the so-called Clean Power Plan, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*,[47] and related regulations, the agency claimed *Chevron* deference for its construction of the term "best available control technology" to include grid-wide conversion of a portion of fossil fuel generation to renewable sources through a cap and trade system.[48] On February 9, 2016, the Supreme Court stayed the rule "pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for writ of certiorari, if such writ is sought."[49] The order further provided that "[i]f the Court grants the petition for writ of certiorari, this order shall terminate when the Court enters its judgment."[50] Justices Ginsburg, Breyer, Sotomayor, and Kagan voted to deny the stay.[51] This strongly suggests that the Chief Justice and Justices Scalia, Kennedy, Thomas, and Alito thought that the EPA's claim of deference was unlikely to prevail on appeal.[52] So what we have seen between 2013 and 2016 is the refusal of the Chief Justice and Justices Kennedy and Alito in *Arlington* to give deference with respect to constructions of statutory authority–the most consequential issue for agencies claiming *Chevron* deference. Then a majority of the Court refused in *Utility Air Regulatory Group* to find a fillable gap where a novel claim of authority was advanced that was hugely consequential. A majority rejected any role for *Chevron* in *King,* both because the issue was too consequential and because the

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[45] U.S. CONST. art. I, § 1.

[46] *Id.* art. III, § 1.

[47] 80 Fed. Reg. 64662 (Oct. 23, 2015).

[48] Respondent EPA's Initial Brief at 33, 44–45, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Mar. 28, 2016) (quoting 80 Fed. Reg. 64662, 64666 (Oct. 23, 2015)) (to be codified at 40 C.F.R. pt. 60) (The EPA regulation explicates the phrase "best system of emission reduction" promulgated in the Clean Air Act.)).

[49] West Virginia v. EPA, 136 S. Ct. 1000 (2016) (mem.).

[50] *Id.*

[51] *Id.*

[52] *See* Nken v. Holder, 556 U.S. 418, 425–26 (2009); Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers); *see also* Jill Wieber Lens, *Stays of Injunctive Relief Pending Appeal: Why the Merits Should Not Matter*, 43 FLA. ST. U. L. REV. 1319, 1320 (2016).

administering agency was not one to which Congress would have given gap-filling authority. In *Michigan v. EPA,* a majority refused deference even though the terms to be construed would seem to be ambiguous under traditional *Chevron* practice. To top that off, Justice Thomas questioned the very constitutionality of *Chevron* in his concurrence. Finally, the Supreme Court in 2016 stayed a national environmental rule in the face of a claim of deference. Thus, it appears that by the end of Justice Scalia's tenure no stable majority supported the application of *Chevron* as previously understood.

II. THE MODERN DELEGATION DOCTRINE IS INADEQUATE

In *Department of Transportation v. Association of American Railroads*, the Supreme Court reviewed a decision of the District of Columbia Circuit finding that Amtrak, as a private corporation, cannot be constitutionally granted regulatory power over private railroads.[53] Eight Justices joined the opinion for the Court, reversing the circuit court of appeals on a finding that Amtrak is a governmental entity for purposes of separation of powers analysis.[54] Justice Thomas concurred in the judgment.[55]

Underneath this apparent agreement, significant issues remained for potential evaluation on remand, including the Appointments Clause problem that Amtrak's board members are not appointed by the President, and in any event, have not been administered the constitutionally required oath.[56] Furthermore, the arbitrator was called for to determine if any dead lock between Amtrak and the Federal Railroad Administration under Section 207 of the Passenger Rail and Investment and Improvement Act of 2008 ("PRIAA"),[57] would violate the delegation doctrine if the arbitrator turned out to be a nongovernmental actor.[58] These issues were canvassed at length in Justice Alito's concurrence.[59]

The opinion of Justice Thomas, concurring in the judgment, begins: "We have come to a strange place in our separation-of-powers jurisprudence."[60] By this he meant that when the Court is asked to decide

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[53] 135 S. Ct. 1225, 1231 (2015).

[54] *Id.* at 1227, 1233.

[55] *Id.* at 1240.

[56] *Id.* at 1234.

[57] Pub. L. No. 110-432, div. B, 122 Stat. 4907 (codified in scattered sections of 49 U.S.C.).

[58] *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1234 (2015) (citing Respondent's argument that the arbitrator provision was a violation of the non-delegation doctrine).

[59] *See id.* at 1234–40 (Alito, J., concurring).

[60] *Id.* at 1240 (Thomas, J., concurring in the judgment).

whether Amtrak "is subject to an adequate measure of control by the Federal Government," the Court does not "even glance at the Constitution to see what it says about how this authority must be exercised and by whom."[61] The question as framed by the Court is strange because our "Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'"[62] Instead, the Vesting Clauses found in Articles I, II, and III commit all legislative powers to the Congress, the executive power to the President, and the judicial power to "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[63] "These grants are exclusive" and "[w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it."[64] "The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it."[65] "The function at issue" in *Association of American Railroads* had to do with "the formulation of generally applicable rules of private conduct."[66] Such rules historically have been regarded as legislative.[67]

The idea that the "King could not use his proclamation power to alter the rights and duties of his subjects" appeared even before the English Civil War,[68] and this limitation on the executive was carried forward in the writings of Locke, Blackstone, and Madison.[69] While the Supreme Court has held "that the Constitution categorically forbids Congress to delegate its legislative power to any other body," Justice Thomas was stating the obvious in saying that "it has become increasingly clear . . . that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition."[70]

The test to which he refers is the intelligible principle test enunciated *in J.W. Hampton, Jr. & Co. v. United States*.[71] By that time, "there was a growing trend of cases upholding statutes pursuant to which the Executive exercised the power of 'making subordinate rules within

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61 *Id.*

62 *Id.*

63 *Id.* at 1240–41 (quoting U.S. CONST. art. III, § 1).

64 *Id.* at 1241 (citations omitted).

65 *Id.* at 1242. *Accord* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. PUB. POL'Y 147, 153 (2017).

66 *DOT*, 135 S. Ct. at 1242.

67 *Id.*

68 *Id.* (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 3–4 (2014)).

69 *Id.* at 1243–44.

70 *Id.* at 1246.

71 276 U.S. 394, 409 (1928).

prescribed limits.'"[72] "To the extent that these cases endorsed authorizing the Executive to craft generally applicable rules of private conduct, they departed from the precedents on which they purported to rely."[73] As things now stand, "the intelligible principle test . . . requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law," including such flaccid standards as the "public interest" and "unfair[ness]" or what is deemed "unnecessary."[74]

According to Justice Thomas, "[w]e should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."[75] Were the Court to do so, there would be no room for *Chevron* deference, but for Justice Thomas this would be a small price to pay.

> We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.[76]

It should be noted that on remand the D.C. Circuit ruled that the Passenger Rail Investment and Improvement Act[77] "violates the Fifth Amendment's Due Process Clause by authorizing an economically self-interested actor to regulate its competitors and violates the Appointments Clause by delegating regulatory power to an improperly appointed arbitrator."[78]

III. ADMINISTRATIVE LAW IN GENERAL AND *CHEVRON* IN PARTICULAR ARE INCREASINGLY SUBJECT TO CRITICISM BASED ON FIRST PRINCIPLES

"[T]he question of whether or not the king can issue ordinances parallels our modern question as to whether or not an executive body or officer can establish regulations; and the arguments used pro and con

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[72] *DOT*, 135 S. Ct. at 1249.

[73] *Id.*

[74] *Id.* at 1251.

[75] *Id.* at 1252.

[76] *Id.* at 1254–55.

[77] Pub. L. No. 110-432, div. B, 122 Stat. 4907 (codified in scattered sections of 49 U.S.C.).

[78] Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 821 F.3d 19, 23 (D.C. Cir.), *reh'g and reh'g en banc denied*, No. 12-5204 (D.C. Cir. Sept. 9, 2016). No review was sought in the Supreme Court.

have followed much the same lines."[79] This quote provides a good jumping-off point for Professor Philip Hamburger's historical and doctrinal tour de force demonstrating that modern American administrative law is outside of the law, above the law, and absolute because it is consolidated and not divided. It also evades the Constitution by not honoring the separation of powers established by its first three Articles. Administrative law is seen to be all of these things when contrasted with a real law, enacted by a real representative legislature, enforced by real judges, in real courts, and administered by an executive who does not himself make the law. In sharp distinction, administrative law is promulgated by officials whose discretion is uncontrolled and irresponsible when measured by democratic norms, and is enforced by the same officials who promulgate it, through proceedings before administrative law judges who are neither independent nor disinterested.[80] "The history . . . shows that administrative lawmaking returns to precisely the sort of extra-legal governance that constitutional law was designed to prohibit."[81]

By the time Professor Hamburger reaches *Chevron* deference, he is prepared to relegate the case to the category of the notorious.[82] Substantively he says this:

> Like the deference to rulemaking, the deference to interpretation is an abandonment of judicial office. The Constitution grants judicial power to the courts, consisting of judges who were assumed to have an office or duty of independent judgment. The Constitution thereby establishes a structure for providing parties with the independent judgment of the judges, and this means their own, personal judgment, not deference to the judgment of the executive, let alone the executive when it is one of the parties. Nonetheless, the judges defer to judgments of the executive, and they thereby deliberately deny the benefit of judicial power to private parties and abandon the central feature of their offices as judges.[83]

Although legal doctrine may not be much moved by legal writing in the ordinary case, we have already seen that Justice Thomas cited Professor Hamburger when concurring in the judgment in *Association of*

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[79] JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 89–90 (1927).

[80] PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 498–502 (2014) (discussing how administrative power, through its creation, processes, and enforcement, conflicts with the Constitution).

[81] *See* HAMBURGER, *supra* note 80, at 31.

[82] *Id.* at 315.

[83] *Id.* at 316.

American Railroads.[84] The Court's newest Justice has also noticed Professor Hamburger's book as we will see in the next part.[85]

IV. JUSTICE GORSUCH BRINGS A DISTINCTLY NEW VIEW OF *CHEVRON* TO THE COURT

In 2015, the Tenth Circuit denied rehearing in a case where a sex offender was convicted of failing to notify authorities of his intent to leave the country[86] under a provision of the Sex Offender Registration and Notification Act ("SORNA").[87] This law "left it to the Attorney General to decide whether and on what terms sex offenders convicted before the date of SORNA's enactment should be required to register their location or face another criminal conviction."[88] After quoting this provision—"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 . . . and to prescribe rules for registration of any such sex offender" then-Judge Gorsuch remarked: "Yes, that's it."[89] On his way to opining that the intelligible principle doctrine is inadequate to cure delegation defects in the criminal context,[90] he saluted Professor Hamburger's book.[91]

In 2016, then-Judge Gorsuch found himself writing the panel decision in *Gutierrez-Brizuela v. Lynch*, holding that inadmissibility under a one-year bar that prevented aliens who entered the country illegally more than once from obtaining adjustment of status, did not apply retroactively.[92] Then, unusually enough, he wrote a concurrence with his own panel opinion, using it as a vehicle to question the continuing viability of *Chevron*.[93] He concluded that opinion with this:

> All of which raises this question: what would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would

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[84] Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1242 (2015) (Thomas, J., concurring in the judgment).

[85] *See, e.g.*, Egan v. Del. River Port Auth., 851 F.3d 263, 281 n.4 (3d Cir. 2017) (Jordan, J., concurring in the judgment) ("The doctrine of deference deserves another look." *Id.* at 278.).

[86] *U.S. v. Nichols*, 784 F.3d 666, 667–68 (10th Cir. 2015) (en banc) (memo.) (Gorsuch, J., dissenting from the denial of rehearing en banc).

[87] 42 U.S.C. § 16913(d) (2012).

[88] *Id.*

[89] *Egan*, 851 F.3d at 668.

[90] *Id.* at 676–77 ("By any plausible measure we might apply that is a delegation run riot, a result inimical to the people's liberty and our constitutional design.").

[91] *Id.* at 670 n.2.

[92] 834 F.3d 1142, 1144–45, 1148–49 (10th Cir. 2016).

[93] *Id.* at 1149, 1158 (Gorsuch, J., concurring).

> continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*. Of course, courts could and would consult agency views and apply the agency's interpretation when it accords with the best reading of a statute. But de novo judicial review of the law's meaning would limit the ability of an agency to alter and amend existing law. It would avoid the due process and equal protection problems of the kind documented in our decisions. It would promote reliance interests by allowing citizens to organize their affairs with some assurance that the rug will not be pulled from under them tomorrow, the next day, or after the next election. And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes—an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment. We managed to live with the administrative state before *Chevron*. We could do it again. Put simply, it seems to me that in a world without *Chevron* very little would change—except perhaps the most important things.[94]

In the concurrence, these questions were asked:

> But even taking the forgiving intelligible principle test as a given, it's no small question whether *Chevron* can clear it. For if an agency can enact a new rule of general applicability affecting huge swaths of the national economy one day and reverse itself the next (and that is exactly what *Chevron* permits), you might be forgiven for asking: where's the "substantial guidance" in that? And if an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington's* application of *Chevron* says it can), you might well wonder: where are the promised "clearly delineated boundaries" of agency authority?[95]

In discussing delegation, then-Judge Gorsuch cited with approval *Esquivel-Quintana v. Lynch*.[96] In that case, the Sixth Circuit applied *Chevron* deference to the construction of the term "sexual abuse of a minor" by the Board of Immigration Appeal, rejecting application of the rule of lenity in a civil case.[97] Judge Sutton did not believe that *Chevron* should apply to a statute having both criminal and civil consequences and would have applied the rule of lenity.[98] Certiorari was granted,[99] and it seemed possible that the Supreme Court might have a vehicle for reexamining the status of *Chevron*. Not so. In the end, a unanimous Court, with Justice Gorsuch recused, ruled that the statute, read in context,

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[94] *Id.* at 1158 (emphasis omitted).

[95] *Id.* at 1154–55 (citation omitted).

[96] *Id.* at 1149, 1156 (citing Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027–32 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part)).

[97] *Esquivel-Quintana*, 810 F.3d at 1024, 1027.

[98] *Id.* at 1027.

[99] Esquivel-Quintana v. Lynch (*Esquivel-Quintana II*), 810 F.3d 1019 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 368, 368 (2016).

unambiguously forecloses the Board's interpretation of sexual abuse of a minor, so that neither the rule of lenity nor *Chevron* deference applies.[100]

CONCLUSION

So we are left with straws in the wind and notions in the air. But these straws in the wind and notions in the air are sufficiently interesting to warrant an alert search for a proper vehicle to revisit *Chevron*. Although the Supreme Court has recently limited *Chevron* in an incremental manner, the case is so contrary to first principles that it ought to be taken up and reversed.

[100] Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572–73 (2017).

IN RE NEELY: THE "PEDESTAL PRINCIPLE" AND JUDICIAL FIRST AMENDMENT LIBERTIES IN AN ERA OF INCREASING THOUGHT CONFORMITY

The Honorable Vance D. Day[*]

INTRODUCTION

It stands to reason that in a constitutional republic the institution responsible for adjudicating disputes and interpreting the application of the law must be held in high esteem by the society it serves.

> In a democracy, the enforcement of judicial decrees and orders ultimately depends upon public cooperation. The level of cooperation, in turn, depends upon a widely held perception that judges decide cases impartially. This is one meaning of the frequently used phrase "confidence in the judiciary." If this confidence were lost, the judicial system could not function. Should the citizenry conclude, even erroneously, that cases were decided on the basis of favoritism or prejudice rather than according to law and fact, then regiments would be necessary to enforce judgments.[1]

To buttress this concept, societies founded upon the rule of law have developed high expectations of impartiality, independence, and integrity for members of the judiciary. That is good and right. Over time, as pluralistic societies become more diverse, governments have felt a need to enshrine certain ethical expectations of the judiciary, culminating in the adoption of various codes of conduct.[2]

Jurisdictions throughout the United States have developed and adopted judicial codes of conduct in an attempt to clarify what constitutes the ethical boundaries pertaining to the official and non-official activities of judges.[3] There is a perspective held by some in the legal profession that to maintain public confidence in the judiciary, judges must be seen as smarter, more moral, unbiased, independent, and on the whole, above the common citizenry.[4] Society's need for confidence in the judiciary has

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[*] The Honorable Vance D. Day was appointed in 2011 to the Oregon Circuit Court, Third Judicial District by Governor John Kitzhaber. He was elected to a six-year term in the fall of 2012. Before his tenure on the bench, Judge Day worked in Taiwan for the Ritz Taipei Hotel as a Training Manager, served as a reporter/anchor on Middle East Television's Evening News, apprenticed as a cabinet maker, and was a trial lawyer for twenty years in Oregon. His appointment to the bench came as a surprise to most, as he served as the Chairman of the Oregon Republican Party for four years, yet was appointed by a governor who was a Democrat.

1 JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 274–75 (1990).

2 A. WAYNE MACKAY, JUDICIAL ETHICS: EXPLORING MISCONDUCT AND ACCOUNTABILITY FOR JUDGES 4–5 (1995).

3 SHAMAN ET AL., *supra* note 1, at 3–4.

4 *Id.* at 1–2.

resulted in the pedestalization of its members.[5] Those who are seen to violate the "pedestal principle"[6] are subject to punishment under the Code.

As cultural expectations change over time, much has been written on the effect of expanding the sphere of unenumerated rights when they conflict with the enumerated rights of individuals. In the context of public confidence in its judicial institutions, to what extent does the application of the Judicial Code of Conduct subjugate, if at all, the First Amendment protections held by members of the bench? Do the sincerely held religious beliefs of a judge, when discovered by the public, violate the restriction against harming public confidence in the independence, integrity, and impartiality of the judiciary?

I. MARRIAGE NEWLY DEFINED AND THE LIBERTY OF JUDGES UNDER THE FIRST AMENDMENT

Prior to *Obergefell v. Hodges,* federal district courts began to rule that state constitutions defining marriage between a man and a woman violated the constitutional rights of same-sex couples.[7] As a result, various judges ran afoul of judicial code provisions when objecting to performing same-sex marriages.[8] In *Obergefell*, the Court used language which alludes to some form of putative "safe harbor" for those with religious objections to same-sex marriage:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons.[9]

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[5] *Id.* at 1.

[6] *Put Someone on a Pedestal*, MACMILLAN DICTIONARY, https://www.MACMILLANDICTIONARY.com/us/dictionary/american/put-someone-on-a-pedestal (last visited Oct. 23, 2017) (placing someone on a pedestal can be equated to believing he or she has "no faults").

[7] 135 S. Ct. 2584, 2597 (2015).

[8] Neely v. Wyo. Comm'n on Judicial Conduct and Ethics (*In re Neely*), 2017 WY 25, 1, 390 P.3d 728, 732 (Wyo. 2017) *petition for cert. filed*, No. 17-196 (U.S. Aug. 4, 2017); Christopher T. Holinger, Note, *When Fundamental Rights Collide, Will We Tolerate Dissent? Why a Judge Who Declines to Solemnize a Same-Sex Wedding Should Not Be Punished*, 29 REGENT L. REV. 365, 366 (2017).

[9] *Obergefell*, 135 S. Ct. at 2607. In his dissent in *Obergefell,* Justice Thomas points out that the majority

> makes only a weak gesture toward religious liberty in a single paragraph. And even that gesture indicates a misunderstanding of

State administrative commissions charged with matters of judicial discipline in the post-*Obergefell* world have not given much credence to the safe harbor perspective of balancing the new right to same-sex marriage with First Amendment protections. *In re Neely* presents a microcosm of the pre-eminence of the Code's "pedestal principle" in stark contrast to the First Amendment protections asserted by the judge in her defense.[10]

Judge Ruth Neely's case came before the Wyoming Commission on Judicial Conduct and Ethics' ("Commission") based upon a remark the judge made to a local newspaper reporter when he asked the judge if she was "'excited' to be able to perform same-sex marriages."[11] Judge Neely responded that "I will not be able to do them . . . . We have at least one magistrate who will do same-sex marriages, but I will not be able to."[12] "When law and religion conflict, choices have to be made. I have not yet been asked to perform a same-sex marriage."[13] The local newspaper published the comments and a complaint was eventually filed with the Commission. *In re Neely* stated, "Judge Neely is a devout Christian and a member of the Lutheran Church, Missouri Synod. It is undisputed that she holds the sincere belief that marriage is the union of one man and one woman."[14]

After an investigation and an evidentiary hearing, the Commission recommended that Judge Neely "be removed from her positions as municipal court judge and part-time circuit court magistrate because of her refusal to perform same-sex marriages in her judicial capacity as a part-time circuit court magistrate."[15] In a 3-2 decision, the Wyoming Supreme Court concluded, "as have all the state judicial ethics commissions that have considered this question, that a judge who will perform marriages only for opposite-sex couples violates the Code of Judicial Conduct, and . . . that Judge Neely violated Rules 1.2, 2.2, and

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> religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for "religious organizations and persons . . . as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Religious liberty is about freedom of action in matters of religion generally, and the scope of that liberty is directly correlated to the civil restraints placed upon religious practice.

Id. at 2638 (Thomas, J., dissenting) (citations omitted).

10 *In re Neely*, ¶ 3, 390 P.3d at 732.

11 *Id.* at ¶ 9, 390 P.3d at 734.

12 *Id.* (internal quotation marks omitted).

13 *Id.* (internal quotation marks omitted).

14 *Id.* at ¶ 8, 390 P.3d at 733.

15 *Id.* at¶ 1, 10, 13, 390 P.3d at 732, 734–35.

2.3 of the Wyoming Code of Judicial Conduct."[16] However, the majority did not accept the Commission's recommendation for removal, and instead ordered public censure, with specific conditions.[17]

Anticipating running afoul of an eventual "sincerely held religious belief" defense, the *In re Neely* majority sought, in true Kafkaesque manner,[18] to shift the debate from the inherent conflict of constitutional rights to that of public confidence in the judiciary:

> This case is *not* about same-sex marriage or the reasonableness of religious beliefs. We recognize that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." This case is also not about imposing a religious test on judges. Rather, it is about maintaining the public's faith in an independent and impartial judiciary that conducts its judicial functions according to the rule of law, independent of outside influences, including religion, and without regard to whether a law is popular or unpopular.[19]

The dissent presented a vigorous defense of Judge Neely's First Amendment liberties by launching its assault on the majority's analysis on what the case was actually about:

> Contrary to the position asserted by the majority opinion, this case *is* about religious beliefs and same sex marriage. The issues considered here determine whether there is a religious test for who may serve as a judge in Wyoming. They consider whether a judge may be precluded from one of the functions of office not for her actions, but for her statements about her religious views. The issues determine whether there is room in Wyoming for judges with various religious beliefs. The issues here decide whether Wyoming's constitutional provisions about freedom of religion and equality of every person can coexist. And, this case determines whether there are job requirements on judges beyond what the legislature has specified.[20]

Although the Supreme Court in *Obergefell* sought to provide comfort to those who held a religious perspective on natural marriage, the "redefinition of marriage has brought with it an intolerance on the part of the legal elite toward those religious institutions and communities that insist on believing and practicing a worldview that has, at its cultural

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[16] *Id.*, at ¶ 1, 390 P.3d at 732; Bill Duncan, *A New, Ideological Litmus Test for Christian Judges,* NAT. REV. (Mar. 15, 2017, 4:00 AM), http://www.NATIONALREVIEW.com/article/445754/wyoming-supreme-court-censures-christian-judge-over-same-sex-marriage.

[17] *In re Neely*, ¶ 1, 390 P.3d at 732.

[18] *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 779 (4th ed. 1999) (defining "Kafkaesque" as "characteristic of, or like the writings of Kafka . . . surreal, nightmarish, confusingly complex").

[19] *In re Neely*, ¶ 1, 390 P.3d at 732 (citations omitted) (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015)).

[20] *Id.* at ¶ 78, 390 P.3d at 753–54 (Kautz, J., dissenting) (alteration in original).

center, the traditional definition of marriage."[21] The issues analyzed and addressed in *In re Neely* are a portent for the future.

II. DEVELOPMENT OF JUDICIAL ETHICS

Judicial office demands a high standard of behavior due in part to the immense power inherent in the authority to interpret and apply the law. Ancient texts from various cultures spoke of the need for officials deciding disputes and rendering justice to be impartial in their decisions.[22] A thorough review of the history of judicial ethics is not the goal of this Article, but it is worth noting that it is not of recent concern. Perhaps the earliest affirmation in Western European history of the need for a judicial code of conduct is found in a 1346 statute in the time of Edward III.

> We have commanded all our Justices, That they shall from henceforth do equal Law and Execution of right to all our Subjects, rich and poor, without having regard to any Person, and without omitting to do right for any Letters or Commandment which may come to them from Us, or from any other, or by any other cause[.][23]

As the common law developed so did the concept and expectation that those administering the law would do so impartially and without graft.[24] At its genesis, the Federal Judiciary was expected to be held in high esteem and to be free from bias.[25] Alexander Hamilton argued that the federal courts must adjudicate matters between the states due to the natural bias of one state to prefer its claims over the claims of another:

> The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. And it ought to have the same

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[21] Barry W. Bussey, *Rights Inflation: Attempts to Redefine Marriage and the Freedom of Religion*, 29 REGENT L. REV. 197, 197 (2017); *Obergefell*, 135 S. Ct. at 2607.

[22] *See, e.g.*, Statutes of King Edward the Third, 1346, 20 Edw. 3, c. 1–5, *in* 1 Statutes of the Realm 251, 303–04, (exemplifying the need for impartial decision making during the 1300's in England); *see also Deuteronomy* 1:17 (exemplifying the desire for impartiality in the Christian culture).

[23] Statutes of King Edward the Third, 1346, 20 Edw. 3, c. 1–5, *in* 1 Statutes of the Realm, *supra* note 22.

[24] Historically, it is interesting to note that Sir Francis Bacon, who wrote the first major treatise in English law on judicial ethics, "Of Judicature," and who is quoted in the ABA's Canons of Judicial Ethics, admitted receiving substantial gifts from litigants in cases before him. Although this practice was widely condoned in Elizabethan England, it resulted in Bacon's conviction for bribery and his imprisonment in the Tower of London.

George Edwards, *Commentary on Judicial Ethics*, 38 FORDHAM L. REV. 259, 260–61 (1969).

[25] *Id.* at 261.

> operation in regard to some cases between citizens of the same State. . . . The courts of neither of the granting States could be expected to be unbiased. . . . [I]t would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.[26]

As our republic advanced in maturity, a movement grew within the American Bar Association to better delineate the ethical requirements associated with public service on the bench. Out of this movement came the ABA's Model Code of Judicial Conduct.[27]

III. THE MODEL CODE OF JUDICIAL CONDUCT

> The ABA Model Code of Judicial Conduct is self-described as a set of aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.[28]

As noted below, the scope of the Code applies to both public and private behavior. "Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[29]

When considering the impact of the Code on the private daily life of the jurist, Judge George Edwards put it well:

> The truth of the matter is that, aside from the confines of his home, a judge really has no truly private life. Everything he does is considered by the public—not by its ordinary standard as to human conduct, but by the public's much stricter standard as to what it thinks a judge should or should not do. Those of us who choose the judiciary as a vocation simply have to accept this as a fact of life and seek to avoid excesses in conduct, including some which might be tolerated in other occupations.[30]

In *In re Neely*, the majority looked to specific provisions of the Model Code of Judicial Conduct to analyze Judge Neely's public statement concerning her religious convictions.[31] In doing so, they stated that all the

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[26] THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Ian Shapiro ed., 2009).

[27] Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 JUDGES' J. 7, 7 (2005), *available at* www.ABANet.org/judicialethics/resources/JudicialWinterArticle.pdf.

[28] MODEL CODE OF JUDICIAL CONDUCT SCOPE [4] (AM. BAR ASS'N 2011).

[29] MODEL CODE OF JUDICIAL CONDUCT PREAMBLE [2] (AM. BAR ASS'N 2011).

[30] Edwards, *supra* note 24, at 273.

[31] 2017 WY 25, ¶¶ 59–70, 390 P.3d 728, 747–51 (Wyo. 2017), *petition for cert. filed*, No. 17-195 (U.S. Aug. 4, 2017) (citing Rules 1.1. Compliance with the Law, 1.2. Promoting Confidence in the Judiciary, 2.2. Impartiality and Fairness, and 2.3. Bias, Prejudice, and Harassment).

provisions utilized "address different facets of the fundamental requirement that judges maintain public confidence in the judiciary by impartially applying the law."[32] Although the evidence was clear that Judge Neely never acted in her judicial capacity to deny marriage for a same-sex couple seeking such, her public statement was found to have violated Rule 1.2, Promoting Confidence in the Judiciary: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[33]

Judge Neely's statement to the press concerning the conflict between her faith and the newly discovered right to same-sex marriage brought on an ethics investigation, trial, and the Commission's recommendation that she be removed from the judiciary because she failed to promote confidence in the judiciary. Although most members of the judiciary, including this author, agree that public confidence in the judiciary is important to effectuate its rulings, sanctioning a judge for no other crime than speaking one's mind about the conflict between the law and the free exercise of religion is tantamount to enforcing thought conformity.

IV. EXTERNAL NEXUS OF CONTROL VIA JUDICIAL ETHICS COMMISSIONS

In recent years, there has appeared a new paradigm for exercising an external nexus of control over the thoughts and influences which go into a judge's decisions. Evidence of this shift can be seen in the language used in recent reports or "opinions" issued by judicial ethics commissions from various states.[34] The new ethic standard is imputed into the oath required to be a judge: "The oath is a reflection of the self-evident principle that the

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[32] *Id.* at ¶ 24, 390 P.3d at 737.

[33] *Id.* at ¶¶ 60–62, 390 P.3d at 748–49. According to the Model Code of Judicial Conduct:

> [1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.
>
> [2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.
>
> [3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmts. [1]–[3] (AM. BAR ASS'N 2011).

[34] *See* Sup. Ct. of Ohio Bd. of Prof'l Conduct, Op. 2015-1, 1 (Aug. 7, 2015) [hereinafter Op. 2015-1] (showing external opinion regarding a judge's decision to perform same-sex marriages).

personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty."[35]

It is not coincidental that the language used in opinions requiring judges to perform same-sex marriages is very similar to the above pronouncement.[36] It is ironic that many of those who promote this ethical paradigm for punishing beliefs, applaud and encourage jurists who seek to cement into the law their worldview based solely upon their beliefs.[37] There is a foreshadowing of the next step in the new ethical algorithm associated with the application of the Model Code of Judicial Conduct. The implicit rationale is best described as follows:

If we suspect, or it is revealed, that you are a person of faith, we will assume that you have allowed your faith to violate the self-evident principle that "the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty."[38] *Why? Because, as we all know, that is what people of faith do; they allow their personal, moral, and religious beliefs to factor into their decisions. People of faith hold to a discredited, metaphysical theory of existence which rational people know to be a psychological crutch based on fables fashioned in the Middle Ages. In keeping with their moralistic fables, people of faith judge those of us who do not hold to their outdated metaphysical philosophy. Therefore, people of faith should not be allowed to hold positions of authority in which their "personal, moral, and religious beliefs"*[39] *could (as we suspect they do) impact any of their official duties.*

Judges who express any indication of having a sincerely held religious belief will be held suspect under this new paradigm. As such, they will be viewed as ethically deficient unless, and until, they have

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[35] *Id.* at 2; Or. Comm'n on Judicial Fitness & Disability, Op. 12-139 and 14-86, 39 (Jan. 25, 2016).

[36] Op. 2015-1, *supra* note 34, at 2 (appearing to be the genesis for the new ethical standard); *see In re Neely*, ¶¶ 31–32, 38, 390 P.3d at 740–41 (exemplifying the new ethical standard).

[37] Justice Alito criticizes the majority in *Obergefell* for issuing a judicial fiat based upon personal beliefs:

> To prevent five unelected Justices from imposing their personal vision of liberty upon the American people, the Court has held that "liberty" under the Due Process Clause should be understood to protect only those rights that are "deeply rooted in this Nation's history and tradition." And it is beyond dispute that the right to same-sex marriage is not among those rights.
>
> . . . .
>
> For today's majority, it does not matter that the right to same-sex marriage lacks deep roots or even that it is contrary to long-established tradition. The Justices in the majority claim the authority to confer constitutional protection upon that right simply because they believe that it is fundamental.

Obergefell v. Hodges, 135 S. Ct. 2584, 2640–41 (2015) (Alito, J., dissenting) (citations omitted) (quoting Washington v. Glucksberg, 521 U.S. 701, 720–21 (1997)).

[38] Op. 2015-1, *supra* note 34, at 2.

[39] *Id.*

publicly announced that they have appropriately compartmentalized their faith to their place of worship. All suspect judges will be forced to utter some form of supplemental affirmation that their faith does not invade any part of their thoughts, their deliberations, or their official actions. Private prayer, concerning any judicial duties, would be heresy under the secular humanist paradigm. Yet, no such standard will be applied to the judge who disdains people of faith, or holds to the secular humanist theory of existence.[40]

V. SHIFT FROM SANCTIONING ACTIONS TO ENFORCING CONFORMITY OF THOUGHT

A singular strength of the American judiciary is its diversity. Judges do and should come from different perspectives and backgrounds. "To suggest that that diversity should not be represented on the Bench is to deny an important aspect of the American heritage."[41] The principle of "iron sharpens iron"[42] holds no less import in the context of the judiciary—in fact, as Justice Cardozo observes:

> The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is. We may wonder sometimes how from the play of all these forces of individualism, there can come anything coherent, anything but chaos and the void. Those are the moments in which we exaggerate the elements of difference. In the end there emerges something which has a composite shape and truth and order. It has been said that "History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last." The like is true of the work of courts. The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.[43]

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[40] Does this new ethical paradigm apply to judges who hold to a judicial philosophy of say, judicial restraint, or judicial activism? Aren't these philosophical predispositions personal beliefs which impact the jurist's decisions? *See Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (pointing out the irony of how the majority labels laws upholding the traditional definition of marriage as demeaning).

[41] Edwards, *supra* note 24, at 279.

[42] *See Proverbs* 27:17 (New King James Version) ("As iron sharpens iron, [s]o a man sharpens the countenance of his friend.").

[43] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 176–77 (1921).

Diversity on the bench in thought and practice is evidence of a healthy judiciary. If the actions of a judge violate the specific rule of the Judicial Code of Conduct, then discipline should rightfully follow. But the evidence of violation should be based on actions or conduct; not thoughts or beliefs.[44] As if prescient, Barry W. Bussey stated in a submission to this Journal that "the redefinition of marriage will eventually lead to state coercion of nonconforming groups who do not share the state's enthusiasm."[45] The dissent in *In re Neely* voiced similar concerns:

> To avoid ethics charges like these, judges then must pass a religious test indicating that they have no religious beliefs that would prevent them from performing same sex marriages, or be precluded from performing any marriages. The record points out, and *Obergefell* confirms, that a significant portion of our country holds sincere religious views against same sex marriage. The majority position likely would exclude a significant portion of our citizens from the judiciary, without any compelling reason to do so.
>
> In addition, the majority opinion is concerning for Wyoming in its treatment of constitutional protections for the free exercise of religion. It finds justification to entirely restrict Judge Neely's "exercise" of her religious beliefs because the majority opinion believes someone might question her independence or impartiality, although the evidence does not support such a conclusion. This reduces the constitutional guarantee of a robust principle — "free exercise" — to a minimal "free belief."[46]

Justice Alito's dissent warned of the natural consequences of the majority's decision in *Obergefell*:

> It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent.
>
> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk

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[44] MODEL CODE OF JUDICIAL CONDUCT PREAMBLE [3], SCOPE [6] (AM. BAR ASS'N 2011).

[45] Bussey, *supra* note 21, at 203–04.

[46] Neely v. Wyo. Comm'n on Judicial Conduct and Ethics (*In re Neely*), 2017 WY 25, 143–44, 390 P.3d 728, 766 (Wyo. 2017) (Kautz, J., dissenting), *petition for cert. filed*, No. 17-195 (U.S. Aug. 4, 2017).

being labeled as bigots and treated as such by governments, employers, and schools.[47]

Shortly after Justice Alito's concerns were published in *Obergefell*, I had the opportunity to stand accused of ethics violations before the Oregon Commission on Judicial Fitness and Disability.[48] Commenting on my case, Professor Mark Hall, of George Fox University, made the following observations:

> A government commission has recommended that a civil servant be removed from his post because of his thoughts. A scene from George Orwell's *1984* or the dystopian novel *Kallocain*? Alas, no. Welcome to present-day Oregon.
>
> On January 25, 2016, Oregon's Commission on Judicial Fitness and Disability recommended that Judge Vance Day be removed as a Marion County judge for, among other things, declining to officiate same-sex weddings. Central to the opinion is the Commission's finding that Judge Day is "a Christian whose firmly held religious beliefs include defining marriage as only between a woman and a man."
>
> In Oregon, as in most states, "performing marriages is not a mandatory judicial duty."
>
> . . . .
>
> The Commission concedes that Judge Day's plan to be "unavailable" for same-sex wedding ceremonies was not implemented. He never actually refused to officiate a wedding ceremony because of a couple's sexual orientation.
>
> . . . .
>
> Judge Day has a right to his convictions regarding same-sex marriage, and the Oregon Commission on Judicial Fitness and Disability cannot create a religious test for office that excludes persons of faith who hold such views.
>
> This is not to say that Judge Day may discriminate on the basis of sexual orientation when conducting his judicial duties. But there is no reason to believe that he did, and there are good reasons in the record to believe he did not.
>
> Judge Day's case would have been more difficult if Oregon required judges to solemnize weddings, and if he had, in fact, refused to do so for same-sex couples. . . . But this is an easy case. We live in the United States of America, not Oceania or Worldstate. Civil servants should not lose their jobs for committing thought crimes.[49]

Dr. Hall is correct. Holding beliefs contrary to the bureaucratic elites should not result in ethics charges. The Model Code of Judicial Conduct is

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[47] Obergefell v. Hodges, 135 S. Ct. 2584, 2642–43 (2015) (Alito, J., dissenting) (citations omitted).

[48] Mark David Hall, *Civil Servants Should Not Lose Their Jobs for Committing Thought Crimes*, LEARN LIBERTY (Feb. 14, 2017), http://www.LearnLiberty.org/blog/civil-servants-should-not-lose-their-jobs-for-committing-thought-crimes/.

[49] *Id.*

relatively benign in and of itself, but it has become a dangerous weapon when wielded by those with a malevolent intent toward people of faith. In the wrong hands, Rule 1.2 can become a cudgel, beating down those who allegedly violate the pedestal principle, and at the same time, serving to silence those who may hold similar faith perspectives from expressing those beliefs.[50]

VI. LIBERTY OF CONSCIENCE & JUDICIAL INDEPENDENCE

Liberty of conscience is not a catchphrase or a moniker applied to an ethereal concept. Liberty of conscience is the foundational bedrock upon which our First Amendment rights are established.[51] It has been said that all liberties are first cousins.[52] You attack one and end up diminishing all. Liberty of conscience lies at the heart of judicial independence. If a judicial officer's liberty of conscience is attacked or diminished in any sense, then the independence of the judiciary is at risk.

Although the weakest of the three branches, the judicial branch was and is still seen as the guardian of the Constitution's integrity.[53] Judicial independence is central to that role. In defense of judicial independence Hamilton concluded that such autonomy protected the law from manipulation by the unscrupulous:

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion

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[50] My ethics case is now before the Oregon Supreme Court on *de novo* review. I used to trust the process. I am not so sure anymore. Having one's character, veracity, and integrity subjected to an all-out, take-no-prisoners assault by the government has a way of reducing one's confidence that those in charge of the process can see their way to the truth. One wonders whether sharing my concerns publicly will result in new ethics charges under Rule 1.2. *See* Conrad Wilson, *Oregon Supreme Court Hears Case Against Judge Who Refused Same-Sex Marriages*, OPB (June 14, 2017, 5:15 p.m.), http://www.OPB.org/news/article/oregon-supreme-court-case-judge-vance-day/ (impending decision by the Oregon Supreme Court).

[51] Thomas Kidd, *The American Founding: Understanding the Connection between Religious and Civil Liberties*, RELIGIOUS FREEDOM INST. (June 14, 2016), https://www.religiousfreedominstitute.org/cornerstone/2016/6/14/the-american-founding-understanding-the-connection-between-religious-and-civil-liberties.

[52] *See, e.g.*, Michael K. Young, *Religious Liberties and Religious Tolerance: An Agenda for the Future*, 1996 BYU L. REV. 973, 973 (1996) (calling religious liberty and religious tolerance cousins); Seymour Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 43 (1988) (calling substantive due process and liberty of contract cousins).

[53] *See* THE FEDERALIST NO. 78, at 392–93 (Alexander Hamilton) (Ian Shapiro ed., 2009) (noting the judicial branch's intended purpose).

> dangerous innovations in the government, and serious oppressions of the minor party in the community.[54]

A judge must be true to the law in analysis and application. Private concerns, allegiances, and bias, must be privately identified and catalogued before the judge comes to a decision. If the weight of a jurist's beliefs or predispositions on a certain matter cannot be discarded and a decision made free from such bias, then the jurist should issue an order of recusal from the matter. Whatever the outcome, a judge should be free from external pressure to discuss or conform to the views of others which are in violation of the jurist's own beliefs.

Latin is no longer with us as a required course of study. But in the study of law, Latin maxims are still found and articulate the principled foundations on which the law is built.[55] The Latin phrase "*De Fide et Officio Judicis non Recipitur Quaestio, sed de Scientia Sive sit Eror Juris sive Facti*" embodies the concept of judicial independence and why the decisions of a judge should not be questioned as to the good faith or the process by which they were decided.[56] Translated it means: "The bona fides [good faith] and honesty of purpose of a judge cannot be questioned, but his decision may be impugned for error of law or of fact."[57]

Precedent and our legal heritage demand that a decision of a judge should be questioned if based on an error of law or material fact, or a violation of substantive procedure. A judge's decision should not be questioned based upon a governmental goal of creating within the judiciary conformity of thought or cultural perspective. But in the hands of the Wyoming Supreme Court this is exactly what the Code is being used to effectuate: conformity of thought and expression.

Judge Neely is being sanctioned because of her faith-based perspective and resulting public statement that she believes marriage is between a man and a woman. Shouldn't Judge Neely have her liberty of conscience recognized by the court? The majority opinion takes great pains to state that their decision is not about religion or any First Amendment liberties. The dissent points out the logical consequences of the majority's position:

> In our pluralistic society, the law should not be used to coerce ideological conformity. Rather, on deeply contested moral issues, the law should "create a society in which both sides can live their own values."

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[54] *Id.* at 395.

[55] DUHAIME'S DICTIONARY OF LATIN L. MAXIMS & TERMS, http://www.duhaime.org/LegalDictionary/Category/LatinLawTermsDictionary.aspx (last visited Sept. 12, 2017).

[56] *Id.*

[57] *Id.*

> The *Obergefell* decision affirms this approach for the issue of same sex marriage. It emphasized that the constitutional problem arose not from the multiplicity of good faith views about marriage, but from the enshrining of a single view into law which excluded those who did not accept it as "outlaw[s]" and "outcast[s]." Unfortunately, the majority opinion does just that for Judge Neely and others who share her views. Caring, competent, respected, and impartial individuals like Judge Neely should not be excluded from full participation in the judiciary.[58]

Over the last decade numerous liberal democracies have given way to the equality arguments of the sexual identity movement.[59] Marriage, defined as between one man and one woman since earliest recorded history, has been judicially expanded to include same-sex couples via *Obergefell*.[60] Whatever your perspective on the more expansive definition of marriage, First Amendment advocates who support judicial independence should take pause at the primacy arguments made by the sexual identity movement.[61] Most observers of the court "expected that sexual equality rights would gain traction with other rights given our political and social context. What was not expected was the move toward domination of sexual equality vis-à-vis religious freedom, including religious equality, in the private sphere."[62] The private, religiously based views of judges are at great risk of sanction, if not the catalyst for disqualification from office.

There is a loud and persistent demand since *Obergefell* that religious freedom claims must not inhibit the preeminent rights of sexual equality.[63] The marriage equality movement has now expanded into

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[58] Neely v. Wyo. Comm'n on Judicial Conduct and Ethics (*In re Neely*), 2017 WY 25, 161–62, 390 P.3d 728, 769 (Wyo. 2017) (Kautz, J., dissenting), *petition for cert. filed*, No. 17-195 (U.S. Aug. 4, 2017) (first quoting Douglas Laycock, *Religious Liberty and the Culture Wars,* 2014 U. ILL. L. REV. 839, 877 (2014); then quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2600, 2602 (2015)).

[59] David Masci, Elizabeth Sciupac & Michael Lipka, *Gay Marriage Around the World*, PEW RES. CENTER (August 8, 2017), http://www.Pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/.

[60] *Obergefell*, 135 S. Ct. at 2608. Writing in dissent, Chief Justice John Roberts observed:

> This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship.

Id. at 2613 (Roberts, J., dissenting).

[61] *See id.* at 2594, 2601–02 (stating that there is no difference between a same-sex and opposite-sex couple with respect to the principle of marriage as regarded by the State).

[62] Bussey, *supra* note 21, at 201.

[63] *In re Neely*, ¶¶ 67–71, 390 P.3d at 750–51.

gender self-identification rights.[64] Compliance with the goals and accepted verbiage of the movement is mandatory for those in government.[65] Stray from the accepted ideological perspective, and sanction will soon follow. "However, if we are to remain a liberal democratic society, we must recognize that sexual equality, like all rights, must be curbed. There are necessary limits—including the limit that other rights, such as religious equality, occupy the same real estate."[66]

The challenge is that Rule 1.2 of the Code, in all its various renditions throughout the States, can become a bludgeon in the hands of those who are intent on forcing certain ideas, concepts, and policies more acceptable for those serving as jurists: it can be used to cull out those of contrary viewpoints. From a perspective based on the heritage of judicial independence, judges should be allowed to recuse themselves from duties which conflict with their liberty of conscience without having to justify the underlying reason for their recusal.

CONCLUSION

The United States Constitution protects all within its orbit against a violation of their liberty of conscience, particularly their right to religious liberty. No elected official should be deprived of his or her religious liberty by administrative tribunals acting ultra vires. The "conformity of thought" movement, via draconian application of the Judicial Code's "pedestal principle," is a flagrant assault upon the liberty of conscience of its members. It is a dangerous trajectory which seeks to use the Judicial Code of Conduct to cleanse the bench of any who do not support, dare I say celebrate, the new definition of marriage announced in *Obergefell*.

Liberty of conscience is inherent in judicial independence, as is the unquestionable right of recusal. In seeking to implement a safe harbor created for religious adherents to traditional marriage alluded to in *Obergefell,* those bodies administering the Judicial Code of Conduct should recognize the liberty of conscience rights of the bench, via the right to recusal. Those who respectfully recuse themselves should not be subject to questioning via a governmental ethics investigation.

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[64] Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, N.Y. TIMES (July 16, 2015), https://www.NYTimes.com/2015/07/16/opinion/what-marriage-equality-means-for-transgender-rights.html.

[65] Ryan Anderson, *Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom*, HERITAGE FOUND. (Nov. 30, 2015), http://www.Heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom.

[66] Bussey, *supra* note 21, at 217.

ATKINS TEST FOR EXCLUDING INTELLECTUALLY DISABLED PERSONS FROM EXECUTION WITHSTANDS BARRAGE OF CHALLENGES BY STATE COURTS

The Honorable Joseph A. Migliozzi, Jr.[*]
Ashley Hughes[**]

INTRODUCTION

As long as the death penalty has been upheld as a constitutional form of punishment by the United States Supreme Court, there have been consistent and predictable challenges to its application filling the dockets in almost every state.[1] Since *Gregg v. Georgia*[2] in 1976, most challenges to the death penalty were directed at the methods of execution and the unique characteristics of the individuals sentenced to death.[3] In fact, in 1989, the Supreme Court ruled that it was not "cruel and unusual punishment" to execute someone who was mentally retarded, as long as the jury was adequately informed of mitigating psychological factors at

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[1] *See* Jason M. Schoenberg, *Making the Constitutional Cut: Evaluating New York's Death Penalty Statute in Light of the Supreme Court's Capital Punishment Mandates*, 8 J.L. & POL'Y 337, 337–39, 343–42, 353–55, 376 (1999) (evidencing the individualized sentencing requirements for the death penalty).

[2] Gregg v. Georgia, 428 U.S. 153 (1976).

[3] *Id.* On November 21, 1973, Troy Gregg and another were hitchhiking and were picked up by Fred Simmons and Bob Moore, both of whom Gregg robbed at gunpoint and murdered. *Id.* at 158–59. Gregg was found guilty by a jury and sentenced to death. *Id.* at 161. The United States Supreme Court granted certiorari on Gregg's appeal as to whether the use of the death penalty for murder under Georgia law is a violation of the Eighth and Fourteenth Amendments. *Id.* at 162. The Court held that the imposition of the death penalty following the sentencing instructions provided to the jury did not violate the Constitution. *Id.* at 207. The Court noted that even though the jury may consider aggravating or mitigating circumstances when sentencing, the requirement of at least one statutory aggravating factor focuses the jury's discretion. *Id.* at 206. Furthermore, the Court noted that the necessary review of all death penalty cases by the Supreme Court of Georgia grants an additional assurance that Georgia procedure is applied properly. *Id.* at 207.

See Schoenberg, *supra* note 1, at 337–39, 343–42, 353–55, 376 (evidencing the individualized sentencing requirements to the death penalty).

sentencing.[4] Then there was the challenge to the gas chamber as a method of execution which, although not ruled unconstitutional, has not been used to execute an inmate since 1999.[5]

Yet the momentum of executions throughout the country experienced a significant reduction at the start of the new millennium.[6] Most notably, in 2002, the Supreme Court completely changed course from its earlier decision in *Penry v. Lynaugh* and ruled that executing persons who are mentally retarded (now commonly identified as intellectually disabled) violates the Eighth Amendment to the United States Constitution and that a "national consensus" supporting that finding had already developed.[7] This landmark ruling in *Atkins v. Virginia* not only required all states to change their eligibility requirements for the death penalty,[8] but established a test for states to follow in determining whether a

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[4] Penry v. Lynaugh, 492 U.S. 302, 333 (1989). On October 25, 1979, Pamela Carpenter was raped, beaten, and stabbed in her home. *Id.* at 307. Her description of the assailant, prior to her death, led to the arrest of Johnny Paul Penry, who was ultimately convicted and sentenced to death. *Id.* at 310–11. The Supreme Court granted certiorari on the issue of whether the Eighth Amendment categorically prohibited Penry's execution because he was mentally retarded. *Id.* at 313. The Court concluded that there was insufficient evidence demonstrating a national consensus against the execution of the mentally retarded, and that it is sufficient for a jury to consider mitigating evidence of mental retardation in determining whether the death penalty is an appropriate sentence. *Id.* at 335. However, the Court did remand the case for resentencing due to the lack of jury instructions that would provide the jury with a method of exercising its "reasoned moral response" to the evidence presented at trial regarding culpability. *Id.* at 328. Penry was eventually retried and convicted of capital murder and again sentenced to death. Penry v. Johnson, 532 U.S. 782, 788 (2001). In *Penry*, the Supreme Court again refused to bar execution of the mentally retarded under the Eighth Amendment, but again decided that the jury was inadequately informed regarding Penry's mental retardation as a mitigating factor at sentencing. *Id.* at 804.

[5] *See* SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 227–30 (2010) (discussing the challenge to the gas chamber that temporarily delayed Walter Grand's execution by the gas chamber); *cf.* LaGrand v. Stewart, 170 F.3d 1158, 1159 (9th Cir. 1999) (upholding Walter's death sentence by the gas chamber because he had elected to receive his death sentence via the gas chamber over lethal injection multiple times). The first execution by the gas chamber occurred in 1924 in Nevada, and the last one occurred in 1999, when Walter LaGrand was executed by the gas chamber in Arizona. CHRISTIANSON, *supra*, at 229. In total, the United States has used the gas chamber to execute 593 people. *Id.* at app. 2 at 238, 251. Today, six states seem to maintain the use of the gas chamber. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-execution#az (last visited Sept. 20, 2017). However, lethal injection is the primary use of execution in all six of the states. *Id.*

[6] Tracy L. Snell, *Prisoners Executed*, BUREAU OF JUST. STAT. (BJS) (Dec. 31, 2013), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2079. The number of executions in the United States, in one year, peaked at ninety eight in 1999, and since then has generally trended downward. *Id.*

[7] Atkins v. Virginia, 536 U.S. 304, 316–17, 321 (2002).

[8] *Id.* at 321.

defendant is intellectually disabled.[9] When *Atkins* was decided, thirty-eight states authorized the death penalty as a statutory sentencing option.[10] In 2005, the Supreme Court applied the same "national consensus" rationale in its landmark decision, *Roper v. Simmons*, which held that the execution of juveniles (persons under the age of eighteen) was constitutionally barred.[11] Similar to the Supreme Court history of *Atkins*, *Roper* overturned the 1989 Supreme Court ruling of *Stanford v. Kentucky*, which had upheld the constitutionality of executing persons over the age of sixteen.[12]

Since 2002, however, state courts and legislatures, including those in Virginia, have scrutinized and challenged the *Atkins* test adopted by the Supreme Court, resulting in several important and clarifying rulings.[13] This Essay reviews some of those challenges and clarifies where the law currently stands in determining whether a defendant is intellectually disabled and, therefore, not eligible for execution.

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[9] *Id.* at 317–18.

[10] *Id.* at 342 (Scalia, J., dissenting).

[11] Roper v. Simmons, 543 U.S. 551 (2005). Christopher Simmons, at the age of seventeen, was charged with burglary, kidnapping, stealing, and the murder of Shirley Crook. *Id.* at 556–57. He was tried as an adult, convicted, and sentenced to death. *Id.* at 557–58. Following *Atkins*, Simmons filed a petition for relief claiming the reasoning behind *Atkins* prohibited the execution of a juvenile under the age of eighteen at the time the crime was committed. *Id.* at 559. The United States Supreme Court granted certiorari to determine whether the execution of juveniles is unconstitutional. *Id.* at 560. The Court noted that capital punishment is limited to the worst offenders, and drew three main distinctions between juveniles and adults, which prevent juveniles from being part of the worst offenders: (1) "[a] lack of maturity and an underdeveloped sense of responsibility"; *id.* at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367); (2) being "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; *id.*; and (3) "the character of a juvenile is not as well formed as that of an adult"; *id.* at 570. Considering the distinctions drawn by the Court between juvenile offenders and adult offenders, along with the national consensus against executing juveniles, the Court ruled that juveniles were prohibited from receiving the death penalty. *Id.* at 578. Therefore, the Court affirmed the Missouri Supreme Court ruling setting aside Simmons's death sentence and imposed a sentence of life in prison without eligibility for probation, parole, or release. *Id.* at 578–79.

[12] Stanford v. Kentucky, 492 U.S. 361, 380 (1989). Two cases before the Supreme Court brought into question the constitutionality of sentencing a sixteen or seventeen year old to death. *Id.* at 364–65. The first involved Kevin Stanford, who at seventeen years old murdered, raped, and sodomized Barbel Poore in Kentucky. *Id.* at 365. The second involved Heath Wilkins, who at sixteen years old murdered Nancy Allen in Missouri. *Id.* at 366. Both individuals were transferred from the juvenile justice system to be tried as adults in accordance with state statutes. *Id.* at 365–67. Stanford and Wilkins were each sentenced to death, and appealed their cases on the grounds that executing a sixteen or seventeen year old violates the Eighth Amendment. *Id.* at 364–65. The Supreme Court granted certiorari in both cases. *Id.* at 368. The Court affirmed the sentences of both Stanford and Wilkins looking largely to the national consensus regarding executing individuals of sixteen or seventeen years of age, which at the time demonstrated no majority opposition to executing juveniles. *Id.* at 380.

[13] *See generally infra* sections III–IV and accompanying notes.

I. *ATKINS*

In the summer of 1996, U.S. Air Force airman Eric Nesbit was abducted and robbed at a convenience store in Hampton, Virginia, and was later taken to a field in neighboring Yorktown, Virginia where he was shot eight times and died.[14] Two men were subsequently identified and charged with Nesbit's death from camera footage at an ATM machine used during the robbery.[15] Following the arrest of William Jones and Daryl Atkins, each of the suspects admitted to the robbery and abduction but accused the other of pulling the trigger in the murder.[16] Jones negotiated a plea for life in prison in exchange for his testimony against Atkins as the triggerman in the capital murder charge.[17] Atkins was subsequently convicted of capital murder and sentenced to death in 1998, but that sentence was reversed the following year by the Virginia Supreme Court and remanded for resentencing due to an improper jury instruction.[18] During the new sentencing hearing, Atkins's defense counsel argued again that he was mildly mentally retarded in mitigation of his sentence, but the Commonwealth's expert responded with testimony that he assessed Atkins to be of average intelligence.[19] The jury again returned a sentence of death.[20] The Supreme Court of Virginia affirmed the sentence in a 5-2 decision, with Justices Hassell and Koontz dissenting on the grounds that the punishment was disproportionate to the crime, since the defendant had an IQ of 59 and other characteristics of a person who was mentally retarded.[21]

The *Atkins* case was eventually appealed to the United States Supreme Court and certiorari was granted "[b]ecause of the gravity of the concerns expressed by the [Virginia Supreme Court] dissenters, and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years."[22] In June of 2002, Justice Stevens delivered the majority opinion in a 6-3 decision, holding that "such punishment is excessive and that the Constitution 'places a substantive restriction on the

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[14] Atkins v. Virginia, 536 U.S. 304, 307 (2002).

[15] *Id.*

[16] *Id.*

[17] *Id.* at 307 n.1.

[18] *Id.* at 309.

[19] Atkins v. Commonwealth, 534 S.E.2d 312, 322–23 (Va. 2000) (Hassell & Koontz, JJ., concurring in part, dissenting in part) ("'Q: Do you have an expert opinion as to the Defendant's intellect?' 'A: He is of average intelligence, at least.'").

[20] *Id.* at 314 (majority opinion).

[21] *Id.* at 321 (Hassell & Koontz, JJ., concurring in part, dissenting in part) ("I dissent because I believe that the imposition of the sentence of death upon a mentally retarded defendant with an IQ of 59 is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

[22] *Atkins*, 536 U.S. at 310.

State's power to take the life' of a mentally retarded offender."[23] The case was reversed and remanded to Virginia with a mandate, applicable to all states, to develop appropriate procedures to enforce this new constitutional restriction on the death penalty.[24] Chief Justice Rehnquist and Justices Scalia and Thomas dissented, with Justice Scalia writing, "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members."[25]

The most significant language in the majority opinion involved the discussion and analysis of clinical and diagnostic norms for identifying persons with mental retardation.[26] The Court noted that since its decision in *Penry*, "state legislatures across the country [had begun] to address the issue . . . of the suitability of imposing the death penalty on mentally retarded offenders."[27] The Court goes on to adopt the "legislative consensus," accepting the clinical definition of mental retardation as (1) subaverage intellectual functioning with (2) significant limitation in adaptive skills, (3) which are manifest before age eighteen.[28] While the Court was clear that it deferred to the states to adopt a procedure for implementing this constitutional restriction, Justice Stevens's opinion was equally clear that this three-part test for assessing clinical evidence was to be the minimum standard applied by state courts in determining whether a person suffered from mental retardation.[29]

Ironically, the case of Daryl Atkins, which changed the law of the land with respect to executing the mentally retarded, nearly ended with Atkins himself being executed after remand to Virginia.[30] In July of 2005, Atkins and his defense team returned to the original trial judge for a new proceeding before a jury to determine whether Atkins was mentally retarded pursuant to the Supreme Court's formula and Virginia's new statute.[31] Following a three week trial, during which the prosecution introduced evidence by its expert, Dr. Stanton Samenow, the jury returned a verdict that Daryl Atkins was *not* mentally retarded and the Judge set an execution date.[32] Once again, the Atkins defense team

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[23] *Id.* at 320 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

[24] *Id.* at 317.

[25] *Id.* at 338 (Scalia, J., dissenting).

[26] *Id.* at 318 (majority opinion).

[27] *Id.* at 313–14.

[28] *Id.* at 318.

[29] *Id.* at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)) ("[W]e leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.").

[30] *See generally id.* at 321 (The Supreme Court's decision in *Atkins* did not automatically reduce Atkins's sentence to that of life in prison. Instead, the Court remanded the case "for further proceedings not inconsistent with [the] opinion.").

[31] Atkins v. Commonwealth, 631 S.E.2d 93, 95 (Va. 2006).

[32] *Id.* at 95–96.

appealed this sentence to the Virginia Supreme Court relying in large part on the challenge to the qualification of the prosecution's expert, Dr. Samenow, as he admitted during cross-examination that Atkins was his "first and last" assessment for mental retardation.[33] Agreeing with the argument by defense counsel, the Virginia Supreme Court once again reversed the jury verdict and remanded the case for another jury proceeding, holding that Virginia's emergency statute upon remand from the United States Supreme Court required that any mental health expert appointed must be "skilled in the administration, scoring and interpretation of . . . measures of adaptive behavior."[34]

Daryl Atkins was now preparing for his fourth jury proceeding when his defense team—now comprised of the Capital Defender from Virginia and an anti-trust attorney from an international law firm who agreed to work on the case pro bono—received information challenging the validity of the original guilty verdict.[35] One of the lawyers for co-defendant William Jones notified the Atkins defense team of a possible *Brady v. Maryland*[36] violation arising from an interview of the co-defendant prior to his testimony at Atkins's trial.[37] Following a thorough investigation of this claim, Atkins moved for a *Brady* hearing. The original trial judge granted the motion and ultimately ruled that the prosecutor violated *Brady* during the trial, thereby seriously affecting the legitimacy of the original guilty verdict.[38] After considering this evidence, the trial court judge commuted Atkins's sentence to life in prison.[39] This ruling was upheld by the Virginia Supreme Court on the prosecution's motion for a writ of mandamus and the *Atkins* saga finally ended.[40]

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[33] *Id.* at 97.

[34] *Id.* (quoting VA. CODE ANN. § 19.2-264.3:1.2(A) (LexisNexis, LEXIS through 2003 Sess.)).

[35] *In re* Commonwealth, 677 S.E.2d 236, 237 (2009); Mark E. Olive, *The Daryl Atkins Story*, 23 WM. & MARY BILL RTS. J. 363, 376–77 (2014) (Atkins asserted that the Commonwealth's Attorney had withheld exculpatory material, as well as suborned perjury, during the 1998 capital murder trial.).

[36] Brady v. Maryland, 373 U.S. 83 (1963). The Supreme Court held that the suppression of evidence by the prosecution that is favorable to the accused is a violation of the accused's due process rights when the evidence is significant to either guilt or punishment. Olive, *supra* note 35, at 376–77.

[37] *In re* Commonwealth, 677 S.E.2d at 238.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 241 ("We will not permit the Commonwealth to ask the circuit court during the remanded hearing on mental retardation to exercise discretion and rule upon other legal issues but, inconsistently, assert in the mandamus proceeding that the circuit court lacked legal authority to do so. The Commonwealth will not be allowed to approbate and reprobate.").

II. INTELLECTUAL DISABILITY AND THE DSM-V

The Diagnostic and Statistical Manual of Mental Disorders ("DSM") is a publication of the American Psychiatric Association ("APA") that is relied upon by clinicians, pharmacists, and various health agencies for standard language and definitions of mental health disorders.[41] Although the manual has undergone several updates and revisions, the current DSM-V was published in March of 2013, replacing the DSM-IV which was in existence at the time of the *Atkins* decision.[42] This manual is universally accepted as the authority for psychiatric diagnoses within the United States and defines intellectual disability as requiring three criteria: (1) deficits in intellectual functioning; (2) marked deficits in adaptive functioning; and (3) onset of intellectual and adaptive deficits during the developmental period.[43]

However, the international psychiatric community and the World Health Organization ("WHO") rely primarily on the International Classification of Diseases, 10th Edition ("ICD-10").[44] As many as 110 countries use the ICD-10 for diagnosing causes of death, statistical reports for health organizations, and diagnostic definitions.[45] The ICD-10 defines mental retardation in much broader terms than the DSM-V, characterizing the condition as an "incomplete development of the mind, which is especially characterized by impairment of skills manifested during the developmental period, which contribute to the overall level of intelligence."[46] It is important to note that among the changes to the DSM-V is the reference to persons previously identified in the DSM-IV as diagnosed with "mental retardation."[47] Taking into consideration the concerns of diagnostic professionals and various health agencies, the DSM-V now uses the term "intellectual disability" in place of "mental retardation."[48] While the ICD-10 Guide for Mental Retardation, a

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[41] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5 (5th ed. 2013).

[42] *Id.* at 6.

[43] *Id.* at 5, 33.

[44] WORLD HEALTH ORG., THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIORAL DISORDERS 2 (1992); *Classifications of Diseases (ICD)*, WORLD HEALTH ORG., www.who.int/classifications/icd/en/ (last visited Sept. 26, 2017).

[45] *International Classification of Diseases (ICD) Information Sheet* in *Classifications of Diseases (ICD)*, WORLD HEALTH ORG., www.who.int/classifications/icd/factsheet/en/ (last visited Sept. 26, 2017).

[46] WORLD HEALTH ORG., ICD-10 GUIDE FOR MENTAL RETARDATION 1 (1996), http://www.who.int/mental_health/media/en/69.pdf.

[47] AM. PSYCHIATRIC ASS'N, *supra* note 41, at 809.

[48] *Id.* at 809 ("The term *mental retardation* was used in DSM-IV. However, intellectual disability (intellectual developmental disorder) is the term that has come into common use over the past two decades among medical, educational, and other professionals, and by the lay public and advocacy groups.").

supplement to the Classifications published in 1996, still uses the term mental retardation, it is expected to replace that term with "intellectual development disorder" in the next edition, ICD-11.[49] In fact, over the past decade, the American Psychiatric Association and the WHO have consulted closely on diagnoses in their respective publications.[50]

The significance of these two manuals becomes evident in post-*Atkins* challenges to the definition or classification of persons who are clinically diagnosed as intellectually disabled.

III. *HALL V. FLORIDA*

The first challenge to the *Atkins* test advancing to the Supreme Court arose out of a decades-old case from Florida.[51] In 1981, Freddie Lee Hall was convicted of two counts of murder during the commission of a robbery and abduction, and sentenced to death for one of the murders.[52] Throughout the appellate process, Hall's lawyers presented extensive mitigating evidence of his inability to adapt or adjust to daily life since childhood, suggesting severe deficits in adaptive functioning.[53] Hall suffered from an intellectual disability, stimulated in part by horrible childhood abuse akin to "torture."[54] He was beaten, hanged, burned, and buried routinely by his abusive family.[55] By the time he was an adult, he was still unable to care for himself or hold a simple job.[56] Nonetheless, the Supreme Court of Florida concluded, "Hall's argument that his mental retardation provided a pretense of moral or legal justification" had "no merit," and affirmed his death sentence.[57]

Following the 2002 *Atkins* ruling, Hall petitioned the Supreme Court of Florida to halt his execution because he claimed he suffered from mental retardation.[58] In 2010, the Supreme Court of Florida granted Hall a hearing on this matter, during which Hall presented evidence of his behavioral deficits and an IQ score of 71.[59] In legislation that actually preceded *Atkins*, Florida mandated an IQ score of 70 or below in order to establish intellectual disability, so the Supreme Court of Florida rejected

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[49] Marc J. Tassé et al., *AAIDD Proposed Recommendations for ICD-11 and the Condition Previously Known as Mental Retardation*, 51 INTELL. & DEVELOPMENTAL DISABILITIES 127, 128 (2013).

[50] Darrel A. Regier et al., *The DSM-5: Classification and Criteria Changes*, 12 WORLD PSYCHIATRY 92 (2013).

[51] Hall v. Florida, 134 S. Ct. 1986, 2001 (2014).

[52] *Id.* at 1990.

[53] *Id.* at 1990–91.

[54] Hall v. State, 614 So. 2d 473, 479–80 (Fla. 1993) (Barkett, C.J., dissenting).

[55] *Id.* at 480.

[56] Brief for Petitioner at 8, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882).

[57] *Hall*, 614 So. 2d at 478.

[58] Hall v. State, 201 So. 3d 628, 632 (Fla. 2016) (per curiam).

[59] *Id.*

Hall's appeal without even considering evidence of limited adaptive skills.[60] Essentially, the Supreme Court of Florida interpreted its existing statute to be consistent with the first prong of the *Atkins* intellectual disability test and to be a bright line standard of 70 on an IQ test, regardless of whether the other two prongs of *Atkins* clearly demonstrated a mental disability.[61] Mr. Hall was in a tenuous position as he had taken a total of nine IQ tests, administered within a forty year period, on which his scores ranged from 60 to 80.[62] However, the sentencing court excluded some scores for evidentiary reasons, leaving Hall's lowest score at 71.[63] The Supreme Court of the United States granted certiorari to determine, in Justice Kennedy's words, whether Florida can "execute a man because he scored a 71 instead of a 70 on an IQ test."[64]

In its 5-4 ruling, with Chief Justice Roberts and Justices Alito, Scalia, and Thomas dissenting, the Court reversed the Florida decision as unconstitutional, holding that Florida's bright line rule misconstrued the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of approximately 70.[65] Justice Kennedy went on to write in the majority opinion that the Florida legislation was against medical practice and therefore unconstitutional in two key areas.[66] First, it is an accepted practice among psychiatric professionals to interpret IQ scores as a range, "not as a single fixed number."[67] In fact, the Court goes on to note that all instruments used for testing IQ have a "standard error of measurement, often referred to by the abbreviation 'SEM,'" which reflects an inherent imprecision of the test itself.[68] The factors that contribute to the standard error of measure included, "the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing."[69] Justice Kennedy cited the *Atkins* opinion

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[60] *Id.* at 632, 634.

[61] *Hall*, 134 S. Ct. at 1994 ("On its face this statute could be interpreted consistently with *Atkins* and with the conclusions this Court reaches in the instant case. . . . [b]ut the Supreme Court of Florida has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited.").

[62] *Id.* at 1992.

[63] *Id.*

[64] *Id.* at 2001.

[65] *Id.*

[66] *Id.* at 1995, 2000.

[67] *Id.* at 1995.

[68] *Id.*

[69] *Id. See* Robert L. Schalock et al., USER'S GUIDE: INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 22 (Am. Ass'n on Intell. &

which referenced the DSM-IV's definition of mild mental retardation as "people with an IQ level of 50-55 to *approximately* 70."[70]

Secondly, the Court ruled that it is incorrect to take an IQ score as "final and conclusive evidence" of an individual's mental capacity when medical experts examine a totality of factors present in the individual's life.[71] When dealing with the complex field of intellectual disabilities, it is appropriate to rely upon experts within the profession since they are tasked with defining, interpreting, and diagnosing mental illnesses.[72] These professionals have long agreed that a diagnosis of intellectual disability cannot be distilled to a bright-line score on a standardized test.[73] Instead, medical professionals take into consideration all three elements of the *Atkins* formula when rendering a diagnosis.[74] A state's decision that a standardized score irrefutably determines an individual's mental status, defies commonly accepted medical practice, and by extension, the "evolving standards of decency" by which the Court determines the constitutionality of death penalty sentences.[75] Thus, the Court determined that Florida's rule was invalid under the Constitution's bar to cruel and unusual punishment.[76]

Writing for the dissent, Justice Alito cautioned that the Court is substituting "professional societies" for American society when interpreting the rationale of "evolving standards of decency that mark the progress of a maturing society."[77] Justice Alito emphasized that the *Atkins* decision left to the states the task of developing methods to determine whether a defendant was mentally retarded and "did not provide definitive procedural or substantive guides" for making that determination.[78] He went on to challenge the majority's use of the term "consensus" when at least nine other states, as of 2014, had a similar statutory IQ score cut-off as Florida.[79] Since the states that have abolished the death penalty do not factor it into the analysis, that leaves twelve states that accept the SEM theory and nine states that have not taken a

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Developmental Disabilities, 11th ed. 2012); ALAN S. KAUFMAN, IQ TESTING 101 138–39 (2009).

[70] *Hall*, 134 S. Ct. at 1998 (emphasis added) (quoting Atkins v. Virginia, 536 U.S. 304, 308 n. 3 (2002)).

[71] *Id.* at 1995.

[72] *Id.* at 1993.

[73] *Id.* at 1995.

[74] *Id.* at 1994.

[75] *Id.* at 1992 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[76] *Id.* at 2001.

[77] *Id.* at 2002 (Alito, J., dissenting) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)).

[78] *Id.* at 2003 (quoting Bobby v. Bies, 556 U.S. 825, 831 (2009)).

[79] *Id.*

specific position on this issue.[80] So, Justice Alito queried, where is the consensus?[81] Finally, the dissent argued that Florida does, in fact, recognize the risk of testing error by considering multiple IQ test scores of an individual.[82] On September 8, 2016, the Supreme Court of Florida commuted Freddie Lee Hall's sentence from death to life in prison.[83]

IV. *MOORE V. TEXAS*

Although Texas was not one of the states identified by Justice Kennedy as having a similar statutory scheme to Florida for identifying intellectually disabled persons, the State of Texas did utilize a post-*Atkins* method of diagnosing mental disabilities that ultimately drew the attention of the Supreme Court.[84] In April of 1980, Bobby James Moore shot and killed a seventy year-old grocery store attendant during an armed robbery with two co-defendants.[85] At the age of twenty, Moore was convicted of capital murder, sentenced to death, and remained on death row for the next thirty years while challenging his sentence on various grounds, including his intellectual disability.[86] On petition for relief, pursuant to *Atkins*, the state habeas court received testimony in 2014 from Moore's family related to adaptive behavioral deficits as a youth and further testimony from mental-health experts.[87] Relying on the diagnostic standards in the DSM-V and the American Association on Intellectual and Developmental Disabilities ("AAIDD-11"), the habeas court recommended that the Texas Court of Criminal Appeals ("CCA") reduce his sentence to life in prison.[88] However, the CCA denied Moore's habeas relief, claiming that the habeas court failed to apply the standards for assessing intellectual disability that were adopted by Texas in the 2004 case of *Ex parte Briseno*.[89] The CCA held that since *Atkins*, the "decision to modify

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[80] *Id.* at 2004.

[81] *Id.* at 2004–05.

[82] *Id.* at 2007.

[83] Hall v. State, 201 So. 3d 628, 638 (Fla. 2016).

[84] Moore v. Texas, No. 15-797, slip op. at 5, 8 (U.S. Mar. 28, 2017).

[85] *Id.* at 2.

[86] *Id.* at 2–3.

[87] *Id.* at 3 ("The evidence revealed that Moore had significant mental and social difficulties beginning at an early age. At 13, Moore lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition. . . . Moore's father, teachers, and peers called him 'stupid' for his slow reading and speech.").

[88] *Id.* at 4–5.

[89] *Id.* at 1–2 (citing *ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004)) (From *Briseno*, Texas adopted the following criteria for diagnosing mental disabilities: (a) did his family, friends, teachers, and employers believe the defendant was mentally retarded at that time; (b) is the defendant's conduct impulsive; (c) does defendant's conduct show leadership or is he is a follower; (d) is defendant's conduct in response to external stimuli rational and

the legal standard for intellectual disability in the capital-sentencing context rests with this Court," thus Texas courts adopted *Briseno* inquiries as its procedure for assessing intellectual disabilities.[90]

In refusing to find Moore intellectually disabled, the Texas Court held that his academic and social difficulties were not related to intellectual functioning deficits and, therefore, failed the second prong of the *Atkins* test.[91] While issues related to subaverage intellectual functioning or IQ testing were also relevant issues in the Texas Court's holding, the primary issue on appeal to the United States Supreme Court addressed Texas's reliance on outdated and professionally unaccepted standards for evaluating the limitations in adaptive skills.[92] The facts that the CCA used to support its holding that Moore's adaptive behavioral deficits were not associated with his subaverage intellectual functioning include: his poor grades were the result of outside factors such as multiple changes in schools, drug abuse, absenteeism, and racial harassment;[93] his father called Moore "slow" because Moore often tried to protect his siblings and his mother from his father's physical abuse and often caught his father in situations of infidelity;[94] socially adaptive behavior was evident since Moore was able to support himself on the streets by living in the back of a pool hall, mowing lawns, and playing pool to earn money;[95] and Moore's ability to understand circumstances around him and react appropriately was demonstrated by his attempts to lie and hide facts from the police following his arrest and his several pro se motions and pleadings throughout his appellate process.[96] As the "ultimate fact-finder" on these issues related to adaptive behavioral deficits, the Texas Court denied any *Atkins* relief claimed by Moore.[97]

Justice Ginsburg delivered the opinion for the 5-3 majority of the United States Supreme Court in March of 2017.[98] Ginsburg referenced both *Atkins* and *Hall* in establishing the common theme that "'[t]o enforce

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appropriate; (e) does defendant respond coherently and rationally to oral or written questions or are his responses random; (f) can the defendant hide facts or lie effectively in his own or others' interests; and (g) did the offense committed require forethought, planning, and complex execution of purpose?).

90 *Ex parte* Moore, 470 S.W.3d 481, 487 (Tex. Crim. App. 2015), *vacated and remanded sub nom.*, *Moore*, No. 15-797, slip op. at 5 (U.S. Mar. 28, 2017).

91 *Id.* at 526.

92 Moore v. Texas, 137 S. Ct. 1039, 1048 (2017) ("We granted certiorari to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment and this Court's precedents.").

93 *Ex parte* Moore, 470 S.W.3d at 526.

94 *Id.* at 526–27.

95 *Id.* at 522.

96 *Id.* at 527.

97 *Id.* at 527–28.

98 *Moore*, No. 15-797, slip op. at 5, 3 (U.S. Mar. 28, 2017).

the Constitution's protection of human dignity,' we 'loo[k] to the evolving standards of decency that mark the progress of a maturing society.'"[99] The opinion first addresses Moore's IQ of 74, which, after applying the Standard Error of Measure upheld in *Hall*, "yields a range of 69 to 79 as the State's retained expert acknowledged."[100] Then focusing on the adaptive behavioral deficits, Ginsburg held that the "CCA overemphasized Moore's perceived adaptive strengths. . . . overcom[ing] the considerable objective evidence of Moore's adaptive deficits."[101] Finally, Ginsburg rather pointedly criticized Texas's reliance on the *Briseno* factors, noting that since Texas was "[s]keptical of what it viewed as 'exceedingly subjective' medical and clinical standards, the CCA in *Briseno* advanced lay perceptions of intellectual disability" and, thus, "defined its objective as identifying the 'consensus of Texas citizens.'"[102]

The majority opinion concludes by asserting that while states have some flexibility in enforcing *Atkins*, there is not "unfettered discretion," otherwise "*Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality."[103] In assessing the second element of the *Atkins* test, the medical community focuses the adaptive-functioning inquiry on adaptive deficits and not strengths.[104] By relying on a 1992 definition of intellectual disability from the American Association on Mental Retardation ("AAMR"), the Texas CCA failed adequately to inform itself of the "medical community's diagnostic framework," resulting in a ruling against Moore that was "pervasively infected."[105] With that, Ginsburg vacated the Texas Court's ruling and remanded the case for further proceedings.[106]

Chief Justice Roberts wrote the dissenting opinion, joined by Justices Alito and Thomas, stating that the majority essentially confused the roles of clinicians and justices: "clinicians, not judges, should determine clinical standards; and judges, not clinicians, should determine the content of the Eighth Amendment."[107] Roberts's dissent justified the actions of the Texas CCA in so much as the Court relied on precedents within the Texas judiciary for assessing intellectual disability, especially since the Texas legislature had not yet acted to modify the legal standards.[108] "Just as we

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[99] *Id.* at 9 (second alteration in original) (quoting Hall v. Florida, 134 S. Ct. 1986, 1992 (2014)).

[100] *Id.* at 11 (citation omitted).

[101] *Id.* at 12.

[102] *Id.* at 15.

[103] *Id.* at 17 (quoting *Hall*, 134 S. Ct. at 1998–99).

[104] *Id.* at 12–13.

[105] *Id.* at 18.

[106] *Id.*

[107] *Id.* at 2 (Roberts, C.J., dissenting).

[108] *Id.* at 3.

have corrected lower courts for taking it upon themselves to dismiss our precedent as outdated, so too the CCA rebuked the habeas court for ignoring binding CCA precedent."[109] Roberts went on to cite *Gregg v. Georgia* to distinguish the roles of the legislature and the courts: "in a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[110] By the majority's rejection of the Texas Court's conclusion that Moore failed to demonstrate adaptive behavioral deficits, the Court's decision "constitutionalizes rules for which there is not even clinical consensus."[111]

CONCLUSION

In the fifteen years following the landmark decision in *Atkins*, the United States Supreme Court has struggled with states' interpretation of the term "evolving standards of decency." The majority opinions in *Hall* and *Moore* emphasize the significance of professional clinical interpretations of the elements in the *Atkins* test for determining intellectual disability. The dissenting opinions criticize the role of the judiciary for instituting rules for which there is no clinical or societal consensus. Nonetheless, the legacy of *Atkins* remains—that no person who is intellectually disabled will be eligible for execution. Furthermore, the *Atkins* three-part test for assessing intellectual disability has overcome significant constitutional challenges and remains the same: (1) subaverage intellectual functioning with (2) significant limitation in adaptive skills, (3) which manifest before age eighteen. This test, as referenced in each constitutional challenge, remains consistent with the professional clinical diagnoses recognized nationally and internationally. In essence, the Supreme Court has guided states in each of its post-*Atkins* holdings to conform their intellectual disability assessments to a standard of fairness and decency.

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[109] *Id.* (citation omitted).

[110] *Id.* at 7 (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976)).

[111] *Id.* at 11.

INTENT OR GROSS NEGLIGENCE: HILLARY CLINTON SHOULD BE CHARGED UNDER 18 U.S.C. § 793 FOR MISHANDLING CLASSIFIED INFORMATION

INTRODUCTION

The Department of Justice failed to pursue justice when it decided not to file charges against Hillary Clinton regarding her private e-mail server.[1] Congress created a statute that encompasses the mishandling of classified information through both willful intent and gross negligence to hold government officials to the oath they swore,[2] which is to protect our nation's secrets. Hillary Clinton's acts were precisely what Congress intended to curb, and the lack of charges reveals a hole in our justice system that must be filled.

A nation without justice holds no promise of liberty for its citizens. Our law was established to bind all American citizens, including our government officials, to one foundation.[3] It is essential to our rule of law that our nation's leaders are bound by the law and are held accountable to it. There is no foundation without a rule of law that is enforced against every American despite the office he or she holds. The rule of law does not exist if a nation's government and its citizens are free to act as they wish without repercussions. Our law is foundational, and thus, must be enforced to provide justice to and for the American people.[4]

This Note compares the facts of Hillary Clinton's investigation with the legislative intent and prosecutions under 18 U.S.C. § 793—the Espionage Act of 1917—to determine whether the lack of criminal charges was appropriate. Part I of this Note explains the history of the Act along with its legislative intent. It further analyzes the two applicable provisions under the statute, subsections (d) and (f). Part II discusses the willful action provision by applying cases and additional comments on Congress's intent for the statute. Part III this Note discusses the second applicable provision, gross negligence, by applying cases and legislative intent.

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[1] Judson Phillips, *FBI on Hillary's Emails: Equal Justice under the Law no More*, WASH. TIMES (July 5, 2016), http://www.WashingtonTimes.com/news/2016/jul/5/fbi-hillarys-emails-equal-justice-under-law-no-mor.

[2] *See* 18 U.S.C. §§ 793(d), (f) (2012) (showing the applicable statutory provisions that deal with the mishandling of classified information).

[3] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[4] Miriam Gur-Arye, *Justifying the Distinction Between Justifications and Power (Justifications vs. Power)*, 5 CRIM. L. & PHIL. 293, 293 (2011).

I. 18 U.S.C. § 793—THE ESPIONAGE ACT

A. History of the Espionage Act

After the United States entered World War I in 1917, Congress enacted the Espionage Act to eliminate the threat of interference with the war effort, and specifically to protect against espionage by safeguarding military secrets.[5] Originally, President Woodrow Wilson desired the Act to be much broader than it is today—allowing the President to have control over virtually all information related to the military.[6] After push-back from the media and the American people, however, Congress refused to hand over authority to President Wilson to regulate all information regarding the war, for example, denying him the power to censor the media and screen mail.[7] Congress then adopted the Act that we have today, apart from § 793(e), which was amended in 1950 to prohibit those in possession of information regarding national security to send it to anyone "not entitled to receive it."[8]

B. Legislative Intent of the Espionage Act

The debates surrounding the enactment of the Espionage Act have primarily involved the balance between protecting government secrets and allowing public speech.[9] On several occasions before its enactment, Congress had discussed how to protect military secrets from foreign enemies, while providing Americans with the freedom to express their opinions on national security.[10]

The first attempt to uphold this balance was the enactment of the Defense Secrets Act of 1911.[11] After entering World War I, Congress

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[5] Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 336 (2003).

[6] *Id.* at 345.

[7] *Id.* at 345–46.

[8] *Id.* at 336–37; *see* 18 U.S.C. § 793(e) (2012) (current version of the Code); *see also* Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 999–1000 (1973) [hereinafter Edgar & Schmidt, *The Espionage Statutes*] (explaining the amendments made to § 793(e) in 1950).

[9] Edgar & Schmidt, *The Espionage Statutes*, *supra* note 8, at 939.

[10] Stone, *supra* note 5, at 339–40.

[11] [1] That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place non-contiguous to but subject to the jurisdiction thereof; [2] or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take, or make

sought to broaden the protection of government secrets by enacting the Espionage Act of 1917.[12] Although the new statute used language similar to that of the Defense Secrets Act, it expanded the set of persons to whom the statute would apply.[13] While the Defense Secrets Act applied solely to those "not lawfully entitled" to have classified information, which prohibits spies and espionage activity, Congress broadened the scope of the Espionage Act to those "lawfully having possession of" such information.[14] Thus, this statute encompasses government officials and even members of the public.[15] Congress saw the need to protect our government secrets not only from enemies of the United States but also from the willful and grossly negligent acts that our own government officials might commit when handling classified information.

Congress had specific intentions for each section within the Espionage Act. Sections 793(a) and 794(a) require "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."[16] However, §§ 793(d) and (e) require only that the act be "willful[]."[17] Section 793(f) has an even lower standard, requiring only that the classified documents be lost through "gross negligence."[18] When enacting the Espionage Act, "Congress intended to create a hierarchy of offenses against national security,

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> any document, sketch, photograph, photographic negative, plan, model, or knowledge of anything connected with the national defense to which he is not entitled; [3] or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge, knowing the same to have been so obtained, taken or made; [4] or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempt to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; [5] or whoever, being lawfully intrusted [sic] with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

United States v. Rosen, 445 F. Supp. 2d 602, 611–12 (E.D. Va. 2006) (quoting Act of Mar. 3, 1911 (Defense Secrets Act), ch. 226, § 1, 36 Stat. 1084 (*repealed by* Espionage Act of 1917, ch. 30, 40 Stat. 217).

12 *Rosen*, 445 F. Supp. 2d at 612.

13 *See id.* (quoting and interpreting the relevant provisions of the statute).

14 Defense Secrets Act § 1; 18 U.S.C. § 793(d) (2012).

15 *See* 18 U.S.C. § 793 (using the language "whoever" and "any person" denotes a standard of general applicability).

16 *Id.* §§ 793(a), 794(a); United States v. McGuinness, 35 M.J. 149, 153 (C.M.A. 1992); *see also* United States v. Morison, 844 F.2d 1057, 1065 (4th Cir. 1988) (showing that sections 793(a) and 794(a) require intent or reason).

17 *McGuinness*, 35 M.J. at 153.

18 *Id.*

ranging from 'classic spying' to merely losing classified materials through gross negligence."[19]

Over the one hundred years since this statute was enacted, it rarely has been litigated.[20] But the cases that have been litigated are relevant and informative.[21] The primary concerns regarding the statute have been vagueness and violations of the First Amendment.[22] For instance, the Supreme Court rejected the argument that the phrase "information relating to the national defense" is vague.[23] More litigation arises at the circuit level, but even so it has been somewhat rare.[24] The Fourth Circuit has denied several claims of vagueness and violations of the First Amendment relating to the terms "national defense," "willful," and "unauthorized."[25] If the statute was vague and overbroad, one would think that far more cases would have been litigated over the one hundred years of its life. But the statute has stood the test of time and survived attempts to narrow its protection.

Since the courts have consistently rejected these arguments concerning vagueness or violations of the First Amendment, one should not be hesitant to charge someone under this statute if the facts are present. The sparse precedent is not a valid argument to claim that one should not be charged under this statute when the statute clearly sets out its intentions. The Fourth Circuit stated that the lack of prosecutions "does not indicate that the statutes were not to be enforced as written."[26] Fortunately, the willful and grossly negligent disclosure of our government secrets by our own government officials is not something we see every day, but when we do, our government should not hesitate to press charges, regardless of the defendant's position.

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19 *Id.*

20 United States v. Rosen, 445 F. Supp. 2d 602, 613 (E.D. Va. 2006).

21 *Id.*

22 *Id.*; *see also* Gorin v. United States, 312 U.S. 19, 26–27 (1941) (addressing vagueness of other criminal statues in relation to this statute).

23 *Rosen,* 445 F. Supp. 2d at 26–27; *see Gorin,* 312 U.S. at 29 (illustrating the Supreme Court's rejection of vagueness in regard to defining national defense).

24 *Rosen*, 445 F. Supp. 2d at 613.

25 *Id.*; *see also* United States v. Morison, 844 F.2d 1057, 1076 (4th Cir. 1988) (rejecting the vagueness argument that the statute was intended to apply only to spies); United States v. Truong Dinh Hung, 629 F.2d 908, 918–19 (4th Cir. 1980) (rejecting that the term "willful" is vague); United States v. Dedeyan, 584 F.2d 36, 40 (4th Cir. 1978) (rejecting that the phrase "relating to national defense" is vague); United States v. McGuinness, 35 M.J. 149, 153 (C.M.A. 1992) (rejecting that the term "unauthorized" is vague).

26 *Morison*, 844 F.2d at 1067.

II. 18 U.S.C. § 793(D)—WILLFUL ACTION

There are two primary provisions of 18 U.S.C. § 793 that should have been applied during the investigation of Hillary Clinton—subsections 793(d) and (f).[27] Whether they were applied is unknown.

18 U.S.C. § 793(d) criminalizes:

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it.[28]

This statute criminalizes the act of willfully communicating information regarding national defense to one who is "not entitled to receive it."[29] The statute comprises four elements:

> (1) that the defendant lawfully had possession of, access to, control over, or was entrusted with (2) information relating to the national defense (3) that the defendant reasonably believed could be used to the injury of the United States or to the advantage of a foreign nation and (4) that the defendant willfully communicated, delivered, or transmitted such information to a person not entitled to receive it.[30]

A. Elements of § 793(d)

1. To Whom Does This Statute Apply?

The statute states, "[w]hoever, lawfully having possession of, access to, control over, or being entrusted with" information relating to national defense.[31] It does not specifically apply to one group of people, rather it

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[27] *See, e.g.*, *id.* at 1060 (involving defendants who were prosecuted under both §§ 793(d) and 793(e)); *cf.* 18 U.S.C. § 793(e) (2012) (prohibiting "unauthorized possession" of "information relating to the national defense"). Based on the facts provided by James Comey in his public recommendation, there was no indication that Clinton was unauthorized to possess the information she sent. *See* Comey Press Release, *infra* note 68 (noting no investigation of the premise of provision (e) and consequently this section would not apply to Clinton's investigation).

[28] 18 U.S.C. § 793(d).

[29] *Id.*

[30] United States v. Kim, 808 F. Supp. 2d 44, 55 (D.D.C. 2011); *see* 18 U.S.C. § 793(d) (outlining the necessary elements for determining a violation of the statute).

[31] 18 U.S.C. § 793(d).

applies equally to spies, government employees, the press, and the public as long as their possession is lawful.[32]

In *United States v. Morison*, the Fourth Circuit upheld the defendant's conviction under §§ 793(d) and (e) of the Espionage Act for sending classified information to a newspaper.[33] The defendant, a warfare analyst for the Naval Intelligence Support Center, was given a Top Secret security clearance and worked in a "vaulted area" that could be accessed only by those with the same clearance.[34] Morison argued that this statute did not apply to him because Congress's intention for this statute was to protect the United States from spies and espionage activity.[35] Since Morison did not send the information to an enemy of the United States but to a newspaper, he was not a spy and could not be prosecuted under this statute.[36] Rejecting this argument, the Fourth Circuit stated that the statute clearly uses the word "whoever" to indicate that the statute is not limited to spies.[37] The court further explained that the word plainly applies to anyone who has access to information regarding national defense.[38] The Fourth Circuit quoted the Supreme Court, which had stated that courts are "not free to replace [that clear language] with an unenacted legislative intent."[39]

Additionally, the Fourth Circuit briefly examined Congress's intention behind the statute.[40] The court explained that §§ 793 and 794 were drafted by the Department of Justice under the supervision of Assistant Attorney General Charles Warren and then submitted to Congress.[41] Warren's purpose was to have very specific sections within the statute that prohibited distinct offenses.[42] Both §§ 793 and 794 dealt with national defense, but § 794 prohibits disclosing national defense information to a foreign government.[43] Section 794 specifically provides for spies and those caught in classic espionage activity.[44] It is a more

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[32] Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 407 (1986) [hereinafter Edgar & Schmidt, Curtiss-Wright *Comes Home*].

[33] 844 F.2d 1057, 1060 (4th Cir. 1988).

[34] *Id.*

[35] *Id.* at 1063.

[36] *Id.*

[37] *Id.*; 18 U.S.C. § 793(d) (2012).

[38] *Morison*, 844 F.2d at 1063.

[39] *Id.* at 1064 (quoting INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1065.

[43] *Id.*

[44] *Id.*

serious offense.[45] However, § 793 prohibits disclosing national defense information to one "'not entitled to receive' it."[46] This distinction illuminates Congress's intention to create § 794 to convict spies while § 793 was created to convict whoever sends classified information to one "not entitled to receive."[47]

As Secretary of State at the time, Hillary Clinton was the President's chief foreign affairs advisor, so she was lawfully privileged to possess and entrusted with information relating to our nation's defense. As described by the Fourth Circuit and the language of § 793, one does not have to be a spy or involved in espionage activity in order for this statute to apply.[48] Activity of this sort was prohibited in § 794. The statute's language is clear. "Whoever" was intentionally used to broaden the protection of our nation's classified information.[49] Our nation's security is not compromised solely by planted spies whose intention is to harm the United States. Congress clearly saw the importance of protecting our nation's classified information whether it be from spies or government officials who do not take the necessary and vital precautions to protect the nation they serve. Because Hillary Clinton had access to national defense information, the first element of § 793(d) is satisfied.

2. What is Information Relating to "National Defense"?

In *Gorin v. United States*, the Supreme Court looked at the phrase "national defense" and determined that it is well understood.[50] The phrase was used in the Defense Secrets Act, and the words were defined then.[51] The Supreme Court established that in the context of the Espionage Act, "national defense" means "a generic concept of broad connotations, referring to the military and naval establishments and the related

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[45] *Id.*

[46] *Id.* (quoting 18 U.S.C. § 793(d) (2012)).

[47] *Id.*; *see also* United States v. Dedeyan, 584 F.2d 36, 40 (4th Cir. 1978).

[48] *Supra* text accompanying notes 37–47.

[49] *Supra* text accompanying notes 37–47, 51.

[50] 312 U.S. 19, 28 (1941) (affirming conviction under § 793(d) for gathering information relating to Japanese activities in the United States and delivering more than fifty reports to a foreign nation).

[51] *Id.*

> Whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place non-contiguous to but subject to the jurisdiction thereof . . . .

Act of Mar. 3, 1911 (Defense Secrets Act), ch. 226, § 1, 36 Stat. 1084 (*repealed by* Espionage Act of 1917, ch. 30, 40 Stat. 217.

activities of national preparedness."[52] Whether information regards "national defense" is a question of fact to be determined by a jury.[53] Courts can inform the jury what kind of information relates to "national defense," and then it is up to the jury to decide whether the disclosed information is of that kind.[54]

Further, the government must prove that the disclosure of information "would be potentially damaging to the United States or might be useful to an enemy of the United States."[55] This test has not created a significantly high hurdle since classified information is typically involved.[56] Classified information is labelled according to the level of harm that could be caused if disclosed—consequently, such information usually rises to the level of "potentially damaging" or "useful to an enemy."[57] Information relating to "national defense" does not have to be classified, but the government must prove that steps were taken to maintain the information's secrecy.[58]

In *United States v. Kiriakou*,[59] the district court further narrowed the concept of "national defense" information by applying the test established in *United States v. Rosen*.[60] The two elements are: [1] "the information is closely held by the government and [2] that the information is the type of information that, if disclosed, could harm the United States."[61] The second element can be established if the information "implicates an important government interest such as the national security."[62] The court believed that these two elements eliminate any vagueness that might surround the phrase "relating to the national defense."[63] Despite the formulation of this test, the executive branch's classification system has been used by the majority of courts to establish what relates to national defense, and it

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[52] *Gorin*, 312 U.S. at 28.

[53] United States v. Kim, 808 F. Supp. 2d 44, 53 (D.D.C. 2011).

[54] *Gorin*, 312 U.S. at 32.

[55] United States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988).

[56] David McCraw & Stephen Gikow, *The End to an Unspoken Bargain? National Security and Leaks in a Post-*Pentagon Papers *World*, 48 HARV. C.R.-C.L. L. REV. 473, 492 (2013).

[57] Petition for Writ of Certiorari, Morison v. United States, No. 88-169, 1988 WL 1094767, at *8 (4th Cir. July 28, 1988).

[58] Edgar & Schmidt, Curtiss-Wright *Comes Home*, *supra* note 32, at 399.

[59] 898 F. Supp. 2d 921, 923 (E.D. Va. 2012). John Kiriakou was a Central Intelligence Agency ("CIA") employee for fourteen years where he had access to classified information regarding national defense. Before he began working for the CIA, he signed various agreements stating that he understood the nature of the information he would be handling and the obligation he had to protect such information. *Id.* at 922.

[60] 445 F. Supp. 2d 602, 618 (E.D. Va. 2006).

[61] *Id.*

[62] *Id.* at 621.

[63] *Id.* at 622.

seems to be the most accurate method.[64] To one, the information may seem unimportant, but to another, the information is vital to our nation's defense.[65] This is where the classification system is a reliable tool for establishing what is related to national defense and what is not.[66] One who knows the context of the information should be determining its classification rather than the court system.[67]

According to James Comey, former Director of the Federal Bureau of Investigation ("FBI"), in his official statement to the public, Secretary Clinton turned over approximately 30,000 e-mails from her private server to the State Department in December 2014.[68] The FBI examined whether the e-mails were classified when sent or received and whether an unclassified e-mail contained classified information.[69] Out of these 30,000 e-mails, there were 110 that contain classified information.[70] Eight e-mail chains were determined to contain "Top Secret" information at the time they were sent.[71] Thirty-six chains contained "Secret" information.[72] Eight contained "Confidential" information.[73] Additionally, the FBI determined that there were about 2,000 other e-mails that should have been labelled "Confidential."[74]

The FBI also found several thousand work-related e-mails on then-Secretary Clinton's server that she failed to provide.[75] Some of them had been deleted but traces of them were found on devices connected to Clinton's private e-mail domain.[76] Others were found by sifting through the e-mails of other government employees with whom Clinton would likely have corresponded.[77] The FBI has determined that out of the thousands of e-mails not provided by Clinton, three of them were classified when they were sent or received—one contained "Secret" information while the other two contained "Confidential" information.[78] There were no

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64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 Press Release, James B. Comey, FBI Director, Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), [hereinafter Comey Press Release], https://www.FBI.gov/news/pressrel/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

other e-mails that the FBI determined should have been classified but were not.[79]

Taking into account the high number of "Top Secret," "Secret," "Confidential," and the other e-mails that should have been classified along with Secretary Clinton's access to sensitive information, it is hard to imagine that none of these e-mails related to our nation's defense. If we apply the test established in *Rosen*,[80] the first part is met because the public does not have access to this information, but rather, the information has been closely held by the government as indicated by the classification system.[81] What was specifically contained in these e-mails was not released and should not be released for obvious reasons—because they did relate to our national defense. Second, it must be established that this information could be used to harm the United States.[82] Since these were classified e-mails, the information contained in them would harm the United States if in the wrong hands, since the classification system is based on the level of harm the disclosed information could cause.[83] According to the Supreme Court, whether this information was related to national defense is a question for a jury.[84] Thus, it need not be established beforehand whether the information was related to national defense, although the facts considerably lean towards a determination in favor of the prosecution.

3. Did the Defendant Have Reason to Believe the Information Could Be Used to Injure the United States or to the Advantage of Another Nation?

This element is typically established by the classification system.[85] Once again, if the information is labelled classified, then it will cause some level of harm if disclosed.[86] If classified, the lack of knowledge that a document is related to national defense is not a viable defense.[87] So, if one sends classified information to another who is not entitled to receive it, then that is enough to satisfy this element, regardless of whether the individual saw the "classified" label.[88]

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79 *Id.*

80 *See* United States v. Rosen, 445 F. Supp. 2d 602, 618 (E.D. Va. 2006) (articulating the required elements that the government must prove to determine if information is so closely related to the national defense to fall within the purview of the espionage act).

81 *Id.* at 620–21.

82 *Id.* at 618.

83 Comey Press Release, *supra* note 68.

84 Gorin v. United States, 312 U.S. 19, 29 (1941).

85 *See* United States v. Kim, 808 F. Supp. 2d 44, 53 (D.D.C. 2011) (noting that information designated as "TOP SECRET/SENSITIVE" was a level of classification likely to cause grave harm to national security).

86 *Id.*

87 Edgar & Schmidt, Curtiss-Wright *Comes Home*, *supra* note 32, at 397–98.

88 *Kim*, 808 F. Supp. 2d at 54–55.

The Supreme Court discussed why there is no need to prove that the disclosure of information was intended to injure the United States.[89] The Court states that the language used in the statute was explicit.[90] In § 793(a), the statute states that the disclosed information is "to be used" to injure the United States.[91] However, in § 793(d) the statute explicitly states that the disclosed information "could be used" to injure the United States.[92] Thus, it is not necessary under § 793(d) to determine whether the disclosed information did in fact harm the United States or provide an advantage to a foreign nation, but it must be determined whether the information had the potential to. The classification of the disclosed information sheds light on the extent of potential harm to the United States since its purpose is to classify information based on the level of harm that could be caused if disclosed.[93]

Consistent with the United States District Court of the District of Columbia,[94] Comey explains in his official statement to the public that even if an e-mail is not marked "classified," those that "know or should know that the subject matter is classified are still obligated to protect it."[95] Comey also states that any reasonable person in Hillary Clinton's position should have known that these e-mails should not have been sent or received on an unprotected system.[96] Clinton contends that she did not know the information she sent was classified nor did she see the classification.[97] However, that is irrelevant to establish this element of the statute. It is enough that Clinton should have known the information she

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89 *Gorin*, 312 U.S. at 29.

90 *Id.*

91 18 U.S.C. § 793(a) (2012) ("Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . .").

92 *See id.* § 793(d).

> Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . .

93 *See* Exec. Order No. 13,526, 75 Fed. Reg. 707, 707–08 (Jan. 5, 2010) (basing the classification system on the degree of harm that the disclosure of information could do to the national security of the United States).

94 *See* United States v. Kim, 808 F. Supp. 2d 44, 54–55 (D.D.C. 2011) (articulating that the obligations to protect classified information are different to those unaware of its classifications).

95 Comey Press Release, *supra* note 68.

96 *Id.*

97 Carl Campanile, Daniel Halper & Linda Massarella, *Clinton Claims She Didn't Know Emails Marked 'C' Were Confidential*, N.Y. POST (Sept. 2, 2016, 1:26 PM), http://NYPOST.com/2016/09/02/fbi-releases-documents-on-clinton-email-investigation.

sent was classified, which has the potential to harm the United States if leaked.

4. What Does It Mean to Willfully Communicate, Deliver, or Transmit Such Information to a Person Not Entitled to Receive It?

The fourth element contains two questions: what does "willfully" mean in the context of the Espionage Act, and who would be considered someone "not entitled to receive" such information?

a. What Does "Willfully" Mean in the Context of the Espionage Act?

"Willfully" has different meanings depending on the context of the statute.[98] At times, it means "intentional,"[99] while in other contexts it could mean an "act[] done with a bad purpose"[100] or "a purpose to disobey the law."[101] To determine what meaning of the word was intended, it is important to look at the legislative history of the offense, the structure of the statute, and judicial precedent.[102]

When a statute borders on restricting free expression, Congress will typically narrow the interpretation to avoid potential overbreadth in First Amendment issues.[103] Yet, in § 793(d), the legislative intent gives no indication that "willfully" should be construed narrowly.[104] In fact, it seems to give the opposite indication.[105] Contrary to § 793(d), §§ 793(a) and (b) of the Espionage Act require "intent or reason to believe."[106] This is not seen in § 793(d), which implies § 793(d) was intended to have a broader meaning.[107] During the debates surrounding this statute's enactment, members of Congress used "willfully" in a broad manner.[108] Congress clearly desired a lesser standard of culpability for § 793(d) by eliminating the narrowing language that it used in the previous sections of the Act.[109]

For the 1950 amendment, the House and Senate again looked at the intent requirement of § 793(d).[110] The House confirmed its distinction

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98 Edgar & Schmidt, *The Espionage Statutes*, *supra* note 8, at 1038.

99 Commonwealth v. Welansky, 55 N.E.2d 902, 910 (Mass. 1944).

100 Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938).

101 Ratzlaf v. United States, 510 U.S. 135, 141 (1994).

102 *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 129–30 (6th ed. 2012) (describing the importance of legislative history to determine the precise definition of willful in the context of a particular statute and referencing case law interpreting the term).

103 Edgar & Schmidt, *The Espionage Statutes*, *supra* note 8, at 1039.

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

between subsection 793(d) and subsections 793(a), (b), and (c)—indicating that subsections (a), (b), and (c) refer to spies while (d) includes government officials.[111] The House believed the culpability requirement should be broad when a statute prohibits government employees from communicating such information.[112]

Part of the Senate did not feel the same way.[113] A couple of senators desired to apply a more narrow scope.[114] Additionally, the Legislative Reference Service indicated that subsection (d) should be consistent with (a) and (b) in regards to their culpability requirements.[115] Regardless of these requests, no particular intent requirements were implicated to define "willfully."[116] The House made it clear that "willfully" was to remain broad, and the Senate did not change the context to indicate otherwise.[117]

The structure of the statute indicates that "willfully" only applies to the action elements of the statute. There is not an intent element that comes before the phrase "used to the injury of the United States, or to the advantage of any foreign nation."[118] That phrase is set off by commas, then "willfully" is used in front of "communicates, delivers, transmits or causes to be communicated" to indicate that "willfully" applies to these action elements alone.[119]

The statute explicitly does not require any knowledge of wrongdoing[120] or that the act be done with a "purpose to disobey the law."[121] As explicitly stated in §§ 793(a) and (b), there is a requirement that the act be done "for the purpose of obtaining information respecting the national defense with intent or reason to believe."[122] Generally, "intent" implies a conscious purpose.[123] This language requires that the defendant was aware or should have been aware that a punishable result would occur from his or her act.[124] This conscious purpose is not required in § 793(d).[125] The word "intent" is not included in subsection (d), so it is explicit that Congress did not desire that one act with a "purpose to

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111 *Id.* at 1039–40.
112 *Id.* at 1040.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 18 U.S.C. § 793(a) (2012).
119 *Id.* § 793(d).
120 Edgar & Schmidt, *The Espionage Statutes*, *supra* note 8, at 967.
121 United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir. 1987).
122 18 U.S.C. § 793(a).
123 Edgar & Schmidt, *The Espionage Statutes*, *supra* note 8, at 989.
124 *Id.*
125 18 U.S.C. § 793(d).

disobey the law."[126] Additionally, Congress included the word "knowingly" to § 798 (Disclosure of classified information) to prohibit "knowingly and willfully communicat[ing] . . . classified information."[127] Again, Congress did not include "knowingly" in §793(d).[128] Knowledge of wrongdoing is not required to be punished under this statute. It is enough that one intentionally transmit classified information.

Consistent with Congress's broad interpretation and the structure of the statute, the Supreme Court held that one does not have to prove that the transmitted information was intended to harm the United States, but that the classified information was "willful[ly]" or intentionally transmitted.[129] The Southern District Court of New York has held that the defendant did not have to have specific intent to injure the United States, but it was enough that he "obtained possession of documents and then attempted to transmit them."[130]

Hillary Clinton willfully transmitted classified information on a private server.[131] Regardless of whether she intended to harm the United States, Clinton willfully sent classified information.[132] Clinton has stated that she did not know that the information was classified.[133] However, knowledge of wrongdoing or "a purpose to disobey the law" is not necessary to satisfy this element of the statute. Whether she knew the information was classified or not is irrelevant because she willfully sent the information. The first part of this element has been satisfied, but to establish this element of the statute it must be determined that Clinton willfully transmitted the information to one "not entitled to receive it."[134]

b. Who is "Not Entitled to Receive" Such Information?

The classification system determines who is "not entitled to receive."[135] "Classified information" is any information that the executive branch has determined for purposes of national security to be necessary to protect from unauthorized disclosure.[136] No other branch can change

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126 Bank of New England, N.A., 821 F.2d at 856.

127 18 U.S.C. § 798(a).

128 *Id.* § 793(d).

129 *See* Gorin v. United States, 312 U.S. 19, 29–30 (1941) (declining to require proof that information was obtained for the purpose of injuring the United States); *see also* United States v. Rosen, 445 F. Supp. 2d 602, 616 (E.D. Va. 2006) (finding that §§ 793(d) and (e) prohibit "*willful* communication") (emphasis added).

130 United States v. Coplon, 88 F. Supp. 910, 912 (S.D.N.Y. 1949).

131 Comey Press Release, *supra* note 68.

132 *Id.*

133 *Id.*

134 18 U.S.C. § 793(d) (2012).

135 Edgar & Schmidt, Curtiss-Wright *Comes Home*, *supra* note 32, at 396.

136 United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984).

the classification, and no court can question its classification.[137] Congress has enacted statutes that assume the use of the classification system.[138] The classification system seems to be the most appropriate tool to use, since it specifies who may or may not see the information.[139]

In *United States v. Morison*, the Fourth Circuit addressed whether the phrase "entitled to receive" is vague.[140] The court explained that the government's classification system removes any vagueness concerning this phrase.[141] A "Secret" classification is applied if the information "reasonably could be expected to cause serious damage to the national security."[142] One without the security clearance to see such information is "not entitled to receive it."[143] The court stated that the defendant knew the information was not to be disclosed because he worked in a vaulted area and had a specific security clearance. These facts, along with the information's classification, established who was "entitled to receive" and who was "not entitled to receive."[144] The Fourth Circuit affirmed the lower court's conviction of the defendant under the Espionage Act.[145]

Anyone without the same security clearance as Hillary Clinton was "not entitled to receive" such classified information. James Comey did not reveal who Clinton sent the classified information to in his press release, but Congress has mentioned that Clinton sent classified information to her daughter, Chelsea Clinton.[146] Chelsea Clinton does not have the proper security clearance to see such information. Secretary Clinton can be charged under § 793(d) for sending classified information to a person who is not entitled to receive it, regardless of whether that person used the information to harm the United States or intended to harm the United States. If Clinton merely had classified information on an unprotected server but was sending the information to the proper personnel, then this is not a prohibited willful act. However, based solely on the facts provided by James Comey's official statement and Congress's investigation, Hillary Clinton's conduct would satisfy this element of the statute because she sent classified information to her daughter, who was not authorized to receive it.

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137 *Id.*

138 Edgar & Schmidt, Curtiss-Wright *Comes Home*, *supra* note 32, at 396.

139 United States v. Morison, 844 F.2d 1057, 1074 (4th Cir. 1988).

140 *Id.*

141 *Id.*

142 *Id.* (quoting Exec. Order No. 12,356, 3 C.F.R. § 166 (1982)).

143 *Id.*

144 *Id.*

145 *Id.* at 1060.

146 Steven Lee Myers & Eric Lichtblau, *Clinton Forwarded Daughter Email Chain Most Likely About Climate Talks*, N.Y. TIMES (Nov. 4, 2016), https://www.NYTimes.com/2016/11/05/us/politics/clinton-emails.html.

c. Should Hillary Clinton be Charged Under § 793(d)—Willful Action?

Given the facts provided by the FBI's and Congress's investigation, Hillary Clinton should be charged under § 793(d). The statute prohibits willfully sending classified information to someone not entitled to receive it.[147] Based on the language of the statute, it seems irrelevant that Clinton used a private server to send classified information. Although the server was unprotected, the statute specifically states that one who "communicates, delivers, [or] transmits"[148] information violates the statute. The statute does not criminalize the removal of information. However, the use of a private server is relevant for the gross negligence provision. Nonetheless, Hillary Clinton willfully sent classified information to her daughter, Chelsea Clinton, who does not have a security clearance.[149] Whether she should be convicted should be determined by a jury, but there is certainly clear evidence that charges should be brought, at the least.

III. 18 U.S.C. § 793(F)—GROSS NEGLIGENCE

The second possibly applicable provision in § 793 provides criminal penalties for:

> (f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer . . . .[150]

While § 793(d) prohibits the *willful* disclosure of information, § 793(f) prohibits the *grossly negligent* removal or delivery of information.[151] The first two elements—to whom the statute applies and information relating to national defense—remain the same as under § 793(d) described above.[152] However, the third element in subsection (1) of § 793(f) prohibits permitting the removal of information from its "proper place of custody" or delivery "to anyone in violation of his trust" or "to be lost, stolen,

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147 18 U.S.C. § 793(d) (2012).

148 *Id.*

149 Myers & Lichtblau, *supra* note 146.

150 18 U.S.C. § 793(f).

151 *Id.* §§ 793(d), (f).

152 *Id.*

abstracted, or destroyed" through "gross negligence."[153] Performing any of these three acts through gross negligence violates the statute. Few cases have been litigated under subsection (f), so not every term or phrase has been defined by the courts. The ones that have been defined by the courts—to whom the statute applies, "national defense," "lost," and removal of information from its "proper place of custody"—will be discussed.[154]

A. Elements of § 793(f)

1. Elements One and Two: To Whom the Statute Applies and Information Relating to National Defense

In *United States v. Dedeyan*, Sahag Dedeyan was a civilian mathematician assigned to conduct a Navy study that would examine how to defend airlifts from Russian attacks.[155] After completing the study on March 30, 1973, Dedeyan assigned a "secret" classification to the study, and the classification was approved by the Chief of Naval Operations.[156] Dedeyan took a copy of the study home with him to proofread it.[157] While the study was at his home, he showed the cover of it to his cousin and then put it in his briefcase.[158] Without Dedeyan knowing, his cousin took photos of seventy-two pages of the study with a camera that was given to him by a Soviet representative.[159] Eight months later, Dedeyan's cousin informed him that he had taken photos of the study, and the cousin gave Dedeyan $1,000 to remain silent.[160] Prompted by the FBI, Dedeyan later confessed to accepting the money and promising not to report the abstraction of the study.[161]

Dedeyan was charged under § 793(f)(2) of the Espionage Act.[162] The prosecution argued that the information was significantly related to the United States's national defense because it contained strategic efforts to defend against Russian attacks.[163] The defense argued that the statute was unconstitutionally vague and overbroad.[164] Specifically, the defense claimed that "relating to the national defense" is vague.[165] The Fourth

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153 *Id.* § 793(f).
154 *Id.*
155 584 F.2d 36, 38 (4th Cir. 1978).
156 *Id.*
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at 38–39.
162 *Id.* at 37.
163 *Id.* at 39.
164 *Id.*
165 *Id.*

Circuit looked at *Gorin v. United States*, which held that "relating to the national defense"[166] has a "well understood connotation."[167] Even if the statute were vague, the District Circuit stated that the limiting instruction provided to the jury narrowed the phrase.[168] The instruction stated that the prosecution must prove that:

> [D]isclosure of information in the document would be potentially damaging to the national defense, or that information in the document disclosed might be useful to an enemy of the United States. Information about weapons, munitions of war and intelligence which has been made public by Congress or the Department of Defense and is found in sources lawfully available to the general public does not relate to the national defense. Similarly, where the sources of information are lawfully available to the public, and the United States and the Department of Defense have made no effort to guard such information, the information itself does not relate to the national defense.[169]

The defendant also tried to argue that the statute did not apply to him because he was not a government employee or part of the military.[170] However, the Fourth Circuit explained that the statute applied to Dedeyan because it reads, "[w]hoever [is] entrusted with or [has] lawful possession or control of any document."[171] The Fourth Circuit affirmed the lower court's conviction of Dedeyan for violating § 793(f).[172]

Since the first two elements remain the same as in the willful action section, Hillary Clinton has met both of the first two elements under the gross negligence provision as well. Hillary Clinton was lawfully entrusted with classified information as Secretary of State. She falls under "[w]hoever, being entrusted with or having lawful possession."[173] She is precisely the kind of government official that Congress intended to make sure to protect our nation's secrets. Concerning "national defense," the FBI recovered 110 classified documents on Clinton's private server.[174] Whether these documents related to our "national defense" is a question for the jury.[175] However, considering the sensitive matter Clinton was in charge of regarding our national security, it is likely that at least one of

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[166] *Id.*

[167] *See* 312 U.S. 19, 28 (1941) (explaining the history behind the Defense Secrets Act, the predecessor to the statute now at issue).

[168] *Dedeyan*, 584 F.2d at 39–40.

[169] *Id.* (alteration in original).

[170] *Id.* at 40.

[171] *Id.* (quoting 18 U.S.C. § 793(f) (1976)).

[172] *Id.* at 41.

[173] 18 U.S.C. § 793(f).

[174] Comey Press Release, *supra* note 68.

[175] Gorin v. United States, 312 U.S. 19, 29 (1941).

these 110 documents was related to "national defense" within the statute's meaning.[176]

2. Element Three: "Lost"

In *United States v. Gonzalez*, the U.S. Court of Military Appeals affirmed the lower court's decision to convict the defendant.[177] The defendant, a sergeant in the Air Force, was travelling to deliver mail to a friend in Alaska. Before the defendant left on his trip, he accidently mixed up two classified messages with personal mail and brought them to Alaska.[178] Once he arrived in Alaska, he discovered the two classified messages, and he put them inside a desk in his friend's room to conceal them until he could return them to his squadron.[179] However, he returned to his squadron, forgetting the documents in Alaska.[180] The documents were discovered by another Air Force officer, and he gave them to his supervisor.[181] Ultimately, the classified messages were returned to the Federal Government without evidence of harm.[182]

The defendant was convicted for violating 18 U.S.C. § 793(f) by losing, through gross negligence, two classified messages.[183] The issue that the court addressed was whether the documents were "lost" according to the terms of the statute.[184] After examining the legislative history, the court determined that Congress provided no guidelines to define the term "lost."[185] Thus, without guidelines, the court adopted the ordinary definition of the word.[186] According to *Black's Law Dictionary*, "An article is 'lost' when the owner has lost the possession or custody of it, involuntarily and by any means, but more particularly by accident or his own negligence or forgetfulness, and when he is ignorant of its whereabouts or cannot recover it by an ordinarily diligent search."[187] The court held that the defendant lost the documents when they were taken from the desk by the other Air Force officer.[188] At that time, the defendant was ignorant of their whereabouts.[189] Additionally, the court stated that

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176 Comey Press Release, *supra* note 68.

177 United States v. Gonzalez, 16 M.J. 428, 430 (C.M.A. 1983).

178 *Id.* at 429.

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Lost,* BLACK'S LAW DICTIONARY (5th ed. 1979).

188 *Gonzalez*, 16 M.J. at 430.

189 *Id.*

the act of taking the documents and putting them in the desk may have also fallen under this statute, but in this instance, they were certainly lost once the documents were removed from the desk.[190] Thus, the court put its attention on the defendant's act of losing the documents.[191]

If the FBI were to determine that Clinton's server had indeed been hacked by someone, then based on *Gonzalez*, the classified information could be deemed "lost" as defined under the statute. At that point, Clinton would have lost possession or custody of it if in the hands of someone unauthorized to have it. However, the FBI has not determined whether someone hacked her server but has merely stated that it is certainly possible. Thus, at this time, it cannot be determined whether Hillary Clinton "lost" the classified documents under the definition of the statute.

3. Element Four: Removal of Information from Its "Proper Place of Custody"

In *United States v. Roller*, the United States Navy-Marine Corps Court of Military Review upheld the lower court's decision to convict the defendant.[192] The defendant was in charge of classified documents concerning the Intelligence Division for the Marine Corps in Washington, D.C.[193] For several months, the defendant placed classified documents inside his desk, an authorized secure location.[194] The defendant was approved for a transfer to a different location after a conflict with his supervisor.[195] On the defendant's last day, he quickly put documents from his desk into his gym bag before leaving.[196] Among the documents removed from the defendant's desk were classified materials that he was not authorized to remove.[197] After several weeks, the defendant discovered the classified documents, and stored them in a drawer in his garage with the intent of destroying the documents once he got to his new station.[198] However, a moving company employee discovered the documents before the defendant could destroy them.[199] The Naval Investigative Service ("NIS") was asked to investigate, and the NIS found additional classified

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[190] *Id.*
[191] *Id.*
[192] United States v. Roller, 37 M.J. 1093, 1097 (N-M. Ct. Crim. App. 1993).
[193] *Id.* at 1094.
[194] *Id.*
[195] *Id.* at 1094–95.
[196] *Id.* at 1095.
[197] *Id.*
[198] *Id.*
[199] *Id.*

information in the defendant's home.[200] Charges were brought against the defendant under § 793(f) of the Espionage Act.[201]

The court looked at the defendant's duty to keep the classified information in a secure location.[202] This case can be compared to Hillary's case to determine gross negligence. Although there was little discussion about the individual elements that needed to be met to establish a conviction under § 793(f), the defendant was convicted for carelessly removing classified documents from his desk and taking them home with him.[203] This is remarkably similar to Clinton's situation. Although the defendant in *United States v. Roller* had removed hard copies rather than soft copies, both were removed from a secure location to the individual's unsecure home.[204] Clinton used multiple unprotected, private devices to house classified documents.[205] Comey stated that the presence of these e-mails on an unclassified system was "especially concerning because all of these e-mails were housed on unclassified personal servers not even supported by full-time security staff, like those found at Departments and Agencies of the U.S. Government—or even with a commercial service like Gmail."[206] One of the devices used was a private server within Clinton's home that provided little security.[207] As seen in *Roller*, the mere removal of classified documents from a secure location (defendant's desk) by the defendant to an unsecure location was enough to convict the defendant under § 793(f) of the Espionage Act.[208] Hillary Clinton removed classified documents from a secure server to an unsecure, private server.[209]

In *Roller*, it did not have to be proven that the information got into the wrong hands.[210] During Clinton's investigation, the FBI did not find "direct evidence" that Clinton's personal domain was hacked.[211] However, Comey explained in his official statement that it would be unlikely to see such evidence in light of the use of Clinton's server and those potentially involved.[212] There is evidence that "hostile actors" gained access to private e-mail accounts of people that Clinton regularly communicated with from

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200 *Id.*
201 *Id.*
202 *Id.* at 1096–97.
203 *Id.* at 1095–97.
204 *Id.* at 1094–95; Comey Press Release, *supra* note 68.
205 Comey Press Release, *supra* note 68.
206 *Id.*
207 *Id.*
208 *Roller*, 37 M.J. at 1097.
209 Comey Press Release, *supra* note 68.
210 *Roller*, 37 M.J. at 1095.
211 Comey Press Release, *supra* note 68.
212 *Id.*

her personal server.[213] There is evidence that Clinton used her personal e-mail account outside of the United States and in countries containing United States adversaries.[214] The FBI states that it is possible that Clinton's e-mail account was hacked by enemies of the United States.[215] Regardless of these facts, it is unnecessary to establish whether the information was compromised to be charged under § 793(f).[216] This element was established when Secretary Clinton removed classified information from a secure server to an unsecure server.

4. Through Gross Negligence

As explained in Section II, Hillary Clinton met the requirements for "willful" transmission. She willfully transmitted classified information, and thus, she has also met a gross negligence standard since the mens rea requirements for "willful" are greater than that for "gross negligence." Consequently, it is unnecessary to analyze whether Clinton met a gross negligence standard, but for the curious reader, an analysis of gross negligence has been provided.

One is criminally negligent or grossly negligent if he or she "takes a *substantial* and unjustifiable risk of causing the social harm that constitutes the offense charged."[217] The "risk" in Clinton's case is clearly the removal of classified information from a secure server to an unsecure server.

First, the risk must be substantial.[218] The risk is substantial because Hillary Clinton put our nation's defense in jeopardy. As a former first lady and Secretary of State (2009 to 2013),[219] Hillary Clinton is well aware of her responsibility to safeguard information that could be harmful to our nation if in the wrong hands. Her elevated station as one of our nation's key leaders gave her access to information that was vital to protect for our military and citizens. Allowing this information to be removed to an unsecure server put our country in serious jeopardy, regardless of whether the information was accessed by an enemy. This risk could only be classified as substantial.

Second, the risk must be unjustifiable.[220] Besides convenience, there was no reason for Hillary Clinton to have classified information on an

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[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] 18 U.S.C. § 793(f) (2012).

[217] DRESSLER, *supra* note 102, at 132.

[218] *Id.*

[219] *Biographies of the Secretaries of State: Hillary Rodham Clinton (1947-)*, OFFICE OF THE HISTORIAN, https://history.state.gov/departmenthistory/people/clinton-hillary-rodham (last visited Mar. 11, 2017).

[220] DRESSLER, *supra* note102, at 132.

unsecure server. She was capable of sending the information from the secure computer provided to her by the government. Clinton has confessed that the use of the private server was for convenience. This is hardly a justifiable reason to put our nation's security in jeopardy. Thus, Hillary Clinton was grossly negligent when she removed classified information from a secure place to an unsecure place because the removal was substantial and unjustifiable.

B. Should Hillary Clinton Be Charged Under § 793(f)—Gross Negligence?

Hillary Clinton met all four elements of § 793(f) under the Espionage Act. First, as Secretary of State she had lawful possession of classified documents. Second, the 110 classified documents recovered by the FBI on her private server likely related to "national defense" considering Clinton's role as Secretary of State, although the FBI has not released the information contained in the classified e-mails.[221] Third, Clinton removed the classified information from its secure "proper place of custody" to an unsecure, private server she kept in her home.[222] Fourth, Hillary Clinton was grossly negligent by taking a substantial and unjustifiable risk when she removed classified information from a secure location. However, it would be appropriate to charge Hillary Clinton under both §§ 793(d) and (f), because she meets both standards of mens rea. Though she meets all four elements under the gross negligence provision, she willfully transmitted classified information, and thus could be prosecuted under the higher standard of mens rea under § 793(d).

CONCLUSION

Based on the evidence provided to the public, there is substantial evidence to prosecute Hillary Clinton under the Espionage Act. First, Hillary Clinton, as Secretary of State during the time in question, was lawfully privileged and entrusted with information relating to our nation's defense. Second, the e-mails transmitted by Clinton were declared classified by the FBI, and thus, there is a good chance that a jury would determine that they were related to our nation's defense, considering the information Clinton was privileged to obtain as Secretary of State. Third, Clinton should have known that the information she was transmitting was classified and could harm the United States if disclosed. Lastly, Clinton willfully transmitted classified information to one not entitled to receive it. These facts establish a prima facie case under §§ 793(d) and (f) of the Espionage Act, and Hillary Clinton should be charged with both, regardless of her position.

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[221] Comey Press Release, *supra* note 68.

[222] *Id.*

James Comey states that there is no precedent to prosecute Clinton under this statute.[223] While untrue, there will never be additional precedent if the Justice Department fails to prosecute cases with sufficient evidence because it is fearful of the ramifications. If the Justice Department continues to fail to act in high profile cases, the power that the Justice Department holds to check government officials will cease to exist. The Justice Department has prosecuted for far less than what Clinton has done, and it is frightening to think that a government official can get away with something that the common citizen cannot. Our government officials have an obligation to protect our national defense secrets. They should use the utmost care when handling any information that in the wrong hands could be harmful to our country. The very purpose of this statute is to hold our officials to this obligation. If the Justice Department is not upholding the law, then there is no protection from government officials who find it convenient to keep our nation's secrets on a home computer.

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223 *Id.*

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A CASE STUDY IN THE INTERPRETATION AND CONSTRUCTION OF VIRGINIA TAX STATUTES: DOES THE BUSINESS LICENSE TAX EXEMPTION IN SECTION 58.1-3703 STILL APPLY TO MOTOR CARRIERS?

INTRODUCTION

"It is emphatically the province and duty of the judicial department to say what the law is."[1] From their very beginnings, federal courts, as well as state courts, have been charged with the interpretation of laws in the discharge of their duties.[2] Indeed, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."[3] As they interpret laws, however, courts must grapple with the numerous and contrasting interpretive techniques available to them.[4] Should a judge adhere strenuously to the particular words of a statute as enacted by the legislature? Or should he stray from the literal words of the statute in order to find a more appropriate meaning to give force to the idea the legislature intended? If he chooses the latter, how is the judge to ascertain what the legislature intended? Should all statutes receive the same interpretive treatment?

Recent trends would indicate greater reliance on more literal methods of statutory interpretation.[5] Strict, literal interpretations of statutes help promote the rule of law by offering stability and predictability.[6] People can more ably conform their behaviors to meet the demands of a statute by simply following the letter of the law.[7] This presumes, of course, that the letter of the law is clear. When either the words of the statute or the results they produce make no sense, it is more difficult to know what to do.[8] How should a court interpret a statute when its words are ambiguous? How should a court go about determining whether a statute is ambiguous in the first place? Are there any issues

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

2 *See* THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009) (explaining that the interpretation of law is rightly rooted in the judiciary).

3 *Marbury*, 5 U.S. at 177.

4 Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 127–28 (1994).

5 *See, e.g.*, *id.* at 128 (discussing an "increasing emphasis on literal approaches" to statutory interpretation).

6 *Id.* at 133–34.

7 *Id.*

8 *See, e.g.*, *id.* at 134–36 (explaining how literal interpretation can sometimes lead to absurd results as evidenced by the creation of the absurd result principle).

specifically related to the clarity of tax statutes as opposed to other types of statutes? This Note considers these questions in the context of an existing Virginia tax statute.

Virginia law allows localities within the Commonwealth to impose a tax and charge a fee for the granting of business, professional, and occupational licenses (business licenses) to businesses operating within the given locality.[9] Operation of a business without such license and without an exemption is unlawful.[10] Pursuant to this grant of authority to levy taxes, most Virginia localities have imposed the tax.[11] This grant of authority to the locality, however, is not without limitation. Certain categories of businesses are exempted from tax liability related to obtaining a valid business license.[12]

Among those businesses not liable for the business license tax are public service corporations, motor carriers, common carriers, or other carriers of passengers or property, provided that the business was "formerly certified by the Interstate Commerce Commission" or is "presently registered for insurance purposes with the Surface Transportation Board of the United States Department of Transportation."[13] The public policy behind the rule is to incentivize motor carriers to carry sufficient minimum levels of liability insurance in the event that a Virginia resident is harmed by the acts of the motor carrier as it makes use of the public roads.[14]

Herein lies the problem this Note analyzes: neither of the federal agencies mentioned in the statute exist anymore.[15] The Interstate Commerce Commission was dissolved in 1995,[16] and the Federal Department of Transportation was reorganized in 2000, transferring

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9 VA. CODE ANN. § 58.1-3703(A) (2017).

10 *Id.* § 58.1-3700.

11 *See, e.g.*, HENRICO COUNTY, VA., CODE § 20-354 (effective Jan. 1, 2011) (requiring application for business licenses prior to commencing business operations within Henrico County); VIRGINIA BEACH, VA., LICENSE CODE § 18-5(a) (effective May 25, 1981) (requiring application for business licenses prior to commencing business operations within the City of Virginia Beach).

12 § 58.1-3703(C).

13 *Id.* § 58.1-3703(C)(1).

14 *See generally* U.S. DEP'T OF TRANSP., FED. MOTOR CARRIER SAFETY ADMIN., EXAMINING THE APPROPRIATENESS OF THE CURRENT FINANCIAL RESPONSIBILITY AND SECURITY REQUIREMENTS FOR MOTOR CARRIERS, BROKERS, AND FREIGHT FORWARDERS – REPORT TO CONGRESS 3–4 (2014) [hereinafter CURRENT FINANCIAL RESPONSIBILITY] (showing that this purpose has long been the goal of such legislation).

15 *See infra* notes 16–17.

16 Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV 1151, 1185 (2012).

motor carrier registration duties from the Surface Transportation Board to the newly formed Federal Motor Carrier Safety Administration.[17]

This Note analyzes the conundrum presented by the timing of the changes to the federal agencies paired with the timing of the enactment of Virginia Code section 58.1-3703, the license tax statute, by the General Assembly. It further examines whether any proper construction of the license tax statute exists that will relieve a recently incorporated motor carrier from paying the business license tax within the Commonwealth of Virginia. The first part gives a background on the history of and recent changes to the federal agencies charged with regulation, certification, and registration of motor carriers. It also explores the tax statute in question. The second part examines the general rules of statutory interpretation, beginning with a discussion of analyzing the text of a statute to determine whether it is ambiguous and under what circumstances the results it produces will be deemed absurd. It continues with a background into purpose driven interpretive techniques and use of legislative history to determine the intent behind the statute. It further analyzes the specific, pertinent rules governing the construction of Virginia tax statutes and how those rules should apply to the license tax statute. The conclusion advises as to how a Virginia court would consider the totality of the effects of the interpretive rules and gives suggestions as to how these problems could be avoided in the future.

I. BACKGROUND OF APPLICABLE LAW

A. Federal Regulatory Agencies

The Interstate Commerce Commission was formed via enactment of the Interstate Commerce Act of 1887.[18] Pursuant to the Act, common carriers, which at the time predominately were railroads,[19] were required to perform a number of administrative duties related to the operation of the railroad, provide schedules of train arrivals and departures, limit variance between charges for similar services, and, importantly, provide safe facilities for use by the public.[20] Any grievances by the public for violations of these requirements were to be made in written form to the Interstate Commerce Commission, which had the authority to investigate

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[17] Motor Carrier Safety Improvement Act of 1999, Pub. L. No. 106-159, §§ 3, 4, 101, 107, 113 Stat. 1748, 1749–50, 1758 (1999) (codified as amended at 49 U.S.C. § 1 (1999)).

[18] Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887) (repealed 1995).

[19] *See id.* § 1; *see also* Joseph Auerbach, *The Expansion of ICC Administrative Law Activities*, 16 TRANSP. L.J. 92, 92 (1987) (discussing the prominence of railroads in the 19th century).

[20] Interstate Commerce Act §§ 1–4, 6.

the matter and report thereon.[21] The Railroad Safety Appliance Act expanded the Commission's authority, granting it the power to regulate the safety of railroads and thus creating a uniform set of safety standards applicable nationwide.[22]

The Interstate Commerce Act granted the Interstate Commerce Commission other authority as well.[23] Among the more notable aspects of the Act, at the time, was the granting to the Interstate Commerce Commission the authority to regulate the rates the railroads were allowed to charge for their services.[24] Under the new regulatory scheme, the railroads were forced to adhere to more uniform standards for the rates they charged.[25] For instance, the base rates could no longer be altered based on whether the contracting hauling distance was long-distance, as opposed to local.[26] Likewise, and quite importantly, the railroads were subsequently required to file a schedule of their rates with the Commission and to publish their rates for public use.[27] At the time, this level of regulation of an industry by a federal agency was unprecedented, and set the stage for the regulatory environment we know today.[28]

The Act therefore granted the Interstate Commerce Commission a wide array of oversight authority to regulate the railways. This authority was enhanced by subsequent acts.[29] Importantly, the Safety Appliance Act of 1893, fully implemented in 1911, gave the Interstate Commerce Commission authority to create and enforce laws governing the safety standards required of the railway industry.[30] This grew from an increased concern by the public and Congress about railroad safety.[31]

The Motor Carrier Act of 1935 gave the Interstate Commerce Commission the authority to regulate buses and trucking companies as common carriers.[32] If any common carrier operating in Virginia had

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[21] *Id.* §§ 13–14.

[22] Railroad Safety Appliance Act, ch. 196, 27 Stat. 531, 531 (1893).

[23] Dempsey, *supra* note 16, at 1161 (quoting Paul Stephen Dempsey, *Rate Regulation and Antitrust Immunity in Transportation: The Genesis and Evolution of This Endangered Species*, 32 AM. U. L. REV. 335, 339 (1983)).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 1163 ("Congress expanded the [Interstate Commerce Commission's] jurisdiction in the years after 1887 . . . .").

[30] George Chandler, *The Interstate Commerce Commission—the First Twenty-Five Years*, 16 TRANSP. L.J. 53, 57–58 (1987).

[31] *Id.* at 57.

[32] Motor Carrier Act of 1935, ch. 498, Pub. L. No. 255, §§ 202–03, 49 Stat. 543, 544 (1935).

received a certification from the Interstate Commerce Commission before its dissolution in 1995, then it would clearly not be liable for a business license tax under the license tax statute. The Virginia General Assembly apparently gave great respect to the process implemented by the Interstate Commerce Commission in certifying motor carriers. Such certifications exempt motor carriers from business license taxes in perpetuity,[33] even though the Interstate Commerce Commission no longer exists.[34]

The Interstate Commerce Commission was abolished in 1995.[35] The authority to create and enforce safety and economic regulations related to common carriers was then transferred to the Surface Transportation Board of the United States Department of Transportation, and the Surface Transportation Board retained all of the regulatory duties formerly handled by the Interstate Commerce Commission.[36] The Surface Transportation Board required common carriers to register with the Board and provide, among other things, proof of adequate liability insurance related to operation of such motor carriers.[37]

In 2000, however, some of the authority to regulate motor carriers was transferred to the newly created Federal Motor Carrier Safety Administration, also housed within the United States Department of Transportation.[38] This new agency is the current body with which motor carriers must register and provide proof of liability insurance coverage.[39]

The history of the regulation of motor carriers is thus fairly straightforward. From 1887 until 1995—over one hundred years—the regulation of motor carriers was handled by the Interstate Commerce Commission.[40] From 1995 until 2000, such regulation of motor carriers was handled by the Surface Transportation Board.[41] Beginning in 2000,

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[33] VA. CODE ANN. § 58.1-3703(C)(1) (2017) (showing motor carrier exemptions from business license taxes).

[34] ICC Termination Act of 1995, Pub. L. 104-88, § 101, 109 Stat. 803, 804 (1995).

[35] *Id.*

[36] *See id.* § 702, 109 Stat. at 933 (explaining that "[e]xcept as otherwise provided in the [Interstate Commerce Commission] Termination Act of 1995, or the amendments made thereby, the Board shall perform all functions that, immediately before the effective date of such Act, were functions of the Interstate Commerce Commission").

[37] *See* 49 U.S.C. § 13902(a) (2012) (showing that "the Secretary of Transportation shall register a person to provide transportation subject to jurisdiction under subchapter I of chapter 135 [49 U.S.C. §§ 13501 et seq.] as a motor carrier," and listing the requirements to which a motor carrier would be subject).

[38] *Id.* § 113(a)–(f).

[39] *See* 49 C.F.R. § 387.7(a)–(b)(1), (d)(3)–(e)(1) (2016) (prescribing minimum insurance and surety bonds for registration with the Federal Motor Carrier Safety Administration).

[40] *See supra* notes 18–34 and accompanying text.

[41] *See supra* notes 35–37 and accompanying text.

and continuing to the present, the regulation of motor carriers has been handled by the Federal Motor Carrier Safety Administration.[42]

B. The Virginia Tax Statute

In 1997, during the short period in which federal regulation of motor carriers was handled by the Surface Transportation Board, the Virginia General Assembly enacted the license tax statute, Virginia Code section 58.1-3703.[43] The statute authorizes counties, cities, and towns within the Commonwealth to charge taxes and fees in exchange for a license granting a business the privilege of carrying on operations within the locality.[44] Referred to within this statute is another statute that provides and limits the rates at which businesses may be taxed by a locality.[45] Together, these two statutes grant Virginia localities authority to charge up to thirty-six cents of business license tax per one hundred dollars of gross receipts that a business derives from its operations.[46] It is important to note that the tax is imposed on gross receipts, and not net profits—it is possible for a Virginia business to derive receipts, be required to pay a license tax on those receipts, and still incur a financial loss from operations.[47] The business license tax, therefore, is applicable even if the business is not profitable.

To appreciate the magnitude of the tax, consider again the tax rate of thirty-six cents per one hundred dollars of gross receipts. A business deriving $10,000,000 of gross receipts from its operations would thus incur a license tax of $36,000. This tax is obviously in addition to any federal or state income taxes and personal or real property taxes the business would incur related to other aspects of its operations.[48]

Subsection three of the statute, however, restricts the imposition of business license taxes on businesses operating in a number of industries.[49] These include, among other things, farms, newspaper publishers, manufacturers, miners, not-for-profit corporations, and, as applicable in this analysis, motor carriers.[50]

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[42] *See supra* notes 38–39 and accompanying text.

[43] 1997 Va. Acts 403.

[44] VA. CODE ANN. § 58.1-3703(A) (2017).

[45] *Id.* § 58.1-3706(A).

[46] *Id.* § 58.1-3706(A)(4).

[47] *Id.* § 58.1-3706(A).

[48] *State and Local Taxes*, U.S. DEP'T OF TREAS., https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx (last visited Sept. 13, 2017) (discussing the various forms of general taxation).

[49] *See* § 58.1-3703(C) (listing the various types of business that are not taxable by localities as a prerequisite for obtaining a business license).

[50] *Id.*

In exempting motor carriers from the business license tax liability, the license tax statute specifically refers to the only two federal agencies that, at the time the statute was written, had ever regulated motor carriers. It was not likely within the expectation or contemplation of the General Assembly that the federal agency charged with regulation of motor carriers would change again just three years later. After all, the Interstate Commerce Commission had existed and regulated motor carriers for over one hundred years before its authority was moved to the Surface Transportation Board.[51]

Nonetheless, three years after the enactment of the Virginia statute in question, the United States Department of Transportation was reorganized and the federal regulatory authority over motor carriers was moved to the Federal Motor Carrier Safety Board.[52]

For a motor carrier operating and certified by the Interstate Commerce Commission prior to its dissolution, no issue exists regarding its tax status; the exemption in subsection (C)(1) of the license tax statute clearly applies, and the motor carrier would not have to pay the license tax in order to receive its business license.[53] The statutory interpretation problem relates to a motor carrier that was never certified by the Interstate Commerce Commission but is currently registered for insurance purposes with the Federal Motor Carrier Safety Administration. The question is whether the license tax statute may be read to exempt from the business license tax those common carriers currently so registered.

II. THE PERTINENT RULES OF STATUTORY CONSTRUCTION

The axiomatic rule of construction of Virginia statutes is that unless the statute is ambiguous, there is no need to resort to construction at all.[54] Black's Law Dictionary defines "ambiguity" as an "uncertainty of meaning or intention, as in a contractual term or statutory provision."[55] Already, therefore, there is a tension as to whether resorting to any rules of statutory construction is proper. Do we consider first, and perhaps only, whether there is an *uncertainty of meaning*? Or do we consider also, and simultaneously, whether there exists an *uncertainty of intention* in a

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[51] *See supra* notes 18–37 and accompanying text.

[52] 49 U.S.C. § 113(a)–(f) (2012).

[53] § 58.1-3703(C)(1) (precluding a locality from imposing a license tax on any motor carrier that was "formerly certified by the Interstate Commerce Commission").

[54] *See* Commonwealth Dep't of Taxation v. Delta Air Lines, Inc., 513 S.E.2d 130, 133 (Va. 1999) (explaining that "[w]hen a statute, as written, is clear on its face, this Court will look no further than the plain meaning of the statute's words").

[55] *Ambiguity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

statute as well? If there is such an ambiguity, then it is proper to resort to the rules of construction in order to dispel the ambiguity.[56]

A. Determine If a Statute Is Ambiguous

1. Literal Construction and Absurd Results

When interpreting statutes, "[w]e begin with the words of the statute."[57] In accordance with the "oldest and most commonsensical interpretive principle,"[58] words in a statute should be interpreted in light of the ordinary meaning the words had at the time the statute was written, understanding that words become more inclusive over time due to technological advances.[59] Textualism, also called literalism, the interpretive approach that gives effect to the words of a statute, relies then most heavily on "the most objective criterion available."[60] This method gives utmost significance to the meaning of the *words* of the statute, rather than any supposed *meaning* or *purpose* of the statute.[61] As discussed below, there is difficulty and controversy involved in determining the meaning or purpose of a statute,[62] so adherence to the actual words of a statute provides a more objective standard by which to interpret statutes. Likewise, the textualist approach lends itself to predictability and reliability.[63] This predictability is good for the rule of law, two components of which are, first, predictability and, second, overall coherence of the legal system.[64] Literalism clearly emphasizes the first point.[65]

Strict adherence to the text, however, can work against the second point.[66] Indeed, "a literal interpretation that results in absurdity is likely to offend some other legal principle."[67] In addition to offending legal

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[56] T.B. Benson, *Rules and Aids to Statutory Construction*, 1 VA. L. REG. 512, 512 (1915).

[57] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

[58] *Id.* at 15.

[59] *Id.* at 16.

[60] *Id.*

[61] *Id.* at 16–17.

[62] *See infra* notes 93–102 and accompanying text.

[63] *See* SCALIA & GARNER, *supra* note 57, at 18 ("The unpredictability of purposivism is inevitable . . . .") The authors posed "purposivism" as the alternative to textualism, and thus if purposivism leads to unpredictability, then textualism leads to predictability. *Id.* at 18–19.

[64] Dougherty, *supra* note 4, at 133.

[65] *Id.*

[66] *Id.* at 134.

[67] *Id.*

principals, absurd results stemming from literal interpretations of the words of given statutes are likely to offend common sense as well:

> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt."[68]

While absurdity, in the context of legal interpretation, includes both illogical internal contradictions within a statute and flaws in deductive reasoning required from literal interpretations, it is the notion that the actual *result* produced from a literal interpretation is absurd that is most often an affront to common sense.[69] But the result must be more than simply "odd."[70] The strict interpretation must produce a result that no reasonable person could tolerate.[71] Likewise, "[t]he absurdity must be reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error."[72]

American courts have long used the "absurd results doctrine" to justify departures from literal interpretations of statutes.[73] The Supreme Court strays from the words of a statute in the name of "reasonableness, rationality, and common sense."[74] Indeed, "[i]ts authority derives from its pedigree and, more fundamentally, from common sense."[75] Thus, the absurd results doctrine requires that a result from strict interpretation be severe, while the actual linguistic problems must be relatively benign.

The United States Supreme Court, in its 1868 holding in *United States v. Kirby*, determined that "[a]ll laws should receive a sensible construction."[76] In *Kirby*, a sheriff who arrested a letter carrier wanted for murder was prosecuted for interfering with delivery of the United States mail.[77] The Court held that "[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd

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68 United States v. Kirby, 74 U.S. (7 Wall.) 482, 487 (1868).

69 Dougherty, *supra* note 4, at 142, 145, 151.

70 SCALIA & GARNER, *supra* note 57, at 237.

71 *Id.*

72 *Id.* at 238.

73 D. Wiley Barker, *The Absurd Results Doctrine,* Chevron*, and Climate Change*, 26 BYU J. PUB. L. 73, 75 (2011).

74 Dougherty, *supra* note 4, at 133.

75 *Id.* at 138.

76 74 U.S. (7 Wall.) 482, 486 (1868).

77 *Id.* at 484.

consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."[78] The holding created a presumption that legislative bodies intend for their intent to be the law, rather than just the words they use to create the law,[79] thereby creating a strong inclination for courts to stray from the literal words if absurd results occur from literal interpretations.[80]

Virginia courts have used this doctrine for over a century as well.[81] Virginia courts also invoke public policy in the same circumstances that they invoke the use of absurd results to construe statutes.[82] In such cases when a statute is enacted pursuant to the furtherance of a valid public policy, an interpretation of the statute that would produce a result contrary to that public policy could be considered an absurd result.

The Virginia Supreme Court has considered the absurd results of such an interpretation of a license tax law before.[83] In *White Oak Coal Co. v. Manchester*, the court considered whether a non-resident business was being "carried on or conducted"[84] within a city when it traveled from outside the city to deliver product to a customer on the opposite side of the city. The public policy being considered in that case was the free use of the highways by the public.[85] Municipalities have the power to impose business license taxes for the right to use the roads within the municipality in the ordinary course of business, but they have no right to tax the use of roads outside of their boundaries.[86] White Oak Coal Company was not a resident of Manchester, nor did it have a regular place of business within the city.[87] It primarily conducted its business outside the city, via use of the public highways.[88] A strict interpretation of the ordinance, however, would have deemed the occasional deliveries of coal within the city limits to be "carrying on" of the business within the city,

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78 *Id.* at 486–87.

79 *Id.*

80 *Id.*

81 *See, e.g.*, Immigration Soc'y of Albemarle Cty. v. Commonwealth, 48 S.E. 509, 511 (Va. 1904) ("While the effects and consequences of a statute cannot influence the courts in construing it where the intention of the Legislature is clear, yet the argument of inconvenience, absurdity, injustice, or prejudice to the public interests may be considered by the courts in construing a statute when its language is ambiguous or uncertain and doubtful.").

82 *Id.*

83 White Oak Coal Co. v. Manchester, 64 S.E. 944, 945 (Va. 1909).

84 *Id.*

85 *Id.* at 944–45.

86 *Id.*

87 *Id.* at 944.

88 *Id.*

and thus be taxable.[89] The court held, however, that such a construction would be contrary to the public policy of allowing free use of the highways.[90] The court did not go so far as to assume a presumption that such a result was not intended, but it did find that "[a] general law having effects so burdensome or so absurd is not to be anticipated, and only unequivocal language could convince a court that such legislation was intended."[91] No clear language by the General Assembly indicated the intent to make taxable the occasional delivery into a city, so the court ruled in favor of a construction outside the literal interpretation of the ordinance.[92]

2. The Ambiguity of the License Tax Statute

In determining whether the license tax statute is ambiguous, two possibilities exist. The first possibility is that the statute is not ambiguous. By a strict textual interpretation, it cannot be read to relieve the motor carrier from taxation because the meaning of the words is quite clear. Such an interpretation of the statute will allow a municipality to impose the tax on our hypothetical motor carrier. Was the motor carrier "formerly certified by the Interstate Commerce Commission?"[93] No, it was not.[94] Is the motor carrier "presently registered for insurance purposes with the Surface Transportation Board of the United States Department of Transportation, Federal Highway Administration?"[95] No, it is not. It is presently registered with another federal agency within the Department of Transportation—the Federal Motor Carrier Safety Administration.[96] As the motor carrier is not properly certified or registered with either of the two federal agencies referenced in the statute, it is not exempt from the tax under a strict, literal reading thereof.[97]

The second possibility is that the statute *is* ambiguous and that the hypothetical motor carrier is, in fact, exempt from the license tax. It is absurd that a restructuring of the United States Department of Transportation should render a Virginia tax statute inoperable. The

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89 *Id.* at 945.

90 *Id.* at 944–45.

91 *Id.* at 945 (quoting Cary v. N. Plainfield, 49 N.J.L. 110, 113 (N.J. 1886)).

92 *Id.*

93 VA. CODE ANN. § 58.1-3703(C)(1) (2017).

94 This conclusion is valid unless certification was received prior to the Interstate Commerce Commission's abolition in 1995. ICC Termination Act of 1995, Pub. L. 104-88, § 101, 109 Stat. 803 (1995).

95 § 58.1-3703(C)(1).

96 *See supra* notes 38–39 and accompanying text.

97 § 58.1-3703(C)(1) (referencing the two federal agencies as the Interstate Commerce Commission and the Surface Transportation Board of the United States Department of Transportation, Federal Highway Administration).

statute could be more properly read to mean that any motor carrier properly certified or registered with the Interstate Commerce Commission, the Surface Transportation Board, *or other federal agency* may be exempt from tax. At the time the statute was written, the appropriate federal agencies were either the Interstate Commerce Commission or the Surface Transportation Board.[98] The Federal Motor Carrier Safety Administration, however, is currently the appropriate federal agency with which a motor carrier should register for insurance purposes.[99] As such, this interpretation of the statute precludes a locality from imposing the license tax on any motor carrier presently registered for insurance purposes with the Federal Motor Carrier Safety Administration.[100]

The second interpretation is correct. Common sense is particularly offended by the inoperability of the license tax statute, simply because of an unrelated federal restructuring. Motor carriers are still required to obtain liability insurance and register their coverage with a federal agency in the same way they were previously required to do with the Surface Transportation Board.[101] Likewise, the repair required to dispel the absurd result is minor, and can be accomplished simply by indicating that *subsequent federal agencies* having responsibility for registering motor carriers can satisfy the statute's requirements.[102] As such, the statute is ambiguous, and we are permitted to move on to the canons used to interpret ambiguous statutes.

B. Rules Applicable to the Construction of Statutes

For every argument regarding the interpretation of a particular statute, there is a rule of construction to support it.[103] In his often-cited article from 1950, Professor Llewellyn posed twenty-eight pairs of rules of construction applicable in a myriad of situations.[104] Indeed, he noted that "there are two opposing canons on almost every point."[105] The pairs demonstrate the equally valid, yet utterly opposing arguments that can

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[98] *See supra* notes 43–44, 49–52 and accompanying text.

[99] *See supra* notes 38–39 and accompanying text.

[100] § 58.1-3703(C)(1) (precluding a locality from imposing a license tax on any motor carrier that was "formerly certified by the Interstate Commerce Commission").

[101] *See supra* notes 35–42 and accompanying text.

[102] *See* discussion *infra* Conclusion.

[103] *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950) (demonstrating pairs of countervailing rules for many of the various issues regarding statutory construction).

[104] *Id.* at 401–06.

[105] *Id.* at 401.

be made as to how a given statute is to be interpreted.[106] For example, the first pair of contrasting rules Llewellyn noted was: "[a] statute cannot go beyond its text,"[107] followed by the retort, "[t]o effect its purpose a statute may be implemented beyond its text."[108] The rules Llewellyn cited were pulled from cases,[109] as well as treatises and other doctrinal texts,[110] demonstrating that these are the rules actually being used by courts in addressing matters where interpretation of statutes plays a material role in the outcome.

One commentator has suggested that "[u]nder the approach described by Professor Llewellyn, a court first decides, for reasons independent of the canons of construction, how a statute should be construed. The court then selects from among the contradictory pairs the canon or canons that will support the result the court has already reached . . . ."[111] The cynical understanding of this method is that, since each rule has a valid rule opposing it, then there are, in effect, no rules at all, and that a court can use whatever method it chooses in interpreting statutes. Indeed, "[t]his approach can lead to doctrinal chaos."[112] Llewellyn noted, however, that "[i]f a statute is to make sense, it must be read in the light of some assumed purpose[; a] statute merely declaring a rule, with no purpose or objective, is nonsense."[113] The purpose of the rules of statutory construction therefore, is primarily to determine the best method to give force to the purpose for which the statute was written.[114]

The following sections discuss the general rules of statutory construction and the special rules used for the construction of tax statutes.

1. The Purpose Driven Inquiry

Given that the first rule of construction, when resorting to such rules, is that the purpose of construing a statute is to give effect to the intention of the legislature,[115] it is reasonable to consider the *purpose* of a given statute in addition to simply analyzing the language of the statute. The

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[106] *Id.* at 401–06.

[107] *Id.* at 401.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 631 (1986).

[112] *Id.*

[113] Llewellyn, *supra* note 103, at 400.

[114] *Id.*

[115] Bd. of Supervisors v. King Land Corp., 380 S.E.2d 895, 897 (Va. 1989) ("The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which, absent constitutional infirmity, must always prevail.").

view that determining legislative intent is the principle purpose of statutory construction is not new in Virginia, considering this rule has been noted in Virginia cases since at least 1800.[116] It is also clear that all other rules of statutory construction are subordinate to this first rule.[117] The General Assembly's intent is generally found within the words of the laws it enacts.[118] This, however, is not the case when the literal meaning of the words of a statute is clear, but the meaning of the statute is not. It is possible that the literally read words of a given statute might have an ascertainable meaning, while the statute itself, given the literal meaning of the words, might not.[119] It is this tension between understanding the *words* of a statute and understanding the *meaning* of a statute that drives all questions into the proper construction of the given statute.

Likewise the Virginia Supreme Court, in another business license case, has found that a court should cling strenuously to the words of a statute only if strict interpretation would not thwart the purpose of the statute.[120] The court noted that "[l]egislative words derive vitality from the obvious purposes for which the statutes are enacted,"[121] and, therefore, it seems that knowledge of the purpose and legislative intent behind the enactment of a statute is a prerequisite to determining whether strict adherence to the words of the statute is proper. Knowing the purpose behind a statute can guide a court in proper limitation or expansion of the words of the statute, and thus give the proper effect to the legislative intent.[122]

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[116] *See* Wallace v. Taliaferro, 6 Va. 447, 467 (1800) (indicating that "[i]t is also held, that such construction is to be put upon a statute, as may best answer the intention the makers had in view"). Determining the intention of the General Assembly has thus been the principle purpose of statutory construction in Virginia for well over two hundred years.

[117] *See* Bulala v. Boyd, 389 S.E.2d 670, 674 (Va. 1990) (indicating, after noting the principle purpose of statutory construction is the determination of legislative intent, that "[a]ll rules are subservient to that intent").

[118] *See* Haley v. Haley, 636 S.E.2d 400, 402 (Va. 2006) ("The Court's function is to 'ascertain and give effect to the intention of the legislature,' which is usually self-evident from the statutory language.") (quoting Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc., 626 S.E.2d 436, 438 (Va. 2006)).

[119] *See* Crown Cent. Petroleum Corp. v. Hill, 488 S.E.2d 345, 346 (Va. 1997) (indicating that, while usually a strict interpretation of the words of a statute is the correct starting point, relying only on the meaning of the words is inappropriate when their "literal application would produce a meaningless or absurd result").

[120] Rountree Corp. v. Richmond, 51 S.E.2d 256, 260–61 (Va. 1949) ("The general rule, as to this matter, is that the words of a statute should receive their ordinary acceptation and significance, where such construction is consonant, and not at variance, with the purpose of the statute, and does not thwart or defeat the same . . . .").

[121] *Id.* at 260.

[122] *Id.* at 260–61 ("[T]he proper course is to adopt that sense of the words which promotes in the fullest manner the object of the statute. . . . [O]r where it is not obvious from

The public policy implicated in granting a tax exemption to those motor carriers registered for insurance purposes with the Surface Transportation Board is to incentivize such motor carriers to have sufficient liability insurance coverage to pay for damages in the event the motor carrier is found liable for misconduct upon a city resident.[123] The court may therefore find it absurd that a motor carrier with sufficient insurance coverage and proper registration with the appropriate federal agency is not exempted from business license tax.[124] Nothing in the legislative or regulatory history of the federal agencies indicates an intent to revoke state tax laws.[125] Motor carriers must still register with an agency within the United States Department of Transportation and prove its minimum insurance coverage.[126] The coverage levels are still regulated federally.[127] It is easily implied that the General Assembly's purpose in mandating federal registration for insurance purposes to receive the tax exemption was to ensure that sufficient funds are available to indemnify Virginia residents harmed by motor carriers operating within the Commonwealth. There is no conceivable reason the General Assembly would require registration with a federal agency for insurance purposes to receive the tax exemption other than incentivizing motor carriers into obtaining sufficient insurance coverage. Another federal agency could, and, in fact does, produce the same results.[128]

2. The Use of Legislative History

The absurd results doctrine applies to the appropriate interpretation of the words within a statute. Another approach to determine the meaning of an ambiguously worded statute is to investigate the legislative history of the statute.[129] Examination of legislative history yields evidence as to what the legislature had in mind while drafting and enacting a statute.[130] The use of legislative history, however, is not without controversy. Just as Karl Llewellyn indicated, there are equally valid, yet opposing rules of

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the statute that the evil to be suppressed, or the remedy to be advanced, requires that the construction be limited or enlarged.").

[123] CURRENT FINANCIAL RESPONSIBILITY, *supra* note 14, at 4.

[124] This would be inconsistent with the legislature's public policy goals. *See id.*

[125] *See infra* notes 126–28 and accompanying text.

[126] *Supra* notes 38–39 and accompanying text.

[127] 49 C.F.R. § 387.7 (2016).

[128] *Id.*

[129] Barker, *supra* note 73, at 92–93.

[130] *See, e.g.*, *id.* at 91–93 (explaining that interpreting the text of a statute is just one tool, and that courts must consider legislative intent).

statutory interpretation;[131] there are also equally valid, yet opposing views comprising the legislative history of a law—often many of them.[132]

A legislative body is comprised of many individuals who rarely reach a unanimous consensus as to whether a given law is a good idea or what the law means.[133] It is therefore doubtful that a collective understanding by those in the legislature as to what a law means ever exists.[134] The late Justice Antonin Scalia was skeptical of the usefulness of legislative history.[135] For example, he noted that, when considering the motives of Congress, "[w]e have no way of knowing; indeed, we have no way of knowing that they had any *rational* motive at all."[136] His position has perhaps been bolstered in the last few decades. Observers, including Scalia, have noted the increased level of acrimony and unwillingness to cooperate in Congress, leading to less reliable legislative history.[137]

Other observers disagree, however, and show more willingness to use legislative history to interpret the meaning of an enacted law.[138] Likewise, some have cited relatively recent updates in the social sciences to infer that groups can indeed have a collective intent.[139]

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[131] Llewellyn, *supra* note 103, at 401–06.

[132] *See, e.g.*, Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517, 532, 538 (1994) (arguing that Llewellyn's observation is further supported by conflicting views in tax law on level of deference to give legislative history).

[133] Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983).

[134] *See id.* ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.").

[135] *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 619–21 (1991) (Scalia, J., concurring) (identifying several possible reasons a majority of the Senate may have chosen to enact a particular version of a law, instead of any alternative version).

[136] *Id.* at 621.

[137] *See, e.g.,* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 30, 34–35 (1997) (explaining the problems with relying on legislative history).

[138] *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992) ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute."); *see also* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 695, 704 (1995) (explaining how Justice Stevens's majority opinion emphatically embraces use of legislative history).

[139] *See, e.g.*, Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 442–43 (2005) (describing the psychological theory of "group entitavity," whereby groups brought together for a common purpose are more likely to conceptualize matters as a single unit rather than as a group of individuals).

Even those generally opposed to the use of legislative history, including Scalia, admit that there may be a usefulness in relying on legislative history in certain limited contexts.[140]

The reliance on legislative history to ascertain the meaning of a law is perhaps more helpful when interpreting federal statutes, or statutes enacted by the legislatures of many other states. In Virginia, however, legislative history provides less guidance. Unlike Congress or other states, Virginia does not keep official legislative history.[141] Pursuant to Virginia statute,[142] legislative draft files are only released upon individual request and after obtaining specific approval.[143]

This is not to suggest that Virginia courts are completely without evidence of legislative intent. For example, Virginia courts can track changes in the verbiage of a statute enacted in response to judicial holdings. In *Luttrell v. Cucco*, the Virginia Supreme Court interpreted the meaning of a statute denoting when one spouse may terminate spousal support payments to the other spouse.[144] The statute, prior to legislative amendment, read that spousal support may be terminated "[u]pon the death, cohabitation with a person *of the opposite sex*, or remarriage of the spouse receiving support, . . . unless otherwise provided by stipulation or contract."[145] Subsequent cases interpreting the statute made it clear that only cohabitation with a person of the opposite sex by the spouse receiving spousal support would relieve the paying spouse from further payments.[146] By deliberately removing the prepositional phrase "of the opposite sex" from subsequent versions of the statute, the General Assembly "clearly intended to extend the application"[147] of the statute to relieve spouses from further payments to a former spouse currently cohabitating with *any* other person, regardless of that person's sex.

This example shows that Virginia courts can closely follow changes in the words of statutes from prior versions of the statutes to derive the

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[140] *See, e.g.*, Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring) (Justice Scalia discussed two points which would guide his interpretation of a statute. The first was to read the words enacted into law and determine their plain meaning. The second point was to interpret a law in a manner that most reasonably lends compatibility with the surrounding body of law. In so doing, he indicates a willingness to go beyond the words of a law when strict adherence thereto would yield an absurd result.).

[141] *See* Virginia Division of Legislative Services, LEGIS. REFERENCE CTR., http://dls.virginia.gov/lrc/leghist.htm (last visited Sept. 20, 2017).

[142] VA. CODE ANN. § 30-28.18 (2017).

[143] *Id.* § 30-28.18(B)(C).

[144] *See* 784 S.E.2d 707, 711 (Va. 2016) (explaining evidence of legislative intent can manifest through the General Assembly's amendment of statutory language).

[145] *Id.*

[146] *Id.* at 710–11.

[147] *Id.* at 711.

intent of the legislature. This method is not unique to Virginia and has been employed by courts in other jurisdictions.[148] Virginia courts, however, are limited to methods such as these that monitor changes in language of enacted versions of a given statute to determine the legislative intent behind the words of the statute.[149]

The General Assembly, from time to time, will commission a study to gather facts and expert opinions as to the effects of potential legislative enactments. Virginia courts may sometimes look to these documents when trying to glean the intent behind a statute enacted pursuant to legislative review of such reports.[150] Virginia courts, therefore, have methods of gleaning meaning from legislative history of Virginia statutes, but they are limited in the sources from which they may glean such meaning. The applicable section of the license tax statute currently exists as it was originally written; it has not been amended since it was enacted.[151] Therefore, the inquiry into the current applicability of the license tax statute to motor carriers operating in Virginia and currently registered for insurance purposes with the Federal Motor Carrier Safety Administration is not significantly aided by use of legislative history.

C. Special Rules Applicable to the Construction of Tax Statutes

Tax laws are enacted in the same way other laws are enacted. However, given their nature as extremely complex, policy driven enactments touching nearly every facet of life, tax laws may be more appropriately interpreted by the use of non-traditional interpretive methods. A tax's primary purpose is to raise revenue.[152] Tax laws also have the purpose of incentivizing desirable behaviors.[153] A mortgage interest deduction is allowed while no deduction exists for home rental

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[148] *See, e.g.*, State v. Skalel, 888 A.2d 985, 1014–16 (Conn. 2006) (discussing using legislative history in addition to the language of amendments to ascertain whether legislature intended retrospective application of a statute); McClung v. Emp't Dev. Dep't, 99 P.3d 1015, 1019–20 (Cal. 2004) (discussing amendments as a factor to consider in construing statute as potentially retroactive); McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs., 12 P.3d 144, 149 (Wash. 2000) (discussing amendments clarifying legislative intent).

[149] *Supra* notes 144–47 and accompanying text.

[150] *See, e.g.*, BASF Corp. v. SCC, 770 S.E.2d 458, 474 (Va. 2015) (quoting J. LEGIS. AUDIT & REVIEW COMM'N., REP. TO THE GOVERNOR & GEN. ASSEMB. OF VA.: EVALUATION OF UNDERGROUND ELEC. TRANSMISSION LINES IN VA., H.R. DOC. NO. 87, at 4 (2006)); *see also* Robbins v. Robbins, 632 S.E.2d 615, 622 (Va. Ct. App. 2006) (quoting REP. OF J. SUBCOMM. STUDYING SECTION 20-107 OF THE CODE OF VA. TO THE GOVERNOR OF VA., H.R. DOC. NO. 21, at 7 (1982)).

[151] VA. CODE ANN. § 58.1-3703(C)(1) (2017).

[152] Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1205 (2012).

[153] *Id.*

payments.[154] This incentivizes people to purchase homes, which adds considerably more to the overall economy than does renting. Deductions are allowed for charitable donations,[155] on the theory that these donations enable the private sector to handle tasks that would otherwise fall upon the government. Because of the added policy reasons intended by governments in enacting particular tax rules, it is perhaps more important to understand the intent behind tax law than it is to rely simply on the words of a given tax statute.[156] Indeed, "the unique complexity of the Code makes it more than just another statute, and for that reason the question of when nonliteral interpretations of the Code are appropriate merits separate discussion from the appropriateness of nonliteral interpretations of statutes in general."[157] Because it is so technical and structurally complex, "the Code's concepts often make it difficult for Congress to find words that, used in their 'ordinary, everyday senses,' clearly convey the intended meaning."[158] Given the nature of tax statutes, special and unique interpretive methods have been developed to understand them.

1. Construe Statutes Imposing Taxes Strictly in Favor of the Taxpayer

It is well settled in Virginia that general tax laws, those imposing a tax upon a taxpayer by a taxing authority, are to be construed in favor of the taxpayer.[159] This axiomatic rule of Virginia law traces at least as far back as the 1890's.[160] Given the long legal history of the Commonwealth, it is unsurprising that much of the jurisprudence of Virginia can be traced to English rules. Indeed, Virginia courts in the 1800's relied on English rules for many of their decisions on a wide variety of laws.[161]

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[154] Kenya Covington & Rodney Harrell, *From Renting to Homeownership: Using Tax Incentives to Encourage Homeownership Among Renters*, 44 HARV. J. LEGIS. 97, 99, 107 (2007).

[155] I.R.C. § 170(a)(1) (2017).

[156] Zelenak, *supra* note 111, at 663–64.

[157] *Id.* at 630; *see also id.* at 639 ("[T]he very complexity of the Code may give the Code more in the way of underlying structures and permeating policies than most other statutes. These structures, policies, and principles can be discovered—sometimes easily, sometimes with great difficulty and uncertainty— through a thoughtful reading and study of the Code as a whole.").

[158] *Id.* at 639.

[159] Combined Saw & Planer Co. v. Flournoy, 14 S.E. 976, 977–78 (Va. 1892) ("Statutes levying duties or taxes upon subjects or citizens are to be construed most strongly against the government, and in favor of their subjects or citizens . . . .").

[160] *Id.*

[161] *See, e.g.*, *id.* at 978; Steele v. Boyd, 33 Va. 547, 556 (1835); Baring v. Reeder, 11 Va. 154, 162 (1806) (illustrating Virginia cases relying substantially on English rules); *see generally* VA. CODE ANN. § 1-200 (2017) (retaining the English common law doctrine in Virginia where not repugnant to other statutory provisions or altered).

Of particular pertinence in this analysis are rules from the 1892 case, *Combined Saw & Planer Company v. Flournoy*, which relied heavily on English lawyer Fortunatus Dwarris's *A General Treatise on Statutes*.[162] Dwarris observed, and the Virginia Supreme Court noted, that the tax laws enacted by the British Parliament are subject to particular scrutiny by courts in order to protect the public from the "pains and penalties"[163] resulting from unjust interpretations of those laws. There is, therefore, a long history in English, American, and specifically Virginia law, of construing revenue rules in favor of the tax-paying public.[164] This is evident in the renowned dicta in *McCulloch v. Maryland*, which states that the "power to tax involves, necessarily, a power to destroy."[165] The courts find themselves in a position to limit the power of legislative and executive actions to tax if those actions become unreasonably burdensome on those potentially subject to the imposition of a tax liability.[166]

If a locality, therefore, is to impose a license tax, it must state in explicit terms the intention of the legislative body enacting the tax.[167] This requirement is not so strict as to require a taxing authority to list individually each particular taxpayer or class of taxpayers to be subject to a given tax. There are far too many potential taxpayers for a legislature to consider when enacting tax rules. Increasingly broad language

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[162] *See Combined Saw*, 14 S.E. at 978 (citing SIR FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND OF JUDICIAL INTERPRETATION 251 (1885) (citation omitted)) ("It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that when the public are to be charged with a burden the intention of the legislature to impose that burden must be explicitly and distinctly shown. In the revenue laws, where clauses inflicting pains and penalties are ambiguously or obscurely worded, the interpretation is ever in favor of the subject, for the plain reason that the legislature is ever at hand, and explains its own meaning, and to express more clearly what has been obscurely expressed.").

[163] *Id.*

[164] *Id.* at 977–78; *see* Mayor v. Hartridge, 8 Ga. 23, 30 (1850) (explaining that taxpayers should be granted the benefit of any doubt); *see* Sewall v. Jones, 9 Pick. 412, 414 (Mass. 1830) (explaining that courts must strictly construe statutes levying taxes); *see also* State v. Bank, 1 Dev. & Bat. 216, 218–19 (N.C. 1835) (discussing the need for clarity in tax statutes and that taxpayers should prevail when ambiguity exists).

[165] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819). Justice Marshall goes on to note that there is a point beyond which no institution can continue to bear a tax. Given that there are a multitude of taxes to which a taxpayer may be subject, it can be inferred from this dicta that the courts perhaps view themselves as restraints on governments' power to tax, thereby providing one the proverbial checks and balances on the legislative branches of various governments. *Id.* at 399–400.

[166] *Id.* at 436–37.

[167] *Combined Saw,* 14 S.E. at 977–78.

implicating the taxation of broad swaths of the public, however, can lead to the ambiguities in question. Legislatures must balance the impossibility of listing individual taxpayers with the generalities of including all taxpayers within the imposition of the tax.

This task is, clearly, a difficult one. Within the Virginia tax code alone are examples of, perhaps, unnecessary specificity.[168] Tax laws are enacted to apply to specific taxpayers, in order that the statute will not be deemed overly broad.[169] Given the tendency of the legislature to use more specific language than necessary,[170] it may reasonably be inferred that the actual intent of the legislature is somewhat less narrowly focused than the words the statute technically designates. The prevailing rule of construction of Virginia tax laws in favor of the taxpayer would support such an inference. Thus, construing the license tax statute in this manner would yield a favorable result for the motor carrier registered with the Federal Motor Carrier Safety Administration.

2. Construe Tax Exemptions Strictly in Favor of the Taxing Authority

When, however, a tax statute has been properly applied to a given cohort of properly identified potential taxpayers, the general rule reverses in favor of the taxing authorities when construing exceptions to that tax statute.[171] Evidence of this rule can, in fact, be found in the Virginia Constitution.[172] Article X of the Virginia Constitution discusses rules of taxation including which political subdivisions within the state have authority to impose certain taxes and by which mechanisms they are empowered to levy and collect such taxes.[173] Section six discusses the exemption from taxation, at the state and local levels, of various property types.[174] The section begins: "[e]xcept as otherwise provided in this Constitution, the following property and no other shall be exempt from

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[168] Consider, *e.g.*, § 58.1-3381(B) of the Virginia Code. This section speaks generally about the how rulings by local Boards of Equalization are to be presumed correct by localities in assessing the value of real estate for the purpose of real property taxation for the two years following the ruling of the board. It is a rule of general applicability, requiring *all* localities within the commonwealth to deem rulings of the Boards of Equalization presumptively correct for the succeeding two years. After stating its requirements, the statute needlessly notes that "[t]his subsection shall apply to the City of Virginia Beach."

[169] *Combined Saw*, 14 S.E. at 977–78.

[170] *See, e.g.*, § 58.1-3381(B) (illustrating unnecessary specificity).

[171] *See, e.g.*, Hunton v. Commonwealth, 183 S.E. 873, 876 (Va. 1936) ("Taxation being the rule and exemption therefrom the exception, constitutional and statutory provisions exempting property from taxation should be strictly construed against the exemption and any doubt should be resolved in favor of the state.").

[172] *See* VA. CONST. art. X, § 6(f) (explaining exemptions from taxation are strictly construed).

[173] *Id.* at § 6(b)–(j).

[174] *Id.* at § 6.

taxation."[175] The phrase "and no other" within the opening clause indicates that the list therein included shall be deemed the definitive list of property exempted from tax and no other property types may be included by more liberalized readings of the text. Likewise, subsection (f) explicitly instructs that "[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed."[176] There is, therefore, a constitutional mandate to construe tax exemptions strictly and in favor of the government.

The principle has played out in the courts as well. For instance, in *Arcese v. Commonwealth*, the court found that:

> When the language of an act is susceptible of two constructions, one of which grants an exemption from taxation and the other does not, or one of which grants only a limited exemption and the other a complete exemption from taxation, that construction should be adopted which denies or restricts the exemption, unless it be very plain that the construction which grants a complete exemption was that intended by the legislative body which enacted the act.[177]

The court opined on the necessity of raising revenues by governments and, given the favorable treatment given potential taxpayers in the construction of general tax statutes, the logic behind strict interpretations of tax exemptions in favor of the government.[178] Indeed, any doubt is "fatal to the claim" of any party claiming the benefit of the exemption.[179] It should be noted, as well, that the taxpayer has the burden to prove that it comes within the terms of the exemption.[180]

An interpretation of the license tax statute as a tax exemption would not stray from the words in the statute and would yield a result favorable to the locality. The statute specifically designates the two federal administrative agencies suitable for motor carrier certification or registration for insurance purposes.[181] Since the Federal Motor Carrier Safety Administration is not listed as an acceptable agency for

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[175] *Id.* at § 6(a).

[176] *Id.* at § 6(f).

[177] 168 S.E. 465, 467 (Va. 1933).

[178] *Id.* at 466–67 ("Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well-founded doubt is fatal to the claim.") (quoting Bank of Commerce v. Tennessee, 161 U.S. 134, 146 (1896)).

[179] *Id.* at 468.

[180] Commonwealth v. Manzer, 154 S.E.2d 185, 189 (Va. 1967). *See also* Westminster-Canterbury of Hampton Rds., Inc. v. City of Va. Beach, 385 S.E.2d 561, 565 (Va. 1989) (noting strict construction of the tax statute and the party bearing the burden of proof).

[181] VA. CODE ANN. § 58.1-3703(C)(1) (2017).

registration, motor carriers registered there would not be included in the group exempt from tax.[182]

3. Determine Whether a Statute is a General Tax Statute or a Tax Exemption

Given the countervailing principles governing the construction of general tax statutes as opposed to the construction of tax exemptions, the obvious first step in determining which canon to employ is to determine whether the given statute is a general tax statute or an exemption.[183] An exemption has been defined as "freedom from a general duty or service; immunity from a general burden, tax, or charge."[184] It has also been defined as "freedom from any charge or obligation to which others are subject."[185]

Applications of these definitions to the license tax statute might yield confusing and contrary conclusions without careful analysis of the nature and structure of the statute. Some study, therefore, of the statute and the surrounding body of law is required.

In *City of Winchester v. American Woodmark Corporation*, the Virginia Supreme Court, in an opinion by the late Justice Leroy R. Hassell, Sr., wrestled with this same question in determining how to interpret Virginia Code §§ 58.1-1100 and -1101(A)(2), which grant localities the authority to assess property taxes on certain types of personal property.[186]

Section 58.1-1100 states that "[i]ntangible personal property, including capital of a trade or business of any person, firm or corporation, except for merchants' capital as defined in section 58.1-3510 which shall be subject to local taxation, is hereby segregated for state taxation only."[187] Section 58.1-1101(C) states that "[t]he subjects of intangible personal property set forth in subdivisions 1 through 9 of subsection A *shall be exempt* from taxation as provided in Article X, Section 6 (a) (5) of the Constitution of Virginia."[188] The combined effect of these statutes is that intangible property is defined, by reference to subdivisions 1 through 9 of

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[182] *Id.*

[183] *See, e.g.*, City of Winchester v. Am. Woodmark Corp., 464 S.E.2d 148, 151 (Va. 1995) ("We first determine whether Code §§ 58.1-1100 and -1101(A)(2) are tax exemptions, construed against American Woodmark, or limitations on the City's power to tax personal property, construed against the City.").

[184] *Id.* (quoting Nat'l R.R. Passenger Corp. v. Catlett Volunteer Fire Co., Inc., 404 S.E.2d 216, 220 (1991)).

[185] *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 795 (1986 ed.)).

[186] *Id.*

[187] § 58.1-1100.

[188] *Id.* § 58.1-1101(C) (emphasis added).

subsection (A) of § 58.1-1101, and those property types listed as intangible are exempted from taxation, per the Constitution of Virginia.[189] The statute itself, however, uses the term "exempt" improperly.[190]

The Court noted that "Code §§ 58.1-1100 and -1101(A)(2) do not provide freedom from the [c]ity's personal property tax to which other entities are subject, but rather classify certain personal property, tangible in fact, as intangible personal property and segregate that property for state taxation only."[191] The sections, therefore, do not grant relief from a tax, but rather describe limits on the taxes that may be imposed by a locality.[192] This semantical difference is essential to understand, because localities within Virginia are granted their authority to tax by the General Assembly via enactment of statutes, and do not have inherent authority to tax on their own.[193] Since sections 58.1-1100 and -1101 are not impositions of taxes, but rather limits on local authority to tax, they cannot be tax exemptions in the proper sense, and are simply general tax statutes.[194] As such, they are to be interpreted in favor of the taxpayer.[195]

The license tax statute works in the same manner.[196] The title of the section even explicitly includes the phrase "limitation of authority."[197] Subsection (A) grants localities the authority to tax business licenses, while subsection (C) imposes limitations on the grant of authority.[198] The fact that the limitation of authority in subsection (C) of the license tax statute does not mention the words "exempt" or "exemption" perhaps makes it more clear than sections 58.1-1100 and -1101, which do include the word "exempt," that it is not, in fact, a tax exemption.[199]

A material difference between the license tax statute and the property tax statutes analyzed in *Winchester*, is that those property types

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[189] *Id.* §§ 58.1-1100, -1101(A), (C).

[190] *Id.* § 58.1-1101(C); *Winchester*, 464 S.E.2d at 151–52 (discussing nature of the statute as a limitation on a grant of authority to localities to tax, rather than a statute imposing a tax itself. Since it is not an imposition of a tax, it cannot, therefore, have exemptions).

[191] *Winchester*, 464 S.E.2d at 151.

[192] *Id.* at 151–52.

[193] *See, e.g.*, Whiting v. Council of W. Point, 17 S.E. 1, 2 (Va. 1893) ("[I]t is a settled principle that, in the absence of legislative authority, a municipal corporation has no power to levy back taxes.").

[194] *Winchester*, 464 S.E.2d at 151–52.

[195] *Id.* at 152.

[196] *See infra* notes 197–99 and accompanying text.

[197] VA. CODE ANN. § 58.1-3703(A) (2017).

[198] *Id.* § 58.1-3703(A), (C).

[199] *Id.* § 58.1-3703(C) (The statute states that "[n]o county, city, or town shall impose a license fee or levy any license tax," and then lists the various entities not taxable by localities. It does not state that localities may tax all entities *except* those listed below.).

"exempted" from local taxation by sections 58.1-1100 and -1101 were instead to be taxed by the Commonwealth instead of the localities.[200] The license tax statute does not itself impose a license tax at the state level on those entities "exempted" from local taxation.[201] Entities not subject to a business license tax at the local level are not subject to a license tax at all.[202] The essential issue, however, is not what the Commonwealth decides to do with the authority to tax it refrains from granting to the localities, but rather whether the grant of authority is made at all.[203]

Because the license tax statute is simply a limited grant of authority to tax, and not itself an imposition of tax,[204] subsection (C) of the statute cannot be considered a tax exemption.[205] As such, it should be treated as a general tax statute, and should be construed in favor of the potential taxpayer.[206]

4. Give Deference to Consistent Opinions of the Tax Commissioner

In Virginia, the Tax Commissioner is appointed by the Governor, subject to the approval of the General Assembly.[207] He is required to devote his full time to the administration of the tax laws and revenue commissioners.[208] Likewise he is authorized to issue regulations, and importantly, publish rulings in individual cases.[209] Regulations by the Tax Commissioner "shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law."[210] In order to promulgate a regulation or rule on an individual case, the Commissioner must first read, understand, and, when needed, construe a given tax statute.[211]

Given that the Commissioner is considered to be the authoritative expert on Virginia tax statutes, it makes sense that a court would be deferential to the Commissioner's interpretations of these statutes. Indeed, "the tax commissioner's construction of a tax statute is entitled to great weight" by courts.[212] This is consistent with the deference given to

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[200] *See, e.g.*, *id.* §§ 58.1-1100, -1101, -3703 (explaining § 58.1-3703 is imposed by localities, whereas §§ 58.1-1100, -1101 are imposed by the state).

[201] *Id.* § 58.1-3703.

[202] *See id.* § 58.1-3703(A) (emphasizing that, since localities have been granted sole authority to tax business licenses, no other government agency can impose the tax).

[203] *See infra* notes 204–06 and accompanying text.

[204] § 58.1-3703(A).

[205] Morse, *supra* note 199, at 25.

[206] City of Winchester v. Am. Woodmark Corp., 464 S.E.2d 148, 152 (Va. 1995).

[207] § 58.1-200.

[208] *Id.* § 58.1-202 (1), (6).

[209] *Id.* §§ 58.1-203, -204.

[210] *Id.* § 58.1-205.

[211] Carr v. Forst, 453 S.E.2d 274, 276 (Va. 1995).

[212] *Id.*

interpretation of other state officials of the laws within their control.[213] Administrative interpretations can be proved by published regulations, private letter rulings, and even oral testimony of taxing officials.[214]

Sometimes, when challenging the position of the Tax Commissioner, "the taxpayer is confronted with a presumption of validity attached to the decision of the [Commissioner] and the burden is on the taxpayer to prove that the assessment is contrary to law or that the [Commissioner] has abused his discretion and acted in an arbitrary, capricious or unreasonable manner."[215]

This notion of giving deference to the interpretation of Virginia tax statutes by the Tax Commissioner is analogous to the *Chevron* deference given by federal courts to interpretations made by the various federal regulatory agencies when interpreting federal statutes.[216] In *Chevron*, the Court stated, in pertinent part, that "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue."[217] If the statute enacted by Congress contains clear language implicating the exact question at hand, then the legislative intent is obvious, and "that is the end of the matter"[218] altogether. The federal agency interpreting the statute to promulgate its regulations, and the court ruling on the agency's regulation, must both defer to the clearly expressed guidance in the statute.[219]

By contrast, if the statute does not contain clear language directing the exact question at hand, a court should consider the possible ways the statute could be interpreted, and determine if the interpretation presented by the federal agency is among those options.[220] If the agency's interpretation is acceptable, the court will defer to that interpretation, even if it believes an alternative might be more proper.[221]

Chevron, therefore, gives the two-part test by which courts are to determine the proper deference to be given to an interpretation of a

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[213] *See, e.g.*, Commonwealth v. Research Analysis Corp., 198 S.E.2d 622, 624 (Va. 1973) ("The construction of a statute by a State official charged with its administration is entitled to great weight.").

[214] Dep't of Taxation v. Lucky Stores, 225 S.E.2d 870, 873–74 (Va. 1976) (using oral testimony to prove administrative interpretation); *see* Dep't of Taxation v. Progressive Cmty. Club, Inc., 213 S.E.2d 759, 762–64 (Va. 1975) (using published regulations to prove administrative interpretation); *see infra* notes 231–34 and accompanying text (using private letter rulings to support administrative interpretation).

[215] *Lucky Stores*, 225 S.E.2d at 874.

[216] Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 844 (1984).

[217] *Id.* at 842.

[218] *Id.* at 842–43.

[219] *Id.* at 843–44.

[220] *Id.*

[221] *Id.* at 844–45.

statute by an administrative agency.[222] In *Chevron*, the administrative agency involved was the Environmental Protection Agency. Many tax practitioners, however, have resisted the use of the formal test presented in *Chevron*.[223] This is based largely on the notion that tax practitioners use their own deferential standard for the interpretation of tax laws, represented in *National Muffler Dealers Association v. United States*,[224] which is more of a balancing test that considers a number of factors related to prior interpretations of a given tax statute.[225] The resistance to application of *Chevron* deference to administrative interpretations of tax laws may also be based on the fact that tax statutes are highly complex, very structured, and often extremely specific.[226] Given this high degree of technicality and specificity, it may be more difficult for a court to come to the conclusion that a given tax statute is ambiguous. If the statute is not ambiguous, a court will not resort to *Chevron* deference or other deferential standards.

In the federal courts, therefore, there is more variance in the level of deference given to the interpretations of tax laws as compared to the interpretations of other laws made by other administrative agencies. This stems from both the nature of tax practitioners[227] and the nature of tax laws.

While there is much variance among the federal courts in interpreting federal tax laws, there does not seem to be as much variance in Virginia courts when interpreting Virginia tax statutes. Likewise, rather than having formal tests by which the federal courts are to determine the proper level of deference, Virginia courts have utilized the more generalized notion that rulings of the Tax Commissioner should receive some deference by the court. There does not seem to be a uniform standard as to *how much* deference a Virginia court should give an interpretation of the Tax Commissioner. Some opinions hold that the Tax Commissioner's interpretations should be given a presumption of

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[222] *Supra* note 129 and accompanying text.

[223] Kristen E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1540 (2006).

[224] Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477 (1979) (considering a list of factors to review, including the length of time the treasury regulation has been in effect, the purpose behind the statute and regulations promulgated therefrom, and the consistency of the regulation's application by the Internal Revenue Service).

[225] *Id.*

[226] *See, e.g.*, Caron, *supra* note 132, at 531–32 (explaining that, given the nature of tax law, there is disagreement among courts and commentators as to how much deference should be given to legislative history).

[227] *Id.* at 531–33.

correctness.[228] Others have found simply that constructions of the Tax Commissioner are to be given great weight.[229] Still others give weight to determinations by the Tax Commissioner only when those determinations are found in published regulations.[230]

The Tax Commissioner has interpreted the precise issue presented in this Note in a 2014 advisory notice.[231] It is the Commissioner's position, unsurprisingly, that "[i]f the Taxpayer was established after the dissolution of the [Interstate Commerce Commission], it could not have been certified by the [Interstate Commerce Commission] and would not qualify for the exemption provided by Va. Code Section 58.1-3703 C 1."[232] This being a private letter ruling, it carries perhaps a lower level of deference than an interpretation found in a published regulation.[233] It is unclear whether this ruling would be granted a presumption of correctness which a taxpayer would then have the burden of rebutting.[234]

Regardless, this opinion is based on an interpretation of the license tax statute as a tax exception rather than a general tax statute. Given the holding in *Winchester*,[235] and its guidance in determining whether a given tax statute is an exception or a general tax law, the license tax statute, and particularly sub-part (C)(1), should be interpreted as being a general tax statute. Thus, it is doubtful that any weight at all should be given to Ruling 14-94.

CONCLUSION

A simple resolution of the problem would be for the General Assembly to *update* the statute to reference the proper federal agency. The statute would ideally be amended to include language indicating that subsequent changes to the federal agencies charged with registering motor carriers would be accommodated by the statute. It would read something like:

> No county, city, or town shall impose a license fee or levy any license tax:
>
> 1. *On any public service corporation or any motor carrier, common carrier, or other carrier of passengers or property formerly certified by the Interstate Commerce Commission or presently registered for insurance purposes with the Federal*

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[228] *See, e.g.*, Dep't of Taxation v. Lucky Stores, 225 S.E.2d 870, 874 (Va. 1976) (explaining the administrator's decision is presumptively valid).

[229] Commonwealth v. Research Analysis Corp., 198 S.E.2d 622, 624 (Va. 1973).

[230] Dep't of Taxation v. Champion Int'l Corp., 265 S.E.2d 720, 726–27 (Va. 1980).

[231] Ruling of the Tax Comm'r, 14-94 (Aug. 25, 2014), https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-94.

[232] *Id.*

[233] *Champion*, 265 S.E.2d at 726.

[234] *Supra* notes 228–30 and accompanying text.

[235] City of Winchester v. Am. Woodmark Corp., 464 S.E.2d 148, 151–52 (Va. 1995).

Motor Carrier Safety Administration of the United States Department of Transportation, Federal Highway Administration, or subsequent federal agency bearing responsibility for registering for insurance purposes any motor carriers, common carriers, or other carriers of passengers or property, except as provided in § 58.1-3731 or as permitted by other provisions of law.

Until any revisions are made by the General Assembly, however, motor carriers currently registered for insurance purposes with the Federal Motor Carrier Safety Administration, as well as the numerous taxing authorities within the Commonwealth that would seek to impose the tax, must look to the law as it is currently written to determine its applicability.[236]

It is an affront to common sense that a reorganization of the Federal Department of Transportation a few years after the enactment of the statute would render the statute inapplicable. As such, a court could easily find that an interpretation of the statute that does not exempt a motor carrier currently registered for insurance purposes with the Federal Motor Carrier Safety Administration creates an absurd result. With this finding, the court would be permitted to stray from the words of the text of the statute and give force to the actual intent of the legislature.

Because the license tax statute is a tax statute, it can reasonably and appropriately be interpreted by first understanding the nature of the policy purpose the General Assembly sought to accomplish by enacting it.[237] The purpose of the rule against taxing motor carriers registered with the Surface Transportation Board is to incentivize motor carriers in Virginia to have adequate insurance to protect other motorists.[238]

Virginia's lack of availability of legislative history is unhelpful in the interpretations of the license tax statute. We do not have the needed evidence to determine what was on the minds of the members of the General Assembly when the statute was enacted. Even if we did, it is questionable whether the evidence is particularly probative, given the nature of the General Assembly as a collection of individuals.

No part of the license tax statute refers to itself as an exception, but rather a mere limitation on the grant of taxing authority to Virginia localities.[239] Having determined that the license tax statute operates as a

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[236] *Supra* notes 43–53 and accompanying text.

[237] *Supra* note 122 and accompanying text.

[238] *Supra* note 14 and accompanying text.

[239] VA. CODE ANN. § 58.1-3703(A) (2017).

general tax statute, rather than a tax exemption,[240] it becomes clear that it should be construed in favor of the taxpayer.

The only factor favorable to localities on this point is the holding of the Tax Commissioner in Ruling 14-94 that the license tax statute is a tax exemption, inapplicable to currently registered motor carriers.[241] The combined weight, therefore, of the *absurd results doctrine* and the proper treatment of the statute as a general tax statute rather than a tax exemption should lead a court to the determination that a motor carrier currently registered for insurance purposes with the Federal Motor Carrier Safety Administration is not liable for the business license tax imposed by any locality within the Commonwealth of Virginia.[242]

Matthew E. Morse[*]

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[240] *Supra* notes 204–06 and accompanying text.

[241] Ruling of the Tax Comm'r, 14-94 (Aug. 25, 2014), https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/14-94.

[242] *Supra* notes 123–24, at 15, notes 194–02, at 25.

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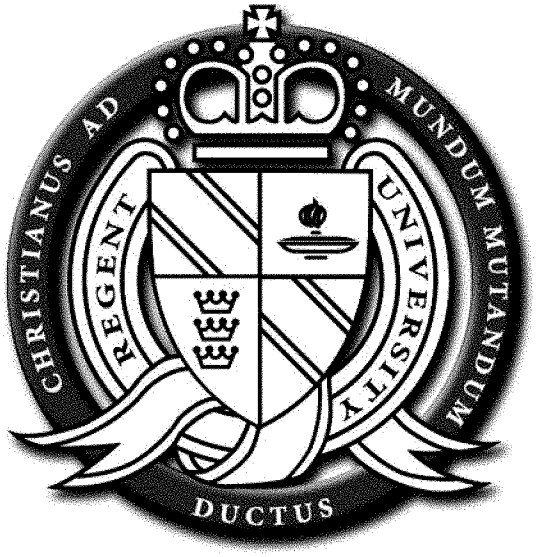

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