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For what avail the plough or sail
Or land or life, if freedom fail?
EMERSON

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New York State Solicitor General
Barbara D. Underwood

Barbara Underwood has dedicated her career to the People of the State of New York. She has served in leadership roles within three District Attorney's offices in New York City (New York County, Kings County, and Queens County), was the first female Attorney General for the State of New York, and currently serves as New York's Solicitor General.

This Volume of

New York University Annual Survey of American Law

is respectfully dedicated to

NEW YORK STATE SOLICITOR GENERAL

BARBARA D. UNDERWOOD

DEDICATION REMARKS

SANDER SABA

Hi everyone,

Thank you all for coming. My name is Sander Saba and on behalf of my journal, *NYU Annual Survey of American Law*, I want to welcome you to our annual Dedication Ceremony, where today we celebrate Solicitor General of New York, Barbara Underwood.

Since our journal was founded, *Annual Survey* has strived to be the practitioner's journal (which I'm sure to some of you sounds like an oxymoron). *Annual Survey* was originally compiled by NYU Law faculty members to serve as a practical, comprehensive guide to developments in American law. Since becoming a quarterly student-edited publication, we continue to honor practitioners through the practical materials we publish, the relevant symposia we host, and of course, our annual dedication of the upcoming volume to a distinguished member of the legal community.

Now, I'm sure we can all agree that Ms. Underwood is an obvious choice. My journal's board certainly thought so. She served as Solicitor General of New York before becoming the first woman to serve as Attorney General at a time when the people of this state needed her most. In her short time as Attorney General, Ms. Underwood stood up for New Yorkers hundreds of times, fighting against harmful policies of the Trump Administration, against companies taking advantage of their customers and investors, and against those who destroy the environment and lie about it—and she won. A lot.

And that's just listing some of her recent accomplishments. Throughout her entire career, Ms. Underwood has served as a guardian of equal justice for all people. She successfully fought against racially discriminatory jury selection, defended the constitutionality of reasonable buffer zones around women's health clinics to protect a woman's right to choose, and last year persuaded the U.S. Supreme Court to vacate the decision to add a question about citizenship to the 2020 census.

She has also served for years as a mentor, earning the Professionalism Award from the American Inns of Court in 2012, honoring her many years of mentorship. Oh, and did I mention she used to teach at NYU Law?

I truly could speak for hours about her accomplishments and how respected she is by her colleagues, but then we would have

brought all these folks out here for nothing! Before I hand it over to our wonderful dedicators for their remarks, I want to thank you all again for coming, and give an especially big thank you to Solicitor General Barbara Underwood for the incredible work you do every day. We are honored to have you here.

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* In memoriam

THE FULL PROMISE OF LIBERTY: A PLACE FOR IDENTITY RHETORIC IN POST-*BOSTOCK* JURISPRUDENCE

SASHA KAWAKAMI

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I. INTRODUCTION

[W]e demand that sex speak the truth . . . and we demand that it tell us our truth, or rather, the deeply buried truth of that truth about ourselves which we think we possess in our immediate consciousness.[1]

In the first volume of *The History of Sexuality*, French philosopher Michel Foucault wrote of a "discursive explosion" of the 18th and 19th centuries that changed the way society discussed and interacted with aberrate sexualities, particularly with regard to homosexuality.[2] He called this the *perverse implantation*: the moment at which "the nineteenth-century homosexual became a personage: a past, a case history and childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology."[3] In other words, homosexuality as a concept came to be recognized not just as a physical act or set of actions—it became inextricably tied to identity. Discourse was

1. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 69 (Robert Hurley trans., 1978).
2. *Id.* at 38.
3. *Id.* at 43.

not merely interested in what people did, but what they *were*. The "perversion" was both constitutive and reflective of identity, and not merely of conduct.

According to Foucault, this discursive explosion was the result of a series of operations and historical events that served not to exclude newfound perversions, but rather to make them intensely and unalterably present. The body became a "mode of specification of individuals," a way to speak about and understand what was once taboo and unspoken.[4] This newfound focus was a "machinery of power" that "did not aim to suppress [sexuality], but rather give it an analytical, visible, and permanent reality."[5] Make no mistake, these deviant sexualities were condemned all the same, but for the first time, the individuals who possessed them were present and "listened to."[6] As Foucault explained, "[i]t was time for all these figures, scarcely noticed in the past, to step forward and speak, to make the difficult confession of what they were."[7] Sexuality gained power from discourse, and vice versa; the two "seek out, overlap, and reinforce one another."[8]

In this Note, I argue that the *Obergefell v. Hodges*[9] opinion, which legalized gay marriage in the U.S., opened the door for a new way to analyze cases in the LGBTQ+ sphere: a *non-perverse* perverse implantation through which sexuality could be recognized as constitutive of identity, and not merely of conduct. That is, following 2015, there was an opportunity for identity to be used by LGBTQ+ advocates as a source of rights beyond *Obergefell*'s reach, i.e., beyond the marriage context. Perhaps it could be used to achieve the "full promise of liberty" that Justice Kennedy alluded to in the opinion, a liberty under which the law protects people, not conduct.[10] Stated differently, with *Obergefell* came the opportunity for expansive progress through what I refer to as "identity rhetoric" or "identity arguments." These arguments describe a relationship between identity and action that is reflexive in nature: what one does is reflective of *who* they are, and who they are is constitutive of what one *does*.

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4. *Id.* at 47.

5. *Id.* at 44.

6. *Id.* at 39.

7. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 39.

8. *Id.* at 48.

9. Obergefell v. Hodges, 576 U.S. 644 (2015).

10. *Id.* at 667.

Thus, the modern implantation would not be "perverse" in the pejorative sense, but in a positive sense: it would reflect a change in the way sexuality is present in discourse, in dialogue, and hopefully, in the law. Indeed, in the years following *Obergefell*, proponents of LGBTQ+ rights began to make a linguistic shift from discussing these rights from an *associational* standpoint (i.e., rights to privacy, intimacy, and to identi*fication* with a particular group) to a standpoint that recognizes identi*ty* as the basis for fundamental rights. In other words, the legal fight for LGBTQ+ rights began to shift rhetorical focus from a right grounded in specific institutional contexts (a right to belong in the workplace, in the bedroom, at the altar, despite one's sexual orientation) to a right grounded in something that transcends those contexts (a right to belong in and of itself).

By the time the three Title VII[11] cases[12] of the 2019 term were argued in October of that year, over thirty-six scholars, practitioners, and organizations had submitted *amicus* briefs to the Supreme Court that contained—and indeed, in many cases, centered on—identity as the basis for finding in favor of the Employees. On one hand, these briefs demonstrate an effort to translate rights from one context (constitutional law) to another (statutory interpretation), but more importantly, they demonstrate the linguistic power of identity rhetoric: how a strategy which shifts the Court's focus from conduct to individual can be the substantive foundation for rights in a vast array of contexts: in marriage, in the workplace, and beyond. In other words, an opinion that recognized a legal right based on identity would avoid the myriad issues that have come as a result of the law's current approach[13] to gay rights (and, in turn,

11. 42 U.S.C. § 2000e-2.

12. *See* Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *rev'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599 (2019); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *aff'd sub nom.* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

13. Historically, legal battles over sex and gender issues have existed in a number of jurisprudential contexts, including Equal Protection (where sexual orientation is not a protected class, and therefore does not get the heightened scrutiny afforded to other suspect classes), Due Process (where, as discussed *infra*, substantive rights are limited to specific institutional settings and narrow social contexts), and statutory interpretation (where the law is defined by and confined to the words drafted by Congress). This fractured approach results in inconsistency among courts and confusion among those who wish to understand—and ultimately, test—the limits of that approach.

avoid the need for further litigation of the same issues in the future).

However, whatever potential for progress *Obergefell* may have ushered in, *Bostock* may have turned on its head. The decision, announced in June of 2020, was almost completely devoid of identity language, instead espousing a textualist approach to the question of precisely what "because of . . . sex" encapsulates.[14] For a majority of the Court, that phrase includes discrimination because of sexual orientation and gender identity, though not for the reasons many had anticipated.

In Part II, I discuss the *Obergefell* opinion and its aftermath, including critics' response to Justice Kennedy's lyrical language as well as the implications that flowed from his emphasis on marriage, family, and the home as the basis for the decision. I explain how, despite the opinion's laser-like focus on marriage, it also presented the opportunity for identity-based arguments in future contexts and cases. In Part III, I examine the identity arguments contained within the *Bostock* briefs to the Supreme Court, focusing on how these arguments placed identity at the forefront of the debate. Specifically, I discuss two forms of identity arguments, both of which flow directly from the language of the *Obergefell* opinion: first, the right to *define* one's identity (that is, the right to live one's life according to their "deeply felt"[15] sense of self) and second, the right to *express* that identity (through individual choice). In Part IV, I discuss the *Bostock* opinion itself and Justice Gorsuch's textualist approach to finding in favor of the Employees—and consequently, the striking absence of nearly any identity language at all. Finally, I consider whether, following that approach, there still exists any place for identity arguments in a post-*Bostock* jurisprudence.

II.
SEX, MARRIAGE, AND DIGNITY: *OBERGEFELL*'S FUNDAMENTAL RIGHTS

> *People will be surprised at the eagerness with which we went about pretending to rouse from its slumber a sexuality which everything—our discourses, our customs, our institutions, our regulations, our knowl-*

14. 42 U.S.C. § 2000e-2; Bostock, 140 S. Ct. 1731 (2020).

15. Brief of Amici Curiae interACT: Advocates for Intersex Youth, et al. in Support of Employees at 28, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter InterACT Brief].

edges—was busy producing in the light of day and broadcasting to noisy accompaniment.[16]

The Supreme Court's landmark opinion in *Obergefell v. Hodges* (2015) begins with these words: "[t]he Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[17] Indeed, the line is only a mere taste of the kind of lyrical language that is to come throughout Justice Kennedy's majority opinion: one that resonates more as a celebration of love, family, and marriage than it does a legal opinion. Refusing to draw from either the Due Process or Equal Protection Clauses alone as the basis for his holding,[18] Kennedy explained that the two are "connected in a profound way," and that the "interrelation of the two principles furthers our understanding of what freedom is and must become."[19] He spoke of how "choices about marriage shape an individual's destiny" and how "through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality."[20] Marriage, he said, is the "keystone of our social order."[21]

For many, Justice Kennedy's verbiage was celebrated across the country as a victory for what he called "highest ideals of love, fidelity, devotion, sacrifice, and family."[22] His words became widely and instantly available to the public,[23] they were read as wedding vows,[24] and in one article, they even earned him the title of "the nation's

16. FOUCAULT, *supra* note 1, at 158.

17. Obergefell, 576 U.S. at 651-52 (holding that, as a matter of constitutional law, the right to marry is a fundamental right of which same-sex couples may not be deprived).

18. Historically, these two clauses have been the basis for sex and gender issues. *See* n.13, *supra.*

19. *See* Obergefell, 576 U.S. at 672.

20. *Id.* at 666.

21. *Id.* at 669.

22. *Id.* at 674.

23. *See* Jane S. Schacter, Obergefell*'s Audiences*, 77 OHIO ST. L.J. 1011, 1026-27 (2016) (explaining how, within hours of the *Obergefell* decision, every website among the top ten news websites as of January 2015 covered the decision and excerpted language from the majority opinion).

24. *See, e.g.*, Jane Gordon Julien, *A Playwright and a Songwriter, Finding the Right Words*, N.Y. TIMES (Sept. 14, 2018), https://www.nytimes.com/2018/09/14/fashion/weddings/a-playwright-and-a-songwriter-finding-the-right-words.html [https://perma.cc/P6M7-XAAT].

most important judicial champion of gay rights."[25] The holding was called "the long-awaited affirmation of the basic humanity of gay Americans."[26] Professor Erwin Chemerinsky wrote: "June 26, 2015 thus will be remembered, like dates such as May 17, 1954, when the Court decided *Brown v. Board of Education*, as the Court taking a historic step forward in advancing liberty and equality."[27] As for the language, the majority opinion's poetic proclamations on love and marriage were "gorgeous, heartfelt, and a little mystifying."[28]

However, not all shared the same enthusiasm for Justice Kennedy's lyrical prose. In a blistering dissent, Justice Scalia retorted that, "[i]f, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began with 'The Constitution promises liberty to all within its reach . . . .' I would hide my head in a bag."[29] Justice Thomas sharply noted that "the Constitution contains no 'dignity' Clause."[30] Chief Justice Roberts, too, was unsupportive: "*Just who do we think we are?*"[31]

For many scholars and proponents of LGBTQ+ rights, however, the problem with Kennedy's language was not its lyricism, but rather his laser-like focus on marriage, family, and the home as the

25. Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html [https://perma.cc/9FSV-ZT5B].

26. Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity as A Suspect Class*, 25 TUL. J. L. & SEXUALITY 1, 3 (2016) ("The profound and intimate power of *Obergefell* should be respected not only because the decision was a strong move toward relieving gay Americans and their families from the material costs, insecurity, and stigma of second class citizenship, but because *Obergefell* advances principles of liberty, equality, and personal autonomy for all Americans.").

27. Erwin Chemerinsky, *Symposium: A Landmark Victory for Civil Rights*, SCOTUSBLOG (June 27, 2015, 8:56 AM), https://www.scotusblog.com/2015/06/symposium-a-landmark-victory-for-civil-rights/ [https://perma.cc/5UTS-7QHA]. *See also* Judith Schaeffer, *Symposium: The Constitution Has Everything to Do With It*, SCOTUSBLOG (June 26, 2015, 4:29 PM), https://www.scotusblog.com/2015/06/symposium-the-constitution-has-everything-to-do-with-it/ [https://perma.cc/W5CL-5QAG] ("Chief Justice Roberts's dissent notwithstanding, *Obergefell v. Hodges* will be a great legacy of the Roberts Court, just not of John Roberts himself. And the Constitution will have had everything to do with it.").

28. Mark Joseph Stern, *Supreme Court 2015: Decoding Anthony Kennedy's Gay Marriage Decision*, SLATE (June 26, 2015, 11:18 AM), https://slate.com/news-and-politics/2015/06/supreme-court-2015-decoding-anthony-kennedys-gay-marriage-decision.html [https://perma.cc/ZW3Y-KN9X].

29. Obergefell v. Hodges, 576 U.S. 644 at 720 n.22 (Scalia, J., dissenting).

30. *Id.* at 735 (Thomas, J., dissenting).

31. *Id.* at 687 (Roberts, C.J., dissenting) (emphasis added).

basis for the decision, as opposed to the established doctrine under the Equal Protection Clause.[32] Legal rights depend on clear definitions—not romantic musings. There was thus worry that future courts interpreting the *Obergefell* opinion would place undue emphasis on the importance of the marriage right at the expense of non-married individuals.[33] In other words, because the contours and limits of the constitutional "liberty interest" at stake would be dispositive in future interpretations, a right that was strictly limited to the marriage context would provide no hope for expansion into new contexts beyond the altar.

Further, not only was there an absence of clear Constitutional categorization with respect to which rights, exactly, were being protected—the source of those rights was also unclear. The majority opinion pointedly proclaimed that "[r]ights come not from ancient sources alone," but that they "rise . . . from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[34] While this proclamation reflected an increasingly popular concept of a living Constitution,[35] it troubled those who were looking for a roadmap for LGBTQ+ rights beyond *Obergefell*. Critics cautioned that the kinds of "broad abstractions"[36] drawn in the opinion would do more harm than good, particularly as future courts would try to grapple with the application of whatever the opinion actually *meant*. As Professor Christopher Green put it, "it's hard to find much to criticize as unsound about his method, because it's hard to see much method at all."[37]

32. *See* Gregg Strauss, *What's Wrong with* Obergefell, 40 CARDOZO L. REV. 631, 642-43 (2018) ("[S]cholars have argued *Obergefell* created unnecessary moral controversy by using due process rather than equal protection law.").

33. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1208 (2016) (arguing that "even as *Obergefell* expands the right to marry, it may also diminish constitutional protection for life outside of marriage.").

34. *See* Obergefell, 576 U.S. at 671-72.

35. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) (arguing against originalism and explaining that the common-law approach of American jurisprudence allows the principles which are drawn from the Constitution to adapt and grow based on changed needs, views, and understanding in American society).

36. *See* Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity,'* THE ATLANTIC (Apr. 29, 2015), http://www.theatlantic.com/politics /archive/2015/04/the-dangerous-doctrine-of-dignity/391796 [https://perma.cc/6LWU-MLL9].

37. Chris Green, *Symposium: "Oh, Well, We Know Better.,"* SCOTUSBLOG (June 26, 2015, 4:27 PM), https://www.scotusblog.com/2015/06/symposium-oh-well-we-know-better/ [https://perma.cc/A9SX-FZQL].

Critics knew that issues would arise for gay persons looking for rights *outside* of this context—that is, rights not grounded in that "enduring bond."[38] As Melissa Murray explained, "in a world where all couples have access to the most 'profound commitment,' there is no obligation to acknowledge or respect relationship statuses that are 'somehow less[ ]' than marriage."[39] Once marriage equality was attained, where could we go from there? What relationships—romantic or otherwise—would meet that high bar set by *Obergefell*? If marriage really was "keystone of our social order," it seemed that many would fall far below that bar.[40]

Notably, the difficulties of translating *Obergefell*'s success to other areas arose not only because it would be difficult to raise other rights to the same importance as marriage, but also because it highlighted the associational aspect of the so-called fundamental rights at the expense of the individuals for whom those rights were won.[41] As Keith Cunningham-Parmeter explains, the "benign imagery" of marriage, family, and the home allowed the Court to "emphasize the primacy of marriage without delving into more complicated issues of gender, sex, and sexuality."[42] In other words, the Court could easily defend the goodness of marriage, a nonthreatening and virtuous heterosexual institution, without having to defend homosexual individuals as a class.

However, as Cunningham-Parmeter further explains, this was not necessarily the Court's own doing, but was actually the result of conscious decision-making and strategy by advocates fighting for gay rights in the years leading up to *Obergefell*:

> [M]ovement lawyers won in court by presenting a "just like you" image of homosexuality to judges that focused on gay couples' long-term commitment, professional careers, and children. These "safe," undifferentiated images intentionally downplayed issues of sexuality, gender, and diversity within the gay community while placing the importance of marriage above other interests.[43]

Indeed, this "like-straight" concept of dignity was a prominent rhetorical strategy in many of the gay rights cases leading up to

38. *See* Obergefell, 576 U.S. at 666.

39. Murray, *supra* note 33, at 1244.

40. *See* Obergefell, 576 U.S. at 669.

41. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLORIDA L. REV. 1099 (2015).

42. *Id.* at 1103.

43. *Id.* at 1102 (internal citations omitted).

Obergefell.[44] Boiled down, the argument was this: gay people want the same things straight people do, therefore Equal Protection mandates that they be entitled to seek those same things which were already granted to straight couples. In the beginning years of the fight for rights in the sex and gender context, this was an effective strategy because it focused on the extension of equality in already acceptable contexts: those resistant to change were more likely to be receptive to arguments made on familiar terms, under familiar and relatable institutional norms. However, while this "assimilationist strategy"[45] allowed for important victories in and beyond the courtroom, it also set a precedent that the rights at issue were fundamental only in the *associational* sense, and only because society and courts characterized them as such. In other words, under this view, *Obergefell* did not dredge up new rights; it simply extended those already existing for heterosexual couples to gay couples.[46] As the majority opinion proclaimed, "[s]ame-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[47] By highlighting marriage at the expense of sex, *Obergefell* communicated that the right to marry should be granted to gay couples not because of their sexuality, but in spite of it.[48]

Again, because the normative power of this strategy comes from the "presumptive goodness"[49] of heterosexual institutions, the removal of those institutions from the debate poses problems for individuals arguing for equal rights in other contexts.[50] Without

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44. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("Persons in a homosexual relationship may seek autonomy for [marriage, procreation, and family] purposes, just as heterosexual persons do.").

45. *See* Susan Frelich Appleton, Obergefell's *Liberties: All in the Family*, 77 OHIO STATE L.J. 919, 924 (2016) (explaining that gay rights advocacy pursued an "assimilationist strategy" by "relying on narratives to highlight the similarities between the human qualities inherent in childrearing in stable marriage relationships and the comparable human qualities . . . inherent in stable homosexual relationships") (internal citations omitted).

46. *See* Marc Spindelman, *Surviving* Lawrence v. Texas, 102 MICH. L. REV. 1615, 1630 (2004) ("[T]he Court vindicates sexual liberty by recognizing heterosexuals' sexual rights and advances 'equality of treatment' by extending that liberty to lesbians and gay men. Rights that are made to the king's measure are fit for a queen.").

47. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

48. *See* Cunningham-Parmeter, *supra* note 41, at 1117.

49. *Id.*

50. *See* Kerry Abrams, *The Rights of Marriage:* Obergefell, Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 556 (2018) (explaining that Justice Kennedy's opinion, "taken alone, appears to put unmarried people and

marriage or family in the mix, arguments for expansive protections are difficult to tether to any one source of doctrine or opinion. Indeed, following 2015, opponents of such expansions were able to considerably narrow the reach of *Obergefell*'s holdings on dignity, equality, and intimacy.[51]

Unless, however, there was another way out. Perhaps *Obergefell*'s weaknesses could prove to be some of its greatest strengths? The stark absence of a formal equality approach, the deliberate quieting of traditional Equal Protection or Due Process scrutiny, allowed for other rhetorical possibilities to rise from between the lines. Justice Kennedy's refusal to pinpoint the precise source from which fundamental rights should flow permitted readers of the opinion to draw from some of the broader abstractions contained in the opinion in order to formulate a new strategy. Namely, a strategy devised from the concepts of liberty and identity.

Obergefell's theory of dignity was not solely bound up in the home, but also in the concept of identity. Dictum declared that the Constitution protects "personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs."[52] Indeed, the majority made clear that these "choices" were not choices at all: the opinion referred to the "immutable"[53] nature of sexual orientation and referenced the damaging effects of repressing the desire to make "truthful declaration[s] . . . of what [ ] in their hearts had to remain unspoken."[54] When Justice Kennedy embraced gay persons' "dignity in their own distinct identity," he spoke to a concept that carried rhetorical power beyond the marriage context—indeed, beyond the confines of any particular context at all.[55]

This idea, that there might exist a freedom to openly express *who you are*, carries a powerful force throughout the majority opinion, right from the very first line: that all people have a constitutionally protected right to "[d]efine and express their identity."[56] Kennedy is able to reach the conclusion that same sex couples are entitled to equal marriage protections from a number of premises,

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their children in jeopardy"). *See also* Murray, *supra* note 33, at 1257 ("If *Obergefell* stands for the proposition that 'love wins,' who loses?").

51. *See, e.g.*, Ramirez v. State, 557 S.W.3d 717, 720 (Tex. App. 2018) (declining to read *Obergefell* as determining that "intimacy, particularly sexual intimacy, between consenting adults is a fundamental right").

52. *See* Obergefell, 576 U.S. at 645.

53. *Id.* at 661.

54. *Id.* at 660.

55. *Id.*

56. *Id.* at 651-52.

including that choices regarding marriage are "inherent in the concept of individual autonomy" and that they "shape an individual's destiny."[57]

Sweeping statements like this, so seemingly untethered to legal doctrine, were the source of much controversy surrounding the opinion. But *Obergefell* was not a standalone manifesto on dignity and autonomy; its predecessors had been paving the way for some time. *Lawrence v. Texas* spoke of the "manifold possibilities" of liberty.[58] *Planned Parenthood of. Se. Pa. v. Casey* described the "[r]ight to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[59] *U.S. v. Windsor* not only discussed marriage—it "rhapsodized about it."[60] But *Obergefell* was perhaps the first case in which identity—as opposed to dignity, intimacy, and autonomy—was given the possibility of being treated as a source of freedom in its own right.

Thus, in the years following *Obergefell*, many advocates saw this as an opportunity to translate that freedom to new contexts.[61] Indeed, it was critical that they do so—if marriage was the sole fundamental right springing from the opinion, the "unique fulfillment to those who find meaning in the secular realm,"[62] there was nowhere else to go from there. *Obergefell* was a momentous victory for the gay rights community, but perhaps it could have meaningful reach beyond the altar. In other words, while *Obergefell* seemed, at least facially, to offer little hope for expectant plaintiffs outside of the marriage-rights context, the opinion's unwavering devotion to an amorphous concept of "liberty" opened the door for others to define not only what that liberty entailed, but from where that liberty came. After all, if rights can and do rise from "better informed

57. *Id.* at 665.

58. *See* Lawrence, 539 U.S. at 558 (holding unconstitutional a Texas statute that criminalized certain intimate homosexual sexual conduct).

59. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851, 877 (1992) (affirming women's right to choose an abortion before fetal viability and imposing an "undue burden" test on state regulation of that right).

60. Kyle Duncan, *Symposium: Overruling* Windsor, SCOTUSBLOG (June 27, 2015, 2:38 PM), https://www.scotusblog.com/2015/06/symposium-overruling-windsor/ [https://perma.cc/8T6E-BYNH] (citing United States v. Windsor, 570 U.S. 744 (2013) (holding that the section of the federal Defense of Marriage Act defining "marriage" and "spouse" to be limited to heterosexual couples violated equal protection and due process principles and concluding that the federal statute served no legitimate constitutional purpose).

61. *See, e.g.*, David B. Cruz, *Transgender Rights After* Obergefell, 84 UMKC L. REV. 693, 696 (2016).

62. *See* Obergefell, 576 U.S. at 656-57.

understanding[s],"[63] and not just ancient texts, there could be hope in expanding the reach of *Obergefell*'s liberty to other contexts.

Justice Kennedy's opinion had acknowledged that, despite the victories gay people had earned in recent years, there was still much more work to be done. He explained that, "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty." [64] Following 2015, the question would be this: was *Obergefell* simply a ticket good for one day, or could it be a path towards fulfilling that promise?

III.
BOSTOCK, TITLE VII, AND THE POWER OF IDENTITY RHETORIC

There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.[65]

In the wake of uncertainty following *Obergefell* regarding just how far its "liberty" principles could reach, there existed a need for advocates of LGBTQ+ rights to draw a connection between the claims that liberty gave rise to in the marriage context and what claims it gave rise to beyond that context. Specifically, the question of whether these principles could have any reach or relevance at all in the employment context had been left markedly unanswered.

In 2019, the Supreme Court heard three cases consolidated under Title VII of the Civil Rights Act of 1964, under which it is unlawful for an employer to fail or refuse to hire, fire, discriminate against, limit, segregate, or classify an employee in an adverse way "because of such individual's "race, color, religion, sex, or national origin."[66] The petitioner in *Bostock v. Clayton County*[67] and the respondents in *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*[68] and *Zarda v. Altitude Express*[69] (collectively, the "Employees") were individuals who were fired be-

63. *Id.* at 671.
64. *Id.* at 667.
65. FOUCAULT, *supra* note 1, at 27.
66. 42 U.S.C. § 2000e-2 (hereinafter "Title VII" or the "Act").
67. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *rev'd sub nom.* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).
68. Equal Emp't Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 560 (6th Cir. 2018), *aff'd sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C., 139 S. Ct. 1599, 1599 (2019).

cause of their LGBTQ+ status. The question before the Court was not whether the definition of the word "sex" itself explicitly included gender identity or sexual orientation, but whether discrimination on the basis of either constitutes *de facto* discrimination "because of . . . sex."[70]

In the over thirty-six *amicus curiae* briefs submitted to the Court in the months leading up to oral argument, the concept of identity was an indispensable part of advocates' rhetorical strategy. Identity was present in the briefs in two main forms: first, in what I call "inherent identity" arguments, which stressed LGBTQ+ identity as a "deeply felt"[71] sense of self and drew connections to other immutable characteristics protected by Title VII. Second, in what I call "expressive identity" arguments, which sought to recharacterize idiosyncratic choices regarding how one presents themselves to the world (through, e.g., clothing choice, voice modulation, *etc.*) as reflections of that deeply felt identity.

Perhaps these arguments proliferated because of *Obergefell*'s amorphous conceptualization of "liberty," perhaps in spite of it. Nevertheless, the *Bostock* briefs demonstrate the rhetorical power of using identity as a basis for legal rights: the idea that, when issues of identity are involved, the law protects individuals, not actions. For rights advocates, identity could be the necessary link that bridged the gap between behavior and the individual, action and actor. In that way, discourse was on the brink of a Foucauldian implantation, but it was unclear whether the Court's opinion would adopt this language, as it had done in *Obergefell*, or move completely away. In the end, it was the latter—an opinion almost completely devoid of identity language, instead employing the textual approach that was largely ignored by many *amici* for the Employees. However, before turning to the opinion itself, I first discuss the presence and power of identity arguments in the *Bostock* briefs.

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69. Zarda v. Altitude Express, Inc., 883 F.3d 100, 100 (2d Cir. 2018), *aff'd sub nom.* Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

70. Title VII. Interestingly, "sex" was added only two days before the Act's passage in the House of Representatives by an amendment offered by Rep. Howard Smith, who opposed the civil rights law, in order to "prevent discrimination against another minority group, the women. . . ." *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9(2) LAW & INEQ. 163, 163 (1991). Thus, it was almost certain that the definition of "sex," at least as originally contemplated by the enacting Congress, would not include sexual orientation or gender identity.

71. *See* InterACT Brief, *supra* note 15, at 7.

A. Inherent Identity Arguments

Under the first categorization, proponents of LGBTQ+ rights sought to show that sexual orientation and gender identity are immutable, intrinsic to individuality, part of one's "deeply felt identity and lived experience."[72] The rhetorical strengths of this argument are facially apparent. It focuses on the inseparable tie between one's understanding of their own identity and their ability to achieve a full and happy life. Words such as "immutable," "inherent," and "fundamental" appear throughout the briefs with powerful force, stressing that the issue is not about whether gay and transgender persons should have a statutorily protected right to expression or choice,[73] but about these persons' lived reality. Under this argument, identity is the direct source of the right—the right to *be*, in and of itself, is protected under Title VII's mandate.

InterACT, a nonprofit organization which advocates for intersex youth, explained in its *amicus* brief that "attempting to reduce sex to a function of genitalia, gonads, or chromosomes—while excluding one's deeply felt identity and lived experience from the calculus—is a fool's errand."[74] It refuted the Employers' contention that identity is "fluid" or malleable, explaining that "evidence shows that gender identity is a deep-seated, persistent trait that is fundamental to a person's sense of self and is evidenced by how they live their lives every day."[75] Likewise, the American Bar Association ("ABA") argued that "sexual orientation and transgender status form part of the immutable essence of an individual's being," and that "[d]iscrimination on that basis is destructive both of the individual and to society, especially one built upon the ideal of equal protection under the laws."[76] Inherent identity arguments thus shift the narrative focus from the Employers' disagreement with their employees' behavior to the plaintiff's identities themselves: for example, it is because of Gerald Bostock's status as a gay man that his employer fired him, not because of his participation in a gay recreational softball league. The target of the discrimination is identity, and because identity is an unalterable feature of the

72. InterACT Brief, *supra* note 15, at 7.

73. *But see* Part III(B), *infra* (arguing that the right to expression is fundamentally a right to identity as well).

74. InterACT Brief, *supra* note 15, at 7.

75. InterACT Brief, *supra* note 15, at 28–29.

76. Brief for the American Bar Association as Amicus Curiae in Support of the Employees at 26, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter ABA Bostock Brief].

human experience, the discrimination should be impermissible under Title VII.

Interestingly, this focus on "identity" and the "immutable" self was a stark departure from the ABA's past strategy. In 2015, the ABA's brief for *DeBoer v. Snyder*—the 2015 companion case to *Obergefell*—did not once mention the words "immutable" *or* "identity," despite gay rights being equally at stake.[77] It spoke of "families' health and well-being"[78] and the general effects of being denied the public and private benefits that come with marriage[79] (e.g., tax exemptions), but did not make any explicit—or, for that matter, implicit—identity arguments. This shift in rhetorical strategy demonstrates the ABA's attempt to deemphasize the factual elements that made *Bostock* markedly different from other gay rights cases (that is, a lack of marriage or family issues, per *Obergefell*) and from other Title VII cases (e.g., *Price Waterhouse v. Hopkins*,[80] which concerned explicit discrimination on the basis of gendered stereotypes). Thus, when one removes these factual disparities, the elements that remain are the "broad remedial purposes" for which Title VII was enacted: to prevent "discrimination based on the interaction of a protected aspect of an employee's identity."[81]

The inherent identity argument was particularly prevalent in the context of transgender rights. Many *amici* devoted the entirety of their briefs to explaining why transgender people do not—indeed, cannot—simply choose to be transgender. For example, the American Medical Association explained that transgender individuals have a "deeply felt, inherent sense" of their gender that does not conform to the gender they were assigned at birth, stressing that "[e]very person has a gender identity, which cannot be altered voluntarily or necessarily ascertained immediately after birth."[82] The primacy of identity as a grounding theme served to emphasize exactly what was at stake in these cases: rights which depend not on

77. *See* Brief of Amicus Curiae American Bar Association in Support of Petitioners, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-571) [hereinafter ABA DeBoer Brief].

78. ABA DeBoer Brief, *supra* note 77, at 19.

79. ABA DeBoer Brief, *supra* note 77, at 11–25.

80. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that discrimination for failing to conform to a gender stereotype constitutes discrimination because of sex under Title VII).

81. ABA DeBoer Brief, *supra* note 77, at 10.

82. Brief of the American Medical Association et al. as Amici Curiae in Support of the Employees at 14, 19, Bostock v. Clayton Cnty.,140 S. Ct. 1731 (2020) (No. 17-1618).

choice, association, or even on statutory text, but rights which flow inherently from the very fact of being human.

The inherency argument also allows connections to be drawn to the other protected categories of Title VII: namely, race. Both are immutable, inherent, fundamental to a person's lived experience. Indeed, a recurrent motif throughout many *amicus* briefs is the appearance of race analogies, not only in connection with early Title VII cases, but also landmark Substantive Due Process cases such as *Loving v. Virginia*.[83] For example, the ABA cited to *Loving* four times in its *Bostock* brief to show that, just as "equal application" of a law cannot justify discrimination based on race, so too can it not justify discrimination based on sexual orientation or transgender status.[84] The brief of LGBTQ+ Members of the Legal Profession and Law Students offered several analogies to race, attempting to broaden the Court's focus from the issue at hand—gay and transgender rights—to consider *all* of the protected categories of Title VII. It asked: "[c]an there be any doubt" about these cases?[85] If not, why should *this* case be any different?

American media outlets also invoked the development of civil rights for persuasive force. One argued that, just as Title VII has come to protect expansive categories of race, so too have "the definitions of gender and sexuality . . . evolved past a binary meaning."[86] Another explained:

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83. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that Virginia miscegenation statutes violated both the Equal Protection and Due Process Clauses, and that marriage restrictions based on race are unconstitutional). *See, e.g.*, Brief of Amici Curiae Muslim Bar Association of New York et al. in Support of the Employees at 12, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) (invoking *Loving* to show that, while it may be true that the enacting Congress in 1964 did not contemplate LGBTQ+ persons as protected by Title VII, neither did it contemplate that interracial couples could be protected when it inserted the word "race").

84. *See* ABA Bostock Brief, *supra* note 76, at 9, 11, 20, 21. Interestingly, the ABA cited *Loving* only once in its brief for DeBoer, despite the fact that *Loving* and *DeBoer* had an arguably clearer connection than *Loving* and *Bostock*: the freedom to marry.

85. Brief of Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Members of the Legal Profession and Law Students as Amici Curiae in Support of the Employees at 4, 10, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (No. 17-1618) ("This behavior and identity policing based on sex would not be permitted if it were based on any other protected characteristic under Title VII, and should not be permitted when based on sex either.").

86. Carliss Chatman, *Men Get Stereotyped Too. It's Time the Court Acknowledges It*, SLATE (Oct. 7, 2019, 4:38 PM), https://slate.com/news-and-politics/2019/10/title-vii-supreme-court-masculinity-stereotypes.html [https://perma.cc/7NTZ-DT5V].

> If you're tempted by the thought that firing a person for having a same-sex partner doesn't discriminate on the basis of sex because the employer would fire *people of any sex* who have same-sex partners, ask yourself whether a law prohibiting *people of any race* to marry outside their racial groups, or to ride in a railroad car designated for people of a different race, discriminates on the basis of race. (It does.)[87]

Of course, the use of race analogies was met with ample criticism—not only from the opposing side, but also from supporters of LGBTQ+ rights.[88] Some argued that citations to *Loving* and other civil rights cases were wholly inappropriate in the context of sexual orientation, not only because of the inherent differences between what constitutes sex- and race-based discrimination, but also the differences between the lived experiences of black and gay persons. As Professor Russell Robinson explains, it can be deeply harmful to make comparisons between differently situated communities, especially ones that paint the picture of a "postracial" America in which "Blacks are doing 'quite well,'" but gay persons are still struggling to achieve legal equality.[89] This picture is damaging not only on a discoursal level, but also because it risks exhausting or diverting civil rights resources away from traditional constituencies that are far away from achieving parity in society.[90]

Further, apart from the problematic nature of comparing differently situated minority groups, many point to the fact that emphasizing the immutable nature of gay or transgender identities runs the risk of excluding those that fall in between and outside of this argument, namely, bisexual persons and other minority groups

87. Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism*, POLITICO (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850 [https://perma.cc/FQN2-J287].

88. *See, e.g.*, Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167, 190–91 (2019) (warning against comparing LGBTQ+ struggles to those faced by racial minorities and calling such a comparison "absurd").

89. Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1055 (2014) (citation omitted).

90. *See* JANET E. HALLEY, *"Like Race" Arguments*, *in* WHAT'S LEFT OF THEORY? NEW WORK ON THE POLITICS OF LITERARY THEORY 40, 58 (Judith Butler et al. eds., 2000) (describing this risk as including both "hard" resources, like jobs or police funding, and "soft" resources, which include a "social/cultural appetite for antidiscrimination").

without the same characteristics.[91] As Janet Halley has explained, "the immutability argument . . . [leaves] bisexuals out in the cold: after all, they can switch."[92] This alienation thus "displace[s]" a core group of persons for whom gay and transgender persons—and their advocates—purport to speak.[93]

Thus, as powerful a strategy as it can be to invoke immutability and inherency as bases for equality claims, it is imperative that they are not the *only* bases on which the claims rest, lest important groups be left out of the conversation, and ultimately, the law. It becomes increasingly important to both emphasize the inherent nature of identity *and* draw attention to the individualistic nature of that identity; that is, the fact that the identity belongs to a person, not just a category. As Ruth Coker wrote, "[c]ategories suggest stasis[,] whereas storytelling reflects our changing life experiences."[94] Professor Robinson, too, has suggested that LGBTQ+ advocates should avoid "like race" arguments that focus on black experiences as necessary for the legal claim and instead provide "detailed, compelling accounts of antigay discrimination, which can stand on their own footing."[95] Indeed, individual storytelling serves as an important component of identity arguments, explored below.

B. Expressive Identity Arguments

Where the first form of identity argument focuses on the right to define one's own identity, the second emphasizes the right to *express* that identity. To be clear, the argument is still an identity argument—the idea here is that the right to expression *is* a right grounded in identity. In other words, the difference between this and the inherent identity argument discussed *supra* is that the former *distinguishes* the right to "be" from the right to choose, whereas the latter argues that the right to choose is inextricably intertwined with the right to be. Expressive identity arguments thus focus

91. *See* Robinson, *supra* note 89, at 1058 (arguing that "installing African American-like oppression as a prerequisite unnecessarily fences out other worthy civil rights claimants, such as people with disabilities").

92. *See* HALLEY, *supra* note 90, at 53.

93. *Id. See also* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (exploring the motivations shared by self-identifying homosexuals and heterosexuals to erase bisexuality from contemporary political and legal discourse); RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) (arguing that "people living the gap are often ostracized by all the communities to which they might belong") [hereinafter COLKER, HYBRID].

94. COLKER, HYBRID, *supra* note 93, at 19.

95. *See* Robinson, *supra* note 89, at 1058.

mainly on how discrimination based on non-conformance to perceived gender norms constitutes discrimination "because of . . . sex" because it holds people to expectations that are antithetical to their own deeply felt personal identities. In other words, to force people to choose between expressing who they are and keeping their jobs is unlawful, not because there is an inherent right to dress or act a certain way, but because those decisions reflect a deeper right to *be*.

The main strength of this rhetorical strategy is that it roots expressive behavior in the idea of sex itself rather than in the concept of idiosyncratic choice. The argument that people should be free from normative judgments about how men and women *should* behave heightens the stakes in a similar way to the types of identity arguments discussed in Part A, by drawing the Court's attention to the human lives bound up and implicated by the law. In this way, expressive behaviors such as clothing choices become *more* than mere decisions about what to wear—they actually constitute outward expressions of identity.

As an initial note, the fight to protect what is perceived as "voluntary" choices has been a part of modern sexuality and gender discourse for quite some time. Indeed, many scholars beyond the legal context have been urging a concept of gender itself that is inextricably tied to conscious decisions about appearance and action. Judith Butler's "performativity" model is perhaps the most influential example of this.[96] Butler, an American gender and literary theorist, famously argued that gender is constituted through series of repetitive acts and known only through communicative behaviors, appearances, and choices.[97] However, because society depends upon a model of gender "essentialism"—i.e., the idea that gender pre-exists and defines the self in a way that is binary and intractable—those who "perform[ ] . . . wrong" are punished, whereas "performing it well provides the reassurance that there is an essentialism of gender identity after all."[98]

It is obvious why, then, some legal scholars have explicitly sought to translate Butler's argument into the Title VII context by

96. *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2nd ed., 1999). As a caveat, Butler's work on performativity is extremely complex, and I cannot purport to capture its intricacies in just a few sentences. For my purposes, however, I use Butler's theory merely to demonstrate the foundations of a performative gender model and the concept that actions and behaviors are intrinsically intertwined with conceptions of sex and gender.

97. Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATER J. 519, 526 (2009).

98. *Id.* at 528.

advocating for a concept of "sex" which includes its performative aspects.[99] Indeed, the performativity model operates as an important recognition that biological sex is not wholly determinative of gender identity, and in fact, the performative features of gender—including conscious behavioral choices—are at least equally, if not more, imperative in establishing a concept of identity.[100]

Discrimination against LGBTQ+ persons is often rooted in societal expectations of how men and women "should behave" (i.e., that men should behave masculinely and women femininely).[101] As some *Bostock amici* noted, "[e]xpectations like these have long been deemed constitutive of male and female identity, and have undergirded a host of assumptions about the purportedly distinct and complementary roles of men and women in society."[102] Thus, discrimination against LGBTQ+ employees because of their perceived defiance of gender norms constitutes discrimination "because of . . . sex."

The linking of sex and LGBTQ+ identity in this way is an important version of the identity argument because it characterizes behavioral choices as *reflections* of something inherent or immutable. Therefore, discrimination against these behaviors must logically and inevitably be *because of* the underlying immutable trait, which must be unlawful under Title VII. *Amici* Legal Aid explicitly drew out this idea in its brief, explaining that discrimination against those who "fail to act and/or identify with the sex they were assigned at birth—is no different from the discrimination directed against [the plaintiff] in *Hopkins* who, in sex-stereotypical terms, did not act like a woman."[103] Indeed, this sort of gender policing is even more prevalent for transgender Americans, as "[a] person is

99. *See, e.g.*, Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1176–79 (2004) (using Butler's model to argue for a redefinition of race and ethnicity under Title VII to include both biological and "performed" features associated with race). *See also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 872–75 (2002) (advocating for what he calls the "weak performative model," which suggests that statuses can be partially constituted by acts; that is, identity may be constituted both by biological and performative influences).

100. *See* Camille Gear Rich, *supra* note 99, at 1179.

101. *See* Brief of Anti-Discrimination Scholars as Amici Curiae in Support of the Employees at 12, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Anti-Discrimination Scholars Brief].

102. Anti-Discrimination Scholars Brief, *supra* note 101, at 3.

103. *See* Brief for the Legal Aid Society as Amicus Curiae in Support of the Employees at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Legal Aid Brief]; Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989) (plaintiff was an employee at Price Waterhouse who was allegedly denied a

defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[104]

As Keith Cunningham-Parmeter noted, a discrimination theory which focuses on sex (rather than on perceived behaviors) "draws critical attention to the fact that any regulation of sexual activity . . . works to reinforce gender stereotypes about how men and women ought to behave."[105] Prior to the *Bostock* decision, Title VII's "heteronormative underpinnings" were revealed by what Cunningham-Parmeter characterized as an inverse relationship between the representation of gay persons in the marriage decisions[106] and in Title VII: "[w]hile the marriage cases have expanded gay rights without talking about gay sexuality, the employment cases talk about gay sexuality without expanding rights."[107] In other words, the constitutional expansion of gay rights in *Obergefell* and its predecessors was predicated on the goodness of heterosexual institutions (i.e., marriage) without focus on the sexual orientation aspect of the case, leading to the myriad issues explored in Part II, *supra* (namely, the trouble with extending *Obergefell*'s holding to contexts outside of marriage). And yet in parallel, legal developments in the Title VII context were largely unhelpful for the gay rights movement because they prohibited only discrimination against a certain type of homosexuality, which Cunningham-Parmeter refers to as "predatory, aggressive, and compulsive" homosexuality, leading to a narrow, reductive characterization of homosexual discrimination in the workplace that served only to reinforce cultural stereotypes about gay people without actually doing the work to expand legal protection.[108]

Thus, expressive identity arguments attempt to merge, in a way, the holdings of the marriage decisions (and the fundamental

promotion because of her "masculine" and "hard-nosed" personality (internal quotation marks omitted)).

104. Legal Aid Brief, *supra* note 103, at 6 (quoting Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011)).

105. Cunningham-Parmeter, *supra* note 41, at 1105.

106. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003). *See also* Kyle Duncan, *Symposium: Overruling* Windsor, SCOTUSBLOG (June 27, 2015, 2:38 PM), https://www.scotusblog.com/2015/06/symposium-overruling-windsor/ [https://perma.cc/8T6E-BYNH] ("*Windsor* did not just mention state authority over marriage in a footnote. *Windsor* rhapsodized about it.").

107. Cunningham-Parmeter, *supra* note 41, at 1117.

108. *Id.* at 1119. Cunningham-Parmeter discusses the limited protections afforded by the holdings in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that Title VII prohibited male-on-male sexual harassment) and *Hopkins*.

rights which flowed from them) with the goals of Title VII, which are to protect against discrimination in the workplace because of a person's identity. These arguments take the precedent set by the Court in both of these areas and draw a logical extension from the right to refuse conformance gender norms and expectations to the right to make conscious choices which are reflective of one's identity. These arguments simultaneously challenge traditional conceptions of what "real" men and women are and argue that the right to live one's life in accordance with his or her deeply felt identity includes the right to defy those conceptions.[109]

Both inherent and expressive identity strategies throughout the *Bostock* briefs placed identity at the forefront of the debate, not only in an effort to raise the stakes of the outcome, but to deliberately divert the possibility of a decision based solely on principles of statutory interpretation. Indeed, many *amici* turned towards an analysis of the textual commands of Title VII as one of the last sections in their arguments.[110] In fact, some *amici* did not discuss the statute, its legislative history, or its legal predecessors at all, instead focusing purely on the detrimental effects of workplace discrimination on LGBTQ+ persons.[111] Others discussed the "impossibility" of a situation in which the employee's sex is *not* taken into account in an employer's discriminatory action, but did not attempt to use traditional methods of statutory interpretation to make that point.[112]

On the other side of the debate, however, this was not the case.

109. *See* Chatman, *supra* note 86.

110. *See, e.g.*, Brief of Amici Curiae Impact Fund et al. in Support of Petitioner in No. 17-1618 and Respondents in Nos. 17-1623 & 18-107 at 23–24, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618). Indeed, it is not until the twenty-second page that InterACT turned towards a construction of "sex" as a matter of statutory interpretation—a mere fraction of its greater argument.

111. *See, e.g.*, Brief of Amici Curiae The Women's and Children's Advocacy Project et al. Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Women's and Children's Advocacy Project Brief]; Brief of the Southern Poverty Law Ctr. et al. as Amici Curiae in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618); Brief of Amici Curiae Business Orgs. in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

112. *See, e.g.*, Brief of GLBTQ Legal Advocates & Defenders et al. as Amici Curiae in Support of the Employees, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

C. The Employers' Argument

Amici for the Employers placed a far greater emphasis on traditional canons of statutory interpretation. They sought to show that this was a straightforward case of ordinary meaning, historical understanding, and legislative intent.[113] For example, *amici* Liberty Counsel, in its brief, provided an excess of interpretative canons it claimed worked in the Employer's favor, including *noscitur a sociis* ("a word is known by the company it keeps"), the canon against surplusage (construe against rendering words "superfluous, void, or insignificant"), and of course, the canon of ordinary meaning (explaining that "the ordinary meaning of 'sex' does not subsume within it "sexual orientation").[114] The American Public Philosophy Institute, too, argued that "it is a well established canon of statutory construction that the meaning of a legal text includes the well established legal meaning of any of its words or phrases."[115] The Public Advocate brief simply listed, in bullet-points, how the Second Circuit *Zarda* opinion violated several canons, including "the supremacy-of-text principle; the ordinary-meaning canon; the fixed-meaning canon; the omitted-case canon; the general-terms canon; and the grammar canon."[116] The list goes on.[117]

It was clear that gay- and transgender-rights advocates worried that, if the Court's decision *were* to rely solely on interpretative methods, the argument would weigh overwhelmingly in favor of the Employers. Indeed, some lower courts had already acknowledged that "it is not even remotely plausible that in 1964 . . . a reasonable person competent in the English language would have understood that a law banning employment discrimination 'because of sex' also

113. *See, e.g.*, Brief of Amicus Curiae Liberty Counsel in Support of Clayton Cty., Altitude Express, and Ray Maynard at 21, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618) [hereinafter Liberty Counsel Brief] (arguing that "except for religion, which has its own historical basis for inclusion in Title VII, the categories presently listed include immutable characteristics over which individuals have no choice and cannot change. To interpret 'sex' to include 'sexual orientation' would ignore the cannon giving items grouped in a list as related in some way.").

114. Liberty Counsel Brief, *supra* note 113, at 17–19.

115. Brief of Amicus Curiae American Pub. Philosophy Inst. in Support of Employers at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

116. Brief Amicus Curiae of Public Advocate of the United States et al. in Support of the Employers at 6, Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020) (No. 17-1618).

117. Other *amicus* briefs discussing canons of interpretation include briefs from, *e.g.*, Members of Congress, Religious Freedom Institute's Islam & Religious Freedom Action Team, Council for Christian Colleges, Foundation for Moral Law, and more.

banned discrimination because of sexual orientation."[118] Thus, a solely textual or originalist inquiry was thought by some to be the nail in the coffin for the Title VII plaintiffs' claims.

Beyond the courthouse walls, it seemed impossible to predict how the Court would rule. On one hand, public opinion seemed to overwhelmingly support a finding in favor of the Employees.[119] On the other, with a conservative-leaning bench, a victory for LGBTQ+ rights seemed unlikely, particularly as transgender issues had only recently begun to make meaningful waves in courts.[120] Some speculated that the Court would make a decision informed by societal attitudes, leaving the precise definition of the term "because of . . . sex" for another day.[121] Others observed that this was a case in which Justices' ideologies were "butting up against the methodological commitments of those same justices."[122] Namely, unpredictability seemed most to stem from uncertainty with regard to how the newest additions to the Court (Gorsuch and Kavanaugh) would rule. Justice Gorsuch, in particular, was speculated to be the key vote in the case: would he remain committed to rigid principles of textualism, or take into consideration the "massive social upheaval" that could result from the decision?[123]

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118. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 114 (internal citation omitted). *See also* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("[T]o claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

119. *See, e.g.*, Vanita Gupta and Sharon McGowan, *Symposium: Let's Talk About Sex: Why Title VII Must Cover Sexual Orientation and Gender Identity*, SCOTUSBLOG (Sept. 5, 2019, 3:53 PM), https://www.scotusblog.com/2019/09/symposium-lets-talk-about-sex-why-title-vii-must-cover-sexual-orientation-and-gender-identity/ [https://perma.cc/J8YL-FC2T].

120. *See* Masha Gessen, *The Supreme Court Considers L.G.B.T. Rights, But Can't Stop Talking About Bathrooms*, THE NEW YORKER (Oct. 9, 2019), https://www.newyorker.com/news/our-columnists/the-supreme-court-considers-lgbt-rights-but-cant-stop-talking-about-bathrooms[https://perma.cc/56JG-K37N] (stating that the hearings for the Title VII cases "provided a snapshot of the current moment"). *See also* Alexander Chen, *The Supreme Court Doesn't Understand Transgender People*, SLATE (Oct. 18, 2019, 3:11 PM), https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html [https://perma.cc/AS27-XQW8] (citing the Court's "palpable discomfort" with transgender people and likening it to "its discomfort about gay people in 1986").

121. InterACT Brief, *supra* note 15, at 30.

122. Emma Green, *The LGBTQ-Rights Movement Is Changing, and So Is the Supreme Court*, THE ATLANTIC (Oct. 8, 2019), https://www.theatlantic.com/politics/archive/2019/10/supreme-court-lgbtq/599608/ [https://perma.cc/WRF7-3XAN].

123. *See Are We All Textualists Now?*, SCOTUSTALK (Oct. 17, 2019), https://www.scotusblog.com/2019/10/are-we-all-textualists-now-lgbt-cases/ [https://perma.cc/4UAY-N4US].

As it turns out, it was both—and neither.

IV.
THE OPINION: A TEXTUALIST APPROACH TO EQUAL RIGHTS

We're all textualists now.[124]

Bostock was a landmark victory for LGBTQ+ rights, a ruling that declared discrimination on the basis of sexual orientation or gender identity to be unlawful under Title VII. It was a "simple and profound victory,"[125] one that was decidedly "the most consequential in the decades-long history of the American L.G.B.T.Q. movement."[126]

But what came as a surprise to some was that the author of this landmark opinion turned out to be the first Trump-appointed justice to the court, Justice Gorsuch. Perhaps an even greater surprise was that textualism provided the basis for the decision. In the end, all nine justices seemed to agree with Gorsuch that the "written word is the law"[127]—here, the text of Title VII. Only six, however, agreed that it meant what Gorsuch said it meant.

In the initial pages of the opinion, Gorsuch sets the parameters of the Court's approach: first, it must "orient [itself] to the time of the statute's adoption" and assess the statutory terms on their own footing before applying them to the case at hand.[128] From there, the application was straightforward: "sex" at the time of Title VII's enactment meant biological roles determined by birth.[129] The term "because of" legally connotes a "but-for" test: the Court should

124. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* at 8:29 YouTube (Nov. 25, 2015), https://www.youtube.com/watch?v=DPEtszFT0Tg [https://perma.cc/Q8F6-ETD5] ("I think we're all textualists now, in a way that just was not remotely true when Justice Scalia joined the bench.").

125. Adam Liptak, *Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules*, N.Y. Times (June 15, 2020), https://www.nytimes.com/2020/06/15/us/gay-transgender-workers-supreme-court.html [https://perma.cc/Q8F6-ETD5].

126. Masha Gessen, *The L.G.B.T.Q.-Rights Movement Wins Its Biggest Supreme Court Victory*, The New Yorker (June 15, 2020), https://www.newyorker.com/news/our-columnists/the-lgbtq-rights-movement-wins-its-biggest-supreme-court-victory [https://perma.cc/6A59-QFAA].

127. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

128. *Id.* at 1738.

129. *Id.* at 1739.

"change one thing at a time and see if the outcome changes."[130] In each case before the Court, the employee's sex was a but-for cause of the adverse action taken against them: for example, if Gerald Bostock was a woman who had been attracted to men, he would not have been fired.[131] The conclusion: "[s]ex plays a necessary and undisguisable role" in an employer's decision to fire an employee on the basis of sexual orientation or gender identity—"exactly what Title VII forbids."[132]

Some, however, were not so readily convinced. From the dissent, Justice Alito wrote that the "arrogance" of the majority's argument was "breathtaking."[133] He took issue with nearly every aspect of the opinion, including its lengthy discussion of matters which were "beside the point,"[134] its employment of "strange" and "illogical" hypotheticals,[135] and its failure to address the ramifications the opinion would surely have on the freedoms of religion and speech.[136] But Alito's primary contention with the majority opinion was its use of textualism to reach the conclusion that Title VII, by its own terms, protects against discrimination of gay and transgender persons. Specifically, he wrote:

> 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.[137]

Gorsuch's use of textualism to reach his decision was met with equal controversy from conservatives beyond the courtroom. One

130. *Id.* (citing University of Tex. Southwestern Medical Center v. Nassar, 570 U.S. 338, 350 (2013)).

131. *See id.* at 1741.

132. *Id.* at 1737. It is important to note, however, that the Court made clear that its approach was a direct application of statutory interpretation principles. In other words, its parameters were explicitly limited to the statute at hand—it did not create any other categorical or protection for sexual orientation or gender identity.

133. *See* Bostock, 140 S. Ct. at 1757 (Alito, J., dissenting).

134. *Id.* (referring to the majority's discussion of sole versus primary motivation, individual versus group rights, etc., to which Alito says, "[a]ll that is true, but so what?").

135. *See id.* at 1759–60.

136. *See id.* at 1782–83.

137. *Id.* at 1755–56.

commentator wrote: "[w]here statutory interpretation is concerned, per *Bostock*, a judge should effectively set aside his or her law school education and retreat to the lessons of high school English class."[138] Another wrote that, as a matter of textualism, the conclusion that Title VII protects against discrimination on the basis of sexual orientation or gender identity is "analytically untenable."[139] The majority had declared that, "[a]t bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings."[140] But if it really were as straightforward as Gorsuch claimed it to be, why was his application of it so controversial?

Notably, the opinion was nearly completely devoid of identity language; indeed, its rigid adherence to textualism leaves no room for anything else. Gorsuch goes out of his way to avoid nearly any non-textual analysis, stating at the very beginning of the opinion that the Court would "proceed on the assumption that 'sex' signified what the employers suggest," that is, sex as defined at birth.[141] Thus, in a single line, Gorsuch disregards hundreds of pages of *amicus* briefs which centered on challenging that very notion. The opinion says nothing about equality, individual rights, or the role identity might play in either—it simply states what the statute says and interprets it. Nothing more, nothing less.

The absence of these elements, however, did not go unnoticed, particularly by the dissenting justices. Justice Alito noted that, while the majority chose to rely solely on textualism for the basis of its opinion, "several other arguments figure prominently in the decisions of the lower courts and in briefs submitted by or in support of the employees," particularly the role of sex stereotypes and the use of race analogies, which he briefly addresses "for the sake of completeness."[142] Additionally, while the majority does declare that "homosexuality and transgender status are inextricably bound up with sex,"[143] he notes that it makes this point "more or less in passing."[144] Justice Alito's issue is not only with the majority's brevity on

138. Jonathan Skrmetti, *Symposium: The Triumph of Textualism: "Only the Written Word is the Law"*, SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law/ [https://perma.cc/KGS3-Z9FX].

139. Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 167 (2020).

140. *See* Bostock, 140 S. Ct. at 1743 (majority opinion).

141. *Id.* at 1739.

142. *Id.* at 1763 (Alito, J., dissenting).

143. *Id.* at 1742 (majority opinion).

144. *Id.* at 1760 (Alito, J., dissenting).

this point, but he questions the very existence of the assumption itself: "[i]t is curious to see," he says, "in an opinion that purports to apply the purest and highest form of textualism."[145]

Further, where Gorsuch deliberately avoids discussion of the implications the decision might have in contexts beyond the workplace, both Alito and Kavanaugh note the potential for far-reaching consequences in other areas, namely, the area of constitutional law. Alito cautions that *Bostock* will "exert a gravitational pull in constitutional cases" because it may be used as a ground for elevating homosexual and transgender persons to the heightened scrutiny reserved for sex-based classifications under Equal Protection review.[146] Kavanaugh, too, draws an explicit connection, but focuses on the history of constitutional precedents, explaining that "[a]ll of the Court's cases from *Bowers* to *Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination."[147] In other words, if, as the majority claimed, the constitutional prohibition on sex discrimination covered sexual orientation too, the Supreme Court had taken a wildly convoluted route towards the vindication of gay rights in those cases (where the Court could have simply held, as a blanket rule, that sexual orientation discrimination *is* sex discrimination).

And to some extent, that's true. If *Obergefell* had simply declared discrimination on the basis of sexual orientation to be unconstitutional, Gerald Bostock would perhaps never have had to bring his case in the first place. Nor would there still be hundreds of other cases pending in lower courts, fighting to have the judicial system declare acts of discrimination unlawful in contexts which lie beyond the reach of Title VII. Textualism won this battle, but the war is not yet close to over—LGBTQ+ rights advocates must continue to challenge discrimination in its manifold micro-contexts.

With a shifting composition of the Supreme Court and an ever-changing sociopolitical climate, it is impossible to say whether *Bostock* signals the rise of an interpretive method under which time-worn texts may be used to further progressive agenda, or whether it is merely the product of societal pressure and changing attitudes. For some, *Bostock* presents the opportunity to reclaim interpretive methods which have been traditionally used to defend the status

145. *Id.* at 1761.

146. *See* Bostock, 140 S. Ct. at 1783.

147. *Id.* at 1833 (Kavanaugh, J., dissenting).

quo.[148] For strict textualists, however, *Bostock* threatens to tear down the safeguards in place that constrain judicial activism and inhibit expansive readings of statutory text.[149] The risk posed by an equality regime which relies solely on textualism then, is the apparent possibility for either outcome to happen.

As Professor Katie Eyer explains, "[b]oth textualism and originalism can be infinitely malleable when only one side of the argument claims the authority to define their contours."[150] This is both the beauty and danger of any interpretive method: its pliability, the flexible nature with which it can be manipulated to conform to either side of an argument. Even ostensibly rigid approaches like textualism or originalism can be molded to an extent to reach conclusions that were unmistakably *not* considered by the writers of the original text—just look at the case in point. The *Bostock* opinion maintains that "[j]udges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."[151] But is that not what all interpretive methods demand? Even a textualist inquiry requires an extent of guesswork about what exactly the words of the statute mean, what the writers intended they mean, and ultimately, what they *should* mean. Regardless, whether the Court will continue to follow this approach is a question that will only be answered with time.

Thus, we find ourselves once again in an uncertain jurisprudential territory we found ourselves in following *Obergefell*, but at the opposite extreme. At least for the time being, the Court seems to have rejected the course set by earlier sexual orientation cases—a course that gradually developed an arsenal of fundamental rights from extra-textual, extra-legal considerations of dignity, autonomy, and identity—to embrace an approach that considers only the

148. *See, e.g.*, Sarah Rice, *Symposium: The Strength of the Written Word Fulfills Title VII's Promise*, SCOTUSBLOG (June 15, 2020, 6:32 PM), https://www.scotusblog.com/2020/06/symposium-the-strength-of-the-written-word-fulfills-title-viis-promise/ [https://perma.cc/5MZ5-EPEP] ("The opinion . . . fulfills the best promises of textualism.").

149. *See* Nelson Lund, *supra* note 139, at 163 ("The unacknowledged theory underlying the result in *Bostock* is that statutory language can simply be declared unambiguous so long as the imputed meaning is not linguistically impossible. This form of textualism thus operates as a super trump card.").

150. Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualism-and-lgbtq-rights/ [https://perma.cc/39VE-MNPU].

151. *See* Bostock, 140 S. Ct. at 1754 (majority opinion).

words of the text itself. Perhaps, following *Bostock*, discourse will see a shift in the way cases are discussed, argued, and ultimately won. Perhaps rights advocates will once again develop a rhetorical strategy that reflects the shift made to identity arguments following *Obergefell*. Now though, rather than asking what rights might spring from the concept of identity, they should ask what else can be found between the lines of statutory text. If, as Justice Kagan recently remarked, we really are "all textualists now,"[152] then perhaps this is the beginning of a new era, or perhaps *Bostock*, too, was a ticket only good for one day.

V.
CONCLUSION: THE FUTURE OF IDENTITY RHETORIC

> *We tell [sex] its truth by deciphering what it tells us about that truth; it tells us our own by delivering up that part of it that escaped us.*[153]

Was *Obergefell* simultaneously the rise and fall of identity rhetoric? Did it both usher in a rhetorical strategy centered on the primacy of identity and at the same time, demand that jurisprudence step back into more concrete methods of analysis lest it go too far? Undoubtedly, the prevalence of identity arguments in the discourse surrounding the Title VII cases was influenced by the trajectory of fundamental rights cases concerning sex, gender, and sexual orientation leading up to the 2019 decision. Without *Obergefell* and its predecessors, rights advocates could not have cited the Supreme Court of the United States in their proclamation that, "[w]hen an individual or group is excluded from equal protection of laws that preserve basic human rights, they suffer injury to their dignity, autonomy, and humanity."[154]

And yet, while *Obergefell* opened the door to that promise, it ultimately failed to fulfill it by only vaguely reaching at the heart of the issue: identity. At surface level, Justice Kennedy's majority opinion had warned against narrow readings of fundamental rights, proclaiming that "*Loving* did not ask about a 'right to interracial marriage';[155] *Turner*[156] did not ask about a 'right of inmates to

152. Harvard Law School, *supra* note 124.

153. FOUCAULT, *supra* note 1, at 69–70.

154. Women's and Children's Advocacy Project Brief, *supra* note 111, at 5 ("Civil rights laws are designed to promote the unifying and universal values of equal dignity and treatment") (citing Heart of Atlanta Motel v. United States, 379 U.S. 241, 291 (1964)).

155. Obergefell v. Hodges, 576 U.S. 644, 2602 (2015).

marry'; and *Zablocki*[157] did not ask about a 'right of fathers with unpaid child support duties to marry," but rather that each case considered the right in its "comprehensive sense, asking if there was a sufficient justification for excluding the relevant class"—i.e., gays and lesbians—from the full protection of the law.[158] Clearly, the opinion hinted that discriminatory treatment of LGBTQ+ persons as a class was unconstitutional, but never explicitly stated so.[159] Thus, by too broadly generalizing about marriage, liberty, and identity, *Obergefell* allowed others to narrow those rights themselves.

In this way, *Obergefell* simultaneously went too far, and not far enough. It went too far beyond the formal equality regime laid down by Supreme Court precedent by employing the type of lyrical language that many viewed to be discrediting to the legal substance of the decision. And yet, it did not go far enough to actually achieve what it seemed to want to achieve: a "full promise" of true equality, a promise that could only be fulfilled by fully bridging the gap between action and actor, between behavior and identity. Did *Bostock* make the same mistake?

Of course, *Bostock* was nonetheless an unequivocal victory for the gay- and trans- rights community, and it was won through an opinion void of any identity language at all. The inquiry, the analysis, and the decision rested solely on just three words: "because of sex." For a majority of the Court, it was enough to say that those words protected discrimination in the workplace against gay and transgender persons—no more, no less. I argue only that, if *Obergefell* had more formally and unambiguously stated that identity was at the heart of its liberty rights, and that person, not conduct, was protected under the law, the *Bostock* opinion may have looked much different.

Thus, the gap between actor and action remains open, at least for now. LGBTQ+ advocates must continue to fight for the very

156. Turner v. Safley, 482 U.S. 78, 81 (1987) (holding that Missouri prison regulations restricting inmates from marrying without prison superintendent permission violated their constitutional right to marry).

157. Zablocki v. Redhail, 434 U.S. 374, 377 (1978) (holding that Wisconsin statutes requiring a court order prior to receiving a marriage license and prohibiting marriage where individuals were delinquent in child support payments violated the constitutional right to marry).

158. *See* Obergefell, 135 S. Ct. at 671.

159. *See generally* Katie Eyer, Brown*, Not* Loving*:* Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L. J. F. 1, 2 (2015) (arguing that *Obergefell* should have institutionalized a "formal equality" regime under which discrimination against a group is presumptively unlawful, and that the resulting "doctrinal uncertainty" would pose real danger to the expansion of gay rights).

specific freedoms that arise in a vast array of societal contexts—beyond the bedroom, beyond marriage, and now, beyond the workplace. Perhaps, then, equality will not be achieved through a Foucauldian discursive explosion, but through *implosion*: through scatterings of specific, narrow, peripheral rights won in individual victories, through standalone cases and decisions that accumulate to form a bigger picture, one which ultimately reveals the kind of unitary equality for which we have been working all along.

Perhaps, too, the door to making expansive, explicit identity-based arguments is closed for now. Yet, identity has always found a way to permeate discourse—whether it does so explicitly and loudly, as it did in *Obergefell*'s declaration of gay persons' right to "define and express their identity,"[160] or whether it does so almost imperceptibly, appearing as fleetingly as *Bostock*'s assumption that "homosexuality and transgender status are inextricably bound up with sex."[161] As Justice Gorsuch observed at the beginning of his opinion: "small gestures can have unexpected consequences."[162] What consequences will follow from here is a question for tomorrow.

160. *See* Obergefell, 576 U.S. at 651-52.
161. Bostock v. Clayton Cnty., 140 S. Ct. 1731,1742 (2020).
162. *Id.* at 1737.

SECONDARY PROSECUTORS AND THE SEPARATION-OF-POWERS HURDLE

*JONATHAN REMY NASH**

This Essay uses the New York Court of Appeals' recent decision in People v. Viviani *as a lens through which to examine secondary prosecutors—that is, prosecutors other than the locally elected district attorney—and state constitutional separation-of-powers doctrine. The* Viviani *court correctly found unconstitutional a state statute that vested concurrent prosecutorial power (with respect to cases alleging the abuse of people with special needs) in a special prosecutor appointed by the governor, and correctly concluded that the statute could not accommodate a saving construction that would have validated special prosecutions upon the consent of the relevant district attorney.* Viviani *appropriately leaves open the possibility of a revised statute that would allow for a special prosecutor upon such consent. Greater emphasis on the value of democratic accountability would have made the value of the consent clearer.*

Moving beyond Viviani*, this Essay considers a taxonomy of settings in which a secondary prosecutor might be appropriate. Consent becomes irrelevant where the district attorney is unavailable, and an impediment where the district attorney is unwilling to undertake his or her prosecutorial duties. The Essay also offers some thoughts on secondary prosecutors as a response to progressive prosecutors.*

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I. INTRODUCTION

American legal systems generally vest prosecutorial authority in local district attorneys. Sometimes, however, a district attorney may lack capacity, or be unwilling, to undertake certain prosecutions. In such circumstances, it may make sense to empower another government agent to act as a "secondary prosecutor." But, depending on where that secondary prosecutor's office resides within the government, such an arrangement may raise separation-of-powers concerns.

When we think of separation of powers in the American federal system, we identify two prototypical settings. The first is separation of powers among the three branches of the federal government; this is often referred to as "horizontal separation of powers."[1] The second is separation of powers between the federal (national) government and the states, so-called "vertical separation of powers."[2]

But states have their own separation-of-powers doctrines. In this Essay, I address the intrastate analog to horizontal separation of powers through the lens of legislation in New York State—ultimately invalidated by the New York Court of Appeals—that vested certain criminal prosecutorial powers in the Office of the Governor. The legislation and ensuing litigation raise the issue of what limits state law might impose on the allocation of power among state governmental actors.

Notably, the issue here is not a power allocation problem that could arise under the guise of traditional, federal separation of powers. New York vests primary prosecutorial power in the state lo-

1. *See, e.g.*, Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 664-65 (1978) (using the moniker "separation of powers").

2. *See, e.g.*, *id.* at 665 (using the moniker "federalism").

cal district attorneys, who are elected on a county-by-county basis. It allocates additional prosecutorial power to the Office of the Attorney General—a statewide elective office—and the Department of Law, over which the attorney general presides.[3] Yet the legislation I discuss here purported to vest certain prosecutorial authority in the Office of the Governor.[4] That division of power would be essentially meaningless were we dealing with the federal government—and, in any event, would certainly raise no separation-of-powers concerns—since the federal attorney general and (almost always) the local federal district attorneys ("U.S. attorneys"[5]) are appointed by the president with the advice and consent of the Senate.[6] Put another way, the president, the attorney general, and U.S. attorneys are parts of the executive branch, unified under the leadership of the president. While some question the reality and desirability of the "unitary executive,"[7] the fact remains, from a legal perspective, that there would be no separation-of-powers concern under a federal analog to the state statute I discuss here.

In contrast, under New York state law, such a division of power is problematic, as evidenced by the New York Court of Appeals' 2021 decision in *People v. Viviani*.[8] There, the Court of Appeals concluded that state constitutional separation-of-powers concerns rendered invalid the portion of a statute that vested a special prosecutor appointed by the governor with discretion to prosecute individuals alleged to have abused people with special needs. The court held that the statute violated state separation-of-powers in that the legislature exceeded its authority to shift prosecutorial power from one constitutional officer to another; that is, from the local district attorneys to the governor (both of whom are elected).[9] The court acknowledged that the legislature had sometimes seen fit to vest prosecutorial discretion in the attorney general (who is also elected) or Department of Law, but explained that there was no historical precedent for vesting such power in a gubernatorial appointee.[10]

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3. *See infra* notes 14-22 and accompanying text.

4. *See* N.Y. EXEC. LAW § 552 (McKinney, Westlaw through L. 2021); *infra* notes 25-26 and accompanying text.

5. *See* 28 U.S.C. § 541(a).

6. *See infra* note 61 and accompanying text.

7. *See* Jonathan Remy Nash, *Nontraditional Criminal Prosecutions in Federal Court*, 53 ARIZ. ST. L.J. 143, 158 (2021).

8. 169 N.E.3d 224, 229 (N.Y. 2021).

9. *See id.* at 229-31; *infra* notes 34-37 and accompanying text.

10. *See* 169 N.E.3d at 231-32; *infra* notes 38-45 and accompanying text.

Appearing as an intervenor, the attorney general—represented by Solicitor General Barbara Underwood—argued that the court should save the statute from unconstitutionality by interpreting it to require local district attorney consent before the special prosecutor could act.[11] The court did not adopt the solicitor general's argument—not because it saw consent as irrelevant, but rather because it concluded that the statute at issue was incompatible with a construction that allowed for consent.[12] (A concurring judge accepted the solicitor general's argument, but nevertheless concurred in the judgment because the record in the cases before the court offered no evidence of any such consent.[13])

In this Essay, I review and critique the Court of Appeals' decision in *Viviani*, with a special focus on the solicitor general's argument in favor of a saving construction. I argue that, while the court reached the correct conclusion in the case, it relied too heavily on historical practices, while providing too little discussion of democratic accountability—a feature that aligns with the solicitor general's emphasis on district attorney consent.

Beyond *Viviani* itself, I offer a taxonomy of settings in which secondary prosecutors might be appropriate. For each setting, I consider whether district attorney consent would likely be forthcoming, and whether it should be normatively required. I argue that, while consent is critical to validate district attorneys' democratic accountability to their local constituencies, there are some settings in which the requirement of consent must be balanced against the need for a secondary prosecutor. I also offer a few thoughts on conflicts over control of prosecutions between local and state officials, particularly the debate over so-called progressive prosecutors.

The Essay proceeds as follows. Part II presents some background on New York state separation-of-powers jurisprudence and then discusses the *Viviani* case. Part III critiques *Viviani* and highlights the importance of district attorney consent as a means to ensure democratic accountability. Part IV presents the taxonomy of secondary prosecutors and anticipates the future of secondary prosecutors. Part V examines the role of secondary prosecutors in light of the rise of the progressive prosecutor.

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11. *See* 169 N.E.3d at 232.

12. *See id.* at 232-34; *infra* notes 46-52 and accompanying text.

13. *See* 169 N.E.3d at 236-43 (Rivera, J., concurring); *infra* text accompanying note 53.

II.
THE *VIVIANI* CASE AND SEPARATION OF POWERS UNDER NEW YORK STATE CONSTITUTIONAL JURISPRUDENCE

How might secondary prosecutor statutes run afoul of separation-of-powers doctrine? That issue came before the New York Court of Appeals in the *Viviani* case.

The statute at issue in *Viviani*—section 552 of the state's Executive Law[14]—implicated the ability of the legislature to vest criminal prosecutorial power not in state district attorneys, or even the state attorney general, but instead in the governor. The New York Court of Appeals concluded that this allocation of authority violated state separation-of-powers protections. It also rejected an argument—advanced by the attorney general, as enunciated by Solicitor General Barbara Underwood—that the statute could be saved by interpreting it to require, if implicitly, the approval in any given case of, and supervision over any given case by, the appropriate district attorney.

Most states vest authority to prosecute criminal cases in local district attorneys, with some residual prosecutorial authority assigned to the state attorney general.[15] New York follows this general model.

The New York Constitution provides for the election of a district attorney in each county,[16] but it does not delineate the district attorney's powers, responsibilities, and duties.[17] Instead, it is clear from statutory authority[18] and historical practice that "District Attorneys have plenary prosecutorial power in the counties where they are elected . . . ."[19]

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14. N.Y. EXEC. LAW. § 552 (McKinney, Westlaw through L. 2021).

15. *See* Nash, *supra* note 7, at 158.

16. *See* N.Y. CONST., art. XIII, § 13(a) ("In each county a district attorney shall be chosen by the electors once in every three or four years as the legislature shall direct.").

17. People v. Viviani, 169 N.E.3d 224, 230 (N.Y. 2021) ("Although the Constitution establishes the elected office of the District Attorney, it does not assign prosecutorial authority to any constitutional officer, leaving that allocation as a matter for the Legislature . . . .").

18. *See* N.Y. COUNTY LAW § 700(1) (McKinney 2019) (subject to limited exceptions, "it shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed . . . ."); *id.* § 927 (similar effect for the counties within New York City).

19. People v. Romero, 698 N.E.2d 424, 426 (N.Y. 1998); *accord* In re Haggerty v. Himelein, 677 N.E.2d 276, 278 (N.Y. 1997) (identifying "the 'discretionary power to determine whom, whether and how to prosecute [a criminal] matter'" as "the essence of a District Attorney's constitutional, statutory, and common-law

Similarly, the New York Constitution provides for the office of Attorney General,[20] but does not set out the office's essential powers, responsibilities, and duties[21] The Court of Appeals has made clear that the attorney general enjoys only residual prosecutorial power as expressly conferred by statute.[22] And, indeed, statutory law vests limited prosecutorial authority in the attorney general and the Department of Law,[23] of which the attorney general is the head.[24]

The prosecution challenged in *New York v. Viviani* was commenced under section 552 of New York's Executive Law. Section 552(2) empowered the governor to appoint "a special prosecu-

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prosecutorial authority" (quoting *In re Schumer v. Holtzman*, 454 N.E.2d 522, 525 (N.Y.1983))).

20. *See* N.Y. CONST., art. V, § 1 ("The . . . attorney-general shall be chosen at the same general election as the governor and hold office for the same term . . . .").

21. People v. Gilmour, 773 N.E.2d 479, 482 (N.Y. 2002) ("The New York State Constitution establishes the offices of Attorney General . . . and District Attorney . . . , but does not specify or allocate the powers of the respective offices.").

22. *See id.* at 482 ("[S]ince 1796 the Legislature has never accorded general prosecutorial power to the Attorney General . . . ."); *Romero*, 698 N.E.2d at 426 ("Although the District Attorneys have plenary prosecutorial power in the counties where they are elected, the Attorney-General has no such general authority . . . ."); Della Pietra v. State, 526 N.E.2d 1, 3 (N.Y. 1988) ("[T]he Attorney-General is *without any prosecutorial power* except when specifically authorized by statute.").

23. *See* N.Y. EXEC. LAW § 63(10) (McKinney, Westlaw through L. 2021) (empowering the attorney general to "[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute."); *id.* § 63(2) (empowering the governor to "require" the attorney general to "attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement"); *id.* § 70 (providing that, "[w]henever the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced, . . . the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law."); *id.* § 70-a(1)(a) (establishing "within the department of law a statewide organized crime task force" charged with, among other things, "conduct[ing] investigations and prosecut[ing] organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction"). I address these provisions below in Part IV.

24. EXEC. § 60(a) (McKinney, Westlaw through L. 2021) ("The head of the department of law shall be the attorney-general. . . .").

tor . . . for the protection of people with special needs . . . ."[25] In particular, the statute authorized the special prosecutor to "prosecute offenses involving abuse or neglect . . . committed against vulnerable persons by custodians . . . ."[26]

In time, the special prosecutor duly appointed by the governor brought criminal charges against three defendants in three unrelated cases. Each prosecution charged the defendant with having sexually abused a vulnerable person in the defendant's care.[27] The defendants moved to dismiss the indictments against them, arguing that the statute effected an unconstitutional assignment of the prosecutorial power.[28] In each case, the trial court agreed with the defendant's argument, and the Appellate Division affirmed.[29]

The Court of Appeals granted the State leave to appeal and argue that the statute had no constitutional infirmity.[30] Solicitor General Barbara Underwood—arguing on behalf of the Attorney General, who had intervened below[31]—filed a brief urging the court to adopt a saving construction of the statute. She advanced the idea that the statute should be interpreted to include an implicit requirement that, "in order for the special prosecutor to act, the local District Attorney must (1) consent—perhaps even in writing—to the prosecution, and (2) retain the ultimate responsibility for that prosecution."[32]

A. Separation of Powers Arguments

The *Viviani* case turned on a separation-of-powers challenge. New York state constitutional law recognizes the importance of separation of powers. Much like its federal analog, the state constitution creates an executive branch, a legislative branch, and a judicial branch.[33] The New York Court of Appeals has highlighted the separation of powers among these "three coordinate and coequal

25. *Id.* § 552(2)(a) (McKinney, Westlaw through L. 2021). The full statutory title of the position was "special prosecutor and inspector general." *Id.* That individual had the power to "investigate and prosecute" offenses." *Id.*

26. *Id.*

27. People v. Viviani, 169 N.E.3d 224, (N.Y. 2021).

28. *Id.*

29. *See id.* at 228-29. Appeals in all three cases lay to the Third Department, which heard and decided the appeals separately.

30. *See id.* at 229.

31. *See* N.Y. EXEC. LAW § 71(1) (McKinney, Westlaw through L. 2021) (permitting the Attorney General to intervene to defend the constitutionality of a state statute).

32. *Viviani*, 169 N.E.3d at 232.

33. *See* N.Y. CONST., arts. III, IV, VI.

branches of government" as "the bedrock of the system of [state] government."[34]

But New York's separation-of-powers jurisprudence is not limited to guarding the boundaries of the three branches of the government. In the 1913 case, *People ex rel. Wogan v. Rafferty*, the Court of Appeals explained that "the legislature may not transfer" to a different officer "any essential function of [an] office" that is established under the constitution.[35] It was under this notion of separation of powers that the Court of Appeals in *Viviani* invalidated the criminal cases brought by a gubernatorially-appointed prosecutor.[36] The court explained that the statute "deprives the elected District

34. In re Maron v. Silver, 925 N.E.2d 899 (N.Y. 2010).

35. 102 N.E. 582, 582 (N.Y. 1913).

36. *See Viviani*, 169 N.E.3d at 230 ("Here, we must consider whether the creation of the special prosecutor by the Legislature runs afoul of the rule set out in *Wogan*—namely, whether Executive Law § 552 takes an essential function from a constitutional officer and gives it to a different officer chosen in a different manner. We conclude that it does.").

It bears noting that reliance on the *Wogan* test avoids the issue of whether New York state district attorneys, and for that matter the Attorney General, are executive branch actors. That issue is far from clear. On one hand, the constitutional article that purports to establish the state's executive branch—Article IV, with the caption "Executive"—establishes only the offices of the Governor and Lieutenant Governor. *See* N.Y. CONST., art. IV. The office of the Attorney General is established under Article V (captioned "Officers and Civil Departments"), *see id.*, art. V, § 1, while the office of the district attorney is established under Article XIII (captioned "Public Officers"), *see id.*, art. XIII, § 13(a). On the other hand, it has been argued that the job of the state attorney general is inherently executive in nature. *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J.L. & PUB. POL'Y 1, 7-8 (1993); *see also* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2450-55 (2006) (discussing the general division of the executive branch in state governments). And there are sources—including the New York State Senate website and some caselaw—that speak of the Attorney General as part of the executive branch. *See* N.Y. State Senate, *Branches of Government in New York State*, https://www.nysenate.gov/branches-government-new-york-state [https://perma.cc/S36A-N7CU] ("The State Comptroller and the Attorney General are the other two elected officials who serve in the Executive Branch."); People *ex rel.* Spitzer v. Grasso, 836 N.Y.S.2d 40, 51 (App. Div. 2007) ("As an elected representative of the executive branch, the Attorney General unquestionably is entitled to deference from the judiciary in the exercise of his powers."), *aff'd*, 893 N.E.2d 105 (2008). Finally, at least one commentator has argued that New York state district attorneys are inherently executive branch actors. *See* Robert M. Pitler, *Superseding the District Attorneys in New York City-The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 545 (1973) ("The constitutional history of New York State demonstrates that a district attorney, despite his local election in the county in which he serves, is a state executive officer performing a state function and is therefore subject to the exercise of the governor's executive power.").

Attorneys of an essential function of their constitutional office . . . by vesting concurrent discretionary power in a different officer, appointed by the Governor," and that, consequently, it "runs afoul of the rule set out in *Wogan*."[37]

The Court of Appeals then rebuffed the argument that section 552 was consistent with other statutes that authorize shifts of prosecutorial authority away from district attorneys. Most of these statutes vest the shifted prosecutorial power in the attorney general or somewhere else within the Department of Law. For example, Executive Law section 63(2) empowers the governor to "require[ ]" the attorney general or one of his or her deputies to prosecute criminal proceedings "as shall be specified in such requirement."[38] Executive Law § 70-a establishes "within the department of law a statewide organized crime task force" charged with, among other things, "conduct[ing] investigations and prosecut[ing] organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction."[39] While such delegations reduce the prosecutorial authority of district attorneys, they redirect that authority to actors who traditionally enjoy

37. *Viviani*, 169 N.E.3d at 230.

38. N.Y. EXEC. LAW § 63(2) (McKinney, Westlaw through L. 2021). Another subdivision of the same statute directs the attorney general, "[u]pon request of the governor, comptroller, secretary of state, commissioner of transportation, superintendent of financial services, commissioner of taxation and finance, commissioner of motor vehicles, or the state inspector general, or the head of any other department, authority, division or agency of the state," to investigate and prosecute offenses "in violation of the law which the officer making the request is especially required to execute or in relation to any matters connected with such department." *Id.* § 63(3); *see* People v. Gilmour, 773 N.E.2d 479, 483 (N.Y. 2002) (holding that, "[a] request made by the counsel of a department does not satisfy the requirements of Executive Law § 63(3) where there is no indication that the request was made at the express behest of the department head," but otherwise upholding the statute). And yet another subdivision affords the attorney general discretion (without the governor's action) to assume prosecutorial powers with respect to discrimination cases. *See* N.Y. EXEC. L. § 63(10) (empowering the attorney general to "[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of . . . race, creed, color, [or] national origin, . . . in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute").

39. EXEC. § 70-a(1)(a) (McKinney, Westlaw through L. 2021).

some criminal prosecutorial power—the attorney general or other actors within the Department of Law.[40]

Other statutes do not shift prosecutorial authority from a district attorney to the attorney general or Department of Law, but instead shift authority from one district attorney's office to another. A provision of the Judiciary Law calls for a central narcotics prosecutor for the five counties comprising New York City to be an assistant district attorney on the staff of one of the five district attorneys' offices.[41] Such a statute is unproblematic from a separation-of-powers perspective.

One statute vests prosecutorial authority not in the district attorney, attorney general, or Department of Law, but in a private attorney. A provision of the County Law empowers the superior court, in a case where the local district attorney is unavailable or precluded from appearing, to appoint a private attorney in that district attorney's stead.[42] But the Court of Appeals has explained that the statute is "designed narrowly by its terms and by its purpose to

40. *See Gilmour*, 773 N.E.2d at 481 ("From New York's earliest history, the scope of the Attorney General's powers has involved 'splitting of the prosecution with local prosecuting officers.'" (quoting K.T.W. SWANSON, THE BACKGROUND AND DEVELOPMENT OF THE OFFICE OF ATTORNEY GENERAL IN NEW YORK STATE 163 (1954))).

41. *See* N.Y. JUD. LAW § 177-c (McKinney, Westlaw through L. 2021). Technically the statute applies to "[t]he district attorneys of the counties wholly contained in a city having a population of one million or more." *Id.*

42. *See* N.Y. COUNTY LAW § 701(1) (McKinney, Westlaw through L. 2021). The statute also allows the court to appoint a district attorney from another county. The statute provides in full:

> Whenever the district attorney of any county and such assistants as he or she may have shall not be in attendance at a term of any court of record, which he or she is by law required to attend, or are disqualified from acting in a particular case to discharge his or her duties at a term of any court, a superior criminal court in the county wherein the action is triable may, by order:
>
> (a) appoint some attorney at law having an office in or residing in the county, or any adjoining county, to act as special district attorney during the absence, inability or disqualification of the district attorney and such assistants as he or she may have; or
>
> (b) appoint a district attorney of any other county within the judicial department or of any county adjoining the county wherein the action is triable to act as special district attorney, provided such district attorney agrees to accept appointment by such criminal court during such absence, inability or disqualification of the district attorney and such assistants as he or she may have.

Id.

fill emergency gaps,"[43] and "should not be expansively interpreted."[44]

In the end, the Court of Appeals concluded that the statute at issue in *Viviani* went far beyond other New York statutes that diverted prosecutorial authority from district attorneys: "[T]here is simply no analogy . . . to Executive Law § 552's creation of a statewide prosecutor, appointed by the Governor, with concurrent prosecutorial authority over a set of enumerated crimes."[45]

B. Consent Arguments

The Court of Appeals turned next to the argument advanced by Solicitor General Barbara Underwood, on behalf of the attorney general, that the court should adopt a saving construction of section 552. Solicitor General Underwood argued that the statute should be read to include an implicit requirement that the appropriate district attorney approve of, and supervise, the special prosecutor's prosecution.

The Court of Appeals rejected the solicitor general's argument, reasoning that section 552's particular statutory structure was inconsistent with the proposed saving construction. The statute emphasized the concurrent nature of jurisdiction over prosecution of crimes.[46] The notion that local district attorneys approved of, and retained supervision over, prosecutions undertaken by the special prosecutor was belied by the statute.

To be sure, the Court of Appeals has endorsed the maintenance of prosecutions for minor offenses by individuals outside the local district attorney's office with the district attorney's acquiescence. In *People v. Van Sickle*, the court upheld the prosecution for third-degree assault by a complaining witness.[47] And, in *People v. Soddano*, the Court upheld a state trooper's taking the helm of a prosecution for a speeding ticket.[48] As the *Soddano* court explained, "District Attorneys, of course, retain the ultimate, nondelegable responsibility for prosecuting all crimes and offenses, but they may allow appearances by public officers or private attorneys so long as

43. People v. Leahy, 531 N.E.2d 290, 291 (N.Y. 1988).

44. *Id.* at 292 ("To allow the Special District Attorney to investigate and prosecute another or other cases arising out of an incident would violate the statute and the order of appointment and would change the character of the statutory limitation on this extraordinary authority.").

45. People v. Viviani, 169 N.E.3d 224, 232 (N.Y. 2021).

46. *See id.* at 232-34.

47. 192 N.E.2d 9, 9 (N.Y. 1963).

48. 655 N.E.2d 161 (N.Y. 1995).

they are kept aware of all the criminal prosecutions in the county . . . ."[49]

But the *Viviani* court explained that the requirement that district attorneys retain "ultimate responsibility" over prosecutions in their counties "was a limit or check on what authority the District Attorney could delegate under the controlling statutes,"[50] and thus "was not intended as a restriction on the Legislature or as justification for reading that language into other laws."[51] Thus, the court noted that its decision "does not affect that process for delegation of authority by the local District Attorney"[52] at the same time that it rejected the viability of the solicitor general's proposed interpretation. (Judge Rivera accepted the solicitor general's proposed construction, but concurred in the result because the record did not show the requisite district attorney consent.[53])

While the Court of Appeals invalidated the provisions in the statute designed to delegate prosecutorial authority to the special prosecutor, it concluded that other provisions that the legislature would want left intact were properly severable from the invalidated provisions.[54] The court preserved provisions that vested non-prosecutorial functions in the special prosecutor, as well as provisions that allowed the special prosecutor to cooperate with, without interfering with, district attorneys' efforts to protect against abuse or neglect of vulnerable persons.[55] However, it struck down the provisions that provided the special prosecutor with concurrent prosecutorial authority.[56]

III.
CRITIQUING *VIVIANI*: HISTORICAL PRACTICE, ACCOUNTABILITY, AND THE SOLICITOR GENERAL'S PROPOSED SAVING CONSTRUCTION

In order to understand how secondary prosecutor regimes can be constructed to withstand separation-of-powers attacks, it is imperative to assess the Court of Appeals' legal arguments in *Viviani*.

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49. *Id.* at 162.
50. *Viviani*, 169 N.E.3d at 233.
51. *Id.*
52. *Id.* at 233 n.5, 236 (Stein, J., concurring) ("The Court's decision in the instant appeals does not limit or overrule *Soddano* and *Van Sickle* . . . .").
53. *See id.* at 236-43 (Rivera, J., concurring).
54. *See id.* at 234.
55. *See id.* at 234-35.
56. *See id.* at 235.

In fact, the *Viviani* court reached the correct conclusion with respect to the statute, and the facts, there at issue. That said, there are a few critiques worth highlighting.

A. Problems with the Viviani Court's Reasoning

First, the application of the *Wogan* test—that the legislature may not transfer the essential function of a constitutional officer to a different officer—strikes an odd note in *Viviani*. After all, while district attorneys are indeed officers whose existence the state constitution demands, the constitution offers no delineation of their duties, obligations, and responsibilities. The determination of whether a delegation of power is impermissible becomes murky when the constitution does not identify an essential function against which to judge it.

Second, the Court of Appeals' attempt to define the limits that separation of powers imposes on the legislature is somewhat circular. In the absence of any express constitutional limit, the court adverted to historical practices that defined the district attorney's "essential function."[57] Obtaining constitutional limits from historical practices has been the subject of criticism, even in the context of the federal Constitution; history, after all, can be contested and interpreted differently.[58] But the *Viviani* opinion's reasoning raises issues beyond even these: It seeks in large measure to divine limits on legislative power to allocate prosecutorial authority circularly, by examining the history of legislative action to allocate prosecutorial power. One is left questioning why the precise limits lie where they do. In short, the court's approach fails to elucidate where these limits originate and how far they stretch.

B. The Absence of Reliance on Democratic Accountability

The Court of Appeals could have bolstered its reasoning by invoking notions of democratic accountability. In *New York v. United States*, Justice Sandra Day O'Connor's opinion for the United States Supreme Court held that a federal statute that obligated states either to take title of and dispose of radioactive wastes within their borders, or to adopt regulations designed by the federal govern-

57. *See supra* text accompanying notes 35-37.

58. *Compare, e.g.*, United States v. Watson, 423 U.S. 411, 418-23 (1976) (discussing historical practices to support the constitutionality of warrantless arrests in public), *and id.* at 429 (Powell, J., concurring) (lauding the majority opinion's historical analysis, explaining that "logic sometimes must defer to history and experience"), *with id.* at 442 (Marshall, J., dissenting) (arguing that reliance on historical practice "is not substitute for reasoned analysis").

ment, was an unconstitutional "commandeering" by the federal government of state governments.[59] In so doing, Justice O'Connor emphasized the danger that commandeering can mislead voters as to which government—state or federal—is taking an action and, indeed, which government has responsibility for the problem in the first place:

> [W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.
>
> But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[60]

To be sure, the Supreme Court in *New York v. United States* was addressing questions of vertical separation of powers. Indeed, in the federal system, the question raised in *Viviani* could not give rise to concerns of democratic accountability, since the district attorneys (U.S. Attorneys in the federal system) are appointed by the president, not elected;[61] only the president is elected.[62]

Nevertheless, the concerns that animated Justice O'Connor's opinion in the *New York* case also arise in the context of New York's Executive Law § 552. In New York, the governor is elected state-

59. 505 U.S. 144, 174-77 (1992).

60. *Id.* at 168-69; *see also* Nat'l Fed'n of Ind. Bus. v. Sebelius, 567 U.S. 519, 578 (2012) (plurality opinion) ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.").

61. *See* Nash, *supra* note 7, at 155 (describing the appointment system, including very limited exceptions).

62. *See* U.S. CONST., art. II, § 1.

wide, and the district attorney is elected by voters in the county in which the district attorney serves. Here, then, there is an analogous risk of confusion over which official bears responsibility for action (or inaction). In this sense, Executive Law § 552 may leave voters who are dissatisfied over prosecutorial records—whether those who think there have been too many or too few prosecutions (or, too few successful prosecutions)—uncertain as to whether the Governor or district attorney is to blame.

Note, moreover, that the constitutional rule prohibiting "double jeopardy" furthers confusion over which official bears responsibility for prosecutorial action, inaction, or failure. The federal Constitution's Double Jeopardy Clause prohibits government prosecution of the same individual for the same crime more than once.[63]Since the Supreme Court has incorporated the Double Jeopardy Clause against the states,[64]the Clause prohibits New York from conducting multiple prosecutions of the same person for the same crime.

But the prosecutorial power of the local district attorneys and the prosecutorial power drawn upon by the special prosecutor under Executive Law § 552 both derive from the state's prosecutorial power. Hence, a prosecution commenced by the local district attorney precludes a subsequent prosecution by the special prosecutor, and a prosecution commenced by the special prosecutor precludes a subsequent prosecution by the local district attorney. (Indeed, in a situation where both the local district attorney and the special prosecutor are contemplating prosecutions, one can imagine the prosecutors "racing" to swear in the jury in order to trigger criminal jeopardy,[65] thus precluding the other prosecutor from moving forward.) Voters, however, might not understand this dynamic; they might wonder why, for example, where a special prosecutor's case has resulted in acquittal, the local district attorney does not pursue her own prosecution.

Two points here are worthy of note. First, seen through the lens of democratic accountability, the solicitor general's saving con-

63. *See* U.S. CONST., amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .").

64. *See* Benton v. Maryland, 395 U.S. 784, 793-96 (1969).

65. *See* Martinez v. Illinois, 572 U.S. 833, 839 (2014) ("There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'" (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978))); N.Y. CRIM. PROC. LAW § 40.30 (McKinney, Westlaw through L. 2021); *see also* 7 LAWRENCE K. MARKS ET AL.,, N.Y. PRAC., N.Y. PRETRIAL CRIMINAL PROCEDURE § 2:2 (2d ed. 2021) (noting that the New York statute follows federal law).

struction argument takes on additional value. The notion that the local district attorney must consent to, and retain control over, any prosecution makes it easier for local voters to know who ultimately bears responsibility for the prosecution.[66] And it clarifies the confusion otherwise cast by the Double Jeopardy Clause by identifying a single prosecutor who bears responsibility. In other words, the saving construction offered by the solicitor general furthers democratic accountability.

The *Viviani* court did not reject the notion that hinging the special prosecutor's ability on the local district attorney's consent furthers democratic accountability. The court did not dismiss the saving construction as unjustifiable; it simply concluded that the statute itself did not admit to that construction.[67]

Second, even with consent in place, the choice to vest prosecutorial authority in a gubernatorial appointee is odd. Even if they appreciate their local district attorneys as primary prosecutors, voters presumably understand that the attorney general has some role in law enforcement. In theory, state voters may have at least some familiarity with assessing the attorney general's prosecutorial decisions and successes. But the same cannot be said of the governor.

In sum, the *Viviani* decision leaves open the possibility of the legislature "fixing" the statute by explicitly calling for such consent. The legislature should take up that invitation, but vest secondary prosecutorial authority in the office of the attorney general rather than in the office of the governor.

IV.
BEYOND *VIVIANI*: THE FUTURE OF SECONDARY PROSECUTORS

The Court of Appeals' decision in *Viviani* raises the broader question of when "secondary prosecutors" might be appropriate. I turn to that question in this Part. The inquiry involves both doctrinal and normative considerations. I first set out a taxonomy of secondary prosecutors by settings. I then consider lessons we can draw from the taxonomy.

66. *See supra* notes 18-19 and accompanying text.

67. Even Judge Rivera, who accepted the solicitor general's argument, did not reach a different conclusion in the *Viviani* case, since the record provided no evidence of consent on the part of the district attorneys. *See supra* text accompanying note 53.

A. Taxonomy of Secondary Prosecutors

What is a secondary prosecutor? A secondary prosecutor allows for more prosecutions to take place than the sitting district attorney is willing to, or can, undertake. In different settings, there are different actors who may favor a secondary prosecutor—sometimes including the district attorney herself, and sometimes not.

Table 1 presents a taxonomy of situations where a secondary prosecutor might be appropriate. It also categorizes each situation with respect to the likely cooperation or acquiescence of the local district attorney.

TABLE 1: Taxonomy of secondary prosecutors.

Justification for secondary prosecutor	**Likelihood of DA approval**
Lack of resources	High
Low priority/lack of political will	Neutrality/ambivalence
Affirmative refusal of DA to prosecute	Likely none
Need for coordination across jurisdictions	Likely
Lack of expertise	Likely
Necessity	Irrelevant

Consider first the setting where the local district attorney would like to pursue certain prosecutions but lacks the resources to do so.[68] Here, one would expect the district attorney to welcome the opportunity to have anybody—or at least anyone capable of obtaining a favorable result—handle the prosecution. And, accordingly, one would expect the district attorney to grant any requisite consent. Examples of this include the practice (noted above) of allowing state troopers and interested parties to prosecute minor offenses.[69]

68. I assume an overall resource constraint that forces the district attorney to choose among competing initiatives.

69. Other jurisdictions are more open to allowing private individuals to pursue prosecutions. *See* Nash, *supra* note 7, at 159; Peter Kendall, *A Prosecutor Says No to a Rape Charge, so a College Student Calls Her Own Grand Jury*, WASH. POST (May 19, 2021), https://www.washingtonpost.com/national/a-prosecutor-says-no-to-a-rape-charge-so-a-college-student-calls-her-own-grand-jury/2021/05/18/2ea9a130-b766-11eb-a5fe-bb49dc89a248_story.html?fbclid=IWAR1f_WXduyY7ROPY0b

A second setting is where the district attorney considers a certain set of prosecutions to be low-priority, or otherwise lacks the political motivation to pursue such prosecutions. Perhaps, for example, the district attorney is not opposed to such prosecutions, but has higher priorities. Or, more cynically, perhaps the district attorney's supporters and campaign contributors are more interested in other types of prosecutions. In such instances, even if the district attorney has resources to pursue a prosecution, he or she would be neutral or ambivalent about doing so. It follows that the district attorney might be neutral or ambivalent about granting consent for someone else to pursue a prosecution. In order to avoid this quandary, one might expect to see statutes that do not require consent. An example of a statute falling under this setting would include a statute authorizing the attorney general to prosecute criminal offenses in violation of antidiscrimination laws where "prosecution cannot be effectively carried on by the district attorney" or where in the attorney general's "judgment the district attorney has erroneously failed or refused to prosecute."[70] Another is a statute providing that "the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law" in the event that "the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced."[71] (These statutes can also be seen to fall within—and indeed may effectively fall within—the next setting.)

The next setting—more extreme than the last one—is one where the district attorney affirmatively declines to undertake prosecutions with respect to certain persons, or under certain statutes. A statute that applies in this setting empowers the governor to "require" the attorney general to maintain criminal prosecutions in a

7Uz8jr1AHbHf4KUIokhMzEug-koXlQvC6Hrjh-mg0 [https://perma.cc/TTY3-KVEK].

70. N.Y. EXEC. LAW § 63(10) (McKinney, Westlaw through L. 2021) (empowering the attorney general to "[p]rosecute every person charged with the commission of a criminal offense in violation of any of the laws of this state against discrimination because of race, creed, color, or national origin, in any case where in his judgment, because of the extent of the offense, such prosecution cannot be effectively carried on by the district attorney of the county wherein the offense or a portion thereof is alleged to have been committed, or where in his judgment the district attorney has erroneously failed or refused to prosecute").

71. *Id.* § 70 (providing that, "[w]henever the governor shall advise the attorney-general that he has reason to doubt whether in any county the law relating to crimes against the elective franchise is properly enforced, . . . the attorney-general shall assign one or more of his deputies to take charge of prosecutions under the election law").

county "as shall be specified in such requirement."[72] The statute makes clear that the local district attorney is displaced to whatever extent deemed appropriate by the attorney general.[73] Indeed, so clear is it that the statute contemplates displacement of the local prosecutor that it specifies that, "[i]n all such cases all expenses incurred by the attorney-general, including the salary or other compensation of all deputies employed, shall be a county charge."[74] It should come as no surprise that the statute does not call for district attorney assent.

The next setting is one where there is a benefit to be had from coordinating prosecutions across jurisdictions. An example of a statute falling here is the statute that allows for a joint narcotics prosecutor for the five counties comprising New York City.[75] One would expect consent from the relevant district attorneys to be forthcoming here.

Another setting where one would expect consent to be forthcoming is one where local district attorneys are less likely to have relevant expertise. The statute authorizing the joint New York City narcotics prosecutor is an example here, as well.[76] One might think that narcotics prosecutions might benefit from a single narcotics prosecutor with expertise in the area (and expertise to be gained as she continues to serve in the position), as well as expertise about the sizeable narcotics trade that doubtless thrives across New York City's counties.

A final setting is one driven by necessity: The local district attorney is unavailable or disqualified from appearing and conducting prosecutions. Here, a statute (noted above) empowers the courts to appoint in the district attorney's stead a private attorney or a district attorney from another county.[77] The consent of the district attorney is irrelevant.[78]

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72. *Id.* § 63(2).

73. *Id.* (explaining that in such cases, "the attorney-general or his deputy . . . shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform").

74. *Id.*

75. *See supra* note 41 and accompanying text.

76. *See id.*

77. *See supra* note 42 and accompanying text.

78. *In re Schumer v. Holtzman*, 454 N.E.2d 522 (N.Y. 1983), is illustrative. There Elizabeth Holtzman, a former member of Congress and a newly-elected district attorney had taken it upon herself to appoint a special district attorney (David Trager, then the Dean of Brooklyn Law School and subsequently a federal district judge for the Eastern District of New York) to investigate and potentially prosecute

B. Lessons from the Taxonomy

The taxonomy of secondary prosecutors allows us to see how the law ideally would deploy district attorney consent to preserve democratic accountability over the prosecutorial process. Only where prosecutorial consent is irrelevant (where the prosecutor is unavailable or disqualified) or predictably not forthcoming (where the prosecutor is unwilling or unable to prosecute justice might be seen to demand) is consent not required. In those settings, it is important to balance accountability against the potentially greater need to ensure the availability of a viable prosecutor. (That said, people might debate how strong the "need" really is in any given setting.)

Note that the taxonomy also speaks to the divide in New York (and many other states) between localized and centralized control over prosecutorial discretion. New York state defaults to local control. And, except for the appointment of a special prosecutor when the district attorney is unavailable or disqualified, New York statutes demand (in the absence of district attorney consent) affirmative action by some statewide officer—the governor or the attorney general.

Considering Executive Law § 552—the statute at issue in *Viviani*—in the context of the taxonomy presented in Table 1, the district attorneys' failure to prosecute those who abuse vulnerable

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Charles Schumer (now the senior Senator from New York), who had been elected to Holtzman's former congressional seat, concerning Schumer's "allegedly improper use of State employees during the congressional campaign." *Id.* at 523. Holtzman "believed she might be accused of bias or the appearance of bias against petitioner based upon past political differences with him and because she thought some of her former congressional staff might be witnesses in such an investigation." *Id.* On this basis, she asked then-Governor Mario Cuomo to remove her from the matter under Executive Law § 63(2); when he refused, she named the special district attorney.

Upon Schumer's petition, the Court of Appeals invalidated the appointment of the special district attorney since it was not authorized by law: Such a transfer of power could be effective only if it had been accomplished by executive order (under section 63(2)) or by court order (under County Law § 701); since it was not, it was invalid. *See id.* at 525.

Beyond that, however, the Court of Appeals rejected Schumer's argument that the court was obligated to name a special prosecutor to proceed in Holtzman's stead: "The courts, as a general rule, should remove a public prosecutor only to protect a defendant from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence . . . and the appearance of impropriety, standing alone, might not be grounds for disqualification. The objector should demonstrate actual prejudice or so substantial a risk thereof as could not be ignored." *Id.* at 526 (citations omitted).

individuals is likely the result of (i) a lack of resources, (ii) a lack of political will, or (iii) a lack of expertise. Consistent with the solicitor general's argument, three of these settings typically call for—and anticipate the ready availability of—district attorney consent for an outside prosecutor. This suggests that it would be valuable for the legislature to redraft Executive Law § 552 to incorporate the solicitor general's suggestion of requiring consent. It seems, however, that it would be easier—and certainly more in keeping with practice under other statutes—to vest prosecutorial authority with the attorney general or the Department of Law, rather than a prosecutor appointed by the governor.[79]

V.
THE INTERPLAY BETWEEN PROGRESSIVE PROSECUTORS AND SECONDARY PROSECUTORS

The focus that the taxonomy of secondary prosecutors in the previous Part draws upon local democratic accountability and prosecutorial control raises an issue at the forefront of many conversations about public prosecutors today: the progressive prosecutor. Progressive prosecutors are prosecutors elected on a platform of not pursuing prosecutions of lower-level crimes, and taking steps to remedy what they perceive to be the disproportionate effects of the criminal justice system on people of color.[80] While fuller discus-

79. It seems perhaps that the decision to vest prosecutorial power in a gubernatorial appointee (as opposed to the Attorney Section or more generally in the Department of Law) was based at least in part on the fact that section 552 vested the prosecutorial power in tandem with investigative power, *see supra* note 25. The fact that the investigative power remains intact in a gubernatorial appointee after the decision in *Viviani*, *see supra* text accompanying note 55, may argue in favor of once again vesting prosecutorial power in a gubernatorial appointee (but subject to district attorney consent) were the statute reenacted. But the standard path seems to be vesting prosecutorial power in the attorney general or the Department of Law; and if housing the investigative and prosecutorial power in the same place is important, then it seems that the legislature could simply shift the investigative power to the attorney general or Department of Law.

80. For media coverage, see, for example, Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 [https://perma.cc/VU67-QHBC]; Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020), https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair [https://perma.cc/366S-J5GK].

sion of the topic must (and does) lie elsewhere,[81] it is worth noting that local democratic accountability and local prosecutorial primacy make progressive prosecutors a realistic possibility. At the same time, the fact that criminal laws are promulgated and subject to revision by the state legislature (with the assent of the governor, unless a veto has been overridden) creates the possibility of a conflict between a local progressive prosecutor and statewide interests that may lie elsewhere.[82] Such conflicts recently arose in Florida and Pennsylvania,[83] and seem likely to spread with the election of more progressive prosecutors.[84]

New York Executive Law § 63(2) allows for statewide officials to limit the progressive tendencies of a local prosecutor: The governor can "require" the attorney general to assume prosecutorial responsibilities. Other states offer similar opportunities for state officials to supersede local prosecutors.[85]

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81. For discussion, see, for example, *Symposium on Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives: When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020); *Symposium, Prosecutorial Elections: The New Frontline in Criminal Justice Reform*, OHIO ST. J. CRIM. L. 1 (2021); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020).

82. *See* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 565 (2020) ("[T]ensions [between local and statewide interests] have occasionally risen to the surface, as when governors or state attorneys general have sought to remove jurisdiction over certain cases from local prosecutors whom they believe are not duly enforcing the state's laws.").

83. *See* Tyler Quinn Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 97-98 (2018) (discussing effort by the Florida Governor, approved by the state supreme court, to remove a progressive district attorney from a case because of a stated blanket refusal to invoke the death penalty); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, THE INTERCEPT (July 8, 2019), https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/ [https://perma.cc/2SUQ-92NW].

84. *See* Yeargain, *supra* note 83, at 107-10 (predicting the election of more progressive prosecutors based on shifting public opinion and campaign financing by interest groups); Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 151-52 (cataloging such legislative proposals across several states).

85. *See* Yeargain, *supra* note 83, at 110-26 (offering a fifty-state survey).

Another option for a state legislature seeking to curb a progressive prosecutor's discretion is something common in other countries but not the United States: The legislature could also consider implementing a strategy more common in other countries: adding language mandating prosecution to criminal statutes, although this strategy leaves prosecutors with the ability to manipulate the triggers for mandatory prosecution (for example, to conclude that the evidence is insufficient to warrant prosecution). For discussion, see for example, Kay Levine & Mal-

A famous example of this in New York—and perhaps a precursor to the current proliferation of progressive prosecutors—occurred when Governor George Pataki assumed office and followed through on a campaign promise to restore New York's death penalty.[86] When a police officer was killed in the Bronx, Governor Pataki urged then-Bronx District Attorney Robert Johnson to seek the death penalty for the alleged gunman.[87] While D.A. Johnson announced his intent to invoke the time period afforded him under New York's death penalty law to decide whether to seek capital punishment,[88] Governor Pataki—citing D.A. Johnson's stated opposition (including in campaign statements) to capital punishment[89]—acted under Executive Law § 63(2) to remove D.A. Johnson from the case and replace him with then-Attorney General Dennis Vacco.[90]

D.A. Johnson, as well as voters and taxpayers in the Bronx, sued, seeking to restore D.A. Johnson to the criminal case,[91] but the Court of Appeals ultimately upheld Governor Pataki's action. The court first explained that, as a general matter, actions taken by a governor by Executive Order pursuant to a "valid grant of discretionary authority" are "largely beyond judicial review."[92] Moreover, the invocation of Executive Law § 63(2) does not by its terms require a reason.[93] Second, to whatever extent the judiciary could require the governor to provide a reason and examine that reason,

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colm Feeley, *Prosecution*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 210, 213 (Neil J. Smelser & Paul B. Baltes eds., 2015).

86. *See* James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Seeks Justice Served*, N.Y. TIMES (Mar. 8, 1995) ("Gov. George E. Pataki fulfilled one of his central campaign vows today by signing a death penalty bill into law . . . ."), https://www.nytimes.com/1995/03/08/nyregion/death-penalty-in-new-york-reinstated-after-18-years-pataki-sees-justice-served.html [https://perma.cc/6938-X2FD].

87. *See* Clifford Krauss, *Shootout in the Bronx: The Overview – 3 Men Held in Killing of Officer, Bringing Calls for Death Penalty*, N.Y. TIMES (Mar. 16, 1996) https://www.nytimes.com/1996/03/16/nyregion/shootout-bronx-overview-3-men-held-killing-officer-bringing-calls-for-death.html [https://perma.cc/XME7-J4SW].

88. *See* In re Johnson v. Pataki, 691 N.E.2d 1002, 1011-12 (N.Y. 1997) (Smith, J., dissenting).

89. *See id.* at 1003 (describing the Governor's order as noting that "the District Attorney's statements, correspondence and swift rejection of the death penalty option in prior death-eligible cases indicated that the District Attorney had adopted a 'blanket policy' against imposition of the death penalty"); *id.* at 1011 (Smith, J., dissenting) (describing in greater detail D.A. Johnson's statements).

90. *Id.* at 1003; *id.* at 1012 (Smith, J., dissenting).

91. *Id.* at 1004.

92. *Id.*

93. *See id.* at 1005.

the court held that the governor had provided an adequate reason: "[T]he challenged Executive Order expresses the Governor's executive judgment that there was a threat to faithful execution of the death penalty law that supported this particular superseder."[94]

It seems, in short, that—normative arguments to the contrary notwithstanding[95]—Executive Law § 63(2) provides the basis for a secondary prosecutor who might counter (at least in some cases) a progressive prosecutor's tendencies.[96] By requiring the governor to initiate any action and by vesting responsibility for prosecution not in the governor's office but in the attorney general, the statute essentially assures that a local district attorney will only be displaced where the governor prefers how the attorney general would deal with the prosecution at issue to the preferences of the district attorney. One can thus expect the statute would be used to curb a progressive prosecutor only where both the governor and attorney general are considerably less progressive than the district attorney.[97]

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94. *See id.* at 1007.

95. For example, Professor Ronald Wright describes the "critique" that progressive prosecutors "invade the legislature's role when they make prospective categorical judgments about which crimes are worth prosecuting and which are not," Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 836–37 (2020), and responds to it (in part) thus:

> [I]t ignores traditional practices of local chief prosecutors, who commonly formulate general guidance for their line prosecutors about when to decline charges. For decades, prosecutor offices have issued policy guidance to line prosecutors, including policies that instruct prosecutors to decline charges for "joyriding" or to ignore theft or destruction of property cases that fall below a designated level of property loss. The policies are prospective and categorical. If categorical declinations are not part of the prosecutor's job, that would be news to the prosecutors themselves.

Id. at 836-37 (footnotes omitted).

96. *See* Goldrosen, *supra* note 84, at 153 ("The preemption of progressive prosecutors is, in many respects, simply state legislators turning the weaponry of the new preemption toward a new target."). Florida has issued similar holdings with respect to analogous statutes. *See* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 199 (2019); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 619–20 (2020) (discussing the New York and Florida statutes and cases).

97. From a social science perspective, one would say that the statute affords the governor the power to "set the agenda" by choosing between having the prosecution conducted by the local district attorney or the attorney general. Theory predicts that the governor will select the actor with ideal point closer to his or her own. *See generally* Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 Q.J. ECON. 563, 564 (1979).

The availability of a backstop against a progressive prosecutor (even if the backstop will be effective only under certain political alignments) may lead supporters of progressive prosecutors to ask the reverse question: Why is there no backstop available against a local district attorney who enforces the law more strictly than statewide authorities prefer? One answer here is that nothing in Executive Law § 63(2) precludes its availability where the local district attorney is (from the viewpoint of the governor) *over*-prosecuting. The governor could invoke section 63(2) with the hope and expectation that the attorney general will bring lesser charges, or opt not to prosecute at all.

Beyond that, there are tools to rein in what statewide actors might see as an overzealous prosecutor. For one thing, the state legislature (with the aid of the governor, unless they can override a veto) can restrict the state criminal code. (Note that this form of relief is unavailable in response to a progressive prosecutor: Strengthening the criminal code will be of no effect.) For another thing, the governor has the option of exercising the constitutional "power to grant reprieves, commutations and pardons after conviction. . . ."[98] Finally, a prosecutor who transgresses legal lines in undertaking prosecutions may subject herself to statutory and constitutional allegations of malicious prosecution.[99]

VI.
CONCLUSION

This Essay has analyzed the consistency of secondary prosecutor regimes with separation-of-powers concerns through the lens of the Court of Appeals' decision in *Viviani*, with particular attention

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One might think that the attorney general would exhibit a certain fealty to or camaraderie with the local district attorney as a fellow prosecutor. But the reality is that most attorneys general aspire to higher political office—often governor. *See, e.g.*, Tara Leigh Grove, *Justice Scalia's Other Standing Legacy*, 84 U. CHI. L. REV. 2243, 2254 (2017). Indeed, such has been the case in the recent past in New York.

98. N.Y. CONST., art. IV, § 4. For a recent example of a promise to pardon upon conviction (albeit in the context of a prosecution originally begun by a progressive prosecutor), *see* Jim Salter & Heather Hollingsworth, *Judge: Case Against McCloskeys Won't Go Back to Grand Jury*, ASSOCIATED PRESS (Apr. 30, 2021), https://apnews.com/article/st-louis-mccloskey-guns-b40ea1ee046ed658da2ee7adfd80f07f [https://perma.cc/3TPF-8V8Z] (in case originally brought by progressive prosecutor against couple who brandished weapons toward protesters, noting that "Missouri Gov. Mike Parson has vowed to issue pardons if they are convicted"). Of course, the mere fact that an individual must face trial (even with some assurance of a pardon thereafter if there is a guilty verdict) exacts its own costs.

99. *See* Goldrosen, *supra* note 84, at 154-55.

to the court's reaction to the solicitor general's normatively attractive (if statutorily incompatible) argument. It has critiqued the Court of Appeals' reasoning as relying too heavily on historical practice and too little on the important issue of democratic accountability. In addition, this Essay has offered a taxonomy of secondary prosecutors. The taxonomy suggests that local district attorney consent, which is critical to democratic accountability and was central to the solicitor general's argument in *Viviani*, is—and indeed should be—a regular feature in statutes authorizing secondary prosecutors. However, the taxonomy also indicates that consent is and should be balanced against the need for a secondary prosecutor in some settings. The Essay anticipates that secondary prosecutors may play a role in reining in the effects of progressive tendencies of some prosecutors, though the circumstances in which that can happen are limited.

Finally, it is worth noting that the mere fact that the attorney general—having intervened in the case—did not blindly take up the position that the governor's appointment of the special prosecutor was constitutional. Rather, the attorney general's position—as advanced by the solicitor general—was more nuanced. In other words, the arguments in the *Viviani* case confirm the importance of, and the continuing vitality of, separation of powers even between actors nominally within the same overarching branch of government.

FEDERALISM AND THE "SECOND FOUNDING:" CONSTITUTIONAL STRUCTURE AS A "DOUBLE SECURITY" FOR "DISCRETE AND INSULAR" MINORITIES

*BURT NEUBORNE**

INTRODUCTION

Constitutional Law courses are usually taught in two phases. The standard course opens with a review of the structural aspects of the Constitution – separation of powers, federalism, procedural due process, and the scope of judicial review – and then turns to the scope of substantive constitutional protection – religious freedom; free speech; privacy; and the equal protection of the laws. Apart from questions about where the power of judicial review comes from,[1] little, if any, attention is paid to the relationship between decisions about constitutional structure and the effective preservation of substantive constitutional rights.[2] Indeed, openly linking a decision about structure to its likely effect on substance

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1. Marbury v. Madison, 5 U.S. 137 (1803) (asserting power of judicial review over structural issues). The early Supreme Court showed little interest in enforcing substantive constitutional rights. *See, e.g.*, Barron v. Mayor of Baltimore, 32 U.S. 243 (1833) (declining to enforce the Bill of Rights against the states). The Supreme Court did not invoke judicial review in defense of a substantive constitutional right until the appalling decision in Prigg v. Pennsylvania, 41 U.S. 539 (1842), enforcing the self-help rights of slave owners under the Fugitive Slave Clause to apprehend alleged escapees residing in Pennsylvania and remove them South without a hearing. The Court's most important pre-Civil War substantive rights case was the racist milestone, Scott v. Sandford, 60 U.S. 393 (1857), enforcing Fifth Amendment property rights in human beings against Congressional efforts to curb the spread of slavery.

2. I base my observations about Constitutional Law courses on experience in teaching Constitutional Law, on occasion, at N.Y.U., Stanford, and Berkeley; and on conversations with my colleagues who teach it routinely, as well as a review of a number of widely used casebooks. At N.Y.U., as at many other schools, the process has reached the point where the basic Constitutional Law course deals solely with structure, leaving the study of substantive rights to advanced elective courses.

would be inconsistent with the Court's insistence that structural decisions are based on neutral structural principles unrelated to the underlying merits.[3]

I will argue in this brief essay that due respect for: (1) the sacrifice of ordinary people, many of whom fought and died to preserve the Union and end slavery; (2) the remarkable achievements of the architects of the 13th, 14th, and 15th Amendments; and (3) the heroic efforts of Black and White citizens to forge a multi-racial democracy in the wake of the Civil War, characterized by many as a "Second Founding" of the United States,[4] requires that hard structural cases, especially federalism cases potentially affecting the enjoyment of rights to equal treatment, should be decided with an eye toward the effective protection of substantive constitutional rights.

"Footnote Four" of *United States v. Carolene Products*[5] already ties the intensity of judicial review to the need to protect "discrete and insular minorities" against the risk of democratic failure.[6] I believe

3. In my experience, legal disputes over constitutional structure, especially about federalism, are rarely driven by neutral principles. Rather, they are usually designed to advance or retard an underlying substantive issue. Witness the repeated structural *pas des deux* executed by the left and right during the Obama, Trump, and Biden administrations on issues of federalism and separation of powers. *See* FRANK J. THOMPSON, KENNETH K. WONG & BARRY G. RABE, TRUMP, THE ADMINISTRATIVE PRESIDENCY, AND FEDERALISM (2020). I am far from the first academic to describe the Court's tendency to harness structural arguments in aid of substantive ends. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

4. The Second Founding, described more fully at *infra* Part I, is a shorthand for the heroic efforts of the People to preserve the Union and end slavery, and the remarkable work of the architects of the 13th, 14th, and 15th Amendments to introduce equality into the United States Constitution for the first time.

5. 304 U.S. 144, 152 n.4 (1938).

6. *Id. Carolene Products*, an otherwise routine exercise of rational basis scrutiny of governmental regulation of the economy (the case upheld a criminal prosecution for selling "filled" or adulterated milk), announced the New Deal Court's move away from substantive due process. In its place, the Court signaled a commitment to applying rational basis scrutiny to economic regulations, reserving more searching judicial review for enforcing constitutional text (especially the Bill of Rights). The footnote also expresses concern over laws interfering with the proper operation of the political process as a means to repeal bad laws, and for the protection of "discrete and insular minorities" against democratic failure. The full text of Footnote Four, with its numerous citations omitted, reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of unde-

that respect for the structural innovations of the Second Founding should lead federalism cases down the same path by allocating disputed exercises of power to the political entity most likely to respect the underlying substantive constitutional rights at issue. As we saw during the Trump Administration, that does not mean that the federal government always wins.[7] But it does free us to ask the most important question – when the dust settles, which competing political entity is more likely to treat the interests of the weak with appropriate respect.

During my more than 50 years as a civil rights/civil liberties lawyer,[8] federalism has always seemed to me less like legal doctrine and more like the map of a complex shoreline, replete with tidal flats, dangerous shoals, coves, beckoning beaches, rivers, islands, bays, inlets, and archipelagos marking the points at which land and water meet. As a constitutional litigator, I had no choice but to consult the map to plot my course, but I never understood why the map looked as it did; how blank spots on the map should be filled in; or how the ebb and flow of the tides would re-shape the map in the future.

I found the map ugly and unsatisfying. Given the textual ambiguity surrounding most federalism disputes and the lack of a coher-

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> sirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

For examples of the vast body of academic work discussing Footnote Four, see, e.g., John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 75–77 (1980); J. Lewis F. Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982); Lewis Lusky, Footnote *Redux: A "*Carolene Products*" Reminiscence*, 82 COLUM. L. REV. 1093, 1093 (1982); Jack M. Balkin, *The Footnote*, 83 NW. L. REV. 275, 275 (1988). If you add water to Footnote Four, you have the jurisprudential philosophy of the Warren Court. *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court,* 2010 SUPREME COURT REV. 59, 66 (2011).

7. I discuss the two-way role of federalism in protecting discrete and insular minorities in BURT NEUBORNE, WHEN AT TIMES THE MOB IS SWAYED 197-225 (2019). *See also* THE FEDERALIST NO. 51 (James Madison), (discussing the "double security" for substantive rights provided by separation of powers and federalism).

8. All told, I have spent 11 years on the legal staff of the ACLU, beginning in 1967 as a Staff Counsel at NYCLU, eventually serving as ACLU National Legal Director from 1981-86. From 1995-2007, I served as founding Legal Director of the Brennan Center for Justice at N.Y.U. In between, while hiding out in my library at N.Y.U, I was an active public interest lawyer.

ent theory of federalism to help break legal ties, the Supreme Court's Balkanized federalism jurisprudence[9] seemed to me a running Three-card Monte game where litigant/players hunted for government power hidden under cards shuffled by the Justices. The winning federalism card almost always reflected the Justices' view of the underlying legal merits, or the interests of the strong.[10] "States' Rights," the supposed key to the map, has no intrinsic meaning. It has been the mantra of several of the most pernicious movements in American history – the early 19th century effort to preserve slavery; the late 19th century effort to dismantle Reconstruction and restore white supremacy in the states of the old Confederacy; the century-long resistance to federal anti-lynching laws; the "massive resistance" to *Brown v. Board of Education*; resistance to the Voting Rights Act of 1965; and the current war on expanded Black suffrage.[11]

The scope of Congress's most important Article I, Section 8 powers (under the Commerce and Taxation Clauses) have yawed from unjustifiably narrow, shielding unfair or destructive commercial behavior from needed national regulation, to almost comically overbroad, vesting Congress with "necessary and proper" power to tax and regulate just about anything, with no principled path to a middle ground.[12] The Court's most recent major pronouncement

9. For a highly subjective sketch of the federalism map, see the material *infra* at notes 12-28.

10. *See supra* note 3.

11. *See, e.g.*, Paul Finkelman, *States Rights', Southern Hypocrisy, and the Crisis of Union*, 45 AKRON L. REV. 449 (2012); Jefferson Davis, *The Doctrine of State Rights*, 150 THE N. AM. REV. 205 (1890); MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION, (Clive Webb, ed. 2005); NUMEN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1999); FORREST MCDONALD, STATES RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776-1876 (2000).

12. For a snapshot of the roller coaster nature of the Supreme Court's Article I treatment of federal regulatory power, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819) (recognizing implied federal power despite the 10th Amendment and forbidding states from taxing private bank chartered by Congress); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 197 (1824) (upholding Congress's plenary power to regulate travel on interstate waterways); United States v. E.C. Knight Co., 156 U.S. 1, 13-15 (1895) (Congress lacks power to regulate monopoly in manufacture, as opposed to transportation); Houston E. & W. Ry. Co. v. United States (The Shreveport Rate Case), 234 U.S. 342, 351-54 (1914) (upholding national power over intra-state rail rates that discriminated against inter-state traffic); Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918) (invalidating Congressional effort to ban products of child labor from interstate commerce); Carter v. Carter Coal Co., 298 U.S. 238, 303-04 (1936) (invalidating federal law setting maximum hours and minimum wages for coal miners); NLRB v. Jones & Laughlin Steel

in the area, *National Federation of Independent Businesses v. Sebelius*,[13] exemplifies the confused state of the law of federalism. Competing 5-4 majorities invalidated the mandatory coverage aspects of the Affordable Care Act under the Commerce Clause while upholding it under the Taxation Clause with no explanation of why the federalism balance should differ dramatically under the two clauses.[14] The "Dormant" or "Negative" Commerce Clause often impedes states from enacting important regulations aimed at protecting the vulnerable or preserving the environment.[15] Preemption under the Supremacy Clause enables powerful economic entities to: (1) override state objections and impose compulsory arbitration agreements on weak clients, thereby insulating themselves from state judicial scrutiny;[16] and (2) impose arbitrary federal ceilings on state

Corp., 301 U.S. 1 (1937) (upholding National Labor Relations Act); United States v. Darby, 312 U.S. 100 (1941) (upholding minimum wage/maximum hours regulations under Fair Labor Standards Act); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal regulation of wheat grown for feed on farm where grown); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding application of federal anti-discrimination rules to local family owned barbeque restaurant); Perez v. United States, 402 U.S. 146, 154–57 (1971) (upholding federal criminal statute barring loan sharking); United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating federal ban on gun ownership in vicinity of school); United States v. Morrison, 529 U.S. 598, 601–02, 617–19 (2000) (invalidating congressional statute creating federal cause of action for gender-motivated violence); NFIB v. Sebelius, 567 U.S. 519, 558, 561, 562–63 (2012) (ruling that imposition of affirmative duty to purchase health insurance violates the Commerce Clause but upholding requirement under Taxation Clause).

13. 567 U.S. 519 (2012).

14. In fairness to the Justices, eight of them thought that the balance should be the same under each clause. Only the Chief Justice perceived a different balance. 567 U.S. at 552, 574 (2012).

15. The "Dormant," or "Negative" Commerce Clause is a gloss on Article I's grant of power to Congress "to regulate Commerce with foreign nations, and among the several States, and with Indian Tribes." It denies a state power to impose discriminatory regulations designed to benefit local commercial interests or to encumber national commercial activity with a patchwork of local rules. *See, eg.*, Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 at 279 (1873) (invalidating Pennsylvania's attempt to tax railroads transporting coal within state for ultimate sale elsewhere); Camps Newfound/Owatonna v. Town of Harrison, 520 U.S. 564 at 571 (1997) (invalidating Maine's effort to favor charities serving Maine residents). *See generally* Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 36 DUKE L. J. 569 (1987).

16. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (barring collective arbitration under union contracts despite FLSA and NLRA); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (enforcing compulsory arbitration in consumer contracts); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (requiring individualized compulsory arbitration where cost of proceeding exceeds value of claim). I criticize the use of preemption to impose unfair compulsory

legislative efforts to protect the weak.[17] Judge-made limits on the subject matter jurisdiction,[18] judicial reach,[19] and remedial pow-

arbitration clauses in Burt Neuborne, *Ending Lochner Lite*, 50 HARV. CIV.RTS.-CIV.LIBERTIES L. REV. 183 (2015). *See also*, Gade v. Nat'l Solid Waste Mgmt., 505 U.S. 88 (1992) (invalidating Illinois' licensing provisions for workers handling hazardous waste).

17. For a particularly egregious use of foreign affairs pre-emption to prevent state efforts to help the weak, see Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (invalidating California's effort to require German insurance companies doing business in California to allow inspection of their records by Holocaust survivors to determine whether unpaid claims existed. The Court reasoned that Executive Agreements between Germany and the United States (the "Berlin Accords") designed to assist the parties in resolving private litigation against German industry arising out of the Holocaust had imposed an implied ceiling on state assistance to Holocaust victims). The case was particularly galling since I had played a significant role in negotiating the resolution of the private litigation without imagining that I was placing a ceiling on state efforts. *See* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Related Litigation in American Courts*, 80 WASH U. L. Q. 795 (2002). The negotiations are described in STUART EIZENSTAT, IMPERFECT JUSTICE (2004).

18. For analytically questionable self-imposed restrictions on the subject matter jurisdiction of the federal courts, see, e.g., Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (imposing complete diversity); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 149 (1908) (narrowly interpreting "arising under" to eliminate federal defenses). *See also* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (declining to apply Alien Tort Statute to conduct occurring outside the United States); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (declining to apply Alien Tort Statute against corporate defendant); Nestlé USA v. Doe, 593 U.S.___ , 141 S.Ct. 1931 (2021) (declining to apply Alien Tort Statute against domestic defendants for acts committed abroad).

19. For analytically questionable horizontal federalism limits on the geographical reach of federal (and state) courts, see Prigg v. Com. of Pennsylvania, 41 U.S. 539, 608 (1842) (declining to permit Pennsylvania courts to make an initial preliminary determination in case alleging escape of slave from Maryland); Hanson v. Denckla, 357 U.S. 235, 254-55 (1958) (declining to permit Florida to exercise jurisdiction over issues raised by Florida domiciliary's will); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (declining to permit Oklahoma to litigate legal responsibility of seller of car that malfunctioned in Oklahoma); Kulko v. Superior Court, 436 U.S. 84 (1978) (declining to permit California to adjust child support payments for children living in state); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (declining to permit California to obtain jurisdiction over foreign manufacturers of items allegedly malfunctioning in California); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873 (2011) (declining to permit New Jersey to provide forum for victim of malfunctioning machine manufactured abroad and sold in a different state); Walden v. Fiore, 571 U.S. 277, 279 (2014) (declining to permit Nevada to litigate alleged government abuse of Nevada resident taking place in another state); Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1784 (2017) (declining to permit California to entertain drug-related claims by non-residents against national corporation engaged in sale of drug in California).

ers[20] of the federal courts, premised on amorphous concepts like "our Federalism" or "fundamental fairness," shunt important legal issues to politically sensitive state judicial tribunals less likely to protect the weak.[21] The 10th Amendment, lacking principled norms for judicial enforcement, became an ideological weapon in the struggle over gun control.[22] 11th Amendment jurisprudence, bereft of textual or intellectual coherence, exudes arbitrariness and often leaves victims searching for effective judicial remedies.[23]

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20. For analytically questionable federalism-based limits on the remedial powers of a federal court, see Younger v. Harris, 401 U.S. 37, 54 (1971) (barring federal judges from enjoining pending unconstitutional state judicial proceedings); Hicks v. Miranda, 422 U.S. 332 (1975) (blocking pending federal proceeding once state criminal proceedings commence). *But see*, New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (permitting federal proceedings despite pending state court action on the same issue).

21. I have previously noted the substantive Fourth Amendment impact of weakening federal habeas corpus review. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

22. The 10th Amendment provides: "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." For most of its life, the 10th Amendment was deemed a mere tautology, judicially unenforceable because it lacks manageable judicial standards. For the modern Supreme Court's tortuous efforts to enforce the 10th Amendment, see, e.g., Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating application of federal minimum wage statutes to employees of state and local governments), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); New York v. United States, 505 U.S. 144 (1992) (invalidating aspects of federal statute governing disposal of radioactive waste); Printz v. United States, 521 U.S. 898, 933 (1997) (invalidating federal requirement that state law enforcement official conduct background checks on persons seeking to buy guns); Reno v. Condon, 528 U.S. 141, 143 (2000) (upholding ban on state sale of drivers' license information). For a useful summary of the area, *see* Sharon E. Rush, *Oh, What a Truism the Tenth Amendment Is*, 71 FLA. L. REV. 1095 (2019).

23. The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The 11th Amendment was enacted in response to *Chisholm v. Georgia*, which had held that Georgia, by entering the Union, had waived any sovereign immunity defense to a diversity case in federal court brought by non-residents of the state. 2 U.S. 419, 452 (1793) Its literal text, confined to diversity or alienage jurisdiction, reverses *Chisholm*. The Court abandoned the literal text in *Hans v. Louisiana*, applying the 11th Amendment to block federal question cases brought by in-state residents while denying any protection to local governments. 134 U.S. 1, 20-21 (1890) In *Ex parte Young*, the Court rejected an effort to impose the 11th Amendment to block constitutionally-based injunctive relief against state officials. 209 U.S. 123, 166-67 (1908). In *Pennhurst State Sch. & Hosp. v. Halderman*, the Court extended the 11th Amendment's jurisdictional bar to state law injunctive claims pending in federal court under pendent jurisdiction. 465 U.S. 89, 121 (1984). In *Seminole Tribe v. Florida*, the Court invalidated Congress'

Unduly narrow readings of Section 1 of the 14th and 15th Amendments, confining constitutional protection to intentional racial and gender discrimination, invite unscrupulous state and local politicians to disguise discriminatory behavior as legitimate "neutral" regulation.[24] At the same time, highly-aggressive readings of Section 1 have allowed business corporations to thwart state regulation[25] and have "incorporated" virtually the entire Bill of Rights against the states "jot and tittle," occasionally at the expense of important and legitimate state interests.[26] Finally, grudging readings of Congress's enforcement powers under Section 5 of the 14th and Section 2 of 15th Amendments have repeatedly blocked a sympa-

effort to abrogate 11th Amendment immunity under the Commerce Clause and applied it to block a form of statutorily-based federal injunctive relief. 517 U.S. 44, 76 (1996). In *Alden v. Maine*, the Court invoked the 11th Amendment to block efforts to enforce federal statutory law in unconsenting state courts. In recent years, the Court has drawn back somewhat, re-asserting the power of federal courts to issue injunctive relief against unconsenting state officials. 527 U.S. 706 (1999).

24. *See* Washington v. Davis, 426 U.S. 229 (1976) (14th Amendment equal protection claim requires proof of intent or purpose to discriminate against racial minorities); City of Mobile v. Bolden, 446 U.S. 55 (1980) (15th Amendment claim of racial voting discrimination requires proof of discriminatory purpose). *See also* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding preferential treatment of veterans in public employment despite discriminatory impact on women).

25. For the emergence of corporations as highly protected entities under the 5th and 14th amendments, *see* Burt Neuborne, *Of "Singles" Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769 (2013). *See generally*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) (invalidating restrictions on corporate speech as discriminatory); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683-84 (2014) (business corporation entitled to free exercise protection).

26. The word magic that transported the Bill of Rights across a Due Process bridge, rendering the first eight amendments applicable against the states can be traced through Twining v. New Jersey, 211 U.S. 78, 98 (1908) (suggesting that aspects of the first eight amendments may be protected against the states because they fall within the scope of due process of law); Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment to the states as an alternative to substantive due process); Palko v. Connecticut, 302 U.S. 319 (1937) (arguing for "selective incorporation;" declining to invalidate state's right to appeal in criminal case); Adamson v. California, 332 U.S. 46 (1947) (applying selective incorporation to uphold state rule permitting comment on defendant's refusal to testify); Malloy v. Hogan, 378 U.S. 1 (1964) (applying 5th Amendment to states, leading to overruling of Adamson); Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968) (applying virtually total incorporation to the Bill of Rights); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010) (Second Amendment fully incorporated against state and local governments)*;* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (unanimous jury requirement incorporated against states – "jot and tittle" approach).

thetic national majority from providing needed protection to victims of state and local discrimination.[27]

But it doesn't have to be that way. The map of federalism can – and should - be re-drawn to enhance federalism's post-Civil War structural role as a protector of "discrete and insular minorities." Much of the raw material that we use to forge the law of federalism – the 1787 constitutional text; the 1791 Bill of Rights, the 10th and 11th Amendments; institutional history, especially the history of the early Republic; and policy articulated in the Federalist Papers - desperately needs updating in light of a "Second Founding,"[28] belat-

27. For a sampling of the Court's narrow reading of Congress' power under Section 5 of the 14th and 15th Amendments, see *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883) (invalidating Congressional public accommodation law); United States v. Cruikshank, 92 U.S. 542 (1875) (invalidating federal anti-lynching law); City of Boerne v. Flores, 521 U.S. 507 (1997) (invalidating Congressional effort to enforce the free exercise clause against the states); United States v. Morrison, 529 U.S. 598 (2000) (invalidating Congress' effort to create private cause of action for gender motivated violence); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (invalidating Congress's attempt to authorize suits against states for age discrimination); Bd. of Tr. v. Garrett, 531 U.S. 356 (2001) (invalidating Congress's effort to authorize suits against states for discriminating against the disabled); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (invalidating Section 5 of the Voting Rights Act of 1982); and Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (narrowly construing Section 2 of the Voting Rights Act). *But see* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (upholding Congress's power to authorize suits against states for violating the Family and Medical Leave Act).

28. I never heard the words "Second Founding" in law school. The concept was originally described by W.E.B. Dubois in 1903. W.E.B. Du Bois, *The Dawn of Freedom*, The Souls of Black Folk (1903) (discussing the period from 1861 to1872), but too few listened. My attention was drawn to the idea of a Second Founding by Justice Thurgood Marshall's courageous Bi-Centennial address warning that the Constitution was not complete until equality was inserted into the document by the second Founders. Thurgood Marshall, Remarks at the Annual Seminar of the S.F. Patent and Trademark Law Ass'n, (May 6, 1987), available at http://thurgoodmarshall.com/the-bicentennial-speech [https://perma.cc/EH6A-GXWB]. *See also*, Stuart Taylor, *Marshall Sounds Critical Note on Bicentennial*, N.Y. Times, May 7, 1987, at A1. Although a significant body of scholarly material now describes and celebrates the Second Founding, it remains dwarfed by academe's continued preoccupation with the First Founding. Eric Foner's work stands out as a brilliant guide to the momentous events surrounding the formal end to slavery and the constitutional invention of equality. See the magisterial Eric Foner, Reconstruction: America's Unfinished Revolution 1863-77 (2014 ed.) [hereinafter Foner, Reconstruction], and his highly readable synopsis, Eric Foner, The Second Founding: How the Civil War and Reconstruction Remade the Constitution (2019) [hereinafter Foner, The Second Founding]. I rely heavily on Foner's work in this essay. Foner describes the events leading to the ratification of the 13th Amendment in 1865 in Foner, Reconstruction *supra* at 1863-77 and Foner, The Second Founding, *supra* at 21-54. He chronicles the events leading to the ratification of the 14th Amendment in 1868 in Foner, Reconstruction, *supra*,

edly (but magnificently) introducing the prime value o f equality into the Constitution.

I.
A TALE OF TWO FOUNDINGS

We are all devotees of the nation's First Founding beginning in Philadelphia in the years after the Revolutionary War.[29] Veneration of George Washington, John Adams, Thomas Jefferson, James Madison, and the rest of the "Founding Fathers" as secular saints begins on the first day of kindergarten and continues through the last time you saw "Hamilton," or read a Supreme Court opinion respectfully seeking the First Founders' original intent.

With the exception of the martyred Abraham Lincoln, though, no similar cult celebrates the thoughts and achievements of the men and women who forged the nation's Second Founding in the wake of the Civil War. The Second Founding took place between 1860-1877 with: (1) the nation's fateful decision to go to war to prevent Southern secession and the indefinite perpetuation of slavery;[30] (2) President Lincoln's January 1, 1863 Emancipation

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and FONER, THE SECOND FOUNDING, *supra* at 55–92. The events leading to the ratification of the 15th Amendment in 1870 are described in FONER, RECONSTRUCTION, *supra*, and FONER, THE SECOND FOUNDING, *supra* 93–123. For a pathbreaking history of the drafting and adoption of the 14th Amendment, *see* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *See also* Jacobus tenBroek, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951).

Alas, the Supreme Court, despite its current obsession with constitutional history, does not yet give adequate weight to the words and actions of the Second Founders, in large part because of the residual effect of the so-called Dunning School of American historians who have mischaracterized the Second Founding as a tragic experiment in radical excess. See *infra* at pp. 12-16 for the impact of the Dunning School on the Supreme Court's treatment of the Second Founding.

29. Somewhat arbitrarily, I date the formal beginning of the First Founding on May 14, 1787, the first convening of what became the Constitutional Convention in Philadelphia. Relevant pre-history of the First Founding encompasses the period of the Articles of Confederation adopted by the Continental Congress on November 15, 1777, ratified by the states on March 1, 1781, and formally terminated on March 4, 1789; as well as the political events occurring during the Colonial period, culminating in the adoption of the Declaration of Independence by the second Continental Congress on July 2, 1776, its public promulgation on July 4, and its principal signing on August 2, 1776. I include the adoption of the Bill of Rights in 1791 and the ratification of the 11th and 12th Amendments in 1795 and 1804 within the First Founding.

30. The nation's decision to use force to prevent secession is described in James M. McPherson, THE BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988). The theoretical case for secession rested on John Calhoun's conception of federal-

Proclamation, a wartime measure freeing enslaved persons held in areas engaged in rebellious efforts to secede;[31] (3) the post-Civil War ratification of the 13th Amendment ending slavery and involuntary servitude (1865), the 14th Amendment guarantying birthright citizenship, the enjoyment of the privileges and immunities of national citizenship, equal protection of the laws, and due process of law (1868), and the 15th Amendment forbidding racial discrimination in access to the ballot (1870);[32] (4) the Presidential elections of 1864 (approving the 13th Amendment), 1868 (approving the 14th Amendment), and 1872 (overwhelmingly approving the 15th Amendment);[33] (5) the emergence in 1866 and 1867 of Congressionally-fostered bi-racial state governments in the Reconstructed South,[34] followed in 1871-73 by vigorous action by Congress and President Grant protecting bi-racial governance against terrorist as-

ism that viewed the 1787 Constitution as a compact between sovereign states and viewed the idea of sovereignty as indivisible. If the indivisible idea of "sovereignty" resided in the states, each state remained free to withdraw from the compact. *See* RICHARD HOFSTADTER, *John C. Calhoun: The Marxist of the Master Class, in* THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (2011). One of the earliest formal articulations of the state-sovereignty position that eventually matured into Calhoun's full-blown theory was written by two of our most venerated first Founders, James Madison and Thomas Jefferson, asserting the right of the states to nullify federal law on unconstitutional grounds. *See* James Madison & Thomas Jefferson, THE RESOLUTIONS OF VIRGINIA AND KENTUCKY PENNED BY MADISON AND JEFFERSON (Robert I. Smith ed., Samuel Shepherd 1835) (1798) [hereinafter Resolutions of Virginia and Kentucky]. *See* H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval,* 80 VA. L. REV. 689 (1994) (arguing that Madison's idea of nullification required collective action by the states). Washington was reportedly appalled by Jefferson and Madison's assertions of the power of state nullification. RON CHERNOW, ALEXANDER HAMILTON 574 (2004).

31. The Emancipation Proclamation may be viewed in the National Archives. The operative language is: "all persons held as slaves within [rebellious territory], shall be then, thenceforward, and forever freeFalse" Emancipation Proclamation (Sept. 22, 1862). Since the Proclamation was a wartime measure aimed at rebellious areas, it did not free approximately 800,000 slaves held in non-seceding states, including Tennessee and West Virginia, or in areas of the South under Union control, like New Orleans and the surrounding area, and pockets of Virginia. *See* HAROLD HOLZER, EMANCIPATING LINCOLN *(*2014).

32. For descriptions of the events leading to the ratification of the 13th, 14th, and 15th Amendments, see *supra* note 28.

33. Eric Foner notes the salience of each Amendment in the 1864, 1868, and 1872 Presidential elections in FONER, THE SECOND FOUNDING, *supra* note 28.

34. See *id.* for the Reconstruction Congress's effort to foster bi-racial democracy. Three years before the ratification of the 15th Amendment, Congress enfranchised Black male citizens in the states of the old Confederacy. *Military Reconstruction Act of March 2, 1867*, ch. 153, sec. 5, 14 Stat. 428, 429. It was the votes of this bloc of newly enfranchised Black citizens that enabled the ratification of the 14th and 15th Amendments. *See also*, FONER, THE SECOND FOUNDING *supra* note 28.

sault by the Ku Klux Klan;[35]and (6) the withdrawal of federal troops from the states of the old Confederacy in 1877, pursuant to the Compromise of 1876 that allowed Rutherford B. Hayes to defeat Samuel J. Tilden in the Electoral College by a single vote, despite having lost the popular vote.[36]

The Second Founding was a tectonic event that formally transformed the United States Constitution by adding equality as a prime value and redrawing the map of federalism to preserve it. Not every adoption of a constitutional amendment qualifies as a "re-founding." In order to be treated as a watershed event warranting (indeed, requiring) reassessment of the entire constitutional text, a constitutional "re-founding" requires sustained exercises of popular will that formally invoke Article V to codify constitutional alterations resting on novel structural principles and enriched prime substantive values. To my mind, the sustained Post-Civil War engagement of the people in introducing equality into the Constitution and dramatically altering the federalism conventions underlying the 1787 Constitution in aid of newly minted equality rights clearly qualifies as such a "re-founding," demanding re-consideration of the entire document.[37]

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35. *See supra* note 28 for material describing the successful rescue effort.

36. For discussions of the Election of 1876, *see* ROY MORRIS, JR., FRAUD OF THE CENTURY: RUTHERFORD B. HAYES, SAMUEL TILDEN, AND THE STOLEN ELECTION OF 1876 (2003); MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876 (2008). The classic account of the Hayes-Tilden election occurs in C. Vann Woodward, *Origins of the New South, 1877 – 1913, in* IX A HISTORY OF THE SOUTH (Wendell Holmes Stephenson & E. Merton Coulter eds., 2009). It is, however, burdened by a virtually complete acceptance of the Dunning School's mordant vision of Reconstruction. The rise and fall of the Dunning School is noted *infra* at pp. 12-16.

37. The notion of formal "re-foundings" generated by the cumulative impact of multiple constitutional amendments altering pre-existing structural arrangements and introducing new prime constitutional values into the text differs from the less formal idea of "constitutional moments," which are said to alter the Constitution's meaning without formal amendment. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984). Professor Ackerman brilliantly develops his thesis in a multi-volume work. BRUCE ACKERMAN, WE THE PEOPLE (2018).

Although it falls outside the scope of this essay, I believe that a "Third Founding" has taken place with the adoption of multiple constitutional amendments (12th, 15th, 17th, 19th, 20th, 22nd, 23rd, 2 4th, 25th, and 26th) designed to preserve the right to vote and to correct flaws in the original 1787 democratic machine. I believe that such a "Third Founding" introduces democratic self-government as an additional prime constitutional value requiring reconsideration of the narrow readings too often given by the Supreme Court to efforts to protect the right to vote in cases like Mobile v. Bolden, 446 U.S. 55 (1980), Shelby Cnty v. Holder, 570 U.S. 529 (2013), Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321

Only the racism inherent in the so-called Dunning School (named after Columbia historian William A Dunning and his students),[38] that misdescribed Reconstruction as an eruption of radical excess that temporarily displaced the "natural" order of life in the South with a short-lived corrupt, tyrannous rule by barely civilized Blacks incapable of self-government,[39] has prevented us (including the Supreme Court) from treating the deliberations and achievements of the Second Founders – patriots like Frederick Douglass, Thaddeus Stevens, John Bingham, Carl Schurz, Edwin Stanton; Charles Sumner, William H. Seward, Susan B, Anthony, Elizabeth Cady Stanton, and Salmon P. Chase – with the same intensity and respect that we quite appropriately lavish on the achievements of George Washington, John Adams, Alexander Hamilton, Thomas Jefferson, James Madison, John Jay, and that intellectual giant, Elbridge Gerry.

The Dunning School fostered the "Lost Cause" vision of the Civil War that romanticized and air-brushed Southern efforts to preserve slavery as principled efforts to preserve individual and state autonomy, and misdescribed the wave of racial terror that swept the South after the removal of federal troops in 1877 as a justified effort to restore good government and the natural racial order.[40] The triumph of the Dunning School in re-writing history

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(2021), Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019), and Crawford v. Marion Cnty, 553 U.S. 181, 204 (2008). *See generally*, Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 608, 662 (2013).

38. For a description and critical analysis of the Dunning School approach to Reconstruction history, see THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION (John David Smith ed., 2013). Professor Smith has assembled a collection of essays surveying current Reconstruction scholarship. INTERPRETING AMERICAN HISTORY: RECONSTRUCTION (John David Smith ed., 2016). *See also*, W.E.B. DU BOIS, *The Propaganda of History*, *in* BLACK RECONSTRUCTION IN AMERICA 711-29 (Free Press ed. 1998) (1935); and BRUCE E. BAKER, WHAT RECONSTRUCTION MEANT: HISTORICAL MEMORY IN THE AMERICAN SOUTH (2007). Eric Foner diplomatically credits the Dunning School with useful innovations in the art of writing history but unequivocally brands it as racist. FONER, THE SECOND FOUNDING, *supra* note 28.

39. For examples of the Dunning school's negative story of Reconstruction, *see* JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION 1866-1876 (1902); WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC 1865–77 (1907); CLAUDE G. BOWERS, THE TRAGIC ERA; THE REVOLUTION AFTER LINCOLN (1929). For a particularly venomous example of the worldwide adoption of White Supremacy as an excuse for colonial exploitation and white racial privilege, see JAMES BRYCE, THE AMERICAN COMMONWEALTH (1888).

40. The myth of the "Lost Cause" was launched shortly after the Civil War by Edward A. Pollard in *The Lost Cause*. EDWARD A. POLLARD, THE LOST CAUSE; A NEW

reached its apogee in 1915 in D.W. Griffith's silent movie epic, *The Birth of a Nation*, a technically brilliant celebration of the Ku Klux Klan's forcible "redemption" of white privilege in South Carolina. *The Birth of a Nation* premiered at the White House, the first movie to be screened by a President. Woodrow Wilson, an ex-academic and a racist, loved it. The movie was an enormous commercial success.[41]

But the ideology of the Lost Cause and the Dunning School's negative depiction of Reconstruction did more than shape public perception of the work of the Second Founders. It poisoned the Supreme Court's official view of the enactment of the 13th, 14th, and 15th Amendments and the heroic efforts of the Second Founders to forge a bi-racial democracy. The poison began its work in 1873 before the ink was dry on the 14th and 15th Amendments in *The Slaughterhouse Cases*,[42] when five members of the Court imposed an extremely narrow reading on Section 1 of the 14th Amendment, especially its privileges and immunities clause, confining it to the protection of a narrow but important category of "national" rights, but refusing to read the 14th Amendment as altering the federalism assumptions held by the First Founders.

Justices Field, Bradley, Swayne, and Chief Justice Chase dissented, arguing that the majority's microscopic reading of the 14th Amendment's reach gutted the Second Founders' effort to limit the power of the states to act oppressively against the weak. Justice Swayne, protesting the majority's narrow construction, correctly characterized the Reconstruction Amendments as a Second Found-

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SOUTHERN HISTORY OF THE WAR OF THE CONFEDERATES (1866). We live with "The Lost Cause" today in the ubiquitous presence of monuments, buildings, parks, and public works dedicated to glorifying the memory of leaders of the Southern effort to secede in defense of slavery. The myth of "The Lost Cause" is so entrenched in many areas of the South that many state legislators seek to ban efforts to teach non-racist Reconstruction history in the public schools. *See* Rashan Ray and Alexandra Gibbons, *Why States Are Banning Critical Race Theory*, https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/ [https://perma.cc/8UTL-EA5H] (containing appendix listing state legislation).

41. Allyson Hobbs, *A Hundred Years Later "The Birth of a Nation" Hasn't Gone Away*, THE NEW YORKER (Dec. 13, 2015). D.W. Griffith, troubled by criticism from the NAACP, followed *The Birth of a Nation* in 1916 with the equally-technically brilliant film, *Intolerance,* an attack on bigotry. It is a sad commentary on American culture that *Intolerance* flopped financially. *See generally* WILLIAM M. DREW, D.W. GRIFFITH'S *Intolerance*: Its Genesis and Its Vision ((2001). For insight into Wilson's troubling record on race, see generally PATRICIA O'TOOLE, THE MORALIST: WOODROW WILSON AND THE WORLD HE MADE (2018).

42. 83 U.S. 36 (1873).

ing, arguing that "fairly construed, these amendments may be said to rise to the dignity of a new *Magna Carta*."[43]

The poison continued three years later in *United States v. Cruikshank*, [44] when a similarly divided 5-4 Court overrode a dissent by the first Justice Harlan[45] and denied Congress the power under Section 5 of the 14th Amendment to protect persons seeking to exercise their constitutional right to vote against lynching and murder by private mobs.[46] Then, in *United States v. Harris*,[47] the Court declined to recognize Congressional power under Section 5 of the 14th Amendment to protect persons incarcerated in state or local jails from private lynch mobs, even when the lynch mob was led by the Sheriff. In *The Civil Rights Cases*,[48] eight Justices overrode a magnificent dissent by the first Justice Harlan and ruled that the federal government was powerless under Section 5 of the 14th Amendment to protect individuals against acts of private discrimination in access to places of public accommodation. Finally, in *Plessy v. Ferguson*, once again over a magnificent dissent by Justice Harlan, the 19th century Supreme Court completed its dismantling of the Second Founding by upholding the legal foundation of Jim Crow – legally-compelled racial segregation.[49]

It's fair to say that in construing the Second Founders' work, the post-Civil War United States Supreme Court functioned as if it were the Supreme Court of the Confederacy.

The poison continued into the 20th century. In *Giles v. Harris*,[50] even the great Justice Oliver Wendell Holmes, wounded in battle during the Civil War, got into the act of ignoring the Second Founding. Confronted by a massive failure to allow Blacks to vote, Holmes, writing for the Court, simply threw up his hands and sur-

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43. 83 U.S. at 125.

44. 92 U.S. 542 (1876).

45. *Id.* at 559 (Harlan, J., dissenting).

46. *Cruikshank* arose out of the Colfax massacre, when a crowd of Black persons who had sought to vote in the 1872 bitterly contested Louisiana gubernatorial election and who had occupied a local courthouse in Colfax surrendered to ex-Confederate forces on April 13, 1873. As many as 150 were murdered. Three Whites died in the confrontation. Eric Foner characterizes the Colfax massacre as the bloodiest act of mass terrorism in the post-Reconstruction era. *See* FONER, RECONSTRUCTION, *supra* note 28, at 437. I read *Cruikshank* as having been overruled by *United States v. Price*, 383 U.S. 787, 801 and n.9 (1966).

47. 106 U.S. 629 (1883).

48. 109 U.S. 3, 13 (1883).

49. 163 U.S. 537, 555-57 (1896) (Harlan, J. dissenting).

50. 189 U.S. 475 (1903).

rendered.[51] The Dunning School spread the poison well into the 20th century. No less an iconic figure than Justice Robert Jackson, who wrote the majestic opinion in *West Virginia v. Barnette*[52] invalidating compulsory flag salutes, dissented in *Korematsu*, and then served as the United States' Chief War Crimes Prosecutor at the Nuremberg trials, joined Felix Frankfurter and Owen Roberts in describing the work of the Second Founders as a well-intentioned mistake that left whites in the South with the bitter memory of Black tyranny and misgovernment.[53] Justice Jackson wrote for the Court in *Collins v. Hardyman*,[54] continuing to deny victims of violence based on political views a federal remedy. Jackson cited the Dunning School classic by Claude Bowers, *The Tragic Era,*[55] as the sole historical support for the Court's favorable citation to cases like *The Slaughterhouse Cases*, *The Civil Rights Cases*, *Cruikshank*, and *United States v. Harris* that read the Reconstruction Amendments and statutes as narrowly as possible.[56]

Jackson's negative views of Reconstruction, which mirrored the elite white view propounded by the Dunning School, were shared by Justices Felix Frankfurter[57] and Owen Roberts. Hugo Black, the great liberal icon appointed to the Court in 1938 was, as a young politician on the make in Alabama, a member of the Ku Klux Klan until his election to the Senate in 1925.[58] A Supreme Court that

51. *Id.* at 486 (declining to exercise broad equitable power to remedy systemic deprivation of the vote).

52. 319 U.S. 624, 644 (1943).

53. Screws v. United States, 325 U.S. 91, 149 (1945) (Roberts, Frankfurter, & Jackson, JJ., dissenting) (arguing that the beating of a Black prisoner to death by local law enforcement officials was a "local" crime not subject to federal prosecution).

54. 341 U.S. 651 (1951).

55. BOWERS *supra* note 39.

56. *Id.* at 657-58.

57. *See* United States v. Williams, 341 U.S. 70, 81-82 (1951) (plurality opinion) (holding that 18 U.S.C. § 241 (1948), a Reconstruction era statute barring conspiracies between private actors and government officials to deprive victims of constitutional rights, does not apply to actions by state government officials). See also, Justice Frankfurter's opposition to the use of the Civil Rights Act of 1871, 42 U.S.C. § 1983, as a means to redress unconstitutional actions by state and local government officials. Monroe v. Pape, 365 U.S. 167, 258-59 (1961) (Frankfurter, J., dissenting) (arguing that clearly unlawful state or local police activity is not taken "under color of law.").

58. Justice Black, born in 1886, was elected to the Senate from Alabama in 1926, allegedly with Klan support. He claimed to have ended his membership in the Klan in 1925. Shortly after Black's confirmation, it was revealed that he had received – and accepted – a lifetime honorary membership in the Klan. *See* William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U.

included an ex-Klan member and swallowed the Dunning School's racist story of radical excess and Black inferiority was hardly likely to treat the Second Founders as worthy of re-shaping the Constitution.

Not surprisingly, at virtually every turn, the Supreme Court minimized the Second Founders' efforts where racial equality is concerned, saddling the modern Court with a wall of appalling judicial precedents eviscerating the ability of Section 1 of the 14th and 15th Amendments, and sections 5 and 2 of the 14th and 15th Amendments to act, in Justice Swayne's words, as a second *Magna Carta*, while transforming – some might say perverting - the work of the Second Founders to protect large corporations and the wealthy.[59]

Even today, although cases like *Plessy*, *Cruikshank*, and *Harris* have been repudiated long after the damage was done, and although lawyers have built an ungainly Commerce Clause workaround of *The Civil Rights Cases,*[60] the current Court, saddled with appalling precedent and educated under the influence of the Dunning School, continues to ignore the voices of the Second Founders in construing the 14th and 15th Amendments. The false distinction between "state action" and private behavior that is ignored or tolerated by state and local government continues to bedevil the Court and complicate efforts to achieve equality.[61] In *Washington v. Da-*

C??. L. R??. 1, 13 (1973). Justice Black went on to serve with great distinction as a defender of free speech, but equality was not his forte. He wrote the Court's unfortunate opinion in *Korematsu* upholding the openly racist treatment of Americans of Japanese ancestry during World War II.

59. *See supra* note 28for a brief discussion of the Supreme Court's unremittingly grudging readings of Section 1 and 5 of the 14th Amendment and Sections 1 and 2 of the 15th Amendment when racial equality is at stake. *See generally* Eric Foner, *The Supreme Court and the History of Reconstruction – and Vice-Versa*, 112 COLUMN L. REV. 1585 (2012); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. R??. 1801 (2010); ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, THE DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (2005). *See* Neuborne, *supra* note 25, at 775 for a survey of the Court's extremely broad readings of Section 1 of the 14th Amendment to protect corporations and wealthy businessmen.

60. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241, 261 (1964) (upholding public accommodations law under Commerce Clause as applied to interstate motel); Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding public accommodations law as applied to small local restaurant under Commerce Clause; leaving open Section 5 of 14th Amendment).

61. *See* Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1388 (2006); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504 (1985).

vis[62] and *City of Mobile v. Bolden*,[63] a majority of the Court continued to insist that Section 1 of the 14th and 15th Amendments require proof of discriminatory animus and say nothing about the knowing enactment of laws falling with disparate severity on discrete and insular minorities. In construing Congress's power to enforce the 14th and 15th Amendments, in cases like *City of Boerne v. Flores*,[64] (invalidating Congressional effort to enforce the free exercise clause against the states); *United States v. Morrison*,[65] (invalidating Congress' effort to create private cause of action for gender motivated violence); *Kimel v. Florida Board of Regents*,[66] (invalidating Congress's attempt to authorize suits against states for age discrimination); *Board of Trustees v. Garrett*,[67] (invalidating Congress's effort to authorize suits against states for discriminating against the disabled); *Shelby County v. Holder*,[68] (invalidating Section 5 of the Voting Rights Act of 1982); and *Brnovich v. DNC*,[69] (narrowly construing Section 2 of the Voting Rights Act), the Court has tethered Congress's Section 5 power to acting against behavior that already violates Section 1, leaving only a small, poorly defined window for prophylactic Congressional legislation to deal with historic failures of states to respect the Section 1 rights of discrete and insular minorities.

Test yourselves on the success of the Dunning School in obliterating the legal and moral significance of the Second Founding. Have you ever heard of the Committee of 15, headed by Johnathan Bingham, who drafted the 14th Amendment? Do you know that it was Black voters, enfranchised by Congress in 1867, who secured the ratification of the 14th and 15th Amendments? Do you know why the drafters placed explicit Congressional enforcement powers in the 13th, 14th, and 15th Amendments? How much do you know about the actual operation of the bi-racial state and local governments established under Reconstruction? Have you ever read anything by Frederick Douglass? If you join me in answering "no" or "nothing" to those questions, you have some idea of the racists' suc-

62. 426 U.S 229 (1976) (imposing intent requirement on 14th Amendment Equal Protection Clause).

63. 446 U.S. 55 (1980) (imposing intent requirement on 15th Amendment right to vote free of racial discrimination).

64. 521 U.S. 507 (1997).

65. 529 U.S. 598 (2000).

66. 528 U.S. 62 (2000).

67. 531 U.S. 356 (2001).

68. 570 U.S. 529 (2013).

69. 141 S. Ct. 2321 (2021).

cess in obliterating an exercise in American greatness from our social and legal consciousness. It's long past time to restore it.

In recent years, the racist miasma fostered by the Dunning School's denigrating picture of Reconstruction has finally been swept away by American historians, led by Eric Foner, who have begun to tell a very different story of the remarkable efforts by the Second Founders to replace slavery with a bi-racial democracy founded on the idea that all men are created equal (sadly, most of the Second Founders stopped at men, bitterly disappointing Elizabeth Cady Stanton and Susan B. Anthony).[70] Given the unfolding historical narrative that is rescuing the achievement of the Second Founders from the racist grip of the Dunning School, I believe that it is time for a full-scale reconsideration of more than a century of constricted Supreme Court treatment of the work of the Second Founders, especially in the area where protection of equality intersects with federalism. It is long past time to treat the magnificent handiwork of the Second Founders with the respect it deserves, even if that means overruling the 19th century cases that set the Court on the wrong federalism path.

Just as the Supreme Court finally adopted the magnificent dissent of the first Justice Harlan in *Plessy* about the meaning of Section 1 of the 14th Amendment, so the current Court should finally adopt Justice Harlan's equally magnificent dissent in *The Civil Rights Cases* urging the Supreme Court to respect the voices of the Second Founders in charting the Court's federalism course.[71] Thus, the relevant constitutional text mapping the boundary between state and federal power in the 21st century is not solely the 1787 constitutional text and the 1791 Bill of Rights (plus the 11th and 12th Amendments), read through an originalist lens as the First Founders might have understood them.[72] Rather, the tectonic force of

70. For examples of the current historical rejection of the Dunning School's denigration of the Second Founding, *see supra* at note 38.

71. 109 U.S. at 26 (arguing that in denying Congress the power to protect newly emancipated persons against violence intended to deny their equal status the Court was ignoring the clear wishes of the architects of the Reconstruction Amendments).

72. I have my doubts about the usefulness of originalism as a philosophy of constitutional interpretation. *Compare* Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009), *with* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009). But that train has apparently left the Supreme Court station. All nine Justices now give at least lip service to following some aspect of the originalist path, although they often bicker over what the precise path should be. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1824 (2020) (differing over the appropriate originalist way to read the phrase "because of sex" in the 1964 Civil Rights Act).

the Second Founding so altered the original nature of "our Federalism" as to require resort to a "blended originalism," pursuant to which the originalist understanding of the First Founders is enriched, complicated, and occasionally supplanted by the structural vision of federalism formally codified by the second-Founders, especially when equality is at stake.[73] When, as will often be the case, the use of blended originalism fails to deliver a clear originalist answer to a hard federalism problem, respect for the Second Founders' decision to insert equality into the document as a prime value should lead us to allocate political power to the political majority most likely to respect the equality-based interests of the discrete and insular minorities for whose benefit the Second Founders introduced equality into the constitutional text in the first place.

A. Autonomy, Equality and the Two Substantive Foundings

The First Founders brilliantly (if somewhat reluctantly)[74] protected individual autonomy – the right to be let alone - against democratic excess and official overreaching by drafting and adopting the Bill of Rights.[75] We appropriately celebrate them for it.[76] Respect for individual autonomy is one of the cornerstones of any decent political order. But wholly unchecked autonomy leads to a world dominated by the strong where life is "nasty, brutish, and short" for everyone else.[77] Thus, while the First Founders magnificently protected autonomy and the rule of law as prime values, the First Founders' Autonomy-Based Constitution was woefully incomplete. It said not a word about equality.[78] How could it when the document reinforced and protected the ultimate abuse of autonomy – the power of the strong to enslave another human being?

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73. I sketch the operation of blended originalism *infra* at pp. 26-28.

74. For the first Founders reluctance to include a Bill of Rights in the 1787 Constitution, *see* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1990).

75. The Bill of Rights was adopted by Congress on September 25, 1789. It was ratified by the requisite number of states on December 15, 1791.

76. *See generally* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2014) (canvassing the first Founders' adoption of the autonomy-laden Bill of Rights, especially the First Amendment).

77. Hobbes's quote from LEVIATHAN, I, xiii, 9, describes the state of nature where one person's individual autonomy is unchecked by anything other than someone else's power to interfere with it.

78. It's not like the idea of equality was absent from late 18th century discourse. The Declaration of Independence, drafted by Thomas Jefferson, opens with the assertion that "all men are created equal," and the contemporaneous French Declaration of the Rights of Man (1789) is saturated with protections of *egalite'*.

Given the first Founders' preoccupation with autonomy and the document's exclusion of equality, it's no surprise that equality arguments fared very badly under the First Founders' Constitution. In *Prigg v. Pennsylvania*,[79] the Court upheld the autonomy-based right of a slave-owner to use self-help to recover an alleged fugitive slave. The equality-based effort by Pennsylvania to require a modicum of judicial process before permitting slave catchers to remove an alleged runaway from the state never had a chance.[80] And, in *Dred Scott v. Sandford*,[81] Chief Justice Taney ruled that no Black person could invoke the diversity jurisdiction of the federal courts in an effort to secure freedom because only whites could be citizens of a state. Given its pro-slavery slant, it is no surprise that the abolitionist leader, William Lloyd Garrison, publicly burnt the First Founders' Constitution, branding it a pact with the devil to preserve slavery.[82]

The Second Founders vastly complicated the constitutional enterprise by abolishing slavery and adding a deeply enriching new prime value – equality – to the constitutional mix. In deference to such a Second Founding, whether the structural constitutional issue is separation of powers, federalism, or the scope of federal judicial power under Article III, constitutional analysis should begin – and perhaps end - with a pragmatic assessment of the impact of a given structural decision on the ability of politically vulnerable persons to protect themselves against democratic failure. I call it "Footnote Four Structuralism."[83]

As we've seen, the two-hundred thirty-four years of our constitutional history have borne witness to at least two formal constitutional "Foundings" by the People. The First-Founding (I call it the "autonomy" Founding) was enabled by the colonists' sacrifice of blood and treasure during the Revolutionary War, and was formally codified by the People, after a false start with the Articles of Confed-

79. 41 U.S. 539 (1842). *See supra* text accompanying note 1.

80. The Justices' majority and dissenting opinions in *Prigg* are masterfully dissected in ROBERT M. COVER, JUSTICE ACCUSED (1975).

81. 60 U.S. 393 (1857). *See supra* text accompanying note 1.

82. FONER, THE SECOND FOUNDING, *supra* note 28, at 9. For Garrison's role in the abolitionist movement, see JOHN L. THOMAS, THE LIBERATOR: WILLIAM LLOYD GARRISON, A BIOGRAPHY (1963).

83. *See supra* at note6 for a brief discussion of Footnote Four in *Carolene Products.* The leading exposition of the link between judicial review and risk of democratic failure is JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

eration, pursuant to Articles VII and V.[84] The Second-Founding (I call it the "equality" Founding) was also enabled by almost inconceivable sacrifices of blood and treasure, this time during the Civil War.[85] As I've noted, the first Founding was all about protecting autonomy - the right to be let alone. Every one of the thirty-one protected activities mentioned in the Bill of Rights shields a category of autonomous behavior from inappropriate government interference.[86] The ultimate abuse of autonomy by the strong – the right to own another human being – was carefully protected by the first Founders' constitution – guaranteed importation of enslaved persons until 1808;[87] the Fugitive Slave Clause;[88] the first Founders' conception of state sovereignty;[89] the protection of private property in the Takings and Due Process clauses that ultimately led to *Dred Scott*;[90] the ban on unapportioned per capita taxation;[91] and the 3/5 compromise.[92] The essence of the Second Founding was the recognition by a new generation that unconstrained autonomy empowers the strong to oppress the weak, with slavery being the ultimate consummation of the process.

Confronted by the largest and richest slave-dependent economy in human history,[93] the Second Founders fought a bloody Civil

84. U.S. CONST. arts. V, VII. Article VII, which establishes the process by which the People adopted the Constitution, provides: "The Ratification of the Conventions of nine States, shall be sufficient for the

Establishment of this Constitution between the States so ratifying the Same." New Hampshire became the 9th state to ratify by Convention on June 21, 1788.

85. Article V is careful to assure that the results of a successful amendment process enjoy equal formal status with the original text adopted pursuant to Article VII. U.S. CONST. art. V. For descriptions of the extraordinary events leading up to ratification of the 13th, 14th, and 15th Amendments, *see supra* note 28.

86. For a listing of the 31 activities protected by the Bill of Rights, *see* Burt Neuborne, "*The House Was Quiet and the World Was Calm the Reader Became the Book" Reading the Bill of Rights as a Poem: An Essay in Honor of the Fiftieth Anniversary of Brown v. Board of Education*, 57 VAND. L. REV. 2007 (2004).

87. U.S. CONST. art. I, § 9.

88. U.S. CONST. art. IV, § 2, cl. 3.

89. The Resolutions of Virginia and Kentucky, drafted in 1798 by Thomas Jefferson and James Madison, asserted the power of the states to nullify federal law. The idea was expanded by John Calhoun to include interposition and eventually secession, all in aid of the owners of slaves. See *supra* note 30 for more on Calhoun and the Resolutions of Virginia and Kentucky.

90. Scott v. Sandford, 60 U.S. 393 (1857). For detail, see *supra* note 1.

91. U.S. CONST. art. I, § 9.

92. U.S. CONST. art. I, § 2, cl. 3.

93. In 1861, four million Black human beings were held in slavery to service a vastly profitable commercial empire based on the labor-intensive growth and exportation of cotton and rice. In 1861, the American South produced nearly 75% of the world's cotton. There were more millionaires *per capita* in the Mississippi River

War to eradicate slavery, and then inserted the idea of equality into the post-Civil War constitutional text to permit (indeed, require) government to limit autonomy where its unbridled exercise enabled the strong to impose unequal treatment on someone else. The 13th Amendment (1864-65) completed the work of Lincoln's 1863 Emancipation Proclamation, formally abolishing "slavery" and "involuntary servitude." The 14th Amendment (1868) formally erased the stain of *Dred Scott* by establishing "birthright citizenship" for all persons born in the United States, requiring states to respect the privileges and immunities of national citizenship, finally codifying the concept of equality before the law, re-stating the principle of due process of law, seeking to blackmail the Southern states into allowing Black people to vote, dealing with the Confederate war debt, and, in the second Founding's version of the "necessary and proper" clause, formally granting Congress the power to enforce the Amendment.[94] The 15th Amendment (1868-70) completed the Second Founding by banning racially-based restrictions on voting. As with the 13th and 14th Amendments, the 15th also formally granted enforcement powers to Congress. President Grant showed what the second Founding could achieve when he unleashed the full power of the United States to crush the Ku Klux Klan's effort to de-stabilize bi-racial government in the South.[95] Enabled by the Reconstruction Act of 1867 and the 15th Amendment, a remarkable flowering of biracial democracy swept the South. Legislatures elected by Black and White voters ratified the 14th and 15th Amendments.[96] More than 600 Black officials were elected to state

Valley than anywhere in the United States. Indeed, if the Confederacy were a single nation, it would have been the fourth richest nation on earth. *See* Greg Timmons, *How Slavery Became the Economic Engine of the South*, HISTORY (Sept. 2, 2020),www.history.com/news/slavery-profitable-southern-economy [https://perma.cc/F694-WZVR]. For a more scholarly treatment of the economic strength of the slave economy, see ROBERT WILLIAM FOGEL, WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY 189 (1989).

94. The full text of the 14th Amendment is annexed as Appendix 1. Justice Swayne's dissent in *The Slaughterhouse Cases,* contains a thoughtful overview of how the various components of the 14th Amendment fit together. 83 U.S. 36, 124-29 (1873) (Swayne, J., dissenting). For a pathbreaking history of the drafting and adoption of the 14th Amendment, see Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341 (1949); TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT, *supra* note 28.

95. President Grant's successful assault on the Klan is described in Richard Zuczek, *The Federal Government's Attack on the Ku Klux Klan: A Reassessment*, 97 S.C. HIST. MAG. 47, 47 (1996). Eric Foner describes and assesses Grant's efforts in FONER, THE SECOND FOUNDING, *supra* note 28, at 115–22.

96. FONER, THE SECOND FOUNDING, *supra* note 28.

legislatures. Fifteen Black members of Congress appeared. Two Black Senators were sworn in. In Mississippi, 80% of eligible Blacks voted in the 1870 gubernatorial election. In 1875, eight Black members of Congress were elected from six states.[97]

And then, it all fell apart. Terrorism swept the South, crushing hopes for bi-racial democracy.[98] Spurred by the latent racism that has never disappeared from American life, academic historians of the Dunning School de-legitimated the monumental achievements of the Second-Founders,[99] the Supreme Court decimated the legal force of their magnificent work,[100] and the American people, following the path set by academic and legal elites, allowed the Second Founding to drift into oblivion. Instead of a great silent film celebrating Lincoln's success in persuading Congress to approve the 13th Amendment, or the Committee of 15's extraordinary achievement in drafting the 14th Amendment, or the Byzantine history of the 15th Amendment, we got *The Birth of a Nation*.

B. Institutional Structure and the Two-Foundings

As we've just seen, the Second Founding revolutionized – and complicated - the value structure of the first Founders' Constitution by adding equality to the mix. But the Second Founders did not stop with adding equality as a prime value. They revamped the first Founders' idea of federalism in order to provide equality with structural, as well as substantive protection.

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97. *Id*. For the story of the rise and fall of biracial democracy in the Reconstruction South, *see* Daniel Byman, *White Supremacy Terrorism, and the Failure of Reconstruction in the United States*, 46 INT'L SECURITY 53 (2021). *See also*, ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

98. *See* Byman, supra note 97.

99. The work of the Dunning School is described *supra* at pp. 10-16.

100. Eric Foner succinctly tells the sad legal tale in FONER, THE SECOND FOUNDING, *supra* note 28, at 125–67. First, the Court decimated the 14th Amendment "privileges and immunities" clause in the *Slaughterhouse Cases*. . 83 U.S. 36 (1873). Then, in *United States v. Cruickshank*, it eliminated the Section 5 personal security guaranties. 92 U.S. 542 (1875) In the *Civil Rights Cases*, it wiped out the public accommodation protections under section 5 of the Fourteenth Amendment. 109 U.S. 3, 25-26 (1883). In *Giles v. Harris*, it crushed the 15th Amendment dream of bi-racial democracy. 189 U.S. 475 (1903). Finally, in *Lochner v. New York*, it deployed the Contracts Clause and Substantive Due Process to invalidate minimum wage and maximum hour legislation in the name of autonomy. 198 U.S. 45 (1905). Thus, a magnificent effort to achieve racial equality for the weak was delegitimated by academic racists, mugged by the Supreme Court, and hijacked by corporate lawyers operating in defense of the strong. Lincoln would weep.

Three brilliant structural innovations rest at the heart of the "First-Founders'" Constitution. The first was an enrichment of the idea of separation of powers, moving from the pre-Revolutionary British view, championed by John Locke,[101] that recognized two governmental "powers" – the power to enforce the law; and the power to make the law[102] - "separated" between the King and parliament;[103] to the more complex view propounded by Montesquieu that identified three governmental "powers" – the power to make law; the power to enforce existing law; and the power to resolve disputes about the law's meaning and applicability – "separated" between and among Congress, the President, and the Supreme Court.[104]

Once the more complex idea of three discrete forms of government "power" separated between and among three branches was

101. Locke's theory of separation of powers is initially stated in his Two Treatises of Government. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, §§ 134 (Legislative), 144 (Executive). It is thoughtfully summarized in M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (Liberty Press 2d ed. 1998) (1967). *See also* Burt Neuborne, *Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 370 n.21 (1982).

102. Judges, in Locke's model, were lumped with Sheriffs as Executive branch law enforcers appointed by the King. That's why judicial review of parliament never formally evolved in Great Britain. VILE, *supra* note 101.

103. In fact, the role of judges in Locke's world is considerably more complex than mere law enforcers. British judges were – and are – responsible for the care and feeding of the mysterious, residual body of law called "the common law," consisting of a body of judge-revealed rules that exist as a matter of pure reason. As a matter of British legal theory, judges do not make the common law. They merely reveal it and apply its logical corollaries. Somehow, the eternal legal verities of the common law always seemed to reinforce the power of the strong to dominate the weak – master-servant; husband-wife; parent-child; man-woman; King-commoner. The first Founders adopted Locke's view of the common law as a timeless judge-revealed river of law in the sky. *C.f.* Swift v. Tyson, 41 U.S 1 (1842) (rejecting the idea of a timeless common law waiting to be discovered by thoughtful judges as a violation of federalism and separation of powers); Erie R.R. v. Tompkins, 304 U.S 64, 78 (1938) (holding that there is no federal common law; except when there is); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (holding that the judiciary will not examine the validity of an act by a foreign sovereign government recognized by the United States, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law); Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (military contractors defense).

104. Montesquieu sets forth an enriched theory of separation of powers. BARON DE MONTESQUIEU, SPIRIT OF THE LAWS (Thomas Nugent trans., Batoche Books 2000) (1749). It is described in VILE, *supra* note101. Montesquieu's great innovation was the recognition of a free-standing judicial power to resolve disputes over the meaning and application of law on an equal footing with the powers of the Legislative and Executive branches. *See* Marbury v. Madison, 5 U.S. 137 (1803).

launched, it became important to generate a theory of allocation in doubtful cases about exactly how the government's "powers" should be "separated." At least two major theories emerged – a theory of negative separation aimed at preventing any group of officials from assembling a dangerous concentration of government power; and a theory of positive separation aimed at lodging governmental functions in a body of officials structured to perform them well.[105] A third, more radical theory – representation-reinforcing separation of powers – allocates power to officials in an effort to enhance the power of vulnerable groups to hold their own in the rough and tumble of democratic politics.[106] In Great Britain, the allocation of power to the House of Lords performs that function, vesting the British aristocracy with an ever-diminishing checking power.[107] The Senate's Article V Equal Suffrage clause, especially when reinforced by a super-majority filibuster rule, functions as our version of the British House of Lords, vesting small groups of rural voters with enhanced checking power often amounting to a veto.[108] It is also possible, though, to generate representation reinforcing theories of separation of powers in aid of "discrete and insular minorities" threatened by democratic failure.[109] Indeed, I believe that much of the Warren Court's jurisprudence can best be understood as enhancing the ability of certain victim groups – principally racial minorities - to punch above their respective weights in the political arena.[110]

The First Founders' second structural innovation was the equally revolutionary idea of an enforceable Bill of Rights protecting a set of autonomy-based individual rights. The first Founders

105. *See* VILE, *supra* note 101. Negative separation flows logically from Madison's "double security" argument in Federalist 51 briefly discussed *infra* at notes 145-147. Positive separation is implied from Madison's defense of the constitution's structure in Federalist 10. The two theories usually reinforce each other but the possibility of collision is always present. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

106. VILE, *supra* note 101. See also, Neuborne, *supra* note 101, at 373.

107. PHILIP NORTON, REFORM OF THE HOUSE OF LORDS 3 (2020).

108. Burt Neuborne, *One State/Two Votes: Do Supermajority Senate Voting Rules Violate the Article V Guaranty of Equal State Suffrage?*, 10 STAN. J. CIV. RTS. AND CIV. LIB. 27, 33 (2014).

109. Footnote Four of *Carolene Products* is explicitly representation reinforcing, viewing courts as owing a special duty of care to "discrete and insular minorities" likely to be treated unfairly in the political process. 304 U.S. at n.4.

110. See Burt Neuborne, *The Gravitational Pull of Race on the Warren Court,* 2010 Supreme Court Review 59.

were initially lukewarm about a Bill of Rights, declining to place one into the 1787 text. It was the People's refusal to accept the 1787 Constitution without the promise of a Bill of Rights that induced Madison and the rest of the first Founders to draft the first 10 Amendments.[111] Once a basket of textually complex individual rights were added to the already complex 1787 text, questions about which group of officials should have the final word in exercising the important power to interpret and enforce the text could not be ignored. The result was – and continues to be - a rich outpouring of theory justifying, challenging, limiting, defining, and describing the role of the Article III judiciary as the ultimate interpreter/enforcer of the structural and rights-bearing provisions of the Constitution. Four competing interpretative theories have emerged.

The first, "literalism," claims to be able to resolve disputes about constitutional meaning by using a dictionary to enforce the "plain meaning" of the text. When it works, literalism resolves counter-majoritarian difficulties associated with judicial review by turning it into an exercise in subordination to the commands of the Founders. Unfortunately, given the necessarily abstract nature of constitutional text, literalism doesn't work very often and risks robotic oversimplification.[112]

"Originalism" then steps in to deal with text that resists literal reading by asking what an ill-defined but privileged group of Founders thought the text meant.[113] Originalists initially asked what the drafters and enactors of a constitutional provision intended it to mean. That approach has been abandoned in favor asking what the contemporaneous "general public" would have understood the text to mean. Not once in the 153 years since the adoption of the 14th Amendment in 1868 has anyone asked what Black voters newly enfranchised by the 1867 Military Reconstruction Act, understood the text to mean when they elected the state legislatures needed to ratify the 14th and 15th Amendments. Whoever gets chosen as the

111. The story of the reluctant drafting of the Bill of Rights is told in IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING (1965). *See also Reluctant Paternity, supra* note 72.

112. For an explanation of the "plain meaning" rule, *see* David A. Strauss, *Why Plain Meaning*, 72 NOTRE DAME L. REV. 1565 (1997). For a critique of the plain meaning rule, *see* Erwin Chemerinsky, *Chemerinsky: The Myth of "Plain Meaning,"* ABA JOURNAL (Oct. 31, 2017), https://www.abajournal.com/news/article/chemerinsky_plain_meaning_is_a_myth [https://perma.cc/HBX8-JJSL].

113. Originalism is closely associated with Justice Antonin Scalia, who vigorously propounded it as an alternative to theories granting significant discretionary power to unelected judges. *See*, Jonathan R. Siegel, *The Legacy of Justice Scalia and His Textualist Ideal*, 85 GEO. WASH. L. REV. 857 (2017).

privileged Founder, though, honestly applied, originalism usually fails to deliver clear answers about what the Founders believed the text to mean.[114]

A third theory, "constructive originalism" (or "purposivism") rejects the idea of looking backward to what the Founders actually meant the text to mean, in favor of a more flexible notion of what they would probably want the text to mean today.[115] Unfortunately, such a sensible approach involves a level of subjective choice that troubles committed majoritarians.

Finally, "judicial pragmatism" does not purport to link a judge's opinion to the commands of the Founding generation. Instead, it seeks to choose the best modern judicial reading of the constitutional text,[116] despite the obvious tensions with democratic political theory.

Suffice it to say that, given the unruly nature of much constitutional text, the murky and contested historical record, and the competing theories of interpretation, clearly correct textual answers to most hard constitutional disputes are rarely apparent.

The third extraordinary innovation was "concurrent federalism" - the idea of a political union between and among a unitary center (the national government) and multiple political units at the periphery (the states), dividing a shared "sovereign" power between and among the center, the periphery, portions of the periphery, and all of the above to perform discrete governmental functions.[117]

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114. For examples of the inability to agree on a clear "originalist" meaning, see District of Columbia v. Heller, 554 U.S. 570, 603, 637 (2008) (dividing 5-4 on originalist meaning of Second Amendment); and Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741, 1755 (2020) (disagreeing intensely over original meaning of "because of sex" in Title VII).

115. *See* Siegel, *supra* note 111.

116. *See id.*

117. The academic literature on American federalism is vast. I have found David L. Shapiro's characteristically elegant FEDERALISM: A DIALOGUE (1995) both informative and challenging. Professor Shapiro, a consummate lawyer who served as Deputy Solicitor General from 1988-1991, organized his work in three parts – a lawyer's brief arguing for national power (14-57); a responsive brief arguing for state power (58-106); and an effort to chart a course between the two extremes (107-140). He also assembles a useful bibliography on federalism at the close of the work. Unfortunately, the book predates the resurgence of state power beginning with United States v. Lopez, 514 U.S. 549 (1995) (invalidating federal Commerce Clause ban on gun ownership in vicinity of school), and United States v. Morrison, 529 U.S. 598, 601–02, 617–19 (2000) (invalidating federal Commerce Clause and Section 5 of 14th Amendment civil cause of action for gender-moti-

The idea of structuring governing power with a center and political units at periphery was well known long before the American Revolution. Leagues of City States in Ancient Greece, the Roman Empire, the Holy Roman Empire, Great Britain itself, the Swiss Confederation, the Hanseatic League, the Hapsburg Empire, the Kingdoms of France and Spain - all were organized around a center in tandem with political units at the periphery. But ultimate "sovereign" power always existed in either the center or at the periphery – it was never shared with even a pretense of equality.[118]

At the time of the First Founding, the prevailing British model consisted of "devolved" peripheral entities (England, Scotland, Wales) and the colonies functioning as decentralized units of administration, with the ultimate "sovereign" power to govern concentrated in the London metropole.[119] Occasionally, as with the Swiss Confederation, a formal central governmental unit existed with sovereign power exercised by the units at the periphery (the cantons). But whether it was the center or the periphery, there was always a dominant partner where ultimate "sovereignty" resided. Indeed, prevailing legal theory at the time of the first Founding, rejected the possibility of sharing "indivisible" sovereignty.[120]

The first Founders' innovative vision of shared sovereignty sought to avoid both the British model of concentrating power in the center, and the excessive diffusion of sovereign power to the periphery that had doomed the Articles of Confederation. Instead, the First Founders envisioned a novel, untidy federal structure composed of a strong center and a powerful periphery each exercising a shared "sovereignty" over discrete tasks. Given the path-breaking notion of "shared sovereignty," virtually no theories existed to guide

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vated violence). *See also* Printz v. United States, 521 U.S. 898 (1997) (invalidating under 10th Amendment Congressional imposition of duty on local enforcement officials to conduct background checks before gun purchases); Alden v. Maine, 527 U.S. 706 (1999) (invalidating under 11th Amendment effort by private parties to enforce federal minimum wage law in non-consenting state court).

118. *See* Ronald L. Watts, *Federalism, Federal Political Systems, and Federations*, 1 ANN. REV. OF POL. SCI. 117 (1998).

119. The highly centralized British approach drove the dispute over "taxation without representation" that eventually led to the America Revolution. British political theory could not imagine colonial parliaments exercising an autonomous power to tax and refused to grant the colonists representation in the British Parliament. *See* Department of State, Office of the Historian, *Parliamentary Taxation of the Colonies, International Trade, and the American Revolution, 1763-1775*, www.history.state.gov./milestones/1750-1775/parliamentary-taxation [https://perma.cc/QB5M-MYTK].

120. SHAPIRO, *supra* note 115 (citing H.J Powell, *The Modern Misunderstanding of Original Intent*, 54 U. Chi. L. Rev. 1513, 1524-26 (1987)).

hard allocative choices. Pre-Revolutionary disputes about federalism in an autocracy provided only limited guidance. Choosing between two competing sets of autocrats turns on relative efficiency, force, control of riches, and maintenance of stability. But post-American Revolutionary democracy-based federalism asks, in addition, which political majority, local, state, or national, *ought* to have the final say on a given political issue.

Not surprisingly, unlike the first two structural innovations – separation of powers and enforceable individual rights – the First Founders did not develop a general theory of shared sovereignty, in large part because profound disagreements over slavery precluded a consensus on where ultimate sovereignty should reside in the new nation. Slave-owning interests and a few New England High Federalists argued that ultimate sovereignty resided in the states.[121] Mercantile leaders and abolitionists centered it in the nation.[122] Pragmatists, like Madison and John Marshall sought to split the atom of sovereignty by vesting sovereignty over discrete tasks in both the states and the nation, without asking questions about where ultimate sovereignty resided. Ambiguity reigned.

The pre-Civil War Republican Party's approach to federalism (and slavery), espoused by Abraham Lincoln, was similarly ambiguous, vesting sovereign power in the states to decide whether to abolish slavery within their respective borders but recognizing sovereign power in the nation to prevent the spread of slavery to the territories.[123] The ambiguity surrounding federalism inherent in the First

121. *See* The Resolutions of Virginia and Kentucky, *supra* note 30 for the federalism position of slave-owners; Mark Janis, *The Hartford Convention and the Specter of Secession*, UCONN TODAY (Dec. 15, 2014), www.today.uconn.edu/2014/12/the-hartford-convention-and-the-specter-of-secession/#[https://perma.cc/BA76-VWNR].

122. Hamilton's mercantile-centered views on federalism are set out in THE FEDERALIST NO. 17 (Alexander Hamilton). Frederick Douglass' abolitionist views are discussed in Paul Finkelman, *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republican,* 81 MO. L. REV. 1 (2016).

123. The pre-Civil War Republican Party's program of barring slavery from the territories but conceding its perpetuation to the Southern states would have left the vast bulk of enslaved persons in indefinite bondage. The Republican's hope that slavery would wither away once it was surrounded by a cordon of freedom overlooked the staying power of the vast Southern economic engine driven by cotton and rice plantations dependent on slave labor. For a description of the Republican position, *see* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY (2010). In a desperate bid to avoid secession and Civil War, the newly elected Lincoln appeared to support a proposed 13th Amendment (the Corwin Amendment) in 1861 that would have granted an unamendable power to the states to perpetuate slavery. The Amendment was enacted by both Houses of Congress and was on its way to the states for ratification when war broke out at Fort

Founding was resolved by a bloody Civil War. In the wake of the defeat of secessionist, pro-slavery forces, the "Second Founders" – political leaders like Frederick Douglas, Thaddeus Stevens, Edwin Stanton, Johnathan Bingham, and Ulysses S. Grant – tinkered with increasing Executive power[124] and made a disastrously bad bet on judicial power to enforce the 14th and 15th Amendments;[125] but did not fundamentally alter the First Founders' structural vision of separation of powers and judicial review. Indeed, they doubled down on it, and lost.[126]

It was the first Founders' third structural innovation – concurrent federalism – that was most dramatically altered by the Second Founding. Just as the first Founders had tweaked Locke's vision of separation of powers to move towards Montesquieu, the Second Founders trashed John Calhoun's idea of indivisible 'sovereignty' rooted in the states.[127] In its place, they forged a new vision of fed-

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Sumpter. Secession may have spared Lincoln from being remembered as the 19th century version of Neville Chamberlain. *See* BRUCE CATTON, THE COMING FURY 128, 197-98 (1961).

124. The exigencies of war and Reconstruction led Presidents Lincoln and Grant to assert broad Presidential power. Lincoln suspended the writ of *habeas corpus* and pressed Executive power to the limit in issuing the Emancipation Proclamation in 1863 and asserting broad power to try civilians in military tribunals. *See Ex parte* Milligan, 71 U.S. 2 (1866). President Grant exercised vigorous Executive authority in his successful campaign 1871-73 campaign against the Ku Klux Klan. *See* FONER, THE SECOND FOUNDING *supra* note 27.

125. The Second Founders dramatically increased the subject matter jurisdiction of the federal courts. In 1875, they activated "arising under" general federal question for the first time in the nation's history in the expectation that Article III courts would be a refuge for the newly emancipated seeking to enforce the promise of equality in the Reconstruction Amendments. They expanded federal habeas corpus jurisdiction and granted civil rights subject matter jurisdiction and remedial authority to federal courts to assure protection of the newly minted equality rights of the weak. Unfortunately, late 19th century American judges were not equal to the task. Reconstruction-era legislation enhancing the pes of the federal courts is described in RICHARD H. FALLON JR. ET AL. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (7thed., 2015).

126. The keystone of the Reconstruction program was the enunciation of new equality-based legal rights, both constitutional and statutory, and the grant of jurisdiction and remedial power to life-tenured federal judges to enforce the fragile rights. Thus, the Second Founders placed all their chips on the willingness of the Article III judiciary to play the counter-majoritarian role carved out for it by Chief Justice John Marshall in *Marbury*. The bet was a spectacular and tragic failure, with the Article III judiciary collapsing under the weight of majoritarian racism. Courts played a counter-majoritarian role all right under the 14th Amendment. But the beneficiaries were corporate America, not freedmen and women.

127. Calhoun had drawn on Madison and Jefferson's Resolutions of Virginia and Kentucky to build a full-blown theory of indivisible state sovereignty justifying secession in defense of slavery. For more on Calhoun's position *see supra* note 30.

eralism that moved towards Frederick Douglass' vision of indivisible "sovereignty" rooted in the national government, at least where protection of equality was concerned. But, once national protection of equality was provided for, the Second Founders recognized state authority over "police power" functions not directly related to the protection of equality. In short, with slavery off the table, the second Founders adopted a modified version of Lincoln's pre-Civil War idea of shared sovereignty – substituting national protection of equality for national prevention of the spread of slavery; but preserving substantial state sovereignty over traditional local concerns.[128]

As the first Justice Harlan realized, a principal jurisprudential issue raised by the (now, long overdue) recognition of a "Second Founding" worthy of serious attention and respect is how we should read a complex, chronologically unfolding document like the 1787 Constitution and its 26 (or 27) Amendments,[129] written over time by successive generations formally manifesting the popular will and codifying it as constitutional text. The answer is easy in settings where: (1) a later text explicitly repeals an earlier text, like the repeal of Prohibition;[130] or where (2) a later text collides with and supersedes an earlier provision.[131] In those settings, the last in time

128. For a description of the Republican Party's pre-Civil War vision of shared federalism see, FONER, THE SECOND FOUNDING, *supra* at note 28.

129. U.S. CONST. amend. XXVII. A 27th Amendment was ratified on May 5, 1992, barring a sitting Congress from raising its own pay without an intervening election. Its legal status is complicated by the fact that it was initially submitted to the states under Article V in on September 25, 1789. Whether the 27th Amendment expired at some point during its ratification Odyssey of 202 years, 7 months, and 10 days is an open question. The next longest ratification period – for the 23rd Amendment, allowing residents of the District of Columbia to vote in Presidential elections, lasted three years and 343 days.

130. The 21st Amendment explicitly repeals the 18th. U.S. CONST. amend. XXI, § 1; U.S. CONST. amend. XVIII, § 1 (repealed 1933). The 12th Amendment re-writes the provisions of Article II describing the balloting of the Electoral College for President and Vice President. U.S. CONST. amend. XII. The 13th Amendment obliterates the Fugitive Slave Clause. U.S. CONST. amend. XIII; U.S. CONST. art. IV, § 2, cl. 3. Section 2 of the 14th Amendment obliterates the Three-Fifths Compromise. U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 2, cl. 3. The unamendable constitutional right to import slaves in Article 1, Section9 expired in 1808. U.S. CONST. art. 1, § 9, cl. 1.

131. The "birthright citizenship" provisions of the 14th Amendment supersede the ugly vision of white-only constitutional citizenship set forth in *Scott v. Sandford*, 60 U.S. 393 (1857). The 16th Amendment's grant of power to Congress to levy taxes supersedes the ban on unapportioned income taxes recognized in *Pollock v. Farmers' Loan & Tr. Co.,* 157 U.S 429 (1895). The 11th Amendment supersedes the vision of waiver of state sovereign immunity effected by Article III,

clearly governs. But where, as with aspects of the Second Founding's treatment of federalism, the structural visions of federalism underlying several chronological layers of constitutional text differ dramatically but do not formally collide, I believe that appropriate weight should, if possible, be given to each successive founding generation's constitutional vision.[132] I call such an effort to use originalist analysis to serve at least two historical masters "blended originalism."

The closest example of such a layered interpretive process is the Court's tortured effort to interpret the 11th Amendment. As we've seen, the 11th Amendment sought to overturn Chief Justice John Jay's opinion in *Chisholm v. Georgia* that the states, by deciding to join the Union, had impliedly waived their sovereign immunity defense against suits in federal court. Despite the 11th Amendment, the current Supreme Court continues to apply aspects of Jay's reasoning, recognizing that the 11th Amendment does not bar the exercise of appellate jurisdiction by the Supreme Court over criminal appeals from state courts,[133] or block suits by the United States or another state against a state in federal court.[134] Until recently, the Court recognized, as well, that states had waived sovereign immunity defenses to suits in each other's state's courts.[135] The Court has also denied an 11th Amendment defense to local government entities, even though their political power rests solely

section 2 embraced by the Supreme Court in *Chisholm v. Georgia*, 2 U.S. 419 (1793); but Section 5 of the 14th Amendment authorizes Congress to override 11th Amendment immunity. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Since the 11th Amendment is later in time than the Article 1, section 8 Commerce Clause, the current Court refuses to permit Congress to supersede the 11th Amendment pursuant to legislation enacted under the Commerce Clause. Seminole Tribe v. Florida, 517 U.S. 44 (1995) (reversing the plurality opinion in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989)).

132. As the first Justice Harlan noted in his dissent in the *Civil Rights Cases*, the great flaw in the Supreme Court's late 19th and early 20th century federalism jurisprudence was a failure to acknowledge the impact of the "Second Founding" on the vision of federalism permeating the "First Founding." A similar failure by the current Court to acknowledge the change in constitutional structure effected by an equality driven Second Founding is at the heart of several deeply unfortunate decisions by the current Court severely circumscribing the explicit grant to Congress of power to enforce the 14th and 15th Amendments. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000; Shelby County v. Holder, 570 U.S. 529 (2013); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

133. Cohens v. Virginia, 19 U.S. 264 (1821).

134. Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

135. Nevada v. Hall, 440 U.S. 410 (1979), rev'd, Franchise Tax Board v. Hyatt, 139 S. Ct. 1485 (2019).

on delegation from protected state governments.[136] And, in *Ex Parte Young*[137] and *Home Telephone and Telegraph v. City of Los Angeles,*[138] the Court twisted and turned to rule that the while the Attorney General of Ohio was not a state actor for the purpose of 11th Amendment immunity from suits seeking injunctive relief against efforts to enforce allegedly unconstitutional state law, Los Angeles city officials seeking to enforce the law were state actors for the purposes of Section 1 of the 14th Amendment. Finally, in *Fitzpatrick v. Bitzer*,[139] in a rare recognition of the importance of Section 5 of the 14th Amendment, the Court ruled that Congress could supersede a state's 11th Amendment immunity, but only if it acted pursuant to Section 5 of the 14th Amendment. For 30 years the Court had ruled, as well, that Congress could override 11th Amendment immunity by enacting legislation under the Commerce Clause. Then, in *Seminole Tribe*[140] , the Court retracted its Commerce Clause override, but reaffirmed Congress's power to override the 11th Amendment with legislation premised on Section 5 of the 14th Amendment, presumably because the 14th is later in time than the 11th.

It borders on *hubris* to pretend to make sense out of the Court's gnarled 11th Amendment jurisprudence, but there appears to be a recognition that, regardless of its limited text, the 11th Amendment froze aspects of state sovereign immunity in its pre-*Chisholm* state, subject to alteration and override by post-11th Amendment activity under the 14th Amendment. In short, a recognition that the last-in-time constitutional event can require reassessment of all that went before, even in the absence of an explicit conflict. That's exactly how I believe that the Reconstruction Amendments should be read—imposing retroactive effects on the entire document, including the First Founders' conception of federalism.

Thus, when the enjoyment of a substantive constitutional right rooted in equality is in play in federalism cases like *United States v. Morrison*,[141] and *Shelby County v. Holder* [142] we should recognize that the Second Founders adopted James Madison's vision of federalism and separation of powers as a "double security" against government

136. Lincoln Cnty v. Luning, 133 U.S. 529 (1890)
137. 209 U.S. 123 (1908)
138. 227 U.S. 278 (1913)
139. 427 U.S. 445.
140. 517 U.S. 44, 76 (1996).
141. 529 U.S. 598 (2000).
142. Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

overreaching.[143] According to Madison, when one federalism partner becomes tone deaf to a constitutional right, it should be possible for an affected person to seek more effective protection of the right in the partner polity.[144] While Madison, writing in 1788, was discussing structural protection of rights rooted in individual autonomy,[145] his "double security" reasoning is even more salient when applied to protecting rights rooted in equality, the luminous prime value added to the Constitution by the Second Founding.[146]

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143. In THE FEDERALIST NO. 51, at 67 (James Madison) (Lester DeKoster, ed., 1976), Madison wrote:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allocated *allotted* to each is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

144. Current examples of Madison's shared-power vision of federalism are: (1) the power of state courts to construe state constitutions more broadly than the federal constitution, allowing potential victims to seek heightened state or local constitutional protection; (2) the "incorporation" of the Bill of Rights against the states, allowing potential victims to appeal from state or local oppressive regulation to a more protective national standard; (3) the presumption of concurrent legislative power, permitting autonomous state and local regulation of commercial activity in the absence of Congressional pre-emption; (4) the doctrine of implied preemption allowing over-regulated entities to appeal to a less intrusive national standard; and (5) the doctrine of express preemption allowing Congress to impose a single national standard in place of a race to the bottom by each state. Taken to its extreme, of course, Madison's shared-power vision morphs into his theory of state power to "nullify" allegedly unconstitutional federal actions set forth in 1798 in the Resolutions of Virginia and Kentucky. See *supra* note 31.

145. Madison's approach to federalism was, to be generous, highly flexible. *Compare* THE FEDERALIST NO. 10 (James Madison and Alexander Hamilton) *with* THE FEDERALIST NO. 51 (James Madison). Madison argues in both Federalist 10 and 51 that larger political units, like the national government, are less likely to be captured by "factions," while also implying in Federalist 10 that smaller units are more responsive to the people. After championing a strong national government at the Constitutional Convention, Madison joined with Jefferson in 1798 in drafting The Resolutions of Virginia and Kentucky asserting state power to "nullify" federal laws on constitutional grounds. *See* supra note 31. For Madison's views on federalism, see LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON & THE FOUNDING OF THE FEDERAL REPUBLIC (1995).

146. While it is well beyond the scope of this brief essay, I believe that much of our constitutional heritage since the Civil War can be viewed through the lens of the interplay between autonomy and equality as prime constitutional values. Every Supreme Court Justice in the modern era has professed to believe in both; but in settings where the two prime values are in tension with one another, as in campaign finance regulation, affirmative action, and religious freedom conservative Justices have tended to favor legal doctrine advancing the First Founders' protection of autonomy, while liberal Justices have tended to adopt legal positions ad-

Sadly, the Supreme Court's failure, beginning in 1873 with the *Slaughterhouse Cases* and continuing to the present day, to integrate the voices of the Second Founding into its reading of federalism concepts dating from the First Founding has badly eroded the Second Founders' equality-driven federalism edifice. Except for a single extraordinary case, *Jones v. Alfred H. Mayer Co.*,[147] the Court has failed to read Sections 1 and 2 of the 13th Amendment[148] as a broad authorization to Congress to eliminate the "badges and incidents" of slavery, as well as the institution of slavery itself. Although the road is officially open, no Supreme Court opinion in the more than 50 years since *Alfred H. Mayer* has sought to buttress Congressional power to take on the lingering consequences of centuries of enslavement by arguing for a broad power to legislate against racial subordination as a continuing badge and incident of slavery.[149] As we've seen, in 1873, in the *Slaughterhouse Cases*,[150] the Supreme Court gutted the centerpiece of the 14th Amendment's protection of newly emancipated citizens against hostile state behavior by giving a microscopic reading to the 14th Amendment's "privileges and immunities" clause. The 19th century Court then invalidated the Second Founders' effort to protect against racially motivated lynching[151] and proceeded to dismantle Congress's effort to protect equal access to public accommodations.[152] In *Plessy v. Ferguson*, the Court read section 1 of the 14th Amendment narrowly and upheld racial segregation, rejecting the argument that "separate but equal" laws constituted a badge or incident of slavery. In 1903, the Court announced itself incapable of protecting the right of Black citizens to vote.[153]

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vancing the Second Founders' embrace of equality. I discuss the dynamic in BURT NEUBORNE, WHEN AT TIMES THE MOB IS SWAYED (2019).

147. 392 U.S. 409 (1968) (upholding the equal housing guaranty in the Civil Rights Act of 1866).

148. The 13th Amendment provides in relevant part:

Sec 1 "Neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." U.S. CONST. amend. XIII, § 1.

Sec 2 "Congress shall have power to enforce this article by appropriate legislation." *Id.* at § 2.

149. *See* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (2018); James Oakes, *The Only Effectual Way": The Congressional Origins of the Thirteenth Amendment*, 15 GEO J. L. & PUB. POL'Y. 115 (2017).

150. 83 U.S. at 124.

151. United States v. Cruikshank, 92 U.S. 542 (1875)

152. *The Civil Rights Cases*, 109 U.S. 3, 25-26 (1883)

153. Giles v. Harris, 189 U.S. 475 (1903).

The modern Court has continually construed Section 1 of the 14th Amendment narrowly to require proof of intentional discrimination as opposed to knowing disparate impact[154] and to require affirmative behavior by a state actor instead of a failure to protect against private assaults on equality.[155] Finally, the modern Court has insisted on tethering Congress's Section 5 enforcement power to violations of Section 1, tolerating only limited efforts at prophylactic protections of equality that go beyond behavior already deemed illegal under section 1.

Such a weary litany of federalism-based limits on the protection of equality could not survive a reconsideration where the voices of the Second Founders were respected; not ignored.

CONCLUSION

As we gain a deeper historical understanding of the moral decency and intellectual brilliance of the equality-driven work of the Second Founders, I hope that the Supreme Court will display the wisdom and courage needed to take a fresh look at its disappointing jurisprudence that has wrongfully ignored the Second Founders' vision of federalism as a structural protection of equality. I dream of a day when the Supreme Court venerates all our Founders – Washington, Jefferson, and Madison, born to plantation privilege; Hamilton, born to provincial want; Lincoln, born to rural poverty; Frederick Douglass, born a slave; and Susan B. Anthony, born a woman. We owe them – each of them - gratitude for the remarkable, untidy mix of democracy, autonomy and equality that is our constitutional birthright; and the earned respect of listening to their voices – all their voices - in reading the constitutional text.

154. *See e.g.*, Washington v. Davis, 426 U.S. 229 (1976) ((imposing intent requirement on 14th Amendment Equal Protection Clause); City of Mobile v. Bolden, 446 U.S. 55 (1980) (imposing intent requirement on 15th Amendment right to vote free of racial discrimination).

155. United States v. Harris, 106 U.S. 629 (1883).

ROPER, *GRAHAM*, *MILLER* & THE MS-13 JUVENILE HOMICIDE CASES

*RAPHAEL A. FRIEDMAN**

INTRODUCTION

On April 11, 2017, five teenage males strolled into a wooded area behind the Central Islip Recreational Center on Long Island, New York.[1] They were lured there by two teenage females under the guise of smoking marijuana together. The male teenagers were quickly surrounded by over a dozen young males armed with clubs formed from tree limbs, knives, axes, and machetes. While one of the teens escaped, the other four were beaten, hacked, and stabbed to death. The victims' mutilated bodies were dragged a short distance and left in a pile. The attackers fled, planning to return to bury the bodies. However, the Suffolk County Police Department discovered the victims' bodies before the killers had a chance to return.

All of the attackers were members of the notorious street gang, La Mara Salvatrucha, better known as the MS-13, an extremely violent transnational criminal organization. The event that led to the murders took place a few months earlier when Josue Portillo, one of the attackers, was involved in a verbal altercation at a 7-Eleven convenience store with the sole teenager who managed to escape. Portillo believed that the teenager and his friends were members of the 18th'] Street gang (an MS-13 rival) and that they were falsely representing themselves to be MS-13 members. Portillo reported this to his superiors within the MS-13 and they decided to kill the teens as revenge. Together, they spent months developing a plan to lure the victims to the woods with the assistance of two female associates of the MS-13. Portillo stayed in contact with the two females

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1. The words "male" and "female" are used in this introduction in order to avoid labeling any of the parties as either "boy" or "man," "girl" or "woman," which would have unintended implications pertaining to the issues addressed in this Note. *See infra* note 2.

via text message, in order to prepare the weapons and strategically position himself and his co-conspirators to ambush the five teens in the woods. He also participated in the actual killings, using a machete to repeatedly strike the four victims. *Mr. Portillo was 15 years old at the time of the killings*.[2]

The majority of MS-13 suspects arrested for murder on Long Island in recent years have been minors.[3] In fact, "most youth who join gangs begin in their early teenage years, and as early as ages 10 and 11."[4] This shocking and tragic phenomenon raises vexing issues for law enforcement, the courts, politicians, educators, and all citizens in communities plagued by gang violence. This Note focuses on a single legal issue: in light of recent Supreme Court cases, beginning with the 2005 landmark ruling in *Roper v. Simmons*, how should judges impose sentences on persons convicted of committing homicide before their eighteenth birthday?[5] Although we will see that the holdings of the three leading Supreme Court cases addressing this question are reasonably clear, many challenging questions remain for sentencing judges who attempt to faithfully apply these decisions. This Note will explore some of these issues through

2. (This Note sometimes refers to juveniles using the prefix "Mr.," consistent with the practice used in legal documents and by courts when describing or addressing young defendants in the adult criminal justice system. The oddity of referring to a 15-year-old (or younger) as "Mr." is perhaps a microcosm of the larger issues at play within the field of juvenile justice and sentencing.) *See* Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Member Pleads Guilty to the Murder of Four Young Men in a Central Islip Park in 2017 (Aug. 20, 2018), https://www.justice.gov/usao-edny/pr/ms-13-gang-member-pleads-guilty-murders-four-young-men-central-islip-park-2017 [https://perma.cc/B77Q-SM6L]; Criminal Sentencing Memoranda at 3, United States v. Portillo, No. 2:17-cr-00366-JFB, 2019 WL 8128912 (E.D.N.Y. July 12, 2019); United States v. Juvenile Male, 327 F. Supp. 3d 573 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status); Liz Robbins, *MS-13 Gang Member Pleads Guilty in Quadruple Murder Highlighted by Trump*, N.Y. Times (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/nyregion/ms13-gang-murder-guilty.html [https://perma.cc/42LN-C8UV]. This case garnered national attention both because of its shocking brutality and because former President Trump highlighted the case during his visit to Long Island on May 23, 2018. *See* Liz Robbins & Michael D. Shear, *Trump, Visiting Epicenter of MS-13 Killings, Demands Tougher Immigration Laws*, N.Y. Times (May 23, 2018), https://www.nytimes.com/2018/05/23/us/politics/trump-immigration-gangs.html [https://perma.cc/4D9H-UAR5].

3. Barbara Demick, *Trump Heads to Long Island, Using Brutal MS-13 Murders to Justify Deportations*, L.A. Times (July 28, 2017), https://www.latimes.com/nation/la-na-ms13-trump-20170727-story.html [https://perma.cc/E467-5MX2].

4. Sam Houston State University, *Gang Life is Short-lived, Study Finds*, ScienceDaily (Sept. 24, 2014), https://www.sciencedaily.com/releases/2014/09/140924113523.htm [https://perma.cc/T36R-4GDX].

5. 543 U.S. 551 (2005).

the prism of MS-13 juvenile-homicide cases, using Mr. Portillo's sentencing as a case study.

This Note proceeds in three parts. Part I sets the stage for studying the Supreme Court's juvenile sentencing jurisprudence. It takes a step back in order to orient the landmark trilogy of cases—*Roper*, *Graham*, and *Miller*—within the broader legal framework of criminal and juvenile justice.[6] It is broken into three subcategories. Subpart (A) briefly explains the principal justifications for punishing criminality. After better understanding why we punish altogether, Subpart (B) analyzes why juveniles should be punished differently from adults. This is explored very briefly from a historical, political, and legal perspective. Subpart (C) explains in what circumstances juveniles in the justice system are treated like adults and why, again from a historical, political, and legal perspective. Part II examines how the Supreme Court limited in some measure the punishments that can be meaded out to juveniles, even if being sentenced within the adult criminal justice system. *Roper*, *Graham*, and *Miller* are explored in detail, as well as some of the preceding cases that paved the road to these landmark rulings, and some subsequent cases. Part III analyzes how judges should implement the guidance given by the Supreme Court in these cases. The analysis will trace Josue Portillo's case, but its implications apply across the field of juvenile justice.

I.
THE EVOLUTION OF JUVENILE JUSTICE

A. The Penological Justifications

In order to properly understand and evaluate any decision regarding sentencing, it is necessary to understand the underlying rationale for punishing citizens in the first place. Indeed, *Roper*, *Graham*, and *Miller* all discuss the "goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation."[7]

Retribution is a broad term that is used to describe many variations of a broad penological justification. Abstractedly, the term stands for the proposition that "criminals should be punished be-

6. Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010).

7. *Graham*, 560 U.S. at 71 (citing Ewing v. California, 538 U.S. 11, 25 (2003)); *see also Roper*, 543 U.S. at 571–73 (discussing retribution and deterrence); *Miller*, 567 U.S. at 472–74 (summarizing the Court's analysis of penological justifications as applied to youth in *Roper* and *Graham*).

cause they deserve it . . . ."[8] Why human beings should be the ones imposing this "deserved" punishment is less than clear. In Anglo-American jurisprudence retribution is often understood to be a valid rationale only insofar as it complements another justification. For example, we may wish to impose a punishment to deter others from the same wrongdoing, but this is only fair if the individual being punished also deserves the punishment. Viewed in this light, retribution is a limitation on punishment.[9] Two specific iterations of the theory are mentioned by the *Roper* court: "an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim . . . ."[10]

Deterrence is subdivided into two categories: general deterrence and specific deterrence. The latter is the idea that by punishing him we incentivize the convicted criminal to cease his criminal behavior, and the former is the idea of preventing *others* from committing like crimes.[11]

Incapacitation is the basic idea of imprisoning the convicted in order to protect society from that individual. Whether we are trying to prevent future rapes, murders, robberies, or drug crimes, the punishment is justified because it serves a most basic utilitarian purpose: protecting the public from potential harm.[12]

Finally, rehabilitation is the notion that punishment can "contribute to the reformation of the offender not only through fear of being punished again, but by a change in his character and habits."[13]

B. Juveniles Are Different: The History of Juvenile Court

The concept of adjudicating juveniles involved in the criminal justice system separate and differently from adults originated in the very last years of the 19th century. At that time, the Progressives

8. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2 (1992).

9. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 65–66 (1968).

10. *Roper*, 543 U.S. at 571.

11. *See, e.g.*, BRAITHWAITE & PETTIT, *supra* note 8, at 2–3.

12. *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 339 (C. K. Ogden ed., 1931) ("Taking away the power of doing injury. It is much easier to obtain this end than [to reform the offender]."); JAMES Q. WILSON, THINKING ABOUT CRIME 148 (rev. ed. 1983) (alteration in original) ("When criminals are deprived of their liberty, as by imprisonment . . . their ability to commit offenses against citizens is ended.").

13. BENTHAM, *supra* note 12, at 338.

conceived of "perhaps their greatest invention: juvenile court."[14] They were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals."[15] Instead, they

> believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but '[w]hat is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' The child—essentially good, as they saw it—was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial.[16]

A key feature of the original juvenile court system extended from the Progressives' vision of how juvenile delinquents should be treated. In focusing on the "best interests" of the child, they believed that procedural protections would harm, rather than help, children. In order for the state to properly function as "*parens patriae*," it was necessary for juvenile court to avoid an adversarial approach.[17] Procedural safeguards available to adult criminal defendants were to be discarded because they were unnecessary and, even worse, might prevent the state from helping a child in need.[18]

Gault was the first of a string of Supreme Court cases to challenge the denial of procedural rights to juveniles in the juvenile court system.[19] The court declared that juvenile court trials "must

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14. Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 464 (2012).

15. *In re* Gault, 387 U.S. 1, 15 (1967).

16. *Id.* (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)).

17. *Parens patriae*, Latin for "parent of his or her country," is the doctrine that gives the state power to act as guardian for citizens who cannot protect themselves. For an early example of the doctrine in a U.S. court case, see *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (recognizing the doctrine of *parens patriae* in rejecting legal challenges to confining children to "Refuge House" if their natural parents are "incompetent or corrupt").

18. *See In re Gault*, 387 U.S. at 15–16.

19. The other cases are: *In re* Winship, 397 U.S. 358, 368 (1970) (holding that children may be found delinquent only if proved guilty beyond a reasonable doubt); Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that children are protected by the double jeopardy clause); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (unsuccessfully arguing that children are entitled to a trial by jury); Fare v. Michael C., 442 U.S. 707 (1979) (unsuccessfully arguing that children should be allowed to speak with probation officers during interrogations); Schall v. Martin, 467 U.S. 253 (1984) (unsuccessfully challenging the practices of pre-trial detainment of juveniles).

measure up to the essentials of due process and fair treatment."[20] The court ruled that children are constitutionally entitled to adequate notice of the charges against them, to the right to counsel (as well as informing their parents of such right), to the right to confront and cross-examine witnesses, and to the right against self-incrimination.[21]

In short, the Court rejected the Progressives' belief that because the purpose of juvenile court was to focus on the best interests of the child, striving to provide rehabilitation rather than punishment, there was little need to ensure fundamental fairness. The Court regarded juvenile court largely as a failed experiment. Recognizing such, beginning in *Gault*, the Court started to formalize the juvenile courts' processes of adjudication. As Justice Fortas succinctly put it, "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[22]

Although the immediate result of *Gault* was a victory for children's rights lawyers and activists, it also caused a shift away from treating children who commit crimes differently from adults.

C. The Adult Juvenile: Transfer to Adult Status

As Professor Guggenheim explains, when the Supreme Court guaranteed children procedural protections, it essentially acknowledged that juvenile court was not as different from adult court as the Progressives had hoped it would be.[23] "Transferring" juveniles to adult court for prosecution then became a less drastic measure.[24]And although the "transfer" of children to "adult status," as it is sometimes referred to, existed before *Gault*, it became more common in the years following the decision.[25] According to a study conducted by the National Center for Juvenile Justice in Pittsburgh, "in 1975, 10,400 [juveniles] were transferred [to adult courts] and in 1982, 13,000."[26] Incredibly, "an estimated 210,000–260,000 juveniles, or 20%–25% of all juvenile offenders, were prosecuted as

20. *In re Gault*, 387 U.S. at 30.

21. The court did not reach the questions of whether there is a constitutional right of a child to obtain a trial transcript or to appeal judgements. *Id.* at 58.

22. *Id.* at 28.

23. Guggenheim, *supra* note 14, at 472–73.

24. *Id.* at 472–74.

25. See 18 U.S.C. § 5032 (enacted in 1953).

26. Mary Jordan, *More Juveniles Being Tried as Adults*, WASH. POST (Dec. 30, 1984), https://www.washingtonpost.com/archive/politics/1984/12/30/more-juveniles-being-tried-as-adults/941b66df-27f8-4e97-829b-149e24eedfbc/ [https://perma.cc/2NQ5-7WM7].

adults in 1996."[27] Estimates remain at over 200,000 juveniles tried or sentenced in adult court in the U.S. each year.[28] In some measure then, *Gault* was both a victory and a loss for children.

The Supreme Court, however, is not entirely responsible for the prevalence of juveniles tried in adult courts from the 1980s until the present. Public opinion and politics (of both the Republican and Democratic parties) during the 1980s and 1990s adopted an exclusively "tough on crime" stance.[29] It was in this general climate of heightened fear of criminals and violence that the slogan "adult time for adult crime," became extremely popular.[30] The slogan represents the idea that if the crime is severe enough, children ought to be treated identically to adults.[31] This is based on beliefs that include: a child mature enough to commit a serious crime is mature enough to be punished as an adult (retributive), such a child is beyond hope and should be jailed for as long as an adult would be

27. Robert Hahn et. al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System*, CDC (Nov. 30, 2007) (emphasis added) (citations omitted), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm [https://perma.cc/6AN3-NW53] ("[T]he review indicates that use of transfer laws and strengthened transfer policies is *counterproductive* to reducing juvenile violence and enhancing public safety.").

28. *See* Jennifer L. Woolard et. al., *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L. J. FORENSIC MENTAL HEALTH 1, 4 (2005).

29. *See* Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019, 2:30 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/CLK7-FCNG] ("[T]he [Democratic and Republican] parties began a bidding war to increase penalties for crime, trying to outdo one another.").

30. 7 Steven A. Drizin & Greg Luloff, Are Juvenile Courts a Breeding Ground for Wrongful Convictions?, 34 N. KY. L. REV. 257, 265 (2007) ("'Adult time for adult crimes' became the rallying cry for politicians across the country, leading to changes in the law in almost every jurisdiction between 1992 and 1999."). As an aside, effective slogans can have a remarkably strong effect on public policy. *See, e.g.*, DENNIS A. HENIGAN, "GUNS DON'T KILL PEOPLE. PEOPLE KILL PEOPLE" AND OTHER MYTHS ABOUT GUNS AND GUN CONTROL 8 (2016) (arguing that the NRA's use of "bumper-sticker slogans" has influenced public perception and severely inhibited advocacy and legislation in the gun violence prevention sphere).

31. However, children may be prosecuted as adults even for non-violent crimes. *See, e.g.*, 18 U.S.C. § 5032 (children may be transferred to adult status for certain drug offenses or crimes involving threats of the use of physical force or substantial risk of the use physical force, even if no force was actually used). Another example is felony murder, for which any conspirator can be tried for first degree murder if a co-conspirator committed murder in the scope of the conspiracy. Kuntrell Jackson, one of the two *Miller* defendants, was transferred to adult court and tried for murder even though he did not shoot the gun that killed the store clerk or perform any acts of violence. *See infra* note 84 and accompanying text.

(incapacitation), and it is the best way to deter youth from committing such crimes (deterrence).[32]

It would be sorely remiss to overlook the disparate impact that the "adult time for adult crime" sensation of the 1990s had on Black children. As Professor Kim Taylor-Thompson recently observed, "the overwhelming majority" of children in adult court are Black.[33] In 1996, political scientist, John DiIulio, coined the term "superpredator" when he wrote: "America is now home to thickening ranks of juvenile 'superpredators'—radically impulsive, brutally remorseless youngsters, including ever more preteenage boys."[34] Taylor-Thompson explains that, although DiIulio's grim prediction of increased crime in America never materialized, the lasting effect of his theories is profound. "The superpredator lie went viral, infecting every single institution that touches children—courts, schools, law enforcement."[35] And this explosive label was "more often reserved for children of color who committed crimes . . . ."[36] Beyond the grossly disproportionate impact the theory had on the lives of Black children, it was deeply entrenched racism that "propelled the spread of this theory" in the first place.[37] "DiIulio insisted that this younger, more dangerous breed of offender would soon target 'upscale central-city districts, inner-ring suburbs, and even the rural heartland.' His warning was clear: White America was in danger."[38]

In a general sense, "the US criminal justice system reflects deep-rooted issues related to enduring economic, social, political, and racial/ethnic inequality."[39] However, these inequities have had

32. *See, e.g.*, Jordan, *supra* note 26 ("David Dunlap, the Alexandria prosecutor who handles most of the city's juvenile cases, said, 'Juveniles who commit adult crimes should be tried as adults. The kids who commit rape and murder are past help.'").

33. Kim Taylor-Thompson, *Op-Ed: Why America is Still Living with the Damage Done by the 'Superpredator' Lie*, L.A. TIMES (Nov. 27, 2020, 4:00 AM), https://www.latimes.com/opinion/story/2020-11-27/racism-criminal-justice-superpredators [https://perma.cc/RYU2-6VFM].

34. WILLIAM J. BENNETT, JOHN P. WALTERS & JOHN J. DIIULIO, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996).

35. Taylor-Thompson, *supra* note 33.

36. Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE, 143, 154 (2014) (citing Perry L. Moriearty, *Framing Justice: Biased Decisionmaking*, 69 MD. L. REV. 849, 851–52 (2011)).

37. Taylor-Thompson, *supra* note 33.

38. *Id.*

39. B.J. Casey et. al., *Healthy Development as a Human Right: Insights from Developmental Neuroscience for Youth Justice*, 16 ANN. REV. L. & SOC. SCI. 9.1, 9.5 (2020).

"especially tragic consequences for young people who are incarcerated."[40] And "these youth tend to be disproportionately poor, undereducated, and of color."[41] Studies and data reveal that children of color, and especially Black children, are more likely to be viewed as "older and less innocent" than White children of the same age.[42] The effects of racism, racial bias, and race-related rhetoric continue to be an indispensable part of meaningful and honest discussion regarding issues of juvenile justice.

Although the idea of transferring a juvenile to "adult status" is an issue that calls for great scrutiny, the Supreme Court has never addressed the issue.[43] Therefore, it is up to the legislature to limit the practice of transferring children to adult court for trial or sentencing. This, they have not done.

II.
JUVENILE SENTENCING

Thus far, we have explored why the state punishes anyone, why juveniles are punished in specialized juvenile courts, and why sometimes they are moved to an adult court. In a series of landmark cases, the Supreme Court placed limitations on the severity of punishments allowed to be imposed on youth, even if they are tried and sentenced "as adults." Part II explores these cases in some detail.

A. The Framework for Eighth Amendment Jurisprudence

The Eighth Amendment proclaims: "Cruel and unusual punishments [shall not be] inflicted."[44] The Supreme Court has developed a two-prong test for deciding whether a punishment meets that constitutional requirement. Whether a punishment is "cruel and unusual" is determined using a proportionality test that weighs the severity of the offense committed against the harshness of the punishment.[45] "The first step of that balancing test must accord

40. *Id.*

41. *Id.*; *see also*, Taylor-Thompson, *supra* note 36, at 163–69 (citing numerous studies showing that "youth of color have been disproportionally prosecuted and punished in the adult justice system").

42. Casey, *supra* note 39, at 9.6.

43. The Supreme Court case that came closest to addressing issues of transfer was *Kent v. United States*, 383 U.S. 541 (1966) (holding that a juvenile court must hold a formal hearing before waiving its jurisdiction). The Ninth Circuit expressly rejected contentions that mandatory transfer laws were unconstitutional. *See* United States v. Juvenile, 228 F.3d 987, 990 (9th Cir. 2000).

44. U.S. CONST. amend. VIII.

45. *See* Graham v. Florida, 560 U.S. 48, 59 (2010).

"the evolving standards of decency that mark the progress of a maturing society."[46] In determining the relevant standards of society, the Court has looked at a number of sources including, "relevant legislative enactments" and actual "jury determinations."[47] In step two, the Court must also "determine in the exercise of its own independent judgement, whether the punishment in question violates the Constitution."[48]

B. Pre-Roper Cases

Before getting to *Roper*, which declared the death penalty an unconstitutionally disproportionate penalty for those who committed murder before the age of 18, it is helpful to first discuss other cases in which the Supreme Court found the death penalty to be categorically disproportionate for an entire class of offenders.[49]

1. Thompson

In the early morning hours of January 23, 1983, William Wayne Thompson participated in the brutal murder of his former brother-in-law. The evidence showed that Thompson, then age 15, and three older people shot the victim twice, cut him, beat him, and broke his leg. They then threw the victim's body into a river, where it was discovered almost a month later.[50] At the penalty stage of the state trial, the jury found that there was an "aggravating circumstance" because "the murder was especially heinous, atrocious, or cruel."[51] Thompson was sentenced to death.[52]

The Court analyzed society's "standards of decency" by first recognizing that children are treated differently from adults in almost every area of the law. The Court noted that a 15-year-old may not vote or sit on a jury in any of the 50 states and, in nearly every state, may not drive a car or marry without parental consent. The Court then cited the fact that all 18 states that have established a minimum age for receiving the death penalty have set it at an age above 15.[53] The Court also referred to the opinions of legal schol-

46. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

47. Thompson v. Oklahoma, 487 U.S. 815, 822 (1988).

48. *Graham*, 560 U.S. at 61; *see also infra* note 73 (citing dissenting opinions of Justices Thomas and Scalia criticizing this prong of the test as beyond the scope of judicial authority).

49. Roper v. Simmons, 543 U.S. 551, 578 (2005).

50. *Thompson*, 487 U.S. at 819.

51. *Id.* at 820.

52. *Id.*

53. *Id.* at 823–30.

ars and other civilized countries, confirming that executing someone for a crime they committed at age 15 "would offend civilized standards of decency . . . ."[54] Finally, it looked to actual practice of juries and found it led "to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community."[55] This framework for analyzing the "standards of decency" of "society" is used almost identically in *Roper*, *Graham*, and *Miller*.[56]

In exercising its own judgement, the *Thompson* Court declared that youth are more "susceptible to influence and to psychological damage" than adults, "generally are less mature and responsible than adults," "lack the experience, perspective, and judgement expected of adults," "are more vulnerable, more impulsive, and less self-disciplined than adults," and "have less capacity to control their conduct and to think in long-range terms than adults."[57] Furthermore, "offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth."[58] However, the Court declined to "draw a line" at age 18, because, in deciding the case, it was sufficient to find "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense."[59]

2. Other Cases

In *Coker v. Georgia*, the Court held that death was a disproportionate punishment for the rape of an adult woman and thus violated the Eighth Amendment.[60] In *Enmund v. Florida*, the Court held a death sentence for a getaway driver who did not kill anyone also violated the Eighth Amendment.[61] In *Kennedy v. Louisiana*, the Court held that the death penalty for child rape in which "the crime did not result, and was not intended to result, in death of the victim" was unconstitutional.[62] Finally, and most precedentially relevant to the *Roper* decision, was the 2002 *Atkins*' decision, in which

54. *Id.* at 830.
55. *Thompson*, 487 U.S. at 832.
56. Roper v. Simmons, 543 U.S. 551, 561–68 (2005); Graham v. Florida, 560 U.S. 48, 62–67 (2010); Miller v. Alabama, 567 U.S. 460, 483–87 (2012).
57. *Thompson*, 487 U.S. at 834 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (citations omitted)).
58. *Id.* (quoting *Eddings*, 455 U.S. at 115–16).
59. *Id.* at 838.
60. 433 U.S. 584 (1977).
61. 458 U.S. 782 (1982).
62. 554 U.S. 407, 413 (2008).

the Court held that death for the mentally disabled was a "cruel and unusual punishment" forbidden by the Eighth Amendment.[63]

C. Roper

In 1993, Christopher Simmons, a 17-year-old high school junior in Missouri, committed a horrific premeditated murder. Together with his 15-year-old friend, Simmons broke into the trailer home of 46-year-old Shirley Cook at 2 a.m., bound her eyes, mouth, and hands with duct tape, and placed her in the back of her own minivan. They then drove her to a state park where they wrapped her entire face in more duct tape, tied her hands and feet together with electrical wire, and threw her off a bridge into a river below, where she drowned.[64] The trial judge sentenced Simmons to death. The Missouri Supreme Court reversed, and the Supreme Court affirmed, holding that the Constitution forbids sentencing juveniles to death, regardless of the gravity of the crime the juvenile may have committed.[65]

The Court explained that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[66] Applying the well-established "evolving standards of decency" framework, the Court concluded that death is a "cruel and unusual" punishment for juvenile offenders.[67] The two-step analysis required the Court first to conclude that there was a "consensus, as expressed in particular by the enactments of legislatures," against the juvenile death penalty and then to "determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."[68]

The Court looked to the same indicia as it did in *Thompson*, *Penry*, *Stanford*, and *Atkins* in determining that "society views juveniles . . . as 'categorically less culpable than the average crimi-

63. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002) (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)).

64. Roper v. Simmons, 543 U.S. 551, 556–57 (2005).

65. *Id.* at 560. The Court first faced the issue presented in *Roper* in 1989 and held that executing offenders who committed murder at age 16 or 17 did not violate the Constitution. Stanford v. Kentucky, 492 U.S. 361 (1989). *Roper* expressly overruled that decision.

66. *Id.* at 578.

67. *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

68. *Id.* at 564.

nal.'"[69] The Court found that States' legislative trends, jury practices, opinions of legal academics, and the practice of foreign countries all weighed in favor of abolishing the juvenile death penalty.[70] However, Justice Kennedy's conclusion for the Court that there was a national consensus against the practice was at best, very questionable. Although the Court relied on precedent in *Atkins*, it admitted that the evidence in that case was stronger than the evidence in this one.[71] Justice O'Connor pressed the distinction in dissent, arguing that whereas no state legislature had endorsed execution of the mentally disabled at the time *Atkins* was decided, "at least seven States have current statutes that specifically set 16 or 17 as the minimum age at which commission of a capital crime can expose the offender to the death penalty."[72] Moreover, as Justice Scalia argued in his dissent, over 50% of states with death penalty laws allowed the execution of those under age 18.[73] Perhaps it is self-evident that the *Roper* decision "had little to do with doctrine and much to do with the dramatically different extralegal context in which [it was] decided."[74]

The Court next exercised its "own judgment" in deciding that the juvenile death penalty was a "cruel and unusual" punishment. The Court summarized three "general differences between juveniles under 18 and adults." First, "a lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions." Second, they are more susceptible to negative influences, including peer pressure. Third, their character is "less fixed," making it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably

69. *Roper*, 543 U.S. at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

70. *See id.* at 564–67.

71. *Id.* at 565.

72. *Id.* at 595–96 (O'Connor, J., dissenting).

73. *Id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."). Justice Scalia went on to decry the majority's decision: "Of course, the real force driving today's decision is . . . the Court's 'own judgement' that murderers younger than 18 can never be as morally culpable as older counterparts." *Id.* at 615. "By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?" *Id.* at 616; *see also* Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) ("I am unwilling to assume that we, as Members of this Court, are any more capable of making such moral judgements than our fellow citizens. Nothing in our training as judges qualifies us for that task, and nothing in Article III gives us that authority.").

74. Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 54 (2007).

depraved character."[75] The Court also went on to explain that overall, the penological justifications for the death penalty are weaker as applied to juveniles.[76]

Five years later, relying heavily on its decision in *Roper*, the Supreme Court decided *Graham*.

D. Graham

In 2003, 16-year-old Terrance Jamar Graham partook in an armed burglary (and failed robbery attempt) of a restaurant in Florida. He pled guilty pursuant to a plea agreement and the court accepted the plea, withholding adjudication of guilt. While on probation, Graham was arrested for his alleged involvement in two more robberies. Although he denied his involvement in both robberies, he admitted to fleeing from the police, which was sufficient for the sentencing court to find that he violated the conditions of his parole. This time, he was sentenced to life imprisonment for his earlier crime. Because Florida abolished its parole system in 1983, Graham's sentence meant he was sentenced to die in prison.[77]

Building on its reasoning in *Roper* that juveniles are different from adults and that these differences must be taken into account if imposing the most extreme sentences on juveniles, the Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."[78]

The analytical framework adopted in *Graham* exactly mirrored the *Thompson* and *Roper* decisions. Yet, the decision in *Graham* was revolutionary. The *Graham* case revealed a significant willingness by a majority of the Court to treat a life sentence as sufficiently similar to the death penalty and thus to warrant a level of scrutiny previously reserved for death penalty cases. It was the first time the Court had invalidated a punishment other than death for an entire category of offenders.[79]

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75. *Roper*, 543 U.S. at 569–70 (citations and quotation marks omitted).

76. *Id.* at 571–72.

77. Graham v. Florida, 560 U.S. 48, 53–58 (2010).

78. *Id.* at 74.

79. *Id.* at 60 ("The previous cases in this classification involved the death penalty."); *see also* Guggenheim, *supra* note 14, at 459 (describing the enormity of the *Graham* decision in light of its willingness to look beyond the established "death is different" limitations—a bedrock principle in Eight Amendment jurisprudence that holds that death sentences are to be reviewed with extremely careful scrutiny—in extending the *Roper* rationale). This is also Justice Thomas' strongest argument in his vehement dissent in *Graham*, criticizing the majority for the ease with which they decide that "[d]eath is different no longer." *Graham*, 560 U.S. at 103 (Thomas, J., dissenting); *see also* Woodson v. North Carolina, 428 U.S. 280, 305

To explain its decision, the Court noted that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences."[80] The Court also stressed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" because the "age of the offender and the nature of the crime each bear on the analysis."[81] The Court also drew confidence from the fact that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[82] Although the Court did not preclude the possibility of a youth spending the remainder of life in prison for non-homicidal crimes, it demanded that there be a possibility of release before the end of a life term.[83]

Just two years later, building on its decisions in *Roper* and *Graham*, the Court decided *Miller v. Alabama*, the final case in a trilogy of landmark cases protecting the rights of juvenile defendants.

E. Miller

Miller involved a companion case which began in November 1999, when 14-year-old Kuntrell Jackson robbed a video store along with two friends. One friend shot and killed the store clerk. And although the scope of Jackson's involvement was argued at trial, all parties agreed he did not kill anyone.[84] He was convicted of "capital felony murder" and sentenced to the state's mandatory life without parole (LWOP) sentence.[85]

One night in 2003, 14-year-old Evan Miller and a friend smoked marijuana and drank alcohol with an adult man, Cole Cannon. When Cannon passed out, Miller stole some money from his

(1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison terms differs from one of only a year or two.").

80. *Graham*, 560 U.S. at 48.

81. *Id.*

82. *Id.* at 68.

83. *Id.* at 75 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.").

84. *See* Miller v. Alabama, 567 U.S. 460, 465 (2021). From a doctrinal perspective, this fact is extremely important. Justice Breyer (joined by Justice Sotomayor) argued in a strongly worded concurrence that irrespective of the *Miller* holding, under *Graham*, if Arkansas were to seek imposition of a life without parole sentence, they would be required to prove that Jackson killed or intended to kill the store clerk. Despite the doctrine of "transferred intent," which underlies felony murder, it is not sufficient to "subject a juvenile to a sentence of life without parole." *Id.* at 491 (Breyer, J., concurring).

85. *Id.* at 466–67.

wallet, but Cannon woke up as Miller tried to place the wallet back in his pocket. After Cannon grabbed him by the throat, Miller grabbed a nearby baseball bat and struck Cannon repeatedly. He then placed a sheet over him and hit him again stating, "I am God, I've come to take your life." Miller and his friend then lit two fires causing Cannon to die from his injuries and smoke inhalation. Miller was convicted of "murder in the course of arson" and sentenced to the state's mandatory sentence of LWOP.[86]

Broadly extending the *Graham* holding, the Court in *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," even if applied to a juvenile who was convicted of murder.[87] Unlike *Graham*'s categorical bar on LWOP sentences for nonhomicidal crimes committed by juveniles, *Miller* allows the imposition of LWOP for homicide, so long as the judge first "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[88] Thus, statutes that *require* LWOP for any crime committed as a juvenile are per se unconstitutional but the discretionary imposition of such a sentence by a trial judge may not be.

Writing for the majority, Justice Kagan based her decision on two lines of precedent. First, the cases that categorically forbade certain punishments for certain offenders supported her conclusion. *Graham* had already extended these "proportionality" cases beyond the death penalty context, providing precedent for the notion that a life sentence is disproportionate for juveniles' crimes. Second, because *Graham* had already likened a life sentence to the death penalty in some respect, the cases that held that judges must consider the specific characteristics of a defendant before sentencing them to death were implicated.[89] For example, in *Eddings v. Oklahoma*, the Court invalidated the death sentence of a 16-year-old who killed a police officer because the judge "did not consider evidence of his neglectful and violent family background . . . and his emotional disturbance."[90] If a life sentence is similar to death, a

86. *Id.* at 468–69.

87. *Id.* at 479.

88. *Id.* at 480.

89. *Miller*, 567 U.S. at 470.

90. *Id.* at 476 (discussing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)); *see also id.* at 475–77 for the Court's full discussion of the individualized sentencings cases.

judge must be given the opportunity to consider the specific characteristics of youth before imposing such a sentence.[91]

F. Montgomery

In 2016, the Supreme Court issued its next juvenile sentencing decision in *Montgomery v. Louisiana*.[92] The question before the Court was whether *Miller*'s holding applies retroactively to pre-*Miller* cases in which LWOP sentences were imposed on defendants who committed murder before turning 18. Following the framework for retroactivity cases on federal collateral review set forth in *Teague v. Lane*, the Court held that *Miller* applies retroactively.[93] The Court held that *Miller* announced a new "substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[94] As a consequence, LWOP sentences imposed pre-*Miller* without consideration of youth must be vacated and sentencing courts must impose a new sentence.

The *Montgomery* decision may be significant for a second reason as well. A reasonable reading of *Miller* is that a judge must consider a list of factors before sentencing a juvenile to LWOP.[95] Indeed, the Court in *Miller* explained that its decision "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[96] According to this understanding, a sentencer would be free to impose LWOP because the crime was particularly

91. It is worth noting that this logic should foreclose *any* mandatory life sentence-schemes, even those imposed on adults. The "individualized sentencing" cases are not limited to juveniles. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976). If we take *Graham*'s comparison of life sentences to the death penalty seriously, it is unclear why we should stop at age 17. Granted, that issue was not before the Court, but it seems unlikely the Court would so hold, even had it been. Perhaps the salient part of the *Miller* opinion is the first line of precedent, i.e., the cases that established that juveniles deserve less punishment than adults. Only if combined with that, would the Court embrace the "individualized sentencing" cases in a context other than the death penalty. Additionally, *Graham* stressed the fact that "life without parole is an especially harsh punishment for a juvenile" because "a greater percentage of his life" will be spent in prison, than an adult sentenced to life in prison. Graham v. Florida, 560 U.S. 48, 70 (2010).

92. 136 S. Ct. 718 (2016).

93. 489 U.S. 288 (1989) (plurality opinion).

94. *Montgomery*, 136 S. Ct. at 735. The Court also noted that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 734.

95. As will be explained later, this is the way the sentencing judge in Josue Portillo's case seemed to interpret the decision.

96. Miller v. Alabama, 567 U.S. 460, 483 (2012).

brutal, even if the other factors (for example, a defendant's brutal upbringing) weighed against such a harsh sentence. In contrast, *Montgomery* seemed to characterize *Miller*'s substantive holding as forbidding a *certain category* of punishment for a *certain category* of offenders: namely, LWOP for "juvenile offenders whose crimes reflect the transient immaturity of youth."[97] Unlike the simple reading of *Miller*, the Court in *Montgomery* seems to interpret all of the factors listed in *Miller* as ways for judges to answer one dispositive question: does the crime committed reflect "incorrigibility"?

This discrepancy between the *Miller* opinion itself and *Montgomery*'s apparent interpretation of *Miller*, was the question presented in the most recent juvenile sentencing case to reach the Court, *Jones v. Mississippi*.[98] The appellant argued:

> As with any rule that bans a penalty for a category of offenders, *Miller* and *Montgomery*'s permanent-incorrigibility rule requires a court to resolve the question of whether an offender is, or is not, a member of the eligible class. Courts resolve questions by making findings. Thus, to sentence a juvenile homicide offender to life without parole, a court must find him permanently incorrigible.[99]

Mississippi disagreed, writing: "If this Court intended that the sentencing court be required to make the finding of fact regarding the defendant being permanently incorrigible, it would have held that in either *Miller* or *Montgomery*."[100] The Supreme Court agreed with Mississippi holding that "Miller does not require trial courts to make a finding of fact regarding a child's incorrigibility" nor does it "require an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility."[101] In a passionate dissent, Justice Sotomayor admonished the majority for a decision which "guts" *Miller* and *Montgomery* and lamented "[h]ow low this Court's respect for *stare decisis* has sunk."[102]

G. Does Miller Actually Contain Two Holdings?

Miller definitely held that mandatory sentencing schemes that require a sentence of LWOP are unconstitutional as applied to de-

97. *Montgomery*, 136 S. Ct. at 734.

98. 141 S. Ct. 1307 (2021).

99. Brief for Petitioner at 13–14, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

100. Brief in Opposition at 7, Jones v. Mississippi, 141 S. Ct. 1307 (2021) (No. 18-1259).

101. *Jones*, 141 S. Ct. at 1319, 1321 (citation omitted).

102. *Id.* at 1328, 1336 (Sotomayor, J., dissenting).

fendants who committed homicide before age 18.[103] But *Miller* seems to state a second holding: not only are statutes requiring sentences of LWOP "cruel and unusual punishment" for juveniles, but additionally, a judge who fails to consider a defendant's youth at sentencing violates the Eighth Amendment regardless of the given statute's flexibility. The Court wrote: "Although we do not foreclose a sentencer's ability to make that judgement [of imposing LWOP] in homicide cases, we *require it* to take into account how children are different."[104] Similarly, in *Graham*, the Court stated: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[105] 'In other words, because there is a substantive right that defendants' youth and its attendant features be considered at sentencing, statutes that preclude consideration are facially unconstitutional. To read *Miller* as standing solely for the proposition that statutes mandating LWOP are unconstitutional misses the forest for the trees.

The Court's holding in one of the earliest cases to consider youth in the context of sentencing is particularly helpful in determining the correct reading of *Miller*. In *Eddings v. Oklahoma*, the Court reversed a death sentence imposed on a 16-year-old who murdered a police officer.[106] The trial judge had stated during the sentencing that "'in following the law' he could not 'consider the fact of this young man's violent background.'"[107] The relevant Oklahoma statute actually *did* allow the sentencing judge to consider "any mitigating circumstances."[108] Citing *Locket v. Ohio*, which held "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

103. Miller v. Alabama, 567 U.S. 460, 479 (2012).

104. *Id.* at 480 (emphasis added).

105. Graham v. Florida, 560 U.S. 48, 76 (2010); *see also* Guggenheim, *supra* note 14, at 492–93 (arguing that *Graham* created a new substantive constitutional right: the right for juvenility to be accounted for in sentencing).

106. 455 U.S. 104 (1982).

107. *Id.* at 112–13. Eddings' parents divorced when he was five; his mother, who may have been an alcoholic and a prostitute, could not "control" him, and he was sent to live with his father, who also could not "control the boy." His father physically abused him. There was also testimony at trial that Eddings was emotionally disturbed, his mental and emotional development was several years below his age, and that he had a sociopathic or antisocial personality. *See id.* at 107. One psychiatrist testified that Eddings "did pull the trigger, he did kill someone, but I don't even think he knew that he was doing it." *Id.* at 108.

108. *Id.* at 106 (citing OKLA. STAT., tit. 21, § 701.10 (1980)).

basis for a sentence less than death," the Court reversed Eddings's death sentence.[109] *Locket* involved Ohio's statutory scheme, which allowed judges to consider only a list of three mitigating factors in deciding whether to impose death. On the other hand, the Oklahoma scheme allowed for consideration of "any mitigating circumstances."[110] Still, the *Eddings* Court held: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."[111] Therefore, although the judge had the statutory freedom under Oklahoma law to consider Eddings's troubled background, his failure to do so meant the imposed sentence violated the Eighth and Fourteenth Amendments. And although it is not dispositive, the logic of the *Eddings* Court is remarkably similar to the broader interpretation of *Miller*.

The Court's reading of *Miller* in *Montgomery* also supports the fact that there are two holdings in *Miller*. *Montgomery* explained that *Miller* announced a new substantive rule—a LWOP "sentence . . . violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'"[112] The rule announced in *Miller*, according to the *Montgomery* Court, was that a *certain category* of punishment is per se unconstitutional for a *certain category* of offenders: namely, LWOP for immature and transient youth. If all *Miller* held was that mandatory LWOP schemes were unconstitutional, *Montgomery* is incomprehensible. For example, suppose that a judge had discretion to impose a sentence less than LWOP but expressly refused to even consider a defendant's youth. Consequently, the juvenile defendant, who was in fact immature and transient, ended up receiving a life sentence. According to *Montgomery*, this result runs afoul of *Miller* because this kind of offender (an immature and transient youth) received an unconstitutional punishment (LWOP).[113] However, for this sentence to actually violate

109. *Id.* at 110 (citing Locket v. Ohio, 438 U.S. 586, 604 (1978)).

110. *Id.* at 106 (citing tit. 21, § 701.10).

111. *Eddings*, 455 U.S. at 113–14.

112. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (citations omitted).

113. Not only that, but even a judge who both had available discretion to impose a lesser sentence and *did* actually consider the defendant's youth can theoretically violate *Miller* if the judge erred. That is, if a judge assesses a juvenile as being "incorrigible," even though the juvenile is in fact just immature and transient, and therefore imposes life without parole, the judge inadvertently violates the Eight Amendment. *See id.* ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'" (citations omitted)). This admittedly unrealistic hypothetical scenario is the

Miller, that case must have another holding beyond forbidding sentencing schemes that mandate LWOP for juvenile defendants. This hypothetical illustrates that *Montgomery* read *Miller* as stating two holdings.

The Second Circuit recently issued a decision consistent with this understanding of *Miller*.[114] In that case, which involved gang-related violent crimes committed by a juvenile, the district court sentenced the defendant to two concurrent terms of life imprisonment, plus an additional five-year sentence for a weapons possession conviction.[115] The Second Circuit vacated the sentence, noting that "while [the Defendant's] sentence was not mandatory and thus does not fall under the categorical ban of *Miller*, his sentence was nonetheless improper."[116] The court explained that "Miller requires the district court to undertake additional reflection on the special social, psychological, and biological factors attributable to youth," even if LWOP is not mandated by statute. Because "[t]he district court did not reference [the Defendant's] age at all, much less grapple with it," the sentence was set aside.[117] The Second Circuit clearly understands *Miller* as containing two holdings.

The Supreme Court itself came very close to directly addressing this issue. On October 16, 2019, it heard oral arguments in *Mathena v. Malvo*, in which the Virginian Warden appealed a Fourth Circuit decision granting convicted murderer Lee Boyd Malvo a resentencing before the Virginia state courts.[118] Malvo was sentenced to LWOP for his role in the "D.C. Sniper Attacks," a 2002 serial shooting spree in which he and another man shot and killed 10 people at random in the span of 20 days. Malvo was 17 years old at the time of the shootings and his lawyers argued that, because the Virginia sentencing court did not consider his youth and its attendant features, *Miller*, which applies retroactively under *Mont-*

subject of Justice Scalia's sharply worded dissent in *Montgomery*. *See id.* at 744 (Scalia, J., dissenting) ("How wonderful. Federal and (like it or not) state judges are henceforth to resolve the knotty 'legal' question: whether a 17-year-old who murdered an innocent sheriff's deputy half a century ago was at the time of his trial 'incorrigible.' . . . What silliness. (And how impossible in practice . . . .)").

114. *See* United States v. Delgado, 971 F.3d 144 (2d Cir. 2020).

115. *Id.* at 151–52, & n.3.

116. *Id.* at 159.

117. *Id.*

118. Brief for Petitioner, Mathena v. Malvo, No. 18-217 (2019), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020).

gomery, gave Malvo a right to a resentencing.[119] Justice Kagan, who wrote the *Miller* opinion, clarified her view of *Miller*'s holding numerous times during oral arguments, at one point saying, "[I]n fact, *Miller* says several times, *not just requires an opportunity to consider but requires consideration*."[120] In contrast, Justices Kavanaugh, Alito, and Gorsuch and Chief Justice Roberts all indicated that, in their opinion, *Miller* has only one rule: mandatory LWOP sentencing schemes are unconstitutional.[121] They pointed to the fact that *Miller* stated its holding explicitly: "We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[122] However, the rest of the *Miller* opinion indicates that this is not the entirety of the holding. Regardless, we will have to wait for the Supreme Court's final determination on this issue, as *Mathena* was dismissed after the Virginia governor signed legislation which made juveniles sentenced to LWOP in the state eligible for parole after twenty years of incarceration.[123]

Although the Supreme Court did not squarely revisit this issue in *Jones*, one must wonder whether the court implicitly rejected Mr. Malvo's argument in one fell swoop. Perhaps the most troubling portion of the *Jones* opinion is the Court's insistence that "if the sentencer has discretion to consider the defendant's youth, the sentencer necessarily will consider the defendant's youth" because "[f]aced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's

119. Petition for Writ of Certiorari at 4–6, Mathena v. Malvo, No. 18-217 (2019), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020). *See supra* notes 112–113 and accompanying text (discussing *Montgomery*).

120. Transcript of Oral Argument at 26–27, Mathena v. Malvo, No. 18-217 (2019) (emphasis added), *cert. dismissed*, 2020 U.S. LEXIS 1368 (2020). This was also the opening point that counsel for Mr. Malvo made during oral arguments:

> "*Miller* is not limited to mandatory schemes where life without parole is the only possible punishment. It invalidated those schemes because they guarantee that courts won't consider whether youth warrants a lower sentence, which creates an unacceptable risk of excessive punishment, but when a court has the theoretical power to consider a lower sentence but doesn't do so, which is what happened here, it creates precisely the same risk . . . ." *Id.* at 34.

121. *Id.* at 37–70.

122. Miller v. Alabama, 567 U.S. 460, 479 (2012).

123. See William W. Berry III, *Mathena v. Malvo*, ABA (Feb. 25, 2020), https://www.americanbar.org/groups/public_education/publications/preview_home/volume/47/issue-1/article-9/ [https://perma.cc/262D-2UDR]. The legislation made the appeal essentially moot, and the parties stipulated that the case be dismissed. Stipulation of Dismissal Under Rule 46.1 Filed, Mathena v. Malvo, 140 S. Ct. 919 (2020) No. 18-217 (R46-11 / OT 2019).

youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor."[124] But *Miller* and *Montgomery* required a judge do more than merely have the defendant's youth float through their mind during sentencing. Unlike the Second Circuit which required the sentencing judge to "grapple" with a defendant's age, a majority of the Supreme Court was satisfied that mere discretion to consider youth assures that the sentencer will.[125]

III.
DID JUDGE BIANCO FOLLOW *MILLER* IN SENTENCING JOSUE PORTILLO?

On June 12, 2019, Josue Portillo was sentenced to 55 years in prison by Circuit Judge Joseph F. Bianco.[126] As the Second Circuit noted in affirming the sentence on appeal, "Judge Bianco provided an extensive explanation of his reasons."[127] Portillo's advisory guidelines range was calculated to be a sentence of life.[128] With the passing of the Sentencing Reform Act of 1984, Congress eliminated parole for federal prisoners convicted of crimes committed on or after November 1, 1987.[129] There remains, however, a system for the reduction of a federal prisoner's sentence: up to 54 days off for each year the prisoner exhibits "exemplary compliance with institutional disciplinary regulations."[130] Accordingly, Mr. Portillo will not leave prison until 2065, when he is 63-years-old.

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124. Jones v. Mississippi, 141 S. Ct. 1307, 1319 (2021).

125. *See* United States v. Delgado, 971 F.3d 144, 159 (2020) (highlighting Second Circuit sentencing approach).

126. Judge Bianco's nomination to serve as a judge on the Second Circuit was confirmed by the Senate on May 8, 2019. He presided over Portillo's sentence, as a "visiting judge," sitting by designation. Bianco handled many MS-13 murder cases while he was a district judge and opted to keep all of the MS-13 cases on his docket as a Circuit Judge. He has perhaps presided over more MS-13 cases than any judge in the country. *See* Zachary R. Dowdy, *Judge Who Presided over MS-13 Gang Cases Confirmed by U.S. Senate for Federal Appeals Court*, NEWSDAY (May 9, 2019, 1:05 AM), https://www.newsday.com/long-island/politics/judge-bianco-senate-second-circuit-1.30825785 [https://perma.cc/M8SB-228A].

127. United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021).

128. *See* Criminal Sentencing Memoranda, *supra* note 2, at 1 (his undisputed "total offense level" was 43).

129. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551).

130. *See* 18 U.S.C. § 3624(b)(1).

A. The Uncommon Sentence

Justice Kagan, writing for the majority in *Miller*, declared that cases in which the "appropriate" sentence is life in prison "will be uncommon."[131] Chief Justice Roberts, in dissent, characterized this as "an invitation to overturn life without parole sentences imposed by juries and trial judges."[132] A close reading of Justice Kagan's opinion reveals a deeply held belief that a LWOP sentence should be *very* uncommon. In explaining why such sentences should be uncommon, she wrote: "That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[133] Additionally, her aforementioned comments during oral arguments in *Mathena v. Malvo* imply that she believes it is possibly correct for a judge resentencing Mr. Malvo to determine something less than LWOP is appropriate even as applied to Malvo who killed or assisted in the killing of 17 people in the span of a few months.[134]

Nonetheless, "uncommon" does not mean never. Based on the circumstances of Portillo's offenses, one would be hard-pressed to imagine a case in which the harshest punishment is more warranted, even for a juvenile.[135] In this light, Judge Bianco's decision is sound, and arguably compelled by the facts of the case. However, the seriousness of the crime is only one factor *Miller* considers important. Even if the defendant committed a vile, brutal set of crimes, the sentencing court is required to consider his "immaturity," "family and home environment," susceptibility to peer pressure, and ability to change into adulthood.[136] Judge Bianco addressed some of these factors in explaining his sentencing decision. A closer look at his analysis follows.

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131. Miller v. Alabama, 567 U.S. 460, 479 (2012).

132. *Id.* at 501 (Roberts, C.J., dissenting).

133. *Miller*, 567 U.S. at 479–80 (citations omitted). This is true "even for expert psychologists." *See* Roper v. Simmons, 543 U.S. 551, 573 (2005).

134. Admittedly, this is far from definitive. Justice Kagan may have wanted the case remanded for resentencing because it was flawed (retroactively) in the lack of consideration of youth, but not that the new sentence should actually be any different. This implicates a murky area of constitutional law: "harmless errors" in the context of the substantive rights of a criminal defendant. *See, e.g.*, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (holding that denying a defendant's choice of counsel requires an automatic reversal because it is impossible to know whether the error was "harmless").

135. *See supra* note 2 and accompanying text.

136. *Miller*, 567 U.S. at 477.

B. What Judge Bianco Was Required to Consider: Does Miller Apply Here?

Before proceeding to examine Judge Bianco's sentence, whether or not *Miller* controls in this case needs to be examined. After all, Judge Bianco did *not* sentence Josue Portillo to LWOP and *Miller* only discussed LWOP sentences.

For why *Miller* should apply, it is important to note that a Portillo's 55-year sentence is awfully close to a life sentence. This is especially true in light of research indicating that imprisonment shortens life expectancy.[137] The Court's reasoning in *Miller* applies equally to sentences like this one, which will only let the defendant out of prison by the time he is old enough to collect social security payments.[138] The issue of very long sentences that are not LWOP is even more relevant in non-homicide cases. *Graham* categorically forbade a LWOP sentence for non-homicidal offenses committed by juveniles.[139] What if a judge sentences a 15-year-old defendant to a 55- or 70-year sentence for a nonhomicide crime—is this consistent with *Graham*? What if the juvenile is sentenced for separate offenses to consecutive term sentences that amount to life in prison? Numerous federal and state courts have considered this issue.[140] Consider this portion of a California Court of Appeals decision regarding a defendant sentenced for numerous non-homicidal crimes committed before he was 15 years old:

> J.A.'s sentence makes him ineligible for parole until he is 70 years of age. Although J.A.'s sentence is not technically a LWOP sentence, it is a de facto LWOP sentence because he is not *eligible* for parole until about the time he is expected to die.

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137. *See, e.g.*, Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [https://perma.cc/8DNZ-6R87] (summarizing two such studies).

138. Professor Guggenheim argues further that "after *Graham*, the Constitution requires consideration of the differences between children and adults when sentencing children *to terms of imprisonment*." Guggenheim, *supra* note 14, at 499 (emphasis added). However, for purposes of Portillo's argument in this case, one need not claim that *Graham* (and *Miller*) control whenever any term of imprisonment is imposed upon a juvenile. The modest argument Portillo made on appeal before the Second Circuit was "that *Miller* should be extended to require that a judge, exercising discretion to impose on a juvenile a sentence of such severity as fifty-five years without the possibility of parole, must consider the factors identified in *Miller*." United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021).

139. *See* Graham v. Florida, 560 U.S. 48, 74 (2010).

140. *See, e.g.*, Willbanks v. State Dep't of Corr., 522 S.W.3d 238, 244–45 (Mo. 2017) (tallying 17 states' high courts' decisions on the issue).

> The trial court's sentence effectively deprives J.A. of any meaningful opportunity to obtain release regardless of his rehabilitative efforts while incarcerated. Should J.A. spend the next half century attempting to atone for his crimes through education, rehabilitation, and introspection into why he committed the offenses knowing there is virtually no chance he will be released? Again recognizing J.A. was not sentenced to LWOP, his sentence nevertheless effectively "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." . . . [W]e conclude J.A.'s sentence is cruel and unusual punishment under *Graham* . . . .[141]

At least one federal court agreed and expanded this rationale to *Miller*. In 2018, the Third Circuit expressly addressed whether "the Eighth Amendment prohibit[s] term-of-years sentences for the entire duration of a juvenile homicide offender's life expectancy when the defendant's 'crimes reflect transient immaturity [and not] . . . irreparable corruption'."[142] The case involved the resentencing of Corey Grant, who, in 1992, was sentenced to LWOP for a slew of crimes he committed while he was 16. In light of *Miller*, Grant's sentence was set aside. The district judge said a life sentence would be inappropriate and instead imposed a sentence of 65 years without parole.[143] Grant argued the sentence was a "de facto LWOP" because "he will be released at age seventy-two at the earliest, which he purport[ed] to be the same age as his life expectancy."[144] The court agreed with him. Among other reasons, the court stated: "[I]t would make little sense if sentencing courts could circumvent Miller and eradicate this constitutionally required distinction [between adults and juveniles] simply by imposing extraordinarily high term-of-years sentences."[145] The panel's decision did not stand for long, however. Six months later, the court vacated the judgement and granted the government's motion for rehearing (en banc).[146]

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141. People v. J.I.A., 127 Cal. Rptr. 3d 141, 149–50 (Ct. App. 2011) (citations omitted), *vacated on other grounds*, 287 P.3d 70 (2012).

142. United States v. Grant, 887 F.3d 131, 142 (3d Cir. 2018) (citing Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016)), *rev'd en banc*, 9 F.4d 186 (2021).

143. *Id.* at 134–35.

144. *Id.* at 135.

145. *Id.* at 143.

146. United States v. Grant, 905 F.3d 285 (2018) (granting rehearing en banc).

However, some courts believe that *Miller* should not be expanded to any non-LWOP sentences. For example, take the case *Willbanks v. State Department of Corrections*. Timothy Willbanks was convicted and sentenced for his gruesome kidnapping, robbing, and shooting of a female stranger when he was 17 years old.[147] "The trial court imposed prison sentences of 15 years for kidnapping, life imprisonment for first-degree assault, 20 years for each robbery count, and 100 years for each armed criminal action count, and set these terms to run consecutively."[148] In 2017, Wilbanks asked the Missouri Supreme Court, in light of *Graham*, to declare the state's parole statutes and regulations unconstitutional as applied to him. He argued that, as a result of his aggregate sentences, "he does not have a meaningful opportunity to obtain release because he does not become parole eligible until he is approximately 85 years old."[149] The Missouri Supreme Court denied Willbanks's request for resentencing, writing: "The [U.S.] Supreme Court has never held that consecutive lengthy sentences for multiple crimes in excess of a juvenile's life expectancy is the functional equivalent of life without parole . . . . Without direction from the Supreme Court to the contrary, this Court should continue to enforce its current mandatory minimum parole statutes and regulations by declining to extend Graham."[150] The Supreme Court then denied Willbanks's petition for certiorari.[151]

But regardless of whether *Miller* applied as a legal matter, Judge Bianco clearly felt compelled to consider the "*Miller* factors" even when imposing a sentence less than LWOP, saying at the beginning of sentencing "that he had reread the *Miller* opinion" and understood "his obligations."[152] Those obligations were, in his words, to

> consider, among other factors, the defendant's chronological age and characteristics, including any immaturity, impetuosity and failure to appreciate the risks and consequences. The

147. Willbanks v. State Dep't of Corr., 522 S.W.3d 238, 240 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017).

148. *Id.* at 240–41.

149. *Id.* Missouri has a parole system which enables Willbanks to get out of prison after completing a certain percentage of his sentences, but under Missouri's parole statues and regulations he will not be eligible for parole before he is 85 years old. *Id.*

150. *Id.* at 246.

151. Willbanks v. Mo. Dep't of Corr., 138 S. Ct. 304 (2017) (denying certiorari).

152. United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020) (citing sentencing transcript at A 245–46), *cert. denied*, 141 S. Ct. 2548 (2021).

> court should consider the family and home environment that surround the defendant. The court should consider the circumstances of the offense including the extent of the juvenile's participation and the conduct and the way familial and peer pressures may have affected him and the possibility of rehabilitation.[153]

While the Second Circuit declined to rule on whether *Miller* was binding in the case, the Court "assum[ed], for purposes of [the] appeal, that the District Court was required to consider the *Miller* factors." The Court noted that Bianco "gave thoughtful consideration to all of these factors."[154] This makes the Portillo's sentencing an ideal case study for examining how judges attempting to be faithful to the Supreme Court's directive in *Miller* should go about exercising their discretion when sentencing those who committed homicide before age 18.

C. "Miller Factors"

In *Miller*, the Court identified four factors that a judge must consider when sentencing a juvenile to a LWOP sentence.[155] (1)

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153. *Id.*

154. *Id.* at 184. Judge Bianco is unusually thorough when articulating his rationales for imposing a sentence. One of his summer law clerks told this author that Judge Bianco had spent days considering Portillo's sentence and had not slept the night before the sentencing. Whether or not one agrees with the sentence imposed in this case, Bianco is clearly acutely aware and sensitive to the fact that "[f]ew, perhaps no, judicial responsibilities are more difficult than sentencing." *See* Graham v. Florida, 560 U.S. 48, 77 (2010).

As an important aside, the sentencing transcript makes clear that Judge Bianco understood *Miller* as requiring careful consideration of a list of factors but not that an ultimate "finding" of incorrigibility had to be reached. In fact, Judge Bianco admitted that Portillo could "change or turn his life around" but "even assuming that [the danger he poses] would dissipate over some time prior to the 55 years, I believe the other factors that I pointed to warrant this sentence in any event." Redacted Brief and Appendix for the United States at 24, United States v. Portillo, 981 F.3d 181 (2d Cir. 2020) (No. 19-2158) (alteration in original) (citing transcript of Judge Bianco's sentencing at 248–49). As explained in Part II, a case pending decision before the Court debates whether *Miller* and *Montgomery* in fact mandate a judge to find a defendant "incorrigible" before imposing LWOP.

155. *See* Miller v. Alabama, 567 U.S. 460, 477 (2012). Per *Miller*, state and federal judges must consider a juvenile defendant's age and its attending features, before imposing a sentence of life without parole. Additionally, because the court explicitly listed the "*Miller* Factors," these must be specifically considered in determining the sentence because "portions of the opinion necessary to that result" are also binding on lower courts under the doctrine of stare decisis. *See* Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). Even the portions of an opinion that are mere dicta are "entitled to greater weight" if they constitute "an important part of

"Immaturity, impetuosity, and a failure to appreciate risks and consequences"; (2) "family and home environment"; (3) "circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected him"; and (4) the possibility of rehabilitation.[156]

1. "Immaturity, Impetuosity, and a Failure to Appreciate Risks and Consequences"

In amicus briefs filed on behalf of the appellants in *Graham*, amici explained:

> Sound judgement requires both cognitive and social and emotional skills, but the former mature sooner than the latter. Studies of general cognitive capacity show an increase from pre-adolescence until about age 16, when gains in cognitive capacity begin to plateau . . . however, social and emotional maturity continues to develop throughout adolescence. Thus, older adolescents (aged 16–17) might have logical reasoning skills that approximate those of adults, but nonetheless lack the abilities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgement.[157]

In addition to describing psychosocial research regarding juveniles' maturity, amici bolstered their argument with "emerging research" in the field of neuroscience. "Recent neurobiological research suggests that the brain systems that govern many aspects of social and emotional maturity, such as impulse control, weighing risks and rewards, planning ahead, and simultaneously considering multiple sources of information, as well as the coordination of emotion and cognition, continue to mature throughout adolescence."[158] Thus, the "brain science" is "consistent with the demonstrated behavioral and psychosocial immaturity of juveniles."[159]

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the Court's rationale for the result that it reached." Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 490 (1986) (O'Connor, J., concurring).

156. *Miller*, 567 U.S. at 477. Factors (b) and (c) are also stated, though more broadly, in 18 U.S.C. § 3553(a)(1) ("[Judge shall consider] the nature and circumstances of the offense and the history and characteristics of the defendant.").

157. Brief for the American Psychological Association et. al. as Amici Curiae Supporting Petitioners at 14–15, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621) [hereinafter APA Graham v. Florida Brief].

158. *Id.* at 23.

159. APA Graham v. Florida Brief, *supra* note 157, at 27; *see also* Graham v. Florida, 560 U.S. 48, 68 (2010) (noting developments in psychology and "brain science").

The Court expressly adopted amici's findings in *Graham*, citing the portions of the American Psychological Association's and the American Medical Association's amicus briefs that discussed the new neuroscientific research.[160]

a. Portillo's Maturity Level

During Portillo's sentencing hearing, Judge Bianco expressed that he accepted the science and the Supreme Court's reasoning but that he does not "believe that [Portillo's] age, which was just under 16, or his immaturity was the driving issue in this case."[161] Judge Bianco then detailed the sophistication of Portillo's plan, describing him as one of the leaders of the group that committed the quadruple murder. This analysis of maturity oversimplifies both the scientific literature and the Court's adoption of those findings.

For example, under the reasoning accepted by the Court in *Miller*, although Portillo possessed the cognitive abilities to plan a quadruple murder, he almost certainly had not yet achieved social and emotional maturity. Perhaps, counterintuitively, the shocking brutality of Portillo's actions suggest as much. It is very likely, according to scientific studies, that he reached much, or all, of his cognitive development by age fifteen while still severely lacking in his social and emotional development.

The defense's retained expert psychiatrist, Dr. Eric Goldsmith, wrote in his report that the defendant "likely has executive functioning problems involving judgement and decision making."[162] He

160. *Graham*, 560 U.S. at 68. The fact that the Court cites the pages in the amicus briefs that discuss neuroscience, rather than the earlier pages detailing the psychosocial and behavioral research, supports Professor Kim Taylor-Thompson's assessment, revealed in conversation with the author in 2018, that that breakthroughs in neuropsychology heavily influenced the *Roper*, *Graham* and *Miller*, in a way that earlier research did not.

161. Redacted Brief and Appendix for the United States, *supra* note 154, at 13 (citing transcript of Judge Bianco's sentencing at 246). Judge Bianco wrote the same in his order granting the government's motion to transfer Portillo to adult status. *See* United States v. Juvenile Male, 327 F. Supp. 3d 573, 578 (E.D.N.Y. 2018) ("The Court does not believe that [Portillo's] immaturity, brain development, and excessive use of marijuana adequately explain his alleged violent tendencies in this case (including his alleged premeditated, pivotal role in the murders).").

162. *Juvenile Male*, 327 F. Supp. 3d at 590 (discussing and citing Dr. Goldsmith's report). Dr. Goldsmith also wrote: "His [Portillo's] manner did not indicate a full appreciation of the gravity of the charges against him, or of the life altering implications of those charges." Dr. Goldsmith attributed the poor decision making to the effects of marijuana on his teenage brain. *Id.* On the other hand, the prosecution argued that "the defendant's apparent apathy toward his situation is far more suggestive of a lack of remorse for the horrific crimes that he commit-

reported that Portillo "displayed very little emotional range" and also diagnosed Portillo with Oppositional Defiant Disorder, Adolescent Anti-Social Behavior, and Cannabis Use Disorder.[163]

In light of the above, Judge Bianco was too dismissive of the first "*Miller* Factor." He oversimplified the "immaturity" prong and ignored the "failure to appreciate risks and consequences" prong.

Judge Bianco highlighted the duration of the planning period in Mr. Portillo's case, as several months had passed between the initial altercation at a 7-Eleven convenience store and the murders. Clearly, Portillo had a long time to consider his actions—he hardly made an "impetuous" decision. Thus, the impulsivity and rash decision-making attributes repeated by the Court throughout the cases are not at all mitigating factors in Portillo's case. Still, the fact that these murders were not committed on the spur of the moment does not negate the other mitigating factors which do apply in this case. As a consequence of being 15 years old, Portillo was lacking social and emotional maturity and an appreciation for "risks and consequences" when he killed four people. It is therefore not clear that Judge Bianco really did "accept" all of the science embraced by the Court.[164]

2. "Family and Home Environment"

a. "But Not Everyone Like Him Commits Murder"

One argument proffered by the prosecutors in their case against Mr. Portillo is a standard one for the U.S. Attorney's Office for the Eastern District of New York, particularly in MS-13 murder cases (juvenile and otherwise). In their Pre-Sentencing Letter, they write: "[Portillo's] upbringing . . . is . . . indistinguishable from

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ted . . . ." Prosecution's Brief-Letter to The Honorable Judge Joseph F. Bianco Re: United States v. Josue Portillo at 4, United States v. Josue Portillo, No. 2:17-cr-00366-JFB (E.D.N.Y. July 12, 2018) (opposing defendant's submission in opposition to transfer to adult-status).

163. *Juvenile Male*, 327 F. Supp. 3d at 590 (citing Dr. Goldsmith's report). In order to be diagnosed with Anti-Social Personality Disorder, an individual must be at least 18 years of age. AM. PSYCHOLOGICAL ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.7B (5th ed. 2012). This is due to the difficulty in determining whether a juvenile's anti-social behavior is indicative of an irreparable condition or immaturity, which was exactly the Court's point in *Miller*.

164. That notwithstanding, Judge Bianco correctly highlighted in his order granting the motion to transfer Portillo to adult status, that "Dr. Goldsmith . . . agreed at the transfer hearing that 'the defendant's demeanor would also be consistent with not having remorse'." *Juvenile Male*, 327 F. Supp. 3d at 591. Additionally, Dr. Goldsmith found that Portillo "has no sign of any major mental illness." *Id.* at 578.

countless other immigrants from El Salvador, who encounter similar (or more challenging) issues of separation and hardship, but do not join the MS-13 and commit horrific acts of violence."[165]

At first glance, this argument is strong but closer scrutiny reveals its limitations. It maintains that because the vast majority of people with "similar issues" to this defendant never commit murder, the issues do not excuse the conduct. But who says it must? The overwhelming majority of people with mental disabilities never commit murder, yet *Atkins* held that such a person who does is categorically *less culpable* because of the mental disability.[166] A prosecutor would have a hard time convincing a judge or jury that a person with a mental disability should not be treated more leniently because "countless others" with "similar issues" do not commit murder. The argument against Mr. Portillo is equally unavailing. Nobody claims a difficult upbringing or undeveloped maturity level *necessarily* leads to murderous conduct; these are merely factors that *lessen the culpability* of such a defendant who does commit murder.

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165. *See* Criminal Sentencing Memoranda, *supra* note 2, at 6. The prosecution made a similar argument in respect to Portillo's journey as he was smuggled into the United States.

> "[D]espite his age at the time of the April 11 Murders, the defendant had significantly greater life experience than most other individuals his age. When he was 14 years-old, he traveled unaccompanied from El Salvador to the United States and illegally crossed the border, before traveling to New York. Thus, the defendant's age at the time of the murders should not be given significant weight." *Id.* at 6.

This argument is even more flawed.

> "The defendant described the trip as traumatic—at times, he was transported in hot shipping containers and trucks, *crowded to the point where he felt like he could not breathe*, and at one point he had to run from immigration officials and hide in a trough. After arriving in the United States, the defendant experienced frequent nightmares about his journey and had difficulty being in hot areas . . . ." *Juvenile Male*, 327 F. Supp. 3d at 584 (emphasis added).

During the sentencing hearing Portillo's attorney went further describing that Portillo almost died on the way into the U.S., traveling on the bottom of a pile of human bodies. I was present at the sentencing and this is paraphrased from the notes I took during the event.

It is one thing to argue that Portillo's difficult journey should not be considered a mitigating factor, but to argue that his significantly greater life experience actually makes him *more* culpable certainly goes too far. Yet, although he agreed that the defendant went through a trip that almost no one goes through, Judge Bianco still noted "that Portillo had certain life experiences that required a level of independence and maturity beyond those of a normal teenager, including making the difficult trip as an unaccompanied minor from El Salvador to the United States." Redacted Brief and Appendix of the United States, *supra* note 154, at 13 (citing transcript of Judge Bianco's sentencing hearing at 246).

166. Atkins v. Virginia, 536 U.S. 304, 317–19 (2002).

The prosecution's line of reasoning is relevant only insofar as it highlights that the defendant's upbringing was not *so* hideous as to make his conduct more understandable. For example, in *Miller*, "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten."[167] Under such awful circumstances, some (though by no means all) judges, may find that the heart-wrenchingly dysfunctional upbringing explains the behavior, or at least significantly mitigates its reprehensibility. The prosecution's comparison of Portillo to "countless other immigrants" can serve the legitimate purpose of highlighting that his upbringing was not uniquely "brutal or dysfunctional."[168] However, beyond that narrow point, the argument should have no influence on the sentencing judge.

b. Family Support: A Double-Edged Sword

Juvenile defendants with seriously troubled or dysfunctional family units or upbringings face a uniquely difficult dilemma: whether or not to highlight their lack of family support in regard to sentencing. If a young person does not have a loving and supportive family to rely on while in prison, nor upon release from prison, the fourth *Miller* factor ("the possibility of rehabilitation") likely weighs in favor of a longer (or life) sentence. However, the very same fact is also relevant in considering factors two ("family and home environment") and three (familial and peer pressure) as a mitigating circumstance. Thus, a conscientious defense attorney may legitimately hesitate to argue that a defendant's lack of family support mitigates culpability, out of fear the judge will hold this *against* the defendant at sentencing. A person lacking family support is more likely to become a recidivist upon being released into the community and a judge may therefore impose a harsher sentence.

Albeit in a very different legal context, Judge Bianco has endorsed this exact mode of thinking.[169] In a reported opinion on a

167. Miller v. Alabama, 567 U.S. 460, 479 (2012) (citations omitted). Evan Miller was six years old the first time he tried to kill himself. *Id.* at 467.

168. *Id.* at 477.

169. For the gruesome facts of this case, see Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Member Convicted of Murdering Mother and Two Year-Old Child (Sept. 9, 2013), https://www.justice.gov/usao-edny/pr/ms-13-gang-member-convicted-murdering-mother-and-two-year-old-child [https://perma.cc/YV3T-UPEX].

transfer-to-adult-status hearing, in the case of another horrific MS-13 (double) murder by a juvenile, he wrote:

> The court concludes that, under the circumstances of this case, the defendant's social background weighs in favor of transfer. Specifically, the court finds that defendant's chaotic and unstable home life . . . present exactly the type of unstable environment and social surroundings that will make it highly unlikely that defendant can rehabilitate himself and avoid criminal behavior.[170]

Admittedly, the legal question presented at a transfer hearing is drastically different from the one at an adult court sentencing hearing. Juvenile courts are limited to imposing a maximum sentence of 5-years imprisonment.[171] Considering the circumstances of the double murder, allowing the defendant to go free at that point would be most absurd by all accounts. Moreover, juvenile court is supposed to be about rehabilitation rather than punishment, so it is logical to consider a difficult family background as it pertains to likelihood of rehabilitation, rather than to mitigation of reprehensibility. Still, Judge Bianco's opinion supports the notion that there is a correlation between lack of family support and a low prospect of rehabilitation, which, in turn, may weigh in favor of a harsher sentence.[172]

Is this right? That is, should judges consider lack of family support to be a reason to impose a *higher* sentence? Normatively, it

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170. United States v. Juvenile Male No. 2, 761 F. Supp. 2d 27, 34–35 (E.D.N.Y. 2011).

171. *See, e.g.*, United States v. Juvenile Male, 754 F. Supp. 2d 569, 573 (E.D.N.Y. 2010) ("The juvenile justice system, including the limited sentencing options available in that system if the defendant is found guilty (such as the statutory maximum of five years' incarceration), is simply ill-equipped and woefully insufficient . . . to adequately address . . . these most grave charges . . . .").

172. The prosecution in Portillo's case also argued that his lack of family support weighs in favor of transfer. Prosecution's Brief-Letter, *supra* note 162, at 3 ("[G]iven the fact that, if released, the defendant would return to the same unsettled family situation, with no identifiable role models to positively influence him, it is highly likely that he would return to the same pattern of destructive behavior.") Another illustration can be seen in a defense attorney's pre-sentencing letter to Judge Bianco in yet a third MS-13 juvenile murder case. The attorney argued that his client should receive a lower sentence in part because "his family has attended each and every court appearance and done their best to visit him . . . Marlon has a safety net to fall into when this period of punishment is over. Unlike many people, he has a chance to meet the goals of rehabilitation." Pre-Sentencing Letter to The Honorable Joseph F. Bianco Re: United States v. Marlon Guevara at 3–4, United States v. Guevara, 2019 WL 8138158 (E.D.N.Y. July 30, 2019) No. 18-275 (S-1) (JFB).

seems unfair to hold one's family environment, "from which he cannot usually extricate himself—no matter how brutal or dysfunctional," against a young defendant.[173] More importantly, the Court in *Miller* rejected this line of reasoning. Rather than consider the "family background and immersion in violence" of Kuntrell Jackson or the "pathological background" of Evan Miller to be reasons to impose a harsher sentence, the Court weighed these factors in favor of leniency.[174] Home environment was a leading factor in the Court's analysis. Insofar as one is concerned with the ramifications of a lack of family support on a defendant's prospects for rehabilitation, the better response should be a policy choice to provide substitute support systems. Rather than foreclosing the defendant from ever receiving support, society should consider how to provide substitute support systems to deeply troubled juvenile defendants.

i. Portillo's Family Support

The tension explained above, between weighing lack of family support as either a factor in favor of a lesser sentence or against it, *may* have been at play in Mr. Portillo's case. It did not appear that there was *anyone* present in the courtroom on his behalf during the sentencing, other than his court-appointed attorney.[175] Nonetheless, his attorney drew no attention to this fact. One of the arguments by prosecutors was that "despite his mother's best efforts . . . [and] despite his supportive family, the defendant chose to join the MS-13 at an early age, and committed the . . . Murders."[176] But where was his "supportive family" at a hearing in which he was quite plausibly going to be sent to prison for the rest of his life?[177]

173. Miller v. Alabama, 567 U.S. 460, 477 (2012).

174. *Id.* at 478.

175. This author attended the sentencing and drew this conclusion from personal observation, but it has not been confirmed.

176. *See* Criminal Sentencing Memoranda, *supra* note 2, at 6. Judge Bianco adopted this reasoning at the sentencing hearing and in his order granting transfer. *See also* United States v. Juvenile Male, 327 F. Supp. 3d 573, 586 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status) ("[T]he defendant appears to have had a fairly stable and supportive family environment in both El Salvador and the United States.").

177. Additionally, Portillo's mother's letter to Judge Bianco prior to sentencing was all of three and a half lines long, with minimal substance. *See* Defense Counsel's Letter to Judge Bianco, Re: United States v. Josue Portillo, *United States v. Josue Portillo, No. 17-366 (JB)* [sic] (E.D.N.Y. July 12, 2019). These facts raise doubts about the alleged "fairly stable and supportive family environment" Judge Bianco concluded that Josue had. *Juvenile Male*, 327 F. Supp. 3d at 586. Ms. Portillo may well have made every effort to forge a connection with her son but the fact is that Josue Portillo had little connection to his mother and family.

Whether or not the defense attorney's omission of that point in this case was calculated, there is legitimate concern generally about raising similar arguments in mitigation of juvenile offenses, due to concerns that the judge will hold the lack of support against the defendant.

To be clear, I am in no way passing judgment on Portillo's mother's decision regarding whether or not to attend the sentencing hearing of her son. She was obviously in an unimaginably difficult position. Rather, my observation is that it seems to have been a plausible argument that Josue Portillo's counsel could have explored. Relatedly, despite his mother's best efforts, Portillo told Dr. Goldsmith that he felt estranged from her and "he did not know her." He said "it was weird" living with her.[178] This is not terribly surprising considering the circumstances: Portillo never met or spoke with his father, who left his mother before he was born; his mother left El Salvador when he was three years old; and he only "occasionally spoke with his mother via telephone." He told Dr. Goldsmith that the conversations were "infrequent, brief, and that he felt 'embarrassed' if he spoke with her for too long."[179] After not seeing his mother for eleven years, he was sent to live with her in her home together with his mother's partner, his mother's partner's grandmother, and his half-sister.[180] Again, defense counsel did not raise these points during sentencing.

At the same time, Portillo's mother and her partner did make sincere efforts to spend time getting to know him and cared for him. The reason his mother and grandmother decided he should leave El Salvador was "out of concern for his safety and well-being."[181]

Ultimately, Judge Bianco concluded that the second *Miller* Factor ("family and home environment") weighed in favor of a harsher sentence (and in favor of transferring him to adult status in the first instance). Although the opposite position certainly could have been taken, Judge Bianco's conclusion was reasonable under the totality of the circumstances.

c. Home Environment in El Salvador

There is an important but seemingly overlooked aspect of Portillo's case, relevant to other MS-13 members who emigrate from Central America. Josue Portillo's life while living in the U.S. was

178. *Juvenile Male*, 327 F. Supp. 3d at 584.
179. *Id.* at 583.
180. *Id.* at 584.
181. *Id.* at 586 (citations omitted).

fairly typical: he attended public school and lived in a home with his family in a quiet suburban area.[182]

Viewed in this way, his horrific cruelty and brutality shock our United States conscience. Nonetheless, it is critical to bear in mind that Portillo spent most of his young life in El Salvador.[183] He lived in a world drastically different from our privileged upbringing in the U.S. and it is critical to appreciate the implications of that in evaluating Josue Portillo's sentence.

One scholar recently wrote,

> El Salvador is widely regarded as the deadliest place on earth that is not a war zone, but it may as well be one. The gang culture that has evolved since the end of the 12-year-long civil war in 1992 is unmatched for its brutality and scale of violence. . . . El Salvador is characterized not only by widespread violence but also by the brutality with which the violence is carried out. After firearms, machetes are the most common murder weapon. Often, the aim is not just to kill, but to torture, maim, and dismember the victim. The emergence of an intricate gang culture with its own traditions, rules, and structures has transformed the act of killing into a ritual, filled with intentional references to sadism and satanism.[184]

In 2015, El Salvador had the highest homicide rate in the world and its Defense Ministry estimated that, in 2019, about 8 percent of the country was involved with gangs.[185] This culture of inhumane violence traces back to the twelve-year-long civil war that devastated El Salvador. "In the course of El Salvador's Civil War, kids as young as 11 and 12 years old were trained and used as soldiers."[186]

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182. *Id.* at 584.

183. *Juvenile Male*, 327 F. Supp. 3d at 584. In fact, he was already 14 when he moved.

184. Tariq Zaidi, A Nation Held Hostage, FOREIGN POL'Y (Nov. 30, 2019, 1:00 AM), https://foreignpolicy.com/2019/11/30/el-salvador-gang-violence-ms13-nation-held-hostage-photography [https://perma.cc/EST5-W5JX]; *see also* INT'L CRISIS GRP., LIFE UNDER GANG RULE IN EL SALVADOR 2 (2018), https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador [https://perma.cc/NA3X-EC2E] ("Nearly 20,000 Salvadorans were killed from 2014 to 2017 [by gang violence]. That's more violent deaths than in several countries that were at war during those years, such as Libya, Somalia, and Ukraine.").

185. Zaidi, *supra* note 184.

186. Andrew M. Garscia, Abstract, *Gang Violence: Mara Salvatrucha —"Forever Salvador,"* J. GANG RES., Winter 2004, at 29, https://www.ojp.gov/ncjrs/virtual-library/abstracts/gang-violence-mara-salvatrucha-forever-salvador [https://

Although an in-depth analysis of El Salvadorian culture is beyond the scope of this Note, critical to the MS-13 juvenile cases is a recognition that, in El Salvador, "[t]he ubiquity of violence is devastating to regular psychological development—and this violence is normalized."[187] Treating immigrant MS-13 gang members as if they were raised in the United States runs contrary to the holdings and spirit of the Supreme Court's cases. This by no means suggests that individuals raised amidst cruelty are excused for their actions, nor that they did not appreciate the wrongfulness of their choices. Still, in Evan Miller's case for example, the Court held that "Miller deserved severe punishment for killing Cole Cannon," but still accounted for his youth and "pathological background" as mitigating factors.[188] The same balancing act is required with regard to immigrants raised in Central America.

Perhaps the greatest weakness in Judge Bianco's analysis is his failure to give due consideration to Portillo's life before coming to the United States and its possible impact on his behavior. When Portillo turned 12, the MS-13 established its strong presence in Portillo's small rural town.[189] Portillo told Dr. Goldsmith that this was when his town became extremely violent.[190] In that first year alone, the gang killed Portillo's cousin's husband, a member of his soccer league suddenly went missing, and he witnessed several violent fights in the street between the MS-13 and police.[191]These experiences led directly to his decision to join a gang, having reasoned that doing so was the safest choice he had.[192] "*Roper*, *Graham*, and *Miller* Courts were all concerned with research on brain development. Research demonstrates how trauma can disrupt healthy brain development."[193] But Judge Bianco may have misunderstood that "communities as a whole can experience trauma," particularly if "vi-

perma.cc/EZZ2-G3ME] (full article available for purchase upon request from the publisher).

187. Zaidi, *supra* note 184.

188. Miller v. Alabama, 567 U.S. 460, 478–79 (2012).

189. United States v. Juvenile Male, 327 F. Supp. 3d 573, 584 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status).

190. *Id.*

191. *Id.*

192. *Id.* As he expressed it to Dr. Goldsmith, "joining a gang was going to be inevitable, as those who didn't join were victimized." *Id.*

193. Gene Griffin & Sara Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD. LEGAL RTS. J. 1, 8–9 (2013) (presenting studies showing physical differences in the brains of children who experienced trauma as compared with children who did not).

olence . . . happens regularly in their neighborhood."[194] This is precisely the story of Portillo's life.

Glossing over the potential impact that witnessing pervasive violence in his hometown at 12 years of age may have had on Portillo, Judge Bianco concluded that Portillo "appears to have had a fairly stable and supportive family environment in both El Salvador and in the United States."[195] Even if, *arguendo*, that is true, the *community* in which he grew up was neither stable nor supportive. Even though the *Miller* Court did not explicitly mention "community environment" as a factor judges should consider, if the environment did impact a youth's upbringing, it is only sensible for a sentencing court to take that into account. This is especially true if the community was ridden with violence, as "the ubiquity of violence is devastating to regular psychological development."[196]

3. "Circumstances of the Homicide Offense, Including the Extent of His Participation in the Conduct and the Way Familial and Peer Pressure May Have Affected Him"

The third *Miller* factor is comprised of a few parts. Judge Bianco evaluated the extent of Portillo's participation as extremely significant. Portillo was the one who brought the initial altercation to the attention of his superiors and who communicated with the female associates throughout the night of the murders, and he partook in the actual killings, using a machete to repeatedly strike the victims. Furthermore, the record does not indicate any familial pressures to join a gang or partake in any criminal activity. To the contrary, Portillo's mother allegedly called for him to come to America in order to extricate him from MS-13 involvement in El Salvador and be reunited with him.[197]

a. Peer Pressure

There are two kinds of peer pressure recognized in the literature. As the American Psychological Association explained in its amicus brief in *Graham*, "[r]esearch has shown that susceptibility to peer influence, particularly in situations involving pressure to engage in antisocial behavior . . . peaks at around age 14, and then

194. *Id.* at 12.

195. *Juvenile Male*, 327 F. Supp. 3d at 586.

196. Zaidi, *supra* note 184. On the other hand, the prosecution and Judge Bianco correctly considered the fact that *upon coming to the United States* Portillo actively sought out the MS-13 to become a member as a factor weighing against a more lenient sentence. *See Juvenile Male*, 327 F. Supp. 3d at 586.

197. *See Juvenile Male*, 327 F. Supp. 3d at 586.

declines."[198] But this pressure is not limited to a certain form. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, *affect their choices even without direct coercion*. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[199]

The *Miller* Court recognized that studies "indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency."[200]

i. Judge Bianco's View

Judge Bianco felt that peer pressure was also not a mitigating factor here. According to Judge Bianco "Portillo joined the gang quickly within months of arriving [on Long Island], knowing what the gang was about. There was no indication in the record of any pressure."[201] Judge Bianco also noted that Portillo played "a key role in the prompting, in the planning and in the execution of this quadruple homicide."[202]

Again, Judge Bianco considers only portions of the science. Judge Bianco referred to Mr. Portillo's own words, that he joined the gang because he wanted "respect, as well as . . . friends, women, and marijuana," as proof that his joining was not the result of peer pressure.[203] But even if Portillo was never explicitly pressured to join the gang, his desire for "respect" should be viewed in the context that "[a]dolescents are . . . more likely than adults to alter their

198. APA Graham v. Florida Brief, *supra* note 157, at 16. Brief for the American Psychological Association et. al. as Amici Curiae in Support of Petitioners at 16, Miller v. Alabama, 576 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter APA Miller v. Alabama Brief].

199. Brief for the American Psychological Association et. al. as Amici Curiae in Support of Petitioners at 18, Miller v. Alabama, 576 U.S. 460 (2012) (Nos. 10-9646, 10-9647) [hereinafter APA Miller v. Alabama Brief] (emphasis added) (citations omitted).

200. Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012) (citing APA Miller v. Alabama Brief, *supra* note 199, at 26–27).

201. Redacted Brief and Appendix of the United States, *supra* note 154, at 14 (citing transcript of Judge Bianco's sentencing hearing at 247).

202. *Id.* at 22 (citing sentencing transcript at 241); *see also* United States v. Juvenile Male, 327 F. Supp. 3d 573, 588 (E.D.N.Y. 2018).

203. Redacted Brief and Appendix of the United States, *supra* note 154, at 14 (citing transcript of Judge Bianco's sentencing hearing at 247–48); *see also Juvenile Male*, 327 F. Supp. 3d at 586 (citing Dr. Goldsmith's report).

behavior . . . by engaging in antisocial behavior . . . to achieve respect and status among their peers."[204]

4. "The Possibility of Rehabilitation"

Miller differentiates between serious crimes that are the product of "immaturity" and those indicative of "incorrigibility."[205] A juvenile's actions are "less likely to be evidence of irretrievable depravity."[206] Indeed, "only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior."[207] But isn't murder in cold blood more than just "illegal activity"? The scientific research, largely accepted by the *Miller* Court, says no. Certainly, the worse the offense, the more likely it is to be a sign of "incorrigibility," but the severity of the crime is not dispositive. "[E]ven within a sample . . . limited to those [juveniles] convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small."[208] As one court put it: "We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."[209]

The question this final *Miller* factor asks is essentially whether the defendant is likely to be able to return to society at some point without posing a danger to the community. As the Supreme Court has stressed, "[i]t is, of course, not easy to predict future behavior" under any circumstance.[210] And the *Miller* Court cautions that the nature of youth makes predicting their future behavior acutely challenging.

Trying to predict what a person will do in the future is obviously an imperfect and uncertain endeavor, and in many ways seems inherently inequitable. However, our criminal justice system cannot avoid trying to do so. In that vein, *Roper*, *Graham*, and *Miller*

204. APA Graham v. Florida Brief, *supra* note 157, at 17.

205. Miller v. Alabama, 567 U.S. 460, 473 (2012).

206. *Id.* at 471 (citations and alterations omitted).

207. *Id.* at 472 (citing Roper v. Simmons, 543 U.S. 551, 570 (2005) (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003))) (alterations and quotation marks omitted).

208. APA Miller v. Alabama Brief, *supra* note 199, at 24.

209. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968) (holding an LWOP sentence for a 14-year-old convicted of rape unconstitutional); *see also* Graham v. Florida, 560 U.S. 48, 73 (2010).

210. Jurek v. Texas, 428 U.S. 262, 274 (1976).

caution that judges should think long and hard before deciding that a young person won't change.[211]

a. Portillo's Future Behavior

Although it is impossible to predict whether or not Portillo will commit future crimes, there are factors that may indicate the likelihood of his rehabilitation. These include his demonstration of regret, his involvement with the MS-13, and his likely deportation upon completion of his sentence.

i. Statement During Sentencing

At the sentencing hearing, Portillo made a brief statement apologizing for his actions, and saying he would always pray for the victims' families. He asked to be given a chance to prove himself later in life and not be sentenced to life in prison. He also said it was "selfish" to be lured into this "terrible gang." He said he wanted to return to El Salvador and be reunited with his sister before he dies. His defense attorney stressed that after meeting with Josue over a dozen times, it was clear that he was remorseful, even if he may not know how to show it, and that his personality was passive.[212] This all weighs in favor of a lesser sentence as it shows hope for rehabilitation. However, these statements were obviously self-serving, and it is impossible to know how genuine they were.

Judge Bianco told Portillo that, in deciding not to impose a life sentence, he considered his age, admission of guilt, and *remorse*.[213]

ii. Gang Membership

Both the prosecution and Judge Bianco pointed to Portillo's continued involvement with the MS-13 while in prison as evidence that he is unlikely to change. Portillo was involved in two violent assaults against other inmates, including one in which he assaulted another inmate associated with a rival street gang.[214] Judge Bianco

211. *See* APA Graham v. Florida Brief, *supra* note 157, at 21 n.43 (citing studies demonstrating the "difficulty of predicting juveniles' future behavior, such as antisocial conduct or psychopathy, because juveniles' social and emotional abilities are not fully developed").

212. I was present at the sentencing and this is paraphrased from the notes I took during the event.

213. *See* Redacted Brief and Appendix of the United States, *supra* note 154, at 12 ("[T]he defendant's 'age, his acceptance of responsibility . . . [and] his expression of remorse' . . . warranted a sentence of 55 years.") (citing transcript of Judge Bianco's sentencing hearing at 244–45).

214. *See* Criminal Sentencing Memoranda, *supra* note 2, at 4–5.

noted that these incidents show that Portillo is unwilling to extricate himself from the MS-13 and cease his violent behavior.[215]

This highlights a serious issue that gangs present to the criminal justice system. The nature of gang structures, with often complex and strictly enforced internal rules, makes leaving them difficult. In the case of the MS-13, this is especially true as "in principle, gang members are not allowed to leave under any circumstances."[216] Portillo's case is a prime example. He sat in prison surrounded by fellow MS-13 members, many of whom were his associates in the months prior to his incarceration.[217] In such an environment, it is indeed hard to imagine a major change in Portillo's lifestyle. In similar indictments in the Eastern District of New York, there are sometimes over twenty MS-13 members charged together. In these cases, not only are the gang members in custody together, but they also sit together in federal court at hearings, sometimes as many as ten at a time.[218]

We can certainly see the need for structural overhaul in this system of imprisonment and adjudication. However, and unfortunately, for now, the system is what it is. Judge Bianco's assessment that Mr. Portillo's continued loyalty to the MS-13 makes the possibility of rehabilitation unlikely, although profoundly tragic, is correct.

Unlike the juvenile defendants in *Roper*, *Graham*, and *Miller*, Portillo is a member of a dangerous gang, one in which members generally do not leave alive. Therefore, the factors that generally weigh heavily against determining a young person is incorrigible are complicated by the realities of gang-life.[219]

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215. *Id.* (detailing Portillo's violent behavior while incarcerated).

216. INSIGHT CRIME, CTR. FOR LATIN AM. & LATINO STUD., MS13 IN THE AMERICAS 27 (2018), https://www.justice.gov/eoir/page/file/1043576/download [https://perma.cc/8E65-MCHJ].

217. *See* Criminal Sentencing Memoranda, *supra* note 2, at 4–5 ("[O]n July 30, 2017, the defendant and . . . a fellow MS-13 member and co-conspirator in the April 11 Murders, assaulted another inmate who was associated with the rival Bloods street gang.").

218. *See, e.g.*, Press Release, U.S. Attorney's Office for the E. Dist. of N.Y., MS-13 Gang Members Indicted in New York for Murder of Four Young Men in Park and Killing of Rival at Deli (July 19, 2017), https://www.justice.gov/usao-edny/pr/ms-13-gang-members-indicted-new-york-murder-four-young-men-park-and-killing-rival-deli [https://perma.cc/RC7C-UHMF] (17 person indictment; several defendants arraigned together before Judge Bianco).

219. *See supra* pp. 32—33 (analyzing lack of family support as a factor in regard to likelihood of rehabilitation).

iii. Deportation

As in almost all cases in which illegal aliens are convicted of crimes in the United States, Portillo will most likely be deported to El Salvador at the conclusion of his long sentence. This raises an aspect of juvenile sentencing unique to undocumented immigrants. As a matter of normative notions of justice and decency, whether a convicted criminal poses a danger upon release from prison within the Unites States or in a foreign country should be of no moment.[220] The public safety of people in a foreign country should be of equal concern to us, if it is our criminal justice system allowing the convict to go free. Nonetheless, deportation upon completion of a prison sentence may be relevant in another way. In assessing risks for recidivism, the fact that a juvenile will be removed immediately from the United States upon completion of a prison term may increase the chances that the individual will integrate back into society safely and productively. Separate from his old community and friends, it may be easier for the individual to create a new identity back in his or her home country. Obviously, predicting this with certainty is not possible, but it is a factor a judge may wish to consider.

Unfortunately, in Mr. Portillo's case, as a member of a transnational gang, this factor is far less compelling. The MS-13 has its largest presence in El Salvador and there is a link between gang members in the United States and those in El Salvador.[221] Therefore, the fact that Portillo will be deported upon release from prison provides little assurance of his ability to reestablish himself in El Salvador. This is especially true because he will likely remain imprisoned alongside other MS-13 members for decades.

CONCLUSION: JOSUE PORTILLO'S SENTENCE

Josue Portillo was sentenced by a federal judge to 55 years in prison and will spend nearly all his life incarcerated.

On the one hand, the crimes he committed are difficult to even fathom. He murdered four innocent young people in the

220. The Second Circuit squarely addressed this point in United States v. Wills, 476 F.3d 103, 107–08 (2d Cir. 2007), *abrogated on other grounds by* Kimbrough v. United States, 552 U.S. 85, 128 (2007). The Court noted "that even assuming that the 'public' protected under § 3553(a)(2)(C) is only the American public, *see Small v. United States*, 544 U.S. 385, 388 (2005) (remarking on the 'commonsense notion that Congress generally legislates with domestic concerns in mind' (quoting *Smith v. United States*, 507 U.S. 197, 205 n.5 (1993))), criminal conduct committed abroad is capable of harming Americans." *Id.*

221. *See* INSIGHT CRIME, *supra* note 216, at 58–62.

most barbaric fashion. He played an essential role in the detailed planning of the murders over the course of several months. Rather than being pressured into partaking in this scheme, he was the one who initially brought the targeted victim to the attention of his superiors within the gang. Portillo did not claim to suffer a particularly difficult upbringing, lived in a stable home environment, and had no diagnosis of mental illness. While in custody for the murders he committed, he maintained his fidelity to the MS-13. The structure of the MS-13 gang makes leaving difficult and unlikely.

On the other hand, it is now accepted, both as a scientific fact and as constitutional doctrine, that the brain of a 15-year-old is different from that of an adult. A 15-year-old lacks self-control, is less able to appreciate consequences, is more susceptible to influence and psychological damage, and has an undeveloped sense of responsibility. The scientific literature indicates that even indirect peer pressure is a powerful force in the decision-making of young people, and Portillo was in fact motivated by his desire for "respect." Although his living arrangements in the United States were not of the sort we would imagine can breed such violence, Portillo spent his formative years in El Salvador, "the deadliest place on earth," where "violence is normalized" and where "the emergence of an intricate gang culture with its own traditions, rules, and structures has transformed the act of killing into a ritual, filled with intentional references to sadism and satanism."[222] Portillo never met his father and was separated from his mother at age 3 for 11 years. He began smoking marijuana at age 12, and joined the MS-13 while still too young to obtain a driver's permit.[223] Finally, even the most serious crimes committed by a 15-year-old are likely to be signs of immaturity rather than incorrigibility.

In imposing a near-life sentence, Judge Bianco concluded that immaturity was not the key factor driving Josue Portillo, but his analysis conflated cognitive and emotional development. The judge also did not seem to pay sufficient consideration to the *indirect* peer pressure that heavily influences adolescents. Most concerning was Judge Bianco's complete disregard for the corrupt and brutally violent culture that permeates El Salvador, where Portillo spent most his life. Under these circumstances, a sentencing court ought to be more sensitive to a 12-year-old who came to believe that "joining a

222. Zaidi, *supra* note 184.

223. *See* United States v. Juvenile Male, 327 F. Supp. 3d 573, 584 (E.D.N.Y. 2018) (order granting government's order to transfer Portillo to adult status).

gang was going to be inevitable, as those who didn't join were victimized."[224]

Manifestly, the main reason Judge Bianco imposed this harsh sentence was the nature and circumstances of the crimes Portillo committed.[225] Judge Bianco also summarized his reasoning during the sentencing saying that anything less than the 55-year sentence "would not adequately account for all the . . . factors . . . seriousness of the offense, the loss of life, the need to promote respect for the law and to provide deterrence, including general deterrence."[226] *Miller* cautioned that LWOP should be "uncommon" for juvenile defendants, in part because of the great difficulty in identifying "the rare juvenile offender whose crime reflects irreparable corruption."[227] Judge Bianco's analysis had its share of flaws by which he did not properly adhere to the Court's directives in *Miller*. Nonetheless, his determination that Josue Portillo should be one of the rare 15-year-olds to receive a near-life (but still not LWOP) sentence, after weighing the totality of the circumstances, was not inconsistent with *Miller*.[228] The brutal nature of the crime, the quadruple loss of life, the extent of Portillo's participation, and his continued affiliation with the MS-13 all weigh in favor of an extremely long sentence.

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224. *Id.*

225. Judge Bianco stressed the "unbelievably violent nature of this crime and the extreme harm it caused" and explained that "the sentence has to reflect the devastating and the senseless act of evil of the loss of four lives and . . . the emotional lifelong suffering that all of the loved ones of these four young men continue to experience and will experience for the rest of their lives." Redacted Brief and Appendix of the United States, *supra* note 154, at 9 (citing transcript of Judge Bianco's sentencing hearing at 240).

226. *Id.* at 15 (citing transcript of Judge Bianco's sentencing hearing at A 249).

227. Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (citing Roper v. Simmons, 543 U.S. 551, 573 (2005)).

228. The Second Circuit affirmed, writing "the sentence is not unreasonable in any legally cognizable sense" despite fifty-five years being "fairly deemed especially harsh for a defendant fifteen years of age at the time of the crime." United States v. Portillo, 981 F.3d 181, 184 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 2548 (2021). *But see supra* pp. 16–21 (discussing *Montgomery* and *Jones*). Theoretically, if the Supreme Court had ruled in favor of Mr. Jones, requiring that sentencing courts make a finding of "incorrigibility," Judge Bianco's sentence may have been challenged because he failed to do that. Instead, he weighed the *Miller* factors, more generally. Of course, for such an appeal to have succeeded, Portillo would also have had to argue that 55 years is the equivalent of LWOP for purposes of *Miller*. *See supra* pp. 23–36 and accompanying footnotes (explaining why *Miller* should apply to a 55-year sentence).

"Few, perhaps no, judicial responsibilities are more difficult than sentencing."[229] Indeed.

229. Graham v. Florida, 560 U.S. 48, 77 (2010).

RESTORING RESPECT FOR THE LISTENER IN FIRST AMENDMENT RELIGIOUS DOCTRINE

HOPE O'LEARY

INTRODUCTION

Today, perhaps more so than ever before, the focus is on the listener. Casual conversations between coworkers in the office must be handled with care to avoid affronting one's colleague. Tweets and Instagram stories, easily made permanent through screenshots and screen recordings, also call for prudence. While some praise "political correctness" as wise and respectful, others mock the term as hypersensitive.[1] But for some of those who disregard due consideration for the listener, "cancel culture" looms large.[2] An unidentified mass online stands ready to condemn the offensive behavior, demanding that the perpetrator be relegated to some inferior status. Prominently, these retributory consequences have included disciplinary action from an employer (Amy Cooper) or boycotts of published works (JK Rowling, Woody Allen).[3]

1. *See* Kat Chow, *'Politically Correct': The Phrase Has Gone from Wisdom to Weapon*, NPR (Dec. 14, 2016, 11:00 PM) https://www.npr.org/sections/codeswitch/2016/12/14/505324427/politically-correct-the-phrase-has-gone-from-wisdom-to-weapon [https://perma.cc/U4NX-LLQQ].

2. *See* Aja Romano, *Why We Can't Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020, 12:03 PM) https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate [https://perma.cc/A9CV-NZPB].

3. *See* Gwen Aviles, *J.K. Rowling Faces Backlash After Tweeting Support for 'Transphobic' Researcher*, NBC NEWS (Dec. 19, 2019, 2:10 PM) https://www.nbcnews.com/feature/nbc-out/j-k-rowling-faces-backlash-after-tweeting-support-transphobic-researcher-n1104971 [https://perma.cc/UBR2-BHCM] (suggesting that the backlash following Rowling's tweet included a boycott of her books); Ligaya Mishan, *The Long and Tortured History of Cancel Culture*, N.Y. TIMES (Dec. 3, 2020) https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html [https://perma.cc/96X4-23NW] (providing examples of retributory consequences); Bret Stephens, *Woody Allen Meets the Cancel Culture,* N.Y. TIMES (Mar. 18, 2020) https://www.nytimes.com/2020/03/18/opinion/woody-allen-memoir.html [https://perma.cc/6TXJ-JY23]; Max Zahn & Andy Serwer, *Franklin Templeton CEO: We 'Stand By' Firing of Viral Ex-Employee Amy Cooper*, YAHOO NEWS (July 15, 2021) https://news.yahoo.com/franklin-templeton-stand-by-firing-of-viral-former-employee-amy-cooper-ceo-135142445.html [https://perma.cc/J2CC-5JVU];.

First Amendment doctrine, on the other hand, ordinarily focuses on the rights of speakers, rather than listeners.[4] The First Amendment's Free Speech Clause provides "Congress shall make no law . . . abridging the freedom of speech . . . ."[5] The Supreme Court considers the speaker to be an invaluable player in the free market of ideas in need of protection.[6] Justice Oliver Wendell Holmes constructed this metaphor, viewing the speaker as essential to the free flow of information, in turn a requirement for the effective functioning of institutions of free choice, like markets and democracies.[7]

Another potential motivation for the Court's continued championing of the speaker is Justice Brandeis' vision of the dignitary speaker with dignitary interests in self-realization.[8] In Brandeis's view, the speaker's freedom to develop her own ideas is a valuable end in itself, not just a means to the free market of ideas.[9] The speaker is entitled to engage in the process of self-determination, through participation in public discourse.[10] The Court has perpetuated this view, accepting that we tolerate offensive speech because

4. *See* Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 411 (2019) (citing BURT NEUBORNE, MADISON'S MUSIC 97-131 (2015)); *see also* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015) (noting that ordinary First Amendment doctrine protects the right to participate in public discourse, but arguing instead that the "constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions").

5. U.S. CONST. amend. I.

6. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting there exists a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

7. Holmes articulated this view in his dissents in *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting), and *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting). *See also* Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 901-02 (2017) [hereinafter Neuborne, *Status of the Hearer*].

8. *See* Whitney v. California, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) ("Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means . . . .").

9. *See id.* at 375.

10. Post & Shanor, *supra* note 4, at 171-72.

the speaker is entitled to work through her ideas as a dignitary right.[11]

A third potential motivation for the Supreme Court's continued endorsement of the rights of speakers is a fear of government. The Court may be wary that government will abuse any power it is given to censor speech, and so champion the rights of speakers as a method of resisting government censorship.[12]

Whether its motivation is the free market of ideas, the speaker's dignitary right to self-realization, or a fear of government censorship, the Court has consistently treated the speaker as a powerful figure and demonstrated hesitancy to restrict speakers' rights.[13] Consequently, the Court has consistently treated the listener as capable of handling whatever speech the speaker throws its way.[14]

Despite this focus on speakers, the three justifications for a speaker's right to speak also support the right of listeners to know.[15] In Justice Holmes' free market of ideas, the listener is just as important, if not more so, than the speaker.[16] The listener absorbs the speaker's information and through her autonomous choices, integrates the information into the free market.[17] Under the Brandeisian dignitary approach, the listener of the speaker's message also enjoys a dignitary interest in self-fulfillment.[18] Likewise, the Court may distrust the government's ability to censor speech and fear that it will prevent the hearer from accessing information necessary to the free market of ideas and to exercising her own dignitary rights.[19] As a result of one or more of these motiva-

11. *See* United States v. Alvarez, 567 U.S. 709, 727-28 (2012) (plurality opinion) (citing *Whitney*, 274 U.S. at 377).

12. Neuborne, *Status of the Hearer*, *supra* note 7, at 897, 902.

13. *See* Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 66, 68, 75 (2016) (noting that a "core purpose" of the First Amendment is to guarantee that the people, not the government, determine what they want to say and how they want to say it, and that the Roberts Court, adopting principles from the Court's First Amendment precedents, has "steadfastly refused to declare speech that many deemed socially worthless to be beyond the pale of the First Amendment's protection").

14. *See infra* Part I.

15. The Court "tends to deploy this powerful vision of a hearer's right to know only when necessary to shore up a weak speaker." Neuborne, *Status of the Hearer*, *supra* note 7, at 909-10.

16. *See id.* at 901.

17. *See id.*

18. *See id.*

19. *See id.* at 906.

tions, the Court has expected the listener to cope with offensive, hateful, and even false speech.[20]

The Supreme Court has demonstrated a markedly different approach to claims alleging a violation of the Establishment Clause. Its analysis more closely resembles regular discourse in 2022, by illustrating a concern for the feelings of the hearer that often prevails over the right of the speaker to speak, or the hearer to know.[21] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion[.]"[22] History, both in England and in the United States prior to the founding, illustrated that governmental support of religion produced an inevitable result: "hatred, disrespect and even contempt of those who held contrary beliefs."[23] The Establishment Clause therefore prohibited the government from preferentially treating one religion over another, or religion over nonbelief.[24] Accordingly, where the

20. *See infra* Part I.

21. *See infra* Part II.A.

22. U.S. CONST. amend. I. Scholars have noted that the Court has been inconsistent in its Establishment Clause jurisprudence in terms of results, theory, and the tests applied. *See* William P. Marshall, *"We Know It when We See It" The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495-96 (1986). But the Court has also stated that complete separation is impossible and therefore required "neutrality." Roemer III v. Bd. of Pub. Works, 426 U.S. 736, 745-46 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required."); *see also* Marshall, *supra*, at 496 (citing Roemer, 426 U.S. at 745; Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). In other instances, the Court has found that the Constitution instead mandates "accommodation" of all religions. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."); *see also* Marshall, *supra*, at 496 (citing *Lynch*, 465 U.S. at 673; Zorach v. Clauson, 343 U.S. 306, 313-14 (1951)). Ultimately, however, the Court has recognized that the Framers believed the government's stamp of approval on one particular religious practice constituted a serious threat to religious freedom. *See* Engel v. Vitale, 370 U.S. 421, 428-29 (1962).

23. *Engel*, 370 U.S. at 431.

24. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the

speaker is the government and the speech consists of a religious display or includes religious messaging, the Court ordinarily prohibits speech that may offend the listener.[25]

The Court has deviated from this customary emphasis on the listener in its Establishment Clause jurisprudence in one particular area: legislative prayer.[26] When litigants allege a violation of the Establishment Clause based on the opening of a session of legislature[27] or a town board meeting[28] with a prayer, the Court has demonstrated reasoning resembling its free speech jurisprudence, expecting the hearer to be capable of coping with the feelings generated by the speech.[29]

This divergence has resulted in a split between the Fifth and Ninth Circuits over what amount of consideration to afford the hearer in the context of school board prayer.[30] The Fifth Circuit has applied the Court's legislative prayer approach (favoring the speaker),[31] whereas the Ninth Circuit has applied ordinary Establishment Clause principles (favoring the hearer).[32]

This Note will argue, first, that under Supreme Court precedent, the Ninth Circuit correctly concluded that school board prayer should not fall within the Court's legislative prayer exemption and should violate the Establishment Clause. Second, this Note will argue that the legislative prayer exemption itself should be deemed an impermissible establishment of religion and should be overruled. In creating the legislative prayer exemption, the Court abandoned its customary sensitivity to the hearer, an approach designed to protect freedom of religion. Instead, the Court applied reasoning that resembled its treatment of the hearer in the free speech context by expecting the listener to cope with the speech. The Court was incorrect to adopt a free speech approach to the establishment claim involving legislative prayer because the Free Speech Clause and Establishment Clause operate through reverse

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Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.").

25. *See infra* Part II.A.

26. *See infra* Part II.B.

27. *See* Marsh v. Chambers, 463 U.S. 783, 784 (1983).

28. *See* Town of Greece v. Galloway, 572 U.S. 565, 569-70 (2014).

29. *See infra* Part II.B.

30. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018) (per curiam); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).

31. *See* McCarty, 851 F.3d at 528-29.

32. *See* Chino Valley, 896 F.3d at 1142-3.

mechanisms.[33] The Free Speech Clause protects free speech by *allowing* speech, ensuring a lack of censorship. In contrast, the Establishment Clause protects freedom of religion by *prohibiting* speech, specifically speech that explicitly or implicitly endorses religion. By applying its free speech jurisprudence approach to an establishment claim against legislative prayer, the Court abandoned the very object of the Establishment Clause – to protect freedom of religion.[34]

I.
BACKGROUND

A. Treatment of the Hearer: Free Speech Claims

When litigants raise claims under the Free Speech Clause that their First Amendment rights have been infringed upon, the Court has regularly sided with the speaker and required the hearer to cope with the speech. The Court has made clear that the hearer must tolerate offensive speech when it does not target the hearer and is not a direct insult.[35] In *Cohen v. California*, the Court invalidated a conviction under a California statute based on a man wearing a jacket bearing the words "fuck the draft" in a Los Angeles courthouse, requiring the hearers present to deal with the explicit speech.[36] The Court found that the four-letter word was "clearly not directed to the person of the hearer" and that no hearer present "could reasonably have regarded the words on appellant's jacket as a direct personal insult."[37] Because precedent has "consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech," government cannot shut off discourse solely to protect the hearer unless substantial privacy interests have been invaded in an intolerable manner.[38] The Court was also motivated at least in part by a fear of government, commenting that a majority could easily silence dissidents and minorities based only on personal preferences.[39] Accordingly, rather than silence the speaker, the hearers present were expected to

33. *See infra* Part V.

34. *See infra* Part V.

35. *See* Cohen v. California, 403 U.S. 15, 20 (1971); *see also* Virginia v. Black, 538 U.S. 343 (2003).

36. 403 U.S. at 16-17.

37. *Id.* at 20 (citation omitted).

38. *Id.* at 21 (citation omitted).

39. Cohen, 403 U.S. at 21. The Court's wariness of government seemed to reflect not only a concern for governmental abuse of censorship, *see supra* text accompanying note 11, but also a regard for the "discrete and insular minorities"

"avoid further bombardment of their sensibilities . . . by averting their eyes."[40]

In *Virginia v. Black*, the Court went further and expected the hearer to be capable of withstanding hateful speech.[41] In *Black,* respondents were convicted of violating a Virginia statute which criminalized cross-burning "with the intent of intimidating any person or group of persons[.]"[42] One respondent had led a Ku Klux Klan rally where a cross was burned, and two respondents had attempted to burn a cross on the yard of a Black neighbor.[43] The Court found that a State cannot suppress speech purely because it was carried out "with the purpose of creating anger or resentment" in the hearer.[44] While a State may ban cross-burning carried out with the intent to intimidate, the provision in the Virginia statute treating *any* cross-burning as prima facie evidence of intent to intimidate rendered the statute unconstitutional.[45] Accordingly, the Court found that some cross-burning is protected speech,[46] despite acknowledging that "the burning of a cross is a 'symbol of hate.'"[47] The sense of anger or hatred aroused in the hearer was not sufficient to ban all cross burnings because of the need to avoid oversuppression of ideas.[48] The Court, embracing a Holmesian free market of ideas method of reasoning, quoted Gerald Gunther:[49]

> The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any

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who may be silenced by a governmental majority. *See* United States v. Carolene Prods Co., 304 U.S. 144, 153 n.4 (1938).

40. Cohen, 403 U.S. at 21.

41. *See* 538 U.S. 343, 366 (2003).

42. *Id.* at 348.

43. *Id.* at 348-350.

44. *Id.* at 366.

45. *Id.* at 367-68.

46. Black, 538 U.S. 366.

47. *Id.* at 357 (citing Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 771 (Thomas J., concurring)).

48. *See* Black, 538 U.S. at 366-67.

49. Gerald Gunther was a leading constitutional law scholar and Stanford Law professor, mentored by Learned Hand. Ari L. Goldman, *Gerald Gunther, Legal Scholar, Dies at 75*, N.Y. TIMES (Aug. 1, 2002) https://www.nytimes.com/2002/08/01/us/gerald-gunther-legal-scholar-dies-at-75.html [https://perma.cc/V5Y6-39G5].

> community's attempt to suppress hateful ideas by force of law.[50]

The hearer is therefore asked to weather hateful, demeaning speech, with arguably no instrumental value, specifically carried out with the purpose of creating anger or resentment in the hearer, so long as it was not designed to intimidate the hearer.

The hearer is expected to cope with offensive and hateful speech because, as the Court has underscored, our system of government rests on the idea that speech should invite debate.[51] In *Texas v. Johnson,* the Court overturned a criminal conviction for burning an American flag in political protest based on a Texas statute outlawing flag desecration.[52] The Court again declined to prioritize the sentiments of the hearer, despite acknowledging that some were "seriously offended" by the protest.[53] The Court instead focused on the critical need for this type of offensive speech for our democratic government to function effectively, again advancing Holmes's free market of ideas: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'"[54] Speech that invites debate and the exchange of ideas, even if it offends the hearer, therefore serves a noble or "high" purpose.[55] Consequently, the Court declared it a "bedrock principle underlying the First Amendment" that the government "may not prohibit the expression of an idea simply because society finds the idea . . . offensive or disagreeable."[56]

The Court once again articulated this bedrock principle in *Snyder v. Phelps,* overturning a damage award against the Westboro Baptist Church for intentionally inflicting emotional distress through an anti-gay demonstration at the funeral of a soldier.[57] The impact on the hearer was striking. The father of the soldier testified that he was "unable to separate the thought of his dead son from his thoughts of Westboro's picketing," and that he often would be-

50. Black, 538 U.S. at 366-67 (citing Gerhard Casper, *Tribute to Professor Gerald Gunther: Gerry*, 55 STAN. L. REV. 647, 649 (2002) (internal quotation marks omitted)).

51. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* 491 U.S. at 399.

52. *Id.* at 399.

53. *Id.* at 408.

54. *Id.* at 408-09 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

55. *See id.*

56. *Id.* at 414.

57. 562 U.S. 443, 460 (2011).

come "tearful, angry, and physically ill" when he thought about it.[58] Expert witnesses also testified that his emotional anguish had resulted in severe depression and had exacerbated pre-existing health conditions.[59] Despite these effects, the Court rearticulated the necessity of avoiding suppression purely based on the offensive nature of the speech.[60] On the contrary, the Court quoted an earlier opinion of the Court for the proposition that "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[61]

On occasion, the Court does not even acknowledge the effect of offensive speech on the hearer in its reasoning. In *United States v. Stevens*, the Court reversed a conviction under a federal statute criminalizing the sale of depictions of animal cruelty and declared the statute facially invalid.[62] The Court did not address the effect on the hearer of the horrifying and cruel "crush videos," in which animals were tortured and killed to appeal to persons with a specific sexual fetish, but simply declared the statute overbroad.[63] Despite a clear lack of instrumental value, the Court found that banning depictions of animal cruelty "as a class" violates the First Amendment, noting that restrictions upon the content of speech have been permitted in only a few limited areas.[64]

Not only is the hearer expected to cope with offensive and hateful speech,[65] but also the hearer is required to sort out true

58. *Id.* at 450.

59. *Id.*

60. *Id.* at 458.

61. *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988) (some internal quotations omitted)).

62. 559 U.S. 460, 482 (2010).

63. *Id.* at 465-66. The case itself involved an application of the statute to depictions of animal fighting, but the Court acknowledged that crush videos fell within the scope of and were the main target of the statute. *Id.*

64. *Id.* at 468.

65. Hate speech has been defined as "any form of expression through which speakers primarily intend to vilify, humiliate, or incite hatred against their targets." Kenneth D. Ward, *Free Speech and the Development of Liberal Virtues: An Examination of the Controversies Involving Flag-Burning and Hate Speech*, 52 U. MIAMI L. REV. 733, 765 (1998). Hate speech is generally protected by the Constitution, unless the speech falls within a narrow, unprotected category. Planned Parenthood v. Am. Coal. of Life Activists, 290 F.3d 1058, 1092 (9th Cir. 2002), as amended (July 10, 2002) (Reinhardt, J., dissenting) ("Speech . . . may not be punished or enjoined unless it falls into one of the narrow categories of unprotected speech recognized by the Supreme Court: true threat, incitement, conspiracy to commit criminal acts, fighting words, etc.") (citations omitted).

speech from false.[66] In *United States v. Alvarez,* the Court overturned a criminal conviction for a false claim of receipt of the Congressional Medal of Honor.[67] The Court declined to protect the hearer from such false speech, reasoning that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[68] The Court once again prioritized the speaker's contribution to the Holmesian free market of ideas over the position of the hearer, in pursuit of a more robust exchange of ideas. However, in *Alvarez,* the Court prioritized the speaker's right to speak not just over the hearer's feelings, but also over the hearer's right to know, since the speaker's contribution to the marketplace of ideas consisted of falsehoods.

II.
TREATMENT OF THE HEARER: ESTABLISHMENT CLAUSE CLAIMS

A. Ordinary Treatment

In contrast to its treatment of the hearer in claims asserting a violation of the freedom of speech, the Court has ordinarily been sympathetic to the concerns of the hearer where the litigant has asserted a violation of the Establishment Clause. In *Engel v. Vitale*, the Court did not focus directly on the hearer, but rather on the government, specifically the prohibition against the government providing support for a religious group.[69] The Court declared that public prayer in public schools violated the Establishment Clause, not because of the potential coercion on the students, but because the government had no right "to control, support or influence the kinds of prayer the American people can say."[70] The Court also acknowledged that indirect coercive pressure on religious minorities is readily apparent where the government supports one particular religious belief, but that the "purposes underlying the Establishment Clause go much further" than preventing coercion.[71] Instead,

66. *See generally* United States v. Alvarez, 567 U.S. 709 (2012) (plurality opinion).

67. *Id.* at 715.

68. *Id.* at 718 (citation omitted). The Court drew a distinction between perjury and statutes prohibiting lying to the government, speech that is not protected by the First Amendment, based on the impact on the integrity of the trial system and the government process, respectively. *See id.* at 720-21.

69. 370 U.S. 421, 430-31 (1962).

70. *Id.* at 429.

71. *Id.* at 431.

the First Amendment's "first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion."[72] The Court then recognized the detrimental effect on the hearer, acknowledging that history illustrated that government support of religion resulted in disrespect and contempt for those in the minority.[73] The Court therefore demonstrated concern for the hearer in its reasoning, but focused on the long-term consequences of government establishment on non-adhering minorities, including the hearer, rather than the hearer's immediate offense or the coercive effect of the prayer.[74] Accordingly, public prayer in public schools violated the Establishment Clause,[75] as did bible readings and readings of the Lord's Prayer.[76]

In 1971, the Court outlined the three-prong *Lemon* test to determine whether a government action violates the Establishment Clause.[77] To satisfy the test and avoid invalidation, the government action must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive entanglement with religion.[78] In *Lemon*, the Court invalidated two state statutes that provided state aid to church-related elementary and secondary schools because they involved excessive entanglement between government and religion.[79] In finding that the statutes involved excessive entanglement, the Court focused on various characteristics of the schools that made them a vehicle for transmitting religion to the next generation, a process enhanced by the impressionable age of the students.[80] The Court therefore demonstrated concern for the coercive effect on the hearer,[81] as opposed to the long-term consequences on non-adherent minorities as in *Engel*.[82]

Justice O'Connor signaled particular sensitivity to the hearer's immediate feelings in her concurrence in *Lynch v. Donnelly*,[83] which

72. *Id.*
73. *Id.*
74. *See* Engel, 370 U.S at 431.
75. *See id.* at 436.
76. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205-06 (1963).
77. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
78. *Id.*
79. *Id.* at 613-614, 625.
80. *Id.* at 616.
81. *See id.*
82. Engel v. Vitale, *supra* note XX,at 431.
83. *See* 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring).

shortly thereafter became controlling precedent.[84] Although she agreed with the majority that the city of Pawtucket did not violate the Establishment Clause by erecting a Nativity scene in its shopping district, O'Connor's articulation of how government may potentially violate the Clause established a framework that was much more deferential to the hearer. Under Justice O'Connor's construction, government violates the Establishment Clause through its "endorsement or disapproval of religion."[85] She reasoned that endorsement sends a message to non-adherents that they are "outsiders, not full members of the political community," and also sends an "accompanying message to adherents that they are insiders, favored members of the political community," whereas disapproval sends the opposite message.[86] O'Connor's endorsement test ushered in a greater concern for the sensibilities of the hearer in the Court's jurisprudence, suggesting that a showing that a nonadherent was made to feel like an outsider may be sufficient to establish a violation of the Establishment Clause.[87]

After *Lynch,* the Court continued to demonstrate sensitivity to the immediate feelings of the hearer. Just four years later, the Court revisited the claim that a local government's display of a Nativity scene violated the Establishment Clause, and found a violation.[88] The Court justified this departure by stating that the rationale of the majority opinion in *Lynch* was "none too clear," and that neither of its lines of reasoning provided guidance in subsequent cases.[89] Instead, the Court embraced O'Connor's framework, agreeing that government endorsement sends a message to nonadherents that they are outsiders.[90] The Court also clarified that to determine whether the government has the effect of endorsing religion under O'Connor's test, the Court should consider "what

84. *See infra* text accompanying notes 88-92.

85. Lynch, 465 U.S. at 688.

86. *Id.*

87. *See id.*

88. *See* County of Allegheny v. ACLU, 492 U.S. 573, 592-603 (1989).

89. *Id.* at 594. Justice Kennedy dissented in *Allegheny*, rejecting O'Connor's endorsement test. *See id.* at 655 (Kennedy, J., dissenting). Kennedy argued that if the intent of the Establishment Clause were to "protect individuals from mere feelings of exclusion," then legislative prayer, permitted just six years earlier in *Marsh v. Chambers*, 463 U.S. 783 (1983), would be invalidated. Allegheny, 492 U.S. at 673 (Kennedy, J., dissenting). He instead suggested a "proselytization" inquiry, noting that there was "no realistic risk" that a creche display represented an effort to proselytize or was otherwise the first step down the road to an establishment of religion. *Id.* at 664 (Kennedy, J., dissenting).

90. *Id.* at 595-97 (majority opinion).

viewers may fairly understand to be the purpose of the display."[91] Here, the Court found factual differences, such as its setting in a country courthouse, that suggested the purpose of the display was to send a message that it supported and promoted a creche's Christian message.[92]

The Court has since demonstrated heightened concern for the immediate feelings of the hearer when applying other Establishment Clause tests apart from the endorsement framework. In *Lee v. Weisman*, the Court concluded that public prayer at a graduation ceremony violated the Establishment Clause, based on concerns for the sentiments of the students in the audience.[93] Applying what is now dubbed the Coercion Test,[94] the Court asked whether the prayer would have a "coercive" effect on the students in attendance.[95] The Court acknowledged that heightened concerns exist in the elementary and secondary public-school context to protect against "subtle coercive pressure," because a non-adhering student may perceive a request to respect religious practices as an "attempt to employ the machinery of the State to enforce a religious orthodoxy."[96]

In its application of the Coercion Test, the Court illustrated sensitivity to the feelings of the hearer, who may feel slighted by the state's decision to support a certain religion over the non-adherent's. Although the graduation ceremony was technically voluntary, students' attendance at their graduation ceremony and participation in the religious activity was "in a fair and real sense obligatory"[97] due to public pressure, and also peer pressure, to attend and on attending students to stand as a group or maintain respectful silence.[98] The Court considered this pressure to be as concrete and consequential as overt compulsion,[99] recognizing that adolescents

91. *Id.* at 595.

92. *Id.* at 599-600.

93. 505 U.S. 577, 588, 599 (1992).

94. *See* Phillip E. Marbury, *Audience Maturity and the Object of the Establishment Clause*, 6 LIBERTY U.L. REV. 565, 573 (2012) ("The origin of this so-called Coercion Test is found in *Lee v. Weisman*, where the Court began its analysis of an Establishment Clause issue by laying out the elements of the three-prong *Lemon* Test, but then – based on the inability of *Lemon* to appropriately address the specific issue at hand – shifted its focus and based its holding upon something different.").

95. Weisman, 505 U.S. at 592.

96. *Id.*

97. *Id.* at 586.

98. *Id.* at 593. The Court recognized that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id.* at 595.

99. *Id.* at 593.

are often more susceptible to peer pressure, especially in matters of social convention.[100] The Court was ultimately concerned with the "conflict of conscience" that the young student hearer was facing,[101] and prioritized the hearer's sensibilities.

Likewise, the Court demonstrated extra attention to the feelings of the student hearer in *Santa Fe Independent School District. v. Doe*, when holding that prayer conducted via a public address system at public high school football games violated the Establishment Clause.[102] The Court applied both O'Connor's endorsement framework as well as the *Lemon* Test, calling its prongs "three factors . . . which guide[ ] 'the general nature of our inquiry in this area.'"[103] Accordingly, the Court considered school sponsorship of a religious message impermissible because it sends the ancillary message to non-adhering hearers that they are outsiders.[104] Although participation at high school home football games was not mandatory, prayer at home football games presented a similar level of impermissible peer pressure as did prayer at a graduation ceremony.[105] High school football games are traditional gatherings of a school community that bring students, faculty, friends, and family together, and therefore the choice between attending and risking a personally offensive religious ritual may be a very difficult one for a student.[106]

B. Departures from Ordinary Treatment of the Hearer

In the area of legislative prayer, however, the Court has departed from its customary protection of the feelings of the hearer confronted with governmental religious messaging. In *Marsh v. Chambers*, the Court held that the Nebraska legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State was constitutionally permissible,[107] reasoning that the practice of opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in United States history and tradition.[108] The Court noted that the Framers of the First Amendment Religion Clauses had voted three days prior to pass a congressional act authorizing a chaplain for Congress.[109] Therefore, the

100. Weisman, 505 U.S. at 593.
101. *Id.* at 596.
102. *See* 530 U.S. 290, 294, 317 (2000).
103. *Id.* at 314 (citing Mueller v. Allen, 463 U.S. 388, 394 (1983)).
104. *See id.* at 309-10.
105. *See id.* at 311-12 (citing Weisman, 505 U.S. at 593).
106. *See id.*
107. Marsh v. Chambers, 463 U.S. 783, 784, 795 (1983).
108. *Id.* at 786.
109. *See id.* at 787-88.

Court concluded, the Framers did not consider legislative chaplains and opening prayers to be a violation of the Establishment Clause.[110]

Although non-adherent hearers in the legislature may ultimately feel isolated by a legislative prayer, the Court did acknowledge the sentiments of these hearers.[111] The Court noted that the target audience of legislative prayer consists of adults who are "presumably not readily susceptible to 'religious indoctrination,' . . . or peer pressure[.]"[112] The Court therefore seemed more comfortable permitting an affront to the sensibilities of the hearer faced with governmental religious content where that hearer was an adult, here an elected legislator. Likewise, the Court indicated some concern for the feelings of the hearer when noting that the Framers did not consider legislative opening prayers to be a "proselytizing activity" or to be "symbolically placing the government's 'official seal of approval on one religious view.'"[113] In *Marsh*, there was also no indication that the Nebraska legislature's prayer had been exploited to proselytize anyone or to disparage any religion, an absence that the Court used in support of finding the prayer constitutional.[114]

More recently, the Court again concluded that the non-adhering hearer must cope with the potential offense of governmental religious speech, this time in the context of town board prayer.[115] The Court held that the practice by the Greece, New York Town Board of opening its monthly meetings with a prayer from an invited clergy member did not violate the Establishment Clause.[116] Justice Kennedy, writing for the majority,[117] determined that the Court should inquire whether the Town Board prayer fits within

110. *Id.* The Court noted that historical patterns cannot alone justify contemporary violations of constitutional guarantees, but that in this context the historical evidence shed light on the Framers' intended meaning of the Establishment Clause. *See id.* at 790.

111. *See id.* at 791-92.

112. *Id.* at 792 (citations omitted).

113. *Id.* (quoting Chambers v. Marsh, 675 F.2d 228, 234 (8th Cir. 1982)).

114. *Id.* at 794-95.

115. *See* Town of Greece v. Galloway, 572 U.S. 565, 569-70 (2014).

116. *Id.*

117. The opinion was 5-4, with Justice Kennedy writing the majority opinion for Chief Justice Roberts, Justices Scalia, Thomas, and Alito, with Justices Breyer, Kagan, Ginsburg, and Sotomayor dissenting. *See generally* Town of Greece, 572 U.S. 565 (2014).

the tradition followed by Congress and the state legislatures permitted under *Marsh*.[118]

In determining whether town board prayer fit within tradition as in *Marsh*, the Court found that the purpose of opening a legislative session with prayer is to "lend gravity to the occasion and reflect values long part of the Nation's heritage."[119] Accordingly, prayer that is "solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing" serves a legitimate purpose.[120] The Court imposed only minimal restraints on the content of the prayer; legislative prayer will only violate the Establishment Clause if a "course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[121] Even then the Court refused to declare a violation, but said that type of prayer "may . . . fall short" of the legitimate governmental purpose and would "present a different case[.]"[122]

In concluding that town board prayer fit within the *Marsh* legislative prayer tradition, the Court's reasoning more closely resembled the Court's treatment of the hearer in the free speech context than its treatment of the hearer in Establishment Clause precedents. The majority concluded first that the sectarian content of the Town Board's prayer did not establish that the prayer was outside the *Marsh* tradition.[123] In the process, the Court explicitly rejected the endorsement test[124] employed in *Allegheny* that considered whether the hearer felt like an outsider.[125] The Court noted that four dissenting Justices in *Allegheny* disputed that endorsement could be the proper test; in their view, an endorsement test would invalidate traditional practices that "recognize the role religion plays in our society," including legislative prayer.[126] Justice Kennedy

118. *See id.* at 577. *Marsh* is sometimes described as an exception to the Court's Establishment Clause jurisprudence, because it upheld legislative prayer without employing any of the tests that traditionally structure the inquiry. However, the Court in *Town of Greece* noted that those tests were found to be unnecessary in *Marsh* because history supported the conclusion that legislative prayer did not violate the Establishment Clause. *Id.* at 575.

119. *Id.* at 583.

120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.* at 578-79.

124. *See id.* at 579-80.

125. *See supra* text accompanying notes 84-87.

126. *See* Town of Greece, 572 U.S. at 579-80.

and the majority in *Town of Greece* agreed and instead embraced an approach much less sympathetic to the feelings of the non-adhering hearer and much more tolerant of governmental religious messaging.[127] Accordingly, a sectarian prayer with "the effect of endorsing a patently Christian message" did not on its own violate the Establishment Clause.[128]

The Court's move from asking whether the religious message or display sends a message to non-adherents that they are outsiders,[129] to asking whether the message or display amounts to a pattern that "over time denigrate[s], proselytize[s], or betray[s] an impermissible government purpose"[130] represents a departure from its customary Establishment Clause jurisprudence, even beyond *Marsh*. The Court demonstrated much less concern for the sentiments of the hearer. The prayer may cause the hearer to feel completely isolated and apart from the rest of the political community, but nevertheless the prayer may be permitted because there has not yet been a pattern or practice of denigration.[131] The prayer in *Town of Greece* isolated certain listeners but withstood challenge because of this absence of pattern or practice. One guest minister offering an invocation characterized the objectors as a "minority" who were "ignorant of the history of our country," and another lamented that other towns did not have "God-fearing" leaders.[132] The Court cast aside these disparaging comments, declaring them insufficient to establish a violation of the Establishment Clause.[133]

The Court in *Town of Greece* separately rejected the argument that the town board's prayer coerced participation by non-adherents in the audience.[134] The Court's application of *Weisman*'s Coercion Test was also much less sympathetic to the feelings of the hearer of the town board prayer.[135] The Court began by essentially ignoring certain offended hearers, contending that the principal

127. *See id.* at 579-83.

128. *Id.* at 579 (quoting County of Allegheny v. ACLU, 492 U.S. 573, 601 (1989)).

129. *See* Allegheny, 492 U.S. at 595-97.

130. Town of Greece, 572 U.S. at 585.

131. The Court's decision to extend First Amendment protection for a legislative prayer so long as no pattern or practice of denigration has been shown resembles its Free Speech approach in *Virginia v. Black*, 538 U.S. 343 (2003), where speech will be protected so long as it was not designed to intimidate the hearer. *See supra* text accompanying notes 41-50.

132. Town of Greece, 572 U.S. at 585.

133. *Id.*

134. *Id.* at 587.

135. *See id.* at 586-91.

audience for the prayers was not the members of the public in the audience but the legislators who "may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing."[136] The Court then acknowledged that members of the audience were offended and made to feel "excluded and disrespected," but the Court (closely mirroring its free speech jurisprudence) found that offense "does not equate to coercion" and that "[a]dults often encounter speech they find disagreeable[.]"[137] The majority was also careful to distinguish *Lee v. Weisman*,[138] where the Coercion Test had produced the opposite outcome and where the Court was more wary of the concerns of the hearer in the audience.[139] The Court noted that the town meeting's target audience in *Town of Greece* consisted mainly of "mature adults," who are less susceptible to religious indoctrination, and that members of the public are free to leave or arrive late to the meeting, unlike the graduation ceremony in *Weisman*.[140] Describing the inquiry as a fact-sensitive one, the Court ultimately concluded that the town board's prayer did not compel the hearer to engage in religious observance.[141]

Marsh and *Town of Greece* represent deviations from the Court's conventional approach to Establishment Clause claims. While the Court does not consistently apply a single framework for evaluating claims based on the Establishment Clause,[142] it has consistently demonstrated a special consideration for the hearer's sense of alienation by the government's religious exhibition. Beginning with *Marsh*, and then more dramatically in *Town of Greece*, the Court departed from this approach and instead insisted that the hearer deal with the religious display.

III.
CIRCUIT SPLIT

The Court's approach in *Marsh* and subsequently in *Town of Greece* has produced a split among the Circuits as to whether school board prayer violates the Establishment Clause. The Fifth and Ninth Circuits disagree over whether school board prayer falls

136. *Id.* at 587.
137. *Id.* at 589.
138. 505 U.S. 577, 592, 598 (1992).
139. *See supra* text accompanying notes 93-101.
140. *Town of Greece*, 572 U.S. at 590.
141. *Id.* at 587.
142. *See supra* note 22.

within the scope of legislative prayer,[143] and consequently what level of concern the hearer is owed.

A. Fifth Circuit

In 2017, the Fifth Circuit in *American Humanist Association v. McCarty* held that school board prayer fell within *Marsh* and did not violate the Establishment Clause,[144] expanding the Supreme Court's detached consideration of the hearer to the school board context. The Birdville Independent School District had a policy of inviting two students, usually either elementary or middle school students, to deliver statements before school-board meetings.[145] One student would lead the Pledge of Allegiance and the Texas pledge, and the other would deliver another form of statement, which according to plaintiffs usually consisted of an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ."[146] The Fifth Circuit acknowledged that the central issue was whether school board prayer fit within the legislative prayer line of cases,[147] or instead within the school prayer cases[148] where the Supreme Court has applied its conventional Establishment Clause tests.[149]

Relying on *Town of Greece*, the Fifth Circuit concluded that the school board context more closely aligned with the legislative context than the public-school setting.[150] Although the court acknowledged that students themselves delivered the religious invocations, like the school prayer in *Santa Fe*,[151] the Fifth Circuit reasoned that the school board was a deliberative body established to accomplish tasks that were "undeniably legislative" such as adopting budgets, collecting taxes, and conducting elections, like the town board in *Town of Greece*.[152] Further, as in *Town of Greece*, most attendees at the

143. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018) (per curiam); Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).

144. McCarty, 851 F.3d at 523, 526.

145. *Id.* at 523-24.

146. *Id.* at 524.

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

148. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000); Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989).

149. *See* McCarty, 851 F.3d at 526.

150. *See id.* at 526-28.

151. *See id.* at 526.

152. *Id.*

meetings were mature adults, and the attendees were not prevented from leaving the meeting room during the prayer, arriving late, or making a later protest.[153] Although members of the board and other school officials would ask the audience, including students in the audience, to stand for the invocation, the court did not consider these "polite requests" to be coercive.[154]

The Fifth Circuit acknowledged that children were present at the school board meetings, and that children are especially susceptible to peer pressure and other forms of coercion.[155] However, the Fifth Circuit dismissed this fact because children were present at the town-board meetings in *Town of Greece* and the Supreme Court nevertheless considered the town board meeting to fall within *Marsh*, and also because the prayer was delivered during the ceremonial part of the meeting.[156]

B. Ninth Circuit

Taking the opposite approach to the Fifth Circuit, the Ninth Circuit declared school-board prayer a violation of the Establishment Clause.[157] In *Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, the local school board opened its meetings with a report by the board's president on the previous session, the pledge of allegiance, and then an opening prayer, usually led by a member of the clergy.[158] Occasionally, a board member or audience member would lead the prayer instead.[159] Students regularly attended the meetings, as student presentations often followed the opening prayer and at times meetings would include recognition of student academic and extracurricular accomplishments.[160] The school board itself also included a student representative who was an "active participant" at meetings.[161]

The Ninth Circuit rejected the notion that school-board prayers should be considered within the meaning of legislative prayer.[162] The court recognized that *Marsh* and *Town of Greece* to-

153. *Id.*
154. *Id.*
155. *See* McCarty, 851 F.3d at 527 (citing Lee v. Weisman, 505 U.S. 577 at 592 (1992)).
156. *See id.* at 527-28.
157. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1152 (9th Cir. 2018) (per curiam).
158. *Id.* at 1138.
159. *Id.*
160. *Id.*
161. *Id.* at 1139.
162. *See id.* at 1142.

gether identified "certain characteristics of setting and content that mark legislative prayer."[163] First, the prayer occurs at the opening of the legislative session to lend gravity to the occasion and to invite legislators to reflect upon shared ideals and common ends, "before they embark on the fractious business of governing."[164] Second, the audience consists of "mature adults" who are free to enter and leave during the prayer.[165] Further, the atmosphere where legislative prayer occurs is distinct from that of a school function, where school personnel "retain a high degree of control over the event" and supervise the students' conduct and substance of the event closely.[166]

The Ninth Circuit concluded that the school-board meeting in *Chino Valley* did not share these legislative prayer characteristics.[167] First, the setting of legislative prayers only "dimly resemble[d]" the Chino Valley Board meetings.[168] The meetings were "not solely a venue for policymaking," but were also "a site of academic and extracurricular activity," and further an "adjudicative forum for student discipline."[169] Therefore, many members of the audience, and many active participants in the meetings, were children whose "attendance was not truly voluntary."[170] The meetings instead functioned as "extensions of the educational experience,"[171] closer to a school function than a legislative session.

The Ninth Circuit also emphasized that the makeup of the audience distinguished the setting from a legislative session. Both *Marsh* and *Town of Greece* were premised on the principle that adult citizens, who are firm in their beliefs, are less susceptible to peer pressure and can tolerate prayer and speech they find disagreeable.[172] The audience in *Chino Valley*, in contrast, included large

163. Chino Valley, 896 F.3d. at 1143.
164. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 583 (2014)).
165. *Id.* at 1143 (citing Town of Greece, 572 U.S. at 590).
166. *Id.* at 1143-44 (citing Lee v. Weisman, 505 U.S. 577, 597 (1992)).
167. *Id.* at 1145.
168. *Id.*
169. Chino Valley, 896 F.3d at 1145.
170. *Id.*
171. *Id.*
172. *Id.* ("Both *Marsh* and *Town of Greece* emphasize that the audience for the prayers at issue consisted of adults—"adult citizens, firm in their own beliefs," who consequently could "tolerate and perhaps appreciate" legislative prayer. . . As *Town of Greece* explained, "[a]dults often encounter"—and, our law presumes, are well-equipped to handle—"speech they find disagreeable." . . . For adults, legislative prayer does not pose an insurmountable constitutional problem, because adults "presumably are not readily susceptible to religious indoctrination or peer pressure."). As the Fifth Circuit in *McCarty* noted, children were present at the town-

numbers of children, who are "more vulnerable to outside influence."[173] In addition to differences in setting, the Ninth Circuit reasoned that the nature of the Board's mandate, and its relationship to the population it serves, was dissimilar from the function of Congress, a state legislature, or a town board.[174] School boards "exercise control and authority over the student population," for example through the power to suspend or expel students, whereas legislators and constituents hold equal status as adult members of the political community such that constituents feel free to exit the environment or voice dissent.[175]

The Ninth Circuit also found that the historical tradition of legislative prayer identified in *Marsh* and *Town of Greece* did not support prayer at school-board meetings.[176] At the time of the Founding, free public education was virtually nonexistent, and the Bill of Rights had not yet been incorporated to the states.[177] Accordingly, the court reasoned, the Framers could not have considered the Establishment Clause's legislative prayer exception to apply to local school boards' actions.[178]

Having found that the school board prayer was not within the meaning of legislative prayer, the Ninth Circuit applied the *Lemon* test[179] to determine whether the policy was an impermissible establishment of religion.[180] The court found that the policy lacked a secular purpose and therefore failed the first *Lemon* prong.[181] Although failure of the first *Lemon* prong alone establishes a violation of the Establishment Clause, the court found that the policy vio-

board meeting in *Town of Greece*. *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 527-28 (5th Cir. 2017). However, the Court in *Town of Greece* found that the meeting's target audience consisted mainly of mature adults and that members of the public were free to leave or arrive late. Town of Greece v. Galloway, 572 U.S. 565, 590 (2014).

173. Chino Valley, 896 F.3d at 1145 (citing Lee v. Weisman, 505 U.S. 577, 593-94 (1992)).

174. *Id.* at 1146.

175. *Id.* at 1146-47 (citation omitted).

176. *Id.* at 1147-48.

177. *Id.* at 1148 (citing Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).

178. *Id.*

179. *See supra* note 79.

180. *See* Chino Valley, 896 F.3d at 1148-51.

181. *Id.* at 1149-50. The school board had offered two secular purported secular purposes: solemnization of the Board meetings, and acknowledging and expressing the Board of Education's respect for the diversity of religious faiths represented and practiced among the district. The Court found that neither purpose was secular; there is no secular reason to limit solemnization to prayers or to certain faiths, and the purpose of acknowledging religious faiths does not encompass nonreligious belief systems and their diversity. *Id.*

lated the second and third *Lemon* prongs as well.[182] The policy advanced religion, in particular Christianity, in violation of the second prong, and the policy fostered excessive government entanglement with religion, in violation of the third.[183] Accordingly, the school board's prayer was an impermissible establishment of religion.[184]

C. The Fifth and Ninth Circuits' Consideration of the Hearer

The Fifth Circuit's expansion of *Marsh* and *Town of Greece* to the school board prayer context results in less concern for the hearer's potential indignation, a particularly problematic result given the more numerous and diverse audience in attendance at a school board meeting. In *Marsh,* the hearers consisted solely of members of the legislature.[185] The Supreme Court expanded that group in *Town of Greece* to the legislators on the town board and also the audience members.[186] The group of hearers at the school-board meeting in *McCarty* included the legislators on the school-board, the audience members, including students receiving awards or giving performances, and the students who delivered the pledges and invocations.[187] However, the Fifth Circuit chose to focus on one primary hearer, the board members, ignoring the feelings of the other hearers, including young students. Moreover, in *McCarty*, the students themselves delivered the invocations,[188] which arguably exacerbates the pressure on other students in the audience to conform that the Court in *Weisman* was concerned with preventing.[189]

The Ninth Circuit's decision to decline to extend *Marsh* and *Town of Greece* to school board prayer followed from its heightened concern for the audience member hearer. The Ninth Circuit's reasoning in part depended on the makeup of the hearers, which included children more vulnerable to pressure and indoctrination.[190] While children were also hearers at the town board meeting in *Town of Greece*,[191] the school board exercised direct authority over

182. *Id.* at 1151.
183. *Id.*
184. *Id.* at 1152.
185. Marsh v. Chambers, 463 U.S. 783, 784 (1983).
186. Town of Greece v. Galloway, 572 U.S. 565, 587-88 (2014).
187. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523-24 (5th Cir. 2017).
188. *See id.* at 524.
189. *See* Lee v. Weisman, 505 U.S. 577, 592 (1992).
190. *See id.* at 593.
191. *See* Town of Greece v. Galloway, 572 U.S. 565, 598 (Alito, J., concurring). *See also McCarty*, 851 F.3d at 527-28.

the children.[192] These students consequently would feel even less free to dissent and more coerced by the exercise of prayer. This concern for the feelings of the student hearer resembles the Court's sympathy for the non-adherent hearer in its ordinary Establishment Clause jurisprudence, in particular the school prayer line of cases.[193]

IV.
APPLYING MARSH AND TOWN OF GREECE TO SCHOOL BOARD PRAYER

Under current Supreme Court precedent, school board prayer should violate the Establishment Clause. The Fifth Circuit correctly acknowledged that school board prayer falls within a gray area between the Supreme Court's school prayer precedents and the legislative and town board meeting prayers upheld in *Marsh* and *Town of Greece*.[194] However, the Fifth Circuit incorrectly concluded that school board prayer fell within *Marsh*, while the Ninth Circuit properly found that school board prayer was outside the proper scope of legislative prayer.

As the Ninth Circuit illustrated, the historical tradition of legislative prayer also does not support prayer at school-board meetings.[195] The Framers could not have considered the Establishment Clause's legislative prayer exception to apply to local school boards' actions because at the time of the Founding, the Establishment Clause did not apply to the states.[196]

Furthermore, school board prayer does not meet the criteria required for a governmental prayer to fall within the meaning of legislative prayer, as established by the Court in *Marsh* and *Town of Greece*. First, a legislative prayer is inherently conducted during a legislative session where the purpose is to govern constituents. Justice Kennedy in *Town of Greece* illustrated this principle by declaring that a prayer is held during a legislative session to invite lawmakers to reflect upon their shared ideals before they begin to govern,[197] and that prayer eases the task of governing by setting the mind to a

192. *See* Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1146-47 (9th Cir. 2018) (per curiam).

193. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Weisman, 505 U.S. at 577; County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989).

194. *See* McCarty, 851 F.3d at 526.

195. Chino Valley, 896 F.3d at 1147-48.

196. *Id.* at 1148.

197. Town of Greece, 572 U.S. at 583.

higher purpose.[198] A school board's primary purpose is not to govern its constituents, but to ensure the education of the students in its district.[199]

In addition to serving a different purpose, the setting and content of a school board meeting diverges notably from a town board meeting. School boards are deliberative bodies and may accomplish tasks that resemble a legislature, like adopting budgets and conducting elections. However, the deliberative nature of a board cannot on its own qualify the board for legislative prayer; otherwise, a student-body president could invite a priest or rabbi to open a student council meeting with a prayer. School boards are, unlike national, state, and local legislatures, a site of academic and extracurricular activity, and an adjudicative forum for student discipline. The board members are often communicating directly to students. Faculty or administrators affiliated with the school also exercise control over the event and supervise the students. While children were present at the town board meeting in *Town of Greece*,[200] the town board members did not exercise any control over the children present. The students at a school board meeting, subject to the discipline of the faculty in attendance, would likely not feel free to dissent from the prayer.

Most notably, an instrumental difference between town board meetings and school board meetings is the hearer. In *Marsh* and *Town of Greece*, the Court considered the legislators or board members, respectively, to be the relevant hearers. The Court in *Town of Greece* acknowledged that audience members were present hearers who may be offended by the prayer, but that the audience consisted mainly of "mature adults," less susceptible to religious indoctrination, and that the audience members were free to leave or arrive late.[201] The same cannot be said for the hearers present at school board meetings. The students in attendance are clearly a relevant group for the Court to consider,[202] attending their own school's board meeting perhaps for the purpose of recognition or disci-

198. *Id.* at 587.

199. *See supra* text accompanying notes 169-171 and text accompanying notes 174-175.

200. *See* Town of Greece, 572 U.S. at 598 (Alito, J., concurring). *See also* McCarty, 851 F.3d at 527.

201. Town of Greece, 572 U.S. at 590.

202. An argument can certainly be made that the children in the audience in *Town of Greece* are relevant hearers (*see infra* text accompanying notes 200-201), but under the Supreme Court's logic they are treated as irrelevant and unfocused companions of their parents. *See id.*

pline.[203] Most significantly, the students involved are more susceptible to peer pressure and indoctrination, and may face a significant "conflict of conscience."[204] The criteria laid out by the Supreme Court that mark legislative prayer, and also the historical tradition that the Court relied on in support of legislative prayer, together make clear that school board prayer should not fall within the scope of the legislative prayer sanctioned by the Court.

V.
SCHOOL BOARD PRAYER: A VIOLATION UNDER PROPER CONSIDERATION OF THE HEARER

School board prayer should violate the Establishment Clause not only because it does not fall within the Supreme Court's understanding of legislative prayer, but also because legislative prayer itself should violate the Establishment Clause. Analysis of the Court's treatment of the hearer over the past half-century illustrates that the Court is much more sensitive to the hearer when establishment claims are raised, as compared to free speech claims.[205] However, the Court broke from this customary approach in *Marsh* and *Town of Greece,* expecting the non-adherent hearer to cope with the isolation and offense of a governmental prayer.[206] The Court's reasoning in *Marsh* and *Town of Greece* mirrored the Court's treatment of the hearer in the free speech context, rather than its establishment jurisprudence.[207]

The Supreme Court was incorrect to adopt a free speech approach to the establishment claims against legislative prayer. The Court's diverging treatment of the hearer in the areas of free speech and establishment follows from the different mechanisms by which the First Amendment protects speech (through the Free Speech Clause) versus religion (through the Establishment Clause).[208]

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203. *See supra* text accompanying note 159.

204. *See* Weisman, 505 U.S. 577, 596 (1992).

205. *See supra* Part I and Part II.A.

206. *See supra* Part II.B.

207. *See id.*

208. Weisman, 505 U.S. at 591. In *Weisman,* the school district had argued that high school students are capable of rejecting ideas with which they disagree and therefore that the non-adhering students were capable of coping with the school prayer, in effect asking the Court to afford the hearer the customary treatment in free speech claims. *See id.*

The Free Speech clause of the First Amendment protects free speech by ensuring its full expression.[209] Each possible motivation for the freedom of speech demands this full, unrestricted expression. First, the speaker's right to speak and the hearer's right to know are critical to the free flow of information, the essential ingredient in Holmes' free market of ideas.[210] Second, the speaker's right to full expression and the hearer's right to consume that full expression are critical to both actors' dignitary quest to understand themselves and achieve self-fulfillment.[211] And thirdly, unlimited speech ensures that the government will not slide down a slippery slope toward over-censorship.[212] Full expression is guaranteed to the speaker even where the government participates, since after all the object of some speech is to persuade the government to adopt an idea.[213]

In contrast, the Establishment Clause protects freedom of religious worship and freedom of conscience in religious matters through a reverse mechanism.[214] The Establishment Clause is a *prohibition* on state intervention in religious affairs, because the Framers deemed religious establishment to be antithetical to religious freedom.[215] Although the Court has fluctuated in what it considers "establishment" of religion to mean,[216] it has accepted that the Establishment Clause prohibited the government from preferentially treating one religion over another, or religion over non-disbelief.[217] The Framers knew from history that government establishment of religion could result in a policy of indoctrination and coercion, endangering religious freedom.[218] This prohibition illustrates the Framers' decision, motivated in large part by a fear of government, to prioritize religious freedom over the free market of religious ideas or the dignitary interest in speaking about one's religion or hearing about other religions.[219]

By deserting its customary sensitivity to the hearer, the Court in *Marsh* abandoned the mechanism by which the Establishment

209. *Id.*
210. *See supra* text accompanying notes 6-7 and text accompanying notes 15-17.
211. *See supra* text accompanying notes 8-11 and text accompanying note 18.
212. *See supra* text accompanying note 12 and text accompanying note 19.
213. Weisman, 505 U.S. at 591.
214. *See id.*
215. *See id.*
216. *See supra* note 22.
217. *See* Everson v. Bd. of Educ., 330 U.S. 1, 15-16 (1947).
218. *See* Weisman, 505 U.S. 577 at 591-92.
219. *See supra* note 22 and text accompanying notes 23-24.

Clause protects religious freedom: prohibiting state support for religion. Applying ordinary Establishment Clause principles, the Court would have recognized that the non-adherent legislator hearer would be made to feel like an outsider by the legislative prayer, and the hearers' ability to withstand the offense should have been irrelevant.[220]

The Court also cast aside the widely accepted neutrality principle, namely that government should remain neutral in matters of religion, including between religion and non-religion.[221] As Justice Douglas recognized, "[t]he First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[222] Instead, the Court substituted history over principle by concluding that legislative prayer did not violate the Establishment Clause based on the historical practice of opening legislative sessions with prayer.[223] The Court's consideration of the hearer was limited, only deeming adults less susceptible to religious indoctrination and noting that no religion had been disparaged by the legislative prayer.[224]

The Court's extension of legislative prayer to town board prayer in *Town of Greece* only further divorced legislative prayer from Establishment Clause principles. In concluding that town board prayer fell within legislative prayer, the Court repeated the *Marsh* Court's cursory consideration of the non-adherent legislator hearer, and then chose to disregard the wide array of other hearers present at the meeting.[225] The Court expected the adults in the

220. Justice Brennan observed in dissent in *Marsh* that "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional." Marsh v. Chambers, 463 U.S. 783, 800-01 (1983) (Brennan, J., dissenting).

221. *See* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Nicholas C. Roberts, *The Rising None: Marsh, Galloway, and the End of Legislative Prayer*, 90 IND. L.J. 407, 410 (2015); *see also* Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 818 (1984) (suggesting that the principle of neutrality is undisputed, although there is "significant disagreement over how benevolent that neutrality should be and how rigorously it ought to be enforced").

222. Engel v. Vitale, Jr., 370 U.S. 421, 443 (Douglas, J., concurring).

223. *See* Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 46 (1993).

224. Marsh, 463 U.S. at 792, 794–95.

225. *See* Town of Greece v. Galloway, 571 U.S. 565, 588 (2014).

audience to be capable of encountering speech they find disagreeable, rather than applying ordinary Establishment Clause consideration of the hearer. Further, the Court ignored the child hearers in the audience, noting only that the audience consisted "mostly" of mature adults and that the audience members were free to come and go as they pleased.[226]

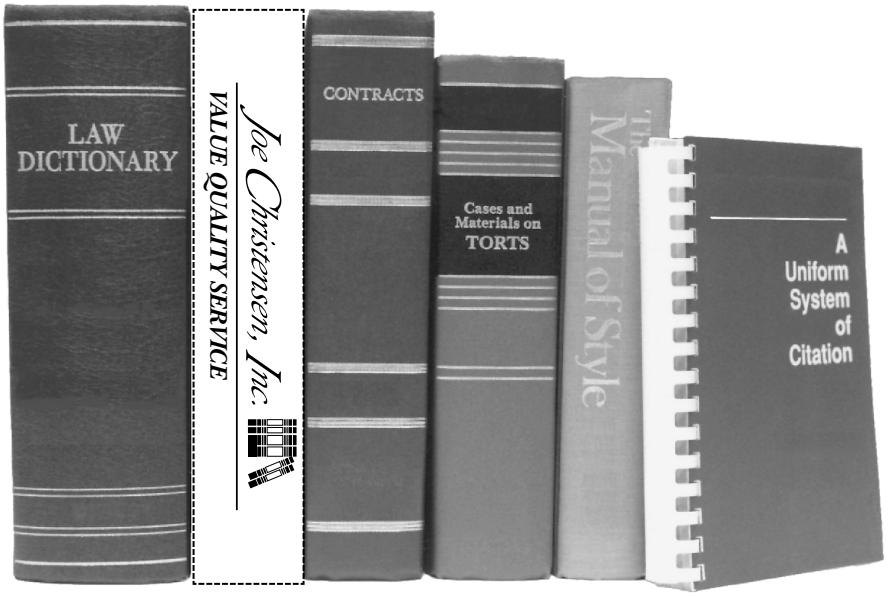
CONCLUSION

The Court's authorization of legislative and town board prayer is inconsistent with its

Establishment Clause jurisprudence. By deserting the sensitivity to the hearer that is typical of its Establishment Clause approach, the Court abandoned the Establishment Clause's purpose of protecting religious freedom. The Court's approach enables the marginalization of religious minorities, including the non-religious. The ends offered in defense of legislative prayer (lending gravity to the occasion, inviting legislators to reflect before they come together to govern) can readily be achieved by moments of silence, rather than by prayer. A moment of silence would allow religious adherents to silently pray and would avoid the isolation of and offense to non-adherents that the Framers intended the Establishment Clause to prohibit.

Likewise, ordinary Establishment Clause consideration for the hearer dictates that school board prayer should be considered an impermissible establishment of religion. A school board prayer isolates the non-adherent hearers, including legislators, members of the school community, and of course, the students who may even be obligated to attend. Religious minority students are likely to feel offended, isolated, pressured, or coerced by the governmental display of religion, and may produce hatred, disrespect, and contempt for those in the minority, the very effects the Establishment Clause seeks to preclude.[227] The Court should revisit *Marsh* and *Town of Greece*, this time giving the hearer the consideration and respect that is now customary in 2022.

226. *Id*. at 590.
227. *See* Engel, 370 U.S. at 431.



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