REGENT UNIVERSITY LAW REVIEW

VOLUME 33 **2020–2021** **NUMBER 2**

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REGENT UNIVERSITY LAW REVIEW

ISSN 1056-3962. The *Regent University Law Review* is published at Regent University and is produced and edited by the students at Regent University School of Law under the supervision of the faculty. The domestic subscription rate is $14.00 per issue. Third-class postage paid at Virginia Beach, Virginia. POSTMASTER: Send address changes to Editor-in-Chief, Law Review, Regent University School of Law, Virginia Beach, VA 23464-9800. Absent receipt of notice to the contrary, subscriptions to the *Law Review* are renewed automatically each year. Claims for issues not received will be filled for published issues within one year before the receipt of the claim. Subscription claims for issues beyond this limitation period will not be honored.

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Address all correspondence to Editor-in-Chief, Regent University Law Review, Regent University School of Law, 1000 Regent University Drive, RH 252C, Virginia Beach, VA 23464. Regent University Law Review's e-mail address is *lawreview@regent.edu*, and Law Review's website address is *http://www.regent.edu/lawreview*.

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HORSESHOES AND HAND GRENADES: HOW THE RECENT AMENDMENTS TO § 34-4 OF THE CODE OF VIRGINIA DO NOT GO FAR ENOUGH IN PROTECTING SENIOR CITIZENS

L. Carter Budwell[*]

INTRODUCTION

"Close only counts in horseshoes and hand grenades."[1] This saying reminds us that there are some areas in life in which being close is simply not good enough. For example, former Vice President Al Gore came very close to becoming President, but it is George W. Bush who holds the spot in American history as our forty-third Commander in Chief.[2] The Buffalo Bills came very close to being Super Bowl Champions in Super Bowl XXV, but it was the New York Giants who received Super Bowl Rings.[3] The reader of this Article can likely think of other examples of how "close" was simply not good enough.

On February 21, 2020, the Virginia General Assembly passed HB 790, which allowed the debtor in bankruptcy to exempt $25,000 in equity

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[1] David Selig, *Frank Robinson Says Orioles Are 'Headed in the Right Direction,'* BALT. SUN (Apr. 27, 2012), https://www.baltimoresun.com/sports/orioles/bs-xpm-2012-04-27-bal-frank-robinson-says-orioles-are-headed-in-the-right-direction-20120427-story.html (explaining that baseball player Frank Robinson first coined this phrase in a 1973 interview with *Time Magazine*).

[2] Susan Baer, *Bush Tells D.C. He'll Try to Heal Election Wounds*, BALT. SUN (Dec. 19, 2000), https://www.baltimoresun.com/news/bs-xpm-2000-12-19-0012190100-story.html (discussing how President Bush won the election with 271 electoral votes, only one more than needed to win).

[3] ED BENKIN, THE FIRST 50 SUPER BOWLS: HOW FOOTBALL'S CHAMPIONSHIPS WERE WON 131, 136–37 (2018) (referring to Super Bowl XXV as "the closest Super Bowl ever played").

in their principal residence.[4] Although this was a very significant improvement on the previous homestead exemptions, this Article attempts to show that it does not go far enough in protecting senior citizens who are in need of bankruptcy relief.

This Article is divided into three sections. Section I provides an overview of bankruptcy and of the recent changes in bankruptcy law in Virginia; Section II explains why additional protections are still needed; and Section III explores possible solutions. It is not the intention of the author to unjustly criticize those who passed HB 790, which did indeed improve the Virginia homestead exemptions significantly. Rather, it is the intent of the author to see how the law may be improved even further.

I. BANKRUPTCY OVERVIEW

As the purpose of this Article is to focus on a specific exemption rather than on bankruptcy in general, this section only provides a basic overview of bankruptcy. "The purpose of consumer bankruptcy is to provide 'the honest but unfortunate debtor' with a financial 'fresh start' by discharging debt that the debtor has no reasonable prospect of paying."[5] The debtor starts bankruptcy by filing a petition, "which includes schedules of assets, liabilities, income, expenses, and other forms."[6]

The two primary types of bankruptcy for individual debtors are Chapter 7 and Chapter 13.[7] In a Chapter 7 bankruptcy, "the debtor surrenders his or her non-exempt assets to a trustee, who sells the assets to pay unsecured creditors pro rata."[8] After the sale, all remaining debts are discharged.[9] "Chapter 7 debtors are allowed to retain exempt property . . . . Because creditors are paid from the non-exempt assets of the debtor's estate, many unsecured creditors receive very little, often nothing, toward the amount of their claim."[10] In Virginia, Title 34 of the Code of Virginia provides exemptions that the debtor can use to protect certain property from being sold by the trustee. For example, the Code protects up to $6,000 of equity in a car,[11] $1,000 in clothing,[12] up to $5,000 in "household

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[4] H.R. 790, 2020 Gen. Assemb., 2020 Sess. (Va. 2020).

[5] Daniel A. Austin, *Medical Debt as a Cause of Consumer Bankruptcy*, 67 ME. L. REV. 1, 3 (2014) (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

[6] *Id.*; 11 U.S.C. §§ 301, 521(a)(1)–(2) (2012).

[7] Austin, *supra* note 5, at 3.

[8] *Id.* at 3–4; 11 U.S.C. § 726(a)–(b) (2012).

[9] Austin, *supra* note 5, at 4.

[10] Alicia McCullar, *Converting Debtors and the Bankruptcy Chamber of Means Testing Secrets: Disparate Treatment of Means Testing for Debtors Who Convert from Chapter 13 to Chapter 7*, 4 BUS. & BANKR. L.J. 145, 151 (2016).

[11] VA. CODE ANN. § 34-26(8) (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.).

[12] *Id.* § 34-26(4).

furnishings,"[13] $3,000 in firearms,[14] and total protection for "[w]edding and engagement rings,"[15] "[u]npaid spousal or child support,"[16] "[m]edically prescribed health aids,"[17] awards from "personal injury or wrongful death,"[18] and "[c]ertain retirement benefits."[19] This Article focuses primarily on the homestead exemption found in § 34-4, which protects $5,000 in "real and personal property, or either."[20] This exemption increases to $10,000 for debtors aged sixty-five or older and permits all debtors an additional $500 in exemptions for every dependent of the debtor.[21] Additionally, as this Article discusses, the homestead exemption protects $25,000 in "real or personal property used as the principal residence of the householder or the householder's dependents."[22]

In a Chapter 13 bankruptcy, "the debtor must pay [his or] her monthly 'projected disposable income' to a Chapter 13 trustee under a plan of reorganization that can last from three to five years."[23] At the end of this period, provided that the debtor makes all payments, "the remaining debts are discharged."[24] Chapter 13 is typically "sought by debtors who have a steady monthly income but have fallen behind on payments to creditors."[25] Chapter 13 is also an option for those who do not qualify because they failed the "means test."[26] Additionally, Chapter 13 may be an option for those whose property value exceeds the amount that they can exempt, as they can pay the value of the non-exempt property to their creditors in the Chapter 13 plan.[27]

With this general overview of bankruptcy in mind, let us now turn our attention to the Virginia exemption that is the subject of this Article.

As mentioned above, on February 21, 2020, the Virginia General Assembly passed HB 790. This bill amended § 34-4 of the Code of Virginia

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[13] *Id*. § 34-26(4a).

[14] *Id*. § 34-26(4b).

[15] *Id*. § 34-26(1a).

[16] *Id*. § 34-26(10).

[17] *Id*. § 34-26(6).

[18] VA. CODE ANN. § 34-28.1 (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.).

[19] VA. CODE ANN. § 34-34 (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.).

[20] VA. CODE ANN. § 34-4 (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.).

[21] *Id*.

[22] *Id*.

[23] Austin, *supra* note 5, at 4 (quoting 11 U.S.C. §§ 1322(a)(1)–(4), 1325(b)(1)(B) (2012)); 11 U.S.C. § 1325(b)(4)(A) (2012).

[24] Austin, *supra* note 5, at 4; 11 U.S.C. § 1328(a) (2012).

[25] McCullar, *supra* note 10, at 151.

[26] *Id*. at 160–61 (explaining that the means test was introduced to evaluate the rebuttable presumption of abuse that arises under all Chapter 7 cases). "[T]he present-day means test established an income to debt threshold ratio that provided a bright-line test for determining whether or not the debtor filed their case in good faith." *Id*. at 156.

[27] Cara O'Neill, *Will Having Lots of Home Equity Affect My Chapter 13 Bankruptcy?*, ALLLAW, https://www.alllaw.com/articles/nolo/bankruptcy/will-having-lots-home-equity-affect-chapter-13-bankruptcy.html (last visited Feb. 12, 2021).

and allowed the debtor to exempt $25,000 in their principal residence.[28] Debtors may also exempt additional real or personal property in the amount of $5,000 (or, if the debtor is over the age of sixty-five, $10,000).[29]

These new exemptions are a tremendous improvement over the previous homestead exemption, which only allowed debtors to protect $5,000 in real or personal property (or $10,000 if the debtor was over the age of sixty-five).[30] Even the extra amount for those over the age of sixty-five is still a fairly new addition to the Virginia Code, having not been added until 2009.[31] This previous amount is quite pitiful when compared to the homestead exemptions of other states. Indeed, out of all fifty states, only Kentucky, New Jersey, and Pennsylvania provide similar or less protection to debtors.[32] On the other hand, numerous states provide for

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[28] H.R. 790, 2020 Gen. Assemb., 2020 Sess. (Va. 2020). The updated law reads:

> Every householder shall be entitled, in addition to the property or estate exempt under §§ 23.1-707, 34-26, 34-27, 34-29, and 64.2-311, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $5,000 in value or, if the householder is [sixty-five] years of age or older, not exceeding $10,000 in value*, and, in addition, real or personal property used as the principal residence of the householder or the householder's dependents not exceeding $25,000 in value*. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding $500 in value for each dependent.

Id.

[29] *Id.*

[30] VA. CODE ANN. § 34-4 (2009). The previous statute read:

> Every householder shall be entitled, in addition to the property or estate exempt under §§ 23-38.81, 34-26, 34-27, 34-29, and 64.1-151.3, to hold exempt from creditor process arising out of a debt, real and personal property, or either, to be selected by the householder, including money and debts due the householder not exceeding $ 5,000 in value or, if the householder is [sixty-five] years of age or older, not exceeding $ 10,000 in value. In addition, upon a showing that a householder supports dependents, the householder shall be entitled to hold exempt from creditor process real and personal property, or either, selected by the householder, including money or monetary obligations or liabilities due the householder, not exceeding $ 500 in value for each dependent.

Id.

[31] *Compare* VA. CODE ANN. § 34-4 (2006) (capping the exemption at $5,000 with no mention of those over the age of sixty-five), *with* VA. CODE ANN. § 34-4 (2009) (giving an additional exemption to those over age sixty-five).

[32] *Homestead Exemptions by State and Territory*, ASSET PROT. PLANNERS, https://www.assetprotectionplanners.com/planning/homestead-exemptions-by-state/ (Jan. 15, 2021). Pennsylvania and New Jersey do not offer a homestead exemption. *Id.* Kentucky allows debtors to protect $5,000 in real or personal property but does not include an expanded exemption for senior citizens. *See* KY. REV. STAT. ANN. § 427.060 (West, Westlaw through 2020 Reg. Sess. and Nov. 3, 2020 election) (detailing Kentucky's homestead exemptions).

unlimited exemptions.[33] Massachusetts, Nevada, and Rhode Island provide an exemption of $500,000 or more.[34] Some states provide at least $100,000 in exemptions, as do the Federal Exemptions.[35]

Under the old law, the debtor who was over the age of sixty-five could exempt up to $10,000 in real property, and joint debtors over sixty-five could exempt $20,000.[36] Under the new code, the debtor who is over the age of sixty-five can exempt $25,000 in their principal residence along with the $10,000 originally allotted, and joint debtors over the age of sixty-five could exempt $50,000 along with the $20,000 that they could originally exempt, for a total exemption of up to $70,000.[37] When it is taken into account that bankruptcy trustees typically consider the cost of sale of a house before determining how much equity is available in a house,[38] the new law will undoubtedly do much in protecting the real property of debtors in consumer bankruptcy.

While the new law clearly exempts more property than the previous law, a casual reader of the two laws will quickly see that, while the $10,000 exemption for debtors over the age of sixty-five continues in the new law, there is not a corresponding increase in the amount that debtors over the age of sixty-five can exempt in their primary residence.[39] In other words, the $25,000 primary residence exemption does not change based

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[33] *See, e.g.*, IOWA CODE ANN. § 561.16 (West, Westlaw with legis. from 2020 Reg. Sess., subject to changes made by Iowa Code Ed. for Code 2021) ("The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary."); KAN. STAT. ANN. § 60-2301 (West, Westlaw through laws enacted during 2021 Reg. Sess. of Kan. Leg. effective Mar. 4, 2021) ("[A] homestead to the extent of 160 acres of farming land, or of one acre within the limits of an incorporated town or city, . . . occupied as a residence by the owner . . . together with all the improvements on the same, shall be exempted from forced sale under any process of law . . . ."); S.D. CODIFIED LAWS § 43-45-3 (Westlaw through 2020 Sess. L., Gen. Election results, Exec. Order 20-34 and Sup. Ct. Rule 20-06) (giving a homestead absolute exemption from court ordered sale or division).

[34] MASS. GEN. LAWS ANN. ch. 188, § 1 (West, Westlaw through Ch. 226 of 2020 2d Ann. Sess.) ($500,000); NEV. REV. STAT. ANN. § 21.090 (West, Westlaw through end of both 31st and 32d Spec. Sess.) ($605,000); 9 R.I. GEN. LAWS § 9-26-4.1(a) (LEXIS through all acts of 2020 Sess. (through ch. 80), including corrections by Dir. of L. Revision) ($500,000).

[35] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1101(A)(1) (Westlaw through Second Reg. Sess. of the Fifty-Fourth Leg., and includes Elections Results from Nov. 3, 2020 Gen. Election) ($150,000); DEL. CODE ANN. tit. 10, § 4914(c)(1) (LEXIS through 82 Del. L., ch. 292) ($125,000); MINN. STAT. ANN. § 510.02 (West, Westlaw with all legis. from 2020 Reg. Sess. and 1st through 7th Spec. Sess.) ($450,000); 11 U.S.C. § 522(p)(1) ($125,000).

[36] *See* VA. CODE ANN. § 34-4 (2009) (permitting "[e]very householder" who was over the age of sixty-five to exempt up to $10,000 in home equity); Cheeseman v. Nachman, 656 F.2d 60, 64 (4th Cir. 1981) (holding that each debtor in a joint case is a householder and entitled to an exemption).

[37] VA. CODE ANN. § 34-4 (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.). Again, the new code grants the exemption to "[e]very householder." *Id.*

[38] DEANNE LOONIN & JOHN RAO, THE NATIONAL CONSUMER LAW CENTER GUIDE TO SURVIVING DEBT 358 (2005).

[39] § 34-4.

on the debtor's age. In the next section this Article argues argue that, despite the improvement in the law, it does not go far enough in helping debtors over the age of sixty-five.

II. WHY THE NEW EXEMPTION IN § 34-4 IS NOT SUFFICIENT FOR THOSE OVER SIXTY-FIVE

As discussed in the previous section, the new version of § 34-4 greatly expanded the homestead exemption in Virginia. That fact should not be overlooked. However, it does not adequately protect debtors over the age of sixty-five. There are several reasons why this is so. For one thing, the number of senior citizens with debt has increased in recent years.[40] Also, debtors over the age of sixty-five are more likely than ever before to have substantial equity in their home but may lack the same ability to pay their other debts that younger debtors have.[41] Additionally, debtors over the age of sixty-five are more likely than those under the age of sixty-five to have medical debt, which is a major cause of many bankruptcies in America.[42] Debtors over the age of sixty-five are also less likely to be earning an income that would allow them to pay their debts in a Chapter 13 Bankruptcy.[43]

A. The Number of Senior Citizens in Debt Is Increasing

A 2019 report by the Congressional Research Service found that the percentage of elderly households with debt has increased significantly in recent decades.[44] In 1989, the percentage of elderly households with debt

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[40] ZHE LI, CONG. RSCH. SERV., HOUSEHOLD DEBT AMONG OLDER AMERICANS, 1989–2016 1 (2019) [hereinafter HOUSEHOLD DEBT].

[41] *See* Patricia Mertz Esswein, *Retirees, Make the Most of Your Home Equity*, KIPLINGER (Nov. 2, 2020), https://www.kiplinger.com/retirement/601665/retirees-make-the-most-of-your-home-equity (reporting that homeowners over age sixty-two have record home equity); Greg Iacurci, *Lawmakers Want to End Age Discrimination—and That's Good for Your Wallet*, CNBC (Jan. 21, 2020, 12:37 PM), https://www.cnbc.com/2020/01/21/house-of-representatives-passes-age-discrimination-bill.html (explaining that older workers earn less or have trouble finding employment).

[42] Theresa J. Pulley Radwan & Rebecca C. Morgan, *The Elderly in Bankruptcy and Health Reform*, 18 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2010).

[43] *See* Iacurci, *supra* note 41 (reporting that debt is increasing in households headed by someone over age sixty-five, that older Americans have difficulty finding jobs, and that the jobs they do find have lower wages than when they were younger); David Lord, *Why Are So Many Americans over 65 Declaring Bankruptcy?*, MARKETWATCH (Nov. 6, 2018, 8:07 AM), https://www.marketwatch.com/story/why-are-so-many-americans-over-65-declaring-bankruptcy-2018-11-06 (reporting that medical expenses are increasing for those over age sixty-five).

[44] HOUSEHOLD DEBT, *supra* note 40, at 3.

was 37.8%.[45] By 2016, that number had increased to 61.1%.[46] The average amount of debt held by senior citizens also increased substantially during that time from $29,918 in 1989 to $86,797 in 2016.[47] Much of this debt came from mortgages on primary residences and "other residential properties."[48] However, 3.5% of the debts owed by elderly debtors in 2016 was credit card debt, and 8.9% was "other debts."[49] Using the 2016 figure of $86,797, that translates into over $3,000 in credit card debt and approximately $7,700 in "other debts."[50] Furthermore, as this section discusses, rising health care costs are also contributing to the debts owed by senior citizens.[51]

Given that the number of debtors over the age of sixty-five is clearly increasing,[52] it should come as no surprise that some of these debtors may have to look for relief through the bankruptcy courts.

B. Senior Citizen Debtors Are More Likely to Have Substantial Equity

According to an article in *Forbes*, 37% of homeowners had paid off their mortgages as of 2017.[53] Of this 37%, "[o]lder homeowners especially are making headway on mortgage debt."[54] Forty-one percent of homes owned by baby boomers (those within the age range of fifty-five to sixty-nine) were mortgage free in 2017, and 68% of those seventy and older were mortgage free.[55] On the other hand, only 15.9% of millennials were debt free when it comes to their mortgages.[56] This should not come as a surprise, as "[b]aby [b]oomers . . . have had many years to pay off their mortgages."[57] In addition to having a higher percentage of debt-free homeowners within their ranks, baby boomers have nearly twice as many

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[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 5.

[49] *Id.*

[50] *Id.*

[51] *See* Lord, *supra* note 43 (discussing the impact of rising healthcare costs on senior citizens).

[52] *See id.* (explaining that the number of individuals over age sixty-five who declared bankruptcy increased 204% between 1991 and 2016).

[53] Brenda Richardson, *Nearly 40% of Homes in the U.S. Are Free and Clear of a Mortgage*, FORBES (July 26, 2019, 3:24 PM), https://www.forbes.com/sites/brendarichardson/2019/07/26/nearly-40-of-homes-in-the-us-are-free-and-clear-of-a-mortgage/?sh=64ea765347c2.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

homeowners in general than do millennials (those aged twenty-five to thirty-nine).[58]

These statistics show that older debtors will need more protection for the equity in their houses than younger debtors, as older debtors are more likely to have substantial equity in their homes. Although, as mentioned previously in this Article, the new § 34-4 could potentially protect up to $70,000 dollars in home equity for senior citizens in bankruptcy, this amount will likely prove insufficient for many senior citizens in Virginia. According to *Business Insider*, Virginia is ranked seventeenth in the nation as one of the most expensive places to have a home.[59] The median house value in Virginia was listed at $285,229,[60] and, as of the end of 2018, slightly over 31% of homes in Virginia were owned free and clear.[61] Therefore, as senior citizens are more likely to own their home than younger debtors,[62] it is unlikely that the new law will do much to help a senior citizen in need of bankruptcy relief if his or her house is valued at the median. Assuming a couple over the age of sixty-five was forced into bankruptcy as a result of medical debt (which this Article discusses later), and that couple owned their home and that home was valued at the median mentioned above, the new law would still likely leave over $200,000 in unprotected equity in their home.

C. Debtors over the Age of Sixty-Five Are Less Likely to Have the Financial Resources to Pay Their Debts

It might be argued that debtors over the age of sixty-five with no mortgage payment would have an easier time paying their other debts. However, this is not always the case. For one thing, "[m]any adults experience increases in physical limitations with age."[63] Additionally, as

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[58] *Id*.

[59] Marissa Perino & Dominic-Madori Davis, *Here's the Typical Home Price in Every State—and What You Can Actually Get for That Money*, BUS. INSIDER (Apr. 10, 2020, 9:15 AM), https://www.businessinsider.com/average-home-prices-in-every-state-washington-dc-2019-6.

[60] *Id*.

[61] Colin Holmes, *Which States Have the Most Mortgage-Free Homeowners?*, MOVE.ORG (Dec. 12, 2018), https://www.move.org/states-most-mortgage-free-homeowners/.

[62] Jeffery M. Jones, *Older Americans Buck Trend of Decreased Homeownership*, GALLUP (July 26, 2017), https://news.gallup.com/poll/214514/older-americans-buck-trend-decreased-homeownership.aspx.

[63] Julia Holmes et al., *Aging Differently: Physical Limitations Among Adults Aged 50 Years and Over: United States, 2001-2007*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 2009), https://www.cdc.gov/nchs/products/databriefs/db20.htm; Kerry Hannon, *It's Time We Pay Attention to These Ignored Older Workers*, MARKETWATCH (Dec. 31, 2020, 11:00 AM), https://www.marketwatch.com/story/its-time-we-pay-attention-to-these-ignored-older-workers-11609360548.

the *Harvard Business Review* noted in an article arguing for the hiring of older workers, "if you are older, you are likely to be considered less capable, less able to adapt, or less willing to roll up your sleeves and do something new than your younger peers."[64] And as Justice Thurgood Marshall wrote in his dissenting opinion in *Massachusetts Board of Retirement v. Murgia*:

> [I]n the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs[.]
>
> . . . .
>
> [T]he incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave[.][65]

In addition to the difficulties that senior citizens have in finding employment, many senior citizens do not have any retirement savings by which to pay their debts. The American Association of Retired Persons ("AARP") noted that, in 2016, 48% of households that were headed by someone over the age of fifty-five did not have "some form of retirement savings."[66] While *Forbes* disagreed with AARP and stated that around 77% of older Americans have some sort of retirement plan,[67] even 77% means that 23% of older Americans are without some form of retirement. In 2015, there were an estimated 47.8 million people in the United States who were aged sixty-five or older.[68] Twenty-three percent of that number is nearly eleven million people over the age of sixty-five who may not have any kind of retirement savings.

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[64] Josh Bersin & Tomas Chamorro-Premuzic, *The Case for Hiring Older Workers*, HARV. BUS. REV. (Sept. 26, 2019), https://hbr.org/2019/09/the-case-for-hiring-older-workers.

[65] 427 U.S. 307, 324 (1976) (Marshall, J., dissenting) (alterations in original) (quoting 29 U.S.C. § 621(a)).

[66] William E. Gibson, *Nearly Half of Americans 55+ Have No Retirement Savings*, AARP (Mar. 28, 2019), https://www.aarp.org/retirement/retirement-savings/info-2019/no-retirement-money-saved.html.

[67] Andrew Biggs, *No, Half of Older Americans Aren't Without Retirement Savings*, FORBES (Mar. 27, 2019, 7:36 PM), https://www.forbes.com/sites/andrewbiggs/2019/03/27/no-half-of-older-americans-arent-without-retirement-savings/?sh=76ade07e6645.

[68] *Older Americans Month: May 2017*, U.S. CENSUS BUREAU (Mar. 27, 2017), https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff08.pdf.

Given the difficulties faced by the elderly in finding employment and the fact that many of the elderly do not have any kind of retirement, it stands to reason that it will be more difficult for them to be able to pay off their debts.

D. Older Debtors Are Likely to Have Medical Debt

Medical debt is a leading cause of consumer bankruptcy,[69] and "the elderly are more susceptible to health problems than the general population."[70] Senator Russell D. Feingold noted in a hearing before the Subcommittee on Administrative Oversight and the Courts in 2009, that "the percentage of bankruptcy filings by people over the age of sixty-five is over three times what it was in 1991 and medical debt is almost certainly a big part of the reason for that."[71] According to the National Council on Aging, "[m]ore than 84% of people aged [sixty-five and over] are coping with at least one chronic condition, and often more as they age."[72]

The COVID-19 pandemic has given the world a ghastly example of the increased medical challenges faced by the elderly—COVID patients aged sixty-five to seventy-four were five times more likely to require hospitalization from COVID-19 than those aged eighteen to twenty-nine, while patients aged seventy-five to eighty-five were eight times more likely to require hospitalization.[73] According to the CDC, elderly patients who contracted COVID-19 were more likely to contract a "[s]evere [i]llness" from COVID-19, which could require hospitalization, intensive care, or the use a ventilator.[74] The expenses resulting from these treatments can be extremely high.[75]

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[69] Austin, *supra* note 5, at 21; *see also* Brook E. Gotberg & Michael D. Sousa, *Moving Beyond Medical Debt*, 27 AM. BANKR. INST. L. REV. 93, 101 (2019) ("Even though most Americans possess health insurance, anecdotally among bankruptcy professionals and empirically among bankruptcy law scholars, it is largely unchallenged that medical debt is present in many personal bankruptcy cases.").

[70] Meelad Hanna*, For the Bankrupt Elder, There Is No "Fresh Start": Resisting the Vulture Effect*, 14 SEATTLE J. FOR SOC. JUST. 781, 781 (2016).

[71] *Medical Debt: Can Bankruptcy Reform Facilitate A Fresh Start?: Hearing Before the Subcomm. on Admin. Oversight and the Cts. of the Comm. on the Judiciary U.S. S.,* 111th Cong. (2009) (statement of Sen. Russell D. Feingold).

[72] *Senior Debt Facts*, NAT'L COUNCIL ON AGING, https://www.ncoa.org/economic-security/money-management/debt/senior-debt-facts/ (last visited Feb. 3, 2021).

[73] *Older Adults at Greater Risk of Requiring Hospitalization or Dying if Diagnosed with COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html.

[74] *Id*.

[75] *See, e.g.*, Nicole Lyn Pesce, *Breaking Down This 'Miracle' COVID-19 Survivor's $1.1 Million Hospital Bill*, MARKETWATCH (June 20, 2020, 8:14 AM) https://www.marketwatch.com/story/breaking-down-this-miracle-covid-19-survivors-11-million-hospital-bill-2020-06-16 (discussing a $1.1 million COVID-19 hospital bill).

There are other health issues that are more common among the elderly that can be very expensive. A good example of this is cardiovascular disease.[76] The National Institute on Aging has noted that "[a]dults age sixty-five and older are more likely than younger people to suffer from cardiovascular disease, which is problems with the heart, blood vessels, or both. Aging can cause changes in the heart and blood vessels that may increase a person's risk of developing cardiovascular disease."[77] Another example of health issues that face the elderly is cancer. In 2009, "slightly more than half of all cancers . . . occurred in adults aged [] [sixty-five] years [or older]."[78] It has been predicted that "[b]y 2030, an estimated 70% of all cancers will occur among adults aged [] [sixty-five] years [or older]."[79]

As medical debt is a significant cause of bankruptcy, and, because senior citizens face significant medical challenges, additional bankruptcy protection would be completely reasonable.

E. Conclusion

This section has laid out the reasons why additional homestead protections should be given to senior citizens in bankruptcy. The number of senior citizens in debt is increasing, and these debtors are more likely to have substantial equity in their home while at the same time potentially lacking the resources to pay the equivalent of that equity in a Chapter 13 bankruptcy. Given this and the increased risk that senior citizens have when it comes to health care costs, increasing the homestead exemption for senior citizens would merely fulfill "[t]he principal purpose of the Bankruptcy Code . . . to grant a 'fresh start' to the 'honest but unfortunate debtor.'"[80]

Having explored some of the reasons why an increase in the homestead for senior citizens is warranted, this Article now turns to possible solutions.

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[76] *See* Dennis Thompson, *Heart Disease Could Cost U.S. $1 Trillion a Year by 2035*, CBS NEWS (Feb. 14, 2017, 4:55 PM), https://www.cbsnews.com/news/heart-disease-could-cost-us-1-trillion-per-year-by-2035/ (reporting that the cost of heart disease in the U.S. is projected to increase from $555 billion in 2016 to $1.1 trillion in 2035).

[77] *Heart Health and Aging*, NAT'L INST. ON AGING, https://www.nia.nih.gov/health/heart-health-and-aging (last visited Feb. 3, 2021).

[78] Mary C. White et al., *Age and Cancer Risk: A Potentially Modifiable Relationship*, 46 AM. J. PREVENTIVE MED. S7, S8 (2014).

[79] *Id*.

[80] Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (2007) (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

III. POSSIBLE SOLUTIONS

There are feasible solutions to the problems set out in Section II. These solutions include simply exempting all real estate owned by debtors or creating an increased exemption to debtors over the age of sixty-five.

A. Exempting All Real Estate Regardless of Age

One potential solution is to simply put no limit on what the debtor can exempt in his or her principal residence. As mentioned above, Virginia would not be the only state to create such an exemption.[81] Furthermore, there are a number of assets for which Virginia does allow 100% exemption. Virginia allows debtors to totally exempt certain retirement accounts, health aides that are medically prescribed, wedding or engagement rings, personal injury awards, or unpaid child support.[82] These are by no means insignificant assets. For example, in 2019, Vanguard, a retirement savings account company, reported that the average account balance of its defined contribution plan for individuals aged sixty-five and over was $192,877.[83] Therefore, if Virginia were to simply protect the entire primary residence of the debtor, it would not necessarily be doing something entirely novel. And by doing so, it could help debtors avoid the problems that were mentioned in this Article.

B. A Corresponding Increase to the Principal Residence Exemption

Another potential solution to the problems set out in Section II of this Article would be to create a larger principal residence exemption for debtors over the age of sixty-five. The Virginia General Assembly seems to be aware of some of the challenges faced by elderly debtors, as it allowed them twice as much homestead protection under the old law.[84] It could create a corresponding increase to the principal residence exemption by allowing an exemption of $50,000 for debtors over the age of sixty-five. Such an exemption would permit an individual debtor over the age of

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[81] *See supra* note 33 and accompanying text (giving examples of states which provide full exemptions for homes).

[82] *See* VA. CODE ANN. § 34-26 (LEXIS through 2020 Spec. Sess. I of Gen. Assemb.) (listing exemptions Virginia allows).

[83] VANGUARD, HOW AMERICA SAVES 2019: VANGUARD 2018 DEFINED CONTRIBUTION PLAN DATA 51 (2019), https://pressroom.vanguard.com/nonindexed/Research-How-America-Saves-2019-Report.pdf.

[84] *See* VA. CODE ANN. § 34-4 (2009) (showing that ordinary debtors were given $5,000 in homestead protection, while debtors over the age of sixty-five were given $10,000).

sixty-five to claim up to $60,000 in exemptions on his or her real property and would allow joint debtors over the age of sixty-five up to $120,000.[85]

This solution would be neither novel nor out of character with Virginia's laws. For one thing, as mentioned above, Virginia has allowed increased exemptions to debtors over the age of sixty-five in the past.[86] Additionally, such an exemption would certainly not be outrageous in light of what some other states provide in protecting the residences of their debtors.[87] Indeed, it would not be the only exemption that protects more equity on the basis of age. For example, Hawaii gives a $30,000 exemption to the debtor "who is either the head of a family *or an individual sixty-five years of age or older*."[88] Individual debtors who do not meet these criteria in Hawaii are given a $20,000 exemption.[89] California's prior law allowed debtors over the age of sixty-five to exempt $175,000 in homestead exemptions, as opposed to $75,000–$100,000 for other debtors.[90] Therefore, creating a corresponding, increased exemption would be in line with what Virginia has done in the past and would be consistent with what other states have done.

CONCLUSION

This Article has reviewed the recent change in Virginia's homestead exemption and found that, while it is an improvement on the previous law, it does not go far enough in protecting the primary residences of senior citizens. The challenges faced by elderly debtors discussed in this Article are very real, and the potential solutions to these problems are entirely possible, as demonstrated by the fact that they have been implemented by other states. Virginia's new law is certainly a step in the right direction, but "close only counts in horseshoes and hand grenades."[91]

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[85] See *supra* text accompanying notes 36–37 for a comparison with the current code.

[86] *See* § 34-4 (mentioning an exemption for debtors over age sixty-five).

[87] *See supra* text accompanying notes 33–35 (showing states which have exemptions that would be similar to or greater than the proposed additional exemption to the Virginia Code).

[88] HAW. REV. STAT. ANN. § 651-92(a)(1) (LexisNexis, LEXIS through 2020 Leg. Sess.) (emphasis added).

[89] *Id*. § 651-92(a)(2).

[90] CAL. CIV. PROC. CODE § 704.730 (Deering 2012).

[91] Selig, *supra* note 1.

GO BIG OR GO HOME: THE CASE FOR BOLDNESS IN PRO-LIFE ADVOCACY AFTER *JUNE MEDICAL SERVICES V. RUSSO*

Matthew J. Clark[*]

On October 6, 2018, the United States Senate voted to confirm Brett Kavanaugh to the United States Supreme Court to replace Justice Anthony Kennedy, who had long been the Court's swing vote on abortion.[1] Pro-life advocates hoped that they had finally secured the fifth vote to overrule *Roe v. Wade*[2] and *Planned Parenthood v. Casey*.[3] As the President of Americans United for Life said on the same day that Justice Kavanaugh was confirmed,

> For the first time in decades, a majority of justices appear to understand not only that life begins at conception, as affirmed by medical science, but also that *Roe* was an egregious example of constitutional overreach. We look forward to the day when *Roe v. Wade* takes its proper place among rightly repudiated rulings like *Plessy*, *Korematsu*, and *Dred Scott* as one of the Court's most shameful decisions. With Justice Kavanaugh on the Supreme Court, we have confidence that that day is soon at hand.[4]

Despite the optimism from the pro-life community, the litigators who brought the first seven cases involving abortion to the Supreme Court after Justice Kavanaugh's confirmation seemed to believe that the new conservative majority would not immediately overrule *Roe* and its progeny

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[1] Christal Hayes et al., *Brett Kavanaugh Sworn in as Supreme Court Justice, Cementing Conservative Control*, USA TODAY, https://www.usatoday.com/story/news/politics/2018/10/06/brett-kavanaugh-senate-confirmation-final-vote-supreme-court/1538964002/ (Oct. 6, 2018, 7:54 PM).

[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992). *See* Daniel Arkin, *Brett Kavanaugh Addressed Roe v. Wade in Speech Last Year*, NBC NEWS, https://www.nbcnews.com/politics/supreme-court/brett-kavanaugh-addressed-roe-v-wade-speech-last-year-n890991 (July 12, 2018, 3:57 PM) (explaining that Kavanaugh could provide the vote conservatives need to overturn the abortion cases).

[4] *Catherine Glenn Foster on Kavanaugh Confirmation*, AMS. UNITED FOR LIFE (Oct. 6, 2018), https://aul.org/2018/10/06/statement-on-brett-kavanaughs-confirmation-to-the-supreme-court.

but would rather chip away at it gradually. However, the Court's decisions in each of those cases, especially in *June Medical Services L.L.C. v. Russo*,[5] have proven the opposite to be true. In seven out of seven cases, the Court has declined to take up the calls to fight abortion in incremental ways.[6] Since the incrementalist approach has not worked, pro-life advocates should consider another approach: a direct assault on *Roe* and *Casey*. In light of the views of the six conservatives on the Court and the Court's decisions in those seven cases, the justices may have rejected the incrementalist approach not because it was too bold, but because it was too weak.

Part I of this Article examines the pro-life petitions that advocates brought before the Court from Justice Kavanaugh's confirmation until the Court granted certiorari in *June Medical*. Part II analyzes the opinions in *June Medical* of the five conservative justices. Part III analyzes events after *June Medical*, which includes the confirmation of Justice Amy Coney Barrett. Finally, Part IV argues that the best way to fight for life is to directly attack *Roe* and *Casey* because the justices are open to such a challenge.

I. PRO-LIFE LITIGATION AT THE SUPREME COURT AFTER JUSTICE KAVANAUGH'S CONFIRMATION

Between the time of Justice Kavanaugh's confirmation and its decision in *June Medical*, the Court ruled on four petitions for a writ of certiorari in cases involving abortion.[7] The Court's decision not to take those cases has provided an opportunity for pro-life litigators to learn what the justices do not find persuasive. Consequently, I will examine these four cases before addressing the Court's decision in *June Medical*.

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[5] 140 S. Ct. 2103, 2133 (2020) (holding an abortion-restricting law unconstitutional, thus keeping access to abortion services open for women in Louisiana).

[6] Planned Parenthood of Kan. & Mid-Mo. v. Andersen, 882 F.3d 1205 (10th Cir.), *cert. denied*, 139 S. Ct. 638 (2018); Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780, 1782 (2019) (highlighting the Court's denial of certiorari with respect to the selective abortion question); Planned Parenthood of Gulf Coast, Inc. v. Gee, 862 F.3d 445 (5th Cir. 2017), *cert. denied*, 139 S. Ct. 408 (2018); W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018), *cert. denied sub nom.* Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606 (2019); FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 10 (2020) (showing the Court's refusal to rule on an application for stay of a nationwide preliminary injunction preventing the FDA from enforcing safety requirements for dispensing Mifeprex, an abortion drug, for the pendency of the COVID-19 pandemic); Planned Parenthood S. Atl. v. Baker, 941 F.3d 687 (4th Cir. 2019), *cert. denied*, 141 S. Ct. 550 (2020); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (holding an abortion regulating act unconstitutional).

[7] *Andersen*, 882 F.3d 1205, *cert. denied*, 139 S. Ct. 638; *Gee*, 862 F.3d 445, *cert. denied*, 139 S. Ct. 408; *Williamson*, 900 F.3d 1310, *cert. denied sub nom. Harris*, 139 S. Ct. 2606; *Box*, 139 S. Ct. at 1782 (denying certiorari as to the selective abortion question presented); *June Medical*, 140 S. Ct. 2103.

A. The First Cases: Planned Parenthood and Medicaid

When Justice Kavanaugh took his seat on the Court, two certiorari petitions involving abortion were already pending.[8] In these cases, the petitioners asked the Supreme Court to consider whether the federal Medicaid statute created a private right of action "to challenge the merits of a state's disqualification of a Medicaid provider."[9] These cases arose after several states found that Planned Parenthood had "engaged in 'the illegal sale of fetal organs' and 'fraudulent billing practices,' and thus removed Planned Parenthood as a state Medicaid provider."[10] Abortion providers in several states sued, but the states argued that federal law did not create a private right of action allowing them to sue.[11] Louisiana and Kansas asked the Supreme Court to decide the matter, noting that there was a split among the federal circuits as to that question.[12]

Nearly two months after Justice Kavanaugh was confirmed, the Court voted 6-3 to deny the petitions in both *Gee v. Planned Parenthood of Gulf Coast, Inc.*, and *Andersen v. Planned Parenthood of Kansas & Mid-Missouri*.[13] In both cases, Chief Justice Roberts and Justice Kavanaugh joined the liberal bloc of the Court, voting to deny the petitions over the dissents of Justices Thomas, Alito, and Gorsuch.[14] Justice Thomas, joined by the other dissenting justices, argued that the Court should have granted certiorari because of the circuit split, the importance of the issues, and because he believed the Court was responsible for causing the confusion.[15] After arguing that the Court should have resolved the matter, Justice Thomas postulated:

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[8] S.M., *Why Did Justice Kavanaugh Take a Pass on Two Planned Parenthood Cases?*, ECONOMIST (Dec. 12, 2018), https://www.economist.com/democracy-in-america/2018/12/12/why-did-justice-kavanaugh-take-a-pass-on-two-planned-parenthood-cases; Petition for Writ of Certiorari, Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408 (2018) (No. 17-1492); Petition for Writ of Certiorari, Andersen v. Planned Parenthood of Kan. & Mid-Mo., 139 S. Ct. 638 (2018) (No. 17-1340).

[9] Petition for Writ of Certiorari, *Gee*, *supra* note 8, at i; *accord* Petition for Writ of Certiorari, *Andersen*, *supra* note 8, at i.

[10] *Gee*, 139 S. Ct. at 410 (Thomas, J., dissenting) (quoting Planned Parenthood of Kan. v. Andersen, 882 F.3d 1205, 1239 n.2 (10th Cir. 2018) (Bacharach, J., concurring in part and dissenting in part)).

[11] Petition for Writ of Certiorari, *Gee*, *supra* note 8, at 9, 23–24; Petition for Writ of Certiorari, *Andersen*, *supra* note 8, at 10–12.

[12] Petition for Writ of Certiorari, *Gee*, *supra* note 8, at 14; Petition for Writ of Certiorari, *Andersen*, *supra* note 8, at 18–19.

[13] *Gee*, 139 S. Ct. at 408; *Andersen*, 139 S. Ct. at 638.

[14] *Gee*, 139 S. Ct. at 408; *Andersen*, 139 S. Ct. at 638; Ariane de Vogue, *Supreme Court Sides with Planned Parenthood in Funding Fight*, CNN, https://www.cnn.com/2018/12/10/politics/supreme-court-planned-parenthood-abortion/index.html (Dec. 10, 2018, 4:05 PM).

[15] *Gee*, 139 S. Ct. at 408–09 (Thomas, J., dissenting).

> So what explains the Court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named "Planned Parenthood." That makes the Court's decision particularly troubling, as the question presented has nothing to do with abortion. It is true that these particular cases arose after several States alleged that Planned Parenthood affiliates had, among other things, engaged in "the illegal sale of fetal organs" and "fraudulent billing practices," and thus removed Planned Parenthood as a state Medicaid provider. But these cases are not about abortion rights. They are about private rights of action under the Medicaid Act. Resolving the question presented here would not even affect Planned Parenthood's ability to challenge the States' decisions; it concerns only the rights of individual Medicaid patients to bring their own suits.
>
> Some tenuous connection to a politically fraught issue does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background. The Framers gave us lifetime tenure to promote "that independent spirit in the judges which must be essential to the faithful performance" of the courts' role as "bulwarks of a limited Constitution," unaffected by fleeting "mischiefs." We are not "to consult popularity," but instead to rely on "nothing . . . but the Constitution and the laws."[16]

As Justice Thomas observed, this case was not about abortion *per se*.[17] However, if the Court had granted certiorari and ruled that there was no private right of action, then it would have hurt the abortion industry (especially Planned Parenthood). Chief Justice Roberts may have joined the liberals in denying certiorari in order to protect the Court's image, as he has been accused of doing before.[18] Since it takes four votes to grant certiorari, Justice Kavanaugh may have voted to deny certiorari after realizing that Roberts would not have joined the conservative bloc. In any case, the Court denied the first chance it had to take a case involving abortion after Kavanaugh joined the bench.

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[16] *Id.* at 410 (first quoting Planned Parenthood of Kan. & Mid-Mo. v. Andersen, 882 F.3d 1205, 1239 n.2 (10th Cir. 2018) (Bacharach, J., concurring in part and dissenting in part); and then quoting THE FEDERALIST No. 78, at 526–28 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

[17] *Id.*

[18] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 162–63 (2019).

B. Abortion, Eugenics, and Fetal Remains

Six days after Justice Kavanaugh's confirmation, the State of Indiana asked the Supreme Court to take an abortion case in *Box v. Planned Parenthood of Indiana & Kentucky*.[19] In this case, the State of Indiana passed a law that (1) barred abortions on the basis of race, sex, or disability and (2) altered the way in which abortion providers had to dispose of the bodies of the aborted babies.[20] After the Seventh Circuit declared both provisions unconstitutional,[21] Indiana petitioned the Supreme Court for certiorari.[22] However, in its certiorari petition, Indiana explicitly noted that it was not challenging the Court's abortion jurisprudence under *Roe* and *Casey*.[23] Fourteen amicus curiae briefs were filed supporting Indiana's petition.[24] However, out of all these amicus briefs, only three of them urged the Court to reconsider its abortion jurisprudence.[25]

In a summary decision, the Court upheld the part of the Indiana law governing the disposal of the babies' bodies,[26] but it denied certiorari as to the other issue because there had not been adequate time for the lower courts to address the constitutionality of prohibiting abortions on the basis of race, sex, or disability.[27] However, at the end of the opinion, the Court stated: "We reiterate that, in challenging this provision, respondents have never argued that Indiana's law imposes an undue burden on a woman's right to obtain an abortion. This case, as litigated, therefore does not implicate our cases applying the undue burden test to abortion regulations."[28]

Justice Thomas issued a lengthy concurrence, agreeing that it was not yet time to consider the other question presented, but arguing that

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[19] 139 S. Ct. 1780 (2019) (per curiam). The petition for a writ of certiorari in this case was filed on October 12, 2018. Petition for Writ of Certiorari at i, Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2018) (No. 18-483).

[20] *Box*, 139 S. Ct. at 1781.

[21] *Id.*

[22] *Id.*

[23] Petition for Writ of Certiorari at 26, 29–30, *Box*, 139 S. Ct. 1780 (No. 18-483).

[24] *Box v. Planned Parenthood of Indiana & Kentucky*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-483.html (last visited Jan. 24, 2021).

[25] *See* Brief for *Amicus Curiae* Susan B. Anthony List in Support of Petitioners at 15, *Box*, 139 S. Ct. 1780 (No. 18-483) (urging the Court to reconsider the viability rule); Brief *Amicus Curiae* of Pro-Life Legal Def. Fund et al. in Support of Petitioners at 3, 12, 21, *Box*, 139 S. Ct. 1780 (No. 18-483) (urging the Court to reconsider its pro-abortion policies); Brief *Amici Curiae* of Ethics & Religious Liberty Comm'n of the S. Baptist Convention et al. in support of the Petitioners at 10, *Box*, 139 S. Ct. 1780 (No. 18-483) (urging the Court to reconsider *Roe* and *Casey*).

[26] *Box*, 139 S. Ct. at 1781.

[27] *Id.* at 1782.

[28] *Id.*

abortion has serious potential to be a means of eugenics.[29] Towards the end of his opinion, Justice Thomas stated:

> Although the Court declines to wade into these issues today, we cannot avoid them forever. Having created the constitutional right to an abortion, this Court is dutybound to address its scope. In that regard, it is easy to understand why the District Court and the Seventh Circuit looked to *Casey* to resolve a question it did not address. Where else could they turn? The Constitution itself is silent on abortion.[30]

Of the nine members of the Court, Justice Thomas alone argued that the Court invented the right to abortion and that the Court needed to face the consequences of its creation at some point.[31] This does not necessarily mean that the other conservative justices disagreed with him, but only that they chose not to speak at this point. After all, since the petitioners did not ask the Court to revisit *Roe* or *Casey*, the other justices may have felt that they should not do so at this time.

C. Dismemberment Abortion

The next petition presented to the Court involving abortion was in *Harris v. West Alabama Women's Center*,[32] which was filed on December 20, 2018.[33] The State of Alabama had passed a law in 2016 prohibiting "dismemberment abortion[s]," which prevented

> abortion providers from purposefully "dismember[ing] a living unborn child and extract[ing] him or her one piece at a time from the uterus through use of clamps, grasping forceps, tongs, scissors, or similar instruments" that "slice, crush, or grasp . . . a portion of the unborn child's body to cut or rip it off."[34]

According to the abortion providers challenging this law, this method of abortion accounted for 99% of abortions after fifteen weeks.[35]

Chief Judge Carnes, writing for the Eleventh Circuit, apparently had misgivings about the Supreme Court's abortion jurisprudence, opening

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[29] *Id.* at 1784 (Thomas, J., concurring).

[30] *Id.* at 1793.

[31] *Id.*

[32] 139 S. Ct. 2606 (2019).

[33] Petition for Writ of Certiorari at i, *Harris*, 139 S. Ct. 2606 (No. 18-837).

[34] *Harris*, 139 S. Ct. at 2606–07 (Thomas, J., concurring) (alterations in original) (first quoting ALA. CODE § 26-23G-3(a) (Westlaw through Act 2020-206); and then quoting ALA. CODE § 26-23G-2(3) (Westlaw through Act 2021-118)).

[35] *Id.* at 2607.

the court's opinion as follows: "Some Supreme Court Justices have been of the view that there is constitutional law and then there is the aberration of constitutional law relating to abortion. If so, what we must apply here is the aberration."[36] Judge Dubina reluctantly concurred, stating:

> I concur fully in Chief Judge Carnes's opinion because it correctly characterizes the record in this case, and it correctly analyzes the law. I write separately to agree on record with Justice Thomas's concurring opinion in *Gonzales v. Carhart*, with whom then Justice Scalia also joined. Specifically, Justice Thomas wrote, "I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and *Roe v. Wade*, has no basis in the Constitution." The problem I have, as noted in the Chief Judge's opinion, is that I am not on the Supreme Court, and as a federal appellate judge, I am bound by my oath to follow all of the Supreme Court's precedents, whether I agree with them or not.[37]

The State of Alabama filed its petition for a writ of certiorari on December 20, 2018, over two months after Justice Kavanaugh was confirmed.[38] The question presented was: "Whether a state ban on dismemberment abortions is unconstitutional where there is a reasonable medical debate that alternatives to the banned procedure are safe?"[39] Alabama's theory was that the dismemberment abortion ban was comparable to the partial-birth abortion ban that the Court upheld in *Gonzalez v. Carhart*.[40] However, the State explicitly said that it was not challenging the validity of the Court's abortion decisions, stating: "Against this backdrop, this petition *does not* ask the Court to overturn *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Instead, Alabama asks only that the Court confirm the continuing validity of *Gonzales* . . .

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[36] W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310, 1314 (11th Cir. 2018) (footnote omitted).

[37] *Id.* at 1330 (Dubina, J., concurring) (citations omitted) (quoting Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring)). Three Alabama pro-life organizations had submitted an amicus brief in that case arguing that a federal appellate judge's duty was ultimately to the Constitution and not to Supreme Court precedent if the two cannot not be reconciled. *See* Brief of Amici Curiae Found. for Moral L. et al. in Support of Petitioners at 13–20, *W. Ala. Women's Ctr.*, 900 F.3d 1310 (No. 17-15208) (advocating that Supreme Court precedent should be disregarded if it cannot be reconciled with the Constitution).

[38] Petition for Writ of Certiorari, *supra* note 33.

[39] *Id.* at i.

[40] *Id.* at 14; *Gonzales*, 550 U.S. at 168.

."[41] Six amicus briefs were filed in support of Alabama's petition.[42] However, out of all of those briefs, only one explicitly called on the Court to reconsider its abortion precedents.[43]

On June 28, 2019, the Court denied the petition.[44] Justice Thomas issued a concurring opinion, noting that the Alabama law in question did not prohibit abortions altogether but only this specific method of abortion, which he described as "particularly gruesome."[45] He then declared, "The notion that anything in the Constitution prevents States from passing laws prohibiting the dismembering of a living child is implausible."[46] However, Justice Thomas noted that the courts below had held that this law placed an "undue burden" on the right of a woman to get an abortion in the second trimester.[47] Justice Thomas therefore attacked the undue burden standard as the real problem in this case, stating:

> This case serves as a stark reminder that our abortion jurisprudence has spiraled out of control. Earlier this Term, we were confronted with lower court decisions *requiring* States to allow abortions based solely on the race, sex, or disability of the child. Today, we are confronted with decisions *requiring* States to allow abortion via live dismemberment. None of these decisions is supported by the text of the Constitution. Although this case does not present the opportunity to address our demonstrably erroneous "undue burden" standard, we cannot continue blinking the reality of what this Court has wrought.[48]

If Justice Thomas believed the Constitution does not prohibit a legislature from prohibiting the dismemberment of a living child, then why did he concur in denying certiorari? The answer appears in the last line: "this case does not present the opportunity to address our demonstrably erroneous 'undue burden' standard."[49] On the one hand, it is odd for Justice Thomas to make such an assertion, because eleven days earlier he wrote that "if the Court encounters a decision that is

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[41] Petition for Writ of Certiorari, *supra* note 33, at 4 (emphasis added) (citation omitted).

[42] *Harris v. West Alabama Women's Center*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-837.html (last visited Jan. 25, 2021).

[43] Brief of Amici Curiae Found. for Moral L. et al. in Support of Petitioners, *Harris*, 139 S. Ct. 2606 (No. 18-837).

[44] *Harris*, 139 S. Ct. at 2606.

[45] *Id.* at 2607.

[46] *Id.*

[47] *Id.*

[48] *Id.* (citations omitted).

[49] *Id.*

demonstrably erroneous— *i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling the precedent."[50] If that is true, then why did he not vote to grant certiorari and use this case to address the undue burden standard?

The answer appears to be that certiorari is a matter of the Court's discretion, not a matter of right.[51] If the Court would have granted certiorari, then Justice Thomas probably would have voted to reverse the Eleventh Circuit's judgment because the Court's abortion decisions were unconstitutional.[52] But because the Court had not yet granted certiorari, he had discretion on how to cast his vote. Thus, if Justice Thomas believed so strongly that the Court's abortion jurisprudence was erroneous and should be corrected immediately, then why would he say that this case did not present the opportunity to address the underlying problem? The most probable reason is this: the petitioner did not ask the Court to address it.[53] Even if Justice Thomas would have addressed this issue sua sponte, his colleagues might not have done the same.

Thus, by denying certiorari but issuing this important concurrence, Justice Thomas was giving pro-life advocates a hint on what the Court would find persuasive: a direct assault on the Court's abortion jurisprudence. Let us not forget that Justice Thomas has worked on the Court with his colleagues for many years and probably has discussed numerous abortion cases with them. He knows the minds of the other conservative justices. Thus, we should not view Justice Thomas's concurrence as anything less than a hint as to the way pro-life advocates should fight for life under the new Court.

II. *JUNE MEDICAL SERVICES. L.L.C. V. RUSSO*

After declining to take *Gee, Andersen*, *Harris*, or the weightier question in *Box*, the Court finally took a surprising abortion case after Justice Kavanaugh's confirmation: *June Medical Services L.L.C. v.*

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[50] Gamble v. U.S., 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring). *Harris* was decided on June 28, 2019, and *Gamble* was decided on June 17, 2019. *Id.* at 1960; *Harris*, 139 S. Ct. at 2606.

[51] SUP. CT. R. 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion.").

[52] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting) ("I remain fundamentally opposed to the Court's abortion jurisprudence."); Gonzalez v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (citation omitted) (noting "that the Court's abortion jurisprudence . . . has no basis in the Constitution"); Stenberg v. Carhart, 530 U.S. 914, 1020 (2000) (Thomas, J., dissenting) ("[T]oday we are told that 30 States are prohibited from banning one rarely used form of abortion that they believe to border on infanticide. It is clear that the Constitution does not compel this result.").

[53] Petition for Writ of Certiorari, *supra* note 33, at 4.

Russo.[54] In this case, the U.S. Court of Appeals for the Fifth Circuit upheld a Louisiana law that required abortion providers to have admitting privileges at a hospital located within thirty miles of the abortion clinic where they work.[55] On January 25, 2019, the abortion clinic challenging the law petitioned the Supreme Court for a stay pending the filing and disposition of a petition for a writ of certiorari.[56] Specifically, the petitioners claimed that the Fifth Circuit's decision was in "direct conflict" with *Whole Woman's Health v. Hellerstedt*.[57] After the application was referred to the Court, the Justices voted 5-4 to grant the stay, with Chief Justice Roberts joining the Court's liberal bloc.[58]

June Medical Services, L.L.C. filed its petition for a writ of certiorari on April 17, 2019.[59] June Medical's certiorari petition presented one question: "Whether the Fifth Circuit's decision upholding Louisiana's law requiring physicians who perform abortions to have admitting privileges at a local hospital conflicts with this Court's binding precedent in *Whole Woman's Health*."[60] The Louisiana Secretary for the Department of Health and Hospitals filed a cross-petition for a writ of certiorari, asking the Court to consider whether abortion clinics could be "presumed to have third-party standing to challenge health and safety regulations on behalf of their patients."[61] Since many challenges to state abortion laws were brought not by the patients but by the abortion providers themselves,[62] holding that abortion providers cannot be presumed to have third-party standing would have dealt a significant blow to the abortion industry. However, the Secretary did not ask the Supreme Court to revisit *Roe*, *Casey*, or even *Whole Woman's Health*. Instead, the Secretary merely asked the Court to review its precedents holding that abortion providers have third-party standing to bring a claim on behalf of their patients.[63]

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[54] 140 S. Ct. 2103 (2020).

[55] June Med. Servs., L.L.C v. Gee, 905 F.3d 787, 790–91, 815 (5th Cir. 2018), *rev'd sub nom*. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

[56] Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, June Med. Servs., L.L.C. v. Gee, 139 S. Ct. 663 (2019) (No. 18A774).

[57] *Id.* at 1; Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[58] *June Med.*, 139 S. Ct. 663; Dahlia Lithwick, *No, John Roberts Isn't a Liberal Now*, SLATE (Feb. 20, 2019, 11:50 AM), https://slate.com/news-and-politics/2019/02/john-roberts-liberal-abortion-june-medical-services.html. Justice Kavanaugh issued a dissenting opinion explaining why he thought a stay should not be granted. *June Med.*, 139 S. Ct. at 663–65 (Kavanaugh, J., dissenting).

[59] Petition for Writ of Certiorari, *June Med.*, 140 S. Ct. 35 (No. 18-1323).

[60] *Id.* at i.

[61] Conditional Cross-Petition at i, *June Med.*, 140 S. Ct. 35 (No. 18-1323).

[62] *See, e.g.*, *Hellerstedt*, 136 S. Ct. at 2300 (showing past challenges to state abortion laws that had been brought by abortion providers); Gonzalez v. Carhart, 550 U.S. 124, 133 (2007) (showing that doctors who performed abortions were bringing suit); Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992) (showing that petitioners were five abortion clinics and one physician who provided abortion services).

[63] Conditional Cross-Petition at i, 25–26 n.16, *June Med.*, 140 S. Ct. 35 (No. 18-1323).

After the Supreme Court granted both petitions for certiorari, the Secretary's opening brief recognized that there might be a discrepancy between *Whole Woman's Health* and *Casey* and briefly asked the Court to overrule *Whole Woman's Health* if it was inconsistent with *Casey*.[64] However, there was no meaningful attempt to challenge the portion of *Roe* that recognized a constitutional right to abortion or *Casey*'s undue burden standard. Forty-two amicus briefs were filed at the merits stage supporting the Secretary.[65] But out of these forty-two briefs, only ten called on the Court to reconsider *Roe* or *Casey*.[66]

At oral argument, *Roe* was not even mentioned.[67] Justice Breyer mentioned *Casey* briefly, arguing that if the Court reconsidered a precedent like *Casey*, then there was no reason the Court should not reexamine precedents like *Marbury v. Madison*[68] as well.[69] The United States Deputy Solicitor General, participating in oral argument as amicus curiae, responded that the Court did not need to go back to revisit *Marbury*, but just needed to reconsider the third-party standing rules.[70] Chief Justice Roberts then asked him a question that changed the subject before he could elaborate further.[71] Thus, by the time oral argument

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[64] *June Med.*, 140 S. Ct. at 2117; Brief for the Respondent/Cross-Petitioner at 67, *June Med.*, 140 S. Ct. 2103 (No. 18-1323). Rebekah Gee, Secretary of the Louisiana Department of Health and Hospitals, resigned and was replaced by Stephen Russo, who took over as respondent and cross-petitioner. Letter from Elizabeth B. Murrill, La. Solic. Gen., La. DOJ, to Scott Harris, Clerk, Sup. Ct. of the U.S. (Feb. 6, 2020).

[65] *See June Medical Services LLC v. Russo*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/june-medical-services-llc-v-russo (last visited Apr. 3, 2021) (listing amicus briefs filed in support of the Secretary and highlighting them in dark green).

[66] The following amicus briefs in *June Medical* made this point: Brief of Amicus Curiae Found. for Moral L. in Support of Rebekah Gee at 3–4, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); *Amicus Curiae* Brief of Eagle F. Educ. & Legal Def. Fund in Support of Dr. Rebekah Gee at 29, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); *Amicus Curiae* Brief of Melinda Thybault et al. in Support of Respondent & Cross-Petitioner at 5, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief of Amici Curiae Ethics & Religious Liberty Comm'n of the S. Baptist Conf. & Lutheran Church-Missouri Synod in Support of Respondent/Cross-Petitioner at 14, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief *Amicus Curiae* of Pro-Life Legal Def. Fund et al. in Support of Rebekah Gee at 19–20, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief for *Amicus Curiae* Right to Life of Mich. Supporting Respondent-Cross-Petitioner at 15, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief *Amicus Curiae* of Ams. United for Life in Support of Respondent & Cross-Petitioner at 2–3, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief *Amici Curiae* of Billy Graham Evangelistic Ass'n and Pac. Just. Inst. in Support of the Respondent at 4, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief of *Amicus Curiae* Ill. Right to Life Supporting Respondent-Cross-Petitioner at 25, *June Med.*, 140 S. Ct. 2103 (No. 18-1323); Brief of *Amicus Curiae* of Int'l Conf. of Evangelical Chaplain Endorsers in Support of the Respondent at 31, *June Med.*, 140 S. Ct. 2103 (No. 18-1323).

[67] *See* Transcript of Oral Argument at 76, *June Med.*, 140 S. Ct. 2103 (No. 18-1323) (failing to even list *Roe* in the transcript's index).

[68] 5 U.S. 137 (1803).

[69] Transcript of Oral Argument, *supra* note 67, at 61–62.

[70] *Id.* at 62–63.

[71] *Id.* at 63.

concluded, the parties had made no attempt to attack *Roe* or *Casey*, and most of the pro-life amici passed on that issue as well.

On June 29, 2020, the Court released its opinion, reversing the decision of the Fifth Circuit in a five-four vote with Chief Justice Roberts joining the liberals.[72] Justice Breyer wrote the plurality opinion, which was joined by Justices Ginsburg, Sotomayor, and Kagan.[73] Chief Justice Roberts did not join the plurality opinion but concurred in the judgment.[74] Justices Thomas, Alito, Gorsuch, and Kavanaugh each filed dissenting opinions.[75]

The vote that surprised many was Chief Justice Roberts's concurrence in the judgment.[76] In his concurrence, the Chief Justice said, "I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."[77] Chief Justice Roberts summarized his position as follows: "The legal doctrine of [stare decisis] requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore[,] Louisiana's law cannot stand under our precedents."[78]

Consistent with some of his past writings, Chief Justice Roberts rejected the idea that precedent could never be overturned, stating that "[s]tare decisis is not an 'inexorable command.'"[79] Chief Justice Roberts therefore does not appear to be of the same mindset as the plurality in *Casey*, which refused to overrule *Roe* primarily because it was precedent.[80] However, he then noted, "Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana's law. Neither party has asked us to reassess the constitutional validity of that standard."[81] Consequently, Chief Justice Roberts applied the undue burden standard and found that

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[72] *June Med.*, 140 S. Ct. at 2133.

[73] *Id.* at 2112.

[74] *Id.* at 2133.

[75] *Id.* at 2142, 2153, 2171, 2182.

[76] Felicia Kornbluh, *Still Anti-Abortion, but Can't Swallow Alternative Facts*, AM. PROSPECT (June 30, 2020), https://prospect.org/justice/supreme-court-john-roberts-june-medical-services-abortion-decision/.

[77] *June Med.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring in judgment).

[78] *Id.* at 2134.

[79] *Id.* (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020)); *see also* Citizens United v. FEC, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (emphasis omitted) (stating that stare decisis is not irrevocable).

[80] *See* Planned Parenthood v. Casey, 505 U.S. 833, 845–46, 864–65 (1992) (discussing the alleged damage to the Court's legitimacy if it admitted it made a mistake).

[81] *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring in judgment) (citation omitted).

Louisiana law violated *Casey* just as the Texas law had done in *Whole Woman's Health*.[82]

Justice Alito wrote the lead dissent.[83] In the portion of his dissent that was joined by Justices Thomas, Gorsuch, and Kavanaugh, Justice Alito wrote, "Unless *Casey* is reexamined—and Louisiana has not asked us to do that—the test it adopted should remain the governing standard."[84] In his dissent, Justice Gorsuch criticized the Court for not following traditional rules of adjudication, noting, "In truth, *Roe v. Wade* is not even at issue here. The real question we face concerns our willingness to follow the traditional constraints of the judicial process when a case touching on abortion enters the courtroom."[85] Likewise, Justice Kavanaugh noted in his dissent: "The State has not asked the Court to depart from the *Casey* standard."[86] Only Justice Thomas, after noting the Court did not have jurisdiction to decide this matter because the plaintiffs lacked standing,[87] stated that "today's decision is wrong for a far simpler reason: The Constitution does not constrain the States' ability to regulate or even prohibit abortion. . . . As the origins of this jurisprudence readily demonstrate, the putative right to abortion is a creation that should be undone."[88]

III. EVENTS FOLLOWING *JUNE MEDICAL*

A. The Court Declines to Act in Two Cases

At the beginning of its October 2020 term, the Court ruled on two abortion cases in a way that was consistent with the approach described in Parts I and II. On August 26, 2020, the Food and Drug Administration applied for a stay of a nationwide injunction in *FDA v. American College of Obstetricians & Gynecologists*.[89] In that case, a federal district court in Maryland enjoined "the Food and Drug Administration from enforcing in-person dispensation requirements for the drug mifepristone during the pendency of the public health emergency," referring to COVID-19.[90] The

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[82] *Id.* at 2138–39.

[83] *Id.* at 2153 (Alito, J., dissenting).

[84] *Id.* at 2154. Justice Alito ultimately concluded that it did not appear that the abortion providers had third-party standing and would have remanded the case to the trial court to examine this issue before proceeding any further. *Id.* at 2153–54.

[85] *Id.* at 2171 (Gorsuch, J., dissenting) (citation omitted).

[86] *Id.* at 2182 n.1 (Kavanaugh, J., dissenting).

[87] *Id.* at 2146 (Thomas, J., dissenting).

[88] *Id.* at 2149.

[89] 141 S. Ct. 10, 10 (2020) (mem.); Application for a Stay of the Injunction Issued by the U.S. Dist. Ct. for the Dist. of Md., *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 10 (No. 20A34).

[90] *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. at 10–11.

Court ruled that "a more comprehensive record would aid this Court's review."[91] Consequently, it held the government's application in abeyance while the district court considered a motion to dissolve the injunction on the ground that the circumstances had changed.[92] The government did not ask the Court to overrule *Roe* or any other abortion precedent,[93] but that is no surprise, given that it was asking merely for a stay. Justices Alito and Thomas dissented, arguing that in practical effect the Court's order was a denial of the application,[94] and that the Court should have granted a stay.[95]

Less than one week later, the Court denied certiorari in *Baker v. Planned Parenthood South Atlantic*.[96] In that case, the Fourth Circuit joined five other circuits in holding that Medicaid recipients have a private right of action if a state determines that Planned Parenthood is not a qualified medical provider.[97] Like the petitioners in *Andersen* and *Gee*, the petitioner in *Baker* asked the Court to resolve the circuit split and clarify the proper framework for determining whether a statute creates a private right of action.[98] The petitioner in *Baker* did not ask the Court to overrule any of its abortion precedents,[99] but again, this is unsurprising since the case was more about Medicaid than about abortion. On October 13, 2020, the Court denied certiorari, this time without any dissenting votes.[100]

B. Justice Barrett Replaces Justice Ginsburg

During the time that this article was being written, President Trump nominated Judge Amy Coney Barrett of the Seventh Circuit to replace the late Justice Ruth Bader Ginsburg.[101] The Senate confirmed her on October

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[91] *Id.* at 11.

[92] *Id.*

[93] *See* Application for a Stay of the Injunction Issued by the U.S. Dist. Ct. for the Dist. of Md., *supra* note 89, at 1–5 (showing that the government did not include any requests to overrule *Roe* or other abortion precedents in its application).

[94] *Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. at 11.

[95] *Id.* While this article was being edited, this case came back to the Supreme Court and the Court granted a stay. FDA v. Am. Coll. of Obstetricians & Gynecologists, 141 S. Ct. 578, 578 (2021). This could be counted as a small victory for the pro-life cause. However, the abortion pill could still be obtained through traditional means.

[96] 141 S. Ct. 550, 550 (2020).

[97] Planned Parenthood S. Atl. v. Baker, 941 F.3d 687, 690, 696 (4th Cir. 2019); *see also* Petition for Writ of Certiorari at 11, *Baker*, 141 S. Ct. 550 (No. 19-1186) (describing the circuit split).

[98] Petition for Writ of Certiorari, *supra* note 97, at 11–12; Petition for Writ of Certiorari, *Andersen*, *supra* note 8, at 3.

[99] Petition for Writ of Certiorari, *supra* note 97, at 11–12.

[100] *Baker*, 141 S. Ct. at 550.

[101] Jimmy Hoover, *Trump Chooses Amy Coney Barrett for Ginsburg's Seat*, LAW360 (Sept. 26, 2020, 5:03 PM), https://www.law360.com/articles/1059159/trump-chooses-amy-coney-barrett-for-ginsburg-s-seat.

26, 2020, and Justice Thomas administered the oath of office to her on the same day.[102] Justice Barrett had clerked for Justice Antonin Scalia and also served as a professor at the University of Notre Dame School of Law.[103] Conservatives praised her nomination, partly because as an originalist she probably would be opposed to *Roe* and its progeny.[104]

IV. DIRECT ASSAULT ON *ROE* AND *CASEY*

Thus, after almost two full terms of Justice Kavanaugh having replaced Justice Kennedy, not a single party to a case has asked the Court to revisit *Roe* or *Casey*. The closest we have gotten to a direct challenge to any of the Court's abortion decisions was the Secretary in *June Medical* asking the Court to overrule *Whole Woman's Health* inasmuch as it is inconsistent with *Casey*.[105] But after nearly two years, nobody (with the limited exception of several amici)[106] has asked the Court to throw out its abortion jurisprudence.

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[102] Grace Segers, *Amy Coney Barrett Sworn in as Newest Supreme Court Justice*, CBS NEWS, https://www.cbsnews.com/news/amy-coney-barrett-supreme-court-justice-sworn-in (Oct. 27, 2020, 11:18 AM); Maanvi Singh et al., *Amy Coney Barrett Is Sworn in as Supreme Court Justice - as It Happened*, GUARDIAN, https://www.theguardian.com/us-news/live/2020/oct/26/trump-biden-election-latest-updates-covid-pence-amy-coney-barrett (Jan. 20, 2021).

[103] Hoover, *supra* note 101.

[104] *See, e.g.*, Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES, https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html (Oct. 26, 2020) (describing Judge Barrett as an originalist); Statement from Catherine Glenn Foster, President & CEO, Ams. United for Life (Sept. 19, 2020), https://aul.org/2020/09/19/americans-united-for-life-urges-the-president-to-nominate-judge-barret-to-the-supreme-court ("We are confident that if appointed to the Supreme Court, Judge Barrett would prove herself a trusted caretaker of the [c]onstitutional protections extended to every human person in America, including human lives in the womb.").

[105] Brief for the Respondent/Cross-Petitioner, *supra* note 64, at 67.

[106] *See supra* note 66 and accompanying text. In *June Medical*, I had the honor of submitting the amicus brief for the Foundation for Moral Law with my colleague, Dr. Martin Wishnatsky. Brief of Amicus Curiae Found. for Moral L. in Support of Rebekah Gee, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (No. 18–1323). Dr. Wishnatsky received his Ph.D. from Harvard and his Juris Doctorate from the Liberty University School of Law. Abby Tuomala & Jeff Tuomala, *Martin Wishnatsky Remembered*, LIBERTY U. SCH. L. (May 12, 2020), https://www.liberty.edu/law/news/martin-wishnatsky-remembered. Martin had been involved with Operation Rescue and had suffered jail time in order to save innocent lives. Sandra G. Boodman, *A Protester's Story*, WASH. POST (April 8, 1993), https://www.washingtonpost.com/archive/politics/1993/04/08/a-protesters-story/baa11ba2-19bd-4078-ad32-d0fb98c384a4/. When we submitted our brief in *June Medical*, Martin was fighting illness. Tuomala, *supra*. He passed away shortly after we submitted our brief. *Obituary for Martin Saul Wishnatsky*, PRATTVILLE MEM'L CHAPEL, https://www.prattvillememorial.com/obituaries/Martin-Wishnatsky/#!/Obituary (last visited Feb. 3, 2021). Among the amicus briefs in the *June Medical* merits stage, ours was the first to ask the Court to overrule *Roe* and its progeny. I am grateful to the Lord that He gave Martin,

To the credit of the pro-life advocates who have been counsel of record in the cases mentioned above, refraining from a direct attack on the Court's abortion jurisprudence was not an unreasonable strategy. With the lone exception of Justice Thomas,[107] none of the five conservative justices have said in his official capacity as a judge that *Roe* and its progeny should be overruled. Further, Chief Justice Roberts has made some key decisions departing from what conservatives expected of him.[108] Likewise, Justice Kavanaugh was not as bold in abortion cases as a judge on the D.C. Circuit as some pro-life organizations would have liked.[109] During his confirmation hearings, the issue of abortion was very contentious, even to the point of Republican Senator Susan Collins voting for him only because she believed he would not cast his vote to overrule *Roe*.[110] Thus, even if Justice Kavanaugh gave the Court a pro-life majority, it was reasonable to question how solid that majority really was.

But after two years, we have now seen how the Court reacted to the limited challenges in *Gee*, *Andersen*, *Box*, *Harris*, *June Medical*, *FDA*, and *Baker*. What we have learned is that the Court has declined to take the opportunity to address issues like whether Planned Parenthood should receive certain public funds, whether a state may ban a method of abortion that is equally as barbaric as partial-birth abortions, whether the State may prohibit abortions on the basis of disability, or whether abortion providers have third-party standing to raise claims on behalf of the mothers.[111] If the colloquial definition of insanity is doing the same thing

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who had done so much to fight for life, the chance to be one of the first lawyers to ask the Supreme Court to overrule *Roe* before he passed away. Brief of Amicus Curiae Found. for Moral L. in Support of Rebekah Gee, *June Med.*, *supra* at 17.

[107] *June Med.*, 140 S. Ct. at 2149 (2020) (Thomas, J., dissenting).

[108] *See, e.g.*, Josh Gerstein, *Conservatives Steamed at Chief Justice Roberts' Betrayal*, POLITICO, https://www.politico.com/story/2015/06/gop-conservatives-angry-supreme-court-chief-john-roberts-obamacare-119431 (June 25, 2015, 11:04 PM) (summarizing Republicans' reactions to Chief Justice Roberts's alignment with Democrat appointees).

[109] *See* Jane Coaston, *Why Social Conservatives Are Disappointed That Trump Picked Brett Kavanaugh*, VOX (July 10, 2018, 12:50 PM), https://www.vox.com/2018/7/10/17551502/kavanaugh-supreme-court-abortion-conservatives-gop (covering Republican skepticism of Justice Kavanaugh's willingness to overturn *Roe*).

[110] *See* Abigail Abrams, *Here's Sen. Susan Collins' Full Speech About Voting to Confirm Kavanaugh*, TIME (Oct. 5, 2018, 5:32 PM), https://time.com/5417444/susan-collins-kavanaugh-vote-transcript (recording Susan Collins's statements that she would vote based on who she believed would not overturn *Roe*).

[111] *See* Petition for Writ of Certiorari, *Andersen*, *supra* note 8, at i (questioning whether Congress "intended to create an implied private right of action to challenge a state's determination that a provider is not 'qualified' under the applicable state regulations" and therefore should not receive public funding); Andersen v. Planned Parenthood, 139 S. Ct. 638, 638 (denying certiorari); Box v. Planned Parenthood, 139 S. Ct. 1780, 1781–82 (denying certiorari to address abortions based on disability); Petition for Writ of Certiorari, *Harris*, *supra* note 33, at i (questioning dismemberment abortions); Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2606 (denying certiorari).

over and over while expecting a different result,[112] then one could say it would be insane to continue leading the fight for life with similar strategies.

What we have learned is this: five Justices still consider *Casey* the governing standard under the Court's abortion precedents;[113] nobody has asked them to reconsider it; and every attempt to attack abortion in smaller increments has failed.[114] We have been trying to cut limbs off the monster, and we have failed every time. Instead of repeating that tactic, I propose that we go for the head.

The basic rule of Supreme Court advocacy is the rule of five: in order to win, you need five votes.[115] Despite their repeated failures to rule in favor of life in the cases discussed above, five Supreme Court justices—namely Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh—have gone out of their way to say that no party has asked them to reconsider *Casey* yet.[116] Pro-life advocates know enough about their jurisprudence to know that they probably believe that *Roe* and *Casey* were wrongly decided. Consequently, this section examines the views of each of these five Justices and the views of Justice Barrett, discuss what they might find persuasive, and present a strategy for how to attack *Roe* and *Casey*.

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[112] This saying traditionally has been attributed to Albert Einstein, but there is no evidence that he ever said it. Christina Sterbenz, *12 Famous Quotes That Always Get Misattributed*, BUS. INSIDER (Oct. 7, 2013, 6:10 PM), https://www.businessinsider.com/misattributed-quotes-2013-10.

[113] Chief Justice Roberts's concurring opinion in *June Medical* is controlling under *Marks v. United States*, which held: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). Chief Justice Roberts rejected the plurality's approach to an expansive balancing test and restated the rule that *Casey* controls. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134–38 (Roberts, C.J., concurring in judgement). Thus, Chief Justice Roberts's opinion is controlling. *See also id.* at 2154 (Alito, J., dissenting) (joined by three other justices, and arguing that until *Casey* is reexamined, "the test it adopted should remain the governing standard").

[114] *But see supra* note 95 and accompanying text, noting one case decided while this article was being edited that could count as a very small victory for the pro-life cause.

[115] The phrase "Rule of Five" was coined by Justice Brennan, who claimed that one could accomplish anything with five votes. Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1159 (2013).

[116] *June Med.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring); *see id.* at 2154 (Alito, J., dissenting) (joined by three other justices in asserting that a reconsideration request of *Casey* has not been presented).

A. Chief Justice Roberts

Despite his disappointing concurrence in *June Medical*, Chief Justice Roberts had a good record in fighting for life before this. From 1989 through 1993, he served as Principal Deputy Solicitor General for the George H.W. Bush Administration.[117] During that time, he co-authored a brief in *Rust v. Sullivan* in which he went out of his way to argue that *Roe* was wrongly decided and should be overruled.[118] In *Rust*, recipients of certain Title X funds challenged regulations that the Department of Health and Human Services promulgated, which prevented the funds from being spent on family-planning programs involving abortion.[119] Although the question of whether *Roe* should be overruled was never presented, Roberts opened his brief with the following argument:

> Petitioners argue that the Secretary's regulations impermissibly burden the qualified right discerned in *Roe v. Wade*, 410 U.S. 113 (1973), to choose to have an abortion. *We continue to believe that Roe was wrongly decided and should be overruled*. As more fully explained in our briefs, filed as *amicus curiae*, in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); and *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court's conclusions in *Roe* that there is a fundamental right to an abortion and that government has no compelling interest in protecting prenatal human life throughout pregnancy *find no support in the text, structure, or history of the Constitution*. If *Roe* is overturned, petitioners' contention that the Title X regulations burden the right announced in *Roe* falls with it. But even under *Roe*'s strictures, the Title X regulations at issue do not violate due process.[120]

Note that Roberts and his co-authors went out of their way to argue that *Roe* was wrongly decided and should be overruled. While the Court

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[117] *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Jan. 24, 2021); Adam Nagourney, *George Bush, Who Steered Nation in Tumultuous Times, Is Dead at 94*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/2018/11/30/us/politics/george-hw-bush-dies.html.

[118] Brief for the Respondent, Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392), 1990 WL 10012655, at *13.

[119] *Rust*, 500 U.S. at 177–78.

[120] Brief for the Respondent, *supra* note 118, at *13 (emphasis added) (citation omitted).

ultimately declined to address that issue in *Rust*,[121] Roberts and his co-authors did not want to miss the chance to attack *Roe* directly. Asking the Court to overrule *Roe* in *Rust* was a long shot, but it was a chance that Roberts did not wish to ignore.

During his tenure as Deputy Solicitor General, Roberts again fought for life in *Bray v. Alexandria Women's Health Clinic*,[122] participating as amicus curiae in oral argument defending Operation Rescue.[123] Before Congress passed the Freedom of Access to Clinic Entrances Act,[124] members of Operation Rescue would engage in civil disobedience by sitting in front of the doors of abortion clinics, which would often lead to them being arrested and charged with trespassing.[125] In *Bray*, abortion providers in Alexandria, Virginia, sued Operation Rescue for conspiring to violate their civil rights under 42 U.S.C. § 1985.[126] Roberts participated in oral argument as amicus curiae for the United States defending Operation Rescue,[127] and the Court eventually ruled in Operation Rescue's favor.[128]

At the same time that the Court was considering *Bray*, the Justice Department took the unusual step of filing a brief in the United States District Court for the District of Kansas in another case involving Operation Rescue.[129] A report from the *Philadelphia Inquirer* claims that Roberts participated in getting the Justice Department to intervene in that case.[130] The district judge responded by going on national television and saying that "it's just ludicrous to believe that somehow our government puts an imprimatur and agrees" to Operation Rescue's actions.[131] Roberts responded to the judge's statements on national television, rebuking his claim that there would be bloodshed if Operation Rescue was not stopped and saying such a claim was "absurd."[132]

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[121] *See Rust*, 500 U.S. at 201–03 (rejecting the argument that the regulation in question violates *Roe* without addressing whether *Roe* was valid).

[122] 506 U.S. 263, 265–66 (1993).

[123] *Id.*; *see also* Linda Greenhouse, *Court Hears Appeal of Ruling That Bars Abortion Protestors*, N.Y. TIMES, Oct. 17, 1991, at A1 (explaining Roberts's argument that protestors who block access to abortion clinics are not targeting women for discriminatory treatment but trying to prevent abortions).

[124] 18 U.S.C. § 248 (1994).

[125] *History*, OPERATION RESCUE, http://www.operationrescue.org/about-us/history (last visited Jan. 24, 2021).

[126] *Bray*, 506 U.S. at 266.

[127] *Id.* at 265.

[128] *Id.* at 287.

[129] NAT'L WOMEN'S L. CTR., NATIONAL WOMEN'S LAW CENTER SPECIAL REPORT: THE RECORD OF JOHN ROBERTS ON CRITICAL LEGAL RIGHTS FOR WOMEN 12 (2005).

[130] *Id.*

[131] *Id.*

[132] *Id.*

It is unlikely that a man who fought for life so much as a practitioner would change course in later years. In the first chance he got to address the issue before the Supreme Court, he went out of his way to attack *Roe* and argue it should be overruled.[133] He also defended Operation Rescue, which some had tried to label as domestic terrorists.[134] One does not do these things without a firm conviction that *Roe* was wrongly decided and that unborn children are in fact people whose lives are worth defending.

Roberts has not made such bold statements about the wrongness of *Roe* or the personhood of the unborn during his tenure as Chief Justice. He has been described as "an 'enigma' who is pulled between his support for the [C]ourt's image and his desire to move it to the right."[135] If this is an accurate description of how Chief Justice Roberts thinks, then it would explain his quiet pro-life votes in *Gonzalez v. Carhart* and *Whole Woman's Health v. Hellerstedt*.[136] He joined Justice Kennedy's main opinion in *Gonzalez* and Justice Alito's dissent in *Whole Woman's Health*,[137] both of which were written on narrow grounds that declined to address whether *Roe* or *Casey* were decided correctly.[138] It also explains how, in *June Medical*, he believed that *Whole Woman's Health* was wrongly decided but believed he was bound to follow it as a precedent that had not been adequately challenged.[139]

If Chief Justice Roberts is torn between the desire to pull the Court to the right and simultaneously protect the Court's image, then perhaps the best way to persuade him that *Roe* and its progeny should be overruled is to convince him that the Court's abortion jurisprudence undermines its legitimacy. In his dissent in *Obergefell v. Hodges*, Chief Justice Roberts accused the Court of inventing the doctrine of substantive due process in the notorious *Dred Scott* case.[140] He accused the Court of doing the same

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[133] *Id.* at 9.

[134] *Id.* at 11; *see* Bernard Nathanson, *Operation Rescue: Domestic Terrorism or Legitimate Civil Rights Protest?*, 19 HASTINGS CTR. REP., Nov.–Dec. 1989, at 28, 29 (discussing how some view Operation Rescue members as terrorists).

[135] Debra Cassens Weiss, *Biography of Chief Justice Roberts Views Him as an Enigma*, ABA J. (Mar. 20, 2019, 7:00 AM), https://www.abajournal.com/news/article/biography-of-chief-justice-roberts-views-him-as-an-enigma.

[136] Gonzales v. Carhart, 550 U.S. 124, 130 (2007); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016).

[137] *Gonzales,* 550 U.S. at 130; *Whole Woman's Health*, 136 S. Ct. at 2330.

[138] *Gonzales*, 550 U.S. at 146; *Whole Woman's Health*, 136 S. Ct at 2309–10. Notably, he did not join Justice Thomas's writings in either case, both of which boldly proclaimed that *Roe* was wrongly decided. *See Gonzales*, 550 U.S. at 169 (Thomas, J., concurring) (arguing that the right to abortion has no basis in the Constitution); *Whole Woman's Health*, 136 S. Ct. at 2328 (Thomas, J., dissenting) (arguing that the Court invented a constitutional right to abortion in *Roe*).

[139] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring in judgment).

[140] Obergefell v. Hodges, 576 U.S. 644, 694–95 (2015) (Roberts, C.J., dissenting).

thing in *Obergefell* by inventing a new right that did not exist.[141] He also accused the Court of committing the same error as it had in the *Lochner* era.[142] What is most interesting about this view for our purposes is that he cited a draft opinion of his old mentor, Judge Henry Friendly of the Second Circuit Court of Appeals.[143] Unbeknownst to many, Judge Friendly was presented with an abortion case shortly before the Supreme Court heard *Roe*.[144] Although Judge Friendly appeared to be in favor of abortion as a matter of policy,[145] he addressed the issue as follows:

> Plaintiffs' position is quite reminiscent of the famous statement of J[ohn] S[tuart] Mill . . . . [Y]ears ago, when courts with considerable freedom struck down statutes that they strongly disapproved, Mr. Justice Holmes declared in a celebrated dissent that the Fourteenth Amendment did not enact Herbert Spencer's Social Statistics. No more did it enact J.S. Mill's views on the proper limits of law-making.[146]

Considering all of this leads to the following conclusion: Chief Justice Roberts probably believes that the Court's abortion jurisprudence is wrong and should be overruled, but his desire to protect the Court's image means that pro-life advocates will have to argue something more than *Roe* and its progeny were just incorrect. Indeed, that was a major point in his concurrence in *June Medical*.[147] His dissent in *Obergefell* may be instructive as to how both of his concerns could be reconciled: Chief Justice Roberts is especially concerned about precedents that read the justices' philosophies of liberty into the Constitution.[148] Thus, if Chief Justice

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[141] *Id.* at 700.

[142] *Id.* at 696, 699.

[143] *Id.* at 705–06. Chief Justice Roberts clerked for Judge Friendly immediately after law school and continued to seek his advice after his clerkship ended. Ronald Collins, *Ask the Author: "Mr. Everything"–Joan Biskupic on Chief Justice John Roberts*, SCOTUSBLOG (Apr. 11, 2019, 10:05 AM), https://www.scotusblog.com/2019/04/ask-the-author-mr-everything-joan-biskupic-on-chief-justice-john-roberts; Michael Norman, *Henry J. Friendly, Federal Judge in Court of Appeals, Is Dead at 82*, N.Y. TIMES (Mar. 12, 1986), https://www.nytimes.com/1986/03/12/obituaries/henry-j-friendly-federal-judge-in-court-of-appeals-is-dead-at-82.html (summarizing Judge Friendly's career).

[144] *See* A. Raymond Randolph, *Before* Roe v. Wade*: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J. L. & PUB. POL'Y 1035, 1035 (2006) (discussing how Judge Friendly wrote an unpublished opinion three years before *Roe*).

[145] *See* Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 33–37 (1978) (criticizing the rationale of the majority's decision in *Roe* but saying "I would like to believe that in their core—forbidding prohibition of abortions in the early months of pregnancy—they were right.").

[146] Randolph, *supra* note 144, at 1308–09 (third alteration in original).

[147] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment).

[148] *Obergefell*, 576 U.S. at 694–95 (Roberts, C.J., dissenting).

Roberts could be shown that the Court's abortion precedents are not only wrong but also as blatantly illegitimate as *Dred Scott*, *Lochner*, and *Obergefell*, he may find that the "special circumstances"[149] needed to overrule binding precedent are present.

B. Justice Thomas

Of all the justices of the Supreme Court, there is no better champion for the right to life than Justice Thomas. Among the five conservatives, Justice Thomas is the only Justice who has said in his judicial opinions "that the Court's abortion jurisprudence . . . has no basis in the Constitution."[150] He has made it a point to say so in nearly every judicial writing addressing abortion,[151] and he even mentions it sometimes in cases that do not address abortion.[152] For Justice Thomas, the analysis is simple: the Due Process Clause "speaks only to 'process.'"[153] Since the Court's precedents protecting abortion have nothing to do with process and have grave consequences, Justice Thomas views *Roe* as one "of the Court's most notoriously incorrect decisions."[154]

Justice Thomas also would not hesitate to overrule *Casey* or *Roe* just because they are precedent. In his concurring opinion in *Gamble v. United States*,[155] Justice Thomas argued that "[w]hen faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."[156] Justice Thomas does not follow the Supreme Court's often-cited rule that a special justification must be present to overrule precedent.[157] Instead, Justice Thomas believes that his "view of [stare decisis] follows directly from the Constitution's supremacy over other sources of law—including [the Supreme Court's] own precedents."[158] Thus, all Justice Thomas needs to

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[149] *June Med.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring in judgment).

[150] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (explaining Justice Thomas's view that "the Court's abortion jurisprudence . . . has no basis in the Constitution").

[151] *See supra* note 52 and accompanying text.

[152] *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in judgment) (discussing whether the Eighth Amendment is applicable to states and classifying *Roe* among "some of the Court's most notoriously incorrect decisions" along with *Dred Scott*); Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in judgment) (focusing on whether due process may be incorporated against the states through the Fourteenth Amendment and listing *Roe*, *Dred Scott*, and *Obergefell* as wrongly decided).

[153] *Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in judgment) (quoting McDonald v. City of Chicago, 561 U.S. 742, 810 (2010) (Thomas, J., concurring in part and concurring in judgment)).

[154] *Id.*

[155] 139 S. Ct. 1960 (2019).

[156] *Id.* at 1984 (Thomas, J., concurring).

[157] *Id.* at 1981.

[158] *Id.* at 1984.

overrule *Roe* or *Casey* is a showing that those precedents are demonstrably erroneous.[159]

Perhaps realizing that some of his colleagues will not overrule a precedent solely on the ground that it was decided incorrectly,[160] Justice Thomas has routinely described *Roe* as one of the Supreme Court's worst decisions of all time.[161] Consequently, Justice Thomas has gone beyond simply arguing that *Roe* and *Casey* were decided incorrectly. Instead, he has, on multiple occasions, compared *Roe* to *Dred Scott*.[162] Justice Thomas likely knows that Chief Justice Roberts might be a critical vote in any challenge to overrule *Roe* or *Casey*. Consequently, Justice Thomas has probably been comparing *Roe* to *Dred Scott* because of Chief Justice Roberts's abhorrence to the abuses of substantive due process, as he explained in his dissent in *Obergefell*.[163]

C. Justice Alito

In 1985, Justice Alito worked for the Justice Department in the Reagan Administration.[164] During that time, he wrote a memorandum discussing whether the Justice Department should take a position on a Supreme Court case involving abortion.[165] Specifically, Justice Alito wrote that the Justice Department "should make clear that [it] disagree[s] with *Roe v. Wade*."[166] When he was applying for another job at the Justice

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[159] The author believes that Justice Thomas is correct. Brief of Amici Curiae Found. for Moral L., et al. in Support of Defendants-Appellants Seeking Reversal at 18–21, Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606 (2019) (No. 18-837); *see also Gamble*, 139 S. Ct. at 1984 (Thomas, J., concurring in judgment) (explaining that a federal court, including the Supreme Court, should act to correct its own erroneous decisions regardless of stare decisis).

[160] *See, e.g.*, Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) (identifying the additional factors that Justice Alito considers when overruling a past decision); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring in judgment) (referencing additional factors when overruling a past decision); Ramos v. Louisiana, 140 S. Ct. 1390, 1412–14 (2020) (Kavanaugh, J., concurring in part) (capturing the Court's history of having multiple factors to consider when overruling a past decision).

[161] *See* Timbs v. Indiana, 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in judgment) (describing how strongly Thomas believes *Roe* is wrongly-decided); *Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring in judgment) (listing *Roe* amongst wrongly decided cases).

[162] *Timbs*, 139 S. Ct. at 692 (Thomas, J., concurring in judgment); *Ramos*, 140 S. Ct. at 1424 (Thomas, J., concurring in judgment).

[163] Obergefell v. Hodges, 576 U.S. 644, 694–95 (2015) (Roberts, C.J., dissenting).

[164] *Current Members*, *supra* note 117; MARTIN ANDERSON & ANNELISE ANDERSON, RONALD REAGAN: DECISIONS OF GREATNESS 8 (2015).

[165] Memorandum from Samuel A. Alito, Assistant to the Solic. Gen., U.S. Dep't of Just., to the Solic. Gen., U.S. Dep't of Just. 1 (May 30, 1985), https://www.archives.gov/files/news/samuel-alito/accession-060-89-216/Thornburgh-v-COG-1985-box20-memoAlitotoSolicitorGeneral-May30.pdf.

[166] *Id.* at 9.

Department, he said in a personal qualifications statement that he was "particularly proud of [his] contributions in recent cases in which the government ha[d] argued in the Supreme Court . . . that the Constitution does not protect a right to abortion."[167] As a judge on the Third Circuit, he voted to strike down a New Jersey ban on partial-birth abortion because he thought the Supreme Court's decision in *Stenberg v. Carhart*[168] had to "be regarded as controlling."[169] However, a year later, he voted to uphold a Pennsylvania law that required a woman to notify her spouse before she got an abortion.[170] The Supreme Court granted certiorari in that case and came to the opposite conclusion of Justice Alito.[171] During his confirmation hearings, Justice Alito was confronted with his record and explained that if he were confronted with an abortion case as a Supreme Court Justice, he would begin his analysis with the question of stare decisis.[172] He further said that if the analysis went beyond stare decisis, "then [he] would approach the question with an open mind and [he] would listen to the arguments that were made."[173]

Justice Alito appears to have lived up to his word as he has served as a Supreme Court Justice. During his tenure on the Court, he has heard three abortion cases: *Gonzales v. Carhart*,[174] *Whole Woman's Health v. Hellerstedt*,[175] and *June Medical Services v. Russo*.[176] In each of these cases, Justice Alito declined to address whether *Roe* or *Casey* should be overruled.[177]

The critical question then for getting Justice Alito's vote is determining how he looks at precedent. In 2018, Justice Alito authored *Janus v. American Federation of State, County, & Municipal Employees,*

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[167] Diane Geng, *Judging Samuel Alito on Abortion Rights*, NPR (Jan. 24, 2006, 4:58 PM), https://www.npr.org/2006/01/24/5081976/judging-samuel-alito-on-abortion-rights.

[168] 530 U.S. 914, 945–46 (2000).

[169] Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 153 (3d Cir. 2000) (Alito, J., concurring in judgment).

[170] Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 719 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part).

[171] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 898 (1992) (plurality opinion).

[172] Richard W. Stevenson & Neil A. Lewis, *Alito, at Hearing, Pledges an Open Mind on Abortion*, N.Y. TIMES (Jan. 11, 2006), https://www.nytimes.com/2006/01/11/politics/politicsspecial1/alito-at-hearing-pledges-an-open-mind-on-abortion.html.

[173] *Id.*

[174] 550 U.S. 124, 130, 132 (2007).

[175] 136 S. Ct. 2292, 2299–300 (2016).

[176] 140 S. Ct. 2103, 2112–13 (2020).

[177] *See Gonzales*, 550 U.S. at 168–69 (joining the majority opinion instead of Justice Thomas's concurrence that argues previous abortion decisions lack a constitutional basis); *Whole Woman's Health*, 136 S. Ct. at 2330–31 (Alito, J., dissenting) (avoiding discussion of whether abortion precedents have a constitutional basis); *June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting) (focusing on standard rules of adjudication and avoiding the veracity of the Court's previous abortion decisions).

Council 31,[178] a landmark opinion that overruled a Supreme Court precedent allowing mandatory unionization of government workers.[179] In determining whether to overrule *Abood v. Detroit Board of Education*, the Court considered the following factors: (1) the quality of the precedent's reasoning,[180] (2) "the workability of the precedent in question,"[181] (3) whether legal or factual developments since the decision have "'eroded' the decision's 'underpinnings' and left it [as] an outlier,"[182] and (4) the reliance interest on the precedent.[183] The Court found that the first three factors weighed in favor of overruling *Abood* and that the reliance interests were not strong enough to save it.[184] The Court also held that the presence of the first three factors provided the often-cited "special justification[s]" for overruling *Abood*.[185]

Since the other conservative justices signed onto Justice Alito's opinion in *Janus*, it stands to reason that not only Justice Alito but the other conservative justices would find a similar analysis persuasive in holding that stare decisis would not save *Roe* or *Casey* from a direct attack. Pro-abortion advocates would probably argue that reliance interests weigh heavily in their favor, as the plurality did in *Casey* itself.[186] But just as that did not save *Abood* from being overruled, the justices likely would find that reliance alone would not save the Court's abortion decisions from being revisited if the other factors warranted such.

It is quite feasible to argue that the other factors weigh in favor of revisiting *Roe* and *Casey*. As for the quality of the precedent's reasoning, Professor Michael Stokes Paulsen has thoroughly argued that *Casey* was the worst constitutional decision of all time, both because of the evil it unleashed and because the Court knew the decision was wrong but went with it anyway in order to save face.[187] The Court's past conservative jurists, whom the current conservative majority would likely respect, have repeatedly assailed *Roe*'s reasoning as terrible.[188] As for the workability

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[178] 138 S. Ct. 2448, 2459 (2018).

[179] *Id.* at 2486 (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[180] *Id.* at 2479.

[181] *Id.* at 2481.

[182] *Id.* at 2482 (quoting States v. Gaudin, 515 U.S. 506, 521 (1995)).

[183] *Id.* at 2484.

[184] *Id.* at 2485–86.

[185] *Id.* at 2486 (alteration in original).

[186] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855–56 (1992) (plurality opinion) (discussing the country's supposed reliance on *Roe*).

[187] *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 998–99, 1001, 1003–04 (2003) (arguing that the Court's concern for its own legitimacy and prestige led it to uphold *Roe* despite the evil consequences of the decision and *Roe*'s illegitimacy).

[188] *See, e.g.*, *Casey*, 505 U.S. at 951–53 (Rehnquist, J., dissenting) (arguing that *Roe* did not comport with the Court's traditional analysis in substantive due process cases); *id.*

of the precedent, as Justice Scalia observed, *Casey* replaced *Roe*'s trimester framework with the "undue burden" standard, supposedly to make the law more clear, while altogether ignoring the fact that this standard was less clear than *Roe*'s trimester framework.[189] As for developments since the precedent was issued, "advances in medical and scientific technology have greatly expanded our knowledge of prenatal life."[190] Moreover, as Chief Justice Parker of the Alabama Supreme Court has observed, *Roe* and *Casey* are outliers because so many other areas of the law treat unborn children as people.[191] Thus, a compelling argument can be made that the *Janus* factors weigh in favor of revisiting *Roe* and *Casey*.

Once Justice Alito could be persuaded to move past the issue of stare decisis, the analysis should be relatively simple. Justice Alito has adhered to the Court's typical approach to substantive due process, which asks whether a right is "fundamental to our scheme of ordered liberty," or whether a right is "deeply rooted in this Nation's history and tradition."[192] It should not take much argument to convince Justice Alito that neither criterion is met here, since most of the States had prohibited or penalized abortion from the mid-nineteenth century until *Roe* was decided.[193]

D. Justice Gorsuch

Justice Gorsuch believes in originalism and textualism.[194] After he wrote the majority opinion for *Bostock v. Clayton County*,[195] some conservatives called his view of textualism into question.[196] But because

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at 979–80 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the Constitution says nothing about abortion); Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (arguing that "nothing in the language or history of the Constitution . . . support[s] the Court's judgment").

[189] *Casey*, 505 U.S. at 985–86 (Scalia, J., concurring in the judgment in part and dissenting in part) (discussing the ambiguity of the "undue burden" standard).

[190] Hamilton v. Scott, 97 So. 3d 728, 746 (Ala. 2012) (Parker, J., concurring specially).

[191] *Ex parte* Phillips, 284 So. 3d 101, 165–66, 169 (Ala. 2018) (Parker, J., concurring specially) (arguing that state statutes regularly treat unborn children as people for the purposes of the following areas of law: criminal, torts, guardianship, health care, property, and family).

[192] McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (emphasis omitted).

[193] *See* Roe v. Wade, 410 U.S. 113, 174–77 (1973) (Rehnquist, J., dissenting) (discussing the history of abortion laws from 1821 through the ratification of the Fourteenth Amendment).

[194] NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 106 (2019).

[195] 140 S. Ct. 1731, 1736 (2020).

[196] *See, e.g.*, *id.* at 1754–56 (Alito, J., dissenting) (calling the Court's decision a ship that "sails under a textualist flag" but actually upholds the opposite theory: that laws should be updated to meet society's current values); Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV.

the Court's abortion jurisprudence calls not for statutory interpretation but constitutional interpretation, Justice Gorsuch would examine this issue under an originalist analysis.[197] While a plausible argument could be made that Justice Gorsuch was applying a textualist analysis in *Bostock*,[198] there is no conceivable way the Fourteenth Amendment's Due Process Clause could have been understood to protect the right to abortion at the time it was ratified.[199]

Because Justice Gorsuch is a constitutional originalist, it should come as no surprise that he recognizes the doctrine of substantive due process for what it is: an invention of the courts.[200] As Justice Gorsuch said in his book, the doctrine of substantive due process was born in *Dred Scott*.[201] Relying on the Fifth Amendment's Due Process Clause, this Court held,

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[202]

In his dissent, Justice Curtis demonstrated that this understanding of due process was unheard of from the time of the Magna Carta until then

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(June 26, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints (characterizing Justice Gorsuch's opinion as halfway textualism because he assumed precedent on the issue was correct rather than analyze the issue based on first principles).

197 GORSUCH, *supra* note 194, at 106.

198 Justice Gorsuch's analysis in *Bostock* could be reduced to the following syllogism: (1) Title VII prohibits discrimination on the basis of sex; (2) sexual orientation and gender identity necessarily involve sex; (3) therefore discriminating on the basis of sexual orientation or gender identity is discriminating on the basis of sex. *Bostock*, 140 S. Ct. at 1746–47. But as Justice Alito noted in his dissent,

> The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society.

Id. at 1755–56 (Alito, J., dissenting).

199 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 722–26 (2015) (Thomas, J., dissenting) (discussing the original meaning of the Due Process Clause); Roe v. Wade, 410 U.S. 113, 174–77 (1973) (Rehnquist, J., dissenting) (arguing that the right to abortion was "completely unknown to the drafters of the [Fourteenth] Amendment" and discussing abortion laws at the time of the Fourteenth Amendment's ratification).

200 GORSUCH, *supra* note 194, at 189.

201 *Id.*

202 Dred Scott v. Sandford, 60 U.S. 393, 450 (1857).

and would by its terms prohibit Congress from eliminating the slave trade or even the States from banning slavery.[203]

For the first time, the Court interpreted the Due Process Clause to confer a *substantive* right to keep human beings as slaves, not a *procedural* right against arbitrary government power.[204] Thus, Justice Gorsuch concludes that, in *Dred Scott*,

> [T]he Court went out of its way to bend the Constitution's terms in an effort to try to quell unrest in the country over the question of slavery. The Court invented the legal doctrine of "substantive" due process and then proceeded to use it to hold that Congress had no power to regulate slavery in the [t]erritories.[205]

Given his abhorrence for substantive due process, it should be easy to make the case to Justice Gorsuch that *Roe* was the *Dred Scott* of the twentieth century.

Unlike the other justices, Justice Gorsuch has not fully articulated his view on stare decisis. In his book, Justice Gorsuch asked, "When should judges follow—or overrule—a prior decision they earnestly believe to be mistaken? Most everyone would agree the answer isn't always or never; judgment is required."[206] Justice Gorsuch voted with the majority in *Janus*,[207] so it is safe to presume that he agreed with the factors that the Court considered in that case.[208] In 2020, Justice Gorsuch authored the Court's opinion in *Ramos v. Louisiana*,[209] which produced much debate about the role of stare decisis.[210] In his opinion, Justice Gorsuch said, "[stare decisis] isn't supposed to be the art of methodically ignoring what everyone knows to be true."[211] Thus, if an advocate can persuade

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[203] *Id.* at 625–28 (Curtis, J., dissenting).

[204] GORSUCH, *supra* note 194, at 125.

[205] *Id.* at 189.

[206] *Id.* at 211. Justice Barrett noted that Justice Scalia likewise did not have a hard and fast rule to resolve the issue. *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1928 (2017) (explaining in relation to stare decisis that Justice Scalia was willing to correct some mistakes, but regarded other as too integrated in our law to touch).

[207] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2459 (2018).

[208] *See id.* at 2478–79 (outlining the factors to examine when deciding to overrule precedent).

[209] 140 S. Ct. 1390, 1392 (2020).

[210] *Id.* at 1402–08 (discussing the role of precedent); *id.* at 1408–10 (Sotomayor, J., concurring in part) (explaining why she believed the precedent in that case should be overruled); *id.* at 1411–16 (Kavanaugh, J., concurring in part) (articulating in detail his view of stare decisis); *id.* at 1421–22 (Thomas, J., concurring in judgment) (restating his view of precedent articulated in *Gamble*); *id.* at 1425 (Alito, J., dissenting) (lamenting that "[t]he doctrine of stare decisis gets [a] rough treatment in today's decision" (emphasis omitted)).

[211] *Id.* at 1405 (majority opinion).

Justice Gorsuch that the Court's abortion jurisprudence has no basis in the Constitution, then it may not take much more than that for him to cast his vote in favor overruling the Court's abortion decisions.

E. Justice Kavanaugh

According to Judge Walker of the D.C. Circuit, who had once served as his clerk, Justice Kavanaugh is a "self-described textualist. He starts with the text, and he goes where the text leads, as informed by structure, history and precedent."[212] When he was nominated, the Congressional Research Service found that he was not as explicitly originalist as Justice Gorsuch,[213] which makes his jurisprudence harder to predict.

In his own words, Justice Kavanaugh's earliest judicial hero was Justice Rehnquist.[214] Justice Kavanaugh frequently agreed with Justice Rehnquist's attacks on the Warren Court,[215] which was accused of "simply enshrining its policy views into the Constitution."[216] Justice Kavanaugh believes that the critical question in whether it is time to change the Constitution is, "who decides?"[217] For Justice Kavanaugh, the answer is clear: "The Constitution quite specifically tells us that the people decide through their elected representatives."[218]

It should be no surprise then that Justice Kavanaugh went out of his way to take note of Justice Rehnquist's dissent in *Roe*.[219] Justice Kavanaugh noted that Rehnquist's view of substantive due process ultimately prevailed in *Washington v. Glucksburg*,[220] although Rehnquist was unsuccessful at getting his colleagues to overrule *Roe* or *Casey*.[221] Nevertheless, Justice Kavanaugh hailed Rehnquist's opinion in *Glucksburg* as "an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy."[222]

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[212] Alex Swoyer, *Brett Kavanaugh Best Described as "Originalist," Say Legal Scholars*, WASH. TIMES (Sept. 3, 2018), https://www.washingtontimes.com/news/2018/sep/3/brett-kavanaugh-best-described-as-originalist-say-/.

[213] *Id.*

[214] Judge Brett Kavanaugh, U.S. Ct. of Appeals for D.C. Cir., From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist (Sept. 18, 2017), https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] 521 U.S. 702 (1997).

[221] Kavanaugh, *supra* note 214 (noting that although Justice Rehnquist was unsuccessful in *Roe* and *Casey*, he was able to garner a majority in *Glucksberg* with his view of substantive due process in social rights cases).

[222] *Id.*

Given how strongly he sympathized with Justice Rehnquist and how much he hailed Rehnquist's opinion in *Glucksburg*, it is fair to assume that Justice Kavanaugh believes *Roe* was wrongly decided. Under *Glucksburg*, only fundamental rights and liberties that are "deeply rooted in this Nation's history and tradition" are protected.[223] Without a doubt, the "right" to abortion is not deeply rooted in this Nation's history and tradition.[224] If Justice Kavanaugh shares Justice Rehnquist's sentiments, then he would agree that *Roe* was an erroneous decision.

But like other members of the Court, Justice Kavanaugh believes that more justification is needed for overruling a precedent than the mere fact that the decision is erroneous: there needs to be "special justification" or "strong grounds" for overruling the precedent.[225] In his concurrence in *Ramos v. Louisiana*, Justice Kavanaugh articulated "three broad considerations" for determining whether special justification or strong grounds are present: (1) whether "the prior decision [is] not just wrong, but grievously or egregiously wrong,"[226] (2) whether "the prior decision caused significant negative jurisprudential or real-world consequences,"[227] and (3) whether "overruling the prior decision [would] unduly upset reliance interests."[228]

If Justice Kavanaugh could be persuaded like Justice Thomas that *Roe* was as bad as *Dred Scott*, then his first consideration would tilt in favor of overruling it. Given his admiration for Justice Rehnquist's approach to substantive due process, it should not be hard to convince him that as a matter of law *Roe* was not just wrong but egregiously wrong. As for the second consideration, *Roe* has caused significant negative jurisprudential and real-world consequences.[229] As Chief Justice Parker of the Alabama Supreme Court has noted, the law generally treats unborn children as people in every other significant area of the law except

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[223] *Glucksberg*, 521 U.S. at 720–21.

[224] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 952–53 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (showing that tradition does not support classifying abortion as a fundamental right under the Fourteenth Amendment); Roe v. Wade, 410 U.S. 113, 174–77 (1973) (Rehnquist, J., dissenting) (arguing that the Framers of the Fourteenth Amendment did not wish the matter of abortion to be withdrawn from the States).

[225] Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

[226] *Id.* at 1414–15. For examples of cases that were egregiously wrong, Justice Kavanaugh cited *Korematsu v. United States*, 323 U.S. 214 (1944), and *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Id.*

[227] *Id.* at 1415.

[228] *Id.*

[229] *Id.* (explaining that in assessing jurisprudential consequences of a precedent, the Court assesses its workability and consistency with other decisions and that in examining real-world effects, the Court assesses a precedent's impact on people and not just on the legal system).

abortion.[230] As for real-world consequences, over sixty-two million babies have been killed by abortion since 1973.[231] The only consideration that Justice Kavanaugh might find weighs in favor of not overruling *Roe* would be reliance interests. This may not be an inevitable conclusion, though. Pro-life advocates could counter that those who have relied on *Roe* have already aborted their children and overruling that decision would not bring them back. But even if pro-choice advocates successfully argue that women have arranged their careers and lives around the right to abort, Justice Kavanaugh may find that the other considerations outweigh the reliance interests. Since the Court found that the other factors outweighed reliance in *Janus*,[232] there is no reason to believe they would not do so again if presented with the challenge to overrule *Roe.*

Interestingly, in *Ramos*, Justice Kavanaugh considered *Casey* to have overruled *Roe*.[233] Elaborating on this point, Justice Kavanaugh said that *Casey* reaffirmed *Roe*'s "central holding" but expressly rejected *Roe*'s trimester framework and "expressly overruled two other important abortion precedents."[234] During his Senate confirmation hearings, Justice Kavanaugh described *Casey* as "precedent on precedent."[235] Comments like these ultimately led Senator Susan Collins of Maine to cast her vote in favor of Justice Kavanaugh, believing that he would defend the right to abortion if appointed to the Court.[236] However, Justice Kavanaugh's concurrence in *Ramos* suggests that he does not consider the Court's abortion precedents to be untouchable, since the Court itself partially overruled *Roe* in *Casey* as well as two other abortion decisions.[237]

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[230] *Ex parte* Phillips, 284 So. 3d 101, 166, 169–74 (Ala. 2018) (Parker, J., concurring specially).

[231] *Abortion Statistics*, NAT'L RIGHT TO LIFE, http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf (last visited Feb. 5, 2021).

[232] *See* discussion *supra* Section IV.C (discussing the *Janus* factors to determine if precedent should be overruled).

[233] *Ramos*, 140 S. Ct. at 1411–12 n.1 (2020) (Kavanaugh, J., concurring in part) (acknowledging that *Casey* overruled *Roe*'s trimester framework).

[234] *Id.*

[235] Mairead Mcardle, *Kavanaugh:* Roe *Is 'Important Precedent of the Supreme Court,'* NAT'L REV. (Sep. 5, 2018, 2:21 PM), https://www.nationalreview.com/news/brett-kavanaugh-roe-v-wade-important-precedent-of-the-supreme-court.

[236] Stavros Agorakis, *Read the Full Transcript of Sen. Collins's Speech Announcing She'll Vote to Confirm Brett Kavanaugh*, VOX (Oct. 5, 2018, 5:50 PM), https://www.vox.com/2018/10/5/17943276/susan-collins-speech-transcript-full-text-kavanaugh-vote.

[237] *See Ramos*, 140 S. Ct. at 1411–12 n.1 (2020) (explaining that overruling precedent has been a factor in many of the Court's most notable decisions and listing *Casey* as one such case).

F. Justice Barrett

The Court's newest associate justice has a record that appears to be promising for those hoping to overrule *Roe*. After law school, Justice Barrett clerked for Justice Scalia.[238] Justice Barrett described Justice Scalia as her "mentor" and said, "[h]is judicial philosophy is mine[] too."[239] When asked by Senator Coons during her confirmation hearing whether she would rule exactly as Scalia did, she responded, "I hope that you aren't suggesting that I don't have my own mind . . . or that I couldn't think independently or that I would just decide like, 'Let me see what Justice Scalia has said about this in the past.' I assure you I have my own mind."[240] While nobody should expect her to parrot Justice Scalia, if her approach to abortion cases is similar to Scalia's, then she probably believes that *Roe* and *Casey* were wrongly decided.[241]

Her record during her time at Notre Dame[242] suggests that she is pro-life and believes that the Court's abortion jurisprudence is incorrect. When she taught at Notre Dame, her name was included on the "University Faculty for Life" group. [243] In 2006, she signed a newspaper ad in the *South Bend Tribune* calling for "an end to the 'barbaric legacy' of *Roe*."[244] In 2013, as a professor at Notre Dame, "she gave two lectures on *Roe v. Wade* during a seminar series co-sponsored by the [pro-life] group Right to Life."[245] Thus, it appears that Justice Barrett is pro-life and believes that *Roe* was decided wrongly.

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[238] *Hon. Amy Coney Barrett*, UNIV. OF NOTRE DAME: THE L. SCH., https://law.nd.edu/directory/amy-barrett (last visited Feb. 3, 2021).

[239] *Full Transcript: Read Judge Amy Coney Barrett's Remarks*, N.Y. TIMES (Sept. 26, 2020), https://www.nytimes.com/2020/09/26/us/politics/full-transcript-amy-coney-barrett.html.

[240] Marisa Schultz, *Amy Coney Barrett Tells Democratic Senator: 'I Hope You Aren't Suggesting I Don't Have My Own Mind,'* FOX NEWS (Oct. 14, 2020), https://www.foxnews.com/politics/amy-coney-barrett-tells-democrat-senator-i-have-my-own-mind.

[241] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that regulation of abortion is an issue for the States and that abortion itself is not a liberty protected by the Constitution); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 520 (1990) (Scalia, J., concurring) (stating that the Constitution does not include the right to abortion).

[242] Justice Barrett graduated from Notre Dame Law School in 1997 and, since 2002, has taught in the fields of federal courts, constitutional law, and statutory interpretation. Notre Dame Law School, *Amy Coney Barrett, Alumna and Longtime ND Law Faculty Member, Confirmed as Supreme Court Justice,* UNIV. OF NOTRE DAME: THE L. SCH. (Oct. 26, 2020), https://law.nd.edu/news-events/news/amy-coney-barrett-confirmed-supreme-court/.

[243] Mili Godio, *Amy Coney Barrett's Political Views, from Abortion to Gay Marriage*, NEWSWEEK (Oct. 12, 2020, 9:00 AM), https://www.newsweek.com/amy-coney-barretts-political-views-abortion-gay-marriage-1537849.

[244] *Id.*

[245] *Id.*

During her tenure as a judge on the Seventh Circuit, Judge Barrett joined two dissents arguing that state restrictions on abortion should be allowed to stand. The first case was *Box*, which was discussed above.[246] In that case, the Seventh Circuit affirmed a district court's injunction prohibiting Indiana from enforcing a law that banned abortions on the basis of sex or disability, as well as another law that required abortion providers to dispose of fetal remains in a dignified way.[247] When the court denied a petition for a rehearing en banc, Judge Barrett joined Judge Easterbrook's dissent, arguing that the State has the authority to regulate the disposal of fetal remains and expressing skepticism that *Planned Parenthood v. Casey* does not allow a State to forbid abortions on the basis of disability or sex.[248]

In the second case, the Seventh Circuit upheld a district court's injunction that prevented Indiana from enforcing a parental notification provision before it went into effect.[249] When the court denied a petition for a rehearing en banc, Judge Barrett joined a dissent arguing that the full court should have considered whether it was proper to enjoin the state from enforcing the law before it went into effect.[250] Thus, in her voting record as a judge on the Seventh Circuit, Judge Barrett cast her vote twice to examine Indiana's attempts to regulate abortion in ways that *Casey* may permit.

The final issue to consider with Justice Barrett is her view of stare decisis. In 2013, Justice Barrett wrote, "I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."[251] Thus, if Justice Barrett had been on the Court when it was deciding *June Medical*, she probably would have disagreed with Chief Justice Roberts's assessment that he was bound to follow *Whole Woman's Health* even though he thought it was wrong.[252] Moreover, Justice Barrett has written

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[246] *See* discussion *supra* Section I.B.

[247] Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300, 302 (7th Cir. 2018).

[248] Planned Parenthood of Ind. & Ky. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 533, 536–38 (7th Cir. 2018) (Easterbrook, J., dissenting).

[249] Planned Parenthood of Ind. & Ky. v. Adams, 937 F.3d 973, 991 (7th Cir. 2019).

[250] Planned Parenthood of Ind. & Ky. v. Box, 949 F.3d 997, 998–99 (7th Cir. 2019) (Kanne, J., dissenting) (per curiam).

[251] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1728 (2013).

[252] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2133–34 (2020) (Roberts, C.J., concurring in judgment) (explaining that although Chief Justice Roberts believes *Whole Woman's Health* was wrongly decided, stare decisis compelled the Court to abide by that decision).

that she does not consider *Roe* "super precedent," because public debate concerning *Roe*'s validity has never subsided.[253]

However, one should not assume that Justice Barrett would attack *Roe* sua sponte just because she believes it was incorrectly decided and that stare decisis does not insulate it from a constitutional challenge. In a law review article that she wrote about the tension between originalism and stare decisis, Justice Barrett postulated that as a general rule the Court focuses on the questions presented in a particular case and considers overruling bad precedent only if asked.[254] She conceded that this was not necessarily a hard and fast rule.[255] However, she believes the Constitution does not require judges to go searching for constitutional errors that are not raised.[256]

Thus, if Justice Barrett had been on the Court when it decided *June Medical*, she probably would have joined Justice Alito's dissent but might have stopped short of joining Justice Thomas's dissent.[257] Thus, if a future pro-life litigant wishes to get Justice Barrett's vote, he must clearly present the question of whether *Casey* should be revisited. If he does, then he may find as ardent an ally in Justice Barrett as he would have found in Justice Scalia.

CONCLUSION: PRESENT THE CHALLENGE

Although it appears pro-life advocates may have had the votes needed to recognize that the Constitution contains no right to abortion since October 2018, they have batted zero out of seven at the Supreme Court.[258] All of those cases have involved either indirect attacks on the right to

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[253] Barrett, *supra* note 251, at 1735 & n.141. Justice Barrett has also declared that she does not consider "superprecedent" to be completely insulated from being overruled, reasoning that a precedent achieves that status only because litigants do not dare to question its validity. *Id.* at 1735. *See also* Godio, *supra* note 243 (noting Barrett's opinion that responses to *Roe* indicate a public rejection of the characterization of stare decisis as declaring a permanent victory on constitutional issues).

[254] Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930 (2017).

[255] *Id.*

[256] *Id.* at 1931.

[257] *See June Med.*, 140 S. Ct. at 2153 (Alito, J., dissenting) (arguing that the plurality decision misuses stare decisis); *id.* at 2149–53 (Thomas, J., dissenting) (arguing against *Roe*'s legitimacy despite the parties offering no challenge to *Roe*).

[258] The only case that might resemble a win for pro-life advocates during this time would be *Box v. Planned Parenthood of Indiana & Kentucky*. 139 S. Ct. 1780 (2019) (per curiam). However, the only conceivable "win" that *Box* gave pro-life advocates was allowing the State to regulate the disposal of fetal remains. *Id.* at 1781–82. However, that holding did nothing to stop the killing of unborn children; it only addressed what must be done with the bodies once the babies have been killed. *Id. See also supra* note 95 and accompanying text, noting one Supreme Court decision rendered while this article was being edited that could count as a small win for the pro-life cause.

abortion (for such issues as: third-party standing, the private right of action in a Medicaid case, the manner in which the abortion pill is provided, or hospital admitting privileges for abortion providers), or attacks on abortion that *Casey* might allow (such as banning abortions on the basis of sex or disability or dismemberment abortions). However, as discussed above, six justices appear to believe that *Roe* and *Casey* were wrongly decided and that stare decisis does not preclude overruling those decisions.[259] If that is the case, then pro-life advocates may be wondering, "Why have they not held that the Constitution does not protect a right to abortion?" The answer, in the words of Scripture, may be this simple: "You do not have because you do not ask."[260]

Arguing that *Roe* and *Casey* should be overruled will require a three-step process. First, pro-life litigators must cleanly present the question that those precedents should be overruled. Out of the six justices who may be inclined to overrule the Court's past precedents, the only one who will consider that issue sua sponte is Justice Thomas.[261] As their writings in *June Medical* demonstrate, the other justices will go out of their way to point out that the parties have not asked them to reconsider those precedents.[262] Could this be a hint that pro-life advocates should in fact raise the issue? Based on their past records and their philosophies of constitutional interpretation, I believe that the answer is yes.

Second, pro-life advocates must convince the Court there is no right to abortion in the Constitution. Based on the views of the justices in question, I believe that the attack on abortion must include three components. First, pro-life advocates must demonstrate that neither the text of the Constitution nor its original intent supports a right to abortion. An originalist argument will be persuasive to all six justices and probably would be enough to convince Justices Thomas, Gorsuch, and Barrett.[263] Second, they must demonstrate that the "right" to abortion is not deeply rooted in this nation's history and traditions. By demonstrating that the Court's abortion precedents do not comport with its usual substantive due

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[259] *See* discussion *supra* Sections IV.A–F (examining the opinions of current conservative Justices on the Supreme Court regarding *Roe*, *Casey*, and stare decisis).

[260] *James* 4:2 (NASB).

[261] *See* discussion *supra* Sections I, II, IV.B (noting Justice Thomas' history of writing about overruling precedent, even without being asked to do so). Despite his belief that the Court needs to overrule *Casey*, Justice Thomas has shown a willingness to cast his vote to deny certiorari if the issue is not cleanly presented or if it is not the right time to consider the issue, although he will continue to reaffirm that the Court needs to overrule *Casey*. *Id.*

[262] *See* discussion *supra* Section II (discussing the Court's comments about precedent in *June Medical*). Based on her writings, Justice Barrett will probably take the same approach. *See* discussion *supra* Section IV.F (discussing Justice Barrett's view of stare decisis).

[263] *See* discussion *supra* Sections IV.B, D, F (examining the originalist views of Justices Thomas, Gorsuch, and Barrett).

process jurisprudence, pro-life advocates may persuade Justices Alito and Kavanaugh.[264] Finally, they must argue that *Roe* and its progeny was one of the most egregious examples of judicial activism in history, on par with (or even worse than) *Dred Scott*, *Lochner*, and *Obergefell*. This argument may convince Chief Justice Roberts, since it would play to his desire to protect the Court's image.[265]

Finally, pro-life advocates must convince the Court that the doctrine of stare decisis does not insulate *Roe* and its progeny from being overruled. Justices Thomas, Gorsuch, and Barrett may be more inclined to overrule *Roe* and its progeny on the ground that the decisions were plainly contrary to the Constitution.[266] Chief Justice Roberts, along with Justices Alito and Kavanaugh, will probably require more than simply analyzing whether those decisions were correctly decided.[267] The Court's approach to the stare decisis factors in *Janus* would be a helpful guide for determining how to approach overruling *Roe*. The key for them will be persuading them that the reliance factor is outweighed by the other stare decisis factors.[268] Doing so may be tedious, but it can be done.

On a side note, pro-life litigators will have to be precise with which decisions they ask the Court to overrule. Technically speaking, the governing standard in abortion cases is no longer *Roe* but *Casey*.[269] As Chief Justice Roberts and Justice Kavanaugh have noted, *Casey* affirmed *Roe*'s core holding that the Constitution protects the right to an abortion but replaced the trimester framework with the undue burden standard.[270] However, if they ask the Court just to overrule *Casey*, then arguably *Roe* would be restored as the governing standard in abortion cases.[271] Thus, they must ask the Court not only to overrule *Casey* but to overrule *Roe* as

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[264] *See* discussion *supra* Sections IV.C, E (discussing the substantive due process views of Justices Alito and Kavanaugh).

[265] *See* discussion *supra* Section IV.A (noting Chief Justice Roberts's apparent desire to preserve the Court's legitimacy).

[266] *See* discussion *supra* Sections IV.B, D, F (reviewing objections to decisions contrary to the Constitution).

[267] *See* discussion *supra* Sections IV.A, C, E (discussing the need for more than mere incorrectness to overrule precedent).

[268] *See* discussion *supra* Section IV.C (analyzing the abortion question under the *Janus* Court's reliance factor).

[269] Gonzales v. Carhart, 550 U.S. 124, 146 (2007) (applying *Casey*'s undue burden as the correct standard for abortion cases rather than *Roe*'s trimester framework).

[270] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2135 & n.1 (2020) (Roberts, C.J., concurring in judgment); *see also* Ramos v. Louisiana, 140 S. Ct. 1390, 1411–12 (2020) (Kavanaugh, J., concurring in part) (listing *Casey* as one of many notable cases in which the Court overruled precedent).

[271] *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 308 (2016) ("[A] decision of a high court overruling its former decision is retroactive and restores the legal rule or principle that was in force before the overruled decision was made.").

well. If both decisions are overruled, then the era of judicially mandated abortion will finally come to an end.[272]

In conclusion, the incrementalistic approach to pro-life litigation has failed at the Supreme Court seven out of seven times in the last two years. Pro-life advocates should not infer from this record that their efforts have been too bold for the Court. Rather, it seems that the Court "finds [their] desires not too strong, but too weak."[273] Over sixty-one million innocent babies have been aborted since 1973,[274] and they may finally have a Court that is willing to stop *Roe*'s bloodshed—if only there was a party bold enough to ask it to do so. My hope is that the next pro-life advocate who petitions the Supreme Court for certiorari will finally take the shot.

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[272] I would take the analysis one step further and say that the Fourteenth Amendment's guarantee of equal protection *requires* the States to either protect everyone from murder or nobody from murder. If it chooses to protect people from murder (which any sane government would do), then it cannot deny to unborn persons the equal protection of the law. For further elaboration on this view, see Brief of Amicus Curiae Found. for Moral L. in Support of Rebekah Gee, *supra* note 66, at 17–23. *See also* Joshua J. Craddock, Note, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 Harv. J.L. & PUB. POL'Y. 539, 568–71 (2017) (arguing that the Fourteenth Amendment requires states to protect the lives of the unborn); *Ex parte* Hicks, 153 So. 3d 53, 71–72 (Ala. 2014) (Moore, C.J., concurring specially) (asserting that the unborn are entitled to legal protection under the Equal ProtectionClause).

[273] C.S. LEWIS, *The Weight of Glory, in* THE WEIGHT OF GLORY: AND OTHER ADDRESSES 25, 26 (2001).

[274] *Abortion Statistics, supra* note 231.

VIRGINIA'S SECOND AMENDMENT SANCTUARIES: DO THEY HAVE LEGAL EFFECT?

*Stephen P. Halbrook**

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* * *

> "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed . . . ."[1]

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[2]

INTRODUCTION

In the November 2019 elections in Virginia, both houses of the General Assembly changed hands from Republican to Democrat, giving the governor the votes he needed to enact new crimes, with severe penalties, regarding the possession and transfer of firearms.[3] Numerous bills to do so were introduced for the 2020 session of the General Assembly.[4] In reaction, nearly all Virginia counties and many cities declared themselves "Second Amendment sanctuaries" or otherwise

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1 VA. CONST. art. I, § 13.

2 U.S. CONST. amend. II.

3 *Members of the House of Delegates 2020 Session Seat Number and House District*, VA. GEN. ASSEMBLY, https://publications.virginiageneralassembly.gov/display_publication/139 (last visited Jan. 17, 2021); *2020 Senate Seat Numbers*, VA. GEN. ASSEMB. https://apps.senate.virginia.gov/Portal/Resources/MemberSeatNo.pdf (last visited Jan. 17, 2021); *see also* Brad Brooks, *Gun Control Legislation Advances in Virginia's Legislature*, REUTERS (Feb. 25, 2020), https://news.trust.org/item/20200224234315-7s2dm (noting that Governor Northam supported eight gun control measures that were voted on by the Virginia House of Delegates and were awaiting the Virginia Senate vote).

4 *E.g.*, H.R. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); H.R. 02, Gen. Assemb., Reg. Sess. (Va. 2020).

passed resolutions opposing infringement on the right to keep and bear arms.[5]

The Attorney General opined that this response has "no legal effect" and that any such laws must be enforced and obeyed unless declared unconstitutional by the judiciary.[6] This Article analyzes the extent to which local governments and local constitutional officers may decline to enforce firearm bans applicable to law-abiding citizens that are deemed violative of the clear text of the arms guarantees of the Virginia and U.S. constitutions and which have not been upheld by the judiciary.

Based on the constitutional text, history, and tradition, this Article argues that laws banning mere possession of the types of firearms and magazines that are commonly possessed infringe on the right to keep and bear arms. That conclusion is buttressed by decisions of the U.S. Supreme Court on the Second Amendment and by the Virginia Supreme Court on Article I, § 13, of the Virginia Constitution. A fractured decision by the federal Fourth Circuit on a Maryland law would not save the legislation at issue.

Even aside from the constitutional issues, local officials have authority to apply scarce resources to combat violent crime and other crimes that have actual victims. They may exercise discretion not to direct resources to ferreting out gun owners who have a banned feature on a rifle or the sale of a shotgun to a friend without a background check.

Moreover, prosecutorial discretion is fundamental to our criminal justice system. Some Commonwealth's Attorneys may choose not to prosecute defendants for technical gun law violations, just as some prosecutors have a policy of not prosecuting marijuana possession cases. Enforcement of gun laws is also limited by due process rights and the prohibition on unreasonable searches and seizures.

Finally, the proposed new Gun Prohibition will make criminals out of law-abiding citizens without any effect on real crime. Experience has proven that gun confiscation schemes have never worked because gun owners neither surrender nor register their firearms. Prohibitions on magazines are also typically met with massive non-compliance. Criminalizing the peaceable possession of commonly possessed firearms that major segments of the population consider constitutionally protected will create disrespect for the law.

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[5] *See, e.g.*, Res. 19-R-067, Chesapeake City Council Reg. Sess. (Va. 2019) (declaring Chesapeake a "Second Amendment Sanctuary" in response to proposed legislation in the 2020 session of the Virginia General Assembly that threatened law abiding citizens' right to keep and bear arms).

[6] Commonwealth of Va., Off. of the Att'y Gen., Opinion Letter 19-059 (Dec. 20, 2019) [hereinafter Att'y Gen. Opinion 19-059].

I. SANCTUARIES FROM CRIMINALIZATION

A. Draconian Proposals to Criminalize Previously Lawful Conduct

When the General Assembly convened in 2020, both houses consisted of a majority of Democrats, and the governor was a Democrat with a strong gun control agenda.[7] Numerous bills were introduced to criminalize firearm possession and transfers, both of which have been lawful since the Commonwealth was founded at Jamestown in 1607.[8]

At the top of the list of the proposed legislation were S.B. 16 and H.B. 961, which would have subjected a citizen to five years in the penitentiary for mere possession of (1) a magazine that holds over ten or twelve rounds, which comes standard with half of all pistols and rifles, or (2) a semiautomatic rifle if it has a single feature on a list, such as an telescoping shoulder stock, which allows the user to adjust the stock to her physique; a protruding pistol grip, which provides a comfortable hold; a muzzle brake, which reduces recoil (kick); and other innocuous features.[9] The banned rifles were described by the pejorative term "assault firearm,"

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[7] *Members of the House of Delegates 2020 Session*, *supra* note 3; *2020 Senate Seat Numbers*, *supra* note 3; Brooks, *supra* note 3.

[8] *See* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3783, 3786 (Francis Newton Thorpe ed., 1909) (noting that under the First Charter of Virginia subjects were to have "Furniture of Armour, Weapons, Ordinance, Powder, Victual, and all other things, necessary for the said Plantations, and for their Use and Defence there"); *Jamestown, a Place of Many Beginnings*, NAT'L PARK SERVS., https://www.nps.gov/jame/index.htm (last visited Feb. 4, 2021) (noting that Jamestown, Virginia, was formed in 1607).

[9] H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (Amendment in the Nature of a Substitute proposed by H. Comm. on Pub. Safety) (proposing to make the sale, possession, or transfer of "large capacity" magazines a class six felony, as well as to expand the definition of "assault firearm" to include firearms that use magazines which hold over twelve rounds or meet other criteria, and make the importation, sale, possession, and transfer of large-capacity firearms punishable as a class six felony); S. 16, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (proposing to expand the definition of "assault firearm" to include firearms which hold magazines over ten rounds or meet other criteria, and make the importation, sale, possession, and transfer of assault firearms punishable as a Class 6 felony); *see also* VA. CODE ANN. § 18.2-10 (LEXIS through 2020 Spec. Sess. I) (providing that Class 6 felonies are punishable by up to five years in prison).

a propaganda term without objective meaning.[10] These provisions would have potentially made felons out of millions of Virginians.[11]

These bills describe the features to be banned with technical complexity, the meaning of which bill supporters had difficulty explaining. Delegate Mark Levine, the sponsor of H.B. 961, stated that the difference between a normal rifle and an "assault weapon" "is how you hold the gun. It makes it a semi-automatic. Meaning you can shoot with each finger, not like a bolt-action" rifle used in hunting.[12] However, the trigger is pulled on ordinary firearms with just one index finger. It is unclear whether a firearm has ever been invented with which "you can shoot with each finger."

To understand the dramatic effect of these bills, for all of Virginia's history, magazines have never been regulated before, rifles of all kinds have been treated as ordinary firearms, and millions of persons possess these items.[13] The proposed five years of imprisonment for mere possession of these items was the same Class 6 felony sentence authorized if a person should unlawfully "shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill . . . ."[14] The disproportion is stark.

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[10] *See* Stephen P. Halbrook, *Reality Check: The "Assault Weapon" Fantasy and Second Amendment Jurisprudence*, 14 GEO. J.L. & PUB. POL'Y 47, 49 (2016) (noting that the term "assault weapons" was coined by gun prohibitionists as propaganda to describe semi-automatic rifles that resembled military rifles); *see also* Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons,"* 8 STAN. L. & POL'Y REV. 41, 43 (1997) (noting that the term "assault weapon" is a "political term, developed by anti-gun publicists to expand the category of 'assault rifles'").

[11] *See* Richard W. Rahn, *Virginia Postpones Restrictive Gun Legislation so the Battle Rages On*, WASH. TIMES (Feb. 17, 2020), https://www.washingtontimes.com/news/2020/feb/17/virginia-postpones-restrictive-gun-legislation-so-/ (hypothesizing that as many as half of the 10 million firearms in Virginia could become illegal due to the General Assembly's 2020 legislation).

[12] Paul Bedard, *Anti-gun "Expert" Says "How You Hold the Gun Makes It" an Assault Weapon*, WASH. EXAM'R (Jan. 29, 2020, 1:57 PM), https://www.washingtonexaminer.com/washington-secrets/anti-gun-expert-says-how-you-hold-the-gun-makes-it-an-assault-weapon (citing Jon Lareau, *20200125 Levine Ebbin Town Hall Explaining AWB*, YOUTUBE (Jan. 25, 2020), https://www.youtube.com/watch?v=DlimCLccxpQ&feature=emb_title (explaining how a person holds a rifle determines whether it is a semi-automatic rifle or a hunting rifle)); H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (showing that a co-sponsor of the bill was Delegate Levine).

[13] *See* Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) ("Roughly five million Americans own AR-style semiautomatic rifles."); Duncan v. Becerra, 970 F.3d 1133, 1141 n.1, 1142 (9th Cir. 2020) ("One estimate based in part on government data shows that from 1990 to 2015, civilians possessed about 115 million LCMs [large-capacity magazines] out of a total of 230 million magazines in circulation. Put another way, half of all magazines in America hold more than ten rounds.").

[14] VA. CODE ANN. § 18.2-51 (LEXIS through 2020 Spec. Sess. I); *see id.* § 18.2-10(f) (explaining that a Class 6 felony is punishable with up to five years in prison).

H.B. 961 was amended by the House of Delegates to keep the felony penalties for sale or purchase of an assault firearm, but to drop the ban on mere possession.[15] It was also amended to keep the felony penalties for sale or purchase of a magazine that holds over twelve rounds, but to make mere possession a Class 1 misdemeanor.[16] After passage in the House, four Democrats joined Republicans in the Senate Judiciary Committee by a vote of 10 to 5 to continue the bill to the 2021 session.[17]

Among other bills, H.B. 2 would have imprisoned a person for five years for lending a rifle to a friend for the day for hunting deer without a background check.[18] H.B. 812 proposed to authorize a year in prison for a person who would purchase more than one handgun within any 30-day period.[19] H.B. 674 proposed the confiscation of firearms from a person subject to a "substantial risk order," enforceable by search warrants not supported by probable cause of a crime, but instead by a determination that the person poses a "substantial risk of personal injury to himself or others . . . by such person's possession or acquisition of a firearm."[20] The above three bills and others would pass, albeit some contained amendments, and were signed by the governor.[21]

When the General Assembly was in session debating the above bills, on January 20, 2020, some 22,000 Virginians peaceably assembled at the Capitol in Richmond to petition the government for a redress of grievances, specifically regarding the proposed gun-ban bills.[22] A large proportion lawfully and openly carried firearms, including the AR-15 and

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[15] *Compare* H.D. 961, 2021 Gen. Assemb., Reg. Sess. (Va. 2021) (Amendment in the Nature of a Substitute as proposed by H. Comm. on Pub. Safety) (proposing to make it a class 6 felony to "import, sell, transfer, manufacture, or purchase" an assault firearm), *with* H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (proposing to make it a Class 6 felony to "import, sell, manufacture, purchase, possess, or transport" an assault firearm).

[16] H.D. 961, 2021 Gen. Assemb., Reg. Sess. (Va. 2021).

[17] H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); *Virginia Senate Rejects 'Assault Weapon' Ban*, ASSOCIATED PRESS, WHSV NEWSROOM (Feb. 17, 2020), https://www.whsv.com/content/news/Virginia-Senate-rejects-assault-weapon-ban-567938451.html.

[18] *See* H.D. 2, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) ("Any person who willfully and intentionally sells, rents, trades, or transfers a firearm to another person without obtaining verification in accordance with this section is guilty of a Class 6 felony.").

[19] H.D. 812, 2020 Gen. Assemb., Reg. Sess. (Va. 2020); VA. CODE ANN. § 18.2-11 (LEXIS through 2020 Spec. Sess. I) (explaining that the penalty for a Class 1 misdemeanor is up to twelve months in prison).

[20] H.D. 674, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

[21] Press Release, Ralph Northam, Governor of Virginia, Governor Northam Signs Historic Gun Safety Legislation into Law (Apr. 10, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856016-en.html.

[22] Brad Brooks, *Thousands of Armed U.S. Gun Rights Activists Join Peaceful Virginia Rally*, REUTERS (Jan. 20, 2020), https://www.reuters.com/article/us-usa-guns-rally-idUSKBN1ZJ15B.

other types of rifles that the bills proposed to ban.[23] The protest was entirely peaceful—there were no shootings, arson, looting, assaults, or rioting—and the crowd cleaned up trash from the streets at the end of the day.[24] The General Assembly would ignore most of their concerns.

B. The Response: Second Amendment Sanctuaries

The Virginia sanctuary movement was a reaction to the above draconian bills threatening imprisonment for activities that have been lawful in Virginia and that were thought by major portions of the population to be innocuous and constitutionally protected. Almost all Virginia counties and many localities passed resolutions affirming support for Second Amendment rights.[25] That includes ninety-one of the state's ninety-five counties and fifty-six cities and towns.[26] A map of the sanctuaries envelops the land area of almost the entire Commonwealth, mostly excluding northern Virginia.[27]

The Virginia sanctuary movement began in earnest after the November 5, 2019, elections in which Democrats became a majority in both the House of Delegates and the Senate. Governor Ralph Northam and the leadership in both houses set an agenda for far-reaching firearm restrictions. Hundreds and even thousands of gun owners packed meetings of county boards of supervisors and city councils to demand and support protection for Second Amendment rights.[28]

There is a comprehensive website that includes the actual texts of all local sanctuary ordinances and resolutions together with some of the proceedings that adopted them.[29] What passed in each of the jurisdictions

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[23] Alan Suderman & Sarah Rankin, *Pro-Gun Rally by Thousands in Virginia Ends Peacefully*, ASSOCIATED PRESS (Jan. 20, 2020), https://apnews.com/article/2c997c92fa7acd394f7cbb89882d9b5b.

[24] Brooks, *supra* note 22.

[25] *Second Amendment Sanctuaries*, VA. CITIZENS DEF. LEAGUE, https://www.vcdl.org/ (Mar. 20, 2020).

[26] *Id.*

[27] *Id.*

[28] *See Second Amendment Sanctuary Push Aims to Defy New Gun Laws*, ASSOCIATED PRESS (Dec. 21, 2019), https://wset.com/news/local/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws-12-21-2019-220326693 ("A standing-room-only crowd of more than 400 packed the meeting room, filled the lobby and spilled into the parking lot recently in rural Buckingham County, Virginia. They had one thing on their minds: guns."); Victoria Sanchez & Heather Graf, *Stafford County Votes to Become a 'Second Amendment Sanctuary*,' WJLA (Dec. 17, 2019), https://wjla.com/news/local/stafford-county-virginia-second-amendment-sanctuary (noting that thousands of residents of Stafford County showed up to voice their support for a Second Amendment Resolution at a board of supervisors meeting).

[29] Noah Davis, *New Virginia Second Amendment Sanctuary State Map Update 01Mar2021*, SANCTUARY CNTYS (Mar. 19, 2021), https://sanctuarycounties.com/2021/03/19/new-virginia-second-amendment-sanctuary-state-map-update-01mar2021/ (compiling all Virginia Second Amendment sanctuary ordinances and resolutions).

varies from soft to hard, general to specific, and short to lengthy. They all have in common concern about impending violations of the right to keep and bear arms and resolve to protect the right. The following two examples are representative.

Stafford County is a high income county of over 150,000 residents located about forty miles south of Washington, D.C.[30] Some 2,000 residents appeared for a session lasting over four hours in which the board of supervisors voted 7-0 in favor of a sanctuary resolution.[31] The resolution began by reciting the arms guarantees of the U.S. and Virginia constitutions and expressing concern about legislation introduced to violate those guarantees.[32] It resolved to declare the county "a Second Amendment Sanctuary" in which the right to keep and bear arms would be upheld, opposed laws that would violate that right, implored the General Assembly and the U.S. Congress to reject infringements or place additional burdens on the right, and authorized the resolution to be sent to the members of the General Assembly, the Congress, and the governor.[33]

Tazewell County has a population of about 40,000 and is located in southwest Virginia; it describes itself as "The Scenic Gateway to the Heart of the Appalachians."[34] There was standing room only at the board of supervisors meeting to consider a sanctuary resolution.[35] When the board asked the crowd for a show of hands in support, there was only one person who was opposed.[36] One supervisor explained that the proposed resolution was designed to make persuasive arguments that would win in court.[37] A sheriff noted that he was sworn to uphold the U.S. Constitution, which

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[30] *See* Press Release, United States Census Bureau, Northern Virginia Dominates List of Highest-Income Cntys, Census Bureau Reps. (Dec. 12, 2013), https://www.census.gov/newsroom/press-releases/2013/cb13-214.html (Stafford County was one of the five counties with the highest median income in 2013); *QuickFacts: Stafford, County. Va.*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/staffordcountyvirginia (Stafford has a population of 152,882) (last visited Feb. 1, 2021); *Distance from Stafford, VA to Washington, DC*, DISTANCE BETWEEN CITIES, https://distance-cities.com/distance-stafford-va-to-washington-dc (last visited Jan. 22, 2021) (indicating that Washington D.C. is 44 miles distance from Stafford).

[31] Sanchez & Graf, *supra* note 28.

[32] Res. 19-367, Stafford Cnty. Bd. of Supervisors Reg. Sess., (2019).

[33] *Id.*

[34] *QuickFacts: Tazewell County, Virginia*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/tazewellcountyvirginia (last visited Jan. 22, 2021) (stating that Tazewell County has a population of about 40,000 people); *Tazewell County, Virginia*, TAZEWELL CNTY. VA., http://tazewellcountyva.org/ (last visited Jan. 22, 2021).

[35] Jade Burks, *Tazewell County Becomes Second Amendment Sanctuary*, WVVA (Dec. 3, 2019, 11:50 PM), https://wvva.com/2019/12/03/tazewell-county-becomes-second-amendment-sanctuary/.

[36] *Id.*

[37] Tazewell Cnty. Bd. of Supervisors Dec. 3, 2019 Meeting Minutes, Reg. Meeting, at 1 (Va. 2019).

supersedes the laws being proposed, and that his office "was not coming to take away anyone's guns."[38] A Commonwealth's Attorney stated that the governor proposed "disarming law abiding citizens" and that "we could not stand for that."[39]

The board proceeded to adopt the Second Amendment Sanctuary Resolution. It mandated that no agent or employee of the County would participate in the enforcement of, or use funds to enforce or investigate, any unlawful act related to firearms.[40] "Unlawful Act" was defined as "any federal or state act, law, order, rule, or regulation which bans or effectively bans, registers or effectively registers, or limits the lawful use of firearms," other than existing laws.[41] That term included a ban on the possession of firearms based on having certain grips and stocks, muzzle brakes and other attachments, and magazine capacity.[42] It also included any restriction on parental rights to train their children in gun safety or on such trained children to hunt alone "or have access to firearms and ammunition for home defense when [their] parents are away."[43]

The Resolution exempted from its protections felons, adjudicated incompetents, subjects of protective orders, and others prohibited from firearm possession by state or federal law that pre-dated the resolution.[44]

The above are representative of the sanctuary resolutions adopted by local jurisdictions. As noted, some were short and general, while others were long and specific. All opposed what they saw as infringements on the right to keep and bear arms.

C. The Attorney General Opinion that Second Amendment Sanctuaries "Have No Legal Effect"

A strong political reaction by gun control proponents followed the declarations of Second Amendment Sanctuaries. Governor Ralph Northam insisted that his "common sense" gun proposals are constitutional and if "law enforcement officers are not enforcing those laws, there [were] going to be some consequences."[45] Representative

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38 *Id.* at 2.

39 *Id.* at 2–3.

40 Res. 19-009, Tazewell Cnty. Bd. of Supervisors Reg. Sess., (2019).

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 Dana Smith, *Governor Northam Says Second Amendment Sanctuaries Won't Stop Him from Pursuing 'Common Sense' Gun Legislation*, 13NEWS NOW (Dec. 11, 2019, 6:13 PM), https://www.13newsnow.com/article/news/politics/governor-northam-on-second-amendment-sanctuaries/291-da6727bc-30ff-43c8-8a4b-6005135632a1. Previously, however, Governor Northam vetoed two bills "that would have banned 'sanctuary city' policies and required local

Donald McEachin (D.-Va.) said that "the governor may have to nationalize the National Guard to enforce the law" and also added that funding could be cut from sheriffs and prosecutors who don't enforce the law.[46]

Virginia Attorney General Mark Herring claimed, "When the General Assembly passes new gun safety laws they will be enforced, and they will be followed. These resolutions have no legal force, and they're just part of an effort by the gun lobby to stoke fear."[47] It might also be surmised that legitimate fear was stoked in the minds of countless gun owners by the potential threat of arrest, conviction, and up to five years of incarceration for their continued possession of the firearms and magazines proposed to be banned.

General Herring issued a formal Opinion on the subject dated December 20, 2019.[48] The courts give attorney general opinions due consideration, but such opinions do not bind the courts.[49] Such opinions may reflect political positions about matters that are unsettled in the law, including on the topic at issue. For instance, a controversial 1993 opinion concluded that "the Second Amendment confers only a collective right upon the citizens of the states to form militias," and thus a ban on the purchase of more than one handgun in thirty days is constitutional.[50] But the supreme courts of the United States and Virginia have explained that the right is an individual right to bear arms, not a "collective" militia right.[51]

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law enforcement agencies to notify federal immigration officials of undocumented immigrants in their custody." Mel Leonor, *Northam Vetoes 'Sanctuary Cities' Bill*, RICHMOND TIMES-DISPATCH (Mar. 19, 2019), https://www.richmond.com/news/local/government-politics/northam-vetoes-sanctuary-cities-bill/article_a0594c7e-b87f-5e4e-9eb8-feb32abdbfc7.html.

[46] Jeffery Martin, *Virginia State Representative Suggests National Guard Be Called to Force Enforcement of New Gun Legislation*, NEWSWEEK (Dec. 13, 2019, 6:19 PM), https://www.newsweek.com/virginia-state-representative-suggests-national-guard-called-force-enforcement-new-gun-1477242; *About U.S. Congressman A. Donald McEachin*, CONGRESSMAN A. DONALD MCEACHIN, https://mcceachin.house.gov/about (last visited Feb. 11, 2021) (noting that McEachin is a Congressional House of Representatives member).

[47] Marie Albiges, *2nd Amendment Sanctuary Resolutions Have "No Legal Effect," Virginia Attorney General Says*, VIRGINIAN-PILOT (Dec. 20, 2019), https://www.pilotonline.com/government/virginia/vp-nw-attorney-general-opinion-2nd-amendment-sanctuary-20191220-tlr25abndbednegmp2da6b6qm4-story.html.

[48] Att'y Gen. Opinion 19-059, *supra* note 6, at 1.

[49] Twietmeyer v. City of Hampton, 497 S.E.2d 858, 861 (Va. 1998); *see also* Payne v. Fairfax Cnty. Sch. Bd., 764 S.E.2d 40, 43 (Va. 2014) ("Virginia courts do not defer to an interpretation of a statute, such as the one in the Attorney General's opinion, that contradicts the plain language of the statute.").

[50] OPINIONS OF THE ATTORNEY GENERAL AND REPORT TO THE GOVERNOR OF VIRGINIA, 13, 16–17 (1993), https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1993_Annual_Report.pdf. For an analysis of that opinion, see Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, 49–62 (1993).

[51] District of Columbia v. Heller, 554 U.S. 570, 579–82 (2008); DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 369 (Va. 2011).

In response to a request for an opinion about resolutions by localities "to declare themselves exempt from any new gun safety laws that the General Assembly may enact in the future," Attorney General Herring's 2019 Opinion concluded that "these resolutions have no legal effect. It is my further opinion that localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact."[52]

The Opinion notes a "gun violence epidemic" in which "over 10,000 Virginians have been killed by a gun since 2007."[53] It would be more accurate to say that they were killed by *a person* with a gun. It is also worth noting that the report on which that data was based stated that "[t]he majority (64.6%) of gun related deaths were due to suicide in 2017."[54]

Given that the most draconian bills in the 2020 session would have banned entire classes of rifles, it is pertinent to consider what types of weapons were used in the 470 homicides committed in Virginia during 2017.[55] Some of the methods of those homicides included handguns (272), stabbing (53), beating (36), shotguns (18), and rifles (18).[56] The Opinion also refers to a mass shooting in Virginia Beach in 2019,[57] but the murderer used two handguns, one of which he legally purchased a year earlier, and the other three years earlier.[58] Neither a rifle ban nor a one-handgun-a-month law would have mattered.

The Opinion went on to note that the Governor would be working with legislators when the General Assembly convened in January 2020 "to enact certain gun safety measures" like universal background checks.[59] However, the Opinion noted that "some localities have adopted resolutions declaring that they intend to opt out of any gun violence prevention measure that may be adopted."[60]

Sanctuary supporters see this vocabulary as euphemistic. To them, "gun safety" refers to the safe handling and use of guns.[61] They see the

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52 Att'y Gen. Opinion 19-059, *supra* note 6, at 1, 4.

53 *Id.* at 1 (citing VA. DEP'T OF HEALTH, OFF. OF THE CHIEF MED. EXAM'R ANN. REP. 2017, at 231 (2019) [hereinafter ANN. REP. 2017]).

54 ANN. REP. 2017, *supra* note 53, at 2.

55 *Id.* at 78.

56 *Id.*

57 Att'y Gen. Opinion 19-059, *supra* note 6, at 1.

58 Whit Johnson & Bill Hutchinson, *Suspected Virginia Beach Shooter Used Legally-Bought Gun Suppressor*, ABC NEWS (June 4, 2019, 9:13 AM), https://abcnews.go.com/US/suspected-virginia-beach-gunman-resigned-personal-reasons-massacre/story?id=63449625.

59 Att'y Gen. Opinion 19-059, *supra* note 6, at 2.

60 *Id.*

61 *See NRA's Statement on Second Amendment Sanctuaries*, NRA-ILA (Dec. 6, 2019) [hereinafter *NRA's Statement*], https://www.nraila.org/articles/20191206/nras-statement-on-second-amendment-sanctuaries 1/ (emphasizing the NRA's support for citizens protecting

purported "gun violence prevention measures" as the unleashing of draconian laws that would entail arrest, prosecution, imprisonment, and ruining of lives of countless citizens who would never commit acts of gun violence.[62]

The Opinion next recites a provision of the Virginia Constitution, but it is not the arms guarantee in Article I, § 13 (which is not mentioned in the entire Opinion). Instead, it is Article VII, § 2, which provides that "[t]he General Assembly shall provide by general law for the . . . powers . . . of counties, cities, towns, and regional governments."[63] The supremacy of state law over local ordinances is further shown by statutes and the common law, such as the Dillon Rule.[64] No one doubts those rules, but a state law that violates a constitutional right would be void, and the Opinion fails to engage in a dialogue on that issue.[65]

Under the above, the Opinion continues, "these resolutions neither have the force of law nor authorize localities or local constitutional officials to refuse to follow or decline to enforce gun violence prevention measures" that may be enacted.[66] The resolutions "have no legal effect" because they do not take concrete action, and instead express the intent to uphold Second Amendment rights, to prohibit use of public funds to restrict those rights, and to oppose infringement of those rights, including "such legal means [as] may be expedient, including without limitation, court action."[67]

Actually, based on the above, the resolutions do appear to take concrete action. They exercise the First Amendment right to petition the government for a redress of grievances.[68] They prohibit use of funds to

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their Second Amendment right by exercising their First Amendment right to speak out against tyrannical politicians); *see also NRA Gun Safety Rules*, NRA EXPLORE, https://gunsafetyrules.nra.org (last visited Feb. 3, 2021) (explaining that the NRA's fundamentals to gun safety are promoted with the safe handling, use, and storage of guns).

[62] *See e.g.*, Shannon Keith, *Hundreds of Residents Turn Out To Support 'Second Amendment Sanctuary' in Bedford County*, NEWS & ADVANCE (Nov. 25, 2019), https://newsadvance.com/hundreds-of-residents-turn-out-to-support-second-amendment-sanctuary-in-bedfordcounty/article_745d1f2a-5698-56e9-869b-5c13df085732.html (noting that people who attended a Bedford County Board meeting proposal to adopt a Second Amendment Resolution which would name Bedford County as a Second Amendment Sanctuary thought that the gun regulatory laws being passed by the General Assembly were tyrannical and went against the U.S. Constitution); *see also* Suderman & Rankin, *supra* note 23 (arguing that law-abiding gun owners would feel the brunt of the General Assembly's proposals and that these bills would strip people of their weapons).

[63] Att'y Gen. Opinion 19-059, *supra* note 6, at 2 (quoting VA. CONST. art. VII, § 2).

[64] *Id.*

[65] *Id.* at 1–4.

[66] *Id.* at 3.

[67] *Id.* at 3.

[68] U.S. CONST. amend. I; s*ee also NRA's Statement*, *supra* note 61 (noting the NRA's support for citizens exercising their First Amendment right to speak out against tyrannical politicians).

enforce unconstitutional laws.[69] And they authorize the filing of lawsuits to enforce constitutional rights.[70]

Local governments and local constitutional officers have neither been delegated any authority "to exempt themselves (or anyone else) from gun violence prevention statutes," the Opinion continues, nor "to declare state statutes unconstitutional or decline to follow them on that basis."[71] Thus, they must comply with all laws unless they are repealed or are invalidated by the judiciary.[72] For that proposition, the Opinion quotes a Virginia judicial decision that "[p]olice are charged to enforce laws until and unless they are declared unconstitutional," but neglects the sentence that follows, noting "the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[73]

Finally, the Opinion refutes the possible argument that a locality may not refuse to enforce law on the basis that it would "'commandeer' local resources."[74] In *Printz v. United States*, the U.S. Supreme Court explained that Congress may not compel the states to implement a federal regulatory program.[75] Unlike Congress, the Opinion notes, "'[t]he authority of the General Assembly shall extend to all subjects of legislation' not specifically 'forbidden or restricted' by the State Constitution."[76]

But there's the rub here—local governments and local constitutional officials see the proposed bills as forbidden by both the state and the federal constitutions. Is there a basis for them to refrain from enforcing such bills as would be enacted?

D. The Attorney General Arrogated to Himself the Authority to Repudiate a Provision of the Virginia Constitution as Unconstitutional

Attorney General Herring argues that local officials must enforce any state law without regard to conflicting constitutional rights, which may only be determined by the courts. Yet when first becoming Attorney General, he arrogated to himself the authority to refuse to enforce a

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69 Att'y Gen. Opinion 19-059, *supra* note 6, at 3; Res. 19-009, *supra* note 40.

70 Att'y Gen. Opinion 19-059 *supra* note 6, at 3.

71 *Id.*

72 *Id.* at 4 (citing Freeman v. Commonwealth, 778 S.E.2d 519, 526 (Va. App. 2015)).

73 *Id.* at 4 n.23 (quoting Freeman v. Commonwealth, 778 S.E.2d 519, 526 (Va. App. 2015)).

74 Att'y Gen. Opinion 19-059, *supra* note 6, at 4.

75 Printz v. United States, 521 U.S. 898, 925 (1997).

76 Att'y Gen. Opinion 19-059, *supra* note 6, at 4 (quoting VA. CONST. art. IV, § 14).

provision of the Virginia Constitution because, in his personal opinion, it violated the federal Constitution.[77]

Virginia voters approved by a fifty-seven percent vote the following constitutional amendment in 2006: "That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions."[78] The prior Virginia Attorney General was defending the constitutionality of the amendment in court when Herring was elected in a close race and took the oath to defend the Constitution and laws of the Commonwealth.[79] Without informing the voters of his intention during the election, he announced upon assuming office that he wanted Virginia to "be on the right side of history," and that he was switching sides and would attack the amendment as unconstitutional.[80] At that time, there was no binding judicial opinion so holding.

General Herring filed a notice in the litigation that, based on "his independent constitutional judgment," he "will not defend the constitutionality of those laws," but "will argue for their being declared unconstitutional" under the Fourteenth Amendment.[81] He argued by analogy that the President may "disregard" legislative encroachments "when they are unconstitutional."[82] He abandoned representation of his client and switched sides.[83]

But his sanctuary Opinion accords no such discretion to the counties and localities that, in their "independent constitutional judgment," resolved not to enforce certain laws deemed unconstitutional. No matter how facially contrary to the right to keep and bear arms, the Opinion says, "gun safety" measures must be enforced without question.[84]

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[77] Markus Schmidt, *Refusing to Defend State Law a Rarity, Herring Says*, RICHMOND TIMES-DISPATCH (Mar. 31, 2014), https://www.richmond.com/news/local/government-politics/refusing-to-defend-state-law-a-rarity-herring-says/article_7c9ba1a8-b887-11e3-898c-001a4bcf6878.html.

[78] VA. CONST. art. I, § 15-A (overturned in 2014 by Bostic v. Rainey, 970 F.2d 456, 483–84 (4th Cir. 2014)); *Virginia Question 1, Marriage Amendment (2006)*, BALLETOPEDIA, https://ballotpedia.org/Virginia_Question_1,_Marriage_Amendment_(2006) (last visited Feb. 1, 2021).

[79] *See* Schmidt, *supra* note 77 (noting that Attorney General Herring justified his position not to hire a legal team to defend the Commonwealth of Virginia's legal position in the same-sex marriage case partly because his predecessor had already filed a brief in support of the Commonwealth's legal position).

[80] *Id.*

[81] Notice of Change in Legal Position by Defendant Janet M. Rainey at 1, Bostic v. Rainey, 907 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395).

[82] *Id.* at 4 (quoting Freytag v. Commissioner, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part)).

[83] *See* Bostic v. Schaefer, 760 F.3d 352, 369, 388 (4th Cir. 2014) (explaining the circumstances that led to the Attorney General's change in legal position).

[84] *See* Att'y Gen. Opinion 19-059, *supra* note 6, at 1, 3–4 (explaining the supremacy of the General Assembly's laws over local ordinances).

In short, the Attorney General arrogated to himself the power to decide that a provision of the Virginia Constitution was invalid without relying on any binding judicial precedent to that effect. The localities and local constitutional officers are members of the executive branch, just as is the Attorney General. Should they vigorously enforce laws that appear to them, in good faith, to violate constitutional rights? The following offers insights into that question.

E. Absent Judicial Resolution, Local Officials Have an Obligation Not to Enforce Laws of Questionable Constitutionality

The Opinion asserts that the Second Amendment Sanctuary resolutions "have no legal effect" and that "localities and local constitutional officers cannot nullify state laws and must comply with gun violence prevention measures that the General Assembly may enact."[85] But local officials take an oath to support and defend the Virginia and U.S. constitutions, both of which provide that the right to keep and bear arms "shall not be infringed."[86] What effect does this have on the issue?

Constitutional rights override state laws that violate such guarantees.[87] Every officer of the Commonwealth takes an oath solemnly swearing or affirming that he or she will "support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia."[88]

The federal Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[89] Moreover, "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution."[90] Virginia's sheriffs and Commonwealth's Attorneys take that oath.[91]

As noted, the Opinion quotes a Virginia court decision that "[p]olice [officers] are charged to enforce laws until and unless they are declared unconstitutional," but neglects the sentence that follows, noting "the

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85 *Id.* at 3–4.

86 U.S. CONST. amend. II; VA. CONST. art. I, § 13; *see also* Joyce L. Malcom, *The Case for Second Amendment Sanctuaries: The Duty to Defend the Constitution*, Geo. Mason U. L. Stud. Rsch. Paper Series, LS 20-16 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677320 (analyzing the sanctuary movement by focusing on the oath taken to support the Constitution).

87 *See id.* at 28–29, 32 (explaining that laws that violate the Constitution are facially void and do not have to be obeyed).

88 VA. CODE ANN. § 49-1 (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2).

89 U.S. CONST. art. VI, cl. 2.

90 *Id.* art. VI, cl. 3.

91 *See id.* (requiring all state judicial and executive officers to take this oath).

possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws."[92] Where does that leave a law that bans commonly-possessed firearms in view of the constitutional directives that the right to keep and bear arms "shall not be infringed"?

By analogy, the Fourth Amendment provides that a search warrant must "particularly describe[] the . . . things to be seized."[93] In *Groh v. Ramirez*, the U.S. Supreme Court held that executing a search warrant that listed nothing to be seized violated a clearly-established right, and thus the law enforcement agent who executed the warrant was not entitled to qualified immunity: "Given that the particularity requirement is *set forth in the text of the Constitution*, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."[94] That the right to keep and bear arms "shall not be infringed" is also set forth in the text of the Constitution.[95]

The U.S. Supreme Court held in *Harlow v. Fitzgerald* that law enforcement officials are not "shielded from liability for civil damages" if they "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[96] Further, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action."[97] Where the constitutional text is plain, violation thereof is not excusable just because a judicial precedent exactly on point may not exist.[98]

As the U.S. Supreme Court explained in *United States v. Lanier*, "general statements of the law are not inherently incapable of giving fair and clear warning."[99] No one could argue with the following obvious example: "The easiest cases don't even arise. There has never been . . . a Section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be

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92 Att'y Gen. Opinion 19-059, *supra* note 6, at 4 n.23 (alterations in original); Freeman v. Commonwealth, 778 S.E.2d 519, 526 (Va. Ct. App. 2015) (quoting Michigan v. DeFillippo, 443 U.S. 31, 38 (1979)).

93 U.S. CONST. amend. IV.

94 540 U.S. 551, 554–57, 563–66 (2004) (emphasis added).

95 U.S. CONST. amend. II.

96 457 U.S. 800, 818 (1982).

97 *Id.* at 819.

98 *See* Hope v. Pelzer, 536 U.S. 730, 741 (2002) (acknowledging an official's capacity to believe his or her conduct violates established law, even in the absence of a clear constitutional rule).

99 520 U.S. 259, 271 (1997).

immune from damages [or criminal] liability."[100] *Lanier* further explained, "When broad constitutional requirements have been 'made specific' *by the text* or settled interpretations, willful violators 'certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. . . . [T]hey are not punished for violating an unknowable something.'"[101]

Law enforcement officers may be sued under the federal Civil Rights Act, 42 U.S.C. § 1983, and are not entitled to qualified immunity when "the constitutional rights at issue are clearly established."[102] A Virginia sheriff "in his individual capacity may be held strictly and vicariously liable" for a deputy's action where the deputy "was acting *colore officii* when he allegedly violated Plaintiff's rights."[103]

Moreover, prevailing parties in § 1983 suits are entitled to attorney's fees under § 1988.[104] For its success in *McDonald* in invalidating the handgun bans of Chicago and Oak Park, Ill., the National Rifle Association was awarded attorney's fees of over $1.4 million.[105] In a case that invalidated certain District of Columbia gun laws, it cost the District over one million dollars in fees.[106] Virginia localities and local constitutional officers would be prudent to avoid enforcement of laws that are of questionable constitutionality, which could result in similar liabilities for fees.

The proposed and passed firearm prohibitions relevant here have not been upheld in the Virginia courts or the pertinent federal courts. There is considerable flux and uncertainty about the validity of similar measures, some of which have been declared unconstitutional by other courts. For example, the Ninth Circuit Court of Appeals declared that California's ban on magazines holding over ten rounds violated the Second

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[100] *Id.* (alterations in original) (citation omitted). "The absence of 'a prior case directly on all fours' here speaks not to the unsettledness of the law, but to the brashness of the conduct." Bellotte v. Edwards, 629 F.3d 415, 424 (4th Cir. 2011) (citation omitted) (explaining that the invalidity of a no-knock search based on mere gun ownership was clearly established under the Fourth Amendment).

[101] 520 U.S. at 267 (alteration in original) (emphasis added) (quoting Screws v. United States, 325 U.S. 91, 104–05 (1945)).

[102] *See, e.g.*, White v. Chapman, 119 F. Supp. 3d 420, 427–29 (E.D. Va. 2015) (denying motions for summary judgment and holding that a civil suit against a sheriff was appropriate because he was not entitled to qualified immunity).

[103] *Id.* at 431.

[104] 42 U.S.C. § 1988(b).

[105] *See* Nat'l Rifle Ass'n v. Vill. of Oak Park, 871 F. Supp. 2d 781, 783, 788–89, 791–92 (N.D. Ill. 2012) (calculating the final figure pursuant to the court's ordered fees).

[106] Heller v. District of Columbia, 801 F.3d 264, 277–81 (D.C. Cir. 2015); *see* Nicholas Toscano, *D.C. to Pay Over $1 Million for Attorneys' Fees Incurred in Second Amendment Case*, STERLING ANALYTICS (Jan. 3, 2012), https://www.sterlinganalytics.com/d-c-to-pay-over-1-million-for-attorneys-fees-incurred-in-second-amendment-case/ (comparing the requested attorneys' fees of $3.1 million to the awarded fees of $1.1 million).

Amendment.[107] And the D.C. Circuit Court of Appeals declared that the District of Columbia's one-handgun-a-month law violated the Second Amendment.[108]

In the 2020 session, the Virginia General Assembly passed a measure authorizing a locality to prohibit the possession of a firearm in a public park owned or operated by the locality.[109] Fairfax County, which has parks on more than 23,000 acres of land,[110] passed such an ordinance.[111] Coincidentally, Delaware had a ban on firearm possession in the 23,000 acres of its parkland, which that state's supreme court declared violative of the state guarantee of the right to bear arms.[112]

Red Flag or "substantial risk orders" are of recent vintage and are largely untested in the courts.[113] Virginia's law is susceptible to challenge in part because it authorizes gun confiscations without an opportunity to be heard and the issuance of search warrants without probable cause.[114] Because the order seizes guns but does nothing to help an allegedly dangerous person, authorities may prefer to seek an emergency custody order if there is a substantial likelihood that a person, because of mental illness, will cause serious physical harm to himself or others.[115]

Professor Shawn E. Fields has posited a theory of "first impression departmentalism" regarding Second Amendment Sanctuaries which takes into account the scenario where a legislature presumes its laws to be constitutional, but sheriffs and other constitutional officers do not.[116] He explains:

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[107] *See* Duncan v. Becerra, 970 F.3d 1133, 1145–47, 1169 (9th Cir. 2020) (holding that the ban on LCMs restricts a person's right to self-defense guaranteed under the Second Amendment).

[108] *Heller*, 801 F.3d at 279–80.

[109] VA. CODE ANN. § 15.2-915(E) (LEXIS through 2020 Spec. Sess. I).

[110] *Park Authority History*, FAIRFAX CNTY. VA., https://www.fairfaxcounty.gov/parks/about-us (last visited Mar. 10, 2021).

[111] FAIRFAX, VA., CNTY. CODE, art. 2, § 6-2-1 (2020).

[112] Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 637, 662 (Del. 2017).

[113] *See* Mark Bowes, *36 Virginians Barred from Possessing Guns Since Va.'s New 'Red Flag' Law Began July 1*, RICHMOND TIMES-DISPATCH (Sept. 18, 2020), https://richmond.com/news/state-and-regional/crime-and-courts/36-virginians-barred-from-possessing-guns-since-va-s-new-red-flag-law-began-july/article_1ee0ac33-75d0-58f2-8186-81e674e114de.html (noting the impact on Virginia gun holders since the passage of the state's new gun control law).

[114] *See* VA. CODE ANN. § 19.2-152.14(A) (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2.) (describing the process of obtaining an ex parte emergency substantial risk order); *id.* § 19.2-152.14(B) (noting that "has reason to believe" is the requisite standard for a search warrant in the context of emergency substantial risk orders).

[115] *See* VA. CODE ANN. § 37.2-808(A) (authorizing emergency custody orders when there is probable cause that the person has a mental illness and there is a substantial likelihood that the person will cause serious harm to himself or others, is in need of hospitalization or treatment, and is unwilling to volunteer for hospitalization or treatment).

[116] Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 496 (2020).

> Neither constitutional interpretation can trump the other as a matter of constitutional law, at least until the issue is clearly resolved by the judiciary. Until then, the coequal political branches share the power and duty to define the contours of constitutional doctrine. The question then returns to whether one branch or level of government can trump the other as a matter of legislative or enforcement power . . . .[117]

What the above means is that, because the state and federal constitutions trump contrary state laws, neither the legislature nor the executive branch at the state level are in a position to tell local officials and local constitutional officers that they must enforce laws they perceive to be unconstitutional absent a judicial resolution of the issue.

F. A Case in Point: Printz v. United States

The U.S. Supreme Court, in *Printz v. United States*, declared as unconstitutional a federal law requiring the law enforcement officers of the states to administer a federal regulatory program—conducting background checks on handgun buyers.[118] That the law was what some today may call a "gun safety" measure did not save it.

The Attorney General Opinion finds no applicability of *Printz* here because, unlike Congress, the General Assembly has power to issue duties to local law enforcement.[119] But *Printz* has a parallel here. This author represented Sheriff Jay Printz and other sheriffs in several cases challenging the federal law in the district courts, courts of appeal, and Supreme Court.[120] When the federal law became effective, Sheriff Printz refused to administer it, even before any court ruling, on the basis that it was unconstitutional and that his scarce resources would be applied to matters more urgent than the federal "gun safety" law, including an unsolved murder and emergencies such as assaults and burglaries in progress.[121]

Sheriff Printz was "required to perform those duties prescribed by state law and takes an oath to this effect," the district court found, but "enforcement of the [federal] Act forces him to reallocate already limited resources such that he is unable to carry out certain duties prescribed by

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117 *Id.*

118 521 U.S. 898, 902–03, 924–25, 935 (1997).

119 Att'y Gen. Opinion 19-059, *supra* note 6, at 4.

120 *Printz*, 521 U.S. 898 (1997); Koog v. United States, 79 F.3d 452 (5th Cir. 1996).

121 Brief for Petitioner at 3–5, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478), 1996 WL 464182, at *3.

state law."[122] Thus he was "forced to choose between violating his oath or violating the [federal] Act."[123] Here, Virginia sheriffs take an oath to support the constitutions of Virginia and the United States,[124] but the purported "gun safety" measures would cause them to violate that oath, not to mention to reallocate their serious duties of combating violent crime.

Thus, while the constitutional issue in *Printz* was the nature of federalism, a very practical aspect involved law enforcement discretion to put resources in the most urgent places. Even if the law was upheld, the United States later agreed that the sheriffs could forgo administering it if more urgent duties took priority.[125]

If the General Assembly enacts victimless crimes, such as possession of a rifle with a pistol grip, will it be conceded that local law enforcement may prioritize violent crime? Or must "gun safety" measures take priority over murder, rape, and robbery?

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Imagine that bills are introduced to confiscate books that some folks do not like and to search houses without warrants to seize them. The Quran or the Bible, *Mein Kampf* or the *Communist Manifesto* might be the targets. If counties declared themselves First and Fourth Amendment Sanctuaries, would that even be controversial? Would we expect an Attorney General opinion claiming that the proposed "press and speech safety" laws must be enforced and obeyed without question? That law enforcement is required to break into houses without warrants as the law directs? And would it be realistic to anticipate unhesitating citizen compliance to turn in the offensive books for a Josef Goebbels-style book burning?

The proliferation of Second Amendment Sanctuaries in Virginia should come as no surprise, given that the proposed bills would impose drastic penalties of imprisonment for victimless conduct seen as a constitutional right. The issue will not go away by brushing off these concerns as having no legal effect and failing to engage in a constitutional dialogue on the merits.

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[122] Printz v. United States, 854 F. Supp. 1503, 1507 (D. Mont. 1994).

[123] *Id.* at 1508.

[124] VA. CODE ANN. § 49-1 (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2).

[125] *See* Mack v. United States, 856 F. Supp. 1372, 1376 (D. Ariz. 1994) ("[I]t will be left to the discretion of the CLEO [chief law enforcement officer] to establish enforcement standards based upon the jurisdiction's resources which, depending on the area, could entirely negate the research obligation.").

II. DO GUN BANS VIOLATE THE RIGHT TO KEEP AND BEAR ARMS?

A. The Virginia and U.S. Constitutions Forbid Infringement of the Inherent Right to Bear Arms

The Virginia Declaration of Rights is "the basis and foundation of government."[126] It declares that all persons "have certain inherent rights," including "the enjoyment of *life* and liberty, with *the means* of . . . pursuing and obtaining happiness and *safety*."[127] The right to self-defense and of the means of defending life is inherent in that provision.[128]

Further, "all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."[129] Along with that is recognition of "the right of the people peaceably to assemble, and to petition the government for the redress of grievances."[130] The Second Amendment Sanctuary resolutions at issue here are classic examples of the exercise of the right to petition.

To ensure protection of the above rights, Section 13 of the Declaration of Rights declares: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed."[131] The Opinion does not recite that explicit language.

Nor does the Opinion acknowledge any meaning of the Second Amendment to the U.S. Constitution, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[132] It's as if the Amendment is of no consequence, except in the misguided imagination of the localities that passed resolutions. The constitutional right endeared to Virginians since it was ratified by the states in 1791, which is at the center of the storm, is absent from the discussion.[133]

The proposed bills would imprison peaceable citizens for exercise of constitutional rights. Many of the new crimes will be Class 6 felonies,

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126 VA. CONST. art. I, pmbl.

127 *Id.* art. I, § 1 (emphasis added).

128 Stephen R. McCullough, *Article I Section 13 of the Virginia Constitution: Of Militias and an Individual Right to Bear Arms*, 48 U. RICH. L. REV. 215, 227 (2013) (explaining that the purpose of this section of the Virginia Declaration of Rights is to protect the right to self-defense).

129 VA. CONST. art. I, § 2.

130 *Id.* art. I, § 12.

131 *Id.* art. I, § 13. For a history of the adoption of the right to bear arms clause, see McCullough, *supra* note 128, and Stephen P. Halbrook, *The Right to Bear Arms in the Virginia Constitution and the Second Amendment: Historical Development and Precedent in Virginia and the Fourth Circuit*, 8 LIBERTY U. L. REV. 619 (2014).

132 U.S. CONST. amend. II.

133 *Id.*

which are punishable by "a term of imprisonment of not less than one year nor more than five years."[134] As proposed, H.B. 961 would impose five years of incarceration for keeping a common firearm with some inconsequential feature, such as a muzzle brake, to reduce recoil. That's exactly the same penalty if a person would unlawfully "shoot . . . any person . . . with the intent to . . . kill."[135] The sense of disproportion is incredibly stark. Moreover, a felony conviction deprives one of his or her civil rights to vote, serve on a jury, run for office, and possess a firearm.[136]

Ironically, supporters of severe criminal penalties for victimless gun crimes advocate lessening criminal penalties for some crimes that do have victims. One press release reads, "Governor Northam Signs Historic Gun Safety Legislation into Law,"[137] in contrast with another that states "Governor Northam Signs Bold New Laws to Reform Criminal Justice."[138] None of the former included the actual misuse of a firearm against a victim, while the latter included increasing the amount of the felony larceny threshold, permitting community service to reduce imposed fines and court costs, reopening sentences of persons convicted when juries were not informed about parole status, and other changes applicable to crimes that have victims.[139]

In addition to the right to bear arms, the right to just compensation is implicated by the proposed gun confiscation laws which offer no compensation.[140] Inherent rights under the Virginia Constitution include

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[134] VA. CODE ANN. § 18.2-10(f) (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2); *see also, e.g.*, H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (punishing the following offenses as Class 6 felonies: any dealer who willfully and intentionally sells or transfers a firearm in violation of this section, any person who attempts to encourage or entice a dealer to transfer a firearm other than to the actual buyer, and any person who imports, sells, transfers, purchases, possesses, or transports an assault firearm, large capacity magazine, silencer, or trigger activator).

[135] VA. CODE ANN. § 18.2-51.

[136] *E.g.*, 18 U.S.C. § 922(g)(1) (explaining how it is unlawful for felons to possess or transport a firearm); VA. CONST. art. II, § 1 (preventing convicted felons from voting unless their rights have been restored by the governor); VA. CONST. art. II § 5 (requiring any person who runs for office to be qualified to vote for that office); VA. CODE ANN. § 8.01-352 (LEXIS through 2021 Reg. Sess. and Acts 2021 Spec. Sess. I, cc. 5, 34, 55, 56, 78, 82, 85, 110, 117 and 118) (providing for objection to jurors who have legal disabilities such as being a convicted felon); VA. CODE ANN. § 18.2-308 (making it unlawful for a convicted felon to possess or transport firearms).

[137] Press Release, Ralph Northam, *supra* note 21.

[138] Press Release, Ralph Northam, Governor of Virginia, Governor Northam Signs Bold New Laws to Reform Criminal Justice (Apr. 12, 2020), https://www.governor.virginia.gov/newsroom/all-releases/2020/april/headline-856054-en.html.

[139] *Compare* Press Release, Ralph Northam, *supra* note 21, *with* Press Release, Ralph Northam, Governor of Virginia, *supra* note 138.

[140] U.S. CONST. amend. V (explaining how just compensation is required when the government takes private property for public use); Denise Cartolano, *Check "Mate": Australia's Gun Law Reform Presents the United States with the Challenge to Safeguard*

"the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[141] "To deprive a citizen of any property already legally acquired, without a fair compensation, deprives him, *quoad hoc*, of the means of *possessing property*, and of the only means, so far as the Government is concerned, besides the security of his person, of *obtaining happiness*."[142]

The Virginia Constitution further provides: "That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof."[143] And the federal Fifth Amendment mandates, "nor shall private property be taken for public use, without just compensation."[144]

In sum, both the Virginia and the U.S. Constitutions provide that "the right of the people to keep and bear arms, shall not be infringed."[145] To say the least, whether imprisoning citizens for keeping and bearing arms and for other exercises of that right constitutes infringement is worthy of discussion.

B. The Founders Sought to Prevent Gun Confiscation

The seal of the Commonwealth of Virginia depicts Virtus, with sword and spear, standing over the slain Tyranny, and includes the caption, *Sic semper tyrannis* ("Thus always to tyrants").[146] Its symbolism of virtuous, armed citizens protecting freedom is unmistakable.

After the Redcoats tried to disarm the colonists at Lexington and Concord in 1775, the Virginia House of Burgesses complained to Lord Dunmore, Virginia's last royal governor, decrying "the many attempts in the northern colonies to disarm the people, and thereby deprive them of

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Their Citizens from Mass Shootings, 41 NOVA L. REV. 139, 173–74 (2017) (recognizing that the United States would be required to pay just compensation for any guns the government requires citizens to surrender).

141 VA. CONST. art. I, § 1.

142 Crenshaw v. Slate River Co., 27 Va. (6 Rand.) 245, 276 (1828) (Green, J., concurring) (emphasis added).

143 VA. CONST. art. I, § 11.

144 U.S. CONST. amend. V.

145 *Id.* amend. II.; *accord* VA. CONST. art. I, § 13.

146 VA. CODE ANN. § 1-500 (LEXIS through 2020 Spec. Sess. and Acts 2021, cc. 1 and 2); 2012–2013 REPORT OF THE SECRETARY OF THE COMMONWEALTH TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA (Patrick Mayfield ed., 2013), https://www.bluebook.virginia.gov/media/governorvirginiagov/secretary-of-the-commonwealth/pdf/bluebooks/2013_RD39-Report_of_the_Secretary_of_the_Commonwealth_2012_-_2013.pdf.

the only means of defending their lives and property."[147] In reaction to Dunmore's "gun safety" measures to do the same, Patrick Henry organized an independent militia company.[148] That could be considered Virginia's first "Second Amendment Sanctuary."

Meanwhile, George Washington organized the Fairfax Independent Militia Company, about which George Mason wrote: "[T]hreat'ned with the Destruction of our Civil-rights, & Liberty," its members pledged that "we will, each of us, constantly keep by us" a firelock, six pounds of gun powder, and twenty pounds of lead.[149] Those were the 18th century equivalents of the guns and magazines that H.B. 961 would ban.

In his Proclamation of November 7, 1775, Dunmore condemned the patriots as "a Body of armed Men unlawfully assembled," declared martial law, and required "every Person capable of bearing Arms" to join his forces "or be looked upon as Traitors to his majesty's Crown," subject to the death penalty.[150]

In 1776, Thomas Jefferson proposed: "No freeman shall be debarred the use of arms . . . ."[151] Jefferson endorsed the penal reformer Cesare Beccaria, who wrote that arms control laws "disarm those only who are neither inclined nor determined to commit crimes. . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man."[152]

When independence was won and the federal Constitution was proposed, James Madison heralded that Americans possess an "advantage of being armed . . . over the people of almost every other nation,"[153] adding: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."[154]

In the Virginia ratification convention, George Mason recalled British plans "to disarm the people; that it was the best and most effectual

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147 VIRGINIA GAZETTE, Aug. 5, 1775, at 1; Ted Brackemyre, *Lord Dunmore: America's First Villain?*, U.S. HIST. SCENE, https://ushistoryscene.com/article/lord-dunmore/ (showing that Lord Dunmore was the last Royal Governor of Virginia) (last visited Feb. 12, 2021).

148 *See* David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 302–03 (2012) (explaining the events that led to Patrick Henry's call to arms in response to Lord Dunmore's actions).

149 1 THE PAPERS OF GEORGE MASON 1725–1792, at 209–11 (Robert A. Rutland ed., 1970).

150 *Lord Dunmore's Proclamation (1775)*, ENCYC. VA., https://encyclopediavirginia.org/entries/lord-dunmores-proclamation-1775/ (last visited Apr. 7, 2021).

151 *Draft Constitution for Virginia (June 1776)*, *in* 1 THE PAPERS OF THOMAS JEFFERSON 329, 344–45 (Elizabeth J. Sherwood & Ida T. Hopper eds., 1954).

152 CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., The Bobbs-Merrill Co. 1963) (1764).

153 The Federalist No. 46 (James Madison).

154 *Id.*

way to enslave them."[155] Patrick Henry averred: "The great object is, that every man be armed. . . . Everyone who is able may have a gun."[156] Virginia ratified the federal Constitution subject to a declaration that "[t]hat the people have a right" to peaceably assemble, to freedom of speech, and to keep and bear arms.[157]

Virginia jurist and commentator St. George Tucker wrote in 1803 that "[w]herever . . . the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction."[158]

Could it seriously be contended that the right to arms in the minds of the Founders, including those from Virginia, would *not* be violated by laws imprisoning peaceable gun owners and confiscating their firearms? That a firearm may be banned because of this or that attachment or how it is held? For instance, H.B. 961 proposed to ban certain ordinary rifles if they have a listed feature, including "a bayonet mount."[159] Yet the federal Militia Act of 1792, adopted a year after the Second Amendment, required each able-bodied male citizen to enroll in the militia and to "provide himself with a good musket or firelock, [and] a sufficient bayonet."[160]

The only firearm bans in the early Republic applied to African Americans. Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun." Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead," without a license.[161] Such limits "upon their right to bear arms" were among the "numerous restrictions imposed on [free blacks] in [Virginia's] Statute Book, many of which [were] inconsistent with the letter and spirit of the Constitution, both of this State and of the United States."[162]

When slavery ended, Frederick Douglass famously said that the freedmen "must have the cartridge box, the jury box, and the ballot box, to protect them."[163] But the Black Codes replaced the Slave Codes, and jurisdictions in the South, such as Alexandria, Virginia, continued "to

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155 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 327, 380 (Jonathan Elliot ed., J.B. Lippincott Co., 2d ed. 1836).

156 *Id.* at 386.

157 *Id.* at 657–59.

158 GEORGE TUCKER, NOTES OF REFERENCE APPENDED TO BLACKSTONE'S COMMENTARIES (1803), at 181 (2013) (ebook).

159 H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (emphasis removed).

160 2d Cong., 1 Stat. 271 (1792).

161 Va. 1819, c. 111, §§ 7–8, https://babel.hathitrust.org/cgi/pt?id=uva.x004234001&view=1up&seq=501.

162 *See* Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 449 (1824) (considering the restriction of free blacks' right to bear arms).

163 Frederick Douglass, *Frederick Douglass on the American Crisis*, NEWCASTLE COURANT, May 26, 1865.

enforce the old law against [freedmen] in respect to whipping and carrying fire-arms . . . ."[164]

Congress responded with the Freedmen's Bureau Act, which protected "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty[] [and] personal security . . . including the constitutional right to bear arms . . . without respect to race or color, or previous condition of slavery."[165] That was followed by the ratification of the Fourteenth Amendment, one objective of which was to protect the right to keep and bear arms.[166]

In sum, the liberty to keep and bear arms was a fundamental right to the Founders, both of Virginia and the United States alike. The Fourteenth Amendment sought to end the infringement of this right as applied to African Americans. Proposals to criminalize the exercise of this right are inconsistent with this history and tradition.

C. A Ban on Common Firearms is Precluded by Decisions of the U.S. and Virginia Supreme Courts

Neither the United States nor Virginia supreme courts have considered, much less upheld, a ban on the commonly-possessed firearms, mostly rifles, proposed to be banned. The proposed gun ban is facially inconsistent with the clear text guaranteeing "the right of the people to keep and bear *arms*" and with the decisions of the United States and Virginia supreme courts.

The U.S. Supreme Court has referred to the AR-15 semiautomatic rifle in the context of a "long tradition of widespread lawful gun ownership" in America.[167] In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects arms that are "in common use" or "typically possessed by law-abiding citizens" for "lawful purposes like self-defense."[168] The right to bear arms was held to be a fundamental right that applies to the states through the Fourteenth Amendment in *McDonald v. City of Chicago*.[169]

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[164] *Report of the Joint Committee on Reconstruction*, 39th Cong. 21 (1866) (statement of John Hawkshurst).

[165] Freedman's Bureau Act, ch. cc. §14, 14 Stat. 173, 176–77 (1866) (in force for two years until the passage of the Fourteenth Amendment made it unnecessary).

[166] *See* McDonald v. City of Chicago, 561 U.S. 742, 775–76, 778 (2010) (explaining how one purpose of the Fourteenth Amendment was to guarantee black citizens the right to keep and bear arms).

[167] *See* Staples v. United States, 511 U.S. 600, 602–03, 610 (1994) (evaluating the history and tradition of private gun ownership in the United States and analogizing the civilian AR-15 with the military M-16).

[168] 554 U.S. 570, 576, 624–25, 627, 636 (2008) (quoting United States v. Miller, 307 U.S. 174, 179 (1938)).

[169] 561 U.S. at 750, 767.

The Supreme Court explained in a stun gun case that protected arms are not limited to the types that existed at the Founding.[170] While some 200,000 Americans own stun guns,[171] nearly twenty million "modern sporting rifles" (also known as "assault weapons") like the AR-15 are in civilian hands.[172] Yet these are the rifles, America's most popular,[173] that are to be banned.

Before his elevation to the Supreme Court, then-Judge Brett Kavanaugh wrote: "In my judgment, both D.C.'s ban on semi-automatic rifles and its gun registration requirement are unconstitutional under *Heller*."[174] Justice Thomas has written: "Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting."[175] Justice Scalia, the author of *Heller*, joined in that view.[176]

Opponents of the right to keep and bear arms have tried to keep the U.S. Supreme Court from hearing any case on the Second Amendment by mooting the case before the Court, as is witnessed by New York City's amendment to its ordinance prohibiting one from removing a handgun from one's premises.[177] Given that *Heller* invalidated D.C.'s handgun ban under the common-use test,[178] the Court could well invalidate rifle bans under the same test.

The Virginia Supreme Court has applied *Heller*'s reasoning to the Virginia arms guarantee as follows: "We hold that the protection of the right to bear arms expressed in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the

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170 Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016) (per curiam).

171 David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS UNIV. L. J. 193, 241 (2016).

172 *NSSF Releases Most Recent Firearm Production Figures*, NAT'L SHOOTING SPORTS FOUND. (Nov. 16, 2020), https://www.nssf.org/nssf-releases-most-recent-firearm-production-figures/?utm_source=bulletpoints; Aaron Smith, *Assault Weapons Like the AR-15 Face Uncertain Future if Trump Loses*, FORBES, (Oct. 22, 2020, 7:32 AM), https://www.forbes.com/sites/aaronsmith/2020/10/22/assault-weapons-including-the-bushmaster-face-uncertain-future-if-trump-loses/?sh=5856f3413882; *see also* Alex Kingsbury, *It's Too Late to Ban Assault Weapons*, N.Y. TIMES, (Aug. 9, 2019), https://www.nytimes.com/2019/08/09/opinion/ar15-assault-weapon-ban.html (estimating that there are nearly 15 million military-style rifles in circulation).

173 *NSSF Releases Most Recent Firearm Production Figures*, *supra* note 172.

174 Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

175 Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting) (citation omitted).

176 *Id.* at 447; District of Columbia v. Heller, 554 U.S. 570 (2008).

177 N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

178 *Heller*, 554 U.S. at 624, 627–29.

instant case."[179] In particular, *Heller* "held that the Second Amendment protects the right to carry and possess handguns in the home for self-defense."[180]

Yet H.B. 961 would ban not only a variety of handguns, but numerous rifles and some shotguns.[181] It is noteworthy that the 2007 Virginia Tech shooting and the 2019 Virginia Beach shooting[182] involved only handguns, which are also used in most gun-related murders, including mass shootings.[183]

Rifles in particular are rarely used in crime. The FBI Uniform Crime Reports show the following weapons were used in homicides in 2018: handguns (6,603), knives (1,515), personal weapons such as hands (672), and rifles of all kinds (297).[184] If, as *Heller* held, the large number of handgun homicides does not justify a handgun ban,[185] the small number of rifle homicides surely would not justify a ban on an unknown subset of such rifles.

The Virginia Court of Appeals rejected an argument that would be equivalent to "limiting the right to keep and bear arms only to muskets because more modern firearms came to be at a later point in time."[186] As *Heller* explained:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to

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179 DiGiacinto v. Rector & Visitors of George Mason Univ., 704 S.E.2d 365, 369 (Va. 2011).

180 *Id.* at 369 (citing *Heller*, 554 U.S. at 635–36).

181 H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

182 *Virginia Tech Shootings Fast Facts*, CNN, https://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/index.html (showing that a 9mm and .22 caliber pistols were the guns used in the Virginia Tech shooting) (Apr. 9, 2020, 9:47 AM); Sara Dorn & Laura Italiano, *New Details Emerge About Alleged Virginia Beach Shooter DeWayne Craddock*, N.Y. POST, https://nypost.com/2019/06/01/new-details-emerge-about-alleged-virginia-beach-shooter-dewayne-craddock/ (June 1, 2019, 10:44 AM).

183 *ALERRT Active Shooter Data*, ADVANCED L. ENF'T RAPID RESPONSE TRAINING, http://activeshooterdata.org/the-event.html (last visited Jan. 17, 2021); *Weapon Types Used in Mass Shootings in the United States Between 1982 and February 2020, By Number of Weapons and Incidents*, STATISTA, https://www.statista.com/statistics/476409/mass-shootings-in-the-us-by-weapon-types-used/ (last visited Apr. 8, 2021); *Most Active Shooters Use Pistols, Not Rifles, According to FBI Data*, TRACE, https://www.thetrace.org/newsletter/mass-shooting-gun-type-data/ (last visited Feb. 12, 2021).

184 *Murder Victims by Weapon 2014-2018*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/expanded-homicide-data-table-8.xls (last visited Jan. 17, 2021).

185 District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008).

186 Prekker v. Commonwealth, 782 S.E.2d 604, 612 n.12 (Va. Ct. App. 2016).

> modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[187]

Governor Ralph Northam's closure of indoor shooting ranges in response to the COVID-19 pandemic gave rise to a circuit court opinion with an extensive analysis of the right to bear arms.[188] In *Lynchburg Range & Training v. Northam*, Lynchburg Circuit Judge F. Patrick Yeatts enjoined the closure order based on the provision that the chapter in the Virginia Code authorizing emergency powers may not be construed to: "Empower the Governor . . . to in any way limit or prohibit the rights of the people to keep and bear arms as guaranteed by Article I, Section 13 of the Constitution of Virginia or the Second Amendment of the Constitution of the United States, including the otherwise lawful possession, carrying, transportation, sale, or transfer of firearms . . . ."[189]

In an opinion letter to the parties, the court noted about the above provision: "It is regrettable the Governor only one time in a footnote cited the statute on which this case turns."[190] Given that seeming disregard for the right to bear arms, the court posed this paradox: "The Governor appears to argue that, when he declares a state of emergency, he can ignore any law that limits his power, even laws designed to limit his power during a state of emergency."[191]

The court found the language of the Virginia guarantee to be compelling—"a well regulated militia, composed of the body of the people, *trained to arms*, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and *bear arms* shall not be infringed."[192] While the operative clause guarantees the right to bear arms, "the prefatory clause provides that the purpose of the right is to have a population trained with firearms in order to defend the Commonwealth."[193] Besides violating the statute, the order failed constitutional muster under strict scrutiny because it was not narrowly tailored.[194] Under that reasoning, if a ban on practicing at indoor shooting

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187 Heller, 554 U.S. at 582.

188 Lynchburg Range & Training v. Northam, 455 F. Supp. 3d 238, 241–48 (W.D. Va. 2020) (mem.).

189 VA. CODE ANN. § 44-146.15(3) (LEXIS through 2020 Spec. Sess. I and Acts 2021, cc. 1 and 2); Order Granting Temporary Injunction, Lynchburg Range & Training, 455 F. Supp. 3d 240 (No. CL20-333).

190 Judge F. Patrick Yeatts, Opinion Letter to David G. Brown & Toby J. Heytens (Apr. 27, 2020).

191 *Id.* at 2–3.

192 *Id.* at 2 (quoting VA. CONST. art. I, § 13).

193 *Id.*

194 *Id.* at 4.

ranges was invalid, even more so must be a ban on mere possession of common firearms and magazines.

Finding that the plaintiff shooting range was likely to prevail on the merits, the court further decided that the injunction would be in the public interest, explaining: "In his Americanized version of Blackstone's *Commentaries on the Laws of England*, St. George Tucker called the right to keep and bear arms the 'true palladium of liberty,' and he called the right of self-defense 'the first law of nature.'"[195]

In sum, banning handguns and long guns such as in H.B. 961 would appear to violate the right to keep and bear arms as interpreted by both the U.S. Supreme Court and the Virginia courts. The Second Amendment Sanctuaries are not engaged in frivolous discourse.

D. A Split Federal Court Decision Would Not Apply to the Proposed Bans Here

In 2013, Maryland enacted a law banning certain firearms but grandfathering those that were possessed on the effective date.[196] Sale, but not possession, of certain magazines was prohibited.[197] The generic features of the banned firearms were narrow and did not include a rifle with a pistol grip or adjustable stock.[198] By contrast, Virginia H.B. 961 would have banned mere possession of enormous numbers of common firearms, with far broader generic definitions, and magazines.[199]

The Fourth Circuit Court of Appeals, in *Kolbe v. Hogan*, held that strict scrutiny applied and that the banned guns and magazines "come within the coverage of the Second Amendment."[200] However, the *en banc* court upheld the Maryland law based on the seemingly-incredible assertion that there is only a "slight" difference between the banned semiautomatics (which fire only a single shot per trigger pull) and fully automatic machine guns (which fire continuously as long as the trigger is pulled).[201] According to the four dissenting judges, the majority simply ignored the *Heller* common-use test.[202]

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195 *Id.* at 5–6 (quoting 1 BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE GENERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA. App. 300 (George Tucker) (1803)).

196 H.D. 1191, 2013 Gen. Assemb., Reg. Sess. (Md. 2013); Trip Gabriel, *New Gun Restrictions Pass the Legislature in Maryland*, N.Y. TIMES (Apr. 4, 2013), https://www.nytimes.com/2013/04/05/us/tighter-gun-rules-pass-the-maryland-legislature.html.

197 *Id.*

198 *Id.*

199 H.D. 961, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

200 813 F.3d 160, 168, 178 (4th Cir. 2016).

201 Kolbe v. Hogan, 849 F.3d 114, 121, 125 (4th Cir. 2017) (en banc).

202 *Id.* at 155–56 (Traxler, J., dissenting).

At any rate, *Kolbe* would not save H.B. 961, which would enact far more radical bans. *Kolbe* does not stand for the proposition that any ban, no matter how draconian, is constitutional. Moreover, the U.S. Supreme Court has not upheld any such ban.

Kolbe's decision on the Second Amendment is not binding on the Virginia Supreme Court, which could disagree with the Fourth Circuit and create a conflict that only the U.S. Supreme Court could resolve.

Above all, the Virginia Supreme Court is the final interpreter of the Virginia arms guarantee, and its decision thereon would not be subject to review by the U.S. Supreme Court.[203] A guarantee under a state bill of rights may be interpreted as having more protection than a similar guarantee under the federal constitution.[204]

In sum, while Maryland's law was upheld by a badly-split Fourth Circuit, the Virginia proposal is far more restrictive and appears to be invalid under the U.S. Supreme Court's decisions on the Second Amendment. Further, the final arbiter of the Virginia arms guarantee is the Virginia Supreme Court.

III. LOCAL OFFICIALS HAVE AUTHORITY TO APPLY LIMITED RESOURCES TO COMBAT VIOLENT CRIME

A. Enforcement of State Laws is Subject to Local Resources and Discretion

The Virginia Constitution provides, "The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted."[205] The subjects of legislation that are "herein forbidden or restricted" obviously include infringement on the right to keep and bear arms and other constitutional guarantees.

The Attorney General Opinion notes that the General Assembly provides for the powers of counties and other localities.[206] But that does not mean that the General Assembly may require them to enforce unconstitutional laws or, given scarce resources, to neglect the suppression of violent crime in order to prioritize victimless "gun safety" measures (such as the proposed felony of possessing a rifle with an adjustable shoulder stock).

The sheriff and the attorney for the Commonwealth are constitutional officers who are elected by and are answerable to the

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203 JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018).

204 *See id.* at 171 (explaining that state courts have "independent authority to construe their own constitutions beyond the protections provided by the federal sibling").

205 VA. CONST. art. IV, § 14.

206 Att'y Gen. Opinion 19-059, *supra* note 6, at 2 (quoting VA. CONST. art. VII, § 2).

voters,[207] not to the governor or the Attorney General. The sheriff shall "exercise all the powers conferred and perform all the duties imposed upon sheriffs by general law," and "shall enforce the law or see that it is enforced in the locality from which he is elected."[208] "The attorney for the Commonwealth shall exercise all the powers conferred and perform all the duties imposed upon such officer by general law."[209] But they have considerable discretion regarding priorities in the enforcement of law based on available resources and danger to the community.[210] Respond to a wife-beating in progress and investigate a murder, or follow up on an informer's tip that two elderly neighbors might trade guns without background checks? That's a no-brainer.

To the extent it may be suggested that officers who do not adequately enforce the purported "gun safety" laws will be removed from office, neither the governor nor the Attorney General has any such power of removal. An elected officer may be removed from office by petition to the circuit court where the officer resides.[211] "The petition must be signed by a number of registered voters who reside within the jurisdiction of the officer equal to ten percent of the total number of votes cast at the last election for the office that the officer holds."[212] Each such voter must sign under penalties of perjury.[213] Recall that most jurisdictions in Virginia have declared themselves Second Amendment Sanctuaries.[214]

Grounds for removal include "neglect of duty, misuse of office, or incompetence in the performance of duties" if such "has a material adverse effect upon the conduct of the office."[215] That may be difficult to prove given the discretion to give priority to combating actual violent crime and crimes with actual victims.

The Commonwealth's Attorney represents the Commonwealth in the trial, but if the proceeding is against the Commonwealth's Attorney, the court appoints an attorney to represent the Commonwealth.[216] The officer is entitled to trial by jury of his or her peers.[217] Review of the case may be sought at the Virginia Supreme Court.[218]

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207 VA. CONST. art. VII, § 4.

208 VA. CODE. ANN. § 15.2-1609 (LEXIS through 2020 Spec. Sess. I).

209 *Id.* § 15.2-1626.

210 *Id.* § 15.2-1627 (explaining the scope of discretion that Commonwealth Attorneys have when determining whether to prosecute misdemeanors).

211 *Id.* § 24.2-233.

212 *Id.*

213 *Id.* at § 24.2-235.

214 *See supra* notes 25–27 and accompanying text.

215 VA. CODE. ANN. § 24.2-233(1) (LEXIS through 2020 Spec. Sess. I).

216 VA. CODE. ANN. § 24.2-237 (LEXIS through 2020 Spec. Sess. I).

217 *Id.*

218 *Id.*

A sheriff was acquitted of not adequately enforcing the alcohol and gambling laws—perhaps because his resources were directed to violent crime—in a case where the court held: "The burden was upon the Commonwealth to prove by clear and convincing evidence that defendant had knowledge of the flagrant violations of law and that he wilfully neglected to perform his duties in regard thereto."[219] The jury found otherwise.[220]

The proposed "gun safety" measures are *mala prohibita* crimes without victims, so there are no victims to complain, and "violations" are private.[221] A neighbor sells an old gun to a friend without paying a gun dealer to process the sale and have a background check; a woman has a pistol for protection that has a magazine that holds thirteen rounds; a hunter has a rifle with a thumbhole stock. How would it be proven that these are "flagrant violations of law" about which a sheriff "wilfully neglected" to make arrests?

"Moreover, the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion."[222] A prosecutor must "ensure that criminal prosecutions are pursued only to seek justice. Consequently, the Commonwealth's attorney should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute."[223] He or she may choose which cases to prosecute or not prosecute, based on *actual* danger to the community.[224] A violent criminal with any kind of gun is a danger to the community. A good citizen with a rifle that has a compensator on the barrel is a danger to no one.

A Commonwealth's Attorney's declination to prosecute harmless violations of "gun safety" measures would not be subject to judicial review.[225] The Virginia Constitution provides, "The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others . . . ."[226] "[T]he structure of tripartite government creates a judicial presumption in favor of 'broad' prosecutorial discretion. 'This broad discretion rests largely on

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219 Commonwealth *ex rel.* Davis v. Malbon, 78 S.E.2d 683, 689–90 (Va. 1953).

220 *Id.* at 690.

221 *Malum Prohibitum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

222 Bradshaw v. Commonwealth, 323 S.E.2d 567, 572 (Va. 1984).

223 Commonwealth of Va., Off. of the Att'y Gen., Opinion Letter on Discretionary Exercise of Governmental Power 01-078 (Dec. 19, 2001), https://www.oag.state.va.us/files/Opinions/2001/01-078.pdf.

224 *See id.* (explaining that prosecutors have discretion over which cases to prosecute); *see also* VA. CODE. ANN. § 15.2-1627 (LEXIS through 2020 Spec. Sess. I) (giving prosecutors discretion to prosecute misdemeanors).

225 Wayte v. United States, 470 U.S. 598, 607 (1984).

226 VA. CONST. art. III, § 1.

the recognition that the decision to prosecute is particularly ill-suited to judicial review.'"[227]

In sum, scarce resources dictate that sheriffs and other law enforcement authorities focus on preventing serious crime and apprehending violent criminals. Commonwealth's Attorneys have the ultimate discretion in what cases to prosecute or not prosecute. The governor has no authority to impose "consequences" on localities that do not use their resources pursuing victimless "gun safety" crimes.

B. Commonwealth's Attorneys Claim Discretion Not to Prosecute Victimless Crimes Like Marijuana Offenses

As an example of prosecutorial discretion not to enforce a specific law, Fairfax County Commonwealth's Attorney Steve Descano issued Policy Directive 20-01 on January 2, 2020, which "directs the Office's prosecutors to move to dismiss simple possession of marijuana charges levied against adults."[228] Thus far, no Attorney General opinion has been issued stating that a Commonwealth's Attorney may not "nullify" the marijuana laws.

The Policy Directive notes: "Removing adult simple-possession-of-marijuana cases from prosecutors' dockets allows prosecutors more time to focus on serious crimes that often involve victims."[229] It further explains that the "downstream consequences of prosecuting adults for simple possession of marijuana represent another type of cost: the unjustified negative effect on the prosecuted individual, their family, and the community. Successful prosecution of these cases results in the individual having a criminal record that can never be expunged."[230]

Similarly, adult simple possession of a rifle with a pistol grip or adjustable stock is not a "serious crime" and involves no "victim." Two friends trading hunting guns without a background check harms no one. Incarcerating and giving such persons felony records will destroy their lives. And unlike possession of marijuana, possession of arms is constitutionally protected.

In short, what's good for the goose is good for the gander. If Commonwealth's Attorneys have discretion not to prosecute marijuana cases, they have all the more discretion not to prosecute cases that they believe would violate constitutional rights.

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[227] Boyd v. Cnty. of Henrico, 592 S.E.2d 768, 781 (Va. 2004) (quoting *Wayte*, 470 U.S. at 607).

[228] Steve Descano, Commonwealth's Attorney for the County of Fairfax, Policy Directive 20-01, (Jan. 2, 2020).

[229] *Id.*

[230] *Id.*

IV. LITTLE PUBLIC COMPLIANCE MAY BE EXPECTED WITH GUN CONFISCATION AND REGISTRATION LAWS

For about two centuries after the Second Amendment was proposed in 1789, rifles and magazines were generally lawful to possess throughout the United States.[231] California passed the first "assault weapons" ban in 1989,[232] and New Jersey passed the first ban on certain magazines in 1990.[233] Only a handful of states have passed similar legislation.[234] Because no victims exist to file complaints, violation of these laws are difficult to detect, and thus they are not very enforceable. Enforcement is typically limited to searches of houses and vehicles based on other reasons that bring persons to the attention of law enforcement. Moreover, there has been a low rate of voluntary compliance with such laws by the public.

Because house-to-house searches are not an option, ferreting out violators requires pulling officers from patrolling crime-ridden neighborhoods and reassigning them to conduct undercover surveillance at gun shows, shooting ranges, and other places where guns may be seen. But the average police officer has no expertise to know, much less to test, whether a firearm has a forbidden feature, such as whether a barrel attachment is a legal device or a compensator.[235]

One cannot tell just by looking on the outside that a firearm necessarily has a banned feature. That may require examination, which may constitute a search requiring a warrant. Proof of some features may require testing by trained experts with specialized equipment.

A social cost to assigning law enforcement officers to pursue otherwise law-abiding citizens in hopes of catching someone with a piece of wood or metal shaped the wrong way may be to alienate citizens from peace officers. Violation of privacy rights, entrapment, denunciations, and degradation of the rule of law are invariable effects of prohibition, whether applied to alcohol in 1920 or to guns a century later in 2020.[236]

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[231] Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate Over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT. 41, 56 (2002); David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–53, 870–72 (2015).

[232] 1989 Cal. Stat. 64–70.

[233] 1990 N.J. Sess. Law Serv. 32 (West).

[234] Jesse Paul, *7 States Have an Assault Weapons Ban. Colorado is Not Among Them—At Least Not Yet*, COLO. SUN (Mar. 24, 2021, 4:05 PM), https://coloradosun.com/2021/03/24/assaults-weapons-ban-colorado-boulder-shooting/.

[235] *Compensator*, GLOSSARY OF THE ASSOCIATION OF FIREARM & TOOL MARK EXAMINERS (6th ed. 2013), https://afte.org/uploads/documents/AFTE_Glossary_Version_6.110619_DRAFT_.PDF ("A device attached to or integral with the muzzle end of the barrel that uses propelling gases to reduce recoil.").

[236] *See* Mark Thornton, Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure (1991) (explaining how alcohol prohibition increased crime and prison occupancy).

Criminals do not obey laws against violent crime; much less would they obey "gun safety" measures. Countless numbers of citizens at large who are law-abiding gun owners cannot be expected to comply with laws that on their face violate what they perceive to be their constitutional rights. Yet they will face felony convictions and imprisonment if they possess the wrong thing, such as a rifle with a thumbhole stock or a magazine that holds thirteen rounds.

In countries that have no Second Amendment protection, most gun owners have refused to comply with confiscatory orders, despite financial incentives as well as disincentives, from imprisonment to the death penalty. Two dramatic examples have taken place in New Zealand and France.

In New Zealand, semiautomatic long guns were banned but the government offered compensation to their owners.[237] When the deadline passed, some two-thirds of the banned guns had not been turned in, despite the threat of five years of imprisonment.[238]

In World War II, the Nazis threatened the death penalty in occupied countries for all who failed to turn in their firearms.[239] Despite countless French citizens facing firing squads for gun possession, fewer than one-third of the hunting guns in civilian hands were surrendered.[240]

In the United States, some of the handful of states to ban "assault weapons" allowed existing owners to register and keep them. The overwhelming majority did not register their firearms. Examples include California and New York.

Under California's 1989 ban, citizens registered only 46,062 out of as many as 600,000 "assault weapons" in the state.[241] Under New York's 2013 ban, only 23,847 citizens registered their "assault weapons," while

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[237] Emanuel Stoakes, *After Mosque Shootings, New Zealand's Weapons Buyback Runs Into an Obstacle: Gun Owners*, WASH. POST (Dec. 20, 2019, 7:35 AM), https://www.washingtonpost.com/world/asia_pacific/after-mosque-attacks-new-zealands-gun-buyback-runs-into-an-obstacle-gun-owners/2019/12/20/b4071106-208f-11ea-b034-de7dc2b5199b_story.html.

[238] *Id.*

[239] Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMPAR. L. 483, 527 (2000).

[240] STEPHEN P. HALBROOK, GUN CONTROL IN NAZI-OCCUPIED FRANCE: TYRANNY AND RESISTANCE 203 (2018).

[241] Carl Ingram, *Few Takers for Assault Gun Grace Period*, L.A. TIMES (Feb. 17, 1992, 12:00 AM), https://www.latimes.com/archives/la-xpm-1992-02-17-mn-1716-story.html.

nearly one million failed to comply,[242] despite the threat of incarceration for a *minimum* of three-and-one-half years and up to seven years.[243]

While H.B. 961, the "assault weapon" and magazine ban bill, failed to pass in the 2020 session, it was continued to the 2021 session by vote of the Senate Judiciary Committee.[244] More such proposals may be expected. The Second Amendment Sanctuaries will be re-energized, and bill supporters will say that they have no legal effect. The debate will be *déjà vu* all over again.

CONCLUSION

In response to draconian bills to criminalize the keeping and bearing of arms, almost all Virginia counties and many municipalities declared themselves Second Amendment sanctuaries. Contrary to the Attorney General's assertion that they have "no legal effect," such declarations may have broad legal ramifications when considered as petitions for redress of grievances, policies for law enforcement that prioritize serious crimes, and agendas for Commonwealth's Attorneys to exercise their discretion only to prosecute worthy offenses. There is a perfect harmony between recognition of constitutional rights and using scarce resources to enforce laws the constitutionality of which are beyond question, rather than laws deemed by large segments of the public as unconstitutional.

Enacting a new Gun Prohibition will only lead to perverse results. Criminals will utterly disregard the purported "gun safety" laws, which will be obeyed only by some citizens who are aware of and understand them. But a ban on firearms in common possession of law-abiding citizens will result in massive non-compliance, which will also be the fate of a requirement that such firearms be registered. Imposing what many perceive as a radical new regime of unprecedented restrictions on a populace that perceives them as unconstitutional will create disrespect for and erode the rule of law.

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[242] Frank Miniter, *Nearly One Million New Yorkers Didn't Register Their "Assault Weapons,"* FORBES (June 24, 2015, 9:31 AM), https://www.forbes.com/sites/frankminiter/2015/06/24/nearly-one-million-new-yorkers-didnt-register-their-assault-weapons/?sh=26f4cc15702f#5a1c73b5702f.

[243] S. 2230, 2013 S., 2013–2014 Reg. Sess. (N.Y. 2013); N.Y. PENAL LAW § 265.02(10) (McKinney, Westlaw through L. 2021, chapters 1 to 49, 61 to 68).

[244] *HB 961 Assault Firearms, Certain Firearm Mags., etc.; Prohibiting Sale, Transp., etc., Penalties*, VA.'S LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?211+sum+HB961 (last visited Mar. 17, 2021).

LAW, SOCIAL JUSTICE, WOKENESS AND THE PROTESTS: WHERE DO WE GO FROM HERE?

Distinguished Panelists[*]

Hon. Kenneth Lee: Good morning, or good afternoon, wherever you may be. My name is Ken Lee, and I sit on the U.S. Court of Appeals for the Ninth Circuit.[1] I will be moderating the first showcase panel, "Law, Social Justice, Wokeness and the Protests: Where Do We Go From Here?" This is obviously a very timely topic, and today we are privileged to have a rock star panel. I'd like to say that this panel is like the law professor version of a Guns N' Roses reunion, except that people here will actually start the show on time.

I don't want our panelists to feel too old, but I will say that when I was in college and law school in the '90s, I read their articles and books. They weren't assigned in classes, but people told me to read them. And when I did, I learned a lot from them. So, I'm honored to moderate this panel.

I will introduce our panelists by alphabetical order. First, we have Professor Randy Barnett. He is the Patrick Hotung Professor of Constitutional Law at Georgetown and Director of the Georgetown Center for the Constitution.[2] For those libertarians watching out there, Professor Barnett is very well known. He is the Axl Rose of the libertarian movement, and I say that in the best way possible. He has been involved in key Commerce Clause cases ranging from *Gonzales v. Raich*, the medical marijuana case, to more recently *NFIB v. Sebelius*, the Affordable Care Act case.[3]

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[*] This panel was held on November 12, 2020, during the 2020 National Lawyers Convention that was held virtually. The panelists included: Professor Randy E. Barnett, Patrick Hotung Professor of Constitutional Law, Georgetown University Law Center; Professor Randall Kennedy, Michael R. Klein Professor of Law, Harvard Law School; Mr. Eugene B. Meyer, President and CEO, The Federalist Society (representing Professor John O. McGinnis); Professor John O. McGinnis, George C. Dix Professor of Constitutional Law, Northwestern Pritzker School of Law; Professor Nadine Strossen, John Marshall Harlan II Professor of Law, Emerita, New York Law School and Former President, American Civil Liberties Union; moderated by Hon. Kenneth K. Lee, United States Court of Appeals for the Ninth Circuit. This article is not a verbatim transcript of the discussion. The statements and questions have been edited for brevity and clarity.

[1] *Lee, Kenneth Kiyul*, FED. JUD. CTR., https://www.fjc.gov/history/judges/lee-kenneth-kiyul (last visited Feb. 3, 2021).

[2] *Randy E. Barnett*, GEO. L., https://www.law.georgetown.edu/faculty/randy-e-barnett/ (last visited Jan. 18, 2021).

[3] *Id.*

Next, we have Professor Randall Kennedy. He is the Michael R. Klein Professor of Law at Harvard Law School.[4] He is a prolific author who has written for both scholarly and lay audiences.[5] His book, *Race, Crime, and the Law*, won the 1998 Robert F. Kennedy Book Award.[6] And I can say it is one of these books that will open your eyes and challenge your assumptions, no matter what your views may be.

We also have Professor John McGinnis. He is the George C. Dix Professor in Constitutional Law at Northwestern Law School.[7] He was the deputy assistant attorney general in the Office of Legal Counsel at the Department of Justice under President Reagan and President Bush from 1987 to 1991.[8] Unfortunately, due to an emergency, he couldn't make it today. But fortunately for us, Eugene Meyer is here, and he will read Professor McGinnis's remarks.

Finally, we have Professor Nadine Strossen. She is the John Marshall Harlan II Professor of Law, Emerita, at New York Law School.[9] She was previously the President of the ACLU for almost two decades,[10] and she is one of the preeminent defenders of free speech and the First Amendment.[11] Her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*, was named as a notable book by *The New York Times*.[12] So before we even start the panel, we've already had our share of sex, drugs, and rock and roll.

I want to start off with Professor Kennedy. I will pose a question for him to answer and then have his presentation. I think everyone has seen the disturbing video of George Floyd, and that was obviously the immediate impetus for the protests and social movement. My question to you is, is there something broader that has caused this social movement and the protests? If so, is the movement an appropriate reaction to that or an excessive reaction?

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[4] *Randall L. Kennedy*, HARV. L. SCH., https://hls.harvard.edu/faculty/directory/10470/Kennedy (last visited Jan. 18, 2021).

[5] *Id.*

[6] *Id.*

[7] *John O. McGinnis*, NW. PRITZKER SCH. OF L., https://www.law.northwestern.edu/faculty/profiles/JohnMcGinnis/ (last visited Jan. 18, 2021).

[8] *Id.*

[9] *Nadine Strossen*, N.Y. L. SCH., https://www.nyls.edu/faculty/nadine-strossen/ (last visited Jan. 19, 2021).

[10] *Id.*

[11] Press Release, ACLU, Civil Liberties Luminary Nadine Strossen to Step Down as ACLU President (May 16, 2008), https://www.aclu.org/press-releases/civil-liberties-luminary-nadine-strossen-step-down-aclu-president.

[12] *Nadine Strossen*, *supra* note 9.

Prof. Randall Kennedy: Judge Lee, thank you very much. And I'd like to thank all who have participated in making this forum available and issuing the invitation to me. As you indicated, Judge Lee, the immediate cause of the protest was police violence against the citizenry.[13] The killing of George Floyd, though horrendous, was not exceptional.[14] It was part of an all too familiar pattern of police misconduct that has been inadequately addressed by the legal system.[15]

You asked me whether there was more to it than that. Yes, indeed, there is more to it than that. Behind this problem of policing is the fact that we live in a society in which, along every index of social life, people of color get the short end of the stick. I don't care if we're talking about educational resources.[16] I don't care if we're talking about access to medicine.[17] I don't care if we're talking about risk of incarceration.[18] I don't care if we're talking about risk of victimization by criminals.[19]

We live in a society in which there is a clear racial hierarchy,[20] and many people of various racial backgrounds are standing up and are saying that they're tired of it and want an end to pigmentocracy.[21]

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[13] April Frazier Camara, *Facing Our Silence and History on Race*, 35 CRIM. JUST., Fall 2020, at 1.

[14] *Id.* ("State-sanctioned violence against Black people did not begin with the killing of George Floyd, but rather it is a part of a long legacy of brutality that started with slavery and currently exists within the criminal legal system.").

[15] *Id.*; *see also* Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1, 2 (2019) ("The United States offers a sad example where, despite anti-discrimination laws and equal protection rights, the government has failed to protect its people from racism.").

[16] *See* Stacy Hawkins, *Race-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?*, 42 J. COLL. & UNIV. L. 151, 156–57 (2017) (arguing that, despite legal guarantees for equal access to educational opportunities, minority students face a "racially segregated and unequal system of public education" due to "opportunity hoarding").

[17] Brian D. Camozzi, *Health Care Access*, 11 GEO. J. GENDER & L. 443, 473 (2010).

[18] *See* THE SENT'G PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1, 1 (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (reporting that African Americans are 5.9 times more likely to be incarcerated than white Americans).

[19] *See Race, Ethnicity, and the Criminal Justice System*, AM. SOCIO. ASS'N, Sept. 2007, at 1, 4, https://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf (reporting that black people were six times more likely to be murdered than white people in 2002).

[20] Miri Song, *Introduction: Who's at the Bottom? Examining Claims About Racial Hierarchy*, 27 ETHNIC & RACIAL STUD. 859, 861–63 (2004).

[21] *See* Kanyakrit Vongkiatkajorn et al., *Voices of Protest*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/graphics/2020/national/protesters-george-floyd/ (transcribing the statements of individuals from various backgrounds and ethnicities who participated in the racial justice protests).

Now, the protest took many forms. There were marches.[22] There were vigils.[23] There were petitions.[24] Most of the protest was peaceful.[25] Most of the protest was very admirable. Again, you had people from all walks of life, all ages, and all complexions standing as one in every region of the United States, saying, "That's right. Black lives do matter." They expressed a desire for a polity in which the agents of law and order handle everybody with respect.

Now, were there problems with some of the protests? Yes. There was some violence.[26] Sometimes there was more than just a little bit of violence. Sometimes there was a lot of violence.[27] Was there some criminality mixed in? Yes, there was.[28] Should this be criticized? Yes, it should be criticized. And there were many people in the protest movement who criticized the arson and the looting because they knew that those actions would be used against the protest movement.[29] They did not want

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[22] Nicole Chavez et al., *Tens of Thousands March in Largest George Floyd Protests So Far in the US*, CNN, https://www.cnn.com/2020/06/06/us/us-george-floyd-protests-saturday/index.html (June 6, 2020, 10:42 PM).

[23] Tad Walch, *More than 1,000 Demonstrators Hold Vigil for George Floyd on Balmy Night in Provo*, DESERET NEWS (June 5, 2020, 7:55 PM), https://www.deseret.com/utah/2020/6/5/21279796/demonstrators-provo-protesters-george-floyd-black-lives-matter.

[24] Simret Aklilu, *Petitions for George Floyd and Breonna Taylor Are the Most Signed Pleas of All Time at Change.org*, CNN, https://www.cnn.com/2020/12/24/us/petitions-change-org-2020-trnd/index.html (Dec. 24, 2020, 4:04 PM). More than 19 million people signed a petition at Change.org demanding "Justice for George Floyd," making it the largest petition in the website's history. *Id.*

[25] Roudabeh Kishi & Sam Jones, *Demonstrations & Political Violence in America: New Data for Summer 2020*, ACLED (Sept. 3, 2020), https://acleddata.com/blog/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/ (reporting that nearly 95% of demonstrations involved peaceful protestors).

[26] *See* Bradford Betz, *George Floyd Unrest: Riots, Fires, Violence Escalate in Several Major Cities*, FOX NEWS (May 31, 2020), https://www.foxnews.com/us/george-floyd-cities-brace-riots-national-guard-troops-mobilize (describing how the National Guard was mobilized to deal with civil disturbances in twenty-four states and the District of Columbia).

[27] *Id.* (describing how rioters threw Molotov cocktails, defaced buildings, and looted businesses in Washington, California, and New York).

[28] *See* Meryl Kornfield et al., *Swept Up by Police*, WASH. POST (Oct. 23, 2020), https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/ (reviewing data on more than 2,600 arrests following the protests and finding that twenty-two percent of those arrests related to violent crimes); *see also* Kaelan Deese, *Vandalism, Looting Following Floyd Death Sparks at Least $1B in Damages Nationwide: Report*, HILL (Sept. 16, 2020, 3:43 PM), https://thehill.com/homenews/news/516742-vandalism-looting-after-floyd-death-sparks-at-least-1-billion-in-damages-report (finding that nationwide looting and vandalism in the wake of George Floyd's death resulted in catastrophic insurance losses in multiple states).

[29] Anthony L. Fisher, *Destruction Swings at the System, but the Punch Lands on Peaceful Protestors*, BUS. INSIDER (June 14, 2020, 9:37 AM), https://www.businessinsider.com/george-floyd-peaceful-protests-looting-riots-destruction-righteous-cause-2020-6.

to see their protest movement besmirched by people acting in an undisciplined, indeed, criminal way.[30]

And there were plenty of people who were friends of the protest who criticized violence, criticized looting, criticized arson.[31] I include myself among that group. But the dysfunctional aspects of the protest and the degradation of the protest, should not be used to besmirch the protest movement in general because it seems to me that the protest movement, in general, was quite good.

Final two points. One, I am speaking at a Federalist Society meeting, and I have to say that I was disappointed by the paucity of voices from the conservative side that spoke up against the abuse of the citizenry by police. I was disappointed by the paucity of voices that spoke up against the culture of impunity that so often allows police officers to engage in misconduct of various sorts, including racist misconduct, and not be held accountable for it. I was disappointed in the paucity of conservative voices that I heard speaking up against governmental encroachment on freedom of expression and liberty of the press.

Finally, the question is, where do we go from here? I hope where we move towards is an embrace of certain policies that The Federalist Society purports to champion.[32] One is limited government. Good. Another is transparency in government. Good. Another is attentiveness to the problem of corruption and abuse by government officials. Good. There is no place in American life where those policies can be put to better use than with respect to the administration of criminal justice, particularly the imperative need to put the police under more spotlight and more effective regulation.

Thank you very much. I look forward to our discussion. Professor Strossen?

Prof. Nadine Strossen: Thank you so much, Randy. I echo so much of what you said. And as we have been reminiscing, about thirty years ago, we both shared the podium at another Federalist Society National

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[30] *Id.*

[31] *Id.*; *see also* Randall Kennedy, *The George Floyd Moment: Promise and Peril*, AM. PROSPECT (June 19, 2020), https://prospect.org/civil-rights/george-floyd-moment-promise-and-peril/ (describing looting and violence as "hooliganism" that is used to besmirch peaceful protests).

[32] *About Us*, FEDERALIST SOC'Y, https://fedsoc.org/about-us (last visited Jan. 24, 2021) ("[The Federalist Society] is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

Lawyers Convention.[33] For me, I've been honored and pleased to speak at so many of these conventions. It's become like a fall tradition. And I, in turn, have a tradition, which is starting by reminding you of the Federalist Society's founding principles. The very first principle listed on its website is "the state exists to preserve freedom."[34] Sounds like it comes straight from the ACLU playbook.[35]

And I have to share the anecdote, as I also regularly do, that in 1995, I was on a panel for a Federalist Society event with one of your founding fathers, Irving Kristol, and he was horrified that that was a founding principle.[36] And I've written down what his words were. He said, "I am shocked to discover that [T]he Federalist Society seems to have said somewhere that the State exists to preserve freedom. The Federalist Society should call a meeting immediately and change that."[37]

So that was in 1995, and every time I speak at a Federalist Society event, I go to the website to make sure you have not changed that principle. And indeed, I was happy to see that you had not, and you continue to repeat and endorse the principles of freedom, limited government, and robust open discourse.[38]

I also saw on your website that the "About Us" section, which I visited this morning, includes a couple dozen testimonials from very ideologically diverse leaders, including people holding very important titles such as United States President, Vice President, Supreme Court Justice, and Attorney General.[39] But I also noticed that of all of these endorsers, there is only one who is quoted not once, but twice. And it happens to be somebody named Nadine Strossen.[40]

So with all seriousness and sincere great respect, this year, above others, I am especially grateful for the platform of this important convention and this influential organization because I want to follow in Randy's footsteps in urging you, Federalist Society leaders and members, conservatives and libertarians, to do what I and other liberals have been

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[33] Symposium, *Speeches from The Federalist Society Fifth Annual Lawyers Convention: Individual Responsibility and the Law*, 77 CORNELL L. REV. 955, 964–90 (1992) (transcribing the *Entitlements, Empowerment, and Victimization* panel that Professor Kennedy and Professor Strossen spoke on in 1991).

[34] *About Us*, *supra* note 32.

[35] *About the ACLU*, ACLU, https://www.aclu.org/about-aclu (last visited Jan. 28, 2021) (stating that the ACLU works "to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country").

[36] Symposium, *Federalist Society Symposium*, 1 MICH. L. & POL'Y REV. 325, 305–47 (1996) (transcribing the *Due Process and Public Education* panel that Professor Strossen and Professor Kristol spoke on in 1995).

[37] *Id.* at 325.

[38] *About Us*, *supra* note 32.

[39] *Id.*

[40] *Id.*

trying to do, which is to speak out against any attack on individual freedom, the rule of law, other forms of illiberalism, whenever and wherever we see it, especially when it comes from our ideological allies.

With that in mind, I'd like to quote an op-ed that came out today, written by Jonathan Zimmerman, who is a professor at the University of Pennsylvania.[41] He is quoting from Joe Biden's wonderful speech on Saturday where he said, "It is time to put away the harsh rhetoric, lower the temperature, see each other again, listen to each other again[.] . . . Let this grim era of demonization in America begin to end here and now."[42]

And I was so struck by his use of that word "demonization" because that is a term that was used both by conservative icon Robbie George and progressive icon Cornel West in the wonderful dialogue they had at your convention right before us.[43] But people like Jon and I are depending on our conservative and libertarian colleagues in The Federalist Society to do what we have been doing, which is complaining when illiberalism flourishes among our ideological allies. Jon, who consistently describes himself as a liberal Democrat, went on to say, "Most people at colleges and universities probably interpreted this remark as an attack on President Donald Trump . . . . But I heard it differently: as a critique of us. Instead of challenging Trump's illiberal spirit, we imitated it."[44]

And then he gives some sad examples that are bolstered by a consistent public opinion survey about an air of illiberalism very prevalent on campuses as well as other sectors of our society of people feeling afraid to express their views on the most important issues, including the crucial issues that Randy flagged in his remarks.[45] So I am trying to do it especially when I find people with whom I share liberal policy goals are using illiberal means to advance those goals. And I wish that The Federalist Society would use your very important voice and influence to do likewise because what a difference it would make if every single one of us did that, evenhandedly and consistently.

Now, I want to say, starting with the charge or the topic description that we were given for this panel, that I have a little bit of a bone to pick

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[41] Jonathan Zimmerman, *When Biden Said 'Put Away Harsh Rhetoric,' He Was Talking About All of Us, Even Us Liberals*, DALL. MORNING NEWS (Nov. 12, 2020, 1:30 AM), https://www.dallasnews.com/opinion/commentary/2020/11/12/when-biden-said-put-away-harsh-rhetoric-he-was-talking-about-all-of-us-even-us-liberals/.

[42] *Id.*

[43] *See Showcase Discussion: A Discussion with Professors Robert George and Cornel West on Freedom of Speech, Freedom of Thought, the Black Lives Matter Movement, and the Cancel Culture*, FEDERALIST SOC'Y, at 42:20, https://fedsoc.org/conferences/2020-national-lawyers-convention#agenda-item-showcase-discussion (last visited Jan. 31, 2021) ("People are made to feel they're under pressure to demonize people on the other side. That demonization has itself become a kind of loyalty test.").

[44] Zimmerman, *supra* note 41.

[45] *Id.*; *see supra* text accompanying notes 14–32.

because I think it was written in such a way that suggested that the problems are coming only from the left or predominantly the left and from social justice advocates. For example, a key sentence says, "[F]or some social justice advocates[,] the concepts of the rule of law, justice, reason[,] and discussion all are suspect at best and tools of oppression at worst."[46]

Yes, that's true, as Jon Zimmerman had said and as I have very often said myself. But we have to recognize that this is a problem that is coming from the conservative right end of the spectrum as well. And it's really important for those of us on either end to be especially brave in criticizing our ideological allies for two reasons. One is because we have more standing to persuade them, and second, because that gives us more credibility when we level the same constructive criticism against our ideological adversaries.

So in that spirit, I signed the Harper's letter this summer, which was quite controversial.[47] I also wrote an essay about cancel culture, which is very critical of left-wing cancel culture which is going to be published by the American Council of Trustees and Alumni.[48] And I want to give a shout-out to the person there who did the most work on it, Jonathan Pidluzny, who is a big fan of The Federalist Society and is probably attending this convention.

I'd also like to, given the conservative orientation of FedSoc, cite a prominent conservative who made this critique about current conservatism, that there is too much illiberalism in it. I'm speaking about *New York Times* columnist Bret Stephens in a column he wrote on October 30 called "*Goodbye Principled Conservatism*."[49]

He says,

> [W]hat today's debased conservatism now boils down to is anti-liberalism. . . . But anti-liberalism is not conservatism. At its principled best, conservatism holds that liberal ends—the right of the individual to enjoy the maximum degree of freedom compatible with the right of his neighbor to do the same—are best secured by conservative means[.]

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[46] *Showcase Panel I: Law, Social Justice, Wokeness, and the Protests: Where Do We Go From Here?*, FEDERALIST SOC'Y, https://fedsoc.org/conferences/2020-national-lawyers-convention#agenda-item-showcase-panel-i (last visited Feb. 1, 2021).

[47] *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), https://harpers.org/a-letter-on-justice-and-open-debate/; *see also* Jennifer Schuessler & Elizabeth A. Harris, *Artists and Writers Warn of an 'Intolerant Climate,' Reaction Is Swift.*, N.Y. TIMES https://www.nytimes.com/2020/07/07/arts/harpers-letter.html (detailing the responses to the letter) (Aug. 10, 2020).

[48] Nadine Strossen, *Resisting Cancel Culture*, AM. COUNCIL TRS. & ALUMNI, Nov. 2020, at 1–2.

[49] Bret Stephens, *Goodbye Principled Conservatism*, N.Y. TIMES, https://www.nytimes.com/2020/10/30/opinion/donald-trump-conservatism.html (last visited Feb. 1, 2021).

> This includes "the habits of a free mind."[50]

Again, right out of the Fed Soc playbook, as we've seen. Bret then goes on to say, "Anti-liberalism, by contrast, [employs] illiberal means," including "the delegitimization of people, laws, and norms that stand for the ideals of an open society."[51]

And unfortunately, we've seen too many attacks on those ideals from liberals and conservatives alike. If you want chapter and verse and specific examples, I commend to you the website of FIRE, the Foundation for Individual Rights and Education, which is very good at keeping track of attacks on all ideas from conservatives and liberals alike.[52]

Yes, too many Antifa and other left-wing protesters have engaged in violence,[53] but it's also true that too many police officers have engaged in violence, not only against peaceful protesters,[54] but also against journalists,[55] legal observers,[56] and medics.[57] Yes, some campus diversity programs undermine intellectual freedom if they aim to inculcate certain

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[50] *Id.*

[51] *Id.*

[52] *See generally Latest News*, FIRE, https://www.thefire.org/ (last visited Feb. 2, 2021) (tracking news stories about free speech and other rights on college campuses).

[53] Betz, *supra* note 26; *see also* Nancy Amons, *ANTIFA Activist Talks About Rioting, Arson at Nashville Historic Courthouse*, NEWS 4 NASHVILLE (July 13, 2020), https://www.wsmv.com/news/antifa-activist-talks-about-rioting-arson-at-nashville-historic-courthouse/article_85f33d3e-c540-11ea-a28f-ff644b47c1cc.html (discussing a self-described ANTIFA activist and anarchist who participated in the riots and condoned the violence); *see also* Press Release, William P. Barr, Attorney General William P. Barr's Statement on Riots and Domestic Terrorism (May 31, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism (transcribing Attorney General Barr's statement that "[t]he violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly").

[54] Adam Gabbatt, *Protests About Police Brutality Are Met With Wave of Police Brutality Across US*, GUARDIAN (June 6, 2020), https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd; Tom Jackman & Carol D. Leonnig, *National Guard Officer Says Police Suddenly Moved on Lafayette Square Protesters, Used 'Excessive Force' Before Trump Visit*, WASH. POST (July 27, 2020, 7:35 PM), https://www.washingtonpost.com/nation/2020/07/27/national-guard-commander-says-police-suddenly-moved-lafayette-square-protesters-used-excessive-force-clear-path-trump/.

[55] *See* Laura Hazard Owen, *U.S. Police Have Attacked Journalists at Least 140 Times Since May 28*, NIEMANLAB (June 1, 2020, 9:53 AM), https://www.niemanlab.org/2020/06/well-try-to-help-you-follow-the-police-attacks-on-journalists-across-the-country/ (documenting reports of widespread violence against journalists).

[56] *See* Press Release, Christopher Pioch et al., Statement on Detention of Legal Observers, N.Y.C. BAR (June 17, 2020), https://www.nycbar.org/media-listing/media/detail/statement-on-detention-of-legal-observers (describing how legal observers have been targeted by police with tear gas, pepper spray, and rubber bullets).

[57] *See* Jonathan Pedneault, *Police Targeting 'Street Medics' at US Protests*, HUM. RTS. WATCH (June 17, 2020, 4:32 PM), https://www.hrw.org/news/2020/06/17/police-targeting-street-medics-us-protests (describing the tear gas, projectiles, and other physical force used against "street medics").

ideas about antiracism and white privilege, but intellectual freedom is also undermined when officials pressure schools to abandon their chosen curriculum and instead to adopt a so-called patriotic curriculum with other fixed ideas about important issues such as race.

Now, surveys indicate that most Americans do support the classic liberal principles of freedom of speech and open discourse.[58] It's just that we have not been speaking up nearly as much as the opponents, the illiberals, on either end of the political spectrum. And that is a perfect segue to the question that we were asked to address, which Randy answered as well, what are possible, desirable responses to these challenges?

And here, I'm going to double down again on the opportunity and the responsibility that Fed Soc has with such an unparalleled network of representation on campuses all across the country, with lawyers chapters, thousands of members in government, in civil society, in the legal system. If every single one of you would raise your voices at every opportunity to challenge a departure from your principles, that would make an enormous difference.

And let me just underscore from a fairly recent perspective I have on The Federalist Society, something else that you can do on campus that will be wonderful, not only on campus, but beyond. For many decades now, throughout your existence, I've been speaking at national conventions. But in the last few years, I actually became approved to be on your list of available speakers for the campus lecture circuit. And I've spoken at dozens of campuses at the behest of The Federalist Society in the last few years.[59] In fact, as recently as this morning, I was communicating with Angela Coco, who is a leader of Fed Soc at the University of Michigan Law School about making a virtual appearance on her campus.

And that has really increased my respect and hope for the positive role that Fed Soc can play because the inviting campus chapter is encouraged to line up at least one other speaker with a different perspective.[60] It is also recommended to seek to co-sponsor the event with

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[58] NW. UNIV., TRUST IN U.S. NEWS MEDIA 9 (2020), https://magazine.medill.northwestern.edu/wp-content/uploads/2020/07/NUQ-Trust-in-U.S.-Media-Report_09July2020.pdf (reporting that ninety-one percent of Americans agree free speech is a value that makes America great); *see also* Richard Wike & Shannon Schumacher, *1. Attitudes Toward Democratic Rights and Institutions*, PEW RSCH. (Feb. 27, 2020), https://www.pewresearch.org/global/2020/02/27/attitudes-toward-democratic-rights-and-institutions/ (reporting that seventy-seven percent of Americans hold the right to speak without government censorship in high regard).

[59] *Prof. Nadine Strossen*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/nadine-strossen (last visited Feb. 2, 2021) (listing Professor Strossen's past speaking events with The Federalist Society).

[60] FEDERALIST SOC'Y, HOW TO FORM & RUN A STUDENT CHAPTER 27 (2019).

other organizations that have different perspectives on the issues.[61] It is required to encourage attendance so it's not just preaching to the choir.[62] And this has worked out beautifully in my experience.

So, I would suggest to all the campus leaders, Angela and others who are listening out there, use this opportunity to discuss the kinds of issues that Randy and I talked about. Line up forums with the Black Law Students Association, with the American Constitution Society, ACLU chapters, students who are interested in criminal law reforms. I think everybody shares the same underlying goals. That's proven by your mission statement. But we deserve to have robust discussions about the appropriate means.

I look forward to continued, renewed support in practice, consistently and evenhandedly, in support of the positive mission statement of The Federalist Society. And now I hand it off to John McGinnis, who is not here in person but whose words will be delivered with passion by Eugene Meyer.

Eugene Meyer:[63] Thank you, Nadine. And thanks, Randy. John, I know, very, very much regrets not being here. And these are his words, not mine, although I no doubt agree with many of them.

The rule of law and the American tradition of government depend on the surrounding culture,[64] and that culture is one of capacious liberalism, liberalism in a philosophical, not a partisan sense. That culture includes a structure built on individual rights (rather than group interests), personal responsibility, and freedom of speech.[65]

So, what are the social movements that threaten this culture today? They go by a variety of names, such as "wokeism"[66] and "the successor ideology."[67] At a high level of generality, their dogma goes like this: Some group has been systematically oppressed, not only by the government but society at large, and that oppression is the sole cause of their desperate plight.[68]

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61 *Id.* at 28.

62 *Id.* at 29.

63 The following remarks were first published in written format.

64 Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1, 2–4, 9, 16–17 (2003).

65 EAMONN BUTLER, CLASSICAL LIBERALISM —A PRIMER 4–6 (2015).

66 Richard M. Reinsch II, *One Nation, Under Woke*, LAW & LIBERTY (Oct. 6, 2020), https://lawliberty.org/one-nation-under-woke/.

67 *See* Ross Douthat, *The Tom Cotton Op-Ed and the Cultural Revolution: How Liberalism, and the Liberal Media, Are Changing Before Our Eyes*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/nyt-tom-cotton-oped-liberalism.html (defining "successor ideology" as a movement away from previous liberalistic ideas whose ideology is still in the process of being developed).

68 Reinsch, *supra* note 66.

Antiracism is an example of the structure of this thinking. Its leading publicist and best-selling author, Ibram X. Kendi, has stated that "racial discrimination is the sole cause of racial disparities in this country and in the world at large."[69] All that has gone before is tainted, and society should be completely remade to reflect this essential truth.

This kind of ideology poses a serious threat to the rule of law. First, begin with the rights-bearing status of the individual. The Declaration of Independence depends on the moral claim that all are created equal, and thus, individuals are equal before the law.[70] People should not enjoy legal privileges because they are members of a class as nobility and clergy enjoyed before the rise of liberalism.[71] Moreover, the individual identification under law makes it harder for groups to use politics to oppress other groups.[72] This barrier helps preserve equality of individuals under the law.[73]

But a social justice movement that focuses on the group rather than the individual inevitably subordinates individual rights.[74] Exhibit A includes the rules on tribunals on sexual assault on campus where the education department took away core protections from the accused, including access to a neutral tribunal and right to cross examination.[75] To be clear, the impulse to prevent sexual abuse is wholly laudable, but the dogmatic structure of a movement that wants to vindicate women against patriarchy transformed reform into a threat to individual rights.

Second, such movements even create distortions in fact-finding as well as the content of law. When Michael Brown was killed in Ferguson, the story was told that he was a victim of police racism who was shot with

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[69] IBRAM X. KENDI, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA 10 (2016).

[70] Alan G. Lance, *Patriotism*, ADVOC., Dec. 2001, at 10, 11.

[71] *See* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 942 (2013) (discussing how the states banned giving nobility titles to citizens); Marci A. Hamilton, *Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 BYU L. REV. 1099, 1132–33 (2004) (discussing how clergy members received benefits because of their position in England, such as avoiding the death sentence and being tried in their own courts).

[72] *See* AARON RHODES, HOW "COLLECTIVE HUMAN RIGHTS" UNDERMINE INDIVIDUAL HUMAN RIGHTS 18–19 (2020) (discussing how "individual rights compel states, and other people, to respect individuals as having sovereignty over their lives").

[73] *Id.* at 18.

[74] *See* RHODES, *supra* note 72, at 4 (stating that group rights mean that a person's rights cannot be advocated unless the entire group's rights can).

[75] *See Dear Colleague Letter: Sexual Violence, Russlyn Ali, Office for Civil Rights*, U.S. Dep't of Educ. (Apr. 4, 2011), at 12, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (discouraging the use of cross-examination by students for fear of traumatization); Manning Peeler, Note, *Seeking Clarity in the Title IX Confusion: Cross-Examination Requirement in Title IX Hearings Under Due Process*, 10 WAKE FOREST J.L. & POL'Y 351, 354–55 (2020) (discussing how cross-examination was discouraged under Obama's administration but was made a requirement under Trump's administration).

his hands in the air, an event which inspired the slogan "Hands up, don't shoot!"[76] It took the Obama Justice Department's report to show that this story was untrue, exonerating the officer legally, although he has never been cleared in the eyes of the social justice movement.[77]

At my law school, the administration nevertheless continues to display a photograph taken at a school demonstration about this incident of people with their hands in the air.[78] It is imperative to the rule of law that facts not be subordinated to an overarching, totalizing social narrative.

Third, personal responsibility is also bound up with the rule of law.[79] In part, that's because people take responsibility for themselves only when they can plan, and they can plan only when they know the rules of the game. In part, that's because a government that's large enough to absolve people of individual responsibility is so powerful that the rule of law cannot constrain it.

But to proclaim that some form of systematic oppression is the cause of all disparities between identity groups undermines this premise. The theory of antiracism articulated by Kendi is an example. It uses racial identity and claims of systematic oppression to rob individuals of agency.[80] It releases individuals from responsibility, both the reported victims and the perpetrators.[81] It is also false. Complex social phenomena in a free society rarely, if ever, have a single cause.

Of course, there's nothing wrong with arguing that specific social practices brought into being by the collective decision of some individuals are responsible for bad outcomes. That's a program of potentially useful reform to eliminate such practices. But unless that empirical work is done, this new utopian movement thwarts rather than promotes social reforms.

Fourth, a culture of freedom of speech and tolerance for dissenting views is also necessary to the rule of law and justice, allowing critique of

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[76] Michelle Ye Hee Lee, *'Hands Up, Don't Shoot' Did Not Happen in Ferguson*, WASH. POST (Mar. 19, 2015, 3:00 AM), https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/.

[77] *Id.*; Memorandum from the Dep't of Just. Rep. Regarding the Crim. Investigation into the Shooting Death of Michael Brown by Ferguson, Missouri Police Officer Darren Wilson 8, 83 (Mar. 4, 2015).

[78] *See* Jack Silverstein, *Black Law Student Groups Find Ways to Support Ferguson, New York Protestors*, CHI. DAILY L. BULL. (May 14, 2015, 6:04 PM), https://www.chicagolawbulletin.com/archives/2014/12/12/law-schools-protests-12-12-14 (discussing how Northwestern Law School students organized a photo shoot to support Michael Brown).

[79] *See* Michael B. Brennan, *The Lodestar of Personal Responsibility*, 88 MARQ. L. REV. 365, 365–66, 369–70 (2004) (discussing different reasons why the law needs to hold people responsible for their actions).

[80] KENDI, *supra* note 69, at 457–58.

[81] *Id.*

both current law and future reform.[82] But some of the social movements have no interest in free speech because they are dogmatically sure of their own truth. It is hardly an accident that James Damore, an engineer at Google, was fired when he called attention to plausible reasons other than discrimination that account for the lower proportion of women in computer science.[83] If one begins with the incontrovertible truth that systematic discrimination is the cause of all disparities, free exchange is unwelcome because give and take can lead to an appreciation of complexity, not sloganeering.

Universities have historically transmitted the culture of capacious liberalism from one generation to the next.[84] Their core form of liberalism is epistemic—an openness to ideas and argument—even against the consensus, so that the truth about the world can be discovered.[85] Here, too, facts must not be subordinated to an official narrative. Universities have previously faced dangers of epistemic closure because professors were overwhelmingly of one ideology, left liberal.[86] But only recently have university administrations themselves increased that danger by taking institutional positions. For example, many schools like my own law school have now labeled themselves antiracist.[87] But antiracism is an encompassing ideology that is not simply a commitment not to discriminate. Indeed, in many versions, it requires discrimination and becomes an Orwellian slogan, another way that truth becomes subordinate to the claims of a broad social narrative.[88] Other universities

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[82] David Adler, *Legal History, Civic Literacy and a Liberal Arts Education: Building Blocks for Civic Participation*, ADVOC., Sept. 2013, at 42, 42.

[83] Stephen Wilks, *Private Interests, Public Law, and Reconfigured Inequality in Modern Payment Card Networks*, 123 DICK. L. REV. 307, 350–51 (2019); Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 99, 111 (2019).

[84] Adler, *supra* note 82, at 42.

[85] *See* Colin Crawford, *On the Role of Universities in the Common-wealth*, 57 U. LOUISVILLE L. REV. 543, 559 (2019) (discussing how debates about different ideologies are important for understanding society).

[86] Christopher Ingraham, *The Dramatic Shift Among College Professors That's Hurting Students' Education*, WASH. POST (Jan. 11, 2016, 2:01 PM), https://www.washingtonpost.com/news/wonk/wp/2016/01/11/the-dramatic-shift-among-college-professors-thats-hurting-students-education/.

[87] *E.g.*, Kim Yuracko, *Northwestern Law's Commitment to Anti-Racism*, NW. SCH. OF L. (June 12, 2020), https://www.law.northwestern.edu/about/news/newsdisplay.cfm?ID=979.

[88] *See, e.g.*, Kenneth L. Marcus, *How Not to Be an Antiracist*, WALL ST. J. (Aug. 24, 2020, 1:13 PM), https://www.wsj.com/articles/how-not-to-be-an-antiracist-11598289191 (discussing how antiracism supporters caused a student to resign from her student government position because of anti-Semitic remarks made about her support for the Zionist movement).

require those who want to be hired or promoted show their commitment to diversity and inclusion of social ideals.[89]

When an educational institution adopts an ideology, certainly one as comprehensive as antiracism, it chills dissenting views and makes the search for truth secondary to making ideas conform to what is thought virtuous when a virtue-signaling university undermines a big part of its core enterprise, making sound inferences about causes and effects in the world. If elites are trained to view society through a dogma rather than openness to sometimes inconsistent facts, they will make America worse, particularly for non-elites, including those who are minorities. Capacious liberalism is the prerequisite for a successful, empirically-based social reform, something that is also necessary to the continued flourishing of the rule of law.

That's the end of Professor McGinnis's remarks, and I will turn it over to Professor Randy Barnett.

Prof. Randy Barnett: Thanks, Eugene. It's a pleasure to be here. I wish it would be in person. I miss the Mayflower Hotel, like I'm sure everybody else does. I also miss the presence of John McGinnis on the panel with me. With the current makeup, it looks a little more like an American Constitution Society panel than a Federalist Society panel, but I'll do my best. And I'm very grateful to John for his written remarks, which I think helpfully set up mine.

I have been wrestling with what I could accomplish in a ten-minute talk beyond complaining. So, I thought I would engage in a bit of self-criticism by offering two observations about the conservative legal movement in which The Federalist Society is a driving force. Doing so is going to require me to make some generalizations that will not apply equally to everyone. My first observation concerns how we can do better responding to claims about social justice, and my second will be how we can do better to responding to claims that are based on what we call wokeness.

By "social justice" I mean the notion that, as persons, we are constituted, first and foremost, by the groups of which we are members from birth. And that "justice" is to be measured by and afforded to these groups rather than to us as individuals. By "wokeness" I refer to the narrative that imagines the American story as one of dominance and oppression by one group over all the others—an American narrative that to be repudiated and destroyed rather than embraced and preserved. This

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[89] *See, e.g.*, *Contribution to Diversity*, CORNELL UNIV., https://facultydevelopment.cornell.edu/statement-of-contribution-to-diversity-equity-and-inclusion-for-faculty-applicants/ (last visited Feb. 3, 2021) (stating that the university seeks to hire those who support and further equality and diversity and that all faculty applying for tenure must submit a statement of their dedication to promoting these values).

is why our story must be expunged from our schools and the statues of Washington and Lincoln must be removed from our public spaces.

First, as an antidote to "social justice," conservative constitutionalists need to spend more energy on the concept of justice—in particular, justice as defined by natural rights, which are affirmed in the Declaration of Independence.[90] It is no accident that my first book, *The Structure of Liberty: Justice and the Rule of Law*, was an explanation and defense of the liberal theory of justice.[91] In my experience, because they not unreasonably fear judges making up and enforcing rights, some conservatives tend to poo-poo justice altogether or, at least, they give it short shrift.

For example, some conservatives like to stress the Declaration's affirmation that governments derive "their just powers from the consent of the governed."[92] At the same time, they tend to dismiss the importance of the first part of that sentence, which says, "[T]o secure these rights," meaning the inalienable natural rights of life, liberty, and the pursuit of happiness, "[g]overnments are instituted among [m]en."[93]

Indeed, some conservatives de-emphasize the role of the Declaration altogether, going out of their way to insist that the Declaration is not law. This was recently done by Justice Barrett in her confirmation hearing. In response to a question by Senator Ben Sasse about the role of the Declaration, she responded with this:

> The Declaration of Independence is an expression of our ideals, an expression of our desire to be free from England. It is not law, however. The Constitution is law. It is our governing document. While the Declaration of Independence tells us a lot about history and the roots of our republic, it is not binding law.[94]

My point is not to single out Justice Barrett for special criticism, nor even to disagree with her claim about what is the "law." I quote her because this instinctive diminution of the Declaration as our founding document is such a fixture of thought for some conservatives that it spontaneously rolled smoothly and eloquently off her tongue.

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[90] *See* PETER C. MEYERS, FROM NATURAL RIGHTS TO HUMAN RIGHTS—AND BEYOND 1 (2017) (discussing the concept of rights that are inherent to humanity and which were affirmed by the Declaration of Independence).

[91] RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 330 (2d ed. 2014).

[92] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[93] *Id.*

[94] *Barrett Confirmation Hearing: Day 3 Part 2*, at 32:15 (C-SPAN television broadcast Oct. 14, 2020), https://www.c-span.org/video/?476317-2/barrett-confirmation-hearing-day-3-part-2.

The case of *Troxel v. Granville* provides another example. In that case, the majority of the Supreme Court upheld the fundamental right of parents to raise their own children.[95] In his dissenting opinion, Justice Scalia—for whom Justice Barrett clerked—conceded that this right was one to which both the Declaration and the Ninth Amendment refers.[96] He wrote:

> In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.[97]

In contrast, Justice Thomas joined the majority and even argued for strict scrutiny of this right.[98]

I suspect the cause of this de-emphasis of justice and natural rights is a preoccupation with a portion of The Federalist Society's mission statement that says, "[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[99] This comes at the expense of that part of the mission statement which insists that "the state exists to preserve freedom."[100] The singular focus on the proper role of *judges* at the expense of the liberal conception of *justice* based on the natural rights that define freedom or liberty is analogous to free market advocates who focus entirely on its efficiency rather than on its justice.

Recently, we've witnessed an insurgency in the conservative movement by those who critique the individual natural rights foundation of the American theory of government. This group advocates a "common good" conservatism that is highly critical of what it disparagingly calls individualism or "liberalism." A few of these advocates have even turned

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95 Troxel v. Granville, 530 U.S. 57, 75 (2000).
96 *Id.* at 91 (Scalia, J., dissenting).
97 *Id.*
98 *Id.* at 80 (Thomas, J., concurring).
99 *About Us*, *supra* note 32.
100 *Id.*

on the Federalist Society's commitment to promoting adherence to the original meaning of the Constitution itself.[101]

Of course, this criticism does not apply to all conservatives. And a skepticism of judges implementing natural rights—a skepticism which I share—is not logically incompatible with a serious treatment of how the structural constraints of the Constitution work to advance substantive justice.[102] But this tendency to focus on what the law *is* rather then what *it ought to be* cedes the moral high ground to those who are asserting conceptions of social justice above, say, the original meaning of the text of the Constitution.

In my view, "social justice" is not justice properly conceived. However, without a grasp of natural rights, why they are so imperative, and how the structures provided by the original meaning of the Constitution work to secure these rights, conservatives are unable to clearly explain why it is that "social justice" conflicts with real justice.[103] A majoritarian or "positivist" conception of popular sovereignty—in which the might of the majority is seen to make right—has a difficult time responding to moral appeals to social justice. This is why I was moved to write my book, *Our Republican Constitution: Securing the Liberty and Sovereignty of We the People*. In that book, I distinguish between the collective or democratic conceptions of popular sovereignty, which is based on implementing the will of the majority, and the individual or republican conception of popular sovereignty, which is based on securing the individual natural rights of We the People—each and every one.[104]

My second observation has to do with wokeness. In my experience in the conservative legal movement, I have found that some conservatives stress the framers and the founding in the Eighteenth Century while diminishing the importance of the Republican Party in the Nineteenth Century. These Republicans were responsible for ending slavery.[105] They fought tirelessly to protect the freedmen, reconstruct Southern state governments to ensure that they were truly republican, and ensure an

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[101] *See, e.g.*, Adrian Vermeule, *Beyond Originalism*, ATL. (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/.

[102] *See* Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 95–96 (1995) (discussing how Justice Thomas would not affirm natural rights as a part of constitutional judgments); Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 39 (1988) (discussing the purpose of substantive rights found within the Constitution).

[103] *See generally* John Hospers, *Justice Versus Social Justice*, FEE (Jan. 1, 1985), https://fee.org/articles/justice-versus-social-justice/ (discussing the differences between justice and social justice).

[104] *See generally* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016).

[105] *See* JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861-1865 (2014) (detailing the Republicans' sustained efforts to dismantle slavery).

equality of civil rights, North and South, by enacting formal constitutional amendments and a series of robust civil rights acts.[106] But in cases like *The Slaughter House Cases*[107] and *The Civil Rights Cases*,[108] the Supreme Court soon gutted these amendments and laws by employing a mixture of original intent and living constitutionalist methods. This eventually culminated in *Plessy v. Ferguson*.[109]

The preoccupation of some conservatives with the role of the judiciary has led them to deprecate the Privileges or Immunities Clause of the Fourteenth Amendment.[110] They fail to acknowledge that the due process of law requires the substance of laws be within the just powers of legislatures to enact.[111] They also favor extending the State Action Doctrine beyond the Privileges or Immunities and Due Process of Law Clauses, where it is apt, to the Equal Protection Clause, where there is good reason to think it is inapt.[112]

Perhaps more importantly, a systemic de-emphasis of the antislavery origins of the Republican Party, the civil rights laws and amendments it enacted, and the effort of Republican administrations to enforce these provisions, results in a failure to provide a positive counternarrative to the woke left. In this regard, I have been influenced by my years long study of antislavery constitutionalism, which was deeply informed by

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[106] *See generally*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT (forthcoming 2021).

[107] 83 U.S. 36 (1873).

[108] 109 U.S. 3 (1883).

[109] *See* U.S. CONST. amends. XIII–XV (showing the amendments that were passed during the Civil War era); Plessy v. Ferguson, 163 U.S. 537, 542, 548–49 (1896) (discussing how the Thirteenth and Fourteenth Amendments did not prevent segregation of the freed slaves from the whites).

[110] *See* David Gans & Doug Kendall, Heller*, Originalism, and the Revival of the Privileges or Immunities Clause*, CONST. ACCOUNTABILITY CTR. (Dec. 11, 2008), https://www.theusconstitution.org/blog/heller-originalism-and-the-revival-of-the-privileges-or-immunities-clause/ (discussing how conservatives might have a difficult time with bringing back the Privileges or Immunities Clause because it would involve overruling a significant number of Supreme Court cases); Kyle Alexander Casazza, *Inkblots: How the Ninth Amendment and the Privileges or Immunities Clause Protect Unenumerated Constitutional Rights*, 80 S. CAL. L. REV. 1383, 1384 (2007) (discussing the controversy over how the judiciary is supposed to interpret things that involve substantive rights).

[111] *See* BARNETT & BERNICK, *supra* note 106, at 261–315 (explaining the original meaning of the Due Process of Law Clause in the Fourteenth Amendment and how it can be implemented); Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599–683 (2019) (same).

[112] *See generally* Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1381–82, 1402 (2006) (discussing how the state action doctrine is not meant to stop government control over individuals, but it does promote people's right to choose how society will be operated). For an explanation of why the state action doctrine properly applies to the original meaning of the Privileges or Immunities and Due Process of Law Clauses but not to the original meaning of the Equal Protection of the Law Clause, see BARNETT & BERNICK, *supra* note 106, at 319–71.

natural rights.[113] In the beginning, I did this simply because I found it to be inherently interesting. Now, it has become an imperative. Yet, it is a narrative that too few in the conservative legal movement are aware of or appreciate.

My constitutional law case book is organized around these themes and emphasizes how slavery was ended as well as how equality and civil rights were thwarted by the Supreme Court's passivity in the face of massive Democratic resistance.[114] This is not, I should stress, a narrative of triumph. It is a narrative of tragedy. But it is a narrative of progress, which honors the struggles and heroism of our ancestors on behalf of liberty and equality rather than excoriating them as knaves and villains.

I find that this narrative completely disarms students who come to my class with a woke narrative in mind and expect a certain kind of narrative from me that they do not get. Class discussions, as a result, have an entirely different tenor than they would have in the absence of this narrative being carefully developed during the first third of the course. Just the other day, a student with an Obama poster on his wall told me during Zoom office hours that he came to my class hostile to originalism only to be surprised by the original meaning of the 14th Amendment.

By spending more time on substantive justice at the founding and the narrative of the United States afterwards, conservatives can do much to displace the left from the moral high ground it has successfully claimed in our elite institutions. In sum, we have a better case to make than we have been making and a better story to tell than we have been telling. Thanks.

Now, I turn it over to Judge Lee to moderate our discussion.

Hon. Kenneth Lee: Thank you all for the very thought-provoking comments. In a little bit, we'll open up for audience questions. And for those folks, you can do so by clicking on the "Raise Hand," and you'll be in the queue to be able to ask questions to the panelists.

But before that, before we open it to the audience, I wanted to give panelists first an opportunity to respond to what other panelists may have said, if they have any additional thoughts or want to respond to any of the points made.

Prof. Nadine Strossen: I would love to. I loved all of the comments, but in my little amount of time here, I'd like to single out Randy Barnett.

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[113] *See* Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165–263 (2011) [hereinafter *Whence Comes Section One?*]; Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 CASE W. RES. L. REV. 653–702 (2013).

[114] RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT (3d ed. 2018); JOSH BLACKMAN & RANDY E. BARNETT, AN INTRODUCTION TO CONSTITUTIONAL LAW: 100 SUPREME COURT CASES EVERYONE SHOULD KNOW 113, 117–18, 121–22 (2020).

I think your counternarrative is really thrilling and consistent with my idea that we're not enemies, left and right. We share a lot, according to you, even a lot more in common than many on either side understand. And I look forward to reading the more detailed explication that I know you've written.

Just one question. I know you had to compress your points. I didn't understand the point about the Equal Protection Clause and state action. Do you mind explicating that a little bit more?

Prof. Randy Barnett: I'd be delighted, although I don't want this panel to get off a tangent about that topic. But in the book that Evan Bernick and I have coming out next year, we try to explain how the duty of protection is a positive duty the government owes its citizens in return for their allegiance.[115] It was an argument that was strongly developed by the antislavery movement, which argued that even slaves had to obey the law, in return for which standard social contract theory said the law owed them a duty of protection.[116]

And so even though the state action doctrine properly applies to the Privileges or Immunities Clause,[117] which says "no state shall make or enforce any law"—that's the state action—nor deprive persons of the due process of law—that would also be a state action[118]—the Equal Protection Clause, we believe, imposes an affirmative constitutional duty on state governments to equally protect the rights of each of its citizens,[119] a duty that was one of the principal problems that was facing the Republicans when they were trying to reconstruct the South, when Democrats were denying equal protection.[120] It was one of the principal things that was being done to the freedmen and also to white Republicans in the South.[121]

Now, the reason why conservatives and others are very skeptical or doubtful or dubious about this, apart from its originalist bona fides, is

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[115] *See* Barnett, *Whence Comes Section One?*, *supra* note 113, at 182 (showing Professor Barnett's work on antislavery constitutionalism and how the government had a duty to provide protection)

[116] *Id.* at 221.

[117] Huhn, *supra* note 112, at 1402.

[118] U.S. CONST. amend. XIV, § 1.

[119] Randy E. Barnett, We the People*: Each and Every One*, 123 YALE L.J. 2576, 2590 (2014).

[120] *See* PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 129–30 (1990) (discussing the "Black Codes" in the Southern states and the resistance that Republicans received from Democrats when attempting to assist former slaves).

[121] *See id.* (detailing the widespread denial of equal protection to former slaves in the Southern states); *White Southern Responses to Black Emancipation*, PBS, https://www.pbs.org/wgbh/americanexperience/features/reconstruction-white-southern-responses-black-emancipation/ (last visited Feb. 1, 2021) (describing the Ku Klux Klan's harsh treatment of white supporters of equal protection in the South during Reconstruction).

that they're concerned about judges imposing this duty on local law enforcement and local government officers, which essentially would impose monetary liability to an unlimited degree by means of judicial decrees on municipalities which have to satisfy these judgments by making payments.[122] I think this, and we say in our book this is a justified concern.

So, what we argue instead is that this is not a duty that judges should be enforcing, but it is a duty that was within the power of Congress to enforce using its Section 5 powers under the Fourteenth Amendment by providing alternative remedies that do not impose duties on the states but provide substitutes for the remedies that states are inadequately providing if a record can be made that states are, in fact, unequally protecting their citizens.[123]

And in this category, we would, for example, have put the Violence Against Women Act, which created a federal cause of action for gender motivated violence.[124] Regardless of whether you agree with Congress's findings that states were inadequately protecting women, it is on the basis of such findings that Congress created an alternative remedy for women, which was invalidated by the Supreme Court on the one hand because it exceeded Congress's commerce power, which it did, but on the other hand because it would have exceeded Congress's Section 5 powers under its reading of the scope of the Equal Protection Clause, which, in my view, it did not.[125] So if it's objectionable, it would be so on the grounds that Congress had an inadequate record before it in order to justify this, but not on the grounds that doing so in the face of inadequate record was within the Section 5 powers of Congress to enact.[126]

Eugene Meyer: I have a question for both Professor Kennedy and Professor Strossen. Let me start with Nadine. You talked about the importance of The Federalist Society doing debates with other groups,[127]

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[122] *See Enforcement*, JUSTIA, https://law.justia.com/constitution/us/amendment-14/12-enforcement.html#tc-2202 (last visited Feb. 3, 2021) (confirming that the Fourteenth Amendment allows Congress to impose civil liability on state officials who violate civil rights); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 724 (1978) (Rehnquist, J., dissenting) (lamenting the Court's decision to remove municipal immunity under the Fourteenth Amendment).

[123] *See* Randy E. Barnett, *Is the Constitution Libertarian?*, 2008–2009 CATO SUP. CT. REV. 9, 24–26 (2009) (positing that the Fourteenth Amendment expanded protection from state and federal governments).

[124] 34 U.S.C. § 12361 (original version at 42 U.S.C. § 13981 (1994)).

[125] United States v. Morrison, 529 U.S. 528, 619–20, 625–27 (2000).

[126] *See id.* at 614–16 (discussing the inadequacy of Congress's findings); Steven G. Calabresi & Nicholas P. Stabile, *On Section 5 of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1431, 1447–48 (2009) (arguing that the Court wrongly decided the Violence Against Women Act's Fourteenth Amendment issue).

[127] *See supra* text accompanying notes 56–62.

which we try to do a lot. The increasing problem we've had, and it hasn't reached a critical stage yet, but it's getting more and more serious, is it is getting increasingly difficult to set up debates, to get other groups to debate, to agree to be part of the debate, and sometimes, even to get debating opponents.

It's a commitment we have had from the beginning and still very strongly have.[128] You may have slightly overstated how much we try to force chapters through the debates, but we definitely very, very strongly encourage it, and mostly, they try to. But I don't know if you have any thoughts on how to get more of these groups to agree to debate.

And I'm going to leave that question for one second and ask the question I had of Professor Kennedy because it's somewhat linked. One of the things that's going on currently—and I'm not saying things aren't going on both ways around; they undoubtedly are—but there is a fair bit of attempt to "cancel" or whatever term you want to use, those people who've done things that either supported Trump or in some way or other done something aligning themselves with Trump.[129] And there have been things written saying, "Somebody who has done that should never—".[130] Basically, you shouldn't hire the law firm that has represented him.[131] You should pressure the sponsors of the firm not to represent—not to do business with the firm because they represented him.[132]

And the two things are linked because both are attempts to counter—to make it so that you do not—not just that you disagree with someone, but you try to go after their jobs, their livelihood. And that certainly has gone on on both sides.[133] And clearly, at some stage, society has certain principles where when ninety-nine percent of the people in society think

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[128] *See About Us*, *supra* note 32 (discussing the Federalist Society's commitment to debates between opposing viewpoints).

[129] *See, e.g.*, Ryan Lizza et al., *AOC Wants to Cancel Those Who Worked for Trump. Good Luck with That, They Say.*, POLITICO (Nov. 9, 2020, 6:01 AM), https://www.politico.com/news/2020/11/09/aoc-cancel-worked-for-trump-435293 (discussing the rhetoric following the 2020 election that Trump officials should not be allowed to profit from their experience with him).

[130] *See supra* note 129 and accompanying text.

[131] Caroline Spiezio, *Blowback Against Trump Campaign Law Firm Targets Clients, Recruiting*, REUTERS (Nov. 12, 2020, 9:33 AM), https://www.reuters.com/article/usa-election-jones-day/blowback-against-trump-campaign-law-firm-targets-clients-recruiting-idUSKBN27S24E (reporting the criticism that Jones Day has received for representing President Trump in his election lawsuits and the pressure placed on clients to drop the firm).

[132] *See id.* (reporting the pressure that the Lincoln Project has placed on companies associated with Jones Day, such as Verizon and General Motors).

[133] Ryan Lizza et al., *supra* note 129; Daniel Dale, *A List of People and Things Donald Trump Tried to Get Canceled Before He Railed Against 'Cancel Culture,'* CNN (July 7, 2020, 4:00 PM), https://www.cnn.com/2020/07/07/politics/fact-check-trump-cancel-culture-boycotts-firings/index.html (listing people or organizations that President Trump has argued should be fired or boycotted for their political stances, including the firing of NFL players for their social justice protests during the national anthem).

something is horrendous, people are going to respond negatively to that person. But when you're starting to do that with twenty-five, thirty, thirty-five, forty percent of society, that strikes me as dangerous. And I wonder if you have thoughts about what to do about that.

Prof. Randall Kennedy: Let me say a word about your allusion to organizations avoiding cosponsoring events with The Federalist Society and people declining to attend debates. I think that one of the reasons why some people don't want to show up and don't want to cosponsor is that they don't want to do anything that's going to further legitimate, further entrench, further empower, The Federalist Society. Frankly, I thought about that before I deciding to join this panel.

The Federalist Society is powerful, and one of the ways in which it discusses itself or makes itself attractive to many people is to say, "Yes, we are conservatives. We are libertarians. We are on the right side of the political spectrum. But we open ourselves up to self-criticism. We have people come to our meetings. Look at Nadine Strossen. Look at Randy Kennedy. Look at the other liberals we invite to our affairs. So think well of us."

Now, I think that there are people in my camp who think that I am being naïve. I'm a progressive. My peeps are the folks who read and support *The American Prospect* magazine,[134] *The Nation* magazine,[135] *Dissent* magazine.[136] Those are my people ideologically. And some of them would say, "Listen, Kennedy, The Federalist Society, when all is said and done, they can say nice things, they can give nice speeches like the ones you've heard today, but when all is said and done, a large number of them are followers of Donald Trump, who has been and is right now a danger to democratic values in the United States of America. And no, we do not want to participate. We do not want to help one whit any organization that is going to line up with Donald Trump."[137]

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[134] *See The American Prospect: An Independent Voice for Liberal Thought*, AM. PROSPECT, https://prospect.org/about (last visited Jan. 17, 2021) (proclaiming the progressive ideology of the publication).

[135] *See About Us and Contact*, NATION, https://www.thenation.com/about-us-and-contact/ (last visited Jan. 17, 2021) (proclaiming the progressive ideology of the publication).

[136] *See About Dissent Magazine*, DISSENT, https://www.dissentmagazine.org/about-dissent-magazine (last visited Jan. 17, 2021) (proclaiming the leftist ideology of the publication).

[137] *See* Elie Mystal, *Donald Trump and the Plot to Take Over the Courts*, NATION (July 15, 2019), https://www.thenation.com/article/society/trump-mcconnel-court-judges-plot/ (expressing disdain for the agenda of President Trump and The Federalist Society and criticizing the Republican stranglehold that Federalist Society judges have on the federal courts); Mark Joseph Stern, *How the Supreme Court Contributed to Growing Inequality*, AM. PROSPECT (Jan. 29, 2020), https://prospect.org/culture/books/how-the-supreme-court-contributed-to-growing-inequality/ (claiming that The Federalist Society has harmed the United States through President Trump's judicial selections).

That is what you face. And the people who offer that critique have a point, a good point. It is deeply disappointing that so many members of The Federalist Society have kept quiet in the face of an absolute danger to American democracy.

We can disagree about various things. We can disagree about tax policy, and industrial policy, and labor law, and affirmative action and still be as one with respect to certain fundamental commitments to democratic norms. But what we have seen in the past couple of years is the transgressing of boundaries that ought never be crossed. Those who have crossed them should be ostracized.

We are in a dangerous moment that has been quite chastening. I have a new appreciation for norms of civility, for norms of compromise that I didn't have before. That is in party why I am here speaking to The Federalist Society. And I would do it tomorrow as well. But do understand the thinking of people on the other side.

Prof. Nadine Strossen: I would just add to that, it's more than a matter of terminology, but I prefer the term "discussion" or "discourse" or "dialogue" to "debate" because—and I say that as a champion debater from high school—the point of a debate is to win. And I think what you should be fostering, and I know from the form letter that you send to your student chapters, you are encouraging robust discussion through the opening statements that present differing perspectives.[138]

But that doesn't have to be a point, counterpoint, black, white binary. It's a recognition that these are complicated issues, and there are different perspectives and different evidence and analysis that should be considered. So, I think if that is emphasized, that this is to bring people together to further understanding among all of us, and that all of us have our understanding enriched when it is cross-fertilized with a variety of perspectives, that that might—perhaps the word debate suggests that The Federalist Society is trying to win this, and we don't want to throw a sacrificial lamb into it.

Also, all organizations at every level are composed of individuals, and all of us individuals who care deeply about bringing people together with different perspectives have a responsibility to act as role models, to act as leaders, to set the tone. So for example, not just the first, I think the second even in a few months discourse you had between Robbie George, such a prominent conservative, and Cornel West, such a prominent

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[138] *See About Us*, *supra* note 32 (stating The Federalist Society's purpose to promote open debate in the student chapters).

progressive,[139] unhesitatingly seeking and welcoming this platform and speaking about the positive role that The Federalist Society can play, I would hope—and Randy, I trade on the fact that you speak regularly, Randy Kennedy, but also Randy Barnett, who's part of the libertarian wing, which I think is often ignored or not given as much attention as the conservative wing.

And also, I see at the level of individual chapters the individual personal relationship between students who are members and leaders of The Federalist Society and the American Constitution Society. On my own campus and many others, there is a lot of cross membership. Students who are genuinely interested in the full range of programs, the full range of perspectives, will join both organizations. They have a great deal of trust and respect for each other. So we have to emphasize that kind of personal conversation.

And then I think at the national level as well, at least in my experience, there were always very good, cordial, collegial relationships between the national leadership of ACS and the national leadership of Fed Soc, even despite disagreement on very important policy issues.

Hon. Kenneth Lee: Mr. Barnett, do you want to respond?

Prof. Randy Barnett: Yeah, let me respond a little bit to what Randy just said. And Randy and I, I should just mention, have known each other for a very long time and gotten along very well. I hope this session is not going to be the end of that friendship.

But I just want to reassure him that we are not unaware of what progressives think about Donald Trump or people who support Donald Trump. We are well aware of what they think. I have a couple of comments to make about that. Number one, none of the issues that we're talking about today began with Donald Trump or began during the last three years.[140] They precede that. Donald Trump is not the cause of this. Donald Trump is a symptom of it.

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[139] *See A Discussion with Professors Robert George and Cornel West*, FEDERALIST SOC'Y, https://fedsoc.org/events/a-discussion-with-professors-robert-george-and-cornel-west (last visited Jan. 20, 2021) (discussing a Federalist Society debate between Professor George and Professor West on August 17, 2020, on the topics of free speech, free thought, Black Lives Matter, and cancel culture); Colleen Flaherty, *Rejecting 'Campus Illiberalism*,*'* INSIDE HIGHER ED (Mar. 16, 2017), https://www.insidehighered.com/news/2017/03/16/ideological-odd-couple-robert-george-and-cornel-west-issue-joint-statement-against (discussing the conservative and progressive ideologies of the professors).

[140] *See* Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying to Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015, 8:28 AM), https://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/index.html (describing the rising social justice movement, which gained traction after the shooting of Trayvon Martin

Donald Trump is a symptom of people who looked on the stage of the candidates that were on offer for the Republican nomination in 2016, and I was a senior advisor to one of Donald Trump's rival candidates, Senator Paul.[141] They looked on that stage and they really saw, they thought, only one person, or at least a plurality of Republicans saw one person they thought was capable of standing up to, fighting back, and not being cowed by the type of aggression that we do witness from the left, both verbally and physically.[142]

Whether they were right or wrong about that, that's the guy they thought, on the stage, was just crazy enough to do what he said he would do, and where all the other ones up there were mere politicians who spouted conservative platitudes while doing pretty much nothing and cowing whenever attacked.[143] Whether they were right or wrong about that calculation, I think that's what launched him or put him at the head of the pack, among other things. So that's number one.

Number two is that I think there's a certain amount of "both sides-ism" that we've entered into in this discussion. What we are all talking about, and what this panel is really about, is an attack on liberalism that is happening within academia in particular[144] and that has now permeated society in general. And Nadine, I know, fully agrees with this, and her comments are fully in this spirit.[145] But it isn't symmetrical. Of course, you're always going to be able to find an example on the other side of something, but that's not really what's happening here. The shutdown culture, the cancel culture, the intimidation culture, the going-after-

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in 2012); Eric Thurm, *Unbreakable Kimmy Schmidt and the Pushback Against 'PC Culture,'* GUARDIAN (Apr. 19, 2016), https://www.theguardian.com/tv-and-radio/2016/apr/19/unbreakable-kimmy-schmidt-pc-culture-tina-fey-south-park (providing an example of political correctness and cancel culture before the Trump presidency).

[141] Linda Greenhouse, *A Chief Justice Without a Friend*, N.Y. TIMES (Oct. 1, 2015), https://www.nytimes.com/2015/10/01/opinion/a-chief-justice-without-a-friend.html.

[142] *See Trump Nation*, USA TODAY, https://www.usatoday.com/pages/interactives/trump-nation/#/?_k=u7dhyp (last visited Feb. 2, 2021) (collecting testimonials from President Trump's supporters prior to the 2016 presidential election; showing that people voted for President Trump because he would stand up to the left's agenda and aggression, that they believed him, that he was not a typical politician, and that he would do better standing up to the left than his fellow Republicans); Demetri Sevastopulo, *How Trump Gave a Voice to Unheard America*, FIN. TIMES (Oct. 27, 2016), https://www.ft.com/content/4ef103be-9bcf-11e6-b8c6-568a43813464 (reporting that the populist support that President Trump received prior to the 2016 election was fueled by his ability to take on the Washington establishment—both Republicans and Democrats).

[143] *See supra* note 142 and accompanying text.

[144] *See supra* text accompanying notes 41–58, 64–89, 101–104.

[145] *See supra* text accompanying notes 41–58, 84–89.

donors culture, this is predominantly coming from one side aimed at shutting down discourse on the other side.[146]

And I know that in the course of characterizing The Federalist Society, Randy referred to it as powerful.[147] It's a private organization.[148] It's very influential with some people. But I don't know if it would be accurate to call it powerful in the relevant sense because it really has no power other than the voice that it represents.

And the fact that it represents a singular location where all the people who are generally shut out of the mainstream and I might even hazard to say powerful institutions like Harvard Law School, that's—The Federalist Society is really the only place they have to go or the principal, primary place they have to go.[149] And as a result, they're all in one place, and they can speak in a more influential or powerful way, if you will, than they would otherwise have if they were dispersed throughout academia—which they are not allowed to be by the discriminatory hiring that is done by most law schools, including my own, who were liberal enough to hire me, but not that many more than me.[150]

And so, the final thing I would say, if we move beyond academia and we talk about protests, which is the subject of this panel as well, is that the District of Columbia, where I reside—although I am not residing at the present; I'm actually taking refuge in central Virginia from the virus—was boarded up in anticipation of this election.[151] And I can assure you

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[146] *See*, *e.g.*, Dennis Prager, *PRAGER: Why the Left Has to Suppress Free Speech*, DAILY WIRE (Jan. 23, 2021), https://www.dailywire.com/news/prager-why-the-left-has-to-suppress-free-speech (discussing the various examples of the political left prohibiting dissenting views as opposed to the comparatively open discourse on the political right); Kevin McDermott, *McDermott: 'Cancel Culture' Is a Betrayal of Everything Liberalism Once Stood For*, ST. LOUIS POST-DISPATCH (Feb. 1, 2020), https://www.stltoday.com/opinion/columnists/kevin-mcdermott/mcdermott-cancel-culture-is-a-betrayal-of-everything-liberalism-once-stood-for/article_3b732eef-b703-5b00-b276-f708971b95f4.html (claiming that cancel culture comes primarily from the left in modern America).

[147] *See supra* text accompanying notes 41–58.

[148] *See About Us*, *supra* note 32 (reporting that The Federalist Society relies on funding from individuals and foundations and does not receive funding from political parties or the government).

[149] *See* Aidan F. Ryan, *Harvard Federalist Society, Long a Conservative Haven, Seeks Distance from Trump*, HARV. CRIMSON (Nov. 15, 2018), https://www.thecrimson.com/article/2018/11/15/federalist-society-hls/ (discussing the conservative haven that The Federalist Society provides for conservative perspectives on campuses like Harvard).

[150] *See* James C. Phillips, *Political Discrimination and Law Professor Hiring*, 12 N.Y.U. J.L. & LIBERTY 560, 603–05, 617 (2019) (reporting the results of a study that showed political discrimination against conservatives in the law school hiring process generally); *see also Randy E. Barnett*, *supra* note 2 (confirming that Randy Barnett is a professor at Georgetown Law School).

[151] Mark Leibovich, *Washington, on Edge About the Election, Boards Itself Up*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/2020/11/02/us/politics/washington-dc-boarded-up-election.html.

that it was not boarded up in anticipation of right-wing violence.[152] And one way I can show that is that it really looks like Joe Biden has won the election, or that's the way it's going, and we're not seeing any right-wing violence.[153] Everything seems to be pretty peaceful.[154] It was being boarded up in response to left-wing violence.[155]

I really appreciated Randy's earlier comments in which he said that his colleagues and friends condemned that violence.[156] And I believe him. But nevertheless, despite that condemnation, that is where the threat to civil order is coming from predominantly.[157] Of course, you can always find examples on the other side of a provocateur here or there. But if you want to generalize, as we generalize about police and we generalize about racism, we can generalize about the source of violence that's shutting down discourse and destroying private property and destroying the very livelihoods of the people and businesses that serve the minority community in many, many cities.

The last thing I guess I will say is that it was a huge accomplishment that took place over my lifetime that big box retail stores were prepared to open up in the inner cities. It used to be that the inner cities were reliant on mom-and-pop stores and other kinds of bodegas that charged higher prices for a variety of reasons. Target and Walmart and a bunch of other big box stores were a revolution, and they were prepared to open up in

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[152] *See* Meredith McGraw, *'Tense and Nervous': Washington Sees an Election Night Like No Other*, POLITICO (Nov. 4, 2020, 3:09 AM), https://www.politico.com/news/2020/11/04/nation-on-edge-civil-unrest-434012 (reporting that barriers were placed around the White House during the election after left-wing protests throughout the summer of 2020).

[153] *See* Hannah Knowles et al., *As Biden Wins Presidency, Trump Supporters Insist Election Isn't Over as They Protest His Loss*, WASH. POST (Nov. 7, 2020, 9:50 PM), https://www.washingtonpost.com/national/election-celebration-protests/2020/11/07/52a65bc2-2108-11eb-9ec3-3a81e23c4b5e_story.html (reporting protests without violence in multiple state capitals after Joe Biden was declared the President-elect).

[154] *Id.*

[155] *See* McGraw, *supra* note 152 (reporting the fear of violence after the left-wing protests during the summer of 2020 and the boarded-up businesses around the city of Washington).

[156] *See supra* text accompanying notes 26–31.

[157] *See* Amy Mitchell et al., *Majorities of Americans Say News Coverage of George Floyd Protests Has Been Good, Trump's Public Message Wrong*, PEW RSCH. CTR. (June 12, 2020), https://www.journalism.org/2020/06/12/majorities-of-americans-say-news-coverage-of-george-floyd-protests-has-been-good-trumps-public-message-wrong/ (reporting poll results that showed Democrat approval of the George Floyd protests and opposition of President Trump's condemnation of the violent protests, as opposed to Republican disapproval of the George Floyd protests and approval of President Trump's condemnation of the violent protests).

Washington, D.C. and in other municipalities to provide reasonably priced, high-quality services to the minority communities.[158]

And all of that is put under threat by the attack on private property that has been justified or at least legitimated by those who support this form of protest or who at least don't adequately condemn it.[159] And in that, I would also include the Democratic nominee or the Democratic candidate for President who made a perfunctory statement about this when it politically was necessary for him to do so[160] but otherwise ignored it, along with most of the rest of the media who attempted to say that the buildings burning behind them were a product of mostly peaceful protests.[161]

Prof. Randall Kennedy: Can I respond?

Prof. Randy Barnett: Absolutely.

Prof. Randall Kennedy: I look forward to reading your work. And I look forward to future discussions. There's nothing at all that you've said that would make me hold you in any less esteem. That's point number one.

Point number two: I agree with much of what has been said here about misguided attacks on fundamental notions of liberty, fundamental notions of due process, fundamental notions of individualism.[162] I completely agree with you, for instance, about the looting. The looters are criminals who have been defended, alas, in the pages of magazines to

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[158] *See* Franklyn Cater, *Big-Box Retailers Move to Smaller Stores in Cities*, NPR (Dec. 21, 2010, 3:26 PM), https://www.npr.org/2010/12/21/132231472/big-box-retailers-move-to-smaller-stores-in-cities (discussing the positive impact big-box retailers would have on underserved inner cities).

[159] *See* Rich Lowry, *Of Course Destruction of Property Is Violence*, POLITICO (June 3, 2020, 8:30 PM), https://www.politico.com/news/magazine/2020/06/03/of-course-destruction-of-property-is-violence-299759 (noting that social justice protests have damaged businesses owned by black citizens as well as stores like Target, which employ and serve the black community).

[160] *See* Evie Fordham, *Biden Condemns Antifa, Violence 'Across the Board' Amid Riots*, FOX NEWS (Sept. 8, 2020), https://www.foxnews.com/politics/biden-condemns-antifa-violent-protests (discussing then-candidate Biden's condemnation of Antifa and violence after the Trump campaign claimed he had not adequately done so).

[161] Joseph Wulfsohn, *MSNBC's Ali Velshi Says Situation Not 'Generally Speaking Unruly' While Standing Outside Burning Building*, FOX NEWS (May 29, 2020), https://www.foxnews.com/media/msnbc-anchor-says-minneapolis-carnage-is-mostly-a-protest-as-building-burns-behind-him.

[162] *See supra* text accompanying notes 31–32 (including Professor Kennedy's remarks); *see supra* text accompanying notes 41–47; 52–88 (including Professor Strossen's remarks); *see supra* text accompanying notes 64–67; (including Professor McGinnis's remarks); *see supra* text accompanying notes 101–102 (including Professor Barnett's remarks).

which I contribute.[163] In my camp, I have made it clear that I find such apologies appalling.[164]

Point number three: in the last few months, there have been numerous efforts to put the arm of the state on institutions of higher education on account of teachings there that politicians ridicule and excoriate.[165] Nadine Strossen mentioned this.[166] These politicians say, "Don't teach that, or your funds will be cut off."[167] I've read about legislation being proposed to punish schools that give a hearing to critical race theory.[168] I'm waiting for members of the Federalist Society to object on grounds of academic freedom, freedom of expression, and intellectual pluralism. I would expect Federalist Society people to stand up and be heard on that. Do we disagree?

Prof. Randy Barnett: No, we don't. And I don't know if we disagree about whether the federal government should be in the business of funding education like that at all, such that once you create the power in the federal government to do that, then the federal government is going to start making choices about what it can fund and what it can't fund. That's possibly one of the problems that gives rise to this opportunity for that kind of curriculum control.

Hon. Kenneth Lee: I want to open it up to the audience for the remaining time period.

Prof. Randy Barnett: I just want to thank Randy for the first two points that he made. We can move on. But I just want to tell him that I heard every word. I really appreciate the fact that he said every word.

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[163] *See, e.g.*, Nathan Tankus, *When Americans Don't Riot, Politicians Feel Unrestrained*, AM. PROSPECT (June 15, 2020), https://prospect.org/civil-rights/when-americans-dont-riot-politicians-feel-unrestrained/ (asserting that violent protests have been historically effective in changing public policy on racial issues).

[164] *See, e.g.*, Randall Kennedy, *The George Floyd Moment: Promise and Peril*, AM. PROSPECT (June 19, 2020), https://prospect.org/civil-rights/george-floyd-moment-promise-and-peril/ (praising those that avoid looting and violence, as doing so discredits the cause).

[165] *See* Connor Perrett, *Trump Threatens to Investigate and Pull Federal Funding from Schools That Teach NYT's 1619 Project on the Consequences of Slavery*, BUS. INSIDER (Sept. 6, 2020, 2:56 PM), https://www.businessinsider.com/trump-pull-funding-california-schools-1619-project-2020-9 (reporting President Trump's threat to pull funding from schools that teach the 1619 Project's curriculum).

[166] *See supra* text accompanying note 53–58.

[167] *Id.*

[168] *See* Matthew S. Schwartz, *Trump Tells Agencies to End Trainings on 'White Privilege' and 'Critical Race Theory'*, NPR (Sept. 5, 2020, 4:31 PM), https://www.npr.org/2020/09/05/910053496/trump-tells-agencies-to-end-trainings-on-white-privilege-and-critical-race-theor (discussing President Trump's order to federal agencies to cease teaching critical race theory).

Hon. Kenneth Lee: The first person we'll call on is Professor Ilya Somin, if you can unmute your line and ask a question to the panel.

Prof. Ilya Somin: My question was inspired by something that Randy Barnett said, but I'm sure other panelists might have thoughts on it as well, that I agree with, I think, most of what you said about that it's important to emphasize the 19th century reconstruction at least as much in some ways as the founding and also emphasize the history there and what it was responding to.

I wonder if you would extend that point, and perhaps others would too, also acknowledging, I think, more fully than many conservatives and also some of my fellow libertarians are willing to do that the original founding was, in fact, very flawed on these issues of race and slavery, that, at the very least, it tolerated slavery in the states.[169] It had the Fugitive Slave Clause.[170] I know in your work on antislavery constitutionalism, you have highlighted some people who said, "Well, maybe the Fugitive Slave Clause doesn't really mean what traditionally people think it means."[171] But it was certainly still there, and there are other examples as well.[172]

So that doesn't mean we should necessarily go to the lengths of the 1619 Project and say, well, it was all just really about defending slavery and that's what the American Revolution was about.[173] But at the same time, it was a bunch of people who on the one hand said, "We're champions of liberty."[174] On the other hand, many of them, not all, but many of them

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[169] Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 YALE J.L. & HUMANS. 413, 414–17 (2001).

[170] U.S. CONST. art. IV, § 2, cl. 3; Ariela Gross & David R. Upham, *Article IV, Section 2: Movement of Persons Throughout the Union*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/article-iv/clauses/37 (last visited Mar. 5, 2021).

[171] *See Whence Comes Section One?*, *supra* note 113, at 187–92 (discussing various historical interpretations of the meaning of the Fugitive Slave Clause).

[172] *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as only three-fifths of a person); *id.* art. I, § 9, cl. 1 (prohibiting Congress from regulating the slave trade until at least 1808).

[173] *See* Jake Silverstein, *Why We Published the 1619 Project*, N.Y. TIMES MAG. (Dec. 20, 2019), https://www.nytimes.com/interactive/2019/12/20/magazine/1619-intro.html (stating that the purpose of the 1619 Project is to reframe America's history by placing slavery and black Americans in the center).

[174] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."); *see e.g.*, 14 JAMES MADISON, *For the* National Gazette, *in* THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 191, 191 (2010) ("America has set the example . . . of charters of power granted by liberty. This revolution in the practice of the world, may, with an honest praise, be pronounced the most triumphant epoch of its history, and the most consoling presage of its happiness."); 6 GEORGE WASHINGTON, *To the Hebrew Congregation*

continued to keep slaves.[175] And with some aspects of the Constitution, they created protection for that institution of slavery.[176] And it seems like many, not all, but many conservatives and some libertarians as well perhaps have not acknowledged that as much as we should.

Prof. Randy Barnett: Not only do I agree with that, my case book, which I mentioned in my comment,[177] is organized around that very principle.[178] The only reason why there was a need for an antislavery constitutionalism to develop in the 19th century is because of some of the mistakes and errors and sins of the 18th century.[179] And so that was implicit in my argument that it should be—that the process that led up to the Reconstruction era and then how the Reconstruction era was undermined was made necessary by the founding.

And my case book goes into this in great detail, as does the video series that Josh Blackman and I produced as part of our book, *An Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know*.[180] We have whole videos on slavery.[181] So yes, absolutely, it is a part of the founding.[182] But I should also point out, antislavery was also a part of the founding as well.[183] And even though every state in the

in Newport, Rhode Island, *in* THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 284, 285 (2008) ("The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy: a policy worth of imitation. All possess alike liberty of conscience and immunities of citizenship.").

[175] *See* Steven Mintz, *Historical Context: The Constitution and Slavery*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-resources/teaching-resource/historical-context-constitution-and-slavery#:~:text=Of%20the%2055%20delegates%20to,members%20of%20anti%2Dslavery%20societies (last visited Jan. 16, 2021) (noting that a significant number of constitutional signatories owned slaves).

[176] *See* Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 470–71 (1992) (noting the Fugitive Slave Clause as an example of the Constitution's structure protecting the institution of slavery).

[177] *See supra* text accompanying note 114.

[178] BLACKMAN & BARNETT, *supra* note 114.

[179] *See* Paul Finkelman, *supra* note 169, at 414–17 (arguing that the Founders failed by conceding to Southern slaveowners on nearly every slavery demand—like the Fugitive Slave Clause, for example).

[180] *E.g.*, Josh Blackman, *Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know*, YOUTUBE (Sept. 17, 2019), https://www.youtube.com/watch?v=a91uuylQeao&list=PLMIM2V8Vm4YoahvCw6yjAIhANTl5ywrJN.

[181] *E.g.*, Josh Blackman, *Dred Scott v. Sandford (1857): An Introduction to Constitutional Law*, YOUTUBE (Sept. 19, 2019), https://www.youtube.com/watch?v=yXk0dYhhW-o (discussing *Dred Scott* and its connection to slavery in the United States).

[182] *See* Mintz, *supra* note 175 (acknowledging that slavery played a significant role in founding America).

[183] *See* DWIGHT LOWELL DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 175 (W.W. Norton & Co. 1966) (1961) (analyzing the antislavery movement that existed before, during, and after America's founding).

Union had slavery in 1776,[184] close to half the states in the Union had either eliminated slavery or were moving towards eliminating slavery by 1787,[185] which is a relatively short period of time.

And in fact, a proslavery ideology in this country did not develop until after the founding. It was almost immediately after the founding when the economic profits to be made by cotton plantation slavery were greatly enhanced by the invention of the cotton gin, which happened two years after the Constitution was enacted, and thereby gave rise to a very, very profitable plantation industry in cotton production that then gave rise to a proslavery ideology that didn't really exist at the time the Constitution was written and enacted.[186]

All of this is much more interesting and more complicated, but in some respects more favorable than the kinds of stories we get on either side that idealize the founding or that demonize the founding. The reality of the founding is actually a lot more interesting and therefore helps explain what happened after the founding, which is as important, I think, as what happened at the founding.

Hon. Kenneth Lee: The next question will be from Sylvia Ross, if you can unmute and ask your question.

Sylvia Ross: All of you were wonderful speakers. I appreciate it. My question is for both Professor Randys. The first one had to do with your point, Professor Randy Barnett, when you mentioned the Declaration as law.[187] And I'd like you to expound on that a little bit and how you see it in relation to being read with the Constitution and the solution to maybe addressing some of these things. And I'd like to hear Professor Kennedy comment on what you may have to say.

Prof. Randy Barnett: Great, thanks. No, I didn't claim that the Declaration was law. I claimed that conservatives go out of the way to dismiss the Declaration as not being law and thereby undermine its

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[184] J. Gordon Hylton, *Before There Were "Red" and "Blue" States, There Were "Free" States and "Slave" States*, MARQ. UNIV. L. SCH. FAC. BLOG (Dec. 20, 2012), https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/comment-page-1/; *Vermont 1777: Early Steps Against Slavery*, NAT'L MUSEUM AFR. AM. HIST. & CULTURE: OUR AM. STORY, https://nmaahc.si.edu/blog-post/vermont-1777-early-steps-against-slavery#:~:text=Such%20an%20opportunity%20came%20on,rights%20for%20African%20American%20males (last visited Jan. 18, 2021).

[185] *See* Hylton, *supra* note 184 (noting that six states—Vermont, Pennsylvania, Massachusetts, New Hampshire, Connecticut, and Rhode Island—abolished or moved to abolish slavery by 1787).

[186] *See* ALPHEUS THOMAS MASON & RICHARD H. LEACH, IN QUEST OF FREEDOM 312 (1959) (noting that the institution of slavery was fading around the time of the Constitution's ratification until the cotton gin revived pro-slavery ideology shortly after).

[187] *See supra* text accompanying notes 90–94.

significance.[188] In fact, I have a short essay that I delivered at the student symposium at Georgetown a couple years ago about how the Declaration was the officially adopted American theory of politics.[189] It was the American political theory that was officially adopted unanimously by each of the thirteen states.[190] And so that is the political theory of our country.

And then after the political theory of our country was officially adopted, there were two cracks at government. The first was the Articles of Confederation,[191] and then the second was the Constitution.[192] So first came our political theory, which is based on natural rights, and then came two forms of government.[193] Whether you think that the Constitution was better than the Articles or not, the Constitution was arguably an improvement, but one that was highly imperfect for reasons that we just talked about[194] and that needed to be improved further, and eventually was improved further through the efforts as well as the lives of many, many millions of Americans.[195]

And so that's what I meant. I said that the Declaration deserves to be a centerpiece of our discussion over justice,[196] which was that point in my remarks. I was talking about how conservatives need to pay a lot more attention to justice as opposed to the rule of law.[197] Sometimes, I would have to admonish my libertarian friends that they have to pay more

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[188] *See, e.g.*, Ira Straus, *The Declaration of Independence Is Not Important*, NAT'L REV. (July 3, 2015, 8:00 AM), https://www.nationalreview.com/2015/07/july-4-wrong-holiday/ (arguing that the Declaration of Independence is not America's founding document).

[189] Randy E. Barnett, *The Declaration of Independence and the American Theory of Government: "First Come Rights, and Then Comes Government,"* 42 HARV. J.L. & PUB. POL'Y 23, 24 (2019) [hereinafter *The Declaration of Independence and the American Theory of Government*].

[190] *Id.*

[191] *Id.* at 23 (noting that the framer's first attempt at government was the Articles of Confederation); ARTICLES OF CONFEDERATION of 1781.

[192] U.S. CONST.; *see also The Declaration of Independence and the American Theory of Government*, *supra* note 189, at 23 (noting that the Constitution was the Framers' second attempt at government).

[193] *See The Declaration of Independence and the American Theory of Government*, *supra* note 189, at 24–26 (arguing that the American Political Theory adopted in the Declaration of Independence is based on natural and inalienable rights). "The political theory announced in the Declaration of Independence can be summed up in a single sentence: *First come rights, and then comes government*." *Id.* at 26.

[194] *See supra* text accompanying notes 169–186.

[195] *See* U.S. CONST. amend. XIII (outlawing slavery); U.S. CONST. amend. XIV (granting equal protection of the laws and ensuring due process of law); U.S. CONST. amend. XV (guaranteeing black Americans the right to vote); *see also The Politics of Passing 1964's Civil Rights Act*, NPR (Feb. 16, 2015, 3:03 PM), https://www.npr.org/2015/02/16/385756875/the-politics-of-passing-1964s-civil-rights-act (discussing the significant efforts of many Americans to pass the Civil Rights Act, ending the Jim Crow era and giving equality to black Americans).

[196] *See supra* text accompanying notes 90–98.

[197] *See supra* text accompanying notes 90–93.

attention to the rule of law as opposed to justice, but that just goes to show that I'm a contrarian, no matter which group I find myself in.

Prof. Randall Kennedy: We can get another question. I agree with much of what Randy said.

Prof. Nadine Strossen: Could I just make one point? I'm holding up here the Cato Institute edition of the Constitution and the Declaration of Independence.[198] And of course, Cato is the libertarian wing here, but very involved in The Federalist Society.[199] This edition includes a wonderful introductory essay by Roger Pilon, long the head of the constitutional project at Cato and a big activist in Fed Soc, which explains the integral interrelationship between the Declaration and the Constitution.[200] I highly recommend it.

Hon. Kenneth Lee: I have my copy here as well, handy. The next question will be from Rashida MacMurry-Abdullah, if you could unmute and ask your question.

Rashida MacMurry-Abdullah: Great. Thank you very much. This has been a very interesting panel. I'd first like to say, Professor Strossen, I love the fact that you alerted us to the fact that it should be a discourse instead of a debate.[201]

But my main question is actually a question for Professor Randy Barnett. You made a comment that the violence was being—and I'm kind of paraphrasing—that the violence was really coming from the liberal wing with respect to the election.[202] But I want to understand how you reconcile the fact that certain groups of individuals in this country have

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[198] THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA (Roger Pilon ed., Cato Inst. 2013).

[199] *Cato's Mission*, CATO INST., https://www.cato.org/mission (last visited Jan. 20, 2021); *e.g.*, David Ufberg, *Federalist Society Hosts Cato Institute Speaker, Discusses Criminal Justice Reform*, UNIV. OF MIA. SCH. OF L. (Nov. 1, 2017), https://www.law.miami.edu/news/2017/november/federalist-society-hosts-cato-institute-speaker-discusses-criminal-justice-reform; Roger Pilon, *Cato at the Federalist Society Convention*, CATO INST.: CATO AT LIBERTY (Nov. 19, 2013, 2:13 PM), https://www.cato.org/blog/libertarians-federalist-society-convention.

[200] THE DECLARATION OF INDEPENDENCE AND THE CONSTITUTION OF THE UNITED STATES OF AMERICA, *supra* note 198, at 1–2, 4, 7; *see Dr. Roger Pilon*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/roger-pilon (last visited Jan. 30, 2021) (acknowledging Roger Pilon as a Federalist Society Contributor).

[201] *See supra* text accompanying note 138.

[202] *See supra* text accompanying notes 151–155.

had to continually go to the Supreme Court to get the rights that are enacted in the Constitution, to get them enforced.[203]

And then how do you reconcile that with the short time of slavery and that thinking about denying people their inalienable rights when we still had *Plessy v. Ferguson* in 1896, almost 100 years later where we were really having state-sanctioned violence?[204] And I would say that that was not the liberal wing at that time with that state-sanctioned violence.

And then with your response, if Professor Randall Kennedy has anything to add to that comment, I would appreciate it. Thank you very much.

Prof. Randy Barnett: I'm sorry, but I lost internet completely and had to sign back in halfway through your question, so I didn't catch the beginning of your question, which I take it was addressed to me.

Rashida MacMurry Abdullah: It was addressed to you. So the first part of my question, you mentioned a comment talking about the liberal wing of violence, particularly with the election.[205] You made a comment that there was some concern because D.C. was boarded up, and so it was more so being concerned that the liberal wing was going to be violent rather than, I guess, the non-liberal wing or the right wing.[206] I always find those terminologies of label not really helpful for the discourse. But I did say that I appreciated that Professor Strossen changed the conversation from discourse as opposed to debate because I do think that's helpful.[207]

But what I really want you to opine on is the how do you reconcile this conversation about individuals who continually have to go to the Supreme Court to enforce their rights in a way of protesting and making sure that their voices are heard, and talking about this kind of liberal, right-wing violence when we had such a long history of state-sanctioned violence. And I would say that that could not be characterized as liberal-wing violence, the state-sanctioned violence.

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[203] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 680 (2015) (holding that same-sex couples have a constitutional right to marry); Roe v. Wade, 410 U.S. 113, 153–55 (1973) (holding that the constitutional right to privacy includes abortion); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregated educational facilities violate the Equal Protection Clause).

[204] *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) (upholding "separate but equal" legislation); *see also* THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889–1918, 11–28 (1919) (compiling one hundred brutal accounts of lynchings with every lynch mob except one escaping criminal punishment).

[205] *See supra* text accompanying notes 151–155.

[206] *Id.*

[207] *See supra* text accompanying note 138.

You had made a point about that it was a relatively short period of time when we had the kind of discourse about antislavery, but I would argue that that short—any day in slavery is probably a day too long. But then it was not until 1896 where we had *Plessy*.[208] So that's 100 years after that discussion with respect to separate but equal. So hopefully, maybe that's where you came back in. And then I said it would be great if Professor Kennedy has a rebuttal to that as well. So thank you.

Prof. Randy Barnett: Right. Okay, I've got it now. By the way, I really didn't use the word liberal to describe the violence that was being feared in D.C. or anywhere else. I tend to reserve the word liberal for liberal, and I like the fact that most liberals today call themselves progressives[209] so I can reserve the term liberal for myself and for Nadine Strossen. So, I didn't really label it. In fact, I don't believe I labeled it at all. Nevertheless, I would probably say, if I was going to pick a label, I would probably say leftist or something like that, to the left of everybody else.

But be that as it may, I really think the more important part of your question has to do with our history that you just alluded to at the end, and I would say it's even worse than you say because *Plessy* was not the end. *Plessy* was the middle of 100 years of state-sanctioned segregation, state-sanctioned subjugation of one people on the basis of race by another people in large parts of the country, in addition to other practices that were happening in the North.[210] And this is a part of our history.

And again, this is emphasized in my case book. The Civil War may have ended slavery, but it didn't end the problem that slavery was a product of.[211] And it took another 100 years to do that.[212] And it has been

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[208] *Plessy*, 163 U.S. at 550–51.

[209] *See* Asma Khalid, *As More Democrats Embrace 'Progressive' Label, It May Not Mean What It Used To*, NPR (Oct. 29, 2018, 5:00 AM), https://www.npr.org/2018/10/29/659665970/as-more-democrats-embrace-progressive-label-it-may-not-mean-what-it-used-to (noting that an increased number of Democrats are embracing the "progressive" label).

[210] *See* David F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 600–03 (1998) (analyzing the oppressive nature of the Black Codes adopted in the South before *Plessy*); *see also* Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 320–21 (1986) (noting that Jim Crow laws were the successor of the Black Codes and that Jim Crow laws subjugated blacks in the South after *Plessy*).

[211] *See* Forte, *supra* note 210, at 584, 596 (noting that the Civil War and the Thirteenth Amendment brought the end of slavery, but that white supremacy combined with a dislike for blacks would be a significant obstacle to overcome to achieve equality); *see also* U.S. CONST. amend. XIII (outlawing slavery).

[212] *See* 42 U.S.C. §§ 2000a(a), 2000d, 2000e-2(a)–(d) (prohibiting discrimination based on race in the Civil Rights Act of 1964); *see also Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/oasam/civil-rights-center/statutes

pointed out by better historians than me, it wasn't really the Supreme Court that ended this discriminatory practice.[213] It was the organized political pressure brought by African Americans themselves along with other compatriots that they had throughout the '50s and the '60s which culminated in congressional laws that helped address this practice.[214] *Brown v. Board of Education* was well in the rearview mirror when those laws were passed in order to address this.[215]

So, at any rate, I would just say that a full account of our history demands a recognition of that. But I will also say that it was, in my view—now, this is where I expect a lot of constitutional law professors to get off the boat—in my view, it was a failure to adhere to the original meaning of the Fourteenth Amendment as well as the Thirteenth and Fifteenth amendments, and a failure of judges to enforce that, or at least to allow Congress to enforce the rights that were protected by those amendments in the form of civil rights acts that were declared unconstitutional in the 1870's—that helped make possible 100 years of subjugation.[216]

And so I believe this is a way of understanding why originalism, which is the view of interpretation that I favor, is a good one. It's an imperative one because I think our Constitution is now a legitimate Constitution, a Constitution that, on balance, is a good Constitution

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/civil-rights-act-of-1964#:~:text=In%201964%2C%20Congress%20passed%20Public,hiring%2C%20promoting%2C%20and%20firing (last visited Jan. 22, 2021) (recognizing the Civil Rights Act of 1964 as this country's most significant piece of civil rights legislation because it eliminated the Jim Crow laws).

213 *See* Steven D. Schwinn, *Civil Rights: Enduring and Revolutionary*, INSIGHTS L. & SOC'Y, Winter 2014, at 4 (characterizing the Civil Rights Act of 1964 as marking the end of Jim Crow); *Jim Crow Laws*, EQUAL JUST. INITIATIVE (May 1, 2014), https://eji.org/news/history-racial-injustice-jim-crow-laws/ (noting that although the Supreme Court weakened Jim Crow laws through cases like *Brown*, it was ultimately the Civil Rights Act of 1964 that ended Jim Crow).

214 *See The Politics of Passing 1964's Civil Rights Act*, *supra* note 195 (describing the Civil Rights Act of 1964's political process from African American demonstrations in the 50's and 60's through Presidents Kennedy and Johnson's efforts to pass the bill); *see also Today in Civil Rights History: Civil Rights Act of 1964 Becomes Law*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (July 2, 2009), https://civilrights.org/2009/07/02/today-in-civil-rights-history-civil-rights-act-of-1964-becomes-law/#:~:text=Forty%2Dfive%20years%20ago%20today,Act%20of%201964%20into%20law.&text=Board%20of%20Education%2C%20which%20held,toward%20desegregation%20and%20equal%20rights (noting that the efforts of African Americans placed significant pressure on Congress and the President to act).

215 Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (being adopted ten years after *Brown*).

216 *See* The Civil Rights Cases, 109 U.S. 3, 20–25 (1883) (holding the Civil Rights Act of 1875 was unconstitutional under the Thirteenth and Fourteenth Amendments); *see also* Robert Longley, *About the Civil Rights Cases of 1883*, THOUGHTCO., https://www.thoughtco.com/1883-civil-rights-cases-4134310 (Jan. 17, 2020) (noting that the Court's decision in the *Civil Rights Cases* allowed the states to begin introducing segregation policies).

because of not only what happened at the founding but how the Constitution has been changed by amendments since then.[217]

Prof. Randall Kennedy: We have a really remarkable thing going on now because, Randy, you sound like you're an intellectual comrade of America's most distinguished living historian, Eric Foner.[218] His latest book, *The Second Founding*, is completely consistent with your view.[219]

Foner suggests that if the Reconstruction Amendments were interpreted as originally intended, they would give a lot of oxygen to a mission that still needs to be carried out in our country, insofar as racial justice is concerned.[220]

With respect to your other question—

Prof. Randy Barnett: Can I respond to that?

Prof. Randall Kennedy: Yeah, sure.

Prof. Randy Barnett: I'm a big fan of Eric's. He was a Salmon Chase lecturer of the Georgetown Center for the Constitution,[221] which I direct.[222] And I'm a big fan of his work. I've been greatly influenced by his work.

I don't agree with every claim he makes about the original meaning of these amendments, but on balance, he's a hero because he, in the 1970's, was first among all from the radical left that fought back against the Dunning School of History, which celebrated the great lost cause of the states' rights movement representing the South.[223] It was a complete

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[217] *See* U.S. CONST. amend. XIII (outlawing slavery); *id.* amend. XIV (granting equal protection of the laws and ensuring due process of law); *id.* amend. XV (guaranteeing black Americans the right to vote); *see also* John O. McGinnis, *How Originalism Energizes the Amendment Process*, LAW & LIBERTY (Sept. 14, 2017) (arguing that the amendment process is the proper method to add constitutional rights).

[218] *Foner, Eric: DeWitt Clinton Professor Emeritus of History*, COLUM. UNIV. DEP'T OF HIST., https://history.columbia.edu/person/foner-eric/ (Oct. 2, 2019, 9:18 AM).

[219] ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

[220] *Id.* at xxiv–xxv (discussing the historical and original interpretations of the Thirteenth, Fourteenth, and Fifteenth Amendments).

[221] *Salmon P. Chase Distinguished Lecture & Faculty Colloquium*, GEO. CTR. FOR THE CONST., https://www.law.georgetown.edu/constitution-center/chase-lecture-and-colloquium/chase-lecture-colloquium/ (last visited Jan. 22, 2021) (listing Eric Foner as a Salmon Chase lecturer).

[222] *Our Team*, GEO. CTR. FOR THE CONST., https://www.law.georgetown.edu/constitution-center/our-team/ (last visited Jan. 22, 2021) (listing Professor Randy Barnett as the Center's director).

[223] *See* Luke E. Harlow, *Forum: The Future of Reconstruction Studies*, J. OF CIV. WAR ERA, https://www.journaloftheciviwarera.org/forum-the-future-of-reconstruction-studies/

revision of what happened during the Civil War from which Reconstruction became totally associated with the word "carpetbaggers"[224] and in which President Grant is disparaged, notwithstanding the fact that he fought so hard for civil rights.[225]

It's Eric Foner from the radical left who was the first person to push back against this. And he told us when he came to our conference that he got into this as a result of doing a high school presentation in which he pushed back against the conventional wisdom that he had in his high school in New York, and that's what started him on this quest. So yeah, I'm a big fan of his. He's influenced me. And I recommend people read his work.

But of course, he's not alone. I would also recommend people read the work of Sean Wilentz, who's written his book, *No Property in Man*, which is a reevaluation of antislavery sentiment at the Constitutional Convention and the degree to which antislavery delegates pushed back against proslavery delegates who tried to insert the concept of property of man in the text of the Constitution and failed to do so.[226] And as a result of their failure, it allowed an antislavery constitutionalism to develop consistent with the text of the Constitution afterwards.[227] That was a major accomplishment that they did. And I highly recommend Sean's book, *No Property in Man*, which the Center for the Constitution will be giving its 2021 Cooley Book Prize to, to honor.[228]

And now, I interrupted you. You were going to make a second point.

Prof. Randall Kennedy: No, let's proceed. Thank you.

Hon. Kenneth Lee: We have about five more minutes, so maybe we could take one more question. Let's see, Alexander Cohen, if you can unmute and ask your question.

He may have dropped off. All right, so we'll move on to Susan Lehman, can you unmute?

(last visited Jan. 30, 2021) (highlighting Eric Foner's significant impact on the historical understanding of Reconstruction).

[224] Eric Foner, Opinion, *Why Reconstruction Matters*, N.Y. TIMES (Mar. 28, 2015), https://www.nytimes.com/2015/03/29/opinion/sunday/why-reconstruction-matters.html.

[225] Richard G. Mannion, The Life of a Reputation: The Public Memory of Ulysses S. Grant 14–15, 270–71 (2012) (Ph.D. dissertation, Georgia State University).

[226] SEAN WILENTZ, NO PROPERTY IN MAN 26, 57 (2018).

[227] *Id.* at 163–64, 268.

[228] *See Thomas M. Cooley Book Prize, Judicial Lecture & Symposium*, GEO. CTR. FOR THE CONST., https://www.law.georgetown.edu/constitution-center/chase-lecture-and-colloquium/thomas-m-cooley-book-prize-symposium/#:~:text=The%202021%20Thomas%20M.,Harvard%20University%20Press%2C%202018) (last visited Jan. 23, 2021) (announcing that Wilentz's book *No Property in Man* will win the 2021 Thomas M. Cooley Book Prize).

Susan Lehman: It seems to me that the woke culture is a practice of a sort of reverse motivation assignment. So, take, for example, Breonna Taylor. Here is a person who's a black American, and very, very tragically shot to death by somebody who is a white American.[229] And so then it's assumed that there are racial motivations in other things as well, other cases not involving police.

So, you're assigning motivation. And if somebody gets fired from their job or other consequences for being an active supporter of Donald Trump, well, then, you must be at least a sympathizer. It takes the individual out of it. So, Breonna Taylor is a member of one group. The police officer is a member of another group, ethnic group, and racial group, so it seems to negate the concept of the individual altogether. How do you have individual rights if you negate the concept of the individual altogether? That's part one.

And then the other very simple question is at what point, especially with people who are not in public life, does it become slander and libel? That's all.

And by the way, I think that many of the answers to our problems are not in the state. That's not to say the challenges aren't there, but I think many of them are—the solutions are spiritual and interpersonal.

There have been Skinheads, such as Christian Picciolini, who had changed because he opened a music store and started having interactions with the black Americans in his neighborhood who were shopping at his store, struck up a conversation with one young man whose mother was going through cancer.[230] And Christian had a relative who had died of cancer.[231] So all of a sudden, here are these bridges.

Hon. Kenneth Lee: We have only a couple more minutes, so if—

Susan Lehman: Okay. Well, I went on because you guys hadn't jumped in on my question. So those are my questions. How do you have individual rights when there's not a concept of the individual? And at what point does this become slander and libel?

Prof. Randall Kennedy: We confront a crisis that challenges us on many levels. It's political. It's cultural. It's social. It's spiritual. So yes, we will have to tap many sources to derive the strength we will need to lift our country to a higher plane.

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[229] Dylan Lovan, *2 Detectives Involved in Breonna Taylor's Death Are Fired*, AP NEWS (Jan. 6, 2021), https://apnews.com/article/breonna-taylor-cops-fired-910c87438ebc09e74eac8a4f4678fb63.

[230] Natasha Lipman, *Christian Picciolini: The Neo-Nazi Who Became an Anti-Nazi*, BBC (Dec. 5, 2020), https://www.bbc.com/news/stories-54526345.

[231] *Id.*

On the issue of racial accusation, people ought to be careful in making allegations of racism. It is true, though, that there are all too many accurate, substantiated, and heart-breaking stories of black people being racially harassed, or worse, by police. That is no figment of the imagination. That is a fact of life that needs urgent redress. This is a problem that has been quantified.[232] This is a problem about which everyone ought to be deeply concerned.

Finally, I know that we're about to get the hook. I want to emphasize again, going back to my initial comment, that The Federalist Society has principles and policies that should be applied more rigorously to the administration of criminal justice.[233] Members of the Federalist Society too, should be out in the street demanding liberty and justice for all. Thank you.

Prof. Nadine Strossen: Amen.

Prof. Randy Barnett: The last thing I want to say is that the last book I would want to plug is a book called *Freedom National: The Destruction of Slavery in the United States, 1861-1865* by a historian named James Oakes.[234] It is a story of the Republican Party, what it did, and how much more effective it was at doing what it did than it's given credit for, particularly by the Dunning School as well as others.[235] So, I highly recommend that book along with the others I've talked about.

Hon. Kenneth Lee: Thank you to all the panelists and the audience. I know we could go on and on about this topic, but we have a time limit. So, thank you again.

Prof. Nadine Strossen: Thank you, Judge Lee.

Prof. Randy Barnett: Bye, everybody.

Prof. Randall Kennedy: Bye, Randy. Bye, Nadine.

Prof. Nadine Strossen: Bye, Randys.

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[232] *See* Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex*, 116 PNAS 16793, 16793–96 (2019) (analyzing the levels of inequality in police treatment by race and concluding that black receive the most disparate treatment).

[233] *See supra* notes 32 and accompanying text.

[234] JAMES OAKES, FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865 (2013).

[235] *Id.* at xiv–xxiv.

SHOULD AMERICA DROP OUT OF THE ELECTORAL COLLEGE?: THE PAST, PRESENT, AND FUTURE OF THE PRESIDENTIAL ELECTION PROCESS

INTRODUCTION

Only one week after President Trump's dramatic upset victory in 2016,[1] in which he became only the fifth person to ascend to the White House without winning the most popular votes,[2] Democrats in Congress responded with a proposal to abolish the Electoral College ("EC") in favor of a national popular vote ("NPV").[3] Four years later, the issue of eliminating the EC has only gained momentum, finding support from a majority of the Democrats' final 2020 presidential candidates and from Hillary Clinton as well.[4] This Note responds to these growing criticisms. Following a brief historical overview, this Note analyzes the arguments for preserving or abolishing the EC against the backdrop of America's modern political environment following the 2016 and 2020 general

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[1] *See* Shane Goldmacher & Ben Schreckinger, *Trump Pulls Off Biggest Upset in U.S. History*, POLITICO, https://www.politico.com/story/2016/11/election-results-2016-clinton-trump-231070 (Nov. 9, 2016, 3:58 AM) ("Clinton had been heavily favored to win. She led national polls and . . . battleground states heading into the election. Her allies were so confident that a supportive super PAC . . . redirected millions to other races."); *see also* Natalie Jackson, *HuffPost Forecasts Hillary Clinton Will Win with 323 Electoral Votes,* HUFFPOST, https://www.huffpost.com/entry/polls-hillary-clinton-win_n_5821074ce4b0e80b02cc2a94 (Nov. 8, 2016) ("[Our] model gives . . . Clinton a 98.2 percent chance of winning the presidency. . . . Trump has essentially no path to . . . victory.").

[2] John Quincy Adams (1824), Rutherford B. Hayes (1876), Benjamin Harrison (1888), and George W. Bush (2000) join Trump in this category. Dave Roos, *5 Presidents Who Lost the Popular Vote but Won the Election*, HISTORY, https://www.history.com/news/presidents-electoral-college-popular-vote (Nov. 2, 2020).

[3] Meg Anderson, *Critics Move to Scrap the Electoral College, but It's Not Likely to Work*, NPR (Nov. 17, 2016, 5:00 AM), https://www.npr.org/2016/11/17/502292749/critics-move-to-trash-the-electoral-college-but-its-not-likely-to-work (describing how President Trump won the presidency on November 8, 2016, and Democrats in Congress introduced legislation to abolish the electoral college on November 15, 2016); S.J. Res. 41, 114th Cong. (2016).

[4] *Compare* Al Weaver, *Meet the Dems Who Want to Abolish the Electoral College*, WASH. EXAM'R (Dec. 21, 2016, 11:01 PM), https://www.washingtonexaminer.com/meet-the-dems-who-want-to-abolish-the-electoral-college (listing thirty Democrats in Congress who were "sponsors and co-sponsors of legislation" to end the EC in 2016), *with We're Asking 2020 Democrats Where They Stand on Key Issues*, WASH. POST (Apr. 1, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/ (showing that fifteen of twenty-six 2020 Democrat presidential candidates supported eliminating the EC), *and* Paul Steinhauser, *Hillary Clinton Calls for Abolishing Electoral College After Casting Electoral Vote for Biden*, KTVU FOX 2 (Dec. 14, 2020), https://www.ktvu.com/news/hillary-clinton-calls-for-abolishing-electoral-college-after-casting-electoral-vote-for-biden (explaining Hillary Clinton's desire to abandon the EC).

elections. In its conclusion, this Note considers the future of the EC and analyzes the ramifications of its abolition.

I. THE PAST: THE FRAMERS' VISION

A. Fundamental Differences: Apportionment of Representation in the National Legislature

Before tackling the Framers' vision of the EC, it is necessary to note some broader principles that form the Constitution's foundation. As Professor Richard Duncan has said, "[t]here were many fundamental differences" among all of the states represented at the Constitutional Convention, with "perhaps the most crucial difference" being "the issue of 'how to apportion representation in the national legislature' among the large-population and small-population states."[5] The Framers' internal battle over congressional representative power is an essential starting point for understanding the EC's relevance and authority.

At the Constitutional Convention, "[t]he large-population states" supported "population-based representation in Congress"[6]—a position that was completely at odds with smaller states, which asserted "that 'an equal vote in each state was essential to the federal idea.'"[7] As the story goes, following "a month of anguished deliberations,"[8] a compromise was struck[9] that resulted in a Congress that was bicameral,[10] with one house "apportioned by population" and another house "composed of two senators from each state, with each Senator having one vote."[11] In effect, these houses were built on fundamentally different viewpoints regarding representation: the House was created to reflect the *national population*,

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[5] Richard F. Duncan, *Electoral Votes, the Senate, and Article V: How the Architecture of the Constitution Promotes Federalism and Government by Consensus*, 96 NEB. L. REV. 799, 799, 802–03 (2017) (quoting MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 127 (2016)).

[6] *Id.* at 803.

[7] *Id.* (quoting KLARMAN, *supra* note 5, at 188).

[8] KLARMAN, *supra* note 5, at 195.

[9] Todd Estes, *The Connecticut Effect: The Great Compromise of 1787 and the History of Small State Impact on Electoral College Outcomes*, 73 HISTORIAN 255, 256 (2011) (noting that the Great Compromise of 1787 "resolved a standoff between large and small states over representation in Congress," which "reassur[ed] the small states that they would not be outvoted in both houses by the large states").

[10] *Id.* The Constitution grants "[a]ll legislative [p]owers" to "a Congress, which shall consist of a Senate and [a] House of Representatives." U.S. CONST. art. I, § 1.

[11] Duncan, *supra* note 5, at 804.

but the Senate gave *each state* equal footing against every other state, no matter how small or large its population.[12]

In addition, the Framers created a system in which, for the Congress to accomplish almost any meaningful task[13]—whether it be legislating or impeaching the President—*both* houses would have an *equal role*.[14] This established the required balance between the will of the people in each individual state and the will of the people nationally.[15] But how did the Framers arrive at such a balanced structure? What ultimately compelled the differing factions to make a truce?

Perhaps forming a compromise was the *only* option for resolving the controversy. After all, the smaller states had become "insistent" in their demands for "equal . . . representation in at least one house of Congress," even threatening to totally "abandon the convention—and, if necessary, the union—rather than relinquish their position."[16] On one side, James Madison (representing the goliath of Virginia) argued for a "national majority . . . [with] power to rule";[17] on the other side, a determined minority of states were defiant, fearing the "enormous and monstrous influence" of "the three great states[,] form[ing] nearly a majority of the people."[18] The Framers ended the stalemate by creating the Senate, a legislative body that, although wielding the power of the Supremacy Clause, was built with "protect[ions for] the liberties of . . . the people of the several states . . . whether large or small."[19]

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[12] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (noting that the House was initially viewed to be the "'grand depository of the democratic principle of the government,' as distinguished from the Senate's function as the forum of the states" (quoting 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 136 (n.p. 1787))); *see also* THE FEDERALIST NO. 45, at 311 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he House . . . [is] drawn immediately from the people.").

[13] Of course, some important tasks are done by one house. For example, the Senate has the "unreviewable" power of approving presidential appointments and ratifying presidential treaties. INS v. Chadha, 462 U.S. 919, 955 (1983).

[14] *See* Wechsler, *supra* note 12, at 548 ("[I]n passing legislation, a Senate majority based on the states must be supported by a House majority based on population . . . ."); *see also* U.S. CONST. art. I, § 1–3 (illustrating that all legislative powers are granted to both the House and the Senate, as one Congress, and each house plays a role in the impeachment process).

[15] John R. Dos Passos, *Some Observations on the Proposition to Elect United States Senators by the People*, 23 GREEN BAG 229, 231 (1911) ("[O]ur present Constitution, recognizing the necessity of proper checks and balances, created two—to act as one when wisdom prevailed, but to operate separately when the folly or passion of the lower house would result in injury to the people.").

[16] KLARMAN, *supra* note 5, at 192.

[17] Duncan, *supra* note 5, at 803.

[18] WILLIAM PETERS, A MORE PERFECT UNION 96–97 (1987).

[19] Duncan, *supra* note 5, at 804–05.

Madison came around to recognizing the importance of a bicameral system, acknowledging in *The Federalist No. 39* that the House "will derive its powers from the people of America," while the Senate "will derive its powers from the States, as *political and coequal societies*."[20] In other words, for any federal law to pass and bind the states, the Senate (acting as the states' representatives) must give its consent.[21] In this regard, Justice Scalia had once argued that the chief value of Congress was its necessity for a consensus among "larger and smaller states" with their varying "cultural and political values."[22] Justice Scalia noted that the Framers envisioned "gridlock" as an inevitable consequence of the bicameral system and as an *intentional protection* on behalf of the people; in the absence of a true national consensus, House "power contradict[s] [Senate] power," which "prevent[s] an excess of legislation" and maintains each house's strength and independence.[23]

B. Fundamental Differences: Selecting the President

The Framers also found themselves in total disagreement about the appropriate voting method for selecting the nation's President.[24] The first proposal gave Congress the power of selection, while another left the vote to the people, and a third option (the ultimate winner) gave the decision to "state-appointed electors."[25] Hamilton framed the question as what option would bring the most "happiness" to America and concluded that the answer was with electors.[26] Charles Pinckney saw election by national population as having "the most obvious [and] striking" problems: "[t]he most populous States," "led by a few active [and] designing men," could easily "combin[e] in favor of" one candidate—silencing the will of the minority, while the majority's President "will be able to carry their

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[20] THE FEDERALIST NO. 39, at 254–55 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis added). The Seventeenth Amendment alters Madison's statement; the Senate's power is now derived from the people of each state. U.S. CONST. amend. XVII.

[21] Duncan, *supra* note 5, at 811.

[22] *Id.* at 814.

[23] David G. Savage, *Justice Scalia: Americans 'Should Learn to Love Gridlock,'* L.A. TIMES (Oct. 5, 2011, 12:00 AM), https://www.latimes.com/politics/la-xpm-2011-oct-05-la-pn-scalia-testifies-20111005-story.html (explaining that the country's Framers believed a bicameral system would best protect minorities when there was no national consensus).

[24] Audrey J. Lynn, *The Continuing Validity of the Electoral College: A Quantitative Confirmation*, 11 CONLAWNOW 1, 4–6 (2019).

[25] *Id.* at 4–5, 11.

[26] *Id.* at 5. Hamilton would later write about the EC that if "it be not perfect, it is at least excellent. It unites . . . all [of] the advantages[] [of] the union [that were] . . . desired." THE FEDERALIST NO. 68, at 458 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

points."[27] Madison feared that Congress selecting the national leader "would violate essential principles of separation of powers";[28] this left two choices: "appointment by Electors chosen by the people" or "immediate appointment by the people."[29] Between the two, he thought that the EC would cause the least resistance;[30] in spite of this, Madison still supported the route of "popular election."[31] Oliver Ellsworth flatly rejected the popular vote approach because of "the advantage . . . [it] would give large states," which he regarded as an "'unanswerable' problem."[32]

A draft of the presidential election provision was presented to the members of the Convention on September 4, 1787; it read, in part: "He shall . . . be elected in the following manner[:] Each state shall appoint in such manner as its Legislature may direct, a number of electors equal to the . . . number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature."[33]

Gouverneur Morris, when explaining the decision to choose electors, noted that nobody "had appeared to be satisfied with an appointment by the Legislature," but that "[m]any were [also] anxious" at the prospect of an "immediate choice by the people."[34] By what appears to be a process of elimination, the EC was born.[35] As an additional perk, Morris had commented, because "the Electors would vote at the same time . . . and at so great a distance from each other, the great evil of cabal was avoided. It would be impossible . . . to corrupt them."[36]

Morris must have dipped his quill in magic ink; after all, his proposal essentially ended an unsolvable dispute that spanned three months.[37] The Framers' attraction to the EC, one scholar asserts, was that it provided "executive independence" from the other branches (particularly quelling fears of presidential selection by Congress), and that it also combined "a degree of proportionality" for the larger states with an air of "equal status [among] the states" for the delegates who feared being subjugated

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[27] *Madison Debates: July 17*, YALE L. SCH., https://avalon.law.yale.edu/18th_century/debates_717.asp (last visited Jan. 18, 2021); Lynn, *supra* note 24, at 6.

[28] Lynn, *supra* note 24, at 6.

[29] *Madison Debates: July 25*, YALE L. SCH., https://avalon.law.yale.edu/18th_century/debates_725.asp (last visited Jan. 18, 2021).

[30] *Id.*

[31] Lynn, *supra* note 24, at 9.

[32] *Id.* (quoting *Madison Debates: July 25*, *supra* note 29).

[33] *Madison Debates: September 4*, YALE L. SCH., https://avalon.law.yale.edu/18th_century/debates_904.asp (last visited Jan. 26, 2021).

[34] *Id.*

[35] *Id.*

[36] *Id.* Similar notions would lead to the passage of the Election Day statute, requiring presidential elections to be held on the same day. *See infra* text accompanying notes 72–75.

[37] Lynn, *supra* note 24, at 8–11; *see also* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020) (noting that the choice of the EC was "an eleventh-hour compromise" and the hardest decision made at the Constitutional Convention).

by a tyrannical majority.[38] Both sides seemed content, and "at no point did any delegate from a large state express the slightest concern that his state would be inadequately represented by this scheme."[39] And the rest is history—the "essence" of the EC has "survived."[40]

C. The Ultimate Safeguard: Article V

Although its importance was well understood at the Convention, "the amending process" was not extensively debated.[41] There was a "general appreciation" that the amending process should be "easy, regular[,] and [c]onstitutional."[42] At the same time, if amendments could be passed *too* easily, the Constitution's binding structural protections would be anything but.[43] This insecurity resulted in a difficult two-step process: in order to successfully pass a constitutional amendment, there must be (1) a proposal "by a two-thirds majority of both houses of Congress," followed by (2) a ratification "by three-fourths of the several states."[44]

As Professor Duncan remarks, the Constitution's "legitimacy . . . as the highest law of the land, the one body of law that rules all other laws" comes from its adherence to "ratification by a strong consensus of . . . the people of the several states."[45] To Duncan, "consensus" required harmony "among the states, whether small or large, . . . cosmopolitan or parochial," regardless of the size of their respective economies.[46] This measure of achieving a strong national consensus stands in sharp contrast to the rash majoritarian impulse of "submit[ting] proposed constitutional revisions to a national popular referendum."[47]

The Framers went so far as to make the Senate composition nearly irrevocable.[48] In fact, there was not even "debate or opposition" on this point: "the provision guaranteeing equal state representation in the

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[38] Lynn, *supra* note 24, at 10–11.

[39] *Id.* at 11.

[40] *Id.* at 11–12.

[41] John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 48 (1991).

[42] *Id.*; FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 202–03 (1966).

[43] Duncan, *supra* note 5, at 808.

[44] *Id.* The amendment process has ground to a halt, as evidenced by the fact that in the fifty years between 1971 and 2021, only one amendment was ratified (in 1992). However, there have been times of occasional spurts of amendments historically. Three amendments were ratified between 1865 and 1870, four between 1913 and 1920, and four between 1961 and 1971. *The Constitution: Amendments 11–27*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/amendments-11-27 (Jan. 12, 2021).

[45] Duncan, *supra* note 5, at 799, 807.

[46] *Id.* at 808.

[47] *Id.*

[48] *Id.* at 804.

Senate" would be "unamendable[] without the consent of every state."[49] Perhaps the smaller states were already familiar with *The Art of the Deal*,[50] but no matter the reason they were able to achieve this unanimous agreement, Article V appeared to give all the states' representatives an "assurance that they would be treated fairly in the new government."[51] With the EC and an equally-apportioned Senate—plus substantial Article V protection—the Framers methodically created a system that balances power against power: the ultimate safeguard.

II. THE PRESENT: POST-CONSTITUTIONAL CONVENTION TO 2021

A. What Is the Electoral College?: A Brief Overview

The fifty states make up 535 electors in the EC, representing 100 senators and 435 representatives;[52] each state is given a minimum of three votes, calculated by a simple formula: S + R = E.[53] After the ratification of the Twenty-Third Amendment, the electors were raised to 538, and Washington, D.C. was granted the "number of electors . . . equal to the . . . number of Senators and Representatives . . . to which [it] would be entitled if it were a State."[54] But this came with a caveat that D.C. may never have more electoral votes "than the least populous State."[55] Although the Amendment weakened the states' influence over

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[49] KLARMAN, *supra* note 5, at 201; *see also* U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").

[50] DONALD TRUMP & TONY SCHWARTZ, THE ART OF THE DEAL (1987). The small states were dogged in their stance, which likely gave them more leverage. *See id.* at 47–48, 53, 89 (asserting that the "biggest strength" in negotiations is one's "leverage[;]" noting that success is often achieved through "driven," "single-minded," "obsessive" efforts; arguing that people must "hold [their] ground" in deal making); Duncan, *supra* note 5, at 804–05.

[51] Duncan, *supra* note 5, at 805 (quoting TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 32 (2d ed. 2012)).

[52] *The Electoral College*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/electoral-college (last visited Jan. 18, 2021). The Permanent Apportionment Act of 1929 both set the maximum number of House seats at 435 and created a process for automatic reapportionment after every decennial census. Permanent Apportionment Act of 1929, Pub. L. No. 71-13, § 2; *The Permanent Apportionment Act of 1929*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Historical-Highlights/1901-1950/The-Permanent-Apportionment-Act-of-1929/ (last visited April 6, 2021).

[53] *Distribution of Electoral Votes*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/allocation (Mar. 6, 2020). "S" represents the two senators that each state receives. "R" represents the proportionate number of representatives that each state receives (with a minimum of one). "E" represents the number of total electoral votes (or "electors") that each state receives.

[54] U.S. CONST. amend. XXIII; Arit John, *Faithless Electors? Safe Harbor Date? What to Know About the Electoral College*, L.A. TIMES (Nov. 6, 2020, 4:15 PM), https://www.latimes.com/politics/story/2020-11-06/faithless-electors-safe-harbor-date-electoral-college.

[55] U.S. CONST. amend. XXIII.

presidential elections,[56] D.C. was still left without any senators or the ability to have representation on issues of legislation or constitutional amendments.[57] Further, territories (e.g., Guam) do not have electors.[58]

To become president, a candidate needs at least 270 electoral votes, a simple majority.[59] Article II grants state legislatures the ability to direct the manner of appointing electors.[60] Forty-eight states have a winner-take-all system: whoever has the most votes wins *all* of that state's electors, no matter how small the margin of victory.[61] Two states (Maine and Nebraska) divide their votes: whoever has the most votes wins *two*

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[56] D.C. "bears not the slightest resemblance to a state. . . . Rhode Island is nearly 20 times as large. . . . [A] state has a multiplicity of interests that must be balanced: agricultural, mining, fishing, banking, insurance, etc. But [D.C.] has only one interest: . . . feeding . . . the federal government." *The Electoral College*, *supra* note 52 (illustrating that when the Twenty-Third Amendment increased the number of presidential electors from 535 to 538, this weakened the states' influence over presidential elections by diluting their vote); John Steele Gordon, *Enfranchising the District of Columbia*, COMMENTARY (July 31, 2019), https://commentarymagazine.com/politics-ideas/enfranchising-washington-dc/.

[57] It is unlikely that D.C. will soon gain these rights; as the only "state" that has sided with one political party in every presidential election, Republicans will likely be wary of granting it any more power. Zachary Crockett, *How Has Your State Voted in the Past 15 Elections?*, VOX (Nov. 8, 2016), https://www.vox.com/policy-and-politics/2016/11/8/13563106/election-map-historical-vote. In 1984, Reagan won forty-nine states (losing Minnesota by less than 0.2%) and D.C. favored Mondale 85% to 14%; in 1972, Nixon also won forty-nine states (losing Massachusetts by 9%) but D.C. favored McGovern 78% to 22%. This divide has only grown larger, with every Democratic candidate winning between 84% and 93% since Bill Clinton. *Id.*; Gordon, *supra* note 56; FEC, FEDERAL ELECTIONS 92: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 17 (June 1993); FEC, FEDERAL ELECTIONS 96: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 19 (May 1997); FEC, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 19 (June 2001); FEC, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 28 (May 2005); FEC, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 29 (July 2009); FEC, FEDERAL ELECTIONS 2012: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 29 (July 2013); FEC, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 28 (Dec. 2017); *Joe Biden Won in Washington, D.C.*, POLITICO (Jan. 6, 2021, 4:41 PM), https://www.politico.com/2020-election/results/washington-dc/; FEC, FEDERAL ELECTIONS 84: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 8 (June 1985); *1972 Presidential General Election Data – National*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org/RESULTS/data.php?year=1972&datatype=national&def=1&f=0&off=0&elect=0 (last visited Feb. 4, 2021).

[58] *Frequently Asked Questions: Can Citizens of U.S. Territories Vote for President?*, NAT'L ARCHIVES, https://www. archives.gov/electoral-college/faq (last visited Jan. 18, 2021).

[59] *Presidential Election Process*, USA.GOV, https://www.usa.gov/election#item-36072 (Jan. 21, 2021).

[60] U.S. CONST. art. II, § 1, cl. 2. Is this power actually unlimited? What happens if an elector does *not* want to vote for the putative winning candidate? *See infra* Section III.B.

[61] *Distribution of Electoral Votes*, *supra* note 53.

electors—representing two Senators; remaining electors are awarded based on the winner of each congressional district.[62]

In the event that no candidate receives 270 votes, a contingent election occurs, empowering the House to select the President and the Senate to select the Vice-President.[63] While Senators vote individually, members of the House vote by state delegation. In essence, each House representative joins with the other representatives of his or her state, and the majority vote among them is what counts.[64] If, by Inauguration Day, Congress is unable to select a President (and a Vice President has not been selected), the Speaker of the House shall resign from his or her position to act as the President until either selection is made.[65]

B. The Electoral College's Historic Developments

Despite the near uniformity that exists today, there was a time when "different States adopted different methods" for allocating their electoral votes.[66] In the early 1800s, there were some states that chose electors by "direct popular vote," and within this group, some divided their votes by congressional district and others voted "at large" across the state.[67] There were even state legislatures that "decided to choose the [e]lectors themselves."[68] By 1836, however, "all States had moved to . . . a direct statewide popular vote,"[69] a "logical consequence" of which—especially in light of the growing "influence of [the] political parties"—was the ensuing "trend toward . . . [a] 'winner-take-all' system."[70] With a "winner-take-all"

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[62] *Id.*

[63] U.S. CONST. amend. XII. The House may select from the three highest performing presidential candidates, and the Senate may select from the two highest performing vice-presidential candidates. *Id.*

[64] *Id.* D.C., lacking congressional representation, is absent from contingent elections. THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 14 (2020).

[65] U.S. CONST. amend. XX; Presidential Succession Act of 1947, 3 U.S.C. § 19(a)(1) (2018); CONG. RSCH. SERV., ORDER CODE RL31761, PRESIDENTIAL SUCCESSION: AN OVERVIEW WITH ANALYSIS OF LEGISLATION PROPOSED IN THE 108TH CONGRESS 3–4 (2005). The exhaustive list of officers who may act as the President after the Speaker and the Vice President is beyond the scope of this Note.

[66] WILLIAM C. KIMBERLING, ESSAYS IN ELECTIONS: THE ELECTORAL COLLEGE 4 (1992).

[67] *Id.*

[68] *Id.* "Still others devised some combination of these methods." *Id.* This "plenary" power of state legislatures to "select the electors itself" was recently reaffirmed by the Supreme Court. Bush v. Gore, 531 U.S. 98, 104 (2000) (per curiam) (citing McPherson v. Blacker, 146 U.S. 1, 28–33, 35 (1892)).

[69] KIMBERLING, *supra* note 66, at 4. South Carolina was the sole outlier; its legislators continued to directly choose the state's electors until 1860. *Id.* Additionally, Colorado and Florida, who were each admitted later that century, chose their own electors. Arizona v. Inter Tribal Council, 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting).

[70] KIMBERLING, *supra* note 66, at 4.

structure, the parties could ensure that all of a state's electors were "loyal to their candidate," "so as not to fragment their support and . . . permit the victory of another party's [e]lector."[71]

Although peculiar when compared to today's system, Congress, "[f]or the first fifty years of the Federation," allowed states to "conduct their presidential elections . . . anytime in a thirty-four-day period before the first Wednesday of December."[72] The obvious problems with this approach only "intensified [with] improved communications."[73] For example, those states that "voted later" had the capacity to "swell, diminish, or be influenced by a candidate's victories" in the earlier state elections.[74] This practice ended in 1845, when Congress set "a uniform time for holding elections," i.e., "the Tuesday . . . after the first Monday in the month of November"—better known as Election Day.[75]

C. How Recent Presidential Candidates Have Won and Lost in the Electoral College

The EC has produced two startling results in the twenty-first century. First was the 2000 election. In that race, George W. Bush secured the presidency with thirty states to Al Gore's twenty—yet, Vice President Gore earned about 550,000 more votes across all fifty states and D.C.[76] The election came down to Florida, which "TV networks initially announced . . . had gone [to] Gore[]," but then was later called for Bush.[77] Voters were not even sure who the President was until the Supreme Court finally ended the mystery five weeks later.[78] The EC came down to *one* final state, a difference of only *537* votes,[79] and the election was won by

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[71] *Id.* Significantly, the notion of a presidential "direct popular vote was not widely promoted as an alternative" to the EC during this period. *Id.* at 3. "[T]he excesses of the recent French revolution (and its fairly rapid degeneration into dictatorship) [may have] given the populists some pause to reflect on the wisdom of *too* direct a democracy," *Id.* at 3–4 (emphasis added).

[72] *Id.* at 5.

[73] *Id.*

[74] *Id.*

[75] Presidential Election Day Act, ch. 1, 5 Stat. 721 (1845); *Presidential Election Day Act of 1845 and the Election of 1840*, STATUTES & STORIES (Aug. 3, 2020), https://www.statutesandstories.com/blog_html/presidential-election-day-act-of-1845-and-the-election-of-1840/.

[76] FEC, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 11–15 (2001) [hereinafter FEC 2000]; Kevin Sack, *The 2000 Campaign: The Vice President; Gore and Lieberman Make Tolerance the Centerpiece*, N.Y. TIMES (Aug. 9, 2000), https://www.nytimes.com/2000/08/09/us/2000-campaign-vice-president-gore-lieberman-make-tolerance-centerpiece.html.

[77] Sarah Pruitt, *8 Most Contentious US Presidential Elections*, HISTORY, https://www.history.com/news/most-contentious-u-s-presidential-elections (Oct. 27, 2020).

[78] *Id.*

[79] *Id.*; FEC 2000, *supra* note 76, at 12, 19.

only *one* electoral vote.[80] It would appear that if the EC ever were to be abolished, it would have occurred following *this* election.

In the 2016 election, President Trump won 304 electoral votes and 30.25 states; Clinton won 227 electoral votes and 19.75 states (plus D.C.).[81] Trump won 2,626 counties to Clinton's 487 (or about 84%–16%).[82] Yet, Clinton still gained nearly *three million more votes* than Trump.[83] To understand the magnitude of this discrepancy, one must see the map of the 2016 election; it is a startling sight: a sea of red, with small islands of blue along the coasts.[84] Trump's support was fueled by the "forgotten" people,[85] who Clinton had famously deemed a "basket of deplorables."[86] For her part, Clinton won the "wealthy, culturally powerful, and heavily populated" coastal areas with "a few urban areas in between."[87]

Interestingly, if one "subtract[s] [Clinton's] margin in California of [4.2 million] votes [from the NPV], Trump actually *won* the [NPV] in the other forty-nine states by approximately 1.5 million votes."[88] Although this statistic may not be very surprising for avid political observers, it does reveal the growing "cultural chasm between urban and non-urban America," a divide that is accentuated through the Democratic Party's "continued dominance" of large, metropolitan areas, and the "stampede toward the [Republicans] almost everywhere else."[89]

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[80] FEC 2000, *supra* note 76, at 12.

[81] FEC, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 6 (2017) [hereinafter FEC 2016]. Trump won a congressional district in Maine, which earned him one of its four electoral votes. Edward D. Murphy, *Trump Takes 1 of Maine's 4 Electoral Votes, in a First for the State*, PORTLAND PRESS HERALD (Nov. 9, 2016), https://www.pressherald.com/2016/11/08/mainers-take-matters-into-their-own-hands-after-bitter-presidential-campaign/.

[82] Duncan, *supra* note 5, at 820.

[83] *Id.*

[84] FEC 2016, *supra* note 81, at 13–14.

[85] Alexander Burns, *Donald Trump Rode to Power in the Role of the Common Man*, N.Y. TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/09/us/politics/donald-trump-wins.html.

[86] John Cassidy, *Hillary Clinton's "Basket of Deplorables" Gaffe*, NEW YORKER (Sept. 11, 2016), https://www.newyorker.com/news/john-cassidy/hillary-clintons-basket-of-deplorables-gaffe.

[87] Duncan, *supra* note 5, at 819.

[88] *Id.* at 820 (emphasis added). Although, as Professor Duncan wisely notes, "[t]his is not meant to imply that votes in . . . California do not count; they very much count to determine who won the electoral votes in California." *Id.* Notably, an additional subtraction of New York's margin gives Trump a three-million-vote lead in the remaining forty-eight states. *Id.*

[89] Ronald Brownstein, *How the Election Revealed the Divide Between City and Country*, ATLANTIC (Nov. 17, 2016), https://www.theatlantic.com/politics/archive/2016/11/clinton-trump-city-country-divide/507902/.

D. The Rise of the Electoral College "Dropouts"

The 1960s were, perhaps, the only years when the EC was truly at risk.[90] Earlier debate had focused less on the EC itself and more on the manner of electoral vote allocation: a "proportional plan" and a "district plan" were the only considered alternatives.[91] But following Richard Nixon's 1968 victory,[92] a proposal to replace the EC in favor of a popular vote easily passed in the House by a vote of 339 to 70.[93] This marked a historical moment; "total abolition" of the EC had never before "been approved by either House."[94] The proposal faced a "wall of opposition" in the Senate, however, and it never even reached a vote.[95]

In 1977, President Carter revived the issue when he "proposed a package of campaign reforms" that included the abolition of the EC.[96] Although a bill was later introduced by Senator Birch Bayh, it failed to garner the necessary votes.[97] After the 2016 election, Senator Barbara Boxer introduced a bill to abolish the EC; it likewise failed.[98] Proposals were again introduced in 2019 by Democrats in both Houses despite "long odds of success."[99] In the same year, four of the final seven Democrats

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[90] *The Electoral College and Direct Election of the President and Vice President: Hearings on S.J. Res. 1, 8, and 18 Before the S. Comm. on the Judiciary*, 95th Cong. 384 (1977) [hereinafter *Hearings*]; *see also*, Gillian Brockell, *Of the 700 Attempts to Fix or Abolish the Electoral College, This One Nearly Succeeded*, WASH. POST (Dec. 5, 2020, 2:10 PM), https://www.washingtonpost.com/history/2020/12/04/abolish-electoral-college-george-wallace-trump-bayh/ (explaining that the electoral college faced its greatest threat of abolition in 1968).

[91] *Hearings*, *supra* note 90, at 384. A proportional EC awards votes "in proportion to the popular vote in each state," while a district-based EC would mirror the systems currently used by Maine and Nebraska. *Id.*; *see supra* text accompanying note 62.

[92] *1968 Electoral College Results*, NAT'L ARCHIVES, https://www.archives.gov/electoral-college/1968 (Dec. 16, 2019); *see* Ed Kilgore, *The Ghosts of the '68 Election Still Haunt Our Politics*, N.Y. MAG. (Oct. 16, 2018), https://nymag.com/intelligencer/2018/10/1968-election-won-by-nixon-still-haunts-our-politics.html (remarking that George Wallace's "actual strategy" as a third-party candidate was to "deny[] Nixon and Humphrey an [EC] majority, giving the South a big bargaining chip for its regional grievances in an election to be determined in the U.S. House").

[93] *Hearings*, *supra* note 90, at 384–85. Among the many supporters of EC abolition were President Nixon and his competitor, Hubert Humphrey. Chris Cillizza, *Sorry, Hillary Clinton. The Electoral College Isn't Going Anywhere*, CNN (Sept. 14, 2017, 3:38 PM), https://www.cnn.com/2017/09/14/politics/electoral-college/.

[94] *Hearings*, *supra* note 90, at 385.

[95] *Id.*

[96] Cillizza, *supra* note 93.

[97] *Id.*

[98] *Id.*

[99] Devan Cole, *Democratic Senator Introduces Constitutional Amendment to Abolish Electoral College*, CNN (Apr. 2, 2019, 11:34 AM), https://www.cnn.com/2019/04/02/politics/senate-democrats-electoral-college-constitutional-amendment/index.html.

running for President endorsed abolishing the EC,[100] while a poll found that 60% of Democratic voters supported such a reform measure.[101]

On the judicial side, there have been a few federal challenges to the constitutionality of the EC.[102] For example, in 1966, Delaware sued New York (and all other states, plus D.C.), claiming that "winner-take-all" systems "debase[d] the national voting rights and political status" of citizens in "small states";[103] the Supreme Court of the United States denied relief.[104] Following the 2000 election, a *pro se* plaintiff argued that the EC had denied voters "their right to 'one person - one vote,'" but the claim failed.[105] The federal district court that heard the case found that it lacked any power to "overrule [a] constitutionally mandated procedure"; in essence, the EC could not be "questioned constitutionally because it is *established by the Constitution*."[106]

In a similar vein, the 2020 election raised a novel constitutional question of whether there are any legal consequences (and importantly, remedies) when states flout the prescribed requirements of the EC process. This dilemma was perhaps best encapsulated in a suit brought directly in the Supreme Court by the state of Texas that challenged the electors of four states because each of their legislatures' authority had been overridden by their respective executive and judicial branches.[107]

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[100] *See We're Asking 2020 Democrats Where They Stand on Key Issues*, *supra* note 4 (highlighting that candidates Mayor Pete Buttigieg, Senator Bernie Sanders, Senator Elizabeth Warren, and Tom Steyer supported abolishing the EC; Senator Amy Klobuchar was open to the idea of abolishing the EC; and former Vice President Joe Biden and Andrew Yang were against abolishing the EC); Quinn Scanlan, *7 Candidates Invited to Face Off in Final Democratic Primary Debate of 2019: DNC*, ABC NEWS (Dec. 13, 2019, 5:34 PM), https://abcnews.go.com/Politics/candidates-invited-face-off-final-democratic-primary-debate/story?id=67706991.

[101] Matthew Sheffield, *Poll: Democrats Want to Abolish Electoral College, Republicans Want to Keep It*, HILL (Mar. 26, 2019), https://thehill.com/hilltv/what-americas-thinking/435816-poll-republicans-support-electoral-college-while-democrats-want.

[102] *See* New v. Pelosi, No. 08 Civ. 9055, 2008 U.S. Dist. LEXIS 87447, at *3–5 (S.D.N.Y. Oct. 29, 2008) (noting that "courts have routinely rejected challenges to the [EC]" and that precedent "made clear that the 'specific historical concerns' that led the Framers to create the [EC] 'validated the collegiate principle despite its inherent numerical inequality'" (quoting Gray v. Sanders, 372 U.S. 368, 378 (1963))).

[103] Motion for Leave to File Complaint, Complaint and Brief at 2, 6, 11, Delaware v. New York, 385 U.S. 895 (1966) (No. 28).

[104] *Delaware*, 385 U.S. at 895.

[105] Trinsey v. United States, No. 00-5700, 2000 U.S. Dist. LEXIS 18387, at *1–2, *6, *12 (E.D. Pa. Dec. 21, 2000).

[106] *Id.* at *7, *9 (emphasis added). This point seems to be incontrovertible. *See New*, 2008 U.S. Dist. LEXIS 87447, at *6 ("Whatever the merits [of abolishing the EC, the] remedy lies in the constitutional amendment process, not the courts."); Williams v. North Carolina, No. 3:17-CV-265, 2017 U.S. Dist. LEXIS 181115, at *10–12 (W.D.N.C. Oct. 2, 2017) (listing thirteen cases that discuss judicial limits in relation to the EC).

[107] Bill of Complaint at 1, 3–4, 10, 37, Texas v. Pennsylvania, No. 155, 2020 U.S. LEXIS 5994 (2020).

The Court, however, found that Texas lacked standing,[108] and so the merits of this constitutional question remain unresolved.

1. The "Way Around" Article V's Requirements

In light of judicial futility and the seeming impossibility of a constitutional amendment, reformers have opted for a "way . . . around" Article V.[109] This backdoor is called the National Popular Vote Interstate Compact ("NPVIC").[110] The NPVIC presumes that "if states with a [combined] total of 270 or more electoral votes agree . . . [to] give their [electoral] votes" to the NPV winner, the EC system will effectively be abolished (without needing to amend the Constitution).[111] As of this writing, fifteen states (and D.C.) have joined, forming 196 electoral votes (i.e., 72.6% of 270).[112] Yet, the state parties are completely partisan; each voted for Clinton in 2016—in fact, each state represents one of her top sixteen popular vote differentials over Trump.[113] Due to the NPVIC's "wide partisan gap,"[114] it appears that, at least for now, it will be unable to reach 270 electoral votes.

Even if the NPVIC *did* reach 270, it is unclear whether it would be constitutional under Article I's Compact Clause, which asserts that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."[115] The Supreme Court analyzed this

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[108] Texas v. Pennsylvania, No. 155, 2020 U.S. LEXIS 5994, at *1 (Dec. 11, 2020).

[109] *CNN Right Now with Brianna Keilar* (CNN Mar. 19, 2019) (statement of Representative Steve Cohen (D-TN)).

[110] *Id.*; *see also* Nathaniel Rakich, *The Movement to Skip the Electoral College May Take Its First Step Back*, FIVETHIRTYEIGHT, https://fivethirtyeight.com/features/the-movement-to-skip-the-electoral-college-may-take-its-first-step-back/ (Aug. 29, 2019, 2:33 PM) (summarizing the latest developments in the NPVIC movement).

[111] *CNN Right Now with Brianna Keilar*, *supra* note 109.

[112] Rakich, *supra* note 110. These states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status (last visited Feb. 1, 2021). Projections for the 2020 congressional reapportionment, however, suggest that this number will likely drop to 195 electoral votes. Mike Schneider, *Winners and Losers from First Release of 2020 Census Data*, AP NEWS (Apr. 26, 2021), https://apnews.com/article/electoral-college-census-2020-government-and-politics-politics-86e1a31aeeea02004a3c71abd58097ee.

[113] *See Status of National Popular Vote Bill in Each State*, *supra* note 112 (listing the fifteen states that have agreed to the NPVIC); FEC 2016, *supra* note 81, at 13. Virginia is the only state in Clinton's top sixteen states yet to pass a NPV law. Valerie Richardson, *Virginia Punts on National Popular Vote, Will Reconsider After November Election*, WASH. TIMES (Feb. 27, 2020), https://www.washingtontimes.com/news/2020/feb/27/virginia-punts-national-popular-vote-will-reconsid/ (noting that the Virginia Senate has delayed any consideration of its NPV bill until sometime in 2021).

[114] Rakich, *supra* note 110.

[115] U.S. CONST. art. I, § 10, cl. 3.

clause in *Virginia v. Tennessee*, where it noted that "agreement" and "compact" "embrace all forms of stipulation, written or verbal."[116] The Court distinguished between those compacts that "the United States can have no possible . . . interest in interfering with" and those that may increase "the political influence of the contracting States, so as to encroach upon" federal "supremacy" or "interfere with [the] rightful management of . . . subjects" under federal authority.[117]

The Court found that the first type of compact would include an agreement for a state to transport goods over another state's waters or for states to work together to prevent "disease" or "plague" occurring on the states' "bordering line."[118] The second type of compact (i.e., the kind recognized under the Compact Clause) includes agreements of a "political character" or "of confederation."[119] When states "league[] for mutual government, political cooperation, and the exercise of political sovereignty," or cede "sovereignty, . . . conferring . . . external political dependence," these agreements require congressional consent.[120] Explicit congressional consent is sufficient, but implied consent may also be found when "Congress adopts the particular [agreement] by sanctioning its objects and aiding in enforcing them."[121] Consent "usually precede[s] the compact," but may be given *after* if the compact "could not well be considered until its nature is fully developed."[122]

Between the two categories of agreements, the NPVIC seems far closer to one of a "political character" than one that "the United States c[ould] have no possible objection . . . with."[123] Further, Congress has certainly not given express or implied consent to the NPVIC[124]—indeed, based on the failure of thirty-five states to pass the law,[125] it seems likely that there is an implied *lack* of consent to adjust the election process. And

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116 148 U.S. 503, 517–18 (1893).

117 *Id.* at 518.

118 *Id.*

119 *Id.* at 519–20.

120 *Id.*

121 *Id.* at 519, 521.

122 *Id.* at 521.

123 *Id.* at 518–19.

124 William G. Ross, *Popular Vote Compact: Fraught with Constitutional Perils*, JURIST (Feb. 28, 2012, 1:00 PM), https://www.jurist.org/commentary/2012/02/william-ross-vote-compact/ ("Congressional consent for NPVIC is far from assured.").

125 Charles Lane, *The Electoral College Has Its Issues. So Do the Alternatives*, WASH. POST (Sept. 28, 2020, 3:39 PM), https://www.washingtonpost.com/opinions/the-electoral-college-has-its-issues-so-do-the-alternatives/2020/09/28/c72b5c2c-00dd-11eb-b7ed-141dd88560ea_story.html (noting that only fifteen states plus D.C. have approved the NPVIC).

even if the NPVIC reached 270, states would likely seek an immediate injunction, petitioning the Supreme Court to resolve the question.[126]

But perhaps it is misleading to frame the issue as one merely of the Compact Clause. The NPVIC arguably violates the foundation that our country is built upon, i.e., the Constitution's underlying principles and the agreements made between the states at the Convention. Direct election by the NPV was considered at the founding and was expressly rejected;[127] the EC was created as a compromise after it became clear that the smaller states would never join the Union if the President were to be chosen based on majority rule.[128] In other words, the United States would not even *exist* without this compromise. To try to undo the EC through a backdoor loophole—merely because the appropriate channel established in Article V is futile—defies the entire point of the States being "United" through a common agreement.

Article V was placed in the Constitution intentionally and with a specific purpose: each state is protected from constitutional alteration, unless a two-thirds majority of both houses and three-fourths of the several states have consented.[129] The NPVIC bypasses Congress and is capable of becoming law with *less than half* of states consenting.[130] Although the NPVIC claims to "retain[] the [EC]," its practical effect is guaranteed: the President will be elected by NPV.[131] To be clear, if election by NPV was passed by constitutional amendment, it would be completely valid. This Note merely asserts that circumventing Article V in order to pass a law that would normally require adhering to Article V is against

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[126] *Cf.* Julia Manchester, *GOP Chairwoman Suggests RNC Plans to Get 'Litigious' over Push for National Popular Vote*, HILL (Feb. 28, 2020, 11:53 AM), https://thehill.com/homenews/campaign/485146-gop-chairwoman-suggests-rnc-plans-to-get-litigious-over-push-for-national ("Stay tuned because the RNC is not going to let this go."). States would likely follow the path of previous injunctive challenges to interstate compacts that lacked congressional consent. See, e.g., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 454, 458 (1978), in which the U.S. Steel Commission sought a permanent injunction barring the operation of the Multistate Tax Commission, an interstate compact made without congressional consent).

[127] *See supra* Section I.B.

[128] *Id*.

[129] *See supra* Section I.C.

[130] *See* Aaron Blake, *The National Popular Vote Effort, Explained*, WASH. POST (July 25, 2013, 1:14 PM), https://www.washingtonpost.com/news/the-fix/wp/2013/07/25/the-national-popular-vote-effort-explained/ (explaining that the NPVIC will go into effect if enough states, whose electoral votes total 270, consent). Based on the already consenting states, as few as twenty states' electoral votes could total 270. *Id.*

[131] *"Agreement Among the States to Elect the President by National Popular Vote,"* NAT'L POPULAR VOTE (Jan. 3, 2021), https://www.nationalpopularvote.com/sites/default/files/1-pager-npv-v206-2021-1-3.pdf.

the spirit of the Constitution and the promises made in good faith between the states at the Constitutional Convention.[132]

2. Arguments Against the Electoral College

Since the Constitutional Convention, "there have been at least 700 proposed amendments to modify or abolish the [EC]."[133] The ABA itself at one time even argued that the EC "is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."[134] Democrats routinely criticize the EC for its failure to guarantee that whoever "gets the most votes" will win.[135] One congressman has suggested that the EC is "conceived in sin";[136] others argue that its origins are "racist."[137] Still more assert "that it distorts our politics . . . by encouraging presidential campaigns to concentrate their efforts in a few states that are not representative of the country at large."[138] Further, some take issue with the serious risk that is created by "[f]aithless [e]lectors," and others believe that the EC plays a "possible role in depressing voter turnout" nationally.[139]

Beyond purely rhetorical talking points, the chief concern of EC opponents seems to be its perceived undemocratic unfairness; after all, it

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[132] Another untapped source of constitutional jurisprudence that may cause the NPV movement to crumble is the fundamental right to vote: if state citizens head to the polls to give an "advisory opinion" that does not directly select the states' electors—but only adds to a separate national total that indirectly selects the states' electors—then the right to vote may be so watered down that it ceases to possess its essential function. See Transcript of Oral Argument at 55–57, Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (No. 19-465) for an exchange in which Justice Alito pressed a related point and in which Washington's Solicitor General responded that "[i]f the legislature made clear that the public vote was entirely advisory, then . . . I think [the legislature] probably could do that."

[133] *Past Attempts at Reform*, FAIR VOTE, https://www.fairvote.org/past_attempts_at_reform (last visited Jan. 30, 2021). This is the highest number of attempted amendments for any constitutional issue. *Id.*

[134] Am. Bar Ass'n's Comm'n on Electoral Coll. Reform, *Electing the President*, 53 A.B.A. J. 219, 220 (1967).

[135] *See, e.g.*, Katrina Vanden Heuvel, *No Matter Who Wins, It's Time to Get Rid of the Electoral College*, WASH. POST (Nov. 3, 2020, 8:00 AM), https://www.washingtonpost.com/opinions/2020/11/03/no-matter-who-wins-its-time-get-rid-electoral-college/ (quoting Democratic Massachusetts Senator, Elizabeth Warren, who had said, "call me old fashioned, but I think the person who gets the most votes should win.").

[136] *CNN Right Now with Brianna Keilar*, *supra* note 109.

[137] Wilfred Codrington III, *The Electoral College's Racist Origins*, ATLANTIC (Nov. 17, 2019), https://www.theatlantic.com/ideas/archive/2019/11/electoral-college-racist-origins/601918/ (stating that "race and slavery were perhaps the foremost" factors in forming the EC and that "[f]or centuries, white votes have gotten undue weight" from "the nation's oldest structural racial entitlement program").

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

[139] KIMBERLING, *supra* note 66, at 9 (emphasis omitted). Faithless electors are discussed *infra* Section III.B.

"does give disproportionate mathematical weight to small states."[140] Some have even argued that, despite small states' advantage, they are still *hurt* by the EC because "almost all of them are ignored" every four years, and that, under an NPV, "almost all small states would get more attention than they currently do."[141] Another argument is that "winner-take-all" systems "allow[] candidates to take . . . votes of strongly partisan states for granted"—or, in other words, "only the swing states matter."[142] So if the United States switched to an NPV system, as the argument goes, "all votes [would] matter" and count equally.[143] Unlike the structure of the EC then, "candidates [would] spread out their attention to states roughly according to their share of the population" so that small states would get "one event apiece" instead of none.[144]

What makes these sorts of arguments so confusing, however, is their illogical back-and-forth of asserting that small states are weakened by the EC,[145] and that, at the same time, these states are given excess power and influence at the expense of larger states.[146] These cannot both be true; to suggest otherwise is intellectual incoherence.

Indeed, it is unnecessary for EC opponents to argue that the EC hurts smaller states. This is obviously false and only weakens the *actual* reason for their disdain: the fact that small states are unfairly benefited to the detriment of states like California and New York.[147] But the main hurdle of this argument (and perhaps why it is blended with so many other rhetorical claims) is that this "flaw" is purposeful, not a freak occurrence

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[140] Ryan Cooper, *The Electoral College Doesn't Benefit Small States. What It Does Is Even Dumber*, WEEK (May 10, 2019), https://theweek.com/articles/840362/electoral-college-doesnt-benefit-small-states-what-does-even-dumber; *see* Jesse Wegman, *The Electoral College Will Destroy America*, N.Y. TIMES (Sept. 8, 2020), https://www.nytimes.com/2020/09/08/opinion/electoral-college-trump-biden.html (noting that the main concerns of the critique against the EC is the unfair advantage it gives some states over others).

[141] Cooper, *supra* note 140.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *See* Wegman, *supra* note 140 (noting that supporters and objectors to the EC think that its main flaw is "the disproportionate power it gives smaller states"); *see also* Vanessa Miller, *Smaller States Get Bigger Say in Electoral College*, GAZETTE (Nov. 26, 2016), https://www.thegazette.com/subject/news/government/elections/smaller-states-get-bigger-say-in-electoral-college-20161126 (explaining that some "small population states cast significantly more per capita electoral votes than do voters from large states," thus giving smaller states more power than they would have under a NPV model).

[147] Kyron Huigens, *The Electoral College Is Actually Worse Than You Think—Here's Why*, OBSERVER (Feb. 27, 2019, 4:37 PM), https://observer.com/2019/02/electoral-college-explanation-popular-vote-loses/.

or a systemic glitch.[148] A little over 230 years ago, small states bargained for such an advantage, and the large states accepted the disadvantage in order to form the country.[149] In other words, the EC is "radically unequal" and "unrepresentative"[150] *by design*, and so any contention based on this fact will never sell as long as Americans value those special traditions and principles formed at the Constitutional Convention.

But these facts lead to the logical conclusion of current anti-EC arguments: America is not really a constitutional republic, but a "'pure' democracy," and the EC makes America "less and less democratic."[151] For many observers, however, this assertion rings hollow: how can U.S. presidential elections be "less and less democratic"[152] when they were *never* democratic to begin with? In other words, to complain now that the EC defies the democratic NPV is to create a straw man that has never existed in American history: that the United States is, or was ever, a pure democracy, or that majority rule is, or was ever, the law.

E. Contemporary Support for Preserving the Electoral College

Despite the rise of EC dropouts,[153] the EC still has plenty of supporters in its corner. Notably, in 1977, the "distinguished political scientist" Martin Diamond wrote a pamphlet for the America Enterprise

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[148] Michael J. O'Sullivan, *Artificial Unit Voting and the Electoral College*, 65 S. CALI. L. REV. 2421, 2423–25 (1992) (noting that when the Founders debated the method of selecting the president, they rejected the direct popular vote method and adopted a system that favored the small states).

[149] *Id.*

[150] Huigens, *supra* note 147.

[151] George Thomas, *'America Is a Republic, Not a Democracy' Is a Dangerous—and Wrong—Argument*, ATLANTIC (Nov. 2 2020), https://www.theatlantic.com/ideas/archive/2020/11/yes-constitution-democracy/616949/ (arguing that the Constitution originally set up a government to be ruled by the majority, not controlled by the minority, which the EC enables); *South Bend Mayor Tells CBS This Morning He Has More Experience than Trump*, WSBT (Jan. 31, 2019), https://wsbt.com/news/local/south-bend-mayor-talks-possible-2020-presidential-bid-on-cbs-this-morning.

[152] *South Bend Mayor Tells CBS This Morning He Has More Experience than Trump*, *supra* note 151; Gary L. Gregg II, *The Origins and Meaning of the Electoral College*, *in* SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE 1, 20 (Gary L. Gregg II ed., 2001).

[153] *See* Weaver, *supra* note 4; *see also* John Daniel Davidson, *Warren: I'll Be 'Last American President Elected by the Electoral College*,' FEDERALIST (Dec. 3, 2019), https://thefederalist.com/2019/12/03/warren-ill-be-last-american-president-elected-by-the-electoral-college ("60 percent of Democratic voters support abolishing the [EC], and . . . mainstream media seems to agree. After the 2016 election, The New York Times attacked [it] as an 'antiquated mechanism,' Time magazine published an article arguing the [EC] was designed to protect slavery, and . . . The Washington Post compared it to a game of chance in a casino.").

Institute titled "The Electoral College and the American Idea of Democracy," as a response to the ABA's report condemning the EC.[154]

Diamond first responded to the ABA's attack on the EC as an "archaic" system by asserting that lawyers should not "acquiesce too readily in the prejudice that whatever is old is archaic."[155] "On the contrary," he argued, one's "first inclination in constitutional matters ought to be that old is good and older is better," or in other words, it is appropriate to "favor . . . the long-persisting, . . . the tried and true."[156] Diamond found truth in Madison's "Aristotelian wisdom," which "warned that tinkering with the Constitution would deprive . . . government of 'that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability.'"[157] Diamond elaborated further:

> Not only is it not at all archaic, but one might say that it is the very model of up-to-date constitutional flexibility. Perhaps no other feature of the Constitution has had a greater capacity for dynamic historical adaptiveness. . . . [It] has experienced an immense historical evolution. But the remarkable fact is that while it now operates in . . . ways not at all as the Framers intended, it nonetheless still operates largely to the *ends* that they intended. What more could one ask of a constitutional provision?[158]

Diamond next unpacked the ABA's criticism of the "undemocratic" features of the EC that allow a NPV loser to "become President by winning a majority of the electoral votes."[159] From Diamond's perspective, "presidential elections are already just about as democratic as they can be" because "[w]e already have one-man, one-vote—*but in the states*. . . . Victory always goes democratically to the winner of the raw popular

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[154] Karlyn Bowman & Joseph Kosten, *From the Archives: 50 Years of Debate over the Electoral College*, AM. ENTER. INST.: AEIDEAS (June 13, 2018), https://www.aei.org/politics-and-public-opinion/elections/from-the-archives-50-years-of-electoral-college-debate/.
Diamond had such "passion[] about [the] subject" that it "may have contributed to his untimely death . . . at age 57 when he collapsed after testifying for about half an hour before the [Senate] opposing an amendment for direct election." *Id.*; *see* Am. Bar Ass'n's Comm'n on Electoral Coll. Reform, *supra* note 134, at 220; *see also* MARTIN DIAMOND, THE ELECTORAL COLLEGE AND THE AMERICAN IDEA OF DEMOCRACY 6 (1977) (arguing that, contrary to the ABA's assertion, the EC is "fundamentally democratic").

[155] DIAMOND, *supra* note 154, at 1–2 (emphasis omitted).

[156] *Id.* at 2.

[157] *Id.* (quoting THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)).

[158] *Id.* at 2–3 (emphasis added).

[159] *Id.* at 6.

vote—*but in the states*."[160] Said another way, even despite "democratic rhetoric," EC opponents do not truly desire "more directly democratic" elections; they instead want elections to be "more directly *national*."[161]

> Democracy thus is not the question regarding the [EC;] federalism is: should our presidential elections remain in part *federally* democratic, or should [they be] completely *nationally* democratic?
>
> Whatever we decide, then, democracy itself is not at stake in our decision, only the prudential question of how to channel and organize the popular will.[162]

Diamond believed that federalism is the cornerstone of the EC system, and that the states' "winner-take-all" structures support this notion by "generat[ing] a federal element" in the EC that "sends a federalizing impulse throughout our whole political process."[163] "It makes the states . . . dramatically and pervasively important in the whole presidential selection process, from the . . . strategies in the nominating campaign through the convention and final election."[164] To switch to a NPV would "[d]efederalize" the process, forming "a contrary nationalizing impulse" that would overtake all aspects of presidential politics.[165] In his view, "when so much [of our current system] already tends toward excessive centralization," "[i]t is hard to think of a worse time . . . to strike an unnecessary blow [to] the federal quality of our political order."[166]

Diamond was concerned that federalism has become "irrelevant" to those opposing the EC—they instead view the election of the President as "wholly national."[167] But this outlook contradicts an enduring principle at the heart of American government: "there is more to democracy itself than merely maximizing national majoritarianism; [the American] idea of democracy includes responsiveness to *local* majorities as well."[168] Our system "guarantee[s] that . . . power . . . will be nationally distributed, rather than concentrated in regional majorities"; it is *this* principle that forms the "hallmark of the *American* idea of democracy."[169]

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[160] *Id.* at 7.

[161] *Id.*

[162] *Id.*; *see also* Duncan, *supra* note 5, at 814–16 (making similar arguments).

[163] DIAMOND, *supra* note 154, at 2, 7.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 8.

[167] *Id.*

[168] *Id.* at 10.

[169] *Id.* at 10–11 (emphasis added). Diamond viewed election by NPV as undemocratic because it would "encourage minor and maverick candidacies . . . likely reduc[ing] the

What makes Diamond's arguments so compelling is that he had no tainted awareness of the future 2000 or 2016 elections, removing any possible partisan perspective. He did acknowledge, however, that "the next time [the NPV loser becomes President]," there would likely be "great[] public distress . . . due, in large part, to the decades of populistic denunciation" of the EC.[170] In other words, the only imminent "danger" of the EC is the continual "undermining of [its] moral authority," and its seeming dangerousness would likely easily evaporate if EC critics would only "cease to cry havoc, and if those who ought to speak up do so and help the American people learn to enjoy the compatibility of the [EC] with the American idea of democracy."[171]

While Diamond may be one of the most effective advocates for preserving the EC, he is certainly not alone. John Yoo, the Emanuel S. Heller Professor of Law at the University of California at Berkeley, commends the EC for "encourag[ing] candidates to campaign state by state, particularly in the large 'battleground' states."[172] If the NPV was chosen, "candidates would ignore the states and campaign solely in the population centers . . . such as New York, Los Angeles, and Chicago."[173] Yoo sees the Framers' purpose behind the EC as one of *increasing*, not decreasing, the "role of the people in the selection of the [P]resident, while dampening the chances of a demagogue seizing power."[174] One more reason that is often cited for preserving the EC is the likely "political mischief" that would occur in its absence: "nuisance lawsuits challenging results."[175] In terms of vote recounts, Richard Lempert, the Eric Stein Professor of Law Emeritus at the University of Michigan, notes that the 2000 election provides a fitting paradigm:

> Whoever won, Bush or Gore, it was going to be by a hairsbreadth. Because of the [EC], we did not have to recount the whole nation.

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winning margin to [a] bare [forty] percent plurality," in which "nearly [sixty] percent of the people might often have voted against the [winner]. How ironic it would be if a reform demanded in the name of democracy and majority rule resulted in a permanent minority presidency!" *Id.* at 17.

[170] *Id.* at 18.

[171] *Id.*

[172] John Yoo, *Sudden Liberal Opposition to Electoral College Not About Democracy, but About Power*, HILL (Nov. 16, 2016, 11:45 AM), https://thehill.com/blogs/pundits-blog/presidential-campaign/306350-sudden-liberal-opposition-to-electoral-college-not.

[173] *Id.*

[174] *Id.*

[175] Bill Whalen, *For Those Who Want a President by Popular Vote, an (Electoral) College of Hard Knocks*, FORBES (Dec. 10, 2019, 9:13 PM), https://www.forbes.com/sites/billwhalen/2019/12/10/for-those-who-want-a-president-by-popular-vote-an-electoral-college-of-hard-knocks/#54621358f61f; Bernard Grofman & Scott L. Feld, *Thinking About the Political Impacts of the Electoral College,* 123 PUB. CHOICE 1, 4 (2005) (exploring the potential issues associated with abolishing the EC).

> Instead we could focus on a more manageable task—recounting the state of Florida. Imagine the problems that would arise, tensions that would exist, and the claims of illegitimacy likely to follow if the entire nation had to be counted, and then recounted to ascertain the results of the election. Even . . . several weeks after the election, some states are still counting ballots. But for the [EC], we would seldom if ever know the winner of the election on Election Day, and we might routinely be in the dark until weeks after the election.[176]

This argument hangs even heavier following the 2020 election and nationwide lawsuits by the Trump campaign charging election fraud and unconstitutional actions by state officials—all accomplished under a much more limited EC (as opposed to NPV) system.[177]

Perhaps "a point that deserves much greater emphasis" when discussing the EC system is its avoidance of "political incentives" that "reward[] extremism."[178] The EC instead incentivizes "candidates to broaden their geographic and political bases of support and . . . to move toward the center rather than the extremes of the political spectrum, so as to reduce rather than increase the sources of political strife and, in the extreme case, civil war."[179] The EC, therefore, works to build bridges and it contributes to more democratic motivations:

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[176] Richard Lempert, *Two Cheers for the Electoral College: Reasons Not to Abolish It*, BROOKINGS (Nov. 29, 2016), https://www.brookings.edu/blog/fixgov/2016/11/29/two-cheers-for-electoral-college/ ("[I]f an election was close enough to justify a recount, how would we manage it? The Florida 2000 recount seems to have employed a substantial fraction of the lawyers [who were] most versed in election law. Where would we find the trained lawyers, poll watchers[,] and others needed to oversee a fair nationwide recount, and what would judicial supervision of a [fifty][-]state recount look like? The [EC] saves us from having to deal with such challenges.").

[177] Jacob Shamsian & Sonam Sheth, *Trump and Republican Officials Have Won Zero out of at Least 42 Lawsuits They've Filed Since Election Day*, BUS. INSIDER (Jan. 5, 2021, 9:51 AM), https://www.businessinsider.com/trump-campaign-lawsuits-election-results-2020-11 (listing such states as Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin as contested states); *see* Press Release, Donald J. Trump for President, Inc., Statement from President Donald J. Trump (Jan. 5, 2021), https://www.donaldjtrump.com/media/statement-from-president-donald-j.-trump-152020/ (noting that the 2020 election "was corrupt in contested states"); *see also* Press Release, Donald J. Trump for President, Inc., Trump Legal Team Statement on "Safe Harbor Deadline" (Dec. 8, 2020), https://www.donaldjtrump.com/media/trump-legal-team-statement-on-safe-harbor-deadline/ ("Despite the media trying desperately to proclaim that the fight is over, we will continue to champion election integrity until every legal vote is counted fairly and accurately.").

[178] Benjamin Zycher, *The Broader Case in Defense of the Electoral College*, AM. ENTER. INST.: AEIDEAS (Dec. 7, 2016), https://www.aei.org/society-and-culture/the-broader-case-in-defense-of-the-electoral-college/.

[179] *Id.*

> [O]nce a candidate [senses] a popular plurality in a state, . . . there is no point in getting more popular votes in that state; instead the candidate is driven to develop plurality support in additional states, in pursuit of a majority in the [EC]. Thus[,] . . . the [EC] force[s] candidates to broaden their geographic bases while implicitly penalizing candidates whose support is heavily regional.[180]

III. THE FUTURE: INEVITABLE PROBLEMS — THE NPVIC AND FAITHLESS ELECTORS

A. Problem: When States Go Renegade

One of the biggest obstacles facing any attempt to nationalize American presidential elections is the freedom that states possess in their election laws.[181] This problem is magnified in the context of the NPVIC: although its "fundamental linchpin" is that the winner will have won the NPV, what would result if "states fail to conduct a popular election for President[?]"[182] After all, nothing in the Constitution blocks states from "eliminat[ing] their statewide popular elections" in favor of "legislature[s] (or some body other than the state's voters)" appointing their electors.[183] And even if states still held popular elections, they could "block the determination of the [NPV] winner" by ending their tabulation "after one of the candidates obtained an unsurpassable lead in the counted ballots in that state," or they could simply "refuse to publicly announce their states' vote totals prior to the [EC] vote in mid-December."[184]

Another point: based on the NPVIC's overall framework, it will "inevitably require [at least] some states to appoint electors pledged to the candidate who *lost* those states' popular vote."[185] Imagine the type of "political pressure" that states would face to "pull out of the [NPVIC] and

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[180] *Id.*

[181] *See* U.S. CONST. art. II, § 1, cl. 2 (granting states the power to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for selecting the President); *id.* art. I, § 4, cl. 1 (granting state legislatures the power to "prescribe[]" the "Times, Places and Manner of holding Elections" in federal races); *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Brian J. Gaines, *Compact Risk: Some Downsides to Establishing National Plurality Presidential Elections by Contingent Legislation*, *in* ELECTORAL COLLEGE REFORM: CHALLENGES AND POSSIBILITIES 113, 119 (Gary Bugh ed., 2010).

[182] Norman R. Williams, *Reforming the Electoral College: Federalism, Majoritarianism, and the Perils of Subconstitutional Change*, 100 GEO. L.J. 173, 209 (2011).

[183] *Id.* at 209–10; *see also* U.S. CONST. art. II, § 1, cl. 2.

[184] Williams, *supra* note 182, at 212.

[185] *Id.* at 215 (emphasis added).

appoint electors to the candidate who won the statewide poll."[186] Or what if a state desired to leave the NPVIC *right before* the election? "Would a court issue an injunction[?]"[187] What if the "withdrawal of one state reduces the number of electors controlled by the bloc of signatory states below the 270-elector threshold[?]"[188] Although, according to at least one scholar, the NPVIC would obligate all the other signatory states to still conform to the agreement, "it is not hard to imagine other states defending their withdrawal on the ground that the original state's withdrawal rendered the [NPVIC] ineffective as a practical matter."[189]

Further, there is an inevitable asymmetry between the states in their varying legal structures,[190] which includes their election-related laws and regulations.[191] As a practical reality, then, the concept of a NPV is actually a "fictional institution" because even if elections were based on a NPV, "there [would] still be fifty-one separate state elections," and each state would have its own voting qualifications, "voting machinery," and "legal regime[s] [for] the initial tabulation and, if necessary, the recounting of votes."[192] Moreover, *Bush v. Gore*[193] ruled that using "different standards in different Florida counties for tabulating votes . . . violated the Equal Protection Clause."[194] If this principle is viewed through the broader lens of the NPVIC, "it is hard to see how the disparate voting qualifications and systems in each state would be constitutionally tolerable."[195]

B. Problem: The Independence of Faithless Electors

This complication is unique to the EC, and therefore, it applies equally to the NPVIC (or any other law that functions within the EC system): "faithless" electors. A faithless elector is simply an elector "who

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[186] *Id.*

[187] *Id.* at 220.

[188] *Id.*

[189] *Id.* (referencing provisions found in Article III of the proposed National Popular Vote Compact Bill which can be viewed at TEXT OF THE NATIONAL POPULAR VOTE COMPACT BILL, https://www.nationalpopularvote.com/bill-text (last visited Feb. 25, 2021)).

[190] One distinct example is that Louisiana remains the only state that is a "mixed jurisdiction"—a "confluence" of both "civil and common law." Christopher Osakwe, *Louisiana Legal System: A Confluence of Two Legal Traditions*, 34 AM. J. COMP. L. 29, 37 (Supp. 1986); *see* A. Brooke Overby, *Mortgage Foreclosure in Post-Katrina New Orleans,* 48 B.C. L. REV. 851, 868 n.73 (2007) (stating that Louisiana is the only civil-law state in the United States).

[191] These variations are countless, but, as just one example, "state approaches to felon disenfranchisement vary tremendously." *Felon Voting Rights*, NCSL (Jan. 8, 2021), http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx. For a detailed analysis of some key variances, see Williams, *supra* note 182, at 222–26.

[192] Williams, *supra* note 182, at 222.

[193] 531 U.S. 98, 110 (2000).

[194] Williams, *supra* note 182, at 226.

[195] *Id.* at 227. Even disparities in "voting machinery and tabulation standards" could be "viewed as irrational or arbitrary and therefore [as] violat[ing] equal protection." *Id.*

is pledged to vote for his party's [presidential] candidate . . . but nevertheless votes for another candidate."[196] Although no such elector has ever altered a presidential election result,[197] the 2016 election revealed an extreme circumstance that raised such a possibility.[198]

Following Trump's victory in 2016, "liberal activist groups" attempted to intimidate his electors by distributing their phone numbers and addresses.[199] In response, these electors faced "not only a flood of emails and phone calls to change their vote to . . . Clinton but death threats as well."[200] One of the strategists behind the harassment stated that the electors needed to be held "accountable for their decision."[201] A Texas elector received "more than 200,000 emails," while an elector in Michigan faced financial retribution against his business.[202] One elector was sent threats that he would have "a bullet [put] in the back of [his] mouth."[203] Republican electors were targeted in "ad campaigns" and "op-eds," and celebrities even filmed *individualized* public videos "call[ing] [electors] out by name" to change their vote.[204] Lawrence Lessig, aided by a midsize California law firm,[205] contacted electors individually to "offer[] free legal aid" for "chang[ing] their vote."[206]

Although President Trump only lost two electors (out of the thirty-seven needed to prevent his EC majority),[207] an interesting question was implicitly presented: are states even allowed, under the Constitution, to

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[196] KIMBERLING, *supra* note 66, at 10.

[197] *Faithless Electors*, FAIRVOTE, https://www.fairvote.org/faithless_electors (July 6, 2020) (mapping out the history of all ninety faithless votes for president that have been cast since 1796).

[198] *Id.*

[199] Hans A. von Spakovsky, *Threatening Electors Violates Federal Law. So Why Isn't Loretta Lynch Doing Anything About It?*, HERITAGE FOUND. (Dec. 15, 2016), https://www.heritage.org/election-integrity/commentary/threatening-electors-violates-federal-law-so-why-isnt-loretta-lynch.

[200] *Id.*

[201] *Id.*

[202] Kyle Cheney, *Electors Under Siege*, POLITICO, https://www.politico.com/story/2016/12/electors-under-siege-232774 (Dec. 18, 2016, 8:52 AM).

[203] Mark Moore, *Electors Are Being Harassed, Threatened in Bid to Stop Trump*, N.Y. POST, https://nypost.com/2016/12/14/electors-are-being-harassed-threatened-in-bid-to-stop-trump/ (Dec. 14, 2016, 8:13 PM).

[204] Cheney, *supra* note 202.

[205] Kyle Cheney, *Lessig, Lawyers to Offer Support to Anti-Trump Electors*, POLITICO (Dec. 5, 2016, 7:39 PM), https://www.politico.com/story/2016/12/larry-lessig-electors-trump-232231.

[206] Moore, *supra* note 203.

[207] Scott Detrow, *Donald Trump Secures Electoral College Win, with Few Surprises*, NPR (Dec. 19, 2016, 4:52 PM), https://www.npr.org/2016/12/19/506188169/donald-trump-poised-to-secure-electoral-college-win-with-few-surprises (explaining that 270 votes are needed for a majority, that Trump won 306 votes, and that, therefore, thirty-seven faithless electors would have been required to bring Trump below the 270 threshold).

remove electors and/or *nullify* their votes? Put another way, are electors truly independent and able to vote for whomever they want?

In *Ray v. Blair*, the Supreme Court held that political parties could require presidential electors to pledge that they would vote for their parties' nominees for President and Vice President and, further, that electors who refuse to take such a pledge can be *excluded* from the pool of electors.[208] The Court did not, however, rule on whether such a pledge "could be legally enforced" *after* the elector is appointed if he or she reneges on such a pledge at the official time for voting.[209] But this question was answered in *Chiafalo v. Washington*: pledge laws *may* be enforced by an elector's removal and/or a financial penalty.[210]

Chiafalo was not, however, a cure-all for the current faithless elector dilemma: a majority of states do not have or enforce any sort of laws to penalize or remove electors who fail to vote for the winning candidate.[211] In these states, *Chiafalo* provides a constitutional basis for the passage of *new* legislation, but until then, electors remain free—at least in theory—to use absolute discretion in casting their votes.[212]

The issue of faithless electors is exacerbated under the NPVIC. For instance, the NPVIC relies on the notion that electors will vote for the NPV winner, even if that candidate loses the elector's state. But in a state following the NPVIC without a concomitant pledge law, any of that state's electors can simply refuse to follow the NPVIC's mandate. Indeed, in the states that have not signed on to the NPVIC, electors could even "decide on their own to support the candidate with the most votes *nationally*."[213] Whether *Chiafalo* grants electors—in the absence of any state pledge law—free rein to vote for *anyone*, even those who are not necessarily running for President, has yet to be determined.[214]

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[208] 343 U.S. 214, 227 (1952). Thirty-three states have either no laws that require electors to vote for a designated candidate or no mechanism for enforcing such a law if enacted. *Faithless Elector State Laws*, FAIRVOTE, https://www.fairvote.org/faithless_elector_state_laws (July 7, 2020) (showing that seventeen states do not require electors to vote for a particular candidate and that sixteen states have no mechanism for enforcing such requirement).

[209] Baca v. Colo. Dep't of State, 935 F.3d 887, 935 (10th Cir. 2019) (citing *Ray*, 343 U.S. at 230).

[210] 140 S. Ct. 2316, 2322–24 (2020).

[211] *See Faithless Elector State Laws*, *supra* note 208 (calculating that thirty-three states either have no laws requiring electors to vote for a specific candidate or have no mechanism to enforce such requirements).

[212] *Chiafalo*, 140 S. Ct. at 2324.

[213] Gregg Re, *Federal Court Undercuts Progressive Efforts to Nullify Electoral College, Rules Electors Can Vote Freely*, FOX NEWS (Aug. 22, 2019) (emphasis added), https://www.foxnews.com/politics/federal-appeals-court-undercuts-progressive-efforts-to-nullify-electoral-college-rules-electors-can-vote-freely.

[214] Leading Cases, Chiafalo v. Washington, 134 HARV. L. REV. 420, 428 (2020).

As of this writing, only five states penalize a faithless elector,[215] while fourteen cancel a faithless elector's vote and replace him or her with a "faithful" elector.[216] It remains to be seen if other states' electors still possess any discretion by default—although such an idea raises one more issue: is there any necessity or logic in having electors at all?

"Whatever the situation in 1789, voters today expect the wishes of the state's majority to be followed."[217] And it is undeniable that, even if only a few electors across a few states were faithless, it creates a serious possibility—in a close election—that elector "defectors" could reverse the "popular majority" and even the "apparent [EC] majority as well."[218] Furthermore, "even if [electors'] votes were later shown to have been motivated by threats or bribes"—which, after the harassment campaign following the 2016 election,[219] is not all that unlikely—"it is hard to see a constitutional basis for overturning their actions."[220]

Since *Chiafalo*'s result appears to be limited to laws that are enacted prior to an election, there remains the question of whether states possess inherent constitutional power to reject electors that refuse to vote for the winning candidate (even when the state had no pledge law on the books before the vote took place); to prepare themselves for this contingency, all states without any such pledge laws should enact their own statutes so that the faithless elector problem can be eliminated for all fifty states. Alternatively, Republicans and Democrats could pass a constitutional amendment eliminating electors' unchecked discretion to ensure stability and predictability in future elections.

CONCLUSION

The EC "is easy to defend, once one gets the hang of it."[221] In contrast to an NPV system, the EC "contributes to the cohesiveness of the country" by electing candidates who can combine "sufficient popular support" with "sufficient distribution of that support" in order to govern all fifty states effectively.[222] Further, abolishing the EC "would strike at the very heart of the federal structure laid out in our Constitution," a system that was

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[215] *Faithless Elector State Laws*, *supra* note 208. These states are California, New Mexico, North Carolina, Oklahoma, and South Carolina. *Id.*

[216] These states are Arizona, Colorado, Indiana, Iowa, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Utah, and Washington. *Id.*

[217] Lempert, *supra* note 176.

[218] *Id.*

[219] *Id.*; Moore, *supra* note 203.

[220] Lempert, *supra* note 176.

[221] DIAMOND, *supra* note 154, at 22.

[222] KIMBERLING, *supra* note 66, at 11–12 (emphasis omitted in the second and third quotes).

"thoroughly and wisely debated by the Founding Fathers."[223] Although the EC may not be "perfect," Hamilton was correct when he predicted that "it is at least excellent."[224] And after roughly 230 years of the EC system's durability,[225] perhaps its excellence is perfect enough.

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[223] *Id.* at 13.

[224] THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[225] David S. Ferriero, *To Choose a President*, NAT'L ARCHIVES (2012), https://www.archives.gov/publications/prologue/2012/summer/archivist.html.

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