DUQUESNE LAW REVIEW OF THE
THOMAS R. KLINE SCHOOL OF LAW

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The Death and Resurrection of Establishment Doctrine

*Gerard V. Bradley**

Abstract

The biggest news of the Supreme Court's 2021–22 term was the Court's "abandonment" of Lemon v. Kurtzman *as the default test for Establishment Clause jurisprudence. For a full half-century,* Lemon v. Kurtzman *defined what our constitutional separation of church and state meant. But now the Court has definitively laid it to rest. The important question of church-state relations stands at a strategic fork in the road that the Court has not faced since 1962, and perhaps not since 1947.*

Justice Gorsuch complained that Lemon *demonstrably failed as law. That it was a judicial tool that flopped by every measure of institutional usefulness. But this indictment leaves the most important part out. What's missing from his story is the dark protagonist of the piece: secularism. It is (was) the beating heart of* Lemon *and the ground-norm of the church-state corpus it animated for decades. It was incompatible with our history and traditions and current practices. The whole story behind* Lemon *is told by the Justices as if beheld very dimly. It is like a garbled communication that nonetheless succeeds, if most carefully reconstructed, in communicating its message. This Article is that reconstruction. It is a charitable interpretation of the Court's narrative, stating the most coherent sense of what the Court says for the sake of going forward into this new dawn of Establishment law.*

The subject of Part II is the ambitious secularity of Lemon. *It's two norms about government action—it must have a "secular" legislative purpose and it must not have the "primary" effect of advancing religion—embody that secularity. It is these which have been "ignored" and bypassed in so many cases. Part III investigates whether the Supreme Court starting in 1947 even claimed to find this normative secularism in the Establishment Clause. Spoiler alert: it made no such claim. Part IV continues this detective story by answering the question: if not in the Constitution, then whence came the judicial secularizing project? Finally, Part V compiles a series of candid confessions that the Establishment Clause "merely" prohibits preferences among churches and denominations. Ultimately, the meaning of the Clause has been hiding in plain sight all along.*

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* Professor of Law at the Notre Dame Law School and for over twenty years co-editor (with John Finnis) of *The American Journal of Jurisprudence.* Luray Buckner, NDLS Class of 2023, provided more help, and better, and in a most timely way, on this article than I expected any student could.

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I. INTRODUCTION

The Supreme Court decided three important religion cases during the 2021–22 term. The cases were *Shurtleff v. Boston* (whether the city's Establishment Clause worries constitutionally justified its refusal to fly a Christian group's flag outside City Hall),[1] *Carson v. Makin* (whether Maine could refuse to subsidize attendance at what it said were pervasively sectarian secondary schools),[2] and *Kennedy v. Bremerton* (whether a public school district could ban a high school football coach's on-field, post-game prayers to avoid a violation of the Establishment Clause).[3]

In each case, the religious party prevailed. In each, the Court said that it was unremarkably applying settled precedents. The Court described *Shurtleff* as a straightforward religious-viewpoint discrimination Free Speech case.[4] *Carson* was a Free Exercise case that the Court saw as a routine application of its public-funding, religious non-discrimination norm. This norm against excluding believers from government aid programs goes back to the 1947 *Everson*[5] case, later developed by the Court in 2017[6] and 2020.[7] The crucial move in Coach Kennedy's case was to treat his post-game prayers as private speech, not government speech. Then it became a Free Speech matter much like *Shurtleff*.

Justice Gorsuch's opinion for the *Kennedy* Court ventured a little further, though, when he wrote that the Court had already

1. Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022).
2. Carson v. Makin, 142 S. Ct. 1987 (2022).
3. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
4. "Here, Boston concedes that it denied Shurtleff 's request solely because the Christian flag he asked to raise 'promot[ed] a specific religion.' Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause." *Shurtleff*, 142 S. Ct. at 1593 (citations omitted).
5. Everson v. Bd. of Educ., 330 U.S. 1 (1947).
6. Trinity Lutheran Church of Columbia, Inc. v. Comer, 140 S. Ct. 2012 (2017).
7. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020); *see also Carson*, 142 S. Ct. at 1997 ("The 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case.").

abandoned the "endorsement test offshoot [of *Lemon v. Kurtzman*]."[8] Indeed it had, as anyone who has followed the Court's Establishment Clause cases over the last decade knows. But then Gorsuch added the startling claim that "the 'shortcomings' associated with [*Lemon's*] 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon*."[9]

This bold claim is *dictum*. At most, the holding in *Kennedy* (and in *Shurtleff*, for that matter) implies *only* that the 'reasonable-observer-might-perceive-an-endorsement-of-religion' worry is kaput. The minimum and probably fairer reading is that such worries are a legitimate government interest, albeit not a "compelling" one.[10] Gorsuch described the "endorsement" test as an "offshoot" of *Lemon*. The main trunk—*Lemon*—would presumably survive the "offshoot['s]" clipping unscathed.

Gorsuch's claim about *Lemon* is not only gratuitous, but it is also untrue. In no case before *Kennedy* did the Court explicitly abandon *Lemon*. No prior holding necessarily implied that it did. Gorsuch offered just two citations to support his assertion: the Court's opinion in *Greece v. Galloway*[11] and the plurality opinion in the Bladensburg Cross case.[12] *Greece* is a 2014 legislative prayer case where the Court declined to use the *Lemon* test. The Court there did not say, however, that it was abandoning *Lemon*. In fact, *Lemon* is never mentioned in the *Greece* Court's opinion. In 2014, the Court maintained that it was doing little more than applying its 1983 landmark legislative prayer case, *Marsh v. Chambers*.[13]

True, the *Bladensburg* plurality kicked *Lemon* around pretty roughly.[14] But it never said or implied that it was burying *Lemon*.

8. *Kennedy*, 142 S. Ct. at 2427.

9. *Id.*

10. The *Kennedy* Court seems to straddle this divide: "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Id.* at 2432.

11. Greece v. Galloway, 572 U.S. 565 (2014).

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

13. *Greece*, 572 U.S. at 569–70 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

14. The rudest kick remains that inflicted by Justice Scalia in the 1993 *Lamb's Chapel* case: "Like some *ghoul* in a *late-night* horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . ." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386, 398 (1993) (Scalia, J., concurring) (emphasis added). More than a few judges have resorted to Scalian images to vent their frustration with *Lemon*. In the Eleventh Circuit, one judge declared that "The Court's Establishment Clause jurisprudence is, to use a technical legal term of art, a hot mess. *Lemon* came and went, and then came again—and now seems, perhaps, to have gone again." Kondrat'Yev v. City of Pensacola, 903 F.3d 1169, 1179 (11th Cir. 2018) (Newsom, J., concurring). The "outrageous-conduct defense," a judge from the Sixth Circuit wrote, "calls

In *American Legion v. American Humanist Association*, a majority of the Supreme Court agreed with Justice Alito that while *Lemon* "ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking," the expectation of a ready framework had "not been met."[15] The six Justices resolved that they would not apply *Lemon* in cases involving aged religious symbols and monuments in public spaces. But only two of them—Gorsuch and Thomas—said that they were done with *Lemon* altogether.[16]

Justice Gorsuch also said in *Kennedy* that "the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test" in *Shurtleff*.[17] Not so. Justice Breyer's opinion for the *Shurtleff* Court nowhere mentioned *Lemon* and nothing that he did say implied its demise. Gorsuch rightly noted that the Court has regularly bypassed *Lemon* and has often criticized it since the 1990s.[18] But this cannot mean that the Court repudiated *Lemon*, for it has been bitterly criticized by sitting Justices since the day it was minted[19] and has frequently been bypassed, starting with *Marsh v. Chambers*. But no one maintains that this criticism killed *Lemon* in the 1970s or 1980s.

Nor is it apparent that the *Lemon* test is guilty of the "abstract" and "ahistorical" charges Gorsuch levels at it. The biggest challenge in applying *Lemon* is really quite prosaic: it is the indeterminacy involved in ascertaining and then evaluating entirely practical matters. Questions about whether a religious "effect" is "primary" or "principal" and whether an "entanglement" is "excessive" call for judgments about degrees of difficult-to-estimate empirical consequences. It is true that *Lemon* did not pursue the extended historical inquiry that so many of the Court's other Establishment Clause

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to mind the *Lemon* test, another 'docile and useful monster' 'worth keeping around' because 'it is so easy to kill' again and again." United States v. Harney, 934 F.3d 502, 507 (6th Cir. 2019). Another judge feared that "the *Lemon* ghoul (while largely ignored by the Supreme Court), has stalked the lower courts, no longer just frightening little children but increasingly devouring religious expression in the public square." Freedom From Religion Found. v. Chino Valley Unified Sch. Dist., 910 F.3d 1297, 1306–07 (9th Cir. 2018) (Nelson, J., dissenting).

15. *Am. Legion*, 139 S. Ct. at 2080.

16. In *Shurtleff,* Justice Gorsuch (writing for Justice Thomas too) said that *Lemon* "produced only chaos," that all it "yielded was new business for lawyers and judges," and that "just like the test itself, the results proved a garble." "Ultimately," he concluded, "*Lemon* devolved into a kind of children's game." Shurtleff v. City of Boston, 142 S. Ct. 1583, 1604–05 (2022) (Gorsuch, J., concurring).

17. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022).

18. *Id.*

19. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 997–98 (2011) (Thomas, J., dissenting from denial of cert.).

cases have. But this comparison misleads. *Lemon* self-consciously attempted, not another deep dive into the founding, but a doctrinal synthesis of prior Court opinions that did. The *Lemon* Court explicitly began its analysis with a "consideration of the cumulative criteria developed by the Court over many years."[20] From its cases, the Court "gleaned" a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster 'an excessive government entanglement with religion.'"[21] And *Lemon* did not completely ignore history. Rather, *Lemon* engaged in something very much like the "history and tradition" analysis that Gorsuch would replace it with. The Court approvingly mentioned a prior decision based on "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present" to decide whether a specific state program was an establishment.[22] In contrast, the *Lemon* Court concluded, "the state programs before us today represent something of an innovation" on that history and declared them presumptively unconstitutional.[23] Even so, *Kennedy* signals unmistakably that a majority of the Supreme Court is most unhappy with the three-part *Lemon* test. After complaining about it for decades and evading it for years, the Justices finally have laid it to rest. Though it was *not* abandoned "long ago," *Lemon* is now dead. The occasion is nearly epochal. In fair weather and foul for a full-half century, *Lemon v. Kurtzman* defined what our constitutional separation of church and state meant. That important question stands upon a pivot, at a strategic fork in the road that the Court has not faced since 1962, and perhaps not since 1947.[24]

For some reason, Justice Gorsuch chose to put the smoking gun into other hands (the Court "long ago abandoned" *Lemon).* But he did not hesitate to justify the execution. His indictment was a legal professional's craft-based set of charges. *Lemon* demonstrably failed *as law*. It was a judicial tool that flopped by every measure of institutional usefulness, including clarity, precision, ease of application, and predictability. It proved to be (as he wrote summarily in *Shurtleff)* "unworkable in practice."[25] *Lemon* was a user-

20. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
21. *Id.* at 612–13 (citations omitted).
22. *Id.* at 624.
23. *Id.*
24. *See* Gerard V. Bradley, *The Judicial Experiment with Privatizing Religion*, 1 LIBERTY U. L. REV. 17 (2006) (providing a further explanation of that saga).
25. Shurtleff v. City of Boston, 142 S. Ct. 1583, 1606–07 (2022).

unfriendly, ineffectual device that did little more than provide a diaphanous screen for judicial policy choices.

But this leaves the most important part out. What's missing from this whole story is the dark protagonist of the piece: secularism.[26] *It* is (was) the beating heart of *Lemon* and the ground-norm of the church-state corpus it animated for decades. *Its* incompatibility with our history and traditions and current practices finally burst *Lemon* like new wine poured into old wineskins. The Court's disgust with *Lemon* is transparently its disgust with this spilled drink (and surely not with *Lemon's* other concerns about religion-inhibiting effects and government intrusion into the internal affairs of churches).

The *Kennedy* Court nonetheless said that it is throwing the whole three-part test overboard. The Justices also appear ready to jettison the doctrine altogether. *Kennedy* would replace *Lemon* with a historical test: "[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[27] This is nothing new; the Court has insisted all along that its Establishment Clause teachings are those of the founders. If *Kennedy* means anything new by "historical practices," it must mean that the Court will no longer try to reconcile its decisions with *Lemons'* secularist mandate. Yet, *that* precise resolve, though present in *Kennedy,* is muffled and obscured by other concerns. And nowhere in the *Lemon*-is-dead narrative does the Court seem inclined to adopt the non-secularist, original public meaning of the Establishment Clause, which the Court has repeatedly acknowledged since 1947.

The whole story behind *Lemon* is told by the Justices as if conceived and beheld through a glass, very darkly. It is like a jumbled, garbled communication that nonetheless succeeds, if most carefully reconstructed, in communicating its message. This Article is that reconstruction. It is a charitable interpretation of the Court's narrative. It states explicitly the most coherent sense of what the Court says for the sake of going forward clear-headedly into this new dawn of church-state constitutional law.

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26. Historian Jon Butler says that secularization typically means: "the essential disappearance of religion from public life despite its presence, even a vital presence, in private life." Jon Butler, *Jack-in-the-Box Faith: The Religion Problem in Modern American History*, 90 J. AM. HIST. 1357, 1360 (2004). The Court has carried this "secularism" into our law by its stated commitment to both a certain neutrality among the different religions and also a neutrality between religion and what the Court has mostly called "non-religion," but sometimes calls "irreligion." *Id.*

27. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022).

The subject of Part II is the ambitious secularity of *Lemon,* the two norms about government action: it must have a "secular" legislative purpose and it must not have the "primary" effect of advancing religion. It is *these* which have been "ignored" and bypassed in so many cases. It is *these* which have proved to be unassimilable to our country's unassailable traditions, such as legislative prayer, government recognition of religious holidays, and the whole panoply of affirmations of the truths of natural religion (think of the Pledge of Allegiance and of the national motto engraved upon our currency).[28] It is *these* twin towers which have been the bulwarks of the "naked" public square *Lemon* attempted to build. *These* norms *should* be abandoned.

Part III investigates whether the Supreme Court starting in 1947 even *claimed* to find this normative secularism in the Establishment Clause. Spoiler alert: it made no such claim. Part IV continues this detective story. It seeks to answer the question: if not in the Constitution, then whence came the judicial secularizing project? Answer: from the Justices' understanding of the relationship among the Court's Establishment Clause doctrines, and their wider notions about secularism and "our democracy."

One might expect that the next question would be to bring the always-simmering debate about the original public meaning of the Establishment Clause to another boil. But in fact, the move explored in Part V is quite different and, in its way, far less contentious. Everyone recognizes that the Establishment Clause includes the "clear command" of a certain "sect-neutrality" when the government deals with religion. The Justices have repeatedly stated that since the advent of Establishment Clause jurisprudence in 1947 (as articulated in *Larson v. Valente,* 1983), the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[29] Part V simply multiplies these candid confessions that the Establishment Clause "merely" equals this prohibition of preferences among churches and denominations. The meaning of the Clause has been hiding in plain sight all along.

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28. The *Lemon* test's "shortcomings," the Bladensburg Court wrote, became clear when faced with the:

> [G]reat array of laws and practices [that] came to the Court . . . that the *Lemon* test could not resolve . . . . It could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings[;] . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."

Am. Legion, 139 S. Ct. at 1080–81.

29. Larson v. Valente, 456 U.S. 228, 244 (1982).

The Justices have always and without exception stated that the Clause itself prohibits a certain government preference for one religion over others. It is just that until now they have chosen to pursue a more ambitious, ideological agenda. Whether the Court's conservatives who have abandoned *Lemon* will embrace the original public meaning of the Establishment Clause is the defining question going forward.

II. DECLENSION AND DISSECTION OF *LEMON*

Lemon itself does not carry the "command" of sect-neutrality into practice. Nothing in that infamous three-part test is necessary to clarify or to justify the "command." *This* original public meaning of non-establishment, this sect-neutrality, is not going down with the *Lemon* ship because it was never on board.

The "entanglement" prong of *Lemon* and the religion-inhibiting effects of government action prong is simply not required to maintain sect-neutrality. Free Exercise doctrine handles those two tasks quite efficiently. The modern wellspring here is found in *Jones v. Wolf*[30] and as that doctrine was importantly expanded in *Hosanna-Tabor*.[31] What I mean by "importantly expanded" is that *Hosanna-Tabor* proceeded from the *Jones'* norm about non-interference with doctrine, worship, and discipline; call it "church autonomy." The *Hosanna-Tabor* Court judged (rightly) that this non-interference norm is so overridingly important that the Court was justified (again, rightly) in erecting a wide protective perimeter around that crucial rule.[32] This protective move depended upon the further correct judgment that, simply put, personnel is policy.

I do not by this mean to suggest that the "ministerial exception" is logically entailed by *Jones v. Wolf*. I would rather say that the exception puts *Jones* into prudent practice. The total effect is to let the spirit blow where it wills.

It is true that sometimes the Court has cited an Establishment Clause contribution to these holdings. In the first paragraph of his opinion for the *Hosanna-Tabor* Court, for example, Chief Justice Roberts wrote, "[t]he question presented is whether the

30. Jones v. Wolf, 443 U.S. 595 (1979).

31. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. Equal Emp. Opportunity Comm'n, 565 U.S. 171 (2012). The canonical historical statement is no doubt found in *Watson v. Jones:* "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." 80 U.S. 679, 728 (1871). *Watson* was, of course, not specifically an Establishment Clause case, however, because the First Amendment did not apply to state disputes at the time.

32. *See Hosanna-Tabor*, 565 U.S. at 194–95, 196.

Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers."[33] Later in *Hosanna-Tabor*, the Chief Justice addressed the Obama Administration's secularistic argument *against* the "ministerial exception." The government maintained that no favor to religious groups was needed or warranted; they could and should be treated as autonomous just to the extent, and in the way, that other expressive associations are. The government saw "no need—and no basis—for a special rule for ministers grounded in the Religion Clauses themselves," as Roberts recounted its position.[34] To this straightforward application of the Court's doctrinal requirement of "neutrality" between "religion" and "nonreligion,"[35] the Chief replied as if dumbfounded: "We find this position untenable . . . . That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations."[36]

Thus did the Court conclusively relieve the perennial "tension" between the two clauses of the First Amendment, one calling for special favorable treatment of religion and the other forbidding it. Roberts' brusque dismissal of the Administration's plausible use of the Establishment Clause principle was itself an omen of *Lemon*'s eventual demise. The "church autonomy" complex of norms could never coexist with the old Establishment Clause doctrine. Even the nominal existence of *Lemon*'s strictures against supporting religion and its notional "neutrality" between religion and "nonreligion" threatened to limit that autonomy.

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33. *Id.* at 176–77. Later in the opinion, Justice Roberts wrote: "By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause . . . ." *Id.* at 188–89. Deriving *Jones* from the Free Exercise Clause alone, and putting it into practice via the "ministerial exception" solely from that Clause, I leave to another occasion.

34. *Id.* at 189.

35. The precise term "nonreligion" made its debut in this connection in *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), and appeared regularly thereafter. Its meaning is nonetheless elusive. One could search in vain for *any* place—"neutral" or otherwise—between "religion" and what is not religion. Consider the Ninth Circuit's use of "nonreligion" when dealing with Coach Kennedy's case. The court wrote, "The [Establishment] Clause 'mandates government neutrality between . . . religion and nonreligion.'" Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1017 (2021), *overruled by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). Before being overturned by the Supreme Court, the circuit court thought Kennedy's post-game "motivational, inspirational talks" must be scrupulously "secular"—the court's word—and *not* religious. *Id.* at 1016. So if "secularism" means the absence of religion, then *no* religion is the "neutral" ground between "religion" and "nonreligion."

36. *Hosanna-Tabor*, 565 U.S. at 189.

But the death-throes of the secularity prong were prolonged. Justice Alito in the Bladensburg case, for example, did not question that the primary purpose of the relevant government conduct under challenge there—monument upkeep, not the original decision to erect or acquire it—must be "secular."[37] "Even if the original purpose of a monument was infused with religion," Alito wrote, "the passage of time may obscure that sentiment."[38] Alito cited without audible disapproval, moreover, the following proposition from *Schempp:* "[The] government may originally have decreed a Sunday day of rest for the *impermissible purpose of supporting religion* but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends."[39]

Now, this secular-purpose prong has infrequently been the Supreme Court's stated ground for invalidating government action. After *Bladensburg*, originating non-secular purposes were eligible for retirement after a decent interval, further limiting the prong's reach. The occasional secular-purpose holdings have, as a matter of fact, been limited to religious displays such as the Ten Commandments.[40] One reason why it has kept this low profile is a certain judicial generosity towards religion-friendly government actions. Even as they struck down a host of parochial school-aid laws in the 1970s, for example, the Justices readily found a "secular" purpose, namely, helping kids get an education.[41] Another reason for the low profile is that the Justices have stretched the bounds of candor when they do not want to strike down an unobjectionable government recognition of our dependence upon God.

The Court has said that expressions like "under God" in the Pledge of Allegiance and the Court's own opening declaration—"God Save this Honorable Court"—are examples of language which time has stripped of literal meaning.[42] Familiarity has bleached them of religious content; they are whited sepulchers, as it were. These expressions linger without valid objection because (to use

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37. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2074, 2083 (2019).

38. *Id.*

39. *Id.* (emphasis added).

40. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (1980); McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).

41. Before that, in the *Walz* case the Justices decided that tax-exemptions for churches were constitutional because they did "not single[] out one particular church or religious group or even churches as such; rather, [they] granted exemption[s] to all houses of religious worship within a broad class of property owned by nonprofit, *quasi*-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

42. *See* Marsh v. Chambers, 463 U.S. 783, 818 (Brennan, J., dissenting); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 303–04 (1963) (Brennan, J., concurring).

phrases from the *Greece* Court's opinion about legislative prayer) they "lend gravity to the occasion," and "reflect values long part of the Nation's heritage."[43] The dissenters in *Greece* referred to pieties which are part of "our expressive idiom" and "our heritage and tradition"—with emphasis on *our*—precisely to indicate a badge of social solidarity rather than *real* prayers.[44] They are living links between our secular present and a sacred past—as was the Bladensburg Cross.

The Supreme Court has sometimes called these expressions examples of "ceremonial deism."[45] This anachronism is especially inappropriate in this area of constitutional law which is so often characterized by a search for instruction from the founders' practices. Two first-rate historians of the founding, neither of whom favors such displays of faith, have written convincingly that "ceremonial deism" is a "phrase that would have meant nothing to our founders."[46] So, too, would the whole idea of what we call "civil religion."[47]

Yet even before *Lemon*'s official demise the Court was willing to compromise on the secular-purpose prong. *Greece v. Galloway* is

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43. Greece v. Galloway, 572 U.S. 565, 583 (2013).

44. *Id.* at 636 (Breyer, J., dissenting).

45. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 695, 716 (1984) (Brennan, J., dissenting); Cnty. of Allegheny v. ACLU, 492 U.S. 573, 603 (1989); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (O'Connor, J., concurring).

46. R. LAURENCE MOORE & ISAAC KRAMNICK, GODLESS CITIZENS IN A GODLY REPUBLIC: ATHEISTS IN AMERICAN PUBLIC LIFE 96 (2018).

47. The many possible connotations of "civil religion" all involve some conscious bending and shaping of extant religious beliefs and sentiment towards sacralizing the polity. It has to do with giving the prevailing political order a religious meaning and sanction, a halo. The founders operated within a world bearing only superficial similarities to a "civil religion" and which was, in fact, fundamentally different. For one thing, the First Amendment and state analogs rendered churches and believers immune to any overt direction from political officials to support the government. This commitment to the independence of the churches limited political figures' options for creating a civil religion.

The founders also bore frequent witness to the truths of natural religion, such as the existence of a Provident Creator God, not because of any particular political advantage but because they thought that these propositions were in fact true. Owen Anderson aptly wrote: "The United States was founded on natural religion." In the Declaration of Independence, our founders declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty, and the pursuit of happiness." THE DECLARATION OF INDEPENDENCE para 2. (U.S. 1776). Nearly two centuries later, in *School District of Abington Township v. Schempp*, the Supreme Court said that the "fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." 374 U.S. 203, 213 (1963).

Many texts also show how the founders believed that their experiment in liberty could not succeed without the civilizing influences and virtues which only religion could supply. But they recognized all the same that they could not, and should not, attempt to inculcate this religious attitude directly. That is because they held that religion had to be free. The founders gambled upon a coincidence of religion and republican virtue, and entered into (to put it one way) a free collaboration with religion to preserve their free society.

important because the Court upheld a government practice which it conceded lacked a "secular legislative purpose."[48] The great bulk of the Court's descriptions of Greece's opening acts leaves no doubt that the Justices regarded them as real *prayers.*[49] The many specimens of the prayers catalogued by Justice Kennedy were especially pious. They could not honestly be assimilated into any non-religious category, like solemnizing expressions, vestiges of a more God-fearing past, or stamps of social solidarity. The majority described Greece's prayers as "invo[cations of] divine guidance in town affairs."[50] The Court said that they were surely "religious in nature" and largely in a "Christian idiom."[51] The Court relied extensively upon *Marsh v. Chambers,* which affirmed the constitutionality precisely of "invok[ing] Divine guidance on a public body entrusted with making the laws."[52] Of the very largely Christian content of the prayers splayed across that record, the *Marsh* Court wrote that they are "a tolerable acknowledgement of beliefs widely held among the people of this country."[53]

The primary-effect prong of *Lemon* often supported judicial holdings against (to give it a name) religion-friendly government action. But it was used less and less as the reign of *Lemon* drew to a close. The Court relied on it only once in the twenty-first century to strike down government action. That 2005 Ten Commandments case, *McCreary,* depended upon contingent local facts.

The muscular constitutional norm against religious discrimination has antecedents as far back as *Everson*, but it had its ups and downs.[54] Over ensuing decades it was partially eclipsed by the Justices' more powerful worry about the uniquely anti-social effects of religious competition for government favors, as well as the Court's unmistakable commitment to protecting the public schools' monopoly on tax support. Thus, religious schools were the object of specific discriminatory norms, such as 'no direct aid' to these schools, period.

48. *Greece*, 572 U.S. at 583.

49. Justice Kennedy noted that the clergy prayed "devotions" and some ministers incorporated "religious holidays, scripture, or doctrine" into their prayers. *Id.* at 571.

50. *Id.* at 570.

51. *Id.* at 571.

52. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

53. *Id.*

54. The First "Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

The new day began in 1993 with a truer parity of treatment for believers in the Free Speech context.[55] The same ban on discrimination surfaced unequivocally much later in the Free Exercise setting.[56] This pincer movement effectively decapitated the *Lemon* second prong, even then. With only the nominal exception of "essentially" religious activities, it seems that any government support extended to a beneficiary class that would include believers and/or their institutions, *must* include believers and/or their institutions.

Locke v. Davey is the leading example of what I call the "nominal" exception to the non-discrimination rule.[57] The Court, in that 2004 case, described Joshua Davey's course of study as "essentially religious" and, for that reason, properly excluded from the scholarship opportunity he was otherwise eligible to pursue.[58] Chief Justice Rehnquist wrote for the Court: "Training someone to lead a congregation is an essentially religious endeavor."[59] *Trinity Lutheran*, *Espinoza*, and *Carson* have rendered *Locke* a drifting derelict; it is bobbing already in a pool of later contrary holdings, which my students this semester easily tabbed as unconvincingly distinguished.[60]

Of Justice Alito's affirmation in *Bladensburg* of the *Lemon* secularity norms, one could hypothesize that he could see as well as anyone else that the Court had, case-by-case over the years, so chipped away at those norms that there is practically nothing left of them. But he might have chosen to leave them standing in *Bladensburg* because he discovered another path to his desired result, and thus spared himself the fuss of formally overruling such a major case. Doing so would also have raised the uncomfortable question of whether all the many cases which had been decided according to those norms were suddenly also overruled. Doing so would have also raised the discomfiting question: if not *Lemon,* what? That honor was left to Justice Gorsuch.

Another tranche of evidence lies in the fact that none of the Justices in *Bladensburg* could reconcile the Court's holdings since around 2000 with its purported secularity norms. None even tried to do so. Justice Alito, for example, described the prevailing

55. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
56. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 386 (1993).
57. Locke v. Davey, 540 U.S. 712 (2004).
58. *Id.* at 721.
59. *Id.*
60. *See generally Trinity Lutheran*, 137 S. Ct. at 2024; Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020); Carson v. Makin, 142 S. Ct. 1987, 1997 (2022). The Court also made clear in this trio of cases that the state interest in sailing wide around putative Establishment Clause violations is not "compelling" (though it is "legitimate").

approach in strikingly non-doctrinal terms. He wrote that the Court has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[61] In his concurrence, Justice Kavanaugh said that the Alito "opinion identifies five relevant categories of Establishment Clause cases," which Justice Kavanaugh dutifully listed.[62] He then asserted that the "*Lemon* test does not explain the Court's decisions in any of those five categories."[63] Justice Kavanaugh's own attempt to articulate a new synthesis of Establishment Clause doctrine is nearly heroic; the reader may judge how closely the heroism resembles that of the Light Brigade.[64] It rather looks to me like one more analytical vivisection of a distended corpus.

There is still a *history* of Supreme Court Establishment Clause decisions relying on secularism, to be sure. But that is genealogy, not law. Attempts at helpful generalization in the Bladensburg Cross case got no further than a self-styled "taxonomy" of Establishment Clause scenarios.[65] Justice Alito's history-guided focus on case-specific facts produced results no more coherent than the shambolic doctrine it would supplant. And recent history especially shows many examples of government action whose purpose and principal effect are precisely to promote and advance religion. *Galloway, Hosanna-Tabor*, and so many holdings supporting an ersatz "ceremonial deism" are some examples. It will not do to argue that many of these cases advance religious liberty, not religion. Advancing religious liberty is the chief way in which government can and should advance religion, a reality whose meaning and value as a human undertaking depend essentially upon the authenticity and

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61. Am. Legion v. Am. Humanist Ass'n., 139 S. Ct. 2067, 2087 (2019).

62. Those categories are: "(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums." *Id.* at 2092 (Kavanaugh, J., concurring).

63. *Id.*

64. Justice Kavanaugh wrote:

> [E]ach category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive *and* if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

Id. at 2093. "That is not to say that challenged government actions outside that safe harbor are unconstitutional. Any such cases must be analyzed under the relevant Establishment Clause principles and precedents." *Id.* at 2093 n.*.

65. *See id.* at 2081 n.16 (majority opinion).

freedom with which one engages religious questions and embraces religious answers.[66] The Court's reliance on secularism in Establishment Clause doctrine had faded even before Gorsuch pronounced *Lemon* dead.

III. Beyond the Constitution

> *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 . . . . 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.*[67]

With these words the Supreme Court, in *Everson*, launched the secularization project which received canonical expression in *Lemon*.[68] All nine Justices in *Everson* subscribed to the secularizing norms expressed above (centrally, the ban on laws which "aid all religions"). They split five-to-four, however, about applying them to the case of reimbursing Catholic school kids for bus rides. The kids won. All nine maintained in the published opinions that they had peddled no novelties. They insisted rather that they had

66. Justice Gorsuch wants to pick up this baton. His criticisms in *Shurtleff* of *Lemon's* shortcomings are mostly on the mark, as is his apparent desire to tack closely to the historically verified original meaning of the Establishment Clause. But he too succumbs to the siren song "is that all there is?" He wrote tellingly that "[b]eyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits." Shurtleff v. City of Boston, 142 S. Ct. 1583, 1609 (2022) (Gorsuch, J., concurring). These "telling traits"—he labelled them "hallmarks"—amounted to a combined historical recovery and synthesis of the Court's holdings. But synthesis of the Court's holdings is impossible, for they are an unstable mix of opposites—cases which faithfully implement secularism and cases which reject that way. Any "synthesis" must find a higher conceptual plane or level of analysis, where the seeming opposites can be reconciled. But there is no such altitude in this case. In any event, going "beyond" the Constitution, even to a wider panoramic catalog of norms about religious liberty which a Justice thinks the founders held, is the problem, not the solution. It is what gave us *Lemon* in the first place.

67. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

68. Another element of this project is the third "entanglement" prong in this passage omitted from the excerpt in the text: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa." *Id.* at 16. The *Everson* Justices were not much interested in what emerged as the second prong of the second *Lemon* criterion, the no-inhibition-of-religion norm. True, the *Everson* majority affirmed a neutrality of sorts between religion and unbelief, and this is a recognizable analog for the whole second part of *Lemon*. Nonetheless, the Justices were without exception most keen to require government to *avoid* promoting religion. They were prepared to do that even when it would seem to many observers, including this one, to evince a hostility to religion and its flourishing.

dutifully followed the founders. Justice Black's opinion for the Court and Justice Rutledge's dissent (which Justices Burton, Jackson, and Frankfurter joined) were both extended historical essays.[69] They covered much of the same Virginia ground. They reached the same normative conclusions. It is therefore remarkable that *Everson*'s assertedly antique, venerable norms were entirely unprecedented.

I do not mean here to emphasize that these norms were foreign to the founding, though they surely were. This paper is, mercifully, not yet one more argument about the "original intent" (or "original public meaning") of the Establishment Clause.[70] It is rather a detective story. "Who done it" is easy; the protagonists are the Supreme Court Justices who inaugurated our secularist era in constitutional law and, secondarily, their successor judicial secularists. Their handiwork anchored the Court's Establishment Clause doctrine up to and then beyond *Lemon*.[71] The mystery part of the narrative is instead "where." Where did these norms come from? The solution to this mystery gives us a clue as to why secularism is the real antagonist in the Establishment Clause drama.

I maintain in this Part that there is a chasm in *Everson* between the stated reasons in the opinions and the actual bases for them. In *Everson* and in many subsequent cases the Justices presented themselves as heralds of history, implementing the truths handed on from the founders. But there is ample reason to judge that they instead re-imagined the past so as to invent what they thought was a better future. I shall propose a sources thesis which has little contact with anything actually said in *Everson,* but which depends largely on what the Justices said in other cases between 1940 and 1948.

Everson's norms surely did not come from the history of the Establishment Clause. No one on the *Everson* Court adduced *any* evidence of its composition, its passage through either house of Congress, or its ratification by the states. The "history" in *Everson* was principally about the mid-1780s fight in Virginia over tax assessments for the clergy. (Yes, the scare-quotes around "history" indicate my judgment that it was law-office history at best.)

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69. Justice Black was especially impressed by what he called "freedom-loving colonials." *Id.* at 11.

70. One such argument is found in GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987) [hereinafter Church-State Relationships in America].

71. For a brief essay about the Justices who have rolled back protagonists' handiwork, *see supra* Part II.

It is just as clear that *Everson*'s secularizing norms do not come from the text of the Establishment Clause. The Justices knew it and said so, more frankly out-of-doors than in the opinions, but in both venues. At the Justices' conference three days after the *Everson* oral argument, Justice Burton, for example, said that he would sustain the state expenditures because this "program is not an established church. The Constitution has not prohibited this step here."[72] Yet Burton subsequently voted to strike down the expenditures. At the same meeting, Chief Justice Vinson plainly asked Justice Frankfurter whether he thought the New Jersey bus rides "establish[] religion." Frankfurter replied that they did not. He quickly added, though, that "the principle was much broader than simply prohibiting the model of colonial establishments or 'giving money to religious institutions.'"[73]

These frank admissions off-mic are audible in the published opinions as well. Justice Rutledge's *Everson* dissent (joined by Justices Frankfurter, Jackson, and Burton) stated that "the object [of the clause] was broader than separating church and state in the narrow sense."[74] That "narrow sense" Justice Rutledge rejected was a reference to the constitutional text. In his opinion, Justice Rutledge wrote, "the Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion."[75] Similarly, the majority's account of the clause's meaning ranges well beyond anything called an 'establishment' at the founding. That is just the beginning. Justice Black wrote that the clause means *"at least"* so much.[76] The bill of particulars in that paragraph, supposedly forbidden by the clause, concludes with attribution, not to the Establishment Clause, but to the Justices' "wall of separation."[77]

That was the end of a circuitous road for Justice Black. He had circulated several drafts of his *Everson* opinion that cleaved to the original public meaning of non-establishment as, basically, equality among the many churches and sects.[78] Under intense pressure from Rutledge and Frankfurter to expand his ambitions, Black eventually settled upon the "means at least this" riff.[79] These two Justices hammered away at Justice Black's drafts, pushing all the way for a

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72. STEVEN K. GREEN, THE THIRD DISESTABLISHMENT: CHURCH, STATE, AND AMERICAN CULTURE, 1940-1975, at 110 (2019).

73. *Id.* at 109.

74. Everson v. Bd. of Educ., 330 U.S. 1, 31 (1947) (Rutledge, J., dissenting).

75. *Id.*

76. *Id.* at 15 (majority opinion).

77. *Id.*

78. GREEN, *supra* note 72, at 111.

79. *Id.* at 112.

"strict separationist" decision.[80] Steven Green shows persuasively in his fine *The Third Disestablishment: Church, State, and American Culture, 1940-1975* that the Virginia episode took center stage in Black's opinion in response to Rutledge's extensive use of it.

One reason why Green is likely right (in addition to the evidence he adduces) is that Black did not mine the substance of "means at least this" from the Virginia debates. He lifted it without attribution from a 1943 volume by Charles Beard, *The Republic*, in which Beard wrote:

> Congress can make no law respecting an establishment of religion. This means that Congress cannot adopt any form of religion as the national religion. It cannot set up one church as the national church, establish its creed, lay taxes generally to support it, compel people to attend it, and punish them for nonattendance. Nor can Congress any more vote money for the support of all churches than it can establish one of them as a national church. That would be a form of establishment.[81]

Beard did not anticipate or advocate "incorporation" in *The Republic*.[82] That was a novelty supplied by the brethren. The Court nonetheless took over the substance of Beard's peroration. Black wrote to a friend that "this great book" might almost have been titled, according to him, "The Origin and Aim of the American Constitution."[83] A telling comment, since in *The Republic* Beard wrote that "The Constitution is a purely secular document . . . . [It] treats

80. *Id.* at 105. Black's interlocutors dissented anyway, over application of the secularizing norms to which all the Justices subscribed.

81. CHARLES A. BEARD, THE REPUBLIC 165 (1943).

82. *Id.*

83. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 362–63 (2d ed. 1997). What Beard said contained kernels of truth wrapped, unfortunately, in transparently false packaging. The unamended Constitution mentions religion by name once: to ban religious tests for federal office. No explicit power over religion was given to the new government. Nonetheless, early drafts of the First Amendment included proposals declaring that "Congress had no power over religion." Maybe so. But that is because the national government possessed no general police power at all. Power over religion (and over education and family matters and public health) was part of the police power, and it was reserved to the states. Thus, the truth (such as it is) of Beard's observation comes from the federal structure of the union, not the separationist doctrine embraced by anti-clerical colonials as a norm of public morality. In fact, where the national government did enjoy a measure of police power—in the territories, for example—we see that public authority (always a matter of delegated congressional authority) possessed the power to promote religion. And did so. Of course, even Beard would have had to consider how, and why, such a secular structure (if it was that) could be imposed upon the states by dint of incorporation. He did not address these questions in *The Republic*. Nor did Justice Black in *Everson*.

religion as a private matter, extraneous to the interests of the Federal government."[84]

The Court followed up its gargantuan pronouncement on the meaning of the Establishment Clause in *Everson* a year later in *McCollum v. Board of Education.*[85] *Everson* was not briefed or argued chiefly as an Establishment Clause case, for the simple reason that the New Jersey state dispute in that case would not then have implicated the as-yet unincorporated Clause. The *Everson* Court famously did those honors. The unprecedented breadth of what it said the Clause meant was, however, *dictum*. The Court resolved *Everson* on a "child-benefit" theory which bypassed Establishment Clause strictures.[86] *McCollum* was fully dressed up, on the other hand, as a constitutive moment. *Everson*'s expansive reading of non-establishment stood in the dock. The most scholarly brief ever filed by a party to an Establishment Clause case was in play. Written by John L. Franklin, it compellingly identified the original meaning of the Clause itself—a ban on government partiality among the sects.[87] The *McCollum* Court offered no rebuttal. Justice Black, author of *Everson,* wrote again for the Court in *McCollum*. He laid out Franklin's contentions: 1) *dictum,* 2) disincorporation, and 3)—by far the most urgently pressed—that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."[88]

Then, Justice Black gave the Court's response: "After giving full consideration to the arguments presented we are unable to accept either of these contentions."[89] As if to say: 'It doesn't matter (because, to the Justices, it didn't). Our warrant is far more noble than the prosaic task of interpreting the Establishment Clause.'

Explaining their affirmation of the broadly "separationist" principle laid down in *Everson*, Justice Frankfurter wrote (for himself and for Justices Jackson, Burton, and Rutledge) in *McCollum*: "[T]he meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating"

84. BEARD, *supra* note 81, at 166.
85. McCollum v. Bd. of Educ., 333 U.S. 203 (1948).
86. Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1946) (comparing bus fares to the benefit children receive from local police protection, public highways, and fire fighters).
87. Appellees' Brief, McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (No. 90).
88. *Id.* at 211.
89. *Id.*

than merely to forbid an "established church."[90] In that same case Justice Murphy explained his vote to one of his clerks who questioned whether there was a real violation of the clause, saying, "Perhaps not in the manner and form at which the amendment was originally aimed, namely a single established church, one to which all are required to adhere or which the state supports . . . . It does, however, seem to violate to a considerable degree the principles of separation."[91]

Even Justice Reed, the sole *McCollum* dissenter and the closest thing to a "pro-religion" Justice on the Court at the time, yielded ground to his opponents. After admitting that the Clause was originally about preventing coercive church attendance, Reed wrote, "Passing years, however, have brought about acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion . . . was equivalent to an establishment of religion."[92]

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90. *Id.* at 212–13.

91. J. WOODFORD HOWARD JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 452 (2014).

92. *McCollum*, 333 U.S. at 244 (Reed, J., dissenting). And so it went: repeatedly and without correction by any other Justice until the 1980s, when—starting with Justice Rehnquist's 1985 scholarly dissent in the moment-of-silence case, *Wallace v. Jaffree*—there arose detectable resistance on the Court to *Everson's* revisionist, totalizing account of the Establishment Clause. Before then, the Court habitually treated its portfolio as if it transcended "merely" prohibiting "establishments." The textual norm was itself understood to include knocking down "a state church" and, when thematized, to prohibiting government preference for one or another denomination or sect. Vastly more important to the Justices was determining what the broader "principle" of "separation" would entail.

The *Engel* Court in 1962, for example, struck down a non-denominational school prayer in what remains the most bitterly unpopular church-state decision in the Court's history. The Court (through Justice Black again) wrote: "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause." Engel v. Vitale, 370 U.S. 421, 430 (1962). That is because, Justice Black explained, the reach and point of the Establishment Clause are broader, and do "not depend upon any showing of direct governmental compulsion." *Id.* The point of the clause was to forestall a "union" of government and religion, to leave "religious function[s] to the people themselves and to those the people choose to look to for religious guidance." *Id.* at 435. Justice Powell's opinion for the Court in *Nyquist (*1973), the most sweeping of the Court's many decisions invalidating state aid to religious schools, takes the same approach. He wrote:

> The history of the Establishment Clause has been recounted frequently and need not be repeated here . . . . It is enough to note that it is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," and even though it does not aid one religion more than another but merely benefits all religions alike.

Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 770–71 (1973) (citations omitted).

The Justices have maintained, openly and repeatedly since 1947, that their task is to go significantly beyond the Establishment Clause, beyond the Constitution, all the way to implementing their own vision of the proper place of religion in our democracy. Indeed, in one of the many state-aid-to-religious-schools cases from the 1970s, Justice White wrote (in a dissent which Justice Rehnquist and Chief Justice Burger joined) that neither the language nor the history of the First Amendment supplied answers to the questions which the Justices were taking up.[93] Instead, the "courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships."[94] For Justice White, the Constitution left the Justices, "a wide range of choice among many alternatives[,]" and the Justices

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In 1961, the Court decided a group of Sunday closing law cases and came imperceptibly closer to addressing the text. Writing for the Court in *McGowan*—the lead case of the group—Chief Justice Warren wrote that the First Amendment, "did not simply bar a congressional enactment *establishing a church;* it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a broad interpretation in the light of its history and the evils it was designed forever to suppress." McGowan v. Maryland, 366 U.S. 420, 442 (1961) (emphasis added). Warren's was the first (as far as my research shows) high Court reliance upon "respecting" to move the Court's sweeping secularism into closer contact with the constitutional text, as if it said: 'not only mere establishments like state churches, but anything like or coming close to them'. There is no evidence in the founding source materials for this creative use of "respecting." Besides, the move fails on its own terms: 'anything like a state church" does not result in *Everson's* secularism, unless one is prepared to defend the view that "respecting" bestows a breathtaking jurisdiction which no one seems to have discovered until 1961. In any event, the best scholarly treatment of "respecting" supports quite the opposite conclusion. Robert George and William Porth have argued persuasively that it signified precisely that the national government *lacked* jurisdiction to interfere in states which maintained an establishment of religion. William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W.VA. L. REV. 109 (1987). *See also* Chief Justice Burger's strategic but nonetheless desperate reliance upon "respecting" in *Lemon,* discussed in the Conclusion hereto, *infra.*

93. *Nyquist*, 413 U.S. at 813 (White, J., dissenting).

94. The full paragraph from which the excerpt in the text is taken indicates that White both recognized that the Court had taken on a project which went well beyond the Constitution, and that he was not necessarily rejecting the assignment:

> No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end, the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

Nyquist, 413 U.S. at 820 (White, J., dissenting).

just picked the interpretation that seemed best to them.[95] *Lemon* was no more than an ordinary episode of this series.[96]

In another case from that era, Justice Powell, writing for the Court, accepted as "firmly established" that "a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike."[97] In other words, the Court can find violations of the Clause even when the text is not offended. Since the purpose of the text, in Powell's opinion, "was to state an objective, not to write a statute," it gave the Justices room to implement their vision of proper church-state relations.[98] However transcendent those visions might be, they undoubtedly involved secularizing the public square, and they did so without constitutional warrant. *Lemon* is a paradigmatic example of this kind of thinking. As the Court wrote:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion."[99]

This kerygmatic passage from *Lemon* was typical of the Court's post-*Everson* corpus in three important ways: its method of consolidation, its view of Catholic schools, and its Court-generated, not Constitution-derived, principles.

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95. *Id.*

96. Justice Burger chose this interpretation:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

97. *Nyquist*, 413 U.S. at 771 (quoting *Lemon*, 403 U.S. at 612).

98. *Id.* at 762 n.4 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (Burger, C.J.)).

99. *Lemon,* 403 U.S. at 612–13 (internal citations omitted).

Lemon displays the Court's preferred method to consolidate and advance. In *Lemon*, the Court synthesized prior cases and then deployed refurbished doctrinal tools, all the while retaining the norm that all government action must be *secular* in purpose and in primary effects. *Lemon*'s tripartite test was presented as two parts in *Schempp* and one part in *Walz*.[100] A consolidationalist opinion, *Lemon* offered no set-piece historical essay. The lessons of history, such as the Court had taught them, were understood. *Lemon* is also typical of the genre in that it described Catholic schools according to what was the accepted script. They are formidable institutions which have a peculiar appeal to some, but they are *not* incubators of democratic habits. Finally, *Lemon* is a consummate exemplar of this paper's argument that *it*, and the *Everson* project which it furthered, is all Court and no Constitution. Chief Justice Burger, writing for the *Lemon* Court, made the case for this last point better than I could ever argue it.

Burger admitted that "[the Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[101] Since the lines are so blurry, the Court could retreat to implementing only the "clear command" of sect-equality. Surely, if the Constitution sends indecipherable signals, then the Court lacks the needed warrant to overturn the rational-basis supported decisions of the more democratically elected public officials. The Justices could turn the burden of clarity against themselves.

But Justice Burger continued, "The language of the Religion Clauses of the First Amendment is at best, opaque."[102] So, what was only "dimly perceived" has now become an ink blot in his mind. But Burger had more to say. He wrote,

> [The Establishment Clause's] authors did not simply prohibit the establishment of a state church or a state religion . . . . Instead they commanded that there should be "no law respecting an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result . . . is not always easily identifiable as one violative of

100. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963) (secular purpose prong and effects prong); *Walz*, 397 U.S. at 672 (neither advancing nor prohibiting religion prong).
101. *Lemon,* 403 U.S. at 612.
102. *Id.*

> the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end.[103]

It is, as Yogi Berra once remarked, like "deja-vu, all over again!"[104] Here we have the whole complex of moves described throughout this Part compacted in a paragraph, save for the addition of the puzzling proposition that "respecting an" authorizes the Justices (in this most sensitive area) to police and prohibit anything like or tending towards . . . an inkblot!

Burger concluded that "[i]n the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[105] The Constitution has been erased. The Court is to face unafraid, and without guidance by any determinate constitutionally prescribed response, a set of hypothesized "evils." It is neither more nor less than reciting a sonorous phrase such as "wall of separation" and then having at it. Thankfully, this position has run its course and a sea change in the doctrine has begun. The Court has had its fun with the Establishment Clause, but that play date has mercifully come to an end.

IV. SOURCES OF SECULARISM

The mystery is not yet over. We still have to answer where *Everson*'s secularism actually came from. The casual reader might cite these words from the majority opinion at the end of the Beard/Black proclamation of 'thou shalt nots': "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[106]

We are not casual readers. We know that this phrase is not in the Constitution. We know that it came from the pen of Jefferson in 1802 and that it played no evident role in the passage and ratification of the Establishment Clause.[107] We also know that every politically engaged actor at the founding, and maybe everyone at the

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103. *Id.*

104. Post Staff Report, *35 of Yogi Berra's Most Memorable Quotes*, N.Y. POST (Sept. 23, 2015), https://nypost.com/2015/09/23/35-of-yogi-berras-most-memorable-quotes/.

105. *Lemon,* 403 U.S. at 612 (citing *Walz*, 397 U.S. at 668).

106. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

107. Laura Swicker, The Politics of Toleration: The Establishment Clause and the Act of Toleration Examined, 66 IND. L.J. 773, 794 and accompanying notes (1999).

founding, warmly embraced "separation of church and state."[108] But we know as well that no one at the founding—not even Jefferson or Madison—thought that it "mean[t] at least this," if "this" includes the scrupulous secularity propounded by the *Everson* Court.[109] So, where did the secularizing spin upon "separation" in *Everson* come from?

Not from the Court's precedents. Neither of its two plainly Establishment Clause decisions before *Everson* supports the broad secularistic reading given to it in 1947.[110] Unsurprisingly, the

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108. Patrick N. Leduc, Christianity and the Framers: The True Intent of the Establishment Clause, 5 LIBERTY UNIV. L. REV. 201, 222–23 (2011).

109. No doubt Jefferson and Madison were ardent "separationists" for their time. Still, that did not mean anything like the thorough secularism that the Justices later attributed to them. Among many evidences that these two men have been artificially cast is that President Jefferson negotiated treaties with the Kaskaskia Indians in which he included direct federal funding to pay for Christian missionaries to evangelize the tribe. These treaties were ratified by the US Senate. For some evidence about Madison's positions, *see* CHURCH-STATE RELATIONSHIPS IN AMERICA, *supra* note 70, at 101–04.

110. Everson may have been the Supreme Court's first square confrontation with the Establishment Clause, but it was not the Court's first Church-state case. Before 1947, the Court decided three challenges to government payments to religious groups—*Bradfield v. Roberts, Quick Bear v. Leupp,* and *Cochran v. Board of Education*. None supports Everson's interpretation of the Establishment Clause; in each the expenditure was upheld. The Court thus cannot rely on this fourth possible support: that of precedent, or stare decisis. In *Bradfield,* the District of Columbia commissioners, pursuant to congressional enabling legislation, reimbursed the Catholic Sisters of Charity for care administered in their hospital to public charges. *Quick Bear* involved payments by the federal government to Roman Catholic missionaries operating schools on Indian reservations. The state legislature in *Cochran* authorized local school boards to purchase textbooks for students in parochial schools, a program virtually identical to the textbook loan scheme upheld by the Supreme Court in *Board of Education v. Allen* (1968).

Although the Court sidestepped the Establishment Clause in each case, the opinions bespeak an indulgent attitude toward state support of religious institutions. The government won in *Bradfield* because the plaintiff could not establish that the hospital was in fact a religious corporation. The documents of incorporation listed the secular names of the individual sisters and did not indicate their clerical affiliation. There was no question on the facts, however, that the Sisters of Charity operated the hospital and that they were a Roman Catholic order. The Court's "four corners" test, however, reflected a remarkable lack of curiosity. That the hospital was controlled by "members of a monastic order or sisterhood of the Roman Catholic [Church]" did not "in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one." Bradfield v. Roberts, 175 U.S. 291, 298 (1899).

The payments in *Quick Bear* were from a tribal trust fund administered by the federal government. The aid was therefore not out of public monies. The solicitor general argued (citing *Bradfield*) that a "school, like a hospital, is neither an establishment of religion, nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations." Quick Bear v. Luepp, 210 U.S. 50, 74 (1907). The Court chose to ignore this argument.

Because the Establishment Clause was not yet applicable to the states, the constitutional issue in *Cochran* was whether aid to parochial schools was an appropriation of public money for private purposes. Of the Louisiana legislature in *Cochran*, the Court said, "Its interest is education, broadly; its method comprehensive. Individual interest are aided only as the common interest is safeguarded." Cochran v. Bd. of Educ., 281 U.S. 370, 375 (1930).

Court did not mention either of these two cases in *Everson*'s text. Each appears once in a footnote, neither to probative effect.[111]

Cantwell v. Connecticut "incorporated" the Free Exercise Clause in 1940 and suggested that the Establishment Clause was incorporated too.[112] Nonetheless, academic consensus holds that *Everson* is the effective incorporating case. It certainly said that the Clause applied to both the federal and state governments.[113] On this account, the *Cantwell* language would be *dictum*, as would be similar language from the 1944 opinion *Murdock v. Pennsylvania,* also cited by the *Everson* Court.[114] Of course, the "means at least this" passage in *Everson* is arguably *dictum,* too, for the decision turned upon a "child-benefit" theory which is extrinsic to those norms.[115] (A theory utilized in other pre-incorporation Establishment Clause cases.) The truth is that *McCollum* (1948) is the first holding which surely depended upon the Establishment Clause's application to the states.

This was all wind-up anyway to delivering what Justice Roberts' opinion for a unanimous court in *Cantwell* said the Establishment Clause meant. Of the Constitution's dual prescriptions for religion, the Establishment clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."[116] The establishmentarian exegesis centers upon coercion of creed or worship. It says nothing about a sweeping ban

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In *Everson*, Black cited this case for the proposition that "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." 330 U.S. at 7.

111. *Quick Bear* appears in footnote 21 of *Everson*, as one entry in a string of cases supporting the claim that: "The meaning and scope of the First Amendment . . . have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth." 330 U.S. at 14–15 n.21. *Bradfield* is a "*cf*" authority for this textual proposition: "The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since" incorporation. 330 U.S. at 15. The "*cf*" is quite generous.

112. The *Cantwell* Court wrote that the "liberty" of the Fourteenth Amendment included those liberties protected by the First Amendment. Since "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof[,] [t]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

113. *Everson*, 330 U.S. at 5.

114. "The New Jersey statute is challenged as a 'law respecting an establishment of religion.' The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Pennsylvania,* 319 U.S. 105, 108, commands that a state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Everson*, 330 U.S. at 8.

115. *See* GREEN, *supra* note 72, at 116.

116. *Cantwell*, 310 U.S. at 303.

on non-discriminatory, voluntary support of the various churches and sects, or of religion as such. And no one alleged coercion in *Everson* anyway.

What happened then, between 1940 and 1947? What cause or reason remapped the Justices' thinking about what the Establishment Clause means? Why did they decide to subsume that important but modest norm within their broader secularist story about "the principle of separation?" That intervening factor—whatever it is—is unlikely to feature Jefferson or Madison. Neither was an obscure figure prior to World War II. Neither popped suddenly into the Court's consciousness in 1940.

Justice Black supplied a crucial clue in *Everson,* one that directs us to a spate of then-recent Free Exercise cases. He wrote that "[t]he *broad* meaning given the [First] Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered" since it was incorporated.[117] Justice Black concluded that "[t]here is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."[118]

I added the emphasis on "*broad*" to suggest that the Justices were already, in those Free Exercise cases, loosening the Constitution's fetters upon them. What do these cases reveal about the Justices' view of the First Amendment?

The Court decided a score or so Free Exercise cases between *Cantwell* and *Everson.*[119] Most of them involved Jehovah's Witnesses. This sudden, recurring encounter with a religious group which practiced a spirited, if not aggressive, form of proselytizing was the seedbed of modern civil liberties jurisprudence; it was the Court's tutorial on the meaning of the Bill of Rights. Chief Justice Stone wrote to a colleague that the Witnesses "ought to have an endowment in [light] of the aid . . . they [give] us in solving the legal problems of civil liberties."[120] Most germane to our story here was probably that the Witnesses presented their outsized street engagements with non-believers as their form of "worship," a staple of religious liberties jurisprudence throughout American history but which had always connoted actions quite different than the Witnesses' in place, form, and content. The Witnesses contentions were as new wine, stretching the wineskin of precedent.

117. *Everson*, 330 U.S. at 15 (emphasis added).

118. *Id.*

119. Between 1938 and 1946, the Court decided 23 Witnesses' cases.

120. Shawn Peters, Prelude to Barnette: The Jehovah's Witnesses and the Supreme Court, 81 ST. JOHN'S L. REV. 758, 759 (2007).

In none of its decisions in the Witnesses' cases, however, did the Court evince any interest in the history which was avowedly the source of the Justices' constitutional analysis in *Everson*. In none of them did the Justices veer from their unanimous *Cantwell* rendering of the Establishment Clause, a rendering which nowhere suggested the secularizing norms against promoting religion which anchored *Everson* and later animated *Lemon*. Looking at these early 1940s decisions nevertheless leads to the fertile ground from which *Everson* sprouted. We can see in them the outlines of the missing intervening factor.

The first takeaway from Justice Black's *Everson* clue is easy to spot. It is that the proviso against an established church, which refers to structural connections between public authority and religious institutions, was transmuted into a "religious liberty" guarantee. The second is that the meaning of this newly-minted non-establishment "liberty" is somehow "broad,", like the meaning of Free Exercise. When one looks at those Free Exercise cases, a further clue comes into focus: *all* of the First Amendment freedoms stand on equal footing and possess related meanings.

Perhaps the clearest statement (among many such statements) of this relationship is the Court's opinion in *Prince*. Replying bluntly to stray prior suggestions (chiefly by Justice Murphy) that freedom of religion had ascended to a preferred First Amendment position, Justice Rutledge wrote for the Court that if the religious claimant "seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured" by the Amendment "can be given a higher place than the others. All have preferred position in our basic scheme."[121] That same year Justice Frankfurter wrote in dissent in *Follett v. McCormick* that if the amendment "grants immunity from taxation to the exercise of religion, it must equally grant a similar exception to those who speak and to the press," for the amendment's protection of those rights is "equally sweeping."[122]

By 1947, all of the Justices save perhaps Justice Murphy were persuaded that the Establishment Clause was a "freedom" provision like the others in the First Amendment, and that all the First Amendment protections had the same standing and importance in our system. Was the meaning of non-establishment mortgaged to this emergent, unifying all-purpose liberty?

121. Prince v. Massachusetts, 321 U.S. 158, 164 (1944).
122. Follett v. McCormick, 321 U.S. 573, 581–82 (1944).

It was. Closer inspection of the cases between *Cantwell* and *Everson* reveals that the Justices treated the discrete provisions of the First Amendment about free speech, press, and religion as constituent components of an encompassing liberty. This larger entity was not an aggregate or amalgam. It was not a synthesis of smaller elements. It worked the other way around. A sweeping, integral freedom of mind/thought/spirit/expression was integrally tied to an understanding of the individual's well-being in a complex modern society such as America, circa 1945. This mega-liberty distributed meaning to each of the more particular freedoms. They were distinctive iterations of the one right of what amounted to (to give it a short name): "well-ordered individuality."

Consider that even the studious reader of the many Jehovah's Witnesses cases could come away confounded by the question: 'now, was that a free speech, free press, parent's rights, or religious liberty case you just read?' An honest answer would often be that it is impossible to disentangle the several strands in any opinion's tapestry of reasons. It scarcely seemed important to the Justices to distinguish them.

A prime illustration of this congestion is Justice Rutledge's opinion for the Court in *Prince v. Massachusetts,* an especially important Jehovah's Witnesses case. In that case, Aunt Sarah Prince was convicted of violating child labor laws by sending her nine-year old niece into the streets to sell religious literature. In a lengthy passage, Justice Rutledge muses on the equal importance of the various First Amendment privileges. He admits, "Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources . . . ."[123] That unity is the concept of liberty.

The Witnesses argued that while the government's prohibition against child labor would prevail against a free speech challenge, the *religious* nature of their claim should carry the day. Justice Rutledge noted the differences in the protections, that "Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought."[124] However, he still saw the rights as essentially inseparable. He wrote, "[I]n the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They *cannot be altogether parted in law* more than in life."[125] Aunt

123. *Prince*, 321 U.S. at 164.
124. *Id.* at 165.
125. *Id.* (emphasis added).

Sarah's rights—freedom of conscience, the right to practice a religion, the right to control her household, and the related right to direct her children's upbringing—are intimately connected. They are connected because they are all "sacred" and "basic in a democracy," essential to citizenship. In other words, they are concretizations of that well-ordered individuality central to democracy.

Think what you wish about these philosophical speculations. But do not think that any of them represents the lesson of colonial or early national history. *Everson,* too, was no more truly the product of judicial noodling on Jefferson's letters or Madison's rhetoric than it was the product of medieval ecclesiology. The Court's secularizing initiative was homespun. Behind the Court's unprecedented secularizing initiative lay a new theoretical problematic, grasped and addressed by the Justices, about how to conceive of individual freedom in a modern state. The war against fascism and the specter of communism no doubt brought the problem to their rapt attention. What I am calling a new "map of the Establishment Clause" was the product of the Justices' own critical reflections about applied political theory, an artifact of their normative questioning about individuality, government authority, societal conformity, and what the Justices understood to be the presuppositions of "*our democracy*."

The Justices were not just rearranging their mental furniture. Much less were they saluting the founders and transmitting the eighteenth-century political gospel. They were reconstituting our polity's relationship between religion and public authority. Here are three bundles of evidence to prove as much.

The first evidence is that the Justices frankly said so. The Court, in 1943, reversed its three-year-old decision and upheld the constitutional liberty of a Jehovah's Witnesses child to refuse to salute the flag.[126] The unusually quick reversal is itself telling. The thematic explanation is no less than breathtaking, even epochal. According to the Court, it was tasked with "translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials . . . ."[127] In order to do that, the Court found it necessary to reconcile conflicting political philosophies. On one side, the principles of liberty contained in the Bill of Rights presupposed that "the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints,

126. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
127. *Id.* at 639–40.

and that government should be entrusted with few controls and only the mildest supervision over men's affairs."[128] Facing off against this view was the then-modern attempt to achieve social advancement through "closer integration of society and through expanded and strengthened governmental controls."[129]

This conflict, the Court determined, "often deprive[s] precedents of reliability and cast[s] us more than we would choose upon our own judgment."[130] Despite the fact that it had just jettisoned the stabilizing weight of precedent, the Court would not be held back by "modest estimates of [it's] own competence" in specialized matters such as public education.[131] Rather, the Court urged itself on to stand guard over the "liberty" interest it was commissioned to protect. If that meant eschewing precedent and relying upon the Court's own analysis of what liberty was required in the democracy, so be it.

The second bundle of evidence is statistical and lexical. Research into a database of Supreme Court opinions since the Founding, reveals at a glance that in the mid-1940's the Court called into being an unprecedented worldview. A search for uses of the words "orthodox," "dogma," "secularism," "irreligion, "no religion," "atheism," "inculcate," and "indoctrinate" yields a consistent pattern.[132] Before 1943, *almost* none; for others literally a debut; then, dozens of uses, in quick succession, thereafter. "Atheism," for example, appeared for the first time in *McCollum* and scores of times since. The 1940 *Gobitis* case marked the debut of "indoctrinate" or "indoctrination,", a word which since then has become synonymous with religious teaching, especially in the Catholic schools which were the crucible of the Court's secularism. "Orthodoxy's" career began with the Second Jehovah's Witness cases, *Barnette*, in 1943. "Nonreligion" appeared nominally for the first time in 1963, in *Schempp,* though the cognate "nonreligious" appeared in 1943, in *Douglas v. Jeannette.*[133]

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. A keyword search of Westlaw and Lexis+ databases for these words and their cognates was narrowed to Supreme Court cases and then sorted chronologically. The results were then examined individually.

133. "Secular" on the other hand, possessed an ample dossier. Its first appearance is in *United States v. Ritchie:* "As early as 17th August, 1833, the Mexican congress decreed that 'the government will proceed to secularize the missions of Upper and Lower California;' and various regulations are prescribed for carrying this policy into effect." 58 U.S. 525, 540 (1854). Its usage is as one would expect. Across three tranches of cases—involving Sunday closing laws, litigation arising out the Mexican government's transfer of hitherto Catholic mission land and assets to public uses, and educational matters—it meant "worldly," of the temporal order, *not* religious or sacred, civil as opposed to ecclesiastical.

All of this lexical evidence tends to confirm that, for the Justices, the Witnesses' travails wrought a conceptual remapping of how they thought about First Amendment civil liberties.

During these same few years, the Justices turned to a political theoretical construct—"democracy"—as the premise from which the content of the several civil liberties would be derived. At the *Everson* conference, for example, Justice Frankfurter observed that *Cochran* "could have settled this" in favor of the schoolchildren.[134] But, he added, "much has changed" as a result of the Jehovah's Witnesses' cases, which have "shifted our latest views about our democracy."[135] These "latest views" about democracy continued to pepper the Court's analysis in civil rights cases. By 1944, the Court had discovered a "democratic faith" (in the *Baumgartner* case).[136] And in *Prince*, mentioned above, the Court stated that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[137]

The third bundle of evidence is the Court's discovery of "religious minorities" starting around 1940, and especially its odd fixation with the Jehovah's Witnesses. Now, it is true that Joseph Rutherford's ascension to the Presidency of the Witnesses in 1935 and his emphasis upon street evangelization initiated a new series of conflicts with civil authorities.[138] He (and they) also enjoyed the dedicated services of Hayden Covington, their competent Supreme Court litigator. But that did not by any means necessitate the extraordinary frequency of the Justices intervention in their legal disputes.

The Court obviously *wanted* to hear and decide their cases. And the evidence strongly suggests that they were more or less closely monitoring a civil liberties crisis on the ground, keenly aware of the possibility that they had unleashed the force of popular intolerance in *Gobitis* and feeling a responsibility to rescind that license. Hence, *Barnette.*[139] To cite just one important example, the author of *Barnette* had written publicly before he joined the Court that the *Gobitis* holding was a lamentable exception to the Court's characteristic vigilance "in stamping out attempts by local authorities to suppress the free dissemination of ideas, upon which the system of

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134. GREEN, *supra* note 72, at 109.
135. *Id.*
136. Baumgartner v. United States, 322 U.S. 665, 674 (1944).
137. Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
138. Iain Maclean, *Millions Now Living Will Never Die*, *in* RELIGIONS OF THE UNITED STATES IN PRACTICE, VOL. 2 379 (Colleen McDannell ed., 2001).
139. *See generally* SHAWN PETERS, JUDGING JEHOVAH'S WITNESSES (2000).

responsible . . . government rests."[140] Robert Jackson came to the Court resolved to reverse *Gobitis*.[141]

Why? The Witnesses' trials crystalized in the Justices' minds, I submit, a perhaps still inchoate conviction about how they could suppress the public role of majority religion(s) by protecting religious minorities. In the words of Justices Black, Douglas, and Murphy, dissenting in *Jones v. Opelika* (1942), "our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be."[142] The founders and generations of Americans after them said that our "republican" form of government depended upon popular virtue which only religion could supply. By 1947, the Justices decided that it was time to found what Beard advocated, namely, a *secular democracy*.

Now we can bring the Court's secularizing construct directly to bear upon *Everson* by adding one more premise. This one commands the foreground of the action. It is a picture of Catholic schooling as profoundly *anti*-democratic. Autocratic control of the minds and political behavior of millions of Catholics by an ecclesiastical hierarchy was perceived as a mortal threat to America's democracy. A beautifully compact expression of the worry, is that "the Catholic approach to education . . . was perceived as creating Catholic automatons not suited to democratic practices."[143] Justice Jackson's dissenting opinion (joined by Justice Frankfurter) is brutally candid about the Catholic threat to democracy presented in *Everson*.[144] He set the table for a full generation of judicial iterations on this theme.

In fact, during the oral argument in *Everson* Justice Douglas passed a note to Justice Black on which he wrote, "[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business."[145] Seconding Justice Frankfurter, Justice Rutledge wrote in a memorandum after the conference, "We all know . . . this is really a fight by Catholic schools to secure this money from the public treasury. It is aggressive and on a wide scale. There is probably . . . no other group which is either

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140. ROBERT JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 284 (1941).
141. *Peters*, *supra* note 120, at 764.
142. Jones v. Opelika, 316 U.S. 584, 624 (1942) (Black, Douglas, Murphy, JJ., dissenting).
143. James E. Zucker, Note, *Better a Catholic Than a Communist: Reexamining* McCollum v. Board of Education *and* Zorach v. Clauson, 93 VA. L. REV. 2069, 2073 (2007).
144. Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (Jackson, J., dissenting).
145. JOHN MCGREEVY, CATHOLICISM AND AMERICAN FREEDOM 184–85 (2003).

persistent in efforts to secure this type of legislation or insistent upon it."[146] The Court's opposition to almost all forms of state aid to religious schools is *founded* upon what they labelled in *Lemon* as the "pervasively sectarian" character of the *Catholic* schools which, the Court invariably pointed out, would be the principal beneficiaries of state largesse.[147]

It is easy to see now, too, how "incorporation" would be a no-brainer for the *Everson* Court. Given the new map of "our democracy," religion, and schooling animating the Court, it would be insane for the Justices to limit its ministrations to strictly federal spaces. If their secularizing campaign was to accomplish anything, they would have to carry it to the states and their subdivisions. And so, we come to the close of our mystery. *Lemon*'s backstory—that story the *Kennedy* Court hesitates to speak of as if it would offend polite company—has been told. And the majority opinion's rationale hangs together only in light of that story.

V. HIDING IN PLAIN SIGHT

Lemon's secularization doctrine is dead, eulogized, and buried. Its "replacement" should be an enforcement of the Establishment Clause, nothing more and nothing less. The Court has always and without exception stated that the Clause itself prohibits a certain government preference for one religion over another. Its original public meaning has never been obscure or more than occasionally even questioned. It is just that it has never been enough for the Justices.

In 1983, the Court in *Larson v. Valente*, declared that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[148] It so happens that the Justices have chosen to supplement this clear command with a host of additional commands, fashioned by them. Even while freelancing their own doctrine, however, Justices have acknowledged the enduring, essential proposition that the Establishment Clause prevents favoritism among religion. Now that the

146. GREEN, *supra* note 72, at 113. Murphy's biographer reports that Rutledge emphasized the need to nip it in the bud. In conference, Rutledge warned, "First it was textbooks, now buses and transportation, and next it will be lunches and teachers." *Id.* at 110. He feared that "[e]very religious institution in [the] country will be reaching into the hopper for help if you sustain this." *Id.* According to Rutledge, state aid should be stopped "at [the] threshold of [the] public school." SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 568 (1984).

147. *See* Gerard V. Bradley, *An Unconstitutional Stereotype: Catholic Schools as Pervasively Sectarian*, 7 TEX. REV. L. & POL. 1 (2002).

148. Larson v. Valente, 456 U.S. 228, 244 (1982).

Court's adlibbing on the Establishment Clause has come to an end, it should return to that clear meaning it has always acknowledged.

Even a quick glance through Establishment Clause history reveals that the Justices' agreement on this point. In the 1971 case, *Gillette v. United States*, a particular statute was challenged on the ground that it "impermissibly discriminates among types of religious belief[s] and affiliation."[149] The Court had no trouble identifying that "[a]n attack founded on disparate treatment of 'religious' claims invokes what is perhaps the *central purpose* of the Establishment Clause—the purpose of ensuring governmental neutrality in matters of religion."[150]

When historical analysis became the vogue, the Court found ample evidence that the Establishment Clause required neutrality among sects. Justice Rehnquist's dissent in *Wallace v. Jaffree*, the moment-of-silence case, illustrates this point.[151] Beginning with the debates during ratification of the First Amendment, Justice Rehnquist used Madison's writings to support the notion that the Amendment was "designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects."[152] Taking history and precedent into account, Justice Rehnquist summed up the Establishment clause as follows: it was "designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the 'incorporation' of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects."[153]

Five years later, Justice Blackmun described the one flicker of clarity in the murkiness that had become Establishment Clause jurisprudence. He wrote for the Court that "Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)."[154] Later on, Justice Blackmun reiterated that this proposition was the "bedrock Establishment Clause principle."[155]

Justice Scalia often protested that the Establishment Clause mandates neutrality among sects. In *Lamb's Chapel*, Scalia,

149. Gillette v. United States, 401 U.S. 437, 449 (1971).
150. *Id.* (emphasis added).
151. Wallace v. Jaffree, 472 U.S. 38 (1985).
152. *Id.* at 98 (Rehnquist, J., dissenting).
153. *Id.* at 113.
154. Cnty. of Allegheny v. ACLU, 492 U.S. 573, 605 (1989).
155. *Id.*

concurring for himself and Justice Thomas, found the school's access policy constitutional because it did "not signify state or local embrace of a particular religious sect."[156] He scoffed at the suggestion that the Establishment Clause prohibited religious-friendly legislation since it is embedded in a Constitution which "gives 'religion in general' preferential treatment."[157] A year later, he reiterated, "the Establishment Clause prohibits the favoring of one religion over others."[158]

More recently, the liberal members of the Court ascribed the same meaning to the Establishment Clause. In *Greece v. Galloway*, Justice Kagan along with Justices Ginsburg, Breyer, and Sotomayor, explained what she thought was the accepted meaning of the Establishment clause.[159] In dissent, Justice Kagan wrote that the local practice of prayer violated the Establishment Clause because it favored a "particular religious creed" over the others, quoting *Larson* for this proposition.[160] The city's practice, according to Justice Kagan, was an example of "religious favoritism anathema to the First Amendment."[161] Despite disagreement over the outcome of the case, Justice Kennedy, writing for the Court, agreed that the government could not promote a "preferred system of belief" or coerce its citizens to support a particular religion.[162] The meaning of the Establishment Clause is quite obvious: it prohibits the government from favoring one religion over another.

VI. CONCLUSION

The post-war Court's secularization project crested in 1985.[163] The tide has been rolling out since. The first shot was fired in *Marsh v. Chambers* (1983), where the Justices suspended application of *Lemon* and exchanged for it for a test drawn from the more religion-friendly confines of American history. There, the *Marsh* court found legions of lawmakers humbly seeking divine guidance of their efforts. The more specifically doctrinal counterattack began under an ally's flag, with the equal-free-speech-for-believers

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156. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 401 (1993) (Scalia, J., concurring).
157. *Id.* at 400.
158. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 748 (1994) (Scalia, J., dissenting).
159. Greece v. Galloway, 572 U.S. 565, 615 (2014) (Kagan, J., dissenting).
160. *Id.* at 618–19.
161. *Id.* at 619–20.
162. *Id.* at 581, 586 (majority opinion).
163. See Gerard V. Bradley, *Dogmatomachy—A 'Privitization' Theory of the Religious Clause Cases*, 30 ST. LOUIS UNIV. L.J. 275, 276 (1985).

holdings in *Lamb's Chapel* (1993) and *Rosenberger* (1995). Another key secularist redoubt was breached in 2000 (in *Mitchell v. Helms)*, when the Court approved expenditures in aid of parochial schools which would have been prohibited by applying *Lemon* as it had been for a full generation.[164] *Zelman* (the Ohio vouchers case) in 2002 widened this breach considerably.[165] Through that gap the Court has since walked several times, most recently in 2022 in *Carson v. Makin*.[166]

These religion friendly results were produced by Justices keen on reversing *Lemon*'s secularism but unwilling to bury that case or, even, to frankly say what they were doing. Their revanchist project has consequently been episodic, a motley skein of tactical maneuvers not yet conceptualized, strategically or justified fundamentally. This de-secularization initiative aligns the Court more closely with the original public meaning of the Establishment Clause, its interpretation up until the mid-twentieth century, and the "history and traditions of the American people." Until now, however, the effort has been *ad hoc* enough to be plausibly accused of being more about judicial policy preferences than constitutional command.

In 2022 the Court finally laid *Lemon* to rest. A majority stands poised to further erase the effects of that secularist misadventure. Early returns—namely, the Court's' clinging to a secularity norm in *American Legion v. American Humanist Association* and its historical turn in *Kennedy*—indicate, however, a lingering unwillingness to sink deep constitutional foundations for its de-secularizing course and for frankly recognizing religion as the constitutionally sanctioned, basic element of our political common good that it is. Those foundations are near at hand. Secularism before and after *Lemon* was always a judicial ideology imposed by Justices who confessed, boldly, that they used the Establishment Clause as an excuse for, and not as a source of, that rejection of religion from the public square. These same Justices invariably recognized that the Establishment Clause itself required instead a certain neutrality among religions, and not hostility to them all.

The proposal on offer in this Article is thus quite straightforward: abandon secularity because it is judicial legislation and replace it with the clear command of the Constitution. These terms seem to be in the wheelhouse of the originalist constitutional philosophy which these Justices espouse.

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164. Mitchell v. Helms, 530 U.S. 793 (2000).
165. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
166. Carson v. Makin, 142 S. Ct. 1987 (2022).

Foreword: New Supreme Court Cases: Duquesne Law Faculty Explains

*Wilson Huhn**

During the 2021-2022 Term, the United States Supreme Court issued several groundbreaking opinions that fundamentally changed the interpretation of the Constitution in a number of areas, including freedom of religion under both the Free Exercise Clause and the Establishment Clause; reproductive freedom and the Right to Privacy; and justiciability, administrative law and the Separation of Powers. The Court also granted certiorari in another case that may have an enormous impact on our representative democracy and the right to vote in federal elections.

On September 30, 2022, several members of the faculty of the Thomas R. Kline School of Law of Duquesne University presented a Continuing Legal Education program, *New Supreme Court Cases: Duquesne Law Faculty Explains*, reviewing these developments. *Duquesne Law Review* graciously invited the faculty panel to contribute their analysis of these cases from the Supreme Court's 2021-2022 term for inclusion in this symposium issue of the Law Review.

Two members of the law faculty discuss decisions of the Supreme Court in 2022 that concern freedom of religion. Associate Dean for Academic Affairs Ann Schiavone analyzes *Kennedy v. Bremerton School District* involving prayer in the public schools,[1] and I summarize *Carson v. Makin*, involving the use of taxpayer funds to pay for religious education.[2]

Professor Rona Kaufman analyzes *Dobbs v. Jackson Women's Health Organization*, the landmark case that overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[3]

Professor Richard Heppner addresses the issue of justiciability, analyzing the recent rulings of the Supreme Court dealing with standing, ripeness, and mootness.[4]

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1. *See* Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40 (2023).
2. *See* Wilson Huhn, *Analysis of* Carson v. Makin, 61 DUQ. L. REV. 50 (2023).
3. *See* Rona Kaufman, *Privacy: Pre- and Post-*Dobbs, 61 DUQ. L. REV. 62 (2023).
4. *See* Richard L. Heppner Jr., *Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79 (2023).

Professor Dana Neacşu analyzes the reasoning of the Court in *West Virginia v. EPA*, and discusses justiciability as well as appropriate delegation of power to administrative agencies and the proper level of judicial deference to administrative decisionmaking.[5]

Professor Bruce Ledewitz analyzes the pending case of *Moore v. Harper* and the independent state legislature theory, addressing an issue that will determine the future of representative democracy in America.[6]

The Constitution protects the inalienable rights of Americans, preserves our representative democracy, and prescribes our form of government. These essays reflect the commitment of the authors to those fundamental freedoms.

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5. *See* Dana Neacşu, *Applying Bentham's Theory of Fallacies to Chief Justice Robert's Reasoning in West Virginia v. EPA*, 61 DUQ. L. REV. 95 (2023).

6. *See* Bruce Ledewitz, *An Alternative to the Independent State Legislature Doctrine*, 61 DUQ. L. REV. 114 (2023).

A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in *Kennedy v. Bremerton*

Ann L. Schiavone[*]

INTRODUCTION

In *Kennedy v. Bremerton School District*,[1] the Roberts Court continued its move to carve out larger spaces for religious practice and expression in public spheres.[2] But in so doing it left lower courts and school districts with many more questions than answers concerning what the Establishment Clause means and what it requires of them. Can school districts still protect students from religious coercion by teachers, classmates, and others? Are entanglements between church and state or the appearance of endorsement no longer problematic?[3] Should the individual history and tradition of schools and communities influence decision making on these questions, or is the court solely concerned with the national history and tradition surrounding free expression, especially at the founding? While giving breathing space to religious expression is valuable, and may in fact provide a correction to what some believe was an overzealous pursuit of secularism in prior Courts,[4] there are risks resulting from the *Kennedy* decision that the Court seemingly discounted or simply ignored.

The first risk is one of religious coercion. The decision in *Kennedy* communicated to school districts that they cannot step in to

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1. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

2. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868 (2021); Espinoza v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

3. *Kennedy*, 142 S. Ct. at 2427 (citing *Am. Legion*, 139 S. Ct. at 2079–81) (finding the Supreme Court abandoned the *Lemon* test—which sought to avoid excessive entanglement—and related endorsement test because they "invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators") (internal quotations omitted).

4. *See* Richard Garnett, *Symposium: Religious Freedom and the Roberts Court's Doctrinal Clean-Up*, (Aug. 7, 2020 9:57 AM), https://www.scotusblog.com/2020/08/symposium-religious-freedom-and-the-roberts-courts-doctrinal-clean-up/.

preemptively address conduct among teachers, staff, and students that has a likely coercive effect on students.[5] Instead, administrators must seemingly wait for complaints and lawsuits from parents, or perhaps even proof of actual direct punishment to a student who fails to participate in a religious activity, rather than proactively addressing problems when they arise. Justice Gorsuch wrote: "[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."[6] By minimizing the coercive effects of the coach's action here, and even seemingly mocking the school's concern for them, Justice Gorsuch makes clear that proactive actions from a school absent direct proof of coercion are not acceptable. A school district hands may be tied even where there is coercion, or the strong likelihood of it, because schools will be worried about interfering with any religious expression or speech.[7] In its ruling, the Court shined its spotlight on Free Exercise and Speech, leaving the Establishment Clause in their shadows.

The second risk is one of inherent bias in favor of Christianity resulting from the application of a pure history and tradition analysis of the Establishment Clause. When the majority signaled the final death knell to *Lemon v. Kurtzman*,[8] and also questioned the endorsement tests employed by previous courts,[9] calling them ahistorical, it signaled primary reliance on history and tradition to determine the application of the Establishment Clause.[10] There is an inherent risk in relying solely on a history and tradition test because the history of United States culture has long been dominated by Christian denominations, and thus examples or historical practices will skew Christian. The risk of trampling on the rights of religious minorities and persons who claim no religious affiliation

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5. *Kennedy*, 142 S. Ct. at 2452 (Sotomayor, J., dissenting) ("In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because 'Kennedy did not seek to direct any prayers to students or require anyone else to participate.'").

6. *Id.* at 2432 (majority opinion).

7. *See* Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District – *A Sledgehammer to the Bedrock of Nonestablishment*, Am. Const. Soc'y (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ (noting that "officials will be extremely wary of disciplining teachers and coaches for their in-school religious behaviors, and they will be highly unwilling to litigate against teachers and coaches who challenge them").

8. *Kennedy*, 142 S. Ct. at 2427.

9. *Id.* at 2428.

10. *Id.*

is significant especially in a school setting, where the potential for coercion has long been a serious concern for the Court.[11]

Both of these risks could have been mitigated if the Court had waited for a case with different facts—perhaps one that includes a coach who was actually fired for quietly praying after a game, or a teacher who was disciplined for saying a prayer over her lunch—and had provided a clearer articulation of what the history and tradition approach requires.[12] With disputed facts and a shadowy Establishment Clause approach, *Kennedy v. Bremerton* will require significant clarification in future cases to provide the necessary framework for schools and lower courts.

THE DISPUTED FACTS

Kennedy involves a football coach who prayed after football games at the 50 yard-line of the field.[13] He was dismissed by the School District after refusing to discontinue this practice.[14] Both sides agree to these facts, but beyond this there is little agreement.

The coach claimed his dismissal was a violation of his First Amendment rights under the Free Exercise Clause and Free Speech Clause.[15] The School District countered, defending the dismissal because his public prayers with students present were a violation of the Establishment Clause.[16] Further, the School District claimed that because the prayers took place while he was still working in his official capacity and still required to supervise students following games, there was no violation of free speech because, under the government speech doctrine, the School District need not be viewpoint neutral in its endorsement or restriction of speech while the coach was working.[17]

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11. *See* Lee v. Weisman, 505 U.S. 577, 578 (1992); *Sch. Dist. of Abington Twp.* v. *Schempp,* 374 U.S. 203 (1963); *Engel* v. *Vitale,* 370 U.S. 421 (1962).

12. *See generally* Richard L. Heppner Jr., *Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability*, 61 DUQ. L. REV. 79 (2023). For reasons explained more fully by Professor Richard Heppner in his essay, there was truly no need for the court to hear this case. It had already been denied certiorari once, and was arguably moot based on the comments and actions of the plaintiff who moved from the area with no intent to return. *Id.* at 93. The coach, however, has more recently seemed to change his mind and indicated a possible intention to return to the position with Bremerton School District, though he has so far not done so. *See* Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/the-story-of-the-praying-bremerton-coach-keeps-getting-more-surreal/ (last updated Sept. 17, 2022, 6:51 AM).

13. *Kennedy*, 142 S. Ct. at 2418.

14. *Id.* at 2418–19.

15. *Id.* at 2419.

16. *Id.*

17. *Id.* at 2420.

In a 6-3 decision authored by Justice Gorsuch, the Court sided with the coach, ruling that the school district violated both his right to free exercise and his right to free speech.[18]

Let us first consider the stark factual dispute. Writing for the majority, Justice Gorsuch noted:

> Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway.[19]

Contrarily, in her strident dissent, Justice Sotomayor stated:

> The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion.[20]

So, which is it? Do we have a coach quietly kneeling in prayer after the game, students ignoring and unaffected by his actions?[21] Or is it a coach leading students in an on-field prayer and including invocations of God and religion in his speeches?[22] Both seem to have occurred, but in the three weeks leading up to his dismissal by the school district, the coach was careful not to involve students from his team or in any way encourage District student participation.[23] Because the coach's dismissal was based on his practices for those three weeks, it provided enough facts for a colorable narrative relied upon by the majority.[24] Yet, there is ample evidence of more

18. *Id.* at 2433.
19. *Id.* at 2415.
20. *Id.* at 2434 (Sotomayor, J., dissenting).
21. *Id.* at 2415 (majority opinion).
22. *Id.* at 2436 (Sotomayor, J., dissenting).
23. *Id.* at 2422 (majority opinion).
24. *Id.*

demonstrative speeches and prayers invoking God and religion.[25] There is evidence of students on the opposing teams being invited to participate,[26] and there is even evidence that students felt pressured to join.[27] None of this was enough to sway the majority who seemed inclined to look at nothing less than compulsion or direct statements requiring participation "or else" to rise to the level of coercion.[28]

Some experts have claimed the fact that the majority described the facts as a "coach quietly praying" on the field during his personal time is enough to narrow this decision to very fact specific contexts.[29] But others argue that simply reading the opinion illustrates the factual dispute underlying this case because of the alternative facts (and pictorial evidence) provided by the dissent.[30] In the short term at least, the decision is likely to lead to significant confusion in its application to the everyday context of school administration. It will have a chilling effect on any actions by school districts to curb religious conduct. While this would inspire more open, robust and widespread religious expression in schools, a result many will celebrate, it will be troublesome for others—particularly religious minorities and non-religious students who may not be able to rely on their school districts to step in when the conduct of teachers, coaches, or other students step over the line.

THE ESTABLISHMENT CLAUSE IN SCHOOLS AND THE RISK OF COERCION

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."[31] These three clauses, the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause, work together to allow citizens open, robust, and free religious belief and expression while avoiding, as much as possible, government interference.[32] The clauses are

25. *Id.* at 2436. (Sotomayor, J., dissenting).
26. *Id.* at 2435.
27. *Id.* at 2440.
28. *Id.* at 2430 (majority opinion).
29. *See* Lupu & Tuttle, *supra* note 7.
30. *Id.* at 2434 (Sotomayor, J., dissenting).
31. U.S. CONST. amend. I.
32. While this essay focuses on the religious clauses, the petitioner in *Kennedy v. Bremerton* also utilized the Free Speech clause to support his case. The Court noted in deciding whether the speech at issue was personal speech (given the most freedom) or government speech (able to be controlled by the school district) that the "critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties." *Kennedy*, 142 S. Ct. at 2424.

complimentary, as Justice Gorsuch aptly pointed out,[33] but it is impossible to ignore that there is also a natural tension present among them.[34] While the Free Exercise Clause guarantees unlimited freedom to believe, limits to expression do exist,[35] and where the religious expression of government employees tends to coerce or seemingly endorse one religion over others, the conflict with the Establishment Clause cannot be clearer.

As Justice Gorsuch noted, teachers and students in public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36] But it is also true that there has been a special concern in elementary and secondary schools for religious expression that can tend toward endorsement of a particular religion or undue coercion of students toward certain types of religious expression.[37]

In 1971, in *Lemon v. Kurtzman*, the Court articulated a test to help lower courts determine when conduct rises to the level of an Establishment Clause violation. The *Lemon* Test, as it came to be known, examined whether a law had a secular purpose, whether its effects neither advanced nor inhibited religion, and whether there was potential for excessive entanglement with religion.[38] In later case law, the Court also examined whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion.[39]

While the *Lemon* Test has long been maligned, particularly by Justices skeptical of the practicality of the "wall of separation between church and state" and favoring an approach that yields to accommodation of varied religious practices, it had not yet been overruled and was applied as recently as 2005.[40] In *Kennedy*, Justice Gorsuch made it clear that *Lemon v. Kurtzman* and its approach to Establishment Clause questions is no longer good law.[41] In place of *Lemon* and the endorsement test, this Court, in

33. *Id.* at 2426.

34. *Id.* at 2447 (Sotomayor, J., dissenting) (citing Locke v. Davey, 540 U.S. 712, 718 (2004)).

35. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) (finding a law prohibiting plural marriage did not violate the Free Exercise Clause).

36. *Kennedy*, 142 S. Ct. at 2423 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U. S. 503, 506 (1969)).

37. *See* Lee v. Weisman, 505 U.S. 577 (1992); *Sch. Dist. of Abington Twp.* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale, 370 U.S. 421* (1962).

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

39. *Kennedy*, 142 S. Ct. at 2427 (citing Cnty. of Allegheny v. Am. Civ. Liberties Union, 492 U.S. 573, 593 (1989)).

40. *See* McCreary Cnty. v. ACLU, 545 U.S. 844 (2005).

41. *Kennedy*, 142 S. Ct. at 2427.

Kennedy, has instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings."[42]

Relying especially on *Town of Greece v. Galloway*, an opinion about legislative prayer authored by Justice Kennedy,[43] the Court pointed out that historical practices and traditions must be taken into account when determining if a particular practice would violate the Establishment Clause.[44] In *Greece*, the Court identified numerous examples of legislative prayer at the founding and beyond in our history.[45] In finding ample historical evidence and little risk of coercion because prayer before legislative sessions was not mandated and involved adults who were less likely to be easily coerced, the Court found no Establishment Clause violation.[46] But, the Court in *Greece* was careful to distinguish legislative prayer from school prayer because of the potential for coercion.[47]

In *Lee v. Weisman*,[48] a school prayer case involving a non-denominational graduation prayer, Justice Kennedy further teased out the risks of prayer in schools, even for those who favor an accommodation approach, stating:

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."[49]

Justice Kennedy then went on to note: "As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[50] He pointed out that prior case law has

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42. *Id.* at 2428.
43. Town of Greece v. Galloway, 572 U.S. 565, 576 (2014).
44. *Kennedy*, 142 S. Ct. at 2428.
45. *Greece*, 572 U.S. at 576.
46. *Id.*
47. *Id.*
48. Lee v. Weisman, 505 U.S. 577 (1992).
49. *Id.* at 587.
50. *Id.* at 592 (citing School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Bd. of Educ. v. Mergens, 496 U.S. 226, 261–62 (1990) (Kennedy, J., concurring).

recognized "that prayer exercises in public schools carry a particular risk of indirect coercion."[51]

In *Kennedy*, Justice Gorsuch distinguished *Lee* because graduations are largely compulsory for students, and therefore listening to prayers would be directly coercive because students cannot avoid them.[52] While the majority noted that coercion remains a concern in school settings, there is little exploration of the risk of coercion or even the evidence that students felt pressured to join the football coach for his post-game prayers.[53] There is no mention of the risk of "subtle coercive pressure" discussed in *Lee* or any risk of indirect coercion.[54] The majority, on the contrary, stated that "in this case [the coach's] private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion."[55]

In *Kennedy*, the majority seems concerned that the school district's actions "suggest that *any* visible religious conduct by a teacher or coach should be deemed impermissibly coercive on students" and that ruling in the school district's favor would allow schools to prevent any visible religious expression such as a prayer over a school lunch, or the wearing of a headscarf, or display of a Star of David.[56] It seems the Court was concerned with school districts making decisions that might go too far to avoid establishment, but which violate free exercise.[57] Future cases will have to determine when the line of coercion is crossed and when school districts can step in; in the meantime, the Court has obviously valued free exercise over establishment, even at the risk of coercion. Gone is the concern for subtle or indirect coercion so important in *Lee*.

WHOSE HISTORY & TRADITION?

In addition to largely ignoring the problem of coercion, the Court in *Kennedy* was also unclear on the source of historical and traditional evidence to be used to test Establishment Clause cases

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51. *Lee*, 505 U.S. at 592 (citing Engel v. Vitale, 370 U.S. 421 (1962); *Schempp*, 374 U.S. at 307) ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.").
52. *Kennedy*, 142 S. Ct. at 2431.
53. *Id.* at 2435–36 (Sotomayor, J., dissenting).
54. *Lee*, 505 U.S. at 592.
55. *Kennedy*, 142 S. Ct. at 2429.
56. *Id.* at 2425.
57. *Id.* at 2432 ("And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.").

following the repudiation of the *Lemon* Test. How should the historical record be weighed and what does the history and tradition approach require concerning prayer in schools? No doubt, a proponent of school prayer will be able to find ample historical examples to support a renewal of the practice similar to what was used by the majority to support legislative prayer in *Greece*. Is that sufficient to renew the practice of school prayer? Or should the history and tradition of a particular school play a role? Justice Gorsuch pointed out numerous examples of religious conduct at Bremerton School District even prior to Kennedy's employment.[58] Was that part of what convinced the Court there was no Establishment Clause violation? The opinion was not very clear on this standard or the evidence to be used, but it followed the general reasoning of the recent line of cases from this Court that focused on history and tradition tests.[59]

The risk of solely employing history and tradition approaches to constitutional questions is that they tend to skew toward the benefit of the majority at the time of the founding: white, wealthy, Christian men. It remains to be seen how the "history and tradition" tests will be applied to future Establishment Clause cases, but where there are likely a surfeit of examples of Christian prayer and exercise in schools, other religious minorities do not have such a benefit. If the Court desires history and tradition to fundamentally anchor legal reasoning in this area, it must be careful not to allow bias to condemn the approach to ignominy. Will the prayer of a Christian coach at the 50-yard line following a game be treated the same as the prayer of a Muslim coach in the same space? What about words said over a candle at a school dance by the teacher who practices Wicca? Only time will tell how the Court will handle these questions. But, the decision in *Kennedy* has already tied the hands of the school districts in addressing religious coercion in school settings. Christians, the majority in most public schools, will be

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58. *Id.* at 2416.

59. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022). The employment of a history and tradition analysis to decide important several Constitutional questions this Term signaled this Court is likely to value such arguments in future cases on a variety of topics and advocates will adjust their arguments accordingly, but the approach is one that will face staunch criticism. One of the chief criticisms of a history and tradition framework is that U.S. history has often marginalized women, people of color, and those belonging to religious minorities. If the court relies exclusively, or even predominantly, on history and tradition to decide cases, it will be prone to perpetuate those inherent inequalities. Additional critics note that the Court has, at times, selectively chosen the history it considers it its decisions and this history it ignores, illustrating that a history and tradition approach can be just as subjective as other approaches to Constitutional analysis.

emboldened to proselytize and will have the backing of the majority community.[60] But the Muslim, Jewish, Hindi, or agnostic student will have neither community backing nor the protection of their school district administration when they face coercion, whether subtle or bold and whether on the field of sport or anywhere else in their school.

CONCLUSION

In *Kennedy*, Justice Gorsuch pronounced that there is only a "mere shadow" of a conflict between the Establishment Clause and Free Exercise and Speech Clauses of the First Amendment, attempting to minimize the perceived adversarial relationship among the constitutional principles. Through this mere shadow, however, one principle is eclipsed by the others. Placing the spotlight on protections of free exercise and speech naturally obscures establishment protections. The Roberts Court appears committed to supporting religious expression in public places, even schools. The broadening of the Free Exercise Clause means we must narrow our view of what constitutes establishment. Future cases are necessary to determine whether this Court will continue to recognize the particular coercive power of authority figures in school settings, and whether the history and tradition approach to Establishment Clause cases will allow for true accommodation or whether it will lead to Christian bias, or even a religious bias over secularism. Perhaps, as noted in the outset, this is an important correction to overemphasized secularization, but it is unfortunate that the Court chose this case with its factual problems to address the concern. Equally, the Court's decision to completely do away with precedent, such as *Lemon*, and to replace it with a vague "history and tradition" standard, leaves school districts and lower courts with almost no guidance in how to apply the ruling. Furthermore, it likely gives a de facto advantage to Christians and Christianity, perhaps just the sort of advancement of a particular religion that the Establishment Clause was written to avoid.

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60. *See* Lupu & Tuttle, *supra* note 7 ("Although any teacher or coach is now free to pray on school premises and on school time, there is every reason to expect that Christian prayer will dominate the scene. Christians remain a majority in most schools, and Christians are far more likely to proselytize than members of other faiths in America. Prayer by Jews, Muslims, and others is more likely to roil the school's fabric of cooperation and more likely to invite complaints by parents – not about prayer per se, but about the exposure of their children to prayer by 'others.'").

Analysis of *Carson v. Makin*

Wilson Huhn[*]

INTRODUCTION

Many school districts in the State of Maine lack high schools, so the children in those districts must attend another school selected by their parents.[1] In 1873 the State of Maine enacted a tuition assistance program, called "town tuitioning," that offers a stipend to participating schools to partially defray the cost of educating children from districts that lack a high school.[2] In 1981 the State of Maine enacted a law that categorically excludes "sectarian schools" from participating in the tuition assistance program.[3] The Maine Department of Education defines a "sectarian school" as a school that is both associated with a particular religious faith and that promotes that faith or presents academic material through the lens of that faith.[4]

Two schools, Bangor Christian Schools (BCS) and Temple Academy, sought the right to participate in the town tuitioning program despite meeting the definition of a "sectarian school." One of the educational objectives of BCS is to "lead each unsaved student to trust Christ as his/her personal savior,"[5] and one of the objectives of Temple Academy is to "foster within each student an attitude of love and reverence of the Bible as the infallible, inerrant, and authoritative Word of God."[6]

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1. *See* Carson v. Makin, 142 S. Ct. 1987, 1993 (2022) (Roberts, C.J.) (summarizing facts of case); *see also* Coleen Hroncich and Solomon Chen, Carson v. Makin*: Another Win for Education Freedom*, CATO INST.: CATO AT LIBERTY (July 21, 2022), https://www.cato.org/blog/carson-v-makin-another-win-education-freedom (same); Carson v. Makin*: Maine Families Fight for School Choice in U.S. Supreme Court Appeal*, INST. FOR JUST., https://ij.org/case/maine-school-choice-3/ (last visited Oct. 16, 2022) (same).
2. *See* sources cited *supra* note 1.
3. Approval for Tuition Purposes, ME. REV. STAT. ANN. tit. 20-A, § 2951 (West 2021). Section 2951(2) provides:

> A private school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution . . . .

4. *See Carson*, 142 S. Ct. at 2007–08 (Breyer, J., dissenting).
5. *Id.* at 2008.
6. *Id.*

Three sets of parents, including Amy and David Carson, sued Pender Makin, the Commissioner of the Maine Department of Education, asserting that the exclusion of sectarian schools, and specifically the exclusion of BCS and Temple Academy, from the tuition assistance program violates the Free Exercise Clause of the First Amendment of the Constitution.[7] On June 21, 2022, the Supreme Court ruled in favor of the parents and held that Section 2951(2) is unconstitutional.[8]

What is remarkable about this decision is that it is the first time that the Supreme Court has forced a state to pay for the religious education of the state's children. The Supreme Court has previously ruled that it is permissible under the Establishment Clause of the First Amendment for a state to *voluntarily include* religious schools in a parental voucher program.[9] But the Court has never before ruled that it violates the Free Exercise Clause for a state to *exclude* religious schools from a taxpayer-funded tuition assistance program.[10]

THE RELIGION CLAUSES OF THE CONSTITUTION

Our most cherished rights are set forth in the Bill of Rights. And the first words of the Bill of Rights are these: "Congress shall make no law respecting an establishment of religion . . . ."[11] Notice the precise wording of the Establishment Clause. It does not prohibit the establishment of "a" religion. It prohibits the establishment of "religion." Notice also the word "respecting." Not only is Congress prohibited from establishing religion, but it may also not make any law "respecting" an establishment of religion. That is, Congress may not enact any laws involving or having anything to do with an establishment of religion.

The second provision of the Bill of Rights is this: "Congress shall make no law . . . prohibiting the free exercise [of religion]."[12] Under the Free Exercise Clause, there can be no laws in our country regulating religious belief or religious doctrine. Americans are free to believe whatever they want to believe and to express their religious

7. *See id.* at 1994–95 (majority opinion).

8. *Id.* at 2002 ("Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment.").

9. Zelman v. Simmons-Harris, 536 U.S. 639, 643–44 (2002) (holding that a state school voucher program that included religious schools does not violate the Establishment Clause).

10. The Court foreshadowed its about-face on this issue in 2020 in Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (striking down a regulation of the Montana Department of Revenue prohibiting the use of tax-credit scholarships at religious schools).

11. U.S. CONST., amend. 1.

12. *Id.*

beliefs.[13] Religiously-motivated conduct, however, is subject to reasonable regulation.[14]

THE COLONIAL EXPERIENCE

Why was the Establishment Clause so important to the Framers that they listed it first among the Bill of Rights? It was because of the colonial experience with laws tending to establish religion. The Establishment Clause is historically identified with the concept that there must be a "separation of church and state."

That phrase was coined by the colonial leader Roger Williams, who in 1635 was exiled from the Massachusetts Bay Colony for heresy.[15] In 1644, in protest of the Massachusetts laws requiring church attendance at the established church and outlawing the expression of beliefs that deviate from the accepted norm, Williams wrote,

> [W]hen they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes [sic] of the world, God hath ever broke down the wall it selfe, . . . and made his Garden a Wilderness, as at this day.[16]

Williams' point was that the exercise of governmental authority by the church inevitably corrupts the church. But separation of church and state means more than that. Williams also wrote that civil government is based upon the will of the people, not religious authority. He concluded: "the sovereign, original, and foundation of civil power lies in the people . . . ."[17] Williams was correct. Our government is based not upon the Christian religion but upon the principle of popular sovereignty. Our present form of government was created in 1788 when "We the People" ordained and established the Constitution of the United States.[18] It is a government of the people, by the people, and for the people.[19]

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13. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

14. *See* Employment Division v. Smith, 494 U.S. 872 (1990) (holding that a law is constitutional under the Free Exercise Clause so long as it is not directed at religion and serves a legitimate governmental interest).

15. *See Roger Williams: American Religious Leader*, BRITTANICA, https://www.britannica.com/biography/Roger-Williams-American-religious-leader (last updated Aug. 31, 2021).

16. ROGER WILLIAMS, MR. COTTONS LETTER LATELY PRINTED, EXAMINED AND ANSWERED, 45 (1644).

17. ROGER WILLIAMS, THE BLOUDY TENENT OF PERSECUTION (1644).

18. U.S. CONST. pmbl.

19. ABRAHAM LINCOLN, *Gettysburg Address*, *in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 22, 23 (Roy P. Basler ed., 1953).

The colony of Massachusetts continued to punish dissenters, exiling Ann Hutchinson[20] and executing Mary Dyer and other Quakers.[21] But freedom of religion blossomed in Rhode Island under the leadership and example of Roger Williams.[22]

A century later, in 1786, the year before the Constitutional Convention, James Madison and Thomas Jefferson opposed a tax that the State of Virginia had adopted to support ministers. Madison wrote his famous *Memorial and Remonstrance Against Religious Assessments*. Madison stated:

> [W]e hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[23]

Madison also successfully led the fight to enact Jefferson's Bill for Religious Freedom, making it unlawful to use tax dollars to support religious establishments. The Bill begins with these words:

> Almighty God hath created the mind free . . . all attempts to influence it by temporal punishments, or burthens . . . are a departure from the plan of the holy author of our religion . . . . [N]o man shall be compelled to frequent or support any religious worship, place, or ministry . . . nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion . . . .[24]

Our first president, George Washington reassured both Catholics and Jews that in this country they would be free to practice their

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20. *See Ann Hutchinson*, HISTORY.COM, https://www.history.com/topics/colonial-america/anne-hutchinson (last updated Aug. 3, 2022).

21. *See Mary Dyer: Quaker Martyr*, BRITANNICA, https://www.britannica.com/biography/Mary-Barrett-Dyer (last updated Sept. 23, 2022).

22. John M. Barry, *God, Government and Roger Williams' Big Idea*, SMITHSONIAN MAG. (Jan. 2012) (describing Williams' role in founding and leading the colony of Rhode Island).

23. Nat'l Archives, *Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, FOUNDERS ONLINE, (quoting VA. DECLARATION OF RIGHTS OF 1776, art. XVI), https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Oct. 6, 2022).

24. Nat'l Archives, *A Bill for Establishing Religious Freedom, 18 June 1779*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082 (last visited Oct. 6, 2022).

religion without interference from the government. In 1788 Washington informed the Vatican through Benjamin Franklin that the Vatican could appoint bishops for the United States without seeking authorization from the American government.[25] In 1790, in his letter to the Touro Synagogue, the new President wrote:

> [F]or, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens . . . [and] every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid.[26]

In 1791 the Bill of Rights was adopted, whose first provision we have seen was the Establishment Clause.[27]

In 1802, our third President, Thomas Jefferson, wrote to the Danbury Baptist Association and described the Establishment Clause and Free Exercise Clause in these terms:

> Believing with you, that religion is a matter which lies solely between Man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, *I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State*.[28]

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25. *See* Sylvia Poggioli, *The Sometimes Tricky Relations Between Popes and Presidents*, NPR (Mar. 26, 2014), https://www.npr.org/sections/parallels/2014/03/26/294320752/the-sometimes-tricky-relations-between-popes-and-presidents (quoting Vatican foreign minister, Archbishop Dominique Mamberti, describing how President Washington informed the Vatican "that it did not need to seek authorization from the U.S. for the appointment of bishops"). The article states:

> The president's reasoning, Mamberti explained, was because "the revolution that brought freedom to the Colonies, first and foremost brought that of religious freedom."

Id.

26. *George Washington's Letter to the Hebrew Congregation of Newport*, TOURO SYNAGOGUE NAT'L HIST. SITE, https://tourosynagogue.org/history/george-washington-letter/washington-seixas-letters/ (last visited Oct. 6, 2022, 9:20 PM).

27. *See supra* notes 11–12 and accompanying text.

28. *Jefferson's Letter to the Danbury Baptists (Jan. 1, 1802)*, LIBR. OF CONG. (June 1998), https://www.loc.gov/loc/lcib/9806/danpre.html (emphasis added) (quoting U.S. CONST. amend. I).

THE SUPREME COURT'S RECOGNITION OF THE PRINCIPLE OF SEPARATION OF CHURCH AND STATE, THE REQUIREMENT OF GOVERNMENT NEUTRALITY, THE SECULAR PURPOSE TEST, AND THE USE/STATUS DISTINCTION

The first time that the Supreme Court struck down a law in protection of freedom of religion was in 1940 in *Cantwell v. Connecticut*.[29] Seven years later, in *Everson v. Board of Education*, after reviewing the words and actions of Madison and Jefferson in colonial Virginia, the Court issued this description of the meaning of the religion clauses:

> *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 Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."*[30]

For 75 years the Supreme Court consistently and repeatedly adhered to the bedrock principle that freedom of religion requires the government to remain neutral with respect to religion.

In 1962, the Court in *Engel v. Vitale* ruled that it was unconstitutional for the New York State Board of Regents to compose a prayer to be read to public school students,[31] and, in 1963, the Court

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29. Cantwell v. Connecticut, 310 U.S. 296 (1940) (reversing convictions for breach of the peace and soliciting without approval as violations of the Establishment Clause and Free Exercise Clause).

30. Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947) (upholding use of state funds to transport children to public and religious schools) (emphasis added) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

31. Engel v. Vitale, 370 U.S. 421 (1962) (striking down an official prayer composed by the New York State Board of Regents for use in the public schools).

in *School District of Abington Township v. Schempp* struck down a Pennsylvania law that required ten Bible verses to be read to public school students every day.[32] In *Schempp*, the Court noted that while there is a tension between the Establishment Clause and the Free Exercise Clause, both of the religion clauses serve the same purpose: the requirement that the government must remain *neutral* in matters of religion:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees.[33]

The Court in *Schempp* explained that any law must have a *secular purpose* and a *primary secular effect*:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[34]

This came to be called the "*Lemon* test," because the Court used it in the 1971 case of *Lemon v. Kurtzman*. In *Lemon*, the Court created the test:

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32. School Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) (striking down state law requiring daily Bible readings or recitation of the Lord's Prayer in the public schools).
33. *Id.* at 222.
34. *Id.*

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[35]

In *Lemon*, and many other cases involving funding of religious schools, the Supreme Court distinguished between state funding that would be used for secular purposes such as school bus transportation which was permissible,[36] and funding that would be used for religious purposes such as teacher salaries which was not permissible.[37]

The conundrum over what is "neutral" with respect to religion led to the Court's recognition that the states must have some degree of discretion in charting a course between the Establishment Clause and the Free Exercise Clause. There is not just a single right answer to every question involving freedom of religion, but rather that there must be some "play in the joints" between the demands of separation of church and state and religious liberty.

PLAY IN THE JOINTS

The related concepts of government "neutrality" toward religion and of "play in the joints" between the demands of the Establishment Clause and the Free Exercise Clause appeared in the seminal case *Walz v. Tax Commission of City of New York*[38] in 1970. In an opinion by Chief Justice Burger the Court stated:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.[39]

Justice Burger added:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that

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35. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (internal citations omitted).

36. *See, e.g.,* Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947) (upholding the use of taxpayer funds to transport children to religious schools).

37. *See, e.g.*, *Lemon*, 403 U.S. at 606 (striking down the use of taxpayer funds to pay for teacher salaries in religious schools).

38. *See generally* Walz v. Tax Com. of N.Y., 397 U.S. 664 (1970) (upholding the granting of property tax exemptions for houses of worship).

39. *Id.* at 668–69.

> no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[40]

The Supreme Court cited the phrase "play in the joints" in several subsequent opinions. In 1973 in *Sloan v. Lemon*[41] the Court struck down Pennsylvania's tuition reimbursement program as violative of the Establishment Clause, ruling that the "play in the joints" that offered the states room to operate between the conflicting demands of the Establishment Clause and the Free Exercise Clause would not allow the state to reimburse parents for the cost of religious education.[42] In 2004 in *Locke v. Davey*[43] the Court acknowledged that under the "play in the joints" doctrine the State of Washington was free to fund theological training and was also free to withhold

40. *Id.* at 669.

41. Sloan v. Lemon, 413 U.S. 825, 835 (1973) (striking down Pennsylvania's tuition reimbursement program under the Establishment Clause).

42. *Id.* at 835. The Court stated:

> But if novel forms of aid have not readily been sustained by this Court, the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: 'Congress' and the States by virtue of the Fourteenth Amendment 'shall make no law respecting an establishment of religion.' With that judgment we are not free to tamper, and while there is 'room for play in the joints,' Walz v. Tax Comm'n, supra, 397 U.S., at 669, 90 S.Ct., at 1412, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

Id.

43. Locke v. Davey, 540 U.S. 712, 718–19 (2004) (upholding state law prohibiting the use of state funds to pursue a degree in theology).

funding for theological training.[44] In 2005 in *Cutter v. Wilkinson*[45] the Court found that "'there is room for play in the joints between' the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause."[46]

In contrast in its three most recent decisions dealing with conflicts between the Establishment Clause and the Free Exercise Clause, the Supreme Court has found there to be no room between the demands of the Establishment Clause and the Free Exercise Clause. Instead, the Court has ruled that if a denial of benefits to religious bodies is not required by the Establishment Clause, then it by definition constitutes discrimination against religion that is forbidden by the Free Exercise Clause.

The Court in *Carson* makes no attempt to chart a course of government neutrality towards religion. This turns fundamental decisions such as *Everson v. Board of Education* and *Walz v. Tax Commissioner* on their heads. In those cases, the Supreme Court ruled that the discretion afforded the states under the religion clauses *allowed* the states to treat religious institutions the same as private non-profit institutions. In *Carson*, as in *Espinoza*, the Supreme Court has ruled that religious institutions *must* be granted the same benefits as private non-profit institutions.

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44. *Id.* at 718–19. The Court stated:

> The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. Yet we have long said that "there is room for play in the joints" between them. In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.
>
> This case involves that "play in the joints" described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, can deny them such funding without violating the Free Exercise Clause.

Id. (internal citations omitted).

45. Cutter v. Wilkinson, 544 U.S. 709, 725–26 (2005) (upholding §3 of the Religious Land Use and Institutionalized Persons Act of 2000 as a permissible accommodation of religion under the Establishment Clause).

46. *Id.* at 713 (citing Walz v. Tax Commissioner, 397 U.S. 664, 669 (1970)).

THE STATUS-USE DISTINCTION

In applying the *Lemon* test in school funding cases, the Supreme Court developed a distinction between the *use* of the funds and the *status* of the recipient. The Establishment Clause prohibited using public funds for religious purposes, but it permitted religious institutions to receive funding for secular purposes. For example, in the 2004 case *Locke v. Davey*, the Court upheld the right of the state to prohibit the use of state funding to study for the ministry because those funds would be *used* for a religious purpose.[47] In contrast, in 2017, the Court in *Trinity Lutheran Church v. Comer* ruled that it violated the Free Exercise Clause for the State of Missouri to prohibit a religious preschool center from qualifying for state funding to improve the safety of its playground because the denial of funding was based solely upon the *status* of the recipient.[48]

THE OVERRULING OF THE "SECULAR PURPOSE" TEST AND THE "USE/STATUS DISTINCTION" AND THEIR REPLACEMENT WITH A TRADITION TEST

In 2014, in *Town of Greece v. Galloway*, a case involving official prayer, the Supreme Court overruled the *Lemon* test and substituted for it a tradition test.[49] In *Galloway*, the Court upheld the practice of a Town Board to hold sectarian prayer at the beginning of town meetings because it was consistent with tradition.[50]

In *Carson v. Makin*, the Supreme Court abandoned the use/status distinction and, as in *Galloway*, the Court replaced this practical standard with a tradition test. In *Carson v. Makin* it was clear that the town tuition funds would be *used* for religious purposes, but the Court distinguished *Locke v. Davey* on the ground that there is a "historic and substantial state interest against using taxpayer funds to support church leaders, . . . [but] that there is no historic and substantial tradition against aiding private religious schools."[51]

47. *Locke*, 540 U.S. at 712 (upholding a statute prohibiting state aid to students for the study of devotional theology).

48. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017) (striking down the exclusion of religious institutions from state aid for improvement of playground surfaces).

49. Town of Greece v. Galloway, 572 U.S. 565, 584 (2014) (upholding the practice of opening town meetings with prayer delivered by invited members of the clergy and concluding that "[t]he prayers delivered in the town of Greece do not fall outside the tradition this Court has recognized.").

50. *Id.*

51. Carson v. Makin, 142 S. Ct. 1987, 2002 (2022) (brackets and internal quotation marks omitted).

Not only did the court in *Carson v. Makin* abandon the secular purpose test and the use/status distinction and replace them with tradition standards, but the Court also grossly misstated our country's history. There is, in fact, a longstanding tradition against using public funds to support private religious schools,[52] and before the Court's recent decision in *Espinoza* there is absolutely no support in American history for the proposition that the government is *required* to support religious education.[53]

Finally, in *Carson v. Makin*, as a practical matter the majority of the Supreme Court also eliminated any "play in the joints" between the Establishment Clause and the Free Exercise Clause, thereby circumscribing the discretion of the states in dealing with religion. The majority stated, "a state's interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling in the face of the infringement of Free Exercise.'"[54]

In *Carson v. Makin* the majority of the Supreme Court does not mention the bedrock principle of separation of church and state. The majority does not attempt to analyze whether its ruling is "neutral" with respect to religion. And the majority manufactures a purported tradition of government subsidization of religious education.

52. *See* Jane G. Rainey, *Blaine Amendments*, FIRST AMEND. ENCYCLOPEDIA https://www.mtsu.edu/first-amendment/article/1036/blaine-amendments (last visited Nov. 4, 2022) (describing the adoption of state constitutional amendments prohibiting the use of public funds to support religious schools). *See also supra* text accompanying notes 22–24, 30.

53. As the Court stated in *Everson*: "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 from they may adopt to teach or practice religion." Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

54. *Carson*, 142 S. Ct. at 1998 (citing Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2250 (2020)).

Privacy: Pre- and Post-*Dobbs*

*Rona Kaufman**

INTRODUCTION

The United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to include a fundamental right to familial privacy. The exact contours of that right were developed by the Court from 1923 until 2015 and included: (1) the right to parent—that is the right to care, custody, and control of one's children;[1] (2) a qualified right to be safe from forced sterilization;[2] (3) the right of married couples and single persons to determine whether to bear or beget a child, including the right to access contraception and abortion;[3] (4) the right to marry a person, without regard to that person's race or sex;[4] and (5) a limited right to autonomy with regard to intimate conduct, association, and relationship.[5] In 2022, with its decision in *Dobbs v. Jackson Women's Health*, the Supreme Court abruptly changed course and held that the right to terminate a pregnancy is no longer part of the right to privacy previously recognized by the Court.[6] This essay seeks to place *Dobbs* in the context of the Court's family privacy cases in an effort to understand the Court's reasoning and the impact the decision may have in the future. To that end, Part I reviews ninety years of Supreme Court privacy jurisprudence. Part II considers the *Dobbs* decision, including the majority, concurring, and dissenting opinions. Part III considers how *Dobbs* may impact privacy jurisprudence moving forward.

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1. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).
2. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942).
3. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).
4. *See generally* Loving v. Virginia, 388 U.S. 1 (1967).
5. *See generally* Obergefell v. Hodges, 576 U.S. 644, 681 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Eisenstadt v. Baird, 405 U.S. 438 (1972).
6. *See generally* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

PART I: PRIVACY

In 1923, in *Meyer v. Nebraska*, the Supreme Court held that a state law prohibiting foreign language instruction for children was unconstitutional.[7] Specifically, the Court found that liberty protected by the due process clause:

> [w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, to worship God . . ., and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[8]

Two years later, in *Pierce v. Society of Sisters*, the Court struck down a statute which prohibited children from being educated in parochial schools.[9] Relying on *Meyer*, the Court found:

> that [this statute] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be [so] abridged by legislation which has no reasonable relation to some purpose within the competency of the state.[10]

In 1927, the Supreme Court had another opportunity to consider the parameters of liberty and privacy.[11] In *Buck v. Bell*, the Court upheld a Virginia statute that made it possible for the state to sterilize Carrie Buck, "a feeble minded white woman," against a challenge that the law was an unconstitutional violation of her Fourteenth Amendment substantive due process and equal protection rights.[12] The Court reasoned that:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our

7. Meyer v. Nebraska, 262 U.S. 390, 400–03 (1925).
8. *Id.* at 399.
9. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925).
10. *Id.*
11. *See generally* Buck v. Bell, 274 U.S. 200 (1927).
12. *Id.* at 205.

> being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.[13]

Thus, in the case of sterilizing a feeble-minded woman, so as to prevent her from birthing undesirable offspring, the Court summarily set aside the argument that her liberty was being infringed upon.[14] It did not seriously consider that forced sterilization statutes might "unreasonably interfere[] with [women's] liberty"[15] or their right to "establish a home and bring up children"[16]—rights recognized as fundamental in *Meyer* and *Pierce*. Instead, it determined that her "sacrifice" was reasonable in light of the state interest in preventing "being swamped with incompetence" and "waiting to execute degenerate offspring for crime."[17]

In 1942, the Court took a very different approach in a similar case when considering the constitutionality of a state statute authorizing the sterilization of Jack Skinner and other "habitual criminals."[18] In *Skinner v. Oklahoma*, the Court found that the forced sterilization of a certain class of criminals violated the equal protection clause.[19] In reaching its conclusion, the Court discussed the nature of the substantive rights involved:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[20]

13. *Id.* at 207 (internal citation omitted).
14. *Id.*
15. *Pierce*, 268 U.S. at 534–35.
16. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
17. *Buck*, 274 U.S. at 207.
18. Rachel Gur-Arie, Skinner v. Oklahoma *(1942)*, THE EMBRYO PROJECT ENCYCLOPEDIA, https://embryo.asu.edu/pages/skinner-v-oklahoma-1942 (last modified July 3, 2018) (citing Skinner v. Oklahoma, 316 U.S. 535, 536 (1942)).
19. *Skinner*, 316 U.S. at 541.
20. *Id.*

Importantly, *Buck* concerned the forced sterilization of a woman[21] while *Skinner* concerned the forced sterilization of a man.[22] Moreover, *Skinner* did not overrule *Buck*.[23] While *Skinner* made it unlawful to sterilize a criminal based on a specific number and character of crimes, it did not make it unlawful for the state to forcibly sterilize feeble-minded women.[24] Of course, it seems clear that it would be an unconstitutional violation of the right to equal protection for the state to discriminate on the basis of sex or race with regard to forcible sterilization. Nevertheless, in practice, women, especially Black and Latina women, are much more likely to be sterilized than men or white women.[25]

With regard to the nature of the liberty rights upon which they rested, neither *Meyer,* nor *Pierce,* nor *Skinner* was explicit about the constitutional foundation. In all three decisions, the Court appeared to simply *know* that the particular state interference was unconstitutional because it infringed on *liberty*.[26] Similarly, in *Buck*, the Court did not engage in a discussion about a constitutionally based right that might call the forced sterilization statute into question—rather, it simply concluded this was not one of those instances when a state statute unconstitutionally interfered with *liberty*.[27] A constitutionally analyzed explication of the right to liberty in the context of family, parenting, or procreation did not come until 1965 when the Court struck down a State statute that prohibited the use of contraceptive devices by married couples.[28]

In *Griswold*, the Court deemed Connecticut's eighty-year-old statute unconstitutional on the basis that it interfered with the married couple's right to liberty.[29] Like in *Skinner*, the Court once again engaged in its discussion with lofty language noting that the

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21. *Buck*, 274 U.S. at 205.

22. *Skinner*, 316 U.S. at 537.

23. Lisa Powell, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 484 (2002).

24. *Skinner*, 316 U.S. at 541.

25. Emily Medosch, *Not Just ICE: Forced Sterilization in the United States,* IMMIGR. AND HUM. RTS. L. REV. BLOG (May 28, 2021), https://lawblogs.uc.edu/ihrlr/2021/05/28/not-just-ice-forced-sterilization-in-the-united-states/.

26. "Although Meyer and Pierce served as precedents in support of the privacy right of couples to make decisions about procreation, they are not themselves procreative liberty cases, nor do they explain, with any particularity, the right of parents to make decisions regarding the upbringing of their children." Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 536 (2001).

27. Buck v. Bell, 274 U.S. 200, 207 (1927).

28. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

29. *Id.*

rights at issue were among the "basic civil rights of man."[30] The Court stated: "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system."[31] But then, in contrast to *Skinner*, the *Griswold* Court was very specific.[32] The Majority identified the source for a constitutional right to marital privacy as being found in the penumbras of the Bill of Rights–specifically–the First Amendment's right to association,[33] the Third Amendment's right against quartering soldiers in one's home during times of peace,[34] the Fourth and Fifth Amendments' rights to be safe from governmental intrusion into one's home, papers, and self-incriminating knowledge,[35] and the Ninth[36] Amendment's explicit retention of individual rights not expressly enumerated.[37] In discussing these rights, the Court focused on the right to privacy that underlies them and concluded that they "create . . . zone[s] of privacy" which the government may not "force him to surrender."[38] In their concurrence, Justices Goldberg, Warren, and Brennan conceptualized the rights at issue as being grounded in the Ninth and Fourteenth Amendments, not in the penumbras as situated by the Majority.[39] With regard to the Ninth Amendment, they stated:

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30. *Id.* at 502 (White, J., concurring).
31. *Id.* at 486 (majority opinion).
32. As one *Griswold* commentator noted,

> The most controversial, boldly-constitutional species of privacy began to take form out of bits and shreds in 1965, with the decision of the Supreme Court in *Griswold v. Connecticut*. Griswold exploded the world of individual liberties wide open by holding that an 80-year-old Connecticut law forbidding the use and distribution of contraceptives violated the right of "marital privacy" embodied—somewhere—in the Constitution. Six members of the Court agreed that the privacy was a fundamental right. Yet where this right took up residence in the text of the Constitution was a source of splintered opinions. Justice Douglas, who authored the opinion for the Court, offered his now-famous explication that the "right to privacy" could be found drifting amidst the "penumbras" of the First, Third, Fourth, Fifth and Ninth Amendments. Other Justices quarrelled over its source, but a majority of the Court found a fundamental right of privacy broad enough to protect the ability of married couples to decide what to do in the privacy of their marital bedrooms, without the intruding nose of the state of Connecticut.

Ken Gormley, *One Hundred Years of Privacy,* 1992 WIS. L. REV. 1335, 1391–92 (1992).

33. *Griswold*, 381 U.S. at 484.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 486–87 (Goldberg, Warren, and Brennan, JJ., concurring).

> To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.[40]

By contrast, Justices Harlan and White found the right in the Fourteenth Amendment's concept of ordered liberty.[41] Finally, Justices Black and Stewart dissented, stating: "I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."[42] Thus, in a 7-2 decision, the Court conceptualized the right to privacy, grounding it in the Bill of Rights and the Fourteenth Amendment, and found that marital privacy, specifically the right of married couples to decide whether to use birth control, was fundamental.[43]

Two years later, in 1967, the Court considered privacy in the context of marriage.[44] In *Loving v. Virginia*, the Supreme Court struck down an anti-miscegenation statute on the basis of both equal protection and substantive due process.[45] The decision in *Loving* focused heavily on the equal protection analysis and had little to say about why exactly the statute denied the Lovings liberty without due process of law.[46] The Court simply noted that the freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[47] It relied on *Meyer* and *Skinner* and identified marriage as "one of the 'basic civil rights of man,' fundamental to our very existence and survival."[48] The Court determined that denial of the right to marriage on racial grounds "is surely to deprive all the State's citizens of liberty without due process of law."[49] And, finally, it recognized that the "freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."[50]

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40. *Id.* at 491.
41. *Id.* at 499–507 (Harlan and White, JJ., concurring).
42. *Id.* at 527, 530 (Stewart and Black, JJ., dissenting).
43. *Id.* at 479 (majority opinion).
44. Loving v. Virginia, 388 U.S. 1, 1 (1967).
45. *Id.*
46. *Id.*
47. *Id.* at 12.
48. *Id.*
49. *Id.*
50. *Id.*

Five years later, in 1972, the Court decided *Eisenstadt v. Baird*, a case similar to *Griswold* but where, rather than considering the infringement of a state contraceptive ban on "married couples," it considered the constitutionality of a state contraceptive ban applied to "unmarried persons."[51] To say that *Eisenstadt* revolutionized our understanding of familial privacy, is an understatement. Prior to *Eisenstadt*, the idea of a right to privacy was consistent with national respect for tradition and patriarchal prerogative. With *Eisenstadt*, that was no longer the case. In *Eisenstadt*, the Court clearly stated that the right to privacy was not a martial right but, rather, an individual right.[52] It famously explained:

> Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[53]

One year later, in *Roe v. Wad*e, the Court extended *Eisenstadt*'s reasoning that privacy protects the right of the individual to make her own decision as to whether to bear or beget a child, to her decision to terminate her pregnancy.[54] Duquesne University President, law professor, and scholar, Ken Gormley, characterized the move from earlier privacy cases to the privacy conceptualization in *Griswold* and *Roe* as "ingenious":

> The ingenious thing about Griswold and Roe, in retrospect, was that they succeeded in blending well-respected constitutional privacy notions—primarily drawing from Fourth and First Amendment cases—with forgotten turn-of-the-century "liberty" cases under the Fourteenth Amendment and swirled these together to produce a completely new form of privacy dealing with "liberty of choice."[55]

The following year, the Court considered whether public school mandatory maternity leave rules—which would force pregnant

51. Eisenstadt v. Baird, 405 U.S. 438, 438 (1972).
52. *Id.* at 453.
53. *Id.* (emphasis added).
54. Roe v. Wade, 410 U.S. 113, 169–70 (1973).
55. Gormley, *supra* note 32, at 1396.

women to leave work at a fixed point during their pregnancies—violated the women's Fourteenth Amendment due process rights.[56] Relying on the "freedom of personal choice in matters of marriage and family life"[57] and citing to *Meyer*, *Pierce*, *Griswold*, *Eisenstadt, Roe,* and *Skinner*, among other cases, the Court found that such mandatory maternity leave rules violated the women's Due Process rights.[58]

In 1976, the Court further affirmed the singularity of the woman's choice to terminate a pregnancy when it struck down a state statute requiring spousal consent.[59] In *Danforth*, the Court expressed its respect for the husband's concerns:

> We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society.[60]

Despite its recognition of the father's "deep and proper concern and interest,"[61] the Court concluded that he could not be given a veto over his wife's decision:

> [I]t is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.[62]

Further, the Court found that the state could not imbue him with the power to prevent his wife from terminating her pregnancy where the state itself lacked that power: "we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right."[63]

> The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two

56. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634 (1974).
57. *Id.* at 639.
58. *Id.* at 640, 646.
59. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70 (1976).
60. *Id.* at 69.
61. *Id.*
62. *Id.* at 71.
63. *Id.* at 70.

> marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.[64]

In 1977, in *Carey v. Population Services*, another contraceptives case, the Court summarized its privacy jurisprudence:

> Although "(t)he Constitution does not explicitly mention any right of privacy," the Court has recognized that one aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment is "a right of personal privacy, or a guarantee of certain areas or zones of privacy." This right of personal privacy includes "the interest in independence in making certain kinds of important decisions." While the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions "relating to marriage; procreation; contraception; family relationships; and childrearing and education." *The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy* . . . . This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.[65]

Despite the Court's recognition of a broad right to privacy in *Carey*, in 1986, the Court declined to extend that right to include gay sex.[66] In *Bowers v. Hardwick*, the Court distinguished the privacy right being sought from those the Court had already recognized, stating:

> [N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or

64. *Id.* at 71.
65. Carey v. Population Servs., Int'l, 431 U.S. 678, 684–85 (1977) (internal citations omitted) (emphasis added).
66. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

> procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.[67]

In 1992, in *Planned Parenthood v. Casey*, the Court returned to its *Danforth* reasoning and took it a step further when it struck down a Pennsylvania law that merely required a woman to notify her spouse of her intent to have an abortion.[68] Through *Danforth* and *Casey*, the Court recognized that prior to the birth of a child, the woman's rights are paramount and her husband does not even have the right to know she is planning to terminate a marital pregnancy.[69] In so doing, the Court struck a vital blow to patriarchal power over the family and again reminded us that "marital privacy" had been replaced by "individual privacy."

In 2003, the Court seized another opportunity to consider whether the right to privacy was broad enough to include gay sex.[70] In *Lawrence v. Texas,* the Court overruled *Bowers v. Hardwick* and held that the criminalization of gay sex was unconstitutional.[71] In *Lawrence*, the Court found that liberty includes an understanding of autonomy that encompasses intimate expression and sexual orientation.[72] Specifically, it stated that "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[73] Importantly, the Court was clear that its decision did not implicate the right to marriage, stating: "[this case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[74]

Twelve years later, in 2015, the Court decided *Obergefell v. Hodges* and found that prohibitions against same-sex marriage

67. *Id.* at 190–91.
68. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 901 (1992).
69. *See generally* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).
70. Lawrence v. Texas, 539 U.S. 558, 562 (2003).
71. *Id.* at 578–79.
72. *Id.* at 562.
73. *Id.*
74. *Id.* at 578.

were, like prohibitions against same-sex sexual conduct, unconstitutional.[75] In *Obergefell,* the Court went well beyond its holding in *Lawrence* by sanctioning same-sex marriage.[76] The Court went to great lengths to explain its decision—ostensibly, at least in part, because *Obergefell* was the realization of the *Lawrence* dissent's fear and prediction that legalization of gay sex would eventually lead to the sanction of gay marriage.[77] After reciting the history of same-sex relationships and various court decisions—none of which demonstrated any deeply rooted right to gay marriage in our nation's history[78]—the Court justified its decision to include same-sex marriage as a privacy right derived from the Fourteenth Amendment right to liberty by reasoning that "four principles and traditions . . . demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[79]

In *Obergefell* the Court once again discussed its privacy jurisprudence. It explained that while many of the family privacy rights arose independently, over time they merged to form a "constellation" of constitutional rights to privacy. Scholars have noted that the "Rights to abortion, contraception, marriage, kinship, and the custody and rearing of children have, for the most part, sprung up independently of one another, only later converging into a loosely recognized constellation of 'family privacy' rights."[80] Thus, in 2015, the Court merged the various strands of privacy recognized since 1923 in finding that the right to liberty under the Due Process clause of the Fourteenth Amendment necessarily includes a "constellation" of family privacy rights" that must extend to the right of individuals to marry someone of the same sex.

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75. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

76. *Id.*

77. *Id.* "But this [distinction] cannot itself be a denial of equal protection, since it is precisely the same distinction regarding partner that is drawn in state laws prohibiting marriage with someone of the same sex while permitting marriage with someone of the opposite sex." *Lawrence*, 539 U.S. at 600. "This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage." *Id.* "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so." *Id.* at 605.

78. *Obergefell*, 576 U.S. at 659–64.

79. *Id.* at 665.

80. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 525, 528 (2000).

PART II: *DOBBS V. JACKSON WOMEN'S HEALTH*

At issue in *Dobbs v. Jackson Women's Health* was a Mississippi statute that prohibited most abortions after fifteen weeks of pregnancy.[81] Based on a pre-*Dobbs* understanding of the constitutional right to privacy, the Mississippi statute was a facially invalid ban on a woman's right to choose whether to bear or beget a child.[82] However, contrary to established privacy precedent, the Supreme Court overruled *Roe* and *Casey* and held no such right is expressly or implicitly protected by any constitutional provision, including the Due Process Clause of the Fourteenth Amendment.[83] Essentially, the Court carved abortion rights out of its privacy jurisprudence and out of the "constellation" of family privacy rights it had recognized just nine years prior. In doing so, it distinguished abortion from all other privacy rights on the basis that none of the other rights involve "the critical moral question posed by abortion"[84] and because none of the other privacy cases involve "potential life."[85]

In reaching its decision to overturn *Roe* and *Casey*, the majority relied on five reasons. First, the Fourteenth Amendment does not include a right to an abortion.[86] Second, no right to abortion is deeply rooted in the nation's history.[87] Third, abortion is not part of some broader entrenched constitutional right—some right to autonomy and to define one's concept of existence.[88] Fourth, stare decisis does not demand that *Roe* and *Casey* be affirmed.[89] And, fifth, the factors to be considered in deciding when to overrule a precedent weigh in favor or overturning *Roe* and *Casey*.[90]

With regard to the substantive due process aspect of the first rationale—that the Fourteenth Amendment does not include a right to abortion—the Court regressed to the language used by the majority in *Bowers*, stating:

> [W]e must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy . . . . Instead, guided by the history and tradition that

81. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2243 (2022).
82. *Id.* at 2244.
83. *Id.* at 2284.
84. *Id.* at 2258.
85. *Id.* at 2260.
86. *Id.* at 2248.
87. *Id.* at 2253.
88. *Id.* at 2257.
89. *Id.* at 2261–63.
90. *Id.* at 2265.

> map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term "liberty." When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to abortion.[91]

The Court then engaged in a historical review to support its second reason—that the right to abortion is not deeply rooted in our nation's history.[92] With regard to its third rationale, that abortion is not part of some broader entrenched right or a right to autonomy, the court simply summarized: "These attempts to justify abortion through appeals to a broader right to autonomy and to define one's 'concept of existence' prove too much. Those criteria, at a high level of generality, could license fundamental rights to illicit drugs, prostitution, and the like."[93] The Court further argued that such a right need not be part of a woman's quest for autonomy given the equal status women have achieved since the 1970s:

> [A]ttitudes about the pregnancy of unmarried women have changed drastically; . . . federal and state laws ban discrimination on the basis of pregnancy; . . . leave for pregnancy and childbirth are now guaranteed by law in many cases; . . . costs of medical care associated with pregnancy are covered by insurance or government assistance; . . . States have increasingly adopted "safe haven" laws, which generally allow women to drop off babies anonymously; . . . a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.[94]

The Court then turned to its fourth rationale—that stare decisis does not mandate that *Roe* and *Casey* be upheld—arguing that it could excise the abortion cases from its privacy jurisprudence without threatening any other aspects of the right to privacy.[95] Finally,

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91. *Id.* at 2247–48 (internal citations omitted).
92. *Id.* at 2265–68. It should be noted that the *Dobbs* historical record has been criticized for its inaccuracies and omissions. Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174.
93. *Dobbs*, 142 S. Ct. at 2258 (internal citation omitted).
94. *Id.* at 2258–59.
95. *Id.* at 2262–64.

the Court turned to its fifth reason, that all relevant factors weigh in favor of overturning *Roe* and *Casey*.[96]

Justice Thomas concurred in the judgment, separately stating his view that there are no substantive rights under the Fourteenth Amendment and all the privacy cases should be overturned.[97] By contrast, Justice Kavanaugh's concurrence sought to calm those who would claim the court is minutes away from overturning the rights to contraception, gay sex, interracial marriage, and same-sex marriage.[98] He argued that the majority's decision was neutral on the issue of abortion, that it merely returned the issue to the states and the people.[99] Kavanaugh further provided specific assurance that the other privacy cases remain protected law and that if a state attempted to prevent a woman from traveling to another state to procure a legal abortion such attempt would be unconstitutional.[100] Meanwhile, in his own concurring opinion, Roberts chastised the Majority for judicial overreach and argued that the Court went too far, that it should have followed precedent by recognizing the right of the woman to choose, and that it simply should have adjusted *Casey's* viability framework to find this Mississippi statute constitutional.[101]

In their Dissent, Justices Breyer, Kagan, and Sotomayor attacked the Majority decision on several bases. Two of their arguments are specifically relevant to the discussion in Part III below. They are: (1) that the Majority's view of abortion regulation as neutral medical regulation—irrelevant to women and women's equality—is wholly out of touch with reality;[102] and (2) that the Majority's assertion that its decision does not necessarily threaten all privacy cases over the last 100 years is disingenuous at best.[103] Specifically, they stated "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[104] Further, "[t]oday's Court . . . does not think there is anything of

96. *Id.* at 2265.
97. *Id.* at 2301–04 (Thomas, J., concurring).
98. *Id.* at 2309–10 (Kavanaugh, J., concurring).
99. *Id.* at 2305.
100. *Id.* at 2309.
101. *Id.* at 2310–17 (Roberts, C.J., concurring).
102. *Id.* at 2328 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
103. *Id.* at 2331–33.
104. *Id.* at 2318. In listing the many ways in which women's status has improved, the Court failed to consider the role that reproductive rights, specifically the right to abortion, played such a change in status since *Roe* was decided. Caitlin Knowles, et al., *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, BROOKINGS (Nov. 30, 2021), https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/.

constitutional significance attached to a woman's control of her body and the path of her life."[105] And, finally,

> [O]ne of two things must be true. Either the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other.[106]

PART III: DOBBS AND THE "CONSTELLATION" OF FAMILY PRIVACY RIGHTS

Pursuant to *Dobbs*, the constitutional right to privacy found in the Due Process Clause of the Fourteenth Amendment does not include any right to terminate a pregnancy.[107] However, the constitutional right to privacy continues to protect the right of the individual to use contraception to prevent pregnancy, the qualified right to not be sterilized against one's will, the right to parent one's child, the right to marry a person of one's choosing without regard to race or sex, and the right to engage in intimate sexual conduct with another consenting adult within the privacy of one's home.

It is challenging to understand constitutional privacy as articulated by the Court from 1972 until 2015 without including the Court's decisions in *Roe*, *Danforth,* *Casey*, and other abortion cases.[108] It is especially difficult to distinguish the rights recognized in *Roe* and its progeny from *Eisenstadt* given that it was *Eisenstadt*, not *Roe*, that protected a woman's right to "decide whether to bear or beget a child."[109] Nevertheless, in *Dobbs*, the Court was clear that though the right to terminate a pregnancy is no longer included in the "constellation" of family privacy rights, this extraction does not weaken or threaten the right to contraception protected in *Griswold*, *Eisenstadt*, and *Carey*.[110] It is impossible to predict whether *Dobbs* will lead the Court to overrule *Griswold*, *Eisenstadt*, and *Carey*. However, regardless of whether the Court later overrules the contraception cases and further extracts rights from the "constellation" of family privacy rights, *Dobbs* is causing confusion with

105. *Dobbs*, 142 S. Ct. at 2323 (Breyer, Sotomayor, and Kagan, JJ., dissenting).
106. *Id.* at 2319.
107. *See generally Dobbs*, 142 S. Ct. at 2228.
108. *See generally* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 505 U.S. 833 (1992); Bellotti v. Baird, 443 U.S. 622 (1979); Gonzales v. Carhart, 550 U.S. 124 (2007).
109. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).
110. *Dobbs*, 142 S. Ct. at 2332 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

regard to the right to access contraception. Specifically, elected officials and health care workers are unsure whether state laws that prohibit all abortions also include a ban on certain types of birth control.[111] Further, to the extent that some states are considering banning certain forms of birth control, there is confusion as to whether such laws would be constitutional under the existing constitutional framework where abortion bans are permissible but contraception bans are not.[112] Similarly unclear is how *Dobbs* impacts in vitro fertilization and other reproductive technologies.[113]

Likewise, there are questions regarding whether *Lawrence* and *Obergefell* can survive *Dobbs*.[114] Given that the rights to gay sex and gay marriage are less "deeply rooted in our nation's history" than the right to terminate an early-term pregnancy; and given that, in significant part, *Dobbs* was based on the view that the right to abortion is not "deeply rooted in our nation's history," it is difficult to understand why *Lawrence* and *Obergefell* will remain good law.

As with contraception, and autonomy in intimate relationships, it is difficult to understand how parental rights survive *Dobbs* given that *Dobbs* very clearly distinguished abortion from other privacy rights on the basis that abortion concerns "potential life."[115] At law, the state interest in protecting living children is and always has been significantly greater than any state interest in protecting potential life.[116] Therefore, if what separates *Dobbs* from the other privacy cases is that there is another relevant interest—that of potential life—than any privacy rights that concern living children, cases like *Meyer*, *Pierce*, and *Lafleur* are arguably under threat, or at least weakened.

Finally, with regard to the right recognized in *Skinner*, that is, a qualified right to not be forcibly sterilized, it is also unclear how or if *Dobbs* will have an impact. When thinking of one's right to determine whether to bear or beget a child, the right appears to be both a positive and negative right—that is the right to chose to *have*

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111. Savannah Hawley, *Major Health System Stops, Then Resumes Plan B Amid Missouri's Abortion Ban Ambiguity*, NPR (June 29, 2022), https://www.npr.org/sections/health-shots/2022/06/29/1108682251/kansas-city-plan-b.

112. Michael Ollove, *Some States Already are Targeting Birth Control*, PEW (May 19, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control.

113. Erin Heidt-Forsythe, et al., Roe *is gone. How Will State Abortion Restrictions Affect IVF and More?,* WASH. POST (June 25, 2022), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/.

114. *Dobbs*, 142 S. Ct. at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting).

115. *Id.* at 2258 (majority opinion).

116. Planned Parenthood v. Casey, 505 U.S. 833, 895–98 (1992).

a child as well as the right to choose to *not have* a child. The right infringed upon in *Skinner* was the right to choose to have a child.[117] The mirror image of that right, the right to choose to not have a child, is the right secured by *Roe*. Now that *Roe* has been overturned, are there consequences for the right to choose to have a child? Pre-*Dobbs*, the right, like the right to abortion, was already heavily qualified by *Buck*.[118] It is unclear whether *Dobbs* further qualifies the right to not be subject to forced sterilization.

Dobbs v. Jackson Women's Health changed our understanding of privacy law. To the extent that the "constellation" of family privacy rights that existed pre-*Dobbs* was predictable and clear, it no longer is. Also unclear is how Dobbs will change our remaining understanding of the Fourteenth Amendment Due Process right to liberty. While this essay does not provide any answers with regard to what the future holds, it attempts to provide a useful background to explain how the Supreme Court interpreted the fundamental right to privacy pre-*Dobbs* and how it may be interpreted post-*Dobbs*.

117. Skinner v. Oklahoma, 316 U.S. 535, 536 (1942).
118. Buck v. Bell, 274 U.S. 200, 205–06 (1927).

Let the Right Ones In: The Supreme Court's Changing Approach to Justiciability

*Richard L. Heppner Jr.**

In last term's blockbuster case *Dobbs v. Jackson Women's Health Organization*, one of the considerations Justice Alito cited for overturning *Roe* and *Casey* was that they "have led to the distortion of many important but unrelated legal doctrines."[1] Alito asserted that abortion jurisprudence has, among other things, "ignored the Court's third-party standing doctrine."[2] Whether that is a fair description of the case law is debatable. But it raises the question of whether the newly ascendant conservative majority might likewise distort standing doctrine, and other justiciability doctrines, in order to decide particular, controversial issues.

The power of federal courts to act is circumscribed not only by the limits of subject matter jurisdiction, but also by various justiciability doctrines. Article III of the Constitution vests the "judicial power of the United States" in the Supreme Court and "such inferior courts" as Congress creates.[3] That power is limited to deciding "cases" and "controversies."[4] It does not permit federal courts to provide advisory opinions when there is not a real dispute between the parties. Based on that constitutional limit, and related prudential concerns, the Court has developed a variety of justiciability requirements limiting which cases can be heard in federal courts, including standing, mootness, and ripeness.[5]

The standing requirement focuses on the party advancing the claim (usually the plaintiff), asking whether it has a "personal

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2275 (2022).
2. *Id.* at 2275–76 (2022). The other doctrines he identified are the standard for facial constitutional challenges, *res judicata*, rules of severability, constitutional avoidance, and the First Amendment. *Id.*
3. U.S. CONST. art. III, § 1.
4. *Id.*
5. *See* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 3529 (3d ed. 2022).

stake" in the litigation.[6] The mootness and ripeness doctrines focus on the timing of the case: If a case is too late—such that the issues "are no longer 'live' or the parties lack a legally cognizable interest in the outcome"—then it is moot.[7] If a case is too early—such that it depends on "contingent future events that may not occur as anticipated, or indeed may not occur at all"—then it is not ripe.[8]

Because each justiciability doctrine poses a potential barrier to accessing federal court, they can frustrate parties who want to effect change through litigation. Indeed, some have criticized the Court's justiciability jurisprudence for allowing courts to avoid deciding cases involving controversial issues.[9] But the justiciability requirements also act as a curb on the courts' power—preventing judicial activism by stopping courts from reaching such issues.[10] This Article argues that the Supreme Court, on its way to reaching several hot-button issues last term, minimized or ignored some justiciability problems.

As discussed below, in *Federal Election Commission v. Ted Cruz for Senate*, the Court minimized standing concerns in order to strike down a campaign-finance law on First Amendment grounds.[11] In two other cases, *Berger v. North Carolina NAACP* and *Cameron v. EMW Women's Surgical Center*, the Court interpreted the standing-related question of intervention loosely to permit state officials to defend a state voter-identification law and a state-law abortion restriction against constitutional challenges.[12] And in *West Virginia*

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6. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021).

7. Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013) (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982)).

8. Trump v. New York, 141 S. Ct. 530, 535 (2020) (quoting Texas v. United States, 523 U.S. 296, 300 (1998)).

9. *See* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 597 (2010) (collecting criticisms of the standing doctrine and arguing that progressive Justices devised the standing doctrine to insulate New Deal legislation from constitutional challenges); *id.* at 653 (noting that "The short period of New Deal insulation was followed only by a long period of conservative 'cooptation' of standing to retard the rights revolution."); *see, e.g.*, Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 145–46 (2013) (arguing that the majority in *Hollingsworth v. Perry*, 570 U.S. 693 (2013) "probably" used standing doctrine to "duck[ ] the constitutional issue . . . because one or more of the . . . Justices . . . were not yet prepared to impose gay marriage on the states.").

10. *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1, 7 (2016) (summarizing arguments for using justiciability doctrines to avoid contentious issues, thereby safeguarding judicial legitimacy and leaving space for democratic dialogue); Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346–56 (1936) (Brandeis, J., concurring) (arguing for using justiciability to avoid contentious, constitutional issues).

11. FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022).

12. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191 (2022); Cameron v. EMW Women's Surgical Ctr., PSC, 142 S. Ct. 1002 (2022).

v. EPA, the Court sidestepped questions of mootness to strike down an EPA regulation and announce the "major questions doctrine" as a new tenet of administrative law.[13]

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To establish standing, Article III requires a plaintiff to show three things: (1) an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by the requested relief.[14] In recent years, much of the focus has been on the injury requirement, with the Court making it harder to show a sufficiently "concrete and particularized" injury to give rise to standing.[15] In *Clapper v. Amnesty International*, for example, the Court held that attorneys, journalists, and human rights activists challenging the constitutionality of the Foreign Intelligence Surveillance Act had not pled an injury giving rise to standing, even though they alleged that they had incurred significant costs to ensure the confidentiality of their communications, because those costs were not traceable to the Act's enforcement.[16] In *Spokeo, Inc. v. Robins*, the Court held that a plaintiff had not alleged an injury in fact giving rise to standing, even though he alleged a violation of a federal statute designed to protect him, because he had not alleged a concrete harm from the violation.[17] And, in *TransUnion LLC v. Ramirez*, the Court held that, in a class action alleging a violation of the Fair Credit Reporting Act, only plaintiffs who suffered a concrete harm (above and beyond a violation of the Act's credit-reporting requirements) had suffered a concrete and particularized injury giving rise to standing.[18]

Last term, standing was an issue in *Federal Election Commission v. Ted Cruz for Senate*.[19] There, Senator Ted Cruz deliberately broke a campaign finance regulation to cause himself a monetary loss and create an injury so that he could challenge the constitutionality of a Federal Election Commission ("FEC") campaign

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13. West Virginia v. EPA, 142 S. Ct. 2587 (2022).
14. Lujan v. Defenders. of Wildlife, 504 U.S. 555, 560–61 (1992); *Cruz*, 142 S. Ct. at 1646.
15. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021); *see also* Michael Gentithes, *Concrete Reliance on Stare Decisis in A Post-*Dobbs *World*, 14 CONLAWNOW 1, 9 (2022); Richard L. Heppner Jr., *Statutory Damages and Standing After* Spokeo v. Robins, 9 CONLAWNOW 125, 125 (2018).
16. Clapper v. Amnesty Int'l, 568 U.S. 398 (2013).
17. Spokeo, Inc. v. Robins, 578 U.S. 330, 333–34 (2016).
18. *Ramirez*, 141 S. Ct. at 2190.
19. FEC v. Ted Cruz for Senate, 142 S. Ct. 1638 (2022).

finance regulation and the provision of the Bipartisan Campaign Reform Act ("BCRA") authorizing it.[20]

Under Section 304 of BCRA, political candidates who loan their own money to their political campaigns may use no more than $250,000 of post-election contributions to pay themselves back.[21] The purpose behind the limit is simple: Congress wanted to prevent wealthy politicians from collecting money after they had already been elected that would go directly into their own pockets, because such direct post-election contributions raise the likelihood and appearance of improper influence. To implement that limit, the FEC issued regulations providing that: (1) political campaigns may repay candidates up to $250,000 in loans using contributions made "at any time"; (2) repayments in excess of $250,000 must be made "within [twenty] days of the election"; and (3) after the twenty-day deadline, any unpaid loans in excess of $250,000 must be treated as a contribution and not repaid.[22] Thus, under the regulations, there is no limit on the amount of money that candidates may lend their campaigns, but they must repay all but $250,000 of the loans within twenty days of the election, to avoid repaying themselves from post-election contributions.

While running for reelection in 2018, Ted Cruz loaned his own campaign committee $260,000, and they did not try to pay it back until after the twenty-day deadline had passed.[23] Therefore, they were able to repay only $250,000, and the remaining $10,000 was deemed a campaign contribution. Cruz and his Committee sued, alleging that the BCRA provision and the FEC's implementing regulation violated the First Amendment, because they limited Cruz's own political speech—that is, how he spends his own money to support his political campaign.[24] Ultimately, the Court—Chief Justice Roberts—agreed with Cruz, holding that both BCRA § 304 and the FEC regulation violated the First Amendment.[25]

To reach that outcome, however, Roberts had to contend with the government's argument that Cruz had no standing to challenge BCRA and the regulation because he had not suffered an injury traceable to them. The government raised two standing arguments, and Roberts rejected them both.

20. *Id.* at 1646.
21. 52 U.S.C.A. § 30116(j).
22. 11 C.F.R. § 116.11–12 (2022).
23. *Cruz*, 142 S. Ct. at 1646.
24. *Id.*
25. *Id.* at 1656–57.

First, the government argued that Cruz lacked standing because his $10,000 injury was "self-inflicted."[26] He deliberately chose to lend himself just over the $250,000 limit, and he deliberately chose not to pay himself back during the twenty-day post-election period.[27] The government argued that—just like the plaintiffs in *Clapper*, who had spent money to avoid the government surveillance they wanted to contest (an injury that the Court ruled did not suffice to confer standing)—Cruz had voluntarily suffered the monetary loss when he could have easily avoided it by paying himself back within twenty days.[28] But the Court held that Cruz had not just voluntarily incurred a cost, he had voluntarily subjected himself to the regulation, and it was the FEC's threatened enforcement of the regulation that actually injured him—an injury that gave him standing.[29]

Second, the government argued that, even if Cruz had standing to challenge the regulation, he did not have standing to challenge the statutory limit in BCRA itself.[30] After all, BCRA's limitations were less severe than the implementing regulation's limitations. BCRA only prohibited candidates from using *post*-election contributions to repay themselves more than $250,000, while the regulation prohibited candidates from using *any* contributions to repay themselves more than $250,000 (if the repayment was more than twenty days after the election). Cruz had stipulated that "none of the $250,000 loan was repaid from contributions after the election," and the Court found that to be true.[31] Thus, it would seem that, even if Cruz had violated the regulation's twenty-day deadline, he had not violated the underlying statute's limitation on use of post-election contributions.

At oral argument, Justices Roberts and Kagan both suggested that perhaps Cruz should have challenged the FEC's regulation for exceeding the scope of the BCRA.[32] But this point did not make it into Kagan's dissent which focused on the substantive merits of the First Amendment challenge.[33] And Roberts ultimately rejected any argument distinguishing between a challenge to the implementing

26. *Id.* at 1646–47.
27. *Id.* at 1647.
28. *Id.*
29. *Id.* at 1647–48.
30. *Id.* at 1648.
31. *Id.* at 1648–49. The Court rejected Cruz's argument that some of the pre-election contributions should be considered post-election contributions because they exceeded the federal contribution limits and the campaign had "redesignated" the excess amounts as post-election contributions to Cruz's next campaign. *Id.*
32. Transcript of Oral Argument at 69–70, *Cruz*, 142 S. Ct. at 1638 (No. 21-12).
33. *Cruz*, 142 S. Ct. at 1657 (Kagan, J., dissenting).

regulation and a challenge to BCRA itself.[34] He reasoned that the FEC's enforcement of the regulation was "traceable to the operation of" BCRA because the FEC could not act without the statute's authorization and the regulation was promulgated to enforce the statute.[35] Moreover, he reasoned, Cruz's constitutional challenge to the statute would, if successful, invalidate the regulation as well, thereby redressing the injury.[36] And so, the Court found Cruz had standing, reached the merits of the claim, and held that both the FEC regulation and BCRA § 304 violated the First Amendment.[37]

* * *

A standing-related issue arose in two other cases last term, *Berger v. North Carolina NAACP* and *Cameron v. EMW Women's Surgical Center*. These cases addressed variations on the following question: when a state law is challenged in court, and some state officials believe that the state executive is not adequately defending it, can they intervene to defend the law? And both cases ruled that they could.

These two cases are not strictly speaking about standing. It is well established that States—despite their sovereign immunity from suit—have an interest in defending, and thus standing to defend, the constitutionality of their own statutes.[38] And, when (thanks to state sovereign immunity) plaintiffs sue state officials to enjoin enforcement of state statutes, the States and their attorneys general have standing to, and often do, mount the defense.[39] In short, for state officials to have standing to defend a state law, they need only be representing the State's interest in its enforcement.

Instead, these two cases are about intervention. And, as discussed below, for a state official to *intervene* to defend a state law, the requirement is different. The official must have an interest in the law's enforcement *that is not already adequately represented* by the other state officials already defending the case.

In *Berger v. North Carolina NAACP*, the issue arose in the context of the NAACP's challenge to North Carolina's voter-ID law.[40] The law was enacted by the North Carolina General Assembly over

34. *Id.* at 1649–50 (majority opinion).
35. *Id.*
36. *Id.*
37. *Id.* at 1656.
38. Maine v. Taylor, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes.").
39. Berger v. N.C. State Conf. of the NAACP, 142 S. Ct. 2191, 2197 (2022) (quoting Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1952 (2019)).
40. *Id.* at 2191.

the Governor's veto.[41] The NAACP sued the Governor and the State Board of Elections (the Board) to challenge the law, and the state Attorney General defended it.[42] The State Speaker of the House and Senate President Pro Tempore (whom the Court dubbed "legislative leaders") moved in the trial court to intervene because they thought the Governor and the Attorney General (a former state senator who had voted against an earlier version of the law) would not adequately defend it.[43] The district court denied the motion to intervene and a motion to reconsider its denial.[44] It permitted them to file an amicus brief, but not to introduce new evidence,[45] and eventually granted a preliminary injunction barring enforcement of the voter-ID requirement in the 2020 primary election.[46]

On appeal from that decision, the Fourth Circuit allowed the legislative leaders to intervene and agreed with them, reversing the preliminary injunction.[47] A separate panel of the Fourth Circuit heard their separate appeal from the denial of their motion to intervene and reversed that as well, holding that they should have been allowed to intervene in the district court.[48] However, the full Fourth Circuit then reheard the intervention question *en banc* and ruled against the legislative leaders, holding that they could not intervene in the district court proceedings because they had not shown that the state Attorney General did not adequately represent the State's interests there.[49]

Intervention as a matter of right is governed by Federal Rule of Civil Procedure 24(a)(2), which provides that a "court must permit anyone to intervene" who timely "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Thus, for Justice Gorsuch, who wrote the majority opinion, the case was about two issues: did the State legislative leaders have an interest in the

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41. *Id.* at 2198 (discussing S. 824, 2017 General Assembly, 2018 Regular Session (N.C. 2017)).

42. *Id.*

43. *Id.*

44. *Id.* at 2199.

45. Order at 3, N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15 (M.D.N.C. 2019) (No. 18-cv-01034), ECF No. 116 ("Amici's brief and all accompanying exhibits (ECF No. 96) are STRICKEN . . . . Amici are permitted to submit a new amicus curiae brief within 10 days of the entry of this order which does not introduce or rely upon evidence not already introduced into the record by the named parties.").

46. *Berger*, 142 S. Ct. at 2199.

44. *Id.* at 2200.

45. *Id.*

46. *Id.*

litigation, and was it adequately represented by the Governor and Attorney General?[50]

As to the first question—the legislative leaders' interest in the litigation—Justice Gorsuch found it was dispositively decided by North Carolina state law, which provided that the Speaker and President Pro Temp "'as agents of the State, by and through counsel of their choice,' 'shall jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution.'"[51] He rejected arguments from the Board and the NAACP that North Carolina law did not actually grant the legislative leaders that interest, so long as the State was still defending the Board.[52]

As to the second question—whether the legislative leaders' interests were adequately represented by the Board's defense—Justice Gorsuch found that the District Court and the Fourth Circuit both erred by applying a presumption that the Governor and Attorney General were adequately representing the legislative leaders' interests.[53] He distinguished this case—where the legislative leaders were statutorily authorized to defend the statute—from other cases where presumptions might apply, such as when private parties seek to intervene to defend legislation.[54] And he observed that—despite the principle that States should speak in one voice, which normally grounds such presumptions—"this litigation illustrates how divided state governments sometimes warrant participation by multiple state officials in federal court."[55] Plus, he accepted the legislative leaders' assertion that they had a different interest in the litigation because the Board sought only "guidance" about which law to apply to the upcoming election, while they sought to "vigorously" defend the constitutionality of the Voter ID law.[56]

In her solo dissent, Justice Sotomayor accused the majority of creating the opposite presumption, "that a State is inadequately represented in federal court unless whomever state law designates as a State's representative is allowed to intervene, even where the interests that the intervenors seek to represent are identical to those of an existing party."[57] According to Sotomayor, the State's

50. *Id.* at 2202–03.
51. *Id.* at 2202 (quoting N.C. GEN. STAT. ANN. § 1–72.2(b) (West 2017)).
52. *Id.* at 2203.
53. *Id.* at 2205.
54. *Id.* at 2204–05.
55. *Id.* at 2205.
56. *Id.*
57. *Id.* at 2206 (Sotomayor, J., dissenting).

interests were already adequately represented by the Board and Attorney General.[58] And the fact that state law gave legislative representatives standing—i.e., an interest in the case—was not sufficient to show that the interest was distinct from that of, and not adequately represented by, the State's other representatives.[59] Moreover, she faulted the majority for allowing State law to determine the adequacy of the representation, which she contended is a question of federal law.[60]

Nonetheless, Justice Gorsuch found the legislative leaders had standing and could intervene to represent their interests. The merits of the underlying case—the constitutionality of the voter-ID law—were not before the Supreme Court. But the holding in *Berger* keeps the door open for state legislators to intervene to defend state statutes more vigorously, even when the State executive is already defending the law in court.

A similar issue arose in *Cameron v. EMW Women's Surgical Center*.[61] There, the law at issue was a Kentucky ban on certain abortion procedures, and the party seeking to intervene was not a legislator, it was the State's Attorney General.[62] A clinic and two doctors (EMW) sued the Kentucky Attorney General and the Kentucky Secretary of Health and Family Services to enjoin enforcement of the abortion ban. The Attorney General's office moved in the district court for dismissal of the claims against him, arguing that the statute did "not confer upon the Attorney General the authority or duty to enforce" and "does not provide the Attorney General with any regulatory responsibility or other authority to take any action" related to the state statute.[63] The Attorney General was dismissed from the case, and the case continued against the Secretary.

The district court enjoined enforcement of the law, and the Secretary appealed. While the appeal was pending, the Attorney General (Andrew Beshear) was elected Governor, and Daniel Cameron was elected to be the new Attorney General. New Governor Beshear appointed a new Secretary to carry on the appeal, and new Attorney General Cameron entered an appearance as counsel for

58. *Id.* at 2210.
59. *Id.*
60. *Id.* at 2210–11.
61. Cameron v. EMW Women's Surgical Ctr., P.S.C., 142 S. Ct. 1002 (2022).
62. *Id.*
63. *Id.* at 1022 (Sotomayor, J., dissenting) (quoting ECF in No. 19–5516 (CA6, June 11, 2020), Doc. 42, pp. 1). The stipulation of dismissal specified that the Attorney General reserved "all rights, claims, and defenses . . . in any appeals arising out of this action[,]" *id.* at 1007 (majority opinion), and on that basis, the Court found that no claims-processing rule barred the Attorney General from intervening on appeal. *Id.* at 1010.

the Secretary on the appeal. The Sixth Circuit affirmed the district court's injunction, and the new Secretary decided not to move for *en banc* review or seek a writ of certiorari in the Supreme Court. At that point, new Attorney General Cameron withdrew as counsel for the Secretary and moved to intervene as a party, despite his office having voluntarily withdrawn as a party before. The Sixth Circuit denied the motion, and he sought certiorari of that denial.[64]

Permissive intervention on appeal is not governed by any specific statute or rule. But courts consider the same "policies underlying" Federal Rule of Civil Procedure 24.[65] So, as in *Berger*, the main issue was whether one official (Attorney General Cameron) had an interest in the appeal that was distinct from and not represented by the official already in the case (the Secretary). The majority opinion, written by Justice Alito, found that the Attorney General was asserting a "substantial legal interest that sounds in deeper, constitutional considerations," namely the interest of the State in defending the continued enforceability of its own statutes.[66] Although Justice Sotomayor's dissent argued that the Attorney General's office had abandoned that interest when it withdrew from the case,[67] Justice Alito found that the Attorney General had disclaimed only his authority to enforce the law, not his authority to defend the State's interests in court.[68] And, just as Justice Gorsuch found in *Berger*, Justice Alito found that Kentucky state law "empowers multiple officials to defend its sovereign interests in federal court."[69]

The remainder of the opinion found that the Attorney General's motion to intervene was timely (because he moved to intervene quickly after the Secretary decided not to continue)[70] and did not prejudice EMW (because he was not able to raise any issues that the Secretary could not have raised).[71] And, thus, the Court held that the Attorney General should have been permitted to intervene to represent the State's interest, even though the Secretary representing those interests had chosen to discontinue the litigation.[72]

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64. *Id.* at 1008–09.
65. *Id.* at 1010.
66. *Id.* at 1010–11.
67. *Id.* at 1023 (Sotomayor, J., dissenting).
68. *Id.* at 1012 n.5 (majority opinion).
69. *Id.* at 1011.
70. *Id.* at 1012–13.
71. *Id.* at 1013–14.
72. Justice Thomas wrote a concurring opinion arguing that the Attorney General also should have been permitted to intervene because, having been dismissed from the district court, he was not a party to that court's final judgment, meaning that he was not circumventing the deadline for appealing from that judgment by waiting to intervene later. *Id.* at

The decisions in *Berger* and *Cameron* may signal a shift in the Court's view of who has an interest in defending state laws against constitutional challenges. Both decisions adopt interpretations of state law that distribute the State's interest among multiple offices and officials in the state government, rather than vesting it in a unitary state executive. As Justice Sotomayor argued in her dissents, the Court had not before relied on state law to grant individual state offices or officials independent interests in defending state laws when the state government was already doing so or had chosen not to. Given the divided (and shifting) composition of many state governments, this change will likely enable more vigorous defenses of state laws—even when only a faction within the state government wants to continue mounting a defense. It remains to be seen whether that will always mean—as it did in *Berger* and *Cameron*—more conservative state politicians defending state laws that more liberal state governments have chosen to stop defending.

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The doctrine of mootness was an issue last term in *West Virginia v. EPA*. That case involved challenges to various EPA regulations governing power plants under the Clean Air Act,[73] specifically: the Obama-era Clean Power Plan (CPP),[74] and the Trump-era Affordable Clean Energy (ACE) Rule.[75] The central holding of the case—that the "major questions doctrine" requires especially clear congressional authorization before administrative agencies undertake "major" regulations—has far-reaching implications for administrative law.[76] But the tangled procedural history it took to get to the Supreme Court may have implications for standing and mootness doctrines as well.

1014–17 (Thomas, J., concurring). Justice Kagan wrote a concurring opinion arguing that, even assuming the Attorney General could have appealed from the district court's judgment, he was not circumventing the appeals deadline by intervening later because he reasonably expected the Secretary to handle the defense, and he timely intervened when it became clear that the Secretary would not do so. *Id.* at 1017–20 (Kagan, J., concurring).

73. 42 U.S.C. § 7411(d).

74. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64510-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 70, 71, 98); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

75. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

76. *See generally* Dana Neacşu, *Applying Bentham's Theory of Fallacies to Chief Justice Robert's Reasoning in West Virginia v. EPA*, 61 DUQ. L. REV. 95 (2023).

In 2015, during the Obama administration, EPA issued the CPP. To reduce carbon dioxide emissions, the CPP set target emissions limits, which were to be enforced by the States.[77] Those limits effectively required energy companies to, among other things, shift some of their power generating from coal-fired power plants to natural-gas-fired plants and renewable energy sources. This "generation shifting" requirement was challenged in court by States (contesting their enforcement duties) and energy companies (contesting the emissions targets). In 2016, the Supreme Court stepped in to stay implementation of the CPP before it took effect.[78] Thanks to that stay, it never went into effect.

In 2019, during the Trump administration, EPA repealed the CPP, finding for the first time that generation shifting implicated a "major question" beyond the scope of EPA's statutory authority under the Clean Air Act.[79] The Trump-led EPA replaced the CPP with a new regulation that did not require generation shifting: the ACE.[80] Various states and private parties sued EPA in the D.C. Circuit, challenging the repeal of the CPP and issuance of the ACE.[81] Other states and private parties (who supported the ACE and opposed the stricter regulations of the CPP) intervened on EPA's side to defend it. The D.C. Circuit held that the generation shifting requirement was permissible under the Clean Air Act, and therefore the repeal of the CPP and its replacement with the ACE rested on a mistaken reading of EPA's statutory authority.[82] So, the D.C. Circuit vacated EPA's repeal of the CPP and issuance of the ACE, and it remanded to EPA for further consideration.[83]

But then, in 2021, after yet another change in Presidential administrations, the Biden-led EPA asked the D.C. Circuit to stay issuance of its mandate, to ensure that the CPP would not go into immediate effect.[84] As it turned out, in response to changes in the

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77. *See* Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64510-01; Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01.

78. West Virginia v. EPA, 577 U.S. 1126 (2016).

79. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

80. *Id.*

81. *See* Am. Lung Ass'n v. EPA, No. 19-1140 (D.C. Cir. Jan. 19, 2021) and consolidated cases.

82. Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir.), *rev'd and remanded sub nom.* West Virginia v. EPA, 213 L. Ed. 2d 896, 142 S. Ct. 2587 (2022).

83. *Id.*

84. Respondents' Motion for a Partial Stay of Issuance of the Mandate, Am. Lung Ass'n v. EPA, No. 19-1140, (D.C. Cir. Feb. 12, 2021), ECF No. 1885168.

energy market, energy producers had already met the CPP's emissions targets through voluntarily engaging in generation shifting.[85] The CPP's goals had been met, and the Biden-led EPA had no interest in reviving it and was already considering promulgating a new rule. The D.C. Circuit stayed its mandate, but some of the intervening parties—the states and private parties who sought to defend the Trump-era repeal of the CPP and promulgation of the ACE—filed petitions for certiorari, which EPA opposed.[86]

The standing and mootness issues raised by this convoluted procedural history are intertwined. In short, was the case mooted by the D.C. Circuit's staying of the mandate and EPA's own plan to issue a new regulation, or did the intervenors have standing to challenge the now-obsolete CPP in the Supreme Court? On the one hand, the CPP never went into effect and never would, so none of the intervenors were harmed by it. And its emissions targets had been met, so it would have no effect even if it were revived. The case seemed moot—any opinion the Court could give about the constitutionality of the CPP would be purely advisory. On the other hand, there was no guarantee that EPA would not try to issue a new rule that included generation shifting—maybe one with more stringent generation-shifting requirements.

The majority opinion authored by Chief Justice Roberts found that there was no justiciability problem, addressing the standing and mootness questions separately.[87] First, it held the intervenors had standing because they were regulated by the original CPP, and the D.C. Circuit's judgment reviving the CPP would cause them a concrete injury if it went into effect.[88] This holding seems to ignore the fact that the CPP's emissions targets had been met, so reviving it would not cause any injury to any of the intervenor energy companies. It may be defensible on the grounds that a revived CPP—if such a thing were possible—would injure the intervenor States, since it would require them to enforce it. In any event, Roberts held that the intervenors had the requisite "injury 'fairly traceable to the *judgment below*'" that a "favorable ruling . . . would redress," regardless of whether that judgment would or could ever go into effect.[89]

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85. West Virginia v. EPA, 142 S. Ct. 2587, 2627–28 (2022) (Kagan, J., dissenting).

86. *See* West Virginia v. EPA, 142 S. Ct. 420 (2021) (granting certiorari).

87. Chief Justice Roberts was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett. Justice Gorsuch's concurring opinion, which was joined by Justice Alito, opined on the merits issues in the case but did not address justiciability. Justice Kagan's dissent was joined by Justices Breyer and Sotomayor.

88. *West Virginia*, 142 S. Ct. at 2606.

89. *Id.* (quoting Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019)).

Roberts then considered whether the case was mooted either by the D.C. Circuit's staying of its mandate or by EPA's abandonment of the CPP and its plan to proceed with new rulemaking.[90] He quickly held that staying a mandate does not moot a case, as appellate courts regularly stay their mandates pending certiorari review.[91] He did not discuss the fact that usually the *losing* party seeks a stay to prevent the judgment against it going into effect pending further appeal, while here it was the prevailing party, EPA, that had sought the stay because it no longer wanted the judgment in its favor to go into effect. Roberts then held that EPA's plans to proceed with new rulemaking did not moot the case either. He relied on a well-established limit on mootness, the idea that "'voluntary cessation does not moot a case' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[92] And he noted that the "heavy" burden to make that showing fell on the EPA.[93] Without mentioning the practical obsolescence of the CPP's generation-shifting requirement (given that the CPP's emissions targets had been met), he held that EPA had not met that heavy burden because it did not disavow its statutory authority to impose different generation-shifting requirements in the future.[94]

As the dissent by Justice Kagan explained, this may be an accurate statement of the Court's "notoriously strict" mootness jurisprudence, but there was "no reason to reach out to decide this case."[95] The Supreme Court has discretion to decline cases even if they are justiciable.[96] The CPP's emissions targets had already been met, and any new EPA rule would not evade review, since it would be subject to pre-enforcement judicial review.[97] The Court's holding is, effectively, an advisory opinion about whether the EPA can use generation shifting in future regulations.[98]

Given all of that, one might wonder why the Court even bothered to hear the case. It seems unlikely that it granted certiorari to rule on the relatively specific (and hypothetical) question of generation shifting under the Clean Air Act. It seems more likely that the

90. *Id.*
91. *Id.* at 2607.
92. *Id.* (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007)).
93. *Id.*
94. *Id.*
95. *Id.* at 2628 (Kagan, J., dissenting).
96. *Id.*
97. *Id.*
98. *Id.*

majority wanted to hear the case as a vehicle to reach the far broader and more consequential issue of the "major questions doctrine." That it amounted to an advisory opinion—where the challenged regulation was no longer in effect and none of the parties challenging the regulation were actually injured—was not going to stop the newly emboldened majority from using the case to expand the scope of judicial authority over agency regulations and strike a blow at the administrative state.

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In an interesting turn of events, another mootness issue arose in the *Kennedy v. Bremerton School District* case, although it did not make it into the final opinion.[99] In that case, the Court held that a school district ran afoul of the First Amendment's Free Exercise and Free Speech clauses when it disciplined a football coach for praying at the 50-yard line after high-school football games.[100] In the Supreme Court, after certiorari was granted but before full briefing, the school district filed a Suggestion of Mootness, arguing that the case was moot because Coach Kennedy had chosen not to re-apply for his job, had moved across the country (from Washington to Florida), and could no longer be reinstated.[101] Coach Kennedy responded by insisting that he wanted to be reinstated and that he would move back to Washington to coach again.[102] After Coach Kennedy won, there was an open question about whether he would actually return to coach again—suggesting maybe the case had been moot after all.[103] On remand, however, Coach Kennedy sought and obtained an injunction reinstating him, and he will apparently be moving back to Washington to coach again. Nonetheless, that such a justiciability issue could fly under the radar, receiving little or no public acknowledgement from the Justices,

99. Kennedy v. Bremerton Sch. Dist., 42 S. Ct. 2407 (2022).

100. *Id.* at 2415–16. The factual background of the case, including what Coach Kennedy actually did and how the school district reacted, was contested throughout the litigation, including in the Supreme Court itself. *Id.* at 2434 (Sotomayor, J., dissenting); *see also* Ann L. Schiavone, *A "Mere Shadow" of a Conflict: Obscuring the Establishment Clause in* Kennedy v. Bremerton, 61 DUQ. L. REV. 40 (2023).

101. Suggestion of Mootness, *Kennedy*, 42 S. Ct. 2407 (No. 21-418); *see also* Amicus Brief of the Freedom from Religion Foundation, et al. as Amici Curiae Supporting Respondent, *Kennedy*, 42 S. Ct. 2407 (No. 21-418).

102. Response to Respondent's Suggestion of Mootness, *Kennedy*, 42 S. Ct. 2407 (No. 21-418).

103. *See* Danny Westneat, *The Story of the Praying Bremerton Coach Keeps Getting More Surreal*, SEATTLE TIMES, https://www.seattletimes.com/seattle-news/the-story-of-the-praying-bremerton-coach-keeps-getting-more-surreal/ (last updated Sept. 17, 2022, 6:51 AM).

illustrates how the circumvention of justiciability barriers can go undetected.

As Justice Alito warned in *Dobbs*, ideological preferences can distort judicial decisions on purportedly non-ideological legal doctrines like justiciability.[104] Ironically, while Alito was lamenting the effects of past abortion decisions, the Court last term seemed willing to bend the justiciability doctrines—or at least to overlook potential justiciability issues—to hear cases on substantive issues that the new conservative majority wanted to reach. The new Court majority may be more open to deciding issues that a more evenly split Court might have avoided. This openness may distort the justiciability doctrines—and affect who can bring which issues to federal court—in the future.

104. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2275 (2022).

Applying Bentham's Theory of Fallacies to Chief Justice Robert's Reasoning in *West Virginia v. EPA*

*Dana Neacşu**

INTRODUCTION

There are two issues in *West Virginia v. EPA.*[1] One regards justiciability, and the other delegation. Article III of the Federal Constitution limits justiciability to controversies, to disputes involving an injured party whose harm the judiciary believes it can remedy. The Constitution is silent on delegation.

This Essay summarizes the Court's decision in *West Virginia v. EPA.*[2] It also analyzes Chief Justice Roberts' reasoning and addresses the case's flaws from two perspectives. It references the Court's decision connecting it to the so-called New Deal Cases,[3] because in both *Panama Refining Co. v. Ryan*,[4] and *West Virginia v. EPA*,[5] the Court accepted to review a lower court's decision about a

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1. West Virginia v. EPA, 142 S. Ct. 2587 (2022).
2. *Id.*
3. Kenneth Culp Davis wrote:

> In only two cases in all American history have congressional delegations to public authorities been held invalid. Panama Refin. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties. *The Panama case was influenced by exceptional executive disorganization and in absence of such a special factor would not be followed today.*

KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 55 (1960) (emphasis added).

4. *Panama Refin. Co.*, 293 U.S. at 405–06.
5. *EPA*, 142 S. Ct. at 2599–2600.

non-existent regulation.[6] In 1935, the governmental kerfuffle was due to a lack of regulatory transparency; the Federal Register had yet to be established.[7] This Essay's analysis incorporates Jeremy Bentham's 1809 work on two classes of fallacies, authority and confusion.[8] Bentham's work on fallacious thinking continues to be relevant today as it exposes arguments used to cloud reasoning and block governmental reform.[9]

ANOTHER CASE ON A CONTINUUM OF JURISPRUDENTIAL ENVIRONMENTAL SKEPTICISM

Like all beings, humans need an environment conducive to survival. Yet, there is an amazing amount of jurisprudential debate about what constitutes such an environment and whether it is under threat from human activities.[10] *Juliana v. United States*[11] is a better-known, recent federal case that contemplated our government's duty to protect the environment for future generations, and where the defendants acquiesced as self-evident that "human activity is likely to have been the dominant cause of observed warming since the mid-1900s."[12] In that case, *Juliana*,[13] a federal district judge held that fossil fuel emissions are "damaging human and

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6. Lotte E. Feinberg stated:

> The specific provision that the Amazon Petroleum Company is charged with violating, and whose constitutionality the company is now challenging (section 9(c) of Title I of the NIRA of June 16, 1933), was inadvertently omitted when it was sent to the printer. This means that the company is charged with violating a provision that *technically does not exist*. More significantly, as the cases moved through the lower courts, almost no one knew about the omission—not the plaintiffs (Amazon Petroleum or Panama Refining), not the defendants (the Justice Department), and not the courts; instead, all believed "it in full force and effect."

Lotte E. Feinberg, *Mr. Justice Brandeis and the Creation of the Federal Register*, 61 PUB. ADMIN. REV., 359, 360 (2001) (emphasis added).

7. *Id.* at 361.

8. JEREMY BENTHAM, THE BOOK OF FALLACIES: FROM UNFINISHED PAPERS OF JEREMY BENTHAM (John Hunt & H. L. Hunt, eds., 1824).

9. Those familiar with Bentham's life know that during his life, as a young lawyer, Bentham was concerned with fallacies in legal argument, then as a concerned Tori he attacked natural rights in his work on anarchical fallacies, and finally, as a septuagenarian, Bentham was concerned with fallacious thinking used to block political reform. That latter work was eventually published. *See generally* BENTHAM, *supra* note 8.

10. *See generally* Dana Neacşu, *The Aesthetic Ideology of* Juliana v. United States *and Its Impact on Environmentally Engaged Citizenship*, 12 J. ENV'T STUD. & SCI. 28 (2022).

11. Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

12. First Am. Compl. ¶¶ 1, 5, 7, 10, 213, 217; Juliana v. United States, Docket No. 6:15-cv-01517 (D. Or. Aug 12, 2015) (filed on Sept 10, 2015).

13. For detailed analysis of the case, *see, e.g.*, Neacşu, *supra* note 10.

natural systems[and] increasing the risk of loss of life."[14] Nevertheless, United States Supreme Court environmental jurisprudence remains unmoved by scientific advances connecting burning fossil fuel to climate change and environmental destruction. It continues its jurisprudence of doubt[15] regarding corrosive environmental causes, including, like here, fossil fuel energy production.

Luckily, the marketplace and vibrant competition among producers, as well as increased involvement from discerning consumers, have contributed to major generational shifts in our electricity.[16] As of 2021, 61% of electricity at the national level was produced by burning fossil fuel, and because carbon dioxide (CO_2) releases vary according to the type of fuel, the worst being coal, less than 22% was produced by burning coal.[17]

West Virginia v. EPA concerned the 2015 administrative rule requiring electrical plants nationwide to reduce their level of coal-burning-produced electricity to 27% by 2030. [18] This 2015 rule, known as Clean Power Plan[19] (CPP), was never applied and its mandated action became obsolete by 2021.[20] As of 2021, the level of coal-burning-produced electricity had been reduced to less than 27%.[21] CPP was an empty regulatory shell unable to cause any injury to anyone. The Court seems to have ignored this reality when it held that "[t]he issue here is whether restructuring the Nation's

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14. *Juliana*, 339 F. Supp. 3d at 1072 ("[D]amaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species . . . .").

15. Few can ever forget Justice Antonin Scalia in 2006, during the oral argument in Massachusetts v. EPA, 549 U.S. 497 (2007), proudly shouting his ecological ignorance: "Troposphere, whatever. I told you before I'm not a scientist. [Laughter]. That's why I don't want to have to deal with global warming, to tell you the truth." Transcript of Oral Argument at 19, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05–1120). For a more in-depth discussion, *see* Neacşu, *supra* note 10.

16. "In 2021, about 4,116 billion kilowatt hours (kWh) (or about 4.12 trillion kWh) of electricity were generated at utility-scale electricity generation facilities in the United States. About 61% of this electricity generation was from fossil fuels—coal, natural gas, petroleum, and other gases." *What is U.S. Electricity Generation by Energy Source?*, EIA, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last updated Nov. 8, 2022).

17. *Id.*

18. West Virginia v. EPA, 142 S. Ct. 2587, 2592 (2022).

19. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60)

20. The EPA ultimately projected, for instance, that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014. *EPA*, 142 S. Ct. at 2593.

21.

Energy source	Billion kWh	Share of total
Fossil fuels (total)	2,504	60.8%
Natural gas	1,575	38.3%
Coal	**899**	**21.8%**

What is U.S. Electricity Generation by Energy Source?, *supra* note 16.

overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the [best system of emission reduction] within the meaning of Section 111."[22] The Nation's overall mix of electricity had reached below the contentious levels during litigation, through the voluntary actions of industry actors.

BRIEF SUMMARY: WHAT IS *WEST VIRGINIA V. EPA* ABOUT?

In 2015, the Environmental Protection Agency (EPA) issued the CPP, which was designed to reduce greenhouse gas emissions from electric power plants mostly by reducing the use of coal to 27% by 2030.[23] This reduction was viewed as essential by the Obama administration as it was getting ready to start its power transfer to the new administration. The CPP was issued within the first main regulatory programs established under the Clean Air Act (CAA)[24] "to control air pollution from stationary sources such as power plants."[25] This program is the litigated[26] "New Source Performance Standards program of Section 111,"[27] which was meant to enable the EPA to regulate emissions from power plants, new and existing.[28]

The CPP required each state to come up with a plan to reduce these emissions. That meant that the plants themselves had to (1) employ technology to become more efficient—a so-called technological cap—and (2) change the mix of fuels used ("generational shift"), by trading or procuring renewable energy, allowing emissions trading, and other actions.[29] The CPP was immediately met with a barrage of litigation.

22. *EPA*, 142 S. Ct. at 2607.

23. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662-01.

24. Clean Air Amendments of 1970, 42 U.S.C. § 7401.

25. *EPA*, 142 S. Ct. at 2600.

26. *Id.*

27. 42 U.S.C.A. § 7411.

28. Section 7411 "directs EPA to list 'categories of stationary sources' that it determines 'cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *EPA*, 142 S. Ct. at 2601. The EPA also has to "(1) 'determine[],' . . . the 'best system of emission reduction which . . . has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that system, and (3) impose an emissions limit on new stationary sources that 'reflects' that amount. *Id.* The "EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category." *Id.* Section 111 focuses on emissions limits for *new* and *modified* sources . . . . Under section 111(d), . . . [EPA] must also address emissions by existing sources . . . not already regulated. *Id.*

29. *Id.*

In this first stage of litigation, the main argument against CPP was focused on the scope of delegation, the coin flip of deciding delegation itself, and whether legislative authority could be delegated.[30] This doctrinal shift from denying delegation to litigating how that delegated authority is used denotes a second jurisprudential continuity in addition to scientific cynicism. It is the same century-old distrust of the administrative state[31] as shown by the Hughes Court in the New Deal cases mentioned at the beginning of this piece.[32] Those cases were connected by the underlying labor act, the centerpiece of the Roosevelt administration's "New Deal"—National Industrial Recovery Act (NIRA)[33]—a statute promoting the most vital and communal interests of its time. Like the NIRA, the CAA is of similar importance. It manifests our communal attempt to improve life for all, by managing pollution. Now, the regulatory power in dispute focuses on Section 111 of the CAA[34] and the scope of the delegated power to an agency, rather than the power delegated to the U.S. President as in the New Deal Cases discussed here.

In the first round of CPP litigation, the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) denied the stay of the CPP rules[35] and set up a briefing schedule.[36] But, before the briefs were due, the petitioners appealed to the Supreme Court, and the Court decided the very contrary.[37] The Court stayed the rule pending litigation, with no reasoning offered by the majority (it was decided 5-

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30. Such a blunt approach is harder to argue while opposing the administrative state, especially for an originalist court because the Constitution says nothing on this issue. But on the agency's use of the authority delegated. DAVIS, *supra* note 3, at 56.

31. As Gillian E. Metzger noted:

> [T]he administrative state includes those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities. In short, it includes all the actors and activities involved in fashioning and implementing national regulation and administration - including that which occurs in hybrid forms and spans traditional public-private and nation-state boundaries.

Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).

32. Panama Ref. Co. v. Ryan, 293 U.S. 388, 438–39 (1935).

33. National Industrial Recovery Act, 48 Stat. 195 (1933).

34. 42 U.S.C.A. § 7411.

35. Order Denying the Motions for Stay, No. 15-1363 (D.C. Cir. 2016).

36. *Id.*

37. West Virginia v. EPA, 577 U.S. 1126, 1126 (2016).

4).[38] Its words read: "The [CPP] is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the District of Columbia Circuit and disposition of the applicants' petition for writ of certiorari, if such writ is sought."[39]

While the D.C. Circuit was involved in hearing arguments about the stay of the Obama EPA Rule CPP, a first administrative interlude took place: The EPA got new leadership with a new administrator appointed by the new president, Donald Trump. The Trump EPA repealed the CPP and issued a new set of regulations called the Affordable Clean Energy Rule (ACER).[40] As a result, the challenge to the CPP became moot. There was no CPP, and the D.C. Circuit never issued a decision on the stay of the CPP.

In a second round of litigation, ACER, the Trump administration's EPA rule on managing pollution, was also challenged in court. On January 19, 2021, in *American Lung Association v. EPA*,[41] the D.C. Court ruled that ACER and the repeal of the CPP were both invalid. It reasoned that "[b]ecause promulgation of [ACER] and its embedded repeal of the [CPP] rested critically on a mistaken reading of the [CAA], we vacate [ACER] and remand to the Agency."[42]

A second administrative interlude took place while the second round of litigation was going on. When the new Biden administration took office in 2021, there was no CPP. Although the D.C. Circuit Court repealed ACER, and its repeal vacated ACER, it did not

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38. Michael B. Gerrard et al., West Virginia v. Environmental Protection Agency: *The Agency's Climate Authority*, 52 ENV. L. REP. 10429 (2022).

39. *EPA*, 577 U.S. at 1126.

40. As the EPA explained:

> The U.S. Environmental Protection Agency (EPA) is finalizing three separate and distinct rulemakings. First, the EPA is repealing the Clean Power Plan (CPP) because the Agency has determined that the CPP exceeded the EPA's statutory authority under the Clean Air Act (CAA). Second, the EPA is finalizing the Affordable Clean Energy rule (ACE), consisting of Emission Guidelines for Greenhouse Gas (GHG) Emissions from Existing Electric Utility Generating Units (EGUs) under CAA section 111(d), that will inform states on the development, submittal, and implementation of state plans to establish performance standards for GHG emissions from certain fossil fuel-fired EGUs. In ACE, the Agency is finalizing its determination that heat rate improvement (HRI) is the best system of emission reduction (BSER) for reducing GHG—specifically carbon dioxide (CO2)—emissions from existing coal-fired EGUs. Third, the EPA is finalizing new regulations for the EPA and state implementation of ACE and any future emission guidelines issued under CAA section 111(d).

Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520-01 (July 8, 2019) (to be codified at 40 C.F.R. pt. 60).

41. West Virginia v. EPA, 142 S. Ct. 2587 (2022) (citing Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (2021)).

42. *Am. Lung Ass'n*, 985 F.3d at 995.

automatically reinstate the CPP.[43] Moreover, the Biden EPA indicated that it was not going to reinstate the CPP.[44] It asked the D.C. Court to vacate the stay while it expressed its intention to work on a new set of measures to reduce power plant emissions.[45]

This second administrative interlude proved to be a fiasco because it did not take into consideration the judiciary distrust of the administrative state.[46] The EPA could have engaged in direct final rulemaking and eliminated this legal purgatory of Wittgensteinian penumbra of meaning ambiguity:[47] was the CPP dead or could it have been resurrected? Direct final rulemaking is a tool for uncontroversial rulemaking (such as burying a repealed regulation). If rulemaking is a long process, of many months, usually up to one-year, direct final rulemaking is a thirty-day endeavor.[48] Unfortunately, the Biden EPA did not foresee the value of taking CPP off the books through a clear rule indicating that or that of issuing a proposed rule.

When the Biden EPA publicly announced its intentions regarding new regulatory measures to the D.C. Circuit Court, the third and

43. Gerrard et al., *supra* note 38, at 10429.

44. Brady Dennis & Juliet Eilper, *EPA to Jettison Major Obama Climate Rule, as Biden Eyes a Bigger Push.,* WASH. POST (Feb. 12, 2021), https://www.washingtonpost.com/climate-environment/2021/02/12/epa-jettison-major-obama-climate-rule-biden-eyes-bigger-push/.

45. *Id.*

46. *See generally* Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017).

47. Michael Davis & Dana Neacşu, *The Many Texts of the Law*, 3 BRIT. J. OF AM. LEGAL STUD. 481, 489 (2014) ("[A]s Wittgenstein noted, maybe all 'assertions about reality, assertions which have different degrees of assurance' may appear obvious, and easy to grasp, but somehow, the most obvious assertions 'may become the hardest of all to understand.'").

48. Further explained:

> Direct final rules were pioneered by EPA. They were initially used in the context of a situation in which the Agency needs to promulgate a completely noncontroversial rule. The Agency doesn't expect any comments on this particular action. So, what the Agency would do is publish simultaneously a final rule that basically purports to implement the action within a certain time frame, and at the same time publish a proposed rule in which it would explain why it thinks the rule is noncontroversial and solicit comments. What the final rule would say is: We publish this proposed rule simultaneously. We don't expect to get any comments. If we don't receive any comments, then we are going to go forward in this time frame. The time frame was set forth in the direct final rule and we'll implement the rule as it is written here . . . . The Agency can simply say: Listen, this is moot. This serves no purpose. To the extent that we as a matter of administrative law need to formally revoke this or put it out of its misery, we're going to do so with this instrument. We'll take comment on it, but I would suggest that the comment should be directed to specifically persuade the Agency that there is a reason to keep the [moribund rule] in effect. If the comment doesn't do that effectively, the direct final rule goes forward.

Gerrard et al., *supra* note 38, at 10432.

final round of litigation started. The Supreme Court granted four writs of certioraris to review the D.C. Circuit decision in *Am. Lung Ass'n*.[49] One came from the state of West Virginia, so the final consolidated cases read *West Virginia v. EPA*.[50] This case had no connection to the first round of litigation involving West Virginia and the CPP. This new consolidated West Virginia case was about the decision to vacate ACER on grounds that the EPA misused its delegated power.[51] Alas, the Court's decision was not about ACER. It was about a rule that did not exist at the time the delegation of authority it invoked was judged, CPP.[52] It is a fable with a moral tale about finding a legal solution to a non-justiciable situation.

THE TWO ISSUES DISCUSSED

The legal issues at hand are justiciability and administrative delegation. Justiciability is defined constitutionally, while administrative delegation is not.

The constitutional demands for justiciability include standing, which is defined constitutionally, and it requires a redressable injury.[53] Here, plaintiffs invoked a potential injury which would have resulted from the CPP's mandate that the industry reduce its emissions from burning coal by 10% to 27% by 2030.[54]

The second issue concerns the delegated authority used by the EPA in issuing the CPP to implement CAA's provisions and engage in CO_2 emission control from old and new power plants. CPP mandated a change which would have had a systemic, industry-wide effect, according to the fuel used, and the type of plants, new and existing.[55] Thus, the question of delegation had a political and

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49. West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022).
50. *Id.* at 2605.
51. *See generally id.*
52. *See generally id.*
53. As noted by James W. Moore:

> One rationale for the injury-in-fact requirement is to ensure that the court will have the benefit of an adversary presentation with full development of the relevant facts. Combined with the redressability requirement (discussed in § 101.42), it tends to assure that the legal questions presented to the court will be resolved in a concrete, factual context conducive to a realistic appreciation of the consequences of judicial action, rather than in the rarified atmosphere of a debating society. Put more colloquially, it prevents "kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation from the people directly affected."

JAMES W. MOORE, *15 Moore's Federal Practice – Civil § 101.40, in* MOORE'S FEDERAL PRACTICE – CIVIL (2022).

54. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units 80 Fed. Reg. 64662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).
55. *EPA*, 142 S. Ct. at 2599.

economic penumbra of meaning: whether that regulatory power could be exercised plant by plant, monitoring each individual source to use the most efficient technology to control its performance, or whether it could be exercised at the electrical grid level, nationally, by encouraging a series of cap-and-trade measures. If successful, the CPP would have engendered a generational shift from coal to gas to wind and solar sources, which could have potentially cost a multi-billion-dollar industry billions of dollars to implement.[56] Because the market implemented all these changes voluntarily, the CPP was never applied, and the delegation was never employed in reality.

DID THE SUPREME COURT SETTLE A JUSTICIABLE CASE, OR DID IT ENGAGE IN ADVISORY DECISION-MAKING?

All actions heard in federal courts are subject to the case-or-controversy requirement of Article III of the Constitution.[57] This requirement has been developed by four justiciability doctrines: standing, ripeness, political question, and mootness.[58] Under Article III, Section 2 of the Constitution, an actual controversy requires standing, which involves a redressable injury.[59] If standing addresses the beginning of a case, "mootness requires that justiciability be present throughout the pendency of the action."[60] When a case becomes moot, the court need not remain involved because the initial injury has been resolved.

TYPES OF MOOTNESS

In 2015, when the CPP became a final rule, coal-burning was at 38%–39%.[61] By the time the Supreme Court granted certiorari, that percentage was lower than the one envisioned by the CPP—whose

56. "EPA's own modeling concluded that the rule would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sector." *Id.* at 2604.

57. U.S. CONST. art. III § 2; *see* JAMES W. MOORE, *12 Moore's Federal Practice – Civil § 57.22*, *in* MOORE'S FEDERAL PRACTICE – CIVIL (2022).

58. U.S. CONST. art. III § 2.

59. "The third prong of the requirement of constitutional standing is that the plaintiff's injury likely will be redressed by a favorable decision. This requirement has been described as the 'redressability' prong of Article III." JAMES W. MOORE, *15 Moore's Federal Practice – Civil § 101.42, in* MOORE'S FEDERAL PRACTICE – CIVIL (2022).

60. JAMES W. MOORE, *15 Moore's Federal Practice – Civil § 101.05, in* MOORE'S FEDERAL PRACTICE – CIVIL (2022).

61. Erica Martinson, *The Fall of Coal*, POLITICO (Apr. 16, 2015), https://www.politico.com/story/2015/04/coal-power-plants-epa-regulations-117011 ("Since 2008, coal has dropped from providing nearly half of the U.S. power market to about 39 percent.").

purpose was to reduce the level of coal burning by 10%.[62] This organic reduction rendered the CPP an obsolete rule, which could not have harmed anyone, even if revived.

During the second round of litigation, the D.C. Circuit decided against the Trump EPA: it vacated its rule, ACER, and its CPP repeal.[63] It did not address the reason behind the Trump EPA's repeal of the Obama-era CPP—the major question doctrine. It only called it unnecessary, superfluous.

With ACER vacated, the Biden EPA diligently moved to state the vacatur because it wanted to issue a new regulation to implement CAA and actually reduce CO_2 emissions.[64] The CPP was still on the books as an obsolete rule—if you remember, its emissions requirements had been met and surpassed.[65]

Under these circumstances, reasonably, the government argued lack of standing. "Article III demands that an actual controversy persist throughout all stages of litigation."[66]

Not only were the rules vacated and abandoned, but the mandated behavior ceased to exist: the CPP, even if reinstated, could have had no impact. The reduction level had been achieved voluntarily by the industry.

The lack of applicable regulations eliminated the possibility of injury.[67] All these reasons ordinarily would have eliminated the controversy.

But, as Justice Frankfurter would have noticed, and the Roberts Court cited his words,[68] semantics matter. The government's lawyer tersely referenced that the lack of controversy "*mooted* the prior dispute as to the CPP Repeal Rule's legality,"[69] instead of arguing that the controversy had been mooted by the plaintiffs' voluntary action.

Chief Justice Roberts disagreed and engaged in a Benthamite fallacy of confusion.[70] Such a fallacy uses sweeping classifications:

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62. Air Quality Implementation Plan; Florida; Attainment Plan for the Hillsborough Area for the 2008 Lead National Ambient Air Quality Standards, 80 Fed. Reg. 20441 (April 16, 2015) (to be codified at 40 C.F.R. pt. 52).

63. See *supra* notes 41 & 42.

64. *See* Gerrard et al., *supra* note 38; Dennis & Eilper, *supra* note 44.

65. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

66. *Id.* at 2606 (majority opinion) (quoting Hollingsworth v. Perry, 570 U.S. 693, 705 (2013)).

67. *Id.*

68. *Id.*

69. *Id.* at 2606–07.

70. BENTHAM, *supra* note 8 (emphasis added). "For instance, explains Bentham, one engages in the fallacy of confusion through sweeping generalities when they speak about cruelties to a Catholic king and conclude with how such behavior becomes cruelties to all Catholics." *Id.* at 266.

here the doctrine of mootness. Chief Justice Roberts addressed its limits—mootness means that while injury exists at the outset of litigation, it subsequently disappears.[71] Thus, he established justiciability at the outset. On that positive note, he continued by focusing on the government's actions: reimposing emission limits. Chief Justice Roberts concluded that because the government had the technical ability to regulate the plaintiffs' behavior, it could harm them, too.[72] However, the facts in *West Virginia v. EPA*[73] supported the opposite, and discrete facts rather than generalities are the foundation of any case or controversy. In this instance, the emission limits in question had been met voluntarily by the industry—the plaintiffs—outside the purview of governmental action. Even if the EPA had reinstated the obsolete rule, the plaintiffs would have suffered no harm.

By addressing mootness in terms of defendant's "voluntary cessation," when the facts of the case indicated that injury was an impossibility, the Chief Justice engaged in the fallacy of confusion. He did so through sweeping generalities. Mootness became defendant's voluntary action, an incorrect summation of the facts: the plaintiffs—the industry—voluntarily made the switch away from coal.

> But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." . . . Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach.[74]

The Court reasoned that had the vacatur been reinstalled, and the EPA changed its mind, then the injury would have been real to the losing side[75] (an impossibility because the demands of the CPP had been met). Furthermore, referencing Freudian slips, but using Wittgensteinian penumbra of meaning, the Chief Justice played

71. EPA, 142 S. Ct. at 2606.

72. "Here the Government 'nowhere suggests that if this litigation is resolved in its favor it will not' reimpose emissions limits predicated on generation shifting; indeed, it 'vigorously defends' the legality of such an approach. We do not dismiss a case as moot in such circumstances." *EPA*, 142 S. Ct. at 2607 (internal citations omitted).

73. *Id.* at 2606.

74. *Id.* at 2607.

75. *Id.* at 2606. What a departure from his dissent in *Massachusetts v. EPA* where he argued that losing coastline due to water level rising due to increased temperature was not a sufficiently direct injury for the state of Massachusetts to prove standing. *See* Massachusetts v. EPA, 549 U.S. 497, 542 (2007) (Roberts, J., dissenting).

"gotcha" with his governmental colleagues—all paid by taxpayers' money.

> That Freudian slip, however, reveals the basic flaw in the Government's argument: It is the doctrine of mootness, not standing, that addresses whether "an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit."[76]

Finding justiciability, the Chief Justice ignored the facts in his reasoning, as both Bentham and H.L.A. Hart[77] would agree. The Chief Justice ignored that the market had eradicated the harm, not the government: by 2021 the transition reached much lower levels than 27%.[78] The market wiped out the controversy. However, the Court swapped concepts, and equated mootness with voluntary mootness by government and did not address the voluntary solution implemented by the market. Bentham calls this fallacy concept-swapping, used to deflect attention through semantic choices.[79] Once the attention was diverted from the lack of justiciability, the majority moved to solve the second issue, that of statutory delegation of power.[80]

ADMINISTRATIVE DELEGATION: CAA AND EPA

The only substantive question in *West Virginia v. EPA* was one of delegation: did the EPA have the needed authority to issue the CPP and mandate reduced level of coal-burning electricity?[81]

There is no constitutional text to guide the Court on how Congress should confer powers to agencies.[82] Thus, the majority could not rely on textualist support for finding the wisdom of our Founding Fathers and engage in what Bentham calls the "wisdom of our ancestors" fallacy.[83] Absent constitutional guidance, the majority

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76. *EPA*, 142 S. Ct. at 2607 (quoting Genesis HealthCare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

77. H.L.A. Hart, *Bentham*, *in* JEREMY BENTHAM–TEN CRITICAL ESSAYS 73, 81 (Bhikhu Parekh ed., 2010).

78. *See supra* note 21.

79. *Id.*

80. *See infra* pp. 106–11.

81. "The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the 'best system of emission reduction' within the meaning of Section 111." *EPA*, 142 S. Ct. at 2607.

82. *See generally* DAVIS, *supra* note 3.

83. Bentham further stated:

> Instead of being guided by their own judgment, the men of the 19th century shut their own eyes, and give themselves up to be led blindfold by the men of the 18th century. The men who have the means of knowing

looked for *stare decisis*, going for the established jurisprudential rule. Semantically, that means finding past holdings, rulings supporting the chosen solution. Refusing to address the novelty of the harm, the majority engaged in the "wisdom of our ancestors" fallacy.[84] Justice Roberts chose not the words of the Founding Fathers, but past rulings devised on far more limited and imperfect experiences, than the evidence and reasoning at hand.[85] This variation of the "wisdom of our ancestors" fallacy avoids engaging the facts of the case.

> [*O*]*ur precedent teaches* that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority.[86]

Even within this fallacious thinking, the majority relied only on ideological precedent[87] supporting its opposition to EPA's power to regulate "a significant portion of the American economy."[88] For instance, Chief Justice Roberts could have chosen the wisdom of past jurists who, when confronted with "the evil at hand," as Justice Douglas did in *FTC v. Bunte Bros.*, whose majority opinion he cited,[89] had been persuaded by the complexity of the task at hand, rather than its technicality. "It warns us not to whittle away administrative power by resolving an ambiguity against the existence

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> the whole body of the facts on which the correctness and expediency of the judgement to be formed, must turn, give up their own judgement to that of a set of men entirely destitute of any of the requisite knowledge of such facts.

BENTHAM, *supra* note 8, at 84.

84. *Id.*

85. J.H. Burns, *Bentham's Critique of Political Fallacies*, *in* JEREMY BENTHAM–TEN CRITICAL ESSAYS 154, 160–61 (Bhikhu Parekh ed., 2010).

86. *EPA*, 142 S. Ct. at 2607–08 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)) (emphasis added).

87. Rachel Reed, *Politics, the Court, and 'the Dangerous Place we Find Ourselves in Right Now'*, HARV. L. TODAY (Sept. 21, 2022), https://hls.harvard.edu/today/politics-the-court-and-the-dangerous-place-we-find-ourselves-in-right-now/?.

88. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

89. FTC v. Bunte Bros., 312 U.S. 349, 357 (1941) (holding that the Federal Trade Commission is without authority under § 5 of the Federal Trade Commission Act to prevent a candy manufacturer within a State from selling, wholly within that State, candy in so-called "break and take" assortments).

of that power where the full arsenal of that power is necessary to cope with the evil at hand."[90]

Instead, of focusing on the evil the EPA tried to mitigate, CO_2 emissions, the Chief Justice chose a doctrine—the major questions doctrine—which blocked the environmental reform needed to control them:

> As for the major questions doctrine "label[ ]," . . . it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we.[91]

Furthermore, the Roberts Court seems to value only certain ancestral wisdom, that which mirrors his.(with one remarkable exception—Justice Frankfurter).[92] Given this quasi-unidimensional approach to reasoning, the Court's analysis denotes an obtuse approach to the role of legal normativity. Paraphrasing Justice Cardozo's words, laws *lato sensu,* statutes and regulations, ought to be interpreted in such a manner that they produce the end in view.[93] Subsequently, the role of the very delegation of legal authority is to allow the government to inquire into various "evils and upon discovery correct them."[94]

The majority opinion refused delegation because, in light of its sweeping impact on the economy, the enabling statute did not use express language to delegate authority.[95] The Court held that system-based rulemaking, like the one the CPP envisaged, needed express congressional authority:

> Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction . . . adequately

90. *Id.*

91. *EPA, 142* S. Ct. at 2595 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324) (internal citations omitted).

92. With one exception, when he quotes Justice Frankfurter discussing the importance of a Congressional "want of assertion." *Id.* at 2610.

93. Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting).

94. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., dissenting).

95. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

> demonstrated," or the BSER. EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category.[96]

Nevertheless, the Court did not hold all "systems" untenable solutions. Using the wisdom of the past, it accepted those types of "system," which did not prove problematic, such as individual source control, which was viewed as a "building block of a "best system" in lieu of a national grid system.[97] Thus, the Court swapped one meaning of "system" for another to justify the desired outcome without much explanation. Only one "building block" of this system will be sanctioned by the Court[98] that which allowed the Court to block the EPA's environmental administrative reform.[99]

West Virginia v. EPA, might create a cloud of doubt over what government agencies can do without extremely specific Congressional authorization. As far as the Biden EPA is concerned, it cannot use particular words such as system[100] in its new rulemaking, if "system" denotes a power grid. But it can use it if it denotes technological systems applicable as an emission cap.[101] The EPA's work may seem that is going to require more individual power source implementation.

In the case at hand, both the statutory goal and the delegated authority have the same aim: to manage CO_2 emissions on an ongoing basis. Given the enormity of its charge, the EPA needs a "roving commission to inquire into evils and upon discovery correct them."[102] More clearly, referencing the words of Justice Cardozo, because there is no legal "standard, definite or even approximate, to which legislation must conform"[103] in order to delegate its authority to achieve its legislative goals, the Court had the option to

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96. *Id.* at 2601 (internal citations omitted).
97. *Id.* at 2603.
98. *Id.* at 2604.
99. The Court stated:

> Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, *Congress considered and rejected" multiple times*. . . . Given these circumstances, our *precedent counsels skepticism* toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach.

Id. at 2614 (emphasis added).

100. *Id.* at 2604.
101. *Id.* at 2610–11.
102. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 552 (1935).
103. *Id.*

promote environmental reform. It chose the opposite by engaging in fallacious reasoning.

It is disconcerting that the Roberts Court found refuge in the Trump EPA defense of "major question doctrine" to dismantle its predecessor's work and minimize the impact of its subsequent rule (even if a mere shell by 2021). The Roberts Court, filled with three Trump appointed justices, found that political position so persuasive as to embrace it as its legal argument in a case that arguably did not meet the threshold of justiciability (no injury – ergo no controversy).[104]

West Virginia v. EPA seems thus poised to go down in history like the New Deal Cases, especially *Panama Ref. Co. v. Ryan*,[105]—a case involving two Texas oil companies charged with violating a provision of regulations that technically did not exist at the time the Hughes Court analyzed its delegated authority.[106] Here, the CPP existed on the books, but its content had evaporated into thin air when the market met its mandate and surpassed it when coal burning represented only 21.8% of the national electricity by 2021.[107] That level was lower than 27% by 2030, as the CPP envisaged.[108] *West Virginia v. EPA* is thus a superfluous political decision that deepened the perception of the Supreme Court as an ideological powerhouse fighting scientific evidence on environmental issues.

The *Panama Oil* case[109]—discussed in the Davis treatise[110] right next to Frankfurter's decision in *FTC v. Bunte Bros*. remains a relevant warning for ideological courts, like the Roberts Court. In his dissent in the *Panama Oil* Case,[111] Justice Cardozo defined a workable approach to delegation which takes into consideration the needs of governing a complex reality, where statutory delegation could not encompass a reality unfathomable at the time:

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104. The rule under discussion was obsolete – its purpose of reducing the coal produced electricity to 27% by 2030, already met. For all intended purposes other than a pedantic exercise in jurisprudential power, the rule under discussion had ceased to exist. *EPA*, 142 S. Ct. at 2628.

105. Panama Ref. Co. v. Ryan, 293 U.S. 388, 438–39 (1935).

106. *See A Brief History Commemorating the 70th Anniversary of the Publication of the First Issue of the Federal Register*, NAT'L ARCHIVES AND REC. ADMIN. (Mar. 14, 2006), https://www.archives.gov/files/federal-register/the-federal-register/history.pdf. On December 10, 1934, at the Supreme Court, the Assistant Attorney General of the United States had been grilled during oral arguments in the first case to reach the Court challenging the constitutionality of the centerpiece of President Roosevelt's "New Deal"—the National Industrial Recovery Act (NIRA). The defects in the case highlighted a fundamental problem facing a democratic government that was exploding with new agencies and new regulations. *Id.*

107. *See supra* note 21.

108. *Id.*

109. *Panama Ref. Co.*, 293 U.S. at 388.

110. *See generally* DAVIS, *supra* note 3.

111. *Panama Ref. Co.*, 293 U.S. at 433 (Cardozo, J., dissenting).

> I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. I deny that such a standard is lacking in respect of the prohibitions permitted by this section [9(c)]*when the act with all its reasonable implications is considered as a whole.* What the standard is becomes the pivotal inquiry.[112]

Chief Justice Roberts writing for the majority found that the scope of the CPP was much too far-reaching. Indeed, the CPP was meant to create a grid (another synonym for system) affecting our national electrical power structure. But the market made it inapposite before it could become binding, and arguably harming. This suggests that Jeremy Bentham's criticism of political and judicial argument (fallacies) stands the test of time. Looking backward for future guidance is both fallacious and unsuitable in our complex, fast-paced reality.

Conclusionary Remarks

At first brush, it may appear that federal agencies after *West Virginia v. EPA* may have an exceedingly difficult time to deal with new problems which did not exist at the time the enabling statute was passed, and the delegation established. The reality is that with the EPA each state has to create their own means of implementing emission controls, which suggests a closer relationship between the federal "administrative state" and state-level agencies. Furthermore, as shown in this instance, the market and engaged citizenship may make a bigger difference than government ruling. Gas burns more efficiently than coal, which is evident from the percentage of electricity which comes from gas, about 40%.[113] The CPP aimed to reduce coal use to 27%;[114] the market had already

112. *Id.* at 434 (emphasis added). And for further clarity, I will add another quote:

> [S]eparation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety. . . . In the complex life of to-day, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts.

Id. at 440–41.

113. Electricity Explained, EIA, https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php (last updated July 15, 2022).

114. West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022) ("Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014.").

produced that result. The CPP was thus obsolete by the time the Supreme Court pronounced itself in this case.

Another way to look at *West Virginia v. EPA* is through the lens of administrative efficiency as the government does not learn fast. For allowing itself the time to "think" about promulgating a new regulation limiting the emission of CO_2 from power plants while both the 2015 CPP and the 2019 ACER regulations were in legal limbo, it received a very harsh penalty.

Presciently, Professor Davis wrote in 1960, about the *Panama* case mentioned earlier: "The Panama case was influenced [in its decision] by exceptional executive disorganization and in absence of such a special factor would not be followed today."[115] Alas, *West Virginia v. EPA* managed to rise from a similarly chaotic situation to that of *Panama*.

Similarly, now like then, the Supreme Court granted certiorari and eventually decided a nonexistent controversy.[116] However, then, in the absence of the Federal Register, the Court could not have known the rule did not exist. Today, the Court found justiciability by stating that if the lower court would have decided in the favor of the government, then the parties would suffer injury.[117] As shown here, that was an impossibility, because the lack of controversy was not due to the government's voluntary action. And, while it did not acknowledge the followed precedent—the *Panama* case and the Hughes Court reasoning—the Roberts Court chose to issue a highly ideological decision. The Roberts decision is inimical to the doctrine of delegation of power, and unfavorable to what is called the "administrative state"—and plays the semantic game loosely.

Again, for the reasons mentioned above by Professor Davis about the *Panama Oil* case,[118] *West Virginia* will not be influential. The Court ignored not a legal penumbra of meaning, but reality, when it unnecessarily and arguably illegally granted certiorari. Diligently, the government could have prevented yet another conservative decision by engaging in direct final rule making—even after oral argument. It would have taken thirty days to put to rest an obsolete rule for a Court too ideological to acknowledge its profound distrust of the EPA and determined to prevent environmental regulations from having any real impact on a destructive, corrosive, humanly harmful electric grid.

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115. DAVIS, *supra* note 3, at 55.
116. *See supra* pp. 95-96.
117. *EPA*, 142 S. Ct. at 2607.
118. DAVIS, *supra* note 3, at 55.

There is no evil more direct and injurious than the injury we choose to let happen against our planet, our lives, and especially our youth. It is remarkable that instead of choosing to focus on the problem at hand—pollution, whose regulation requires an electrical grid solution, a communal perspective about the res-publica, the air we all breath—the Chief Justice found the amount of money that its implementation would require to be the problem that required a direct statement of delegation.

For all these reasons, its decision to ignore the lack of controversy, and the lack of constitutional standards to judge EPA's regulatory charge, the decision in *West Virginia v. EPA* will not have any more impact than the *Panama Oil* case had.[119]

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119. As a final trivia, the only case that followed it was vacated and remanded by the Supreme Court only years later.

> Beware of the Supreme Court's misleading language. That the literal opinions in the Panama and Schechter cases do not embody the effective law is entirely clear. This is dramatically shown when a lower court takes those opinions seriously. For instance, the opinions were followed to the letter by a three-judge district court, which held a delegation invalid because: "We are unable to find in the Act a declaration of policy or standard of action which can be deemed to relate to the subject . . . ." Because the lower court took literally what the Supreme Court had said in the Panama and Schechter opinions, the Supreme Court reversed it!

DAVIS, *supra* note 3, at 58–59 (internal citations omitted).

An Alternative to the Independent State Legislature Doctrine

Bruce Ledewitz[*]

One of the most momentous actions taken by the United States Supreme Court in the last term was not deciding a case but granting review at the end of the term in *Moore v. Harper*, the North Carolina congressional redistricting case.[1] This is the case in which the Supreme Court appears likely to adopt some version of the Independent State Legislature Doctrine (Doctrine). In this essay, I will describe the actual case and the Doctrine. But I will also be offering an alternative to the Doctrine, one that I believe achieves some of the goals that the Justices who favor the Doctrine are pursuing, while avoiding the incoherencies in the Doctrine itself.

The important facts in *Moore* are straightforward. On November 4, 2021, the North Carolina General Assembly adopted a new congressional voting map based on 2020 Census data. At that time, the Republican Party controlled the legislature.[2] In the case below, a group of Democratic Party-affiliated voters and nonprofit organizations challenged the legislature's congressional map in state court pursuant to a state statute, alleging that the new map was a partisan gerrymander that violated the state constitution.[3] On February 14, 2022, the North Carolina Supreme Court ruled that the state could not use the map in the 2022 elections and remanded the case to the trial court for further proceedings.[4] The trial court adopted a new congressional map drawn by three court-appointed experts.

On February 25, 2022, prior to the state's primary election on May 17, Republican state legislators filed an emergency appeal with the U.S. Supreme Court, asking the Court to halt the state court's order until the Court could review the case. The Court denied the request.[5] Justices Samuel Alito, Clarence Thomas, and

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1. Moore v. Harper, 142 S. Ct. 2901 (2022).
2. Harper v. Hall, 868 S.E.2d 499, 513 (N.C. 2022).
3. *Id.* at 513–14.
4. *Id.* at 559–60.
5. *Moore*, 142 S. Ct. 2901.

Neil Gorsuch dissented.[6] In the dissent and in a concurrence in the denial by Justice Brett Kavanaugh, the Justices stated that the Doctrine was an important issue for the Court to resolve.

The question presented by the petition for a *writ of certiorari* in *Moore* was,

> Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.[7]

The Supreme Court granted review on June 30, 2022.[8]

The question presented squarely raised the validity of the Doctrine. The Doctrine does not have a precise definition but can be understood as asserting that the federal Constitution gives state legislatures the authority to regulate federal elections, rather than any state source of authority.[9]

In one sense, this is obviously correct. States could not have inherent authority to regulate federal elections.[10] This authority must therefore come from the federal constitution. And when they legislate, states generally do so through their legislatures rather than the other two branches of state government.

But proponents of the Doctrine generally mean something more than this. The petitioners in *Moore* are suggesting that the Doctrine, if adopted, would interpret the word "Legislature" in two provisions of the U.S. Constitution, art. I, § 4 and art. II, § 1, as meaning the deliberative body of a state without regard to state constitutional, or other, limitations. The former provision, which is at issue in *Moore*, concerns the rules for holding elections for U.S. representatives and senators, including districting and the threat of partisan gerrymandering.

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6. *See generally* Moore v. Harper, 142 S. Ct. 1089 (2022) (mem.) (Alito, J., dissenting).

7. Petition for Writ of Certiorari at i, *Moore*, 142 S. Ct. 1089 (No. 21-1271), 2022 WL 846144, at *i.

8. *Moore*, 142 S. Ct. 2901.

9. *See* Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1, 8–9 (2020).

10. *Id.* at 15.

The latter provision involves the selection of Presidential electors and provides as follows: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."[11] In theory, this provision would permit state legislative majorities to treat the popular Presidential vote in a state as purely advisory and to appoint their own partisan electors regardless of the outcome of the popular vote.[12]

There are, therefore, enormous potential stakes involved in the resolution of *Moore*. Since federal judicial review of partisan gerrymandering claims was already precluded by the political question holding in *Rucho v. Common Cause* in 2019,[13] if the Doctrine is approved by a majority on the Supreme Court, congressional district partisan gerrymandering will not be subject to any form of judicial review.

If that happens, only Congress could prevent, for example, a determined Pennsylvania General Assembly from creating a non-contiguous Congressional District combining a western Pennsylvania District with a number of voters from Scranton, a city in eastern Pennsylvania. Anyone who thinks this could not happen must never have seen Pennsylvania's gerrymandered 7th District, set aside by the Pennsylvania Supreme Court under the state constitution in 2018, infamously known as Goofy kicking Donald Duck for its highly irregular shape.[14]

In fact, the Doctrine is so all encompassing that political partisans fail to realize its breadth. This has happened repeatedly in Pennsylvania. Republicans in cases in Pennsylvania invoked the Doctrine in opposing Pennsylvania Supreme Court decisions

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11. U.S. CONST. art. II, § 1, cl. 3.

12. This interpretation might run afoul of federal rights, of course:

> Article II of the Constitution vests state legislatures with the authority to select presidential electors. This power is plenary, and the Constitution does not require states to give voters the right to directly select their preferred candidate for President. All states, however, have given their citizens the right to vote for presidential electors. When a state government confers the right to vote for presidential electors to its citizens, that right is fundamental and protectable under the Fourteenth Amendment of the Constitution.

Anh Duy Nguyen, *"Whose Electors? Our Electors!": Due Process as a Safeguard Against Legislative Direct Appointment of Presidential Electors After an Election*, 63 B.C. L. REV. 407, 433 (2022).

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

14. *See* Trip Gabriel, *In a Comically Drawn Pennsylvania District, the Voters Are Not Amused*, N.Y. TIMES (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/us/pennsylvania-gerrymander-goofy-district.html.

adopting a new congressional districting map in 2018[15] and arguing for the unconstitutionality of that court's imposition of a three-day extension for the receipt of mail-in ballots in the 2020 election.[16]

But despite the reliance on the Doctrine in these high-profile cases, Republicans have more than once asked the state courts in Pennsylvania to set aside Act 77,[17] which instituted no-excuse mail in voting in Pennsylvania in 2019, as a violation of the Pennsylvania Constitution, without the faintest acknowledgment that at least in federal elections, such an action by a state court would seem to flout the Doctrine.[18]

And when a commonwealth court found Act 77 unconstitutional, that decision failed even to mention, let alone distinguish, the Doctrine.[19]

Simply put—according to the Doctrine—in federal elections, the General Assembly and not the state judges must decide whether mail-in voting is the rule in Pennsylvania. The General Assembly passed Act 77, and it must remain controlling until repealed by that same body.

I assumed that, given the grant of certiorari in *Moore*, the Pennsylvania Supreme Court would be forced to confront the Doctrine when the court reviewed the decision of the commonwealth court. That expectation was dashed. The court upheld Act 77 by a 5-2 vote in *McLinko v. Commonwealth* on August 2, 2022, without a single mention of the Doctrine in either the majority opinion or in the dissents.[20]

Whatever one's opinion of the consequences of adopting the Doctrine, there is not much doubt that the U.S. Supreme Court will do exactly that in *Moore* when the case is decided on the merits. The four Justices mentioned by the petitioners in *Moore* have all

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15. "Mr. Scarnati later refused by letter to turn over election data to the Pennsylvania Supreme Court '[i]n light of the unconstitutionality of the court's Orders and the Court's plain intent to usurp the General Assembly's constitutionally delegated role of drafting Pennsylvania's congressional districting plan . . . .'" Bruce Ledewitz, *A Lost Opportunity to Reach a Consensus on Gerrymandering,* JURIST (Feb. 13, 2018, 01:26:20 PM), https://www.jurist.org/commentary/2018/02/pennsylvania-gerrymandering-bruce-ledewitz/.

16. *See* Republican Party v. Boockvar, 141 S. Ct. 1, 1–2 (2020) (mem.) (Alito, J., concurring).

17. Act of October 31, 2019, Pub. L. No. 552, No. 77, 25 P.S. §§ 3150.11–3150.17.

18. The first such effort was mounted by U.S. Rep. Mike Kelly in an attempt to overturn the 2020 Pennsylvania Presidential election result. *See* Bruce Ledewitz, *Pa. Rep. Mike Kelly Came Closer Than You Think to Stealing the Election for Trump*, PA. CAP.-STAR (Jan. 28, 2021, 6:30 AM), https://www.penncapital-star.com/commentary/how-pa-rep-mike-kelly-nearly-stole-the-election-for-trump-it-was-an-insult-to-the-voters-bruce-ledewitz/.

19. McLinko v. Dep't of State, 270 A.3d 1243, 1273 (Pa. Commw. Ct. 2022).

20. McLinko v. Dep't of State, 279 A.3d 539 (Pa. 2022).

expressed support for the Doctrine in the past.[21] There is no reason to assume that Justice Amy Coney Barrett will break with her conservative fellow Justices on this issue, thus adding a fifth vote.[22]

In addition, as petitioners also mentioned, Chief Justice John Roberts dissented in one precedent arguably directly on point, *Arizona State Legislature v. Arizona Independent Redistricting Commission*,[23] which, in permitting the voters to bypass the state legislature and establish an independent redistricting body, squarely rejected the Doctrine, though not by name.

So confident are the petitioners in *Moore* in the adoption of the Doctrine that they do not even bother to distinguish the Arizona redistricting case. They just assume a Court majority will send that case to the ash heap of history.

Despite this likely success, the Doctrine is both unworkable and incoherent. But it has, at its core, a genuine and admirable concern. I would now like to turn to a critique of the Doctrine and then offer an alternative approach that I feel addresses those legitimate judicial concerns.

As to the critique, the Doctrine exhibits the worst tendency of a simplistic textualism. Certainly, one could argue that the choice of the term "Legislature" in the text of the Constitution should be regarded as meaning something—that using the word "Legislature" is not the same as the simple use of the word "state," for example. In terms of such an argument, it might even be concluded that Chief Justice Roberts had the better argument in his dissent in the Arizona redistricting case. After all, in that case, the state legislature was bypassed altogether by the voters.

However, in most of the cases that come up under the heading of the Doctrine, it is in fact the state legislature that is acting, only under one or another constraint. So, the question in these cases should be, what does the word "legislature" actually mean—what is a state legislature?

In answering that question, an originalist interpretation might begin by looking at the use of the word "legislature" in the framing

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21. *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 26 LEWIS & CLARK L. REV. 405, 424–25 (2022) (collecting cases).

22. This comment was written before oral argument was heard in *Moore*. Several Justices, and especially Justice Barrett, expressed skepticism about the Doctrine. It now appears less likely that the Court will adopt it, at least in its fullest import. *See* Adam Liptak, *Supreme Court Seems Split Over Case That Could Transform Federal Elections*, N.Y. TIMES (Dec. 7, 2022), https://www.nytimes.com/2022/12/07/us/supreme-court-federal-elections.html.

23. Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 824 (2015) (Roberts, C.J., dissenting).

era. But I do not agree that this is how constitutional interpretation should proceed. Rather, we should take our method from *Marbury v. Madison*.[24] In *Marbury*, Chief Justice John Marshall proceeded from first principles concerning written constitutions, free institutions, and the nature of law, before even looking at the text of the Constitution in deciding whether judicial review is authorized by it.[25]

Marshall's approach was structural and rational, which is closer to the nature of law than is an arid and abstract attempt at historical reconstruction. Beware of lawyers claiming to do history. They are usually just hiding commitments already present on other, unexamined grounds. When we want history, we should go to historians. Well, then, how should we understand what a state legislature is from the American experience?

The answer to that is pretty clear, and the framers would have agreed—a state legislature is a deliberative body created by a state constitution and subject to various kinds of constitutional and executive branch checks, including, often, some form of gubernatorial veto. State constitutional limits on legislatures were being enforced by state courts even before the Constitution was adopted[26] and in any event that would soon become the American norm.

Why should we think the framers looked at the nature of a state legislature in some radically different way? And given the overall nature of the constitutional project, why would we think that the framers would be drawn to an image of a state legislature independent of its normal state checks and balances? It would take an awful lot of historical evidence to convince me of such a counterintuitive conclusion.

Actually, since a state legislature draws all of its fundamental process norms from its state constitution, any other conclusion is impossible. Imagine the Pennsylvania House of Representatives drawing a congressional districting map and then announcing that its map is the final product of the Pennsylvania General Assembly, without any vote by the State Senate.

Clearly, that is not how the General Assembly is supposed to operate. But how would we know that other than by the creation in the State Constitution of two houses of the legislature?[27] And how

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24. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

25. *See generally id.*

26. *See* J.R. Saylor, *Judicial Review Prior to* Marbury v. Madison, 7 SW. L. J. 88, 89 (1953) ("Another precedent for judicial review was that the state courts had been exercising this power prior to the Federal Convention.").

27. PA. CONST. art. 11, § 1.

would the claim by the House in my hypothetical be refuted except by some form of state executive or state judicial counter action?

The petitioners in *Moore* seem to be aware of this problem. So, the Petition for Review argues not for the exclusion of all executive checks and state judicial review of state legislative action in the area of federal election regulation, but only for the exclusion of state judicial review under "vague" state constitutional provisions, such as the protection of the right to "free and equal" elections.[28]

Indeed, it may well be that the uncertainty over how to treat a Governor's veto under the Doctrine is why certiorari was granted in *Moore*, in which there was no veto, instead of the parallel Pennsylvania congressional districting case,[29] in which a legislative map was blocked by Governor Wolf's veto before the state supreme court stepped in.[30]

This implied vagueness limit on the reach of the Doctrine demonstrates both that the Doctrine does not work and that the proponents of the Doctrine are actually concerned with something else entirely that the Doctrine accomplishes indirectly.

The Doctrine is structural and for it to make any sense at all, gubernatorial vetoes and all state constitutional judicial review would have to be excluded. There could be no exception for judicial enforcement of "non-vague" state constitutional provisions.

The reference to "vague" state constitutional provisions suggests that what motivates the Doctrine is not some nonsensical structural argument about legislatures but rather the fear that a state court, in particular a state supreme court, might be substituting its own policy preferences—and maybe even worse, the state court majority's partisan political commitments—for the policy preferences of the state legislature.

Obviously, the choice of the word "Legislature" by the framers locates such policy making authority in that branch of state government rather than in the judiciary.

Looking at the issue in terms of limiting the discretion of judges links the Doctrine with the rest of the conservative judicial project, including overruling *Roe v. Wade*[31] in *Dobbs v. Jackson Women's*

27. *See* Petition for Writ, *supra* note 7, at *4.
29. Carter v. Chapman, 270 A.3d 444 (Pa. 2022).
30. Katie Huangpu, *Gov. Tom Wolf Vetoes Pennsylvania Congressional Map Sent to Him by Republicans*, SPOTLIGHT PA (Jan. 26, 2022), https://www.spotlightpa.org/news/2022/01/pennsylvania-redistricting-congressional-map-veto/.
31. Roe v. Wade, 410 U.S. 113 (1973).

Health Organization.[32] Indeed, originalism itself grew from the soil of just such fears of inappropriate judicial policymaking.[33]

If we think of the Doctrine as aimed at preventing judicial policymaking at the state legislature's expense, we have a much more workable standard than either the Doctrine itself or an amorphous term such as "vague" for deciding what constitutional provisions state courts can and cannot enforce.

This standard would suggest, for example, that the Pennsylvania courts were correct in their apparent assumption in the mail-in voting case that they had jurisdiction of the case despite the Doctrine. I do not know if the provisions the courts relied on to first strike down, and then uphold, mail-in voting could be considered vague, but it is very clear that the state constitutional issue of mail-in voting and the limits on absentee voting is a very close state constitutional issue, with strong textual and historical arguments on both sides. In no way could anyone accuse the state courts in this litigation of simply substituting their policy preferences for those of the General Assembly.

The fear of unbridled state supreme court discretion under vague state constitutional provisions also explains the basis for the Doctrine in Chief Justice William Rehnquist's concurrence in *Bush v. Gore*.[34] In that case, it certainly seemed that a partisan state supreme court was inventing procedures as it went along in an attempt to "find" enough votes—to quote President Donald Trump in a later similar quest[35]—to change the outcome of the 2000 Presidential vote in Florida and swing the national election to the Democratic Party candidate, Al Gore.

But if indeed judicial discretion is the issue, then we would be much better off dealing with the matter directly. The problem of state courts manipulating state law to interfere with federal interests is not unknown. It arises, for example, in the doctrine of the adequate and independent state procedural ground in habeas

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32. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) ("In interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about what the liberty that Americans should enjoy.").

33. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann, 1st ed. 1997) ("The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is judges who determine those needs and 'find' that changing law.").

34. Bush v. Gore, 531 U.S. 98, 118 (2000) (Rehnquist, C.J., concurring).

35. Michael D. Shear & Stephanie Saul, *Trump, in Taped Call, Pressured Georgia Official to 'Find' Votes to Overturn Election*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-raffenspergercall-georgia.html.

corpus cases through which state courts hold that federal claims are waived, sometimes by an arbitrary application of state procedural rules.[36]

The U.S. Supreme Court has always held that waiver of a federal claim under state law is itself a federal issue to be determined ultimately by the Supreme Court's consideration of the federal interests at stake compared to the interests of the state.[37]

The issue in *Moore*, and the other cases in which the Doctrine arises, is similar. The federal interest here is that discretion as to policy making in federal election law has been placed by the Constitution in the state legislature. Whenever a state court changes state election law, there is the potential for frustration of that federal interest. A good faith application of state constitutional provisions by a state court is permitted but making things up out of whole cloth to achieve a court's view of better policy, or worse, a partisan result, is not.

This standard would not be easy to apply of course, not least because the Supreme Court would be charging state courts essentially with bad faith. But judging from the tone, that seems to be what several of the Justices thought about the decision by the Pennsylvania Supreme Court in 2020 to extend by three days the time for mail-in ballots to be counted.[38] And if subjectivity and partisanship are really the concerns, it is far better to just say so than to invent a Doctrine completely at odds with everything we know about how state legislatures generally work.

And the bad faith conclusion need not be directly expressed. The rule could simply be that in order for a state court to disallow or otherwise change state election law in federal elections, the state court must demonstrate that its decision arises from established state constitutional sources and precedent.

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36. *See* Beard v. Kindler, 558 U.S. 53, 55 (2009) (noting that discretionary state procedural rules are not automatically inadequate as a ground of waiver).

37. *See* Lee v. Kemna, 534 U.S. 362, 375 (2002).

38. Justice Alito wrote,

> The provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.

Republican Party v. Boockvar, 141 S. Ct. 1, 2 (2020) (mem.) (Alito, J., concurring).

This standard is essentially where even some proponents of the Doctrine have ended up.[39]

I do not know how this standard would apply in *Moore* itself. But this is how we should be addressing the issue in that case, rather than by reference to the Doctrine.

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39. "The Constitution's delegation of authority specifically to the 'Legislature' may impose outer limits on the extent to which state courts can adopt unexpected, implausible interpretations of state election laws governing federal elections." Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 558 (2021). William Baude and Michael McConnell address the issue of judicial discretion without endorsing the Independent State Legislature Doctrine in full, in somewhat similar fashion to the effort in this paper, in a recent magazine article. William Baude & Michael W. McConnell, *The Supreme Court Has a Perfectly Good Option in Its Most Divisive Case*, ATL. (Oct. 11, 2022), https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-independent-state-legislature-doctrine/671695/.

Talk Should Be Cheap: The Supreme Court Has Spoken on Compelled Fees, But Universities Are Not Listening

*Falco Anthony Muscante II**

Abstract

Taking money from a person to support political and ideological projects with which that person disagrees is, in the words of Thomas Jefferson, "sinful and tyrannical." Public universities are meddling with sin and tyranny by compelling some students to pay mandatory student activity fees in support of political and ideological activities with which those students disagree. This Article provides separate legal and historical backgrounds for both public union dues and fees and the more-recent public university student activity fees to ultimately propose a constitutional system congruent with Janus v. AFSCME, Council 31*, and its impact on* Board of Regents v. Southworth *by overruling* Abood v. Detroit Board of Education. *This Article contends that a compelled student fee system is not a limited public forum, debunks four approaches to resolving the constitutional issue, and then proposes a constitutional solution that reconciles* Southworth *with* Janus *and recommends a consistent standard for both union fees and student activity fees. That constitutional solution requires a knowing, voluntary, and intentional choice to pay the fees. Students must affirmatively waive their right not to speak and opt in to pay the fee. Public universities should not force students to support ideas and opinions that they would not otherwise support, simply through their enrollment at the university, with compelled student activity fees. Compelled speech in any form violates a student's First Amendment rights.*

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I. INTRODUCTION

From the very inception of the First Amendment, taking money from a person to support political and ideological projects with which that person disagrees is, in the words of Thomas Jefferson, "sinful and tyrannical."[1] If Jefferson is correct, public universities are meddling with sin and tyranny, at least insofar as they compel some students to pay mandatory fees in support of political and ideological activities with which those students disagree. Individual students and student groups should not have to continuously file lawsuits against large and powerful public universities to protect themselves from First Amendment violations: the United States

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1. 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 393 (1950), *cited in* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961); *see generally* U.S. CONST. amend. I.

Supreme Court should clarify once and for all that, under the First Amendment, compelled fees are compelled speech.

Unfortunately, compelled fees in the public sector are not new. Public unions had been compelling employees to fund political and ideological activities through mandatory agency fees for at least the last fifty years, since *Abood v. Detroit Board of Education*, until the Supreme Court ended this forced speech by affirming First Amendment principles in *Janus v. AFSCME, Council 31*.[2] The same compelled fee doctrine analysis applies in other contexts as well, like in the education industry, where public universities impose mandatory student activity fees.[3] This Article recognizes the fundamental differences that exist between both public unions and universities and private unions and universities, and as such, does not address those institutions in the private sector.[4]

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2. *Compare* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977) (affirming a 1967 agency shop arrangement for teachers, "whereby every employee represented by a union—even though not a union member—must pay to the union"), *overruled by* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018), *with Janus*, 138 S. Ct. at 2460 (holding that agency shop fees are compelled speech that violate the First Amendment).

3. Bd. of Regents v. Southworth, 529 U.S. 217 (2000); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990) (holding that the bar association "may not . . . fund activities of an ideological nature" not "germane" to "the State's interest in regulating the legal profession and improving the quality of legal services").

4. The fundamental difference between the public sector and the private sector is one of market competition. In the private sector, collective bargaining in the context of labor unions is adversarial; the interests of an employee (high wages) and the employer (high profit margins) are necessarily at odds. In the public sector, the union sits on both sides of the bargaining table. Falco A. Muscante II, Comment, *Police Brutality & Unions: Collective Bargaining is the Problem, Not Law Enforcement*, 13 U. MIA. RACE & SOC. JUST. L. REV. (forthcoming 2023), http://ssrn.com/abstract=4197316 ("[I]n the public sector, the employees, vis-à-vis their union, are negotiating with their employer, the government, for tax money collected from constituents."). Public unions contribute to political campaigns; the politicians they support negotiate with the union on behalf of the government, which is *always* the employer in the public sector. The first president of the American Federation of Labor and Congress of Industrial Organizations once said, "it is impossible to bargain collectively with the government." *The Problem With Police Unions*, WALL ST. J., June 11, 2020, at A16. United States presidents across the political and ideological spectrum, including Theodore Roosevelt, William Howard Taft, Franklin Delano Roosevelt, and Ronald Reagan, have distinguished private unions from public unions and offered some degree of criticism regarding the latter. *See, e.g.*, Paul Moreno, *The History of Public Sector Unionism*, HILLSDALE COLLEGE, https://www.hillsdale.edu/educational-outreach/free-market-forum/2011-archive/the-history-of-public-sector-unionism/ (last visited Sept. 14, 2022) ("Presidents Theodore Roosevelt and William Howard Taft recognized the danger of these federal employee organizations lobbying Congress and issued executive orders prohibiting federal employee membership in such organizations."); Franklin Delano Roosevelt, *97 The President Indorses Resolution of Federation of Federal Employees Against Strikes in Federal Service. August 16, 1937, in* 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 324, 325 (Samuel I. Rosenman ed., 1941) ("[T]he process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations . . . ."), *cited in* Brian Nichols, *218: How the Fairness Center Protects Public Sector Employees—with Nathan McGrath*, BRIAN NICHOLS SHOW, at 18:05–21:08 (Mar. 26, 2021), https://www.briannicholsshow.com/218-how-the-fairness-center-protects-public-sector-

Like public unions have done in the past, public universities are violating the First Amendment by compelling speech through fees.[5] Despite numerous documented examples of universities violating students' First Amendment rights through mandatory student activity fees, many of these cases settle before making it to trial.[6] The most recent Supreme Court case on the issue is *Board of Regents v. Southworth*, where a public university wanted to foster independent student groups, but also maintain total control over how the university allocated students' money that it collected separately from tuition.[7]

The Supreme Court established "viewpoint neutrality" as the standard for distributing proceeds from student activity fees *after* they are collected.[8] But the means of collecting those fees ought to be constitutional *before* they are collected. The Court in *Southworth*

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employees-with-nathan-mcgrath/; PHILIP DRAY, THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA 629 (2010) (noting that President Reagan, who led the first strike as president of his private labor union, said that "we cannot compare labor . . . in the private sector with government."); *Abood*, 431 U.S. at 227–28 ("A public employer, unlike his private counterpart, is not guided by the profit motive and constrained by the normal operation of the market.").

5. *See, e.g.*, Joint Ex Parte Motion for Dismissal with Prejudice at 3, Apodaca and Students for Life at Cal. State Univ.—San Marcos v. White, No. 3:17-cv-01014-L-AHG (S.D.C.A. Jan. 31, 2020), ECF No. 101 (settling a dispute by revising the university policy regarding mandatory student association fees to reflect First Amendment constitutional principles); Plaintiffs' Notice of Voluntary Dismissal with Prejudice at 2, Students for Life at Ga. Tech v. Regents of the Univ. Sys. of Ga., No. 1:20-cv-01422-SDG (N.D. Ga. Sept. 10, 2020), ECF No. 33 (settling a dispute between Georgia Tech and Students for Life when the university agreed to revise its policy that initially allowed the student government to deny funding an event where Dr. Martin Luther King, Jr.'s niece was set to speak); Joint Stipulation for Dismissal at ¶¶ 1–2, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-1799-SEB-TAB (S.D Ind. Sept. 4, 2018), ECF No. 18 (settling a dispute regarding the university's distribution of mandatory student activity fees and denial of fees to the plaintiff by the university's agreement to eliminate and replace the current student activity fees guidelines); *see also infra* Part III(A).
Also, old habits die hard; public unions continue to ignore the First Amendment as articulated in *Janus*. *See, e.g.*, Complaint at ¶ 2, Yanoski v. Serv. Emps. Int'l Union, Healthcare Pa. et al., No. 1:21-cv-00414-JPW (M.D. Pa. Mar. 5, 2021), ECF No. 1; Complaint at ¶ 2, Bernard v. Pub. Emps. Fed'n, AFL-CIO et al., No. 1:21-cv-00058-LEK-DJS (N.D.N.Y. Jan. 15, 2021), ECF No. 1; Complaint—Class Action at ¶ 2, Fultz et al. v Am. Fed'n of State, Cnty. and Mun. Emps., Council 13 et al., No. 1:20-cv-02107-JEJ (M.D. Pa. Nov. 12, 2020), ECF No. 1, and one case was recently on petition for a writ of certiorari to the Supreme Court, Pet. for Writ of Cert., Troesch v. Chi. Tchrs. Union, et al., No. 20-1786 (U.S. June 23, 2021), ECF No. 1, *cert. denied* 142 S. Ct. 425 (2021). Although the Court did not grant certiorari in *Troesch*, any similar case would have implications in the public university context as well, as this article will discuss.

6. *See* sources cited *supra* note 5.

7. *See generally Southworth*, 529 U.S. at 217; *see also* William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 200 (2018) (noting that the university might want to distance itself from controversial speakers invited by student groups).

8. *See generally* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

expressly relied on *Abood*, which upheld the constitutionality of compelled public union agency fees for activities "germane to" a public union's collective bargaining, but rejected any fees used for political or ideological activity, to effectively extend these principles from public unions to public universities.[9] The Court in *Janus* overruled *Abood*, prohibiting public unions from being able to force public employees to pay mandatory union dues and fees as a condition of employment without the employees' affirmative consent and waiver of their constitutional right not to pay.[10] But the Supreme Court has not yet revisited *Southworth* to similarly prohibit public universities from collecting mandatory fees from students.

This Article summarizes the relevant legal and historical background of both public unions and public universities to ultimately propose a constitutional system for student activity fees congruent with *Janus*, and its impact on *Southworth* by overruling *Abood*. Because *Janus* overturned *Abood*, and *Southworth* relied on the standard in *Abood*, this Article posits that *Southworth* is no longer good law. A constitutional solution requires a knowing, voluntary, and intentional choice to pay the fees.[11] Public universities should not force students to support ideas and opinions that they would not otherwise support, simply through their enrollment at the university, with compelled student activity fees; compelled speech in any form violates a student's First Amendment rights.

Part II of this Article provides separate legal and historical backgrounds for both public union dues and fees and the more-recent public university student activity fees, which had a similar legal foundation under *Abood* before the Court overruled that precedent.[12] Part III takes a deeper look at First Amendment jurisprudence, explains why a compelled student fee system is not a limited public forum, and discusses the impact of *Janus* on public university student activity fees. Part IV debunks four approaches to resolving the constitutional issue and then proposes a constitutional solution that both reconciles *Southworth* with *Janus* and recommends a consistent standard for both union fees and student activity fees. This solution ensures that the First Amendment rights of both public employees and public students are protected through an affirmative constitutional waiver and opt-in standard before the dues and fees are collected in the first place. Finally, Part V

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9. *See generally Abood*, 431 U.S. at 209.
10. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).
11. *See infra* Part II(A).
12. *See Janus*, 138 S. Ct. at 2460.

concludes with a summary of the arguments, the analysis, and the proposed solution.

II. LEGAL BACKGROUND OF COMPELLED FEES

A. Public Union Dues and Fees

The story of compelled fees and the First Amendment has its roots in the public labor movement. Public unions facilitate "members [working] together to negotiate and enforce a contract with management that guarantees [benefits] . . . like decent raises, affordable health care, job security, and a stable schedule,"[13] and are "in the business of protecting members' job security and winning members better salaries and benefits."[14] Understanding the historical and political context that gave rise to *private* unions is key to understanding public unions and the compelled fees they impose on employees within the bargaining unit.[15]

1. Public Union Agency Fees & Non-Chargeable Expenses

In 1926, Congress enacted the Railway Labor Act, the oldest federal legislation dealing with collective bargaining for private unions.[16] The Act was designed to prevent the disruption of rail service, establish procedures to settle labor disputes, and forbid discrimination for railway union members.[17] Later, in 1935, President Franklin D. Roosevelt championed the National Labor Relations (Wagner) Act of 1935, which sought to remedy the unequal bargaining power structure between private employers and employees and to institute collective bargaining between them.[18]

Collective bargaining is the process by which a union and an employer negotiate for wages, benefits, working conditions, and other

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13. *Unions Begin With You*, AFL-CIO, https://aflcio.org/what-unions-do (last visited Oct. 26, 2021).

14. Daniel DiSalvo, *The Trouble with Police Unions*, 45 NAT'L AFFAIRS (2020), https://www.nationalaffairs.com/publications/detail/the-trouble-with-police-unions.

15. A bargaining unit is simply the group of all employees, regardless of union membership status, represented by the union for purposes of collective bargaining and negotiation with the employer. *Bargaining Unit*, PRAC. L. GLOSSARY, Item 1-504-3640, https://us.practicallaw.thomsonreuters.com/1-504-3640 (last accessed Mar. 20, 2022).

16. *Labor History Timeline: 1607–1999*, VA. COMMW. UNIV., https://socialwelfare.library.vcu.edu/organizations/labor/labor-history-timeline-1607-1999/ (last visited Oct. 26, 2021).

17. *Id.*

18. Moreno, *supra* note 4. Though a champion of private unions, President Roosevelt recognized the inherent difference between private unions and public unions. *See* Roosevelt, *supra* note 4.

employee workplace terms and conditions.[19] When a public union represents the employees of a public employer, that union is the exclusive bargaining agent of the employees under the union contract.[20] This means that the union is the only party that can negotiate with the employer; the employees cannot negotiate independently with their employer.

More than seventy years ago, a group of private-sector employees brought suit against their railroad union when the union entered into an agreement, pursuant to the Railway Labor Act, which required all employees to pay union dues and fees as a condition of their employment.[21] The employees alleged that the dues and fees were not only used to finance political campaigns they opposed, but also that they propagated "political and economic doctrines, concepts and ideologies with which [they] disagreed."[22] Justice William Brennan wrote for the majority in *International Association of Machinists v. Street* and held that public unions may not "use [an employee's] exacted funds to support political causes which he opposes."[23] Justice Hugo Black agreed with that portion of the majority opinion in his dissent, when he wrote, "compulsory contributions to an association of employers for use in political and economic programs" infringe the First Amendment rights of public-sector union employees.[24] In this case, compulsory union dues for political purposes violated the Railway Labor Act.[25]

In the 1950s, New York and Wisconsin were among the first states where public employees unionized.[26] President John F. Kennedy extended union rights to federal government employees in 1963 with Executive Order 10988.[27] President Richard Nixon strengthened those public union rights, and eventually, Congress statutorily enshrined those rights with the Civil Service Act of 1978.[28] Although public unions are not new,[29] they have regularly

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19. *See generally* Muscante, *supra* note 4 (arguing that police unions should not bargain for matters affecting wages, hours, and terms and conditions of employment because those bargaining terms often lead to or promote police misconduct).
20. *Id.*
21. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 742–44 (1961).
22. *Id.* at 744.
23. *Id.* at 769.
24. *Id.* at 789–90 (Black, J., dissenting).
25. *Id.* at 769 (majority opinion).
26. *See generally* Moreno, *supra* note 4.
27. *Id.*
28. *Id.*
29. *See* sources cited *supra* note 4.

faced a political back-and-forth over their purpose, necessity—and most controversially—their funding.[30]

Throughout the years following *Street* and its progeny, the Court struggled to demarcate a line between chargeable expenses, which the union could initially force employees to pay vis-à-vis mandatory agency fees,[31] and fees directed toward political and ideological expenses, which were permissive fees that the public union could not force employees to pay.[32] The Court later cited *Street* in *Abood v. Detroit Board of Education* with regard to public sector unions and held that taking fees against the will of an employee for the specific purpose of funding ideological activities of which the nonconsenting employee did not approve was unconstitutional.[33]

In *Abood*, Michigan authorized an agency shop system for union representation of public employees where every employee, regardless of whether the employee was a union member, was required to pay a service fee equal in price to union dues as a condition of employment.[34] The Court recognized that compelling an employee to financially support the union impacts the employee's First Amendment rights,[35] but held that an employee was still required to pay for things that the Court found were "germane to the [the union's] duties," like collective bargaining.[36] The Court reasoned that the agency shop system "counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation."[37]

The Court also consciously failed to identify a standard for both ideological speech and speech "germane to" the duties of the union.[38] The majority noted and dismissed the employee's argument that all collective bargaining activities are political in some way.[39]

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30. Muscante, *supra* note 4 ("[I]n the public sector, the employees, vis-à-vis their union, are negotiating with their employer, the government, for tax money collected from constituents."); Moreno, *supra* note 4 ("Rather than voting for politicians who enact laws that enable unions to gain more private income, [public] unions simply elect their employers and bargain with them.").

31. Agency fees are fees charged against an employee as a condition of employment when the employee chooses not to join the public union representing her bargaining unit. Initially, these fees were equal to union dues. After *Street*, the fees were only equal to costs that were not associated with political and ideological speech. And since *Janus*, all agency fees are illegal when charged against an employee who chooses not to join (or chooses to leave) her public union.

32. *See, e.g.*, cases cited *infra* notes 41–46.

33. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977).

34. *Id.* at 211.

35. *Id.* at 222.

36. *Id.* at 235.

37. *Id.* at 222.

38. *Id.* at 236.

39. *Id.* at 226.

But Justice William Rehnquist, in his concurrence, foreshadowed the eventual position the Court would adopt when he wrote: "the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word 'political' be taken in its normal meaning."[40]

Following *Abood*, the Court began to carve out additional considerations. In *Chicago Teachers Union, Local Number 1 v. Hudson*, it held unions to a higher standard and required the union to bear the burden of affirmatively providing employees with information about the fees it imposed to minimize the risk that fees were used, even temporarily, for impermissible ideological activities.[41] Later, in *Knox v. SEIU, Local 1000*, the Court held that a public union must provide a "fresh *Hudson* notice" when the union increases or changes dues, and that it may not exact any funds from members without their affirmative consent.[42]

The Court in *Harris* further narrowed *Abood*'s application only to "*full-fledged* public employees," and held that personal assistants employed by individual "customers" but paid by the State are not included.[43] Any agency fee provision must serve a compelling state interest to pass "exacting First Amendment scrutiny."[44] And in *Harris*, the Court said that these agency fee provisions did not pass that scrutiny.[45] The Court's equivocacy in failing to establish a clear rule through this line of cases led to the "perpetua[l] give-it-a-try litigation," of which the late Justice Antonin Scalia warned,[46] at least until the Court announced its 2018 decision in *Janus v. AFSCME, Council 31*.[47]

2. Janus v. AFSCME, Council 31 *& Affirmative Waiver Requirement*

Janus is an important case in First Amendment compelled speech jurisprudence. Although Mark Janus, a public employee, decided not to join his union because of his fundamental opposition

40. *Id.* at 243 (Rehnquist, J., concurring) (emphasis added).
41. Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305, 309–10 (1986) (citing *Abood*, 431 U.S. at 244 (Stevens, J., concurring).
42. Knox v. SEIU, Loc. 1000, 567 U.S. 298, 322 (2012).
43. Harris v. Quinn, 573 U.S. 620, 638–39, 646–47 (2014) (emphasis added).
44. *Id.* at 647–48.
45. *Id.*
46. Lehnert v. Ferris Fac. Ass'n, 500 U.S. 507, 550–51 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part), *quoted in* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2481 (2018).
47. *Janus*, 138 S. Ct. at 2461.

to many of the positions the union held, the union forced Mr. Janus to pay agency fees that amounted to nearly 80% of full union dues.[48]

In an opinion authored by Justice Samuel Alito, the Court expressly overruled *Abood* and held that public employees have a First Amendment right not to subsidize union speech, and unless a public employee affirmatively consents, any payment deducted from an employee for union speech without that employee's consent violates the employee's rights.[49] Further, the Court eliminated the abstruse distinction between "chargeable expenses" and fees directed toward political speech and recognized instead that any forced contribution is forced speech; no public employee who resigns from a union can be forced to pay either agency fees for chargeable expenses or fees directed toward political or ideological projects.[50] Even during the years between the Court's opinions in *Street* and *Janus*, one thing had been abundantly clear: the First Amendment guarantees both the right to speak and the right to associate. Any seizure of payments from employees who provide notice that they are nonmembers and object to supporting the union, to the extent that those payments fund political or ideological projects, does not pass constitutional muster[51] "unless the employee affirmatively consents to pay [by] waiving their First Amendment rights."[52] The Court is clear, "such a waiver cannot be presumed"[53] but "must be freely given and shown by 'clear and compelling' evidence."[54]

Additionally, the Court held that unions are not only prohibited from exacting any funds from union members without their affirmative consent, but also, and more significantly, that unions have no constitutional entitlement to any monies from dissenting employees.[55] *Janus* reaffirmed that the First Amendment forbids unions

48. *Id.* at 2456.
49. *Id.* at 2486.
50. *Id.* at 2481–82, 2486.
51. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233–34 (1977) (noting that "[this Court's] decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments," and "a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment"); Knight v. Minn. Cmty. College Fac. Ass'n, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the right both to speak and to associate"); Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 309 (1986) (recognizing that procedural safeguards are necessary to protect employees' First Amendment rights); *Harris*, 573 U.S. at 647–48 (holding that agency-fee provisions impose a "'significant impingement on First Amendment rights,' and this cannot be tolerated unless it passes 'exacting First Amendment scrutiny'" (quoting Knox v. SEIU, Loc. 1000, 567 U.S. 298, 299–300) (2012)).
52. *Janus*, 138 S. Ct. at 2486.
53. *Id.* (citing *Knox*, 567 U.S. at 313–15).
54. *Id.* (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967) (plurality)).
55. *Id.* at 2464 (citing *Knox*, 567 U.S. at 313).

from compelling an employee to pay fees for political and ideological speech, and also extended the protection to prohibit public unions from seizing *any* payments from employees who provide notice they are nonmembers and object to supporting the union.[56] The First Amendment not only protects a right to speak, but also a right *not* to speak.[57]

The Court addressed the "risk of 'free riders'"[58] and held that "avoiding free riders is not a compelling state interest," and therefore does "[not] overcome First Amendment objections."[59] When a union is the exclusive bargaining representative for a group of public employees, individual employees cannot independently negotiate with their employer, even though they may "oppose positions the union takes in collective bargaining, or even 'unionism itself.'"[60] According to Mr. Janus, he was "not a free rider on a bus headed for a destination that he wishe[d] to reach but [was] more like a person shanghaied for an unwanted voyage."[61] Since *Janus*, and despite the predictions of those critical of the Court's decision,[62] the free-rider argument has largely proven impotent.

B. Public Universities and Student Activity Fees

In the context of the First Amendment, public union dues and student activity fees are analogous.[63] The Supreme Court has applied the same compelled fee doctrine established in the public union cases above to public universities, which exist primarily "to educate youth" by promoting a marketplace of ideas, and to the student activity fees that public universities charge.[64] When a public university compels students to pay student activity fees, the university collects those required charges separately from tuition; students who choose *not* to pay the fees often cannot graduate or receive their transcripts.[65]

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56. *Id.*
57. *See infra* Part III(A).
58. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977).
59. *Janus*, 138 S. Ct. at 2466 (citing *Knox*, 567 U. S. at 311).
60. *Id.* at 2489.
61. *Id.* at 2466.
62. John K. Wilson, *The Problems with the Janus Decision on Union Dues*, Inside Higher Ed. (Aug. 16, 2018, 3:00 AM), https://www.insidehighered.com/views/2018/08/16/problems-janus-decision-union-dues-opinion (recognizing that *Janus* established an absolute right an employee has not to fund speech she dislikes but labeling the employee a "freeloader").
63. Baude & Volokh, *supra* note 7, at 198.
64. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 709 (2010); *see also* Jonathan Kaufman, *State of the Unions: The Impact of* Janus *on Public University Student Fees*, 54 GA. L. REV. (2020) 735, 737.
65. Brief for Respondents at 7, 30, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 20; *see also* Texas A&M University, *Billing &*

On average, the five largest public universities in the country collect $165 per student per year, or nearly $7 million per year in total fees.[66] Today, these fees are used to fund "[registered] student organizations for their programming,"[67] "services related to the physical and psychological health and well-being of students, social and cultural activities and programs, services related to campus life and campus community,"[68] and any operations of student recreation centers.[69] These organizations and services are quite often political

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Fee Explanations, Student Business Services, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html (last visited Sept. 30, 2021) ("Failure to pay amounts owed may result in cancellation of the student's registration and being barred from future enrollment and receiving official transcripts.").

66. These calculations are based on the total number of enrolled students in each of the five largest public universities in the country, multiplied by each respective university's posted student activity fee, and adjusted for a yearly rate. The average of those five individual calculations represents the numbers reported above. *See* Jasmine Johnson, *Texas A&M Reports First Day Enrollment Totals*, TEX. A&M (Aug. 31, 2021), https://today.tamu.edu/2021/08/31/texas-am-reports-first-day-enrollment-totals ("Enrollment for fall 2021 at Texas A&M University on the first day of classes totaled 72,982"); *Billing & Fee Explanations*, TEX. A&M, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html ("A $145 per semester fee ($72.50 per summer five-week term) required of all students for the purpose of operating, maintaining, improving and equipping the Student Recreation Center."); Institutional Knowledge Management, *Enrollment*, UNIV. CENT. FLA. (Sept. 8, 2021), https://ikm.ucf.edu/facts/interactive-facts/enrollment/ (listing enrollment as 70,730 students for fall 2021); Student Government, *Activity & Service Fee*, UNIV. CENT. FLA., https://studentgovernment.ucf.edu/funding/asf/ (last visited Oct. 27, 2021) (calculating the yearly activity fee cost based on an average of 30 credit hours per student per year and that "[e]ach student at UCF pays $11.67 per credit hour in A&SF fees, which accumulates to become the Activity and Service Fee Budget"); Chris Booker, *Ohio State Minority Enrollment Hits Record Highs*, OHIO ST. UNIV. (Sept. 16, 2021), https://news.osu.edu/ohio-state-minority-enrollment-hits-record-highs/ ("[The] total university enrollment is 67,772."); Office of Student Life, *Student Activity Fee FAQs*, OHIO ST. U., https://activities.osu.edu/about/student_activity_fee/ (last visited Oct. 27, 2021) ("For autumn and spring semesters, the fee ranges from $37.50 to $40."); *About UCLA: Fast Facts*, UCLA (June 1, 2021), https://newsroom.ucla.edu/ucla-fast-facts (listing enrollment as 46,000 students); Registrar's Office, *Annual and Term Student Fees*, UCLA, https://sa.ucla.edu/RO/Fees/Public/public-fees?year=2021-2022&term=Spring%20Quarter°ree=Undergraduate (last visited Oct. 27, 2021) (listing the "Student Services Fee," which "covers services that benefit the student and that are complementary to, but not part of, instructional programs," as $376); Office of the Registrar, *Enrollment Reports*, UNIV. MICH., https://ro.umich.edu/reports/enrollment (last visited Oct. 27, 2021) (listing enrollment as 41,227 students); Office of the Registrar, *Tuition & Fees*, UNIV. MICH., https://ro.umich.edu/tuition-residency/tuition-fees?academic_year=169&college_school=19&full_half_term=35&level_of_study=37 (last visited Oct. 27, 2021) (listing mandatory student fees as $164.19).

67. *Student Activity Fee–Brief History*, CORNELL U., https://assembly.cornell.edu/tools-tabs-resources/funding/student-activity-fee-brief-history (last visited Oct. 26, 2021); *see* Press Release, Frank Guadagnino, et al., University Critical of Upcoming Speakers for Repugnant and Denigrating Rhetoric, (Oct. 11, 2022), https://www.psu.edu/news/administration/story/university-critical-upcoming-speakers-repugnant-and-denigrating-rhetoric/.

68. *Fee Descriptions*, UCLA, https://registrar.ucla.edu/fees-residence/fee-descriptions (last visited Oct. 26, 2021).

69. *Billing and Fee Explanations*, TEX. A&M, https://sbs.tamu.edu/billing-payments/billing-fee-explanations/index.html#:~:text=A%20%24145%20per%20semester%20fee,equipping%20the%20Student%20Recreation%20Center (last visited Oct. 26, 2021).

and ideological, and may include: both the College Democrats and the College Republicans, Uncensored America, Turning Point USA, Wisconsin Public Interest Research Group, Progressive Student Network, International Socialist Organization, Gender Equity Center, LGBTQA Pride Center, Feminists for Action, Secular Student Alliance, SPECTRUM, and Students for Life.[70]

1. *Student Activity Fees Are Relatively New*

While early forms of student activity fees existed well before World War II, these fees were generally self-imposed by students to fund "activities and niceties not covered by tuition,"[71] including intramural sports, student newspapers, student organizations, and student unions.[72] At the University of Wisconsin, for example, the fees originally covered heating and lighting for public rooms, music, diplomas, admission to athletic events, concerts, and laboratory fees.[73] At the time, most of these organizations and the associated student activity fees were not for political activities, but for "educat[ing] the whole person" by creating a marketplace of ideas to allow students "to discover and develop the[ir] talents and interests."[74] Many universities established student activity fees shortly

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70. *See, e.g.*, College Democrats of America, https://democrats.org/cda/ (last visited Jan. 12, 2022); College Republican National Committee, https://www.crnc.org/ (last visited Jan. 12, 2022); Bill Chappell, *Penn State is About to Host the Proud Boys Founder, and Its Students Are Protesting*, NPR (Oct. 12, 2022, 3:20 PM EST), https://www.npr.org/2022/10/12/1128448747/proud-boys-founder-penn-state-speaker-protest; Complaint ¶¶ 5–10, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407 (W.D. Mich. Dec. 7, 2016); Brief for Respondents at 8–14, Bd. of Regents v. Southworth, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 20; Apodaca v. White, 401 F. Supp. 3d 1040, 1045 (S.D. Cal. 2019); Complaint ¶ 2, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-1799-SEB-TAB (S.D. Ind. Sept. 4, 2018); Complaint ¶¶ 230–33, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS (S.D.C.A. May 11, 2017), ECF No. 1.

71. Jordan Lorence, FIRE'S GUIDE TO STUDENT FEES, FUNDING, AND LEGAL EQUALITY ON CAMPUS 3 (Edwin Meese III et al. eds., 2003).

72. Alex Aichinger, *Student Activity Fees*, MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1123/student-activity-fees (last visited Oct. 26, 2021).

73. Lorence, *supra* note 71 at 3; *see also* Stephen Richard Adams, The Historical Development of Student Activities and Student Centers at the University of Wisconsin—La Crosse From 1909–1973 at 17 (Apr. 11, 1977) (M.S. thesis, University of Wisconsin— La Crosse), https://minds.wisconsin.edu/bitstream/handle/1793/21858/Adams.pdf?sequence=1&isAllowed=y (quoting a 1925 student newspaper article which shared that student organizations were established to cultivate "interest[s] . . . beyond the classroom to school activities and community affairs" including "literary societies, dramatics, debate, oratory, athletics, musical organizations and lecture courses bringing the best of talent of miscellaneous types right to the school").

74. Adams, *supra* note 73, at 1, 69.

after World War II, but some universities imposed fees on their student bodies much later.[75]

The benign nature of these student activity fees gradually began to shift around the time of World War II, and likely as a direct result of the war.[76] The fees became more political, and certainly, more partisan.[77] By the 1960s and 1970s, the nature of the fees had fundamentally changed because of events like the civil rights movement, the Vietnam War, and the Berkely Free Speech Movement.[78] Student activists began to see the fees, which *initially* funded non-controversial activities, as a source of funding for political and ideological causes of special interest groups and isolated segments of the student body.[79] Public universities are now using the student activity fees that once promoted and encouraged non-political and non-ideological organizations, events, and activities, for conveying messages today that are sharply political and ideological.[80]

2. Board of Regents v. Southworth *& Viewpoint Neutrality*

There are two significant Supreme Court decisions that directly address compelled student activity fees. The first case, *Rosenberger*

75. *Compare Student Activity Fee*, *supra* note 67 (identifying that the first student activity fee Cornell University established was in 1948), *with Student Fee Board Handbook* at 2, PENN STATE (May 11, 2020), https://www.studentfee.psu.edu/files/2020/06/PSU-SIF-Handbook-2020.pdf ("The Student Activity Fee first appeared on students' bills in the 1996 Fall semester.").

76. *See* Adams, *supra* note 73, at 49, 53.

77. Prior to World War II, the only organization that might be considered political on the University of Wisconsin campus was the Socialist Study Club, which was "[o]pen to students interested in *discussing the philosophy* of socialism." *See id.* at 23–24 (emphasis added). After the start of World War II, the University of Wisconsin created a separate subsection for "Political Groups," which included the "Young Democrats" and the "Young Republicans." *Id.* at 48–49. Even by their descriptions, they were based more on politics and ideology: open only to "students interested in" each respective party. *Id.* Whereas the pre-World War II Socialist Study Club was open to anyone interested in discussing the philosophy of socialism, the post-World War II political groups were open only to students "interested in" each respective club. *Id.* at 23–24, 48–49. The difference is subtle but marks the underlying shift away from student activities with the "primary purpose" of "provid[ing] intellectual growth and exposure," *id.* at 24, toward explicitly political and ideological organizations, *see id.* at 48–49.

78. *See, e.g.,* Aichinger, *supra* note 72; Adams, *supra* note 73, at 67; Karen Aichinger, *Berkeley Free Speech Movement*, MIDDLE TENN. ST. UNIV.: THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1042/berkeley-free-speech-movement (last visited Oct. 26, 2021) ("The Berkeley Free Speech Movement refers to a group of college students who, during the 1960s, challenged many campus regulations limiting their free-speech rights.").

79. Lorence, *supra* note 71, at 3–4.

80. *See* Brief in Opposition at 5–15, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026. Student activity fees are assessed to all students separately from tuition but are usually listed on the same invoice that includes tuition and other required charges. *See e.g.*, *infra* text accompanying note 65; Bursar's Office, *Tuition Rates*, UNIV. OF WIS., https://bursar.wisc.edu/tuition-and-fees/tuition-rates (last visited Feb. 1, 2022).

v. Rector & Visitors of the University of Virginia, applies to the *distribution* of the funds collected from mandatory student activity fees *after* those fees are collected.[81] The second case, *Board of Regents v. Southworth*, concerns the *collection* of student activity fees *before* they are allocated and distributed.[82]

In *Rosenberger*, the University of Virginia, although founded by Thomas Jefferson, meddled with sin and tyranny by collecting mandatory fees, separately from tuition, which it used to fund a mere 34% of the total student groups active at the university.[83] One of the groups they chose not to fund was a Christian publication because the publication "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality."[84] Although the university funded at least fifteen other student publications with the funds collected from the compelled student activity fees at the time of the case, it overtly chose *not* to fund the student publication based on the views espoused by the newspaper.[85]

The Supreme Court held that denying funding due to the content of a message amounts to viewpoint discrimination, and that, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."[86] The Court noted that when a public university creates a limited public forum for promoting diverse student speech, as it did in this instance when it established a fund to cover the costs of student activities, it may not "discriminate against speech on the basis of viewpoint."[87] Importantly, the Court noted that the university itself had taken steps to make it explicitly known that the student groups were *not* conveying a message of the university as agents of the university, but instead were conveying their own messages vis-à-vis private speech.[88]

As the court in *Rosenberger* recognized, any limitations must not be based on particular viewpoints, but must be viewpoint neutral.[89] Viewpoint neutrality protects against viewpoint discrimination

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81. Brief in Opposition at 16–17, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 1026.
82. *Id.*
83. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 823–25 (1995); Lorence, *supra* note 71, at 31.
84. *Rosenberger*, 515 U.S. at 823.
85. *Id.* at 825.
86. *Id.* at 828.
87. *Id.* (citing Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993)); *see infra* Part III(B).
88. *Id.* at 824, 833–35.
89. *Rosenberger*, 515 U.S. at 828; *see also* Leora Harpaz, *Public Forum Doctrine*, W. NEW ENGLAND UNIV. SCH. OF LAW, https://wneclaw.com/lawed/publicforums.html (last accessed Oct. 28, 2021).

whereby the government otherwise "uses its power to advance one person's opinion over another's in such matters as religion, politics, and belief."[90] When a university compels students to pay fees to fund private speech, the university must allocate those fees in a viewpoint-neutral fashion.[91]

In the second significant case regarding compelled student activity fees, *Southworth*, the Court distinguished *Rosenberger*:

> While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance.[92]

Whereas *Rosenberger* looked exclusively at the *distribution* of the student activity fees *after* they were collected, *Southworth* looked at the initial *collection* of student activity fees *before* they were allocated and distributed.[93]

In *Southworth*, a group of students from the University of Wisconsin challenged the university's $331.50 yearly compelled student fee as an infringement of the students' First Amendment rights.[94] The students did not challenge the portion of the fees that were used for "nonallocable" functions like student health services, sports, and facilities.[95] The university argued that the compelled fees contributed to the "educational mission" of the university, but the lower courts held to the contrary and invalidated the compelled fee system.[96]

The Supreme Court began its analysis by citing *Abood* and *Keller*, "recognizing that the complaining students are being required to pay fees which are subsidies for speech they find objectionable, even

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90. Lorence, *supra* note 71, at 10.

91. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000).

92. *Id.* at 233.

93. *Compare Rosenberger*, 515 U.S. at 840 (noting that the question before the Court is not about the First Amendment challenges to the means the fees are collected), *with Southworth*, 529 U.S. at 233 ("neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation *once the funds have been collected*") (emphasis added); *see also* Brief in Opposition at 17, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 1026.

94. *Southworth*, 529 U.S. at 221–22.

95. *Id.* at 223.

96. *Id.* at 221; *see also* Brief for Respondents at 38–41, *Southworth*, 529 U.S. 217 (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 20.

offensive."[97] The Court held that extending the "germane to" standard established in *Abood* and *Keller* to public universities would be "unworkable" and "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."[98] The Court noted, "[i]f the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which she or he will or will not support."[99] In dicta, the Court further noted that universities are free to allow for an optional or refund system.[100] The Court ultimately chose not to impose a system like that because it could render the extracurricular student activities inoperative.[101] The Court upheld the viewpoint-neutrality standard established in *Rosenberger* and concluded that a university "may sustain the extracurricular dimensions of its programs by using compelled student fees with viewpoint neutrality as the operational principle."[102]

III. COMPELLED FEES ARE COMPELLED SPEECH

A. Free Speech Includes the Freedom Not to Speak

The First Amendment is a bedrock of our civil society, and it protects against both government impingement of speech and government coercion of speech. Indeed, the Supreme Court has repeatedly and uncontroversially held as much for decades.[103] As Justice William Brennan wrote, "the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."[104] When a person chooses to speak, she necessarily makes value judgments in what to say and what not to say. The Supreme Court has recognized this otherwise

97. *Southworth*, 529 U.S. at 230 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 209 (1977); Keller v. State Bar of Cal., 496 U.S. 1, 1 (1990)).

98. *Id.* at 231–32.

99. *Id.* at 232.

100. *Id.*

101. *Id.*

102. *Id.* at 233–34, *cited in* Apodaca v. White, 401 F. Supp. 3d 1040, 1051–53 (S.D. Cal. 2019) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995)).

103. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding that "the Bill of Rights denies those in power any legal opportunity to coerce" citizens to salute the flag), *cited in* Administrative Office of the U.S. Courts, *What Does Free Speech Mean?*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does (last visited Jan. 6, 2021) ("Freedom of speech includes the right[] [n]ot to speak."); Petition for Writ of Certiorari at 11, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (No. 16-1466) ("If the First Amendment prohibits anything, it prohibits the government from dictating who speaks for citizens in their relations with the government.").

104. Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988).

commonsense notion, noting that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say."[105] A specific application of this principle relates to compelled funding of public unions when the Court held that any compelled funding is compelled speech.[106]

Like public unions have done in the past, public universities attempt to circumvent students' constitutional right not to speak by compelling them to speak through mandatory student activity fees. Because student activity fees are analogous to union dues, a public university that compels a student to pay those fees violates that student's First Amendment rights.[107] The Supreme Court has spoken, both generally with regard to compelled speech and specifically with regard to public universities. But public universities continue to compel students to speak, often disregarding the viewpoint-neutrality standard set forth in *Rosenberger v. Rector & Visitors of the University of Virginia*. There is a synergy between the rights of all expressive groups on public university campuses.[108] The Court's defense of constitutional protections for religious groups in cases like *Rosenberger* is the same defense that protects the rights of LGBTQ groups and other expressive campus groups discussed in the proceeding cases.[109] Students in the cases that follow neither want to be forced to pay for the private speech of others, nor want to force others to pay for their private speech.[110]

Students from local chapters of a student-led, non-partisan national organization, Students for Life of America ("Students for Life"), have filed suit in recent years challenging the viewpoint discrimination they faced after being forced to pay fees to funds designated for student activities that they could not use for the local chapters of their own expressive student organizations.[111] Students

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105. Hurley v. Irish-American Gay, 515 U.S. 557, 573 (1995).

106. *Janus*, 138 S. Ct. at 2460; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234–35 (1977) (holding, even prior to *Janus*, that compelling nonmembers to pay money for political speech violated their First Amendment rights).

107. *See* Baude & Volokh, *supra* note 7, at 198.

108. LUKE C. SHEAHAN, *Why Associations Matter: The Case for First Amendment Pluralism* 108 (2020) (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 831 (1995)).

109. *See id.*

110. *See infra* text accompanying notes 119, 127, 132.

111. *See, e.g.*, *Ball State Corrects Unconstitutional Policies That Harmed Pro-life Student Group, Alliance Defending Freedom*, Alliance Defending Freedom, https://adfmedia.org/press-release/ball-state-corrects-unconstitutional-policies-harmed-pro-life-student-group-0 (last visited Jan. 8, 2022).

for Life has a presence on more than 1,200 campuses across the country.[112]

In one of these Students for Life cases, when the group invited Martin Luther King, Jr.'s niece, Alveda King, to speak on Georgia Tech's campus, the university refused to fund the speaking event because Ms. King is "inherently religious."[113] Brian Cochran, Haley Theis, and other students of Georgia Tech who were members of the local chapter of Students for Life sued the university alleging viewpoint discrimination.[114] In their complaint, the students said that they were forced not only to contribute their money to other groups that espouse ideas with which the students disagree, but also, that the university denied them equal access to the same funding based on Ms. King's views.[115] The university funded numerous other groups with political and ideological positions—$2,760 from the collected student activity fees funded travel for Georgia Tech students to attend the Young Democratic Socialists of America Winter National Conference—but refused to provide funding to Students for Life for Ms. King's speech.[116] As one press release aptly put it, "[u]nder such a standard, [Martin Luther King, Jr.] himself would not be welcome on campus."[117]

The university eventually agreed to revise its policy and pay $50,000 in damages and attorneys' fees.[118] But for students like Brian and Haley, they would rather not contribute to the student activity fund at all rather than be compelled to pay, and then in this instance, be denied funding from the same fund to which they contributed.[119] Other students should not be forced to fund groups like Students for Life when they disagree with the views of the group.[120]

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112. *Students for Life of America*, https://studentsforlife.org/ (last visited Jan. 10, 2022) (noting that Students for Life of America has experienced rapid growth—from 100 to over 1,250 groups—throughout the last 15 years).

113. Complaint at ¶¶ 2, 172, 192, Students for Life at Ga. Tech v. Regents of the Univ. Sys. of Ga., No. 1:20-cv-01422-SDG (N.D. Ga. Apr. 1, 2020), ECF No. 1.

114. *Id.* ¶ 8.

115. *See generally id.*; *Georgia Tech Student Group's Lawsuit Prompts End to Discrimination Against MLK's Niece*, Alliance Defending Freedom, https://adfmedia.org/press-release/georgia-tech-student-groups-lawsuit-prompts-end-discrimination-against-mlks-niece (last visited Jan. 6, 2022).

116. Complaint ¶¶ 148–49, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

117. *Georgia Tech Student Group's Lawsuit*, *supra* note 115.

118. Plaintiff's Notice of Voluntary Dismissal with Prejudice ¶ 2, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

119. Complaint ¶¶ 260–61, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG.

120. Brief in Opposition at 17, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026 ("The students have not asked in this lawsuit that certain campus organizations be censored or silenced on campus, or that certain groups totally be cut off from funding from the mandatory fee."), *citing* Southworth v. Grebe, 151 F.3d 717, 721 (7th Cir. 1998) ("But the students do not ask that we restrict the speech of any

Georgia Tech's blatant viewpoint discrimination, even two years after *Janus v. AFSCME, Council 31*, is unfortunately not an isolated incident. In another legal battle that culminated in 2020, the largest four-year public university system in the country, California State University, agreed to pay $240,000 in damages and attorneys' fees and amend its policy across each of the twenty-three campuses of the university to comply with the constitution's viewpoint-neutrality standard.[121]

In this case, the university compelled students to pay a mandatory activity fee and then dispersed the proceeds of the fee to political and ideological organizations in a manner that was overtly *not* viewpoint neutral.[122] Prior to the settlement, the university had more than 100 recognized student groups, but allocated nearly $300,000—53% of the total student activity fees collected—to two groups on campus that draw sharp political and ideological controversy: the Gender Equity Center and the LGBTQA Pride Center.[123]

When one student, Nathan Apodaca, and the on-campus Students for Life organization requested $500 to bring in their own speaker, they were denied the funding because the university "limits all other student-run organizations to $500 per semester and they are not allowed to use the fees to pay speakers to advocate for their own viewpoints."[124] The students argued that the university treated Students for Life differently by denying mandatory student activity fees to the group even though it was "similarly situated to the Gender Equity Center and the LGBTQA Pride Center at the University" as a "student-led organization[] that engaged in expressive activity on campus to advocate for [its] own viewpoint[]."[125] Although Nathan and other members of the Students for Life group were compelled to pay into the student activity fee system to subsidize other groups that advocated for specific political and ideological positions, they were denied funding to advocate for their own viewpoints.[126] The students filed a lawsuit to vindicate their First

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student organization; they merely ask that they not be forced to financially subsidize speech with which they disagree.").

121. Joint Ex Parte Motion for Dismissal with Prejudice, Apodaca v. White, 401 F. Supp. 3d 1040 (S.D. Cal. 2019), No. 3:17-cv-01014-L-AHG; *see also Pro-life Student Group's Lawsuit Prompts Systemwide Policy Change at Nation's Largest University*, Alliance Defending Freedom, https://adfmedia.org/press-release/pro-life-student-groups-lawsuit-prompts-sytemwide-policy-change-nations-largest-0 (last visited Jan. 6, 2022).

122. Complaint ¶ 73, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS.

123. *Id.* ¶ 2; *see also Systemwide Policy Change*, *supra* note 121.

124. Complaint ¶ 2, *Apodaca*, No. 17-cv-1014-L-NLS.

125. *Id.* ¶¶ 230–33.

126. *Id.* ¶ 2.

Amendment rights that they should no longer be forced to pay for another person's private speech and expression against their will.[127]

Other students from the chapter of Students for Life at Ball State University, Julia Weis, Renee Harding, and Nora Hopf, sued their university when their group applied for $300 from the mandatory student activity fees "to share educational resources with pregnant and parenting students," but the university "denied the club's request because it advocates for pro-life views."[128] The university required all students to pay mandatory student activity fees, but refused funding to Students for Life because the group "engages in activities, advocacy, or speech in order to advance a particular political interest, religion, religious faith, or ideology."[129] The students in the Students for Life organization had collectively paid over $1,000 each year into the student activity fee fund, but were denied access to those funds for their organization.[130] The university ultimately changed their policies and agreed to pay over $12,000 in damages and attorneys' fees.[131]

Students like Brian, Haley, Nathan, Julia, Renee, Nora, and countless others do not want to silence those that deeply, genuinely, and sincerely hold different viewpoints; they simply do not want to be forced to pay for the private speech of other students.[132] Students who disagree with Brian, Nathan, Julia, and others should not be forced to pay for their speech either. One of the common goals that many universities share, promoting a marketplace of ideas, is only truly achieved when *all* students have the freedom to exercise their First Amendment rights to speak and not to speak.[133]

Of the three anecdotes above, the first two cases that were filed alleged that a public university created a public forum by maintaining a mandatory student activity fee system.[134] The Supreme Court

127. *Id.* ¶¶ 20, 193, 221.

128. Complaint ¶¶ 1, 13, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; *Ball State Corrects Unconstitutional Policies*, *supra* note 111.

129. Complaint ¶ 1, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB.

130. *Ball State Corrects Unconstitutional Policies, supra* note 111.

131. *Id.*

132. *See* Complaint ¶ 260, Students for Life at Georgia Tech v. Regents of the Univ. System of Georgia, No. 1:20-cv-01422-SDG; Complaint ¶¶ 2, 20, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS; *see generally* Complaint *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; *see also* Brief in Opposition at 7, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026.

133. *See, e.g.*, Complaint ¶¶ 3, 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

134. Complaint ¶¶ 195–98, *Apodaca*, No. 17-cv-1014-L-NLS; Complaint ¶¶ 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB; *see also* Complaint ¶¶ 135–37, *Turning Point USA at Grand Valley State University*, No. 1:16-cv-01407.

released its decision in *Janus* on June 27, 2018, two weeks after Julia, Renee, and Nora filed their complaint against Ball State University.[135] That moment marked a significant change in the public forum doctrine as applied to student activity fee systems: a compelled student activity fee system is not a limited public forum.[136]

B. A Student Fee System is Not a Limited Public Forum

A student activity fee system is not a limited public forum when it is funded through compulsory fees. Prior to the Supreme Court's decision in *Janus,* compelled student activity fees arguably created a limited public forum, a type of designated public forum whereby the government opens public property for First Amendment expressive activities, but both defines the forum and imposes reasonable limitations based on speaker identity, subject matter, time, or some other means.[137] The government is under no obligation to create a limited public forum, and when it creates such a forum, it does so voluntarily.[138] The Court must address compelled speech and the public forum doctrine by looking first to the method by which the fees were compelled and collected, and only then can the Court turn to the means by which those fees were distributed. If the collection of the fees was unconstitutional, then there is no need—and no basis—for further analysis of the way in which that money is distributed.

In *Perry Education Association v. Perry Local Educators' Association*, a case regarding union access to certain means of communication, the Court plainly articulated First Amendment public forum doctrine.[139] Public forums are government-owned public property which are open to the public, "designed for and dedicated to expressive activities."[140] Justice Byron White identified three categories

135. *See generally* Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018).

136. *See infra* Part III(B); *see generally* Complaint, *Students for Life at Georgia Tech*, No. 1:20-cv-01422-SDG (omitting any discussion of public forum doctrine because it is now inapplicable in the context of student activity fees).

137. Harpaz, *supra* note 89; Doug Linder, *Restricting Speech in the Limited Public Forum*, EXPLORING CONST. LAW (2021), http://law2.umkc.edu/faculty/projects/ftrials/conlaw/designatedforum.htm; Bd. of Regents v. Southworth, 529 U.S. 217, 229–30 (2000) ("Our public forum cases are instructive here by close analogy. This is true even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt from supporting speech."); *see also* Complaint ¶¶ 195–98, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS; Complaint ¶¶ 147–53, *Students for Life at Ball State Univ.*, No. 1:18-cv-01799-SEB-TAB.

138. Linder, *supra* note 137.

139. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45–46 (1983), *cited in* Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018); Aichinger, *supra* note 72.

140. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975).

of public forums: (1) traditional, or quintessential, public forums, whereby the "government may not prohibit all communicative activity"; (2) limited public forums, whereby the state is not required to leave the forum open, but as long as it does, "it is bound by the same standards as apply in a traditional public forum"; and (3) nonpublic forums, whereby the government may regulate speech "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[141]

In a limited public forum, the government must remain viewpoint neutral and may not discriminate based on a speaker's views.[142] Although the government may employ reasonable time, place, and manner restrictions, any content-based restriction must serve a compelling state interest.[143] A compelling interest to justify compelled speech must be ideologically neutral.[144] This viewpoint-neutrality standard protects a group or individual from being forced by the government to convey political and ideological ideas with which the group or individual disagrees.[145] If compelled student activity fees constitutionally create a limited public forum, then the viewpoint-neutrality standard would apply under current constitutional jurisprudence.[146]

One important distinction to draw here is that public forums are necessarily forums for *private* speech.[147] The compelling interest and viewpoint-neutrality standards apply in those contexts, but when the government itself is speaking, whether that be through taxes or tuition dollars, the standards do not apply and the government can speak in any way it chooses.[148] The Court in *Rosenberger* noted that the university itself had taken significant steps to make it explicitly known that the student groups were *not* conveying a message of the university as agents of the university, but instead were conveying their own messages vis-à-vis private speech.[149]

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141. *Perry*, 460 U.S. at 45–46; s*ee generally* Aichinger, *supra* note 72.

142. Legal Info. Inst., *Forums*, CORNELL L. SCH., https://www.law.cornell.edu/wex/forums (last accessed Jan. 12, 2021); *see also* Lorence, *supra* note 71, at 9–10.

143. *Perry*, 460 U.S. at 45.

144. Baude & Volokh, *supra* note 7, at 173 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)).

145. *See, e.g.*, Lorence, *supra* note 71, at 9–10; Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995).

146. *See supra* text accompanying notes 141–43; Press Release, Frank Guadagnino, et al., *supra* note 67.

147. *See* Shurtleff v. City of Bos., 142 S. Ct. 1583, 1595 (2022).

148. Brief for Respondents at 60–61, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 20; *Southworth*, 529 U.S. at 241; *see also* Baude & Volokh, *supra* note 7, at 200.

149. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824, 832–35 (1995).

While a public university itself is a public forum, private speech through a compelled student activity fee scheme is not.[150] The means of collecting the fees is now unconstitutional.[151] Prior to *Janus*, compelled student activity fees were permissible under the public forum doctrine, so long as the university did not deny funding to any student group based on the group's views and expression.[152] However, the collection of fees must be constitutional *before* they can be used in a limited public forum. The Court in *Board of Regents v. Southworth* said that the fees could still be compelled in the interest of the legitimate purposes for which the forum was initially created, which in the case of public universities, is to promote the free-flowing marketplace of ideas.[153] Now that compelled financial contribution schemes are *prima facie* unconstitutional, compelled fees cannot create a limited public forum.[154]

C. Janus *Has Significant Implications for Public Universities*

Janus is explicit: "*Abood* is . . . overruled."[155] On its surface, the Court's holding in *Janus* means that nonmember public employees who no longer want to subsidize the speech of a union cannot be required to pay any amount of money to a public union.[156] But *Janus* applies to compelled speech more generally, and its holding extends well beyond public union contexts.[157] *Janus* renders all compelled financial contribution schemes unconstitutional, even mandatory student activity fees.[158]

A mandatory student activity fee system is a form of compelled financial contribution. The Court in *Southworth* relied almost exclusively on the reasoning in *Abood*, although instead of adopting *Abood*'s "germane to" test as a solution to the difficulty in

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150. *See, e.g.*, *Perry*, 4601999 U.S. S. Ct. Briefs LEXIS 155 U.S. 37, 45 (1983) (citing Widmar v. Vincent, 102 S. Ct. 263, 267 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.")).

151. *See infra* Part III(C).

152. *See, e.g.*, Lorence, *supra* note 71, at 9–10.

153. *See, e.g.*, Adams, *supra* note 73, at 17–19, 24; Complaint ¶ 3, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

154. *See infra* Part III(C).

155. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018).

156. *Id.* at 2486; *see also* Baude & Volokh, *supra* note 7, at 171 ("[R]equiring public employees to pay union agency fees is categorically unconstitutional . . . .").

157. *See Janus*, 138 S. Ct. at 2498 (Kagan, J., dissenting) (noting that the Court has looked to public union law "when deciding cases involving compelled speech subsidies outside the labor sphere," including state bar fees, public university student fees, and commercial advertising assessments).

158. *See, e.g.*, *id.*; Kaufman, *supra* note 64, at 753; Wilson, *supra* note 62 ("Now that *Abood* is overturned, *Southworth* would logically follow it . . . .").

differentiating between chargeable and nonchargeable expenses, the Court in *Southworth* decided to uphold all the fees but require their distribution to be in a viewpoint-neutral manner.[159]

The Court in *Janus*, however, applied more inclusive First Amendment protections to ensure that a person's constitutional rights were not violated, even for a moment.[160] The Court essentially rejected the "germane to" standard and said that all compelled fees are compelled speech because, in part, "when such a line [between chargeable and nonchargeable expenses] is 'impossible to draw with precision,' the solution is to reject all such compulsory funding of speech, [and] not to allow all such compulsory funding."[161] By rejecting all compulsory funding, the Court recognized that any purported benefit conferred on a public employee did not outweigh the employee's constitutional guarantees.[162] Although those who choose not to contribute to a public union still must be represented by their bargaining unit's exclusive representative in collective bargaining and in disciplinary proceedings—what the dissent characterizes as a free-rider problem[163]—the Court found that First Amendment guarantees are more compelling.[164]

If, as *Janus* held, *Abood* is no longer good law even when a public employee receives tangible benefits without contributing to the union, then compelled student advocacy through mandatory fees where the student receives no tangible benefit is certainly unconstitutional.[165] In the public university context, the free-rider argument that the students who choose not to pay the activity fee will unfairly reap some form of benefit is even less compelling than it may have been in *Janus*. In *Janus*, the union argued that "free riders" still receive some purported benefit, but there is no such benefit in the public university context.[166] By not funding the private speech of other students, the only free ride a student receives

159. *Compare* Bd. of Regents v. Southworth, 529 U.S. 217, 231–34 (2000), *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235–36 (1977); *see also* Baude & Volokh, *supra* note 7, at 198.

160. *Janus*, 138 S. Ct. at 2464 (citing Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305 (1986) ("[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose.").

161. *See id.* at 2481.

162. *Id.* at 2486 ("It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely.").

163. *Id.* at 2490 (Kagan, J., dissenting).

164. *Id.* at 2486 (majority opinion).

165. *See id.* at 2467.

166. Purported benefits in the public union context include things like collective bargaining and exclusive representation, among others. There is nothing analogous in the public university context.

is a ride away from the ideological activity that she opposes in the first place. Although cultivating a voluntary marketplace of ideas is noble and worthwhile, the purported benefits are not tangible in the same way that the union benefits are tangible for public employees who choose not to fund the union.[167] Furthermore, the varied and diverse student voices on the campus of a public university will still contribute to a broad marketplace of ideas by nature of the diverse students who choose to attend the university.[168]

Because *Janus* expressly overruled *Abood* on that basis, any standard that relied on *Abood* is unconstitutional.[169] Justice Elaina Kagan even acknowledged in her dissenting opinion that *Southworth*, among other cases, was based on *Abood*.[170] Compelling fees from public employees amounts to the same harm as compelling fees from public university students. In short, because *Janus* made the standard in *Abood* unconstitutional, and *Southworth* relied on *Abood*, the standard in *Southworth* is unconstitutional.[171]

The students' speech in *Rosenberger,* and later in *Southworth*, is private speech.[172] Because *Janus* overturned *Abood*, even speech "germane to," or in the interest of the legitimate purposes of the limited public forum (union, university, etc.) cannot be compelled absent a constitutional waiver. Because the student activity fees were used for private speech and not for government speech as the petitioner in *Rosenberger* conceded—and indeed preferred—this pulls the speech out of public forum analysis.

IV. PROPOSED CONSTITUTIONAL SYSTEM

The Supreme Court has spoken: one person cannot be forced to speak for another through compelled fees.[173] Unless a person affirmatively consents to financially contribute to private speech, any money taken by force is unconstitutional.[174] How then can public universities comply with these constitutional standards? There are at least five possible solutions: (1) eliminate the student activity fee

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167. *See Unions Begin With You, supra* note 13.
168. *See infra* Part IV(B).
169. *See Janus*, 138 S. Ct. at 2481–82.
170. *Id.* at 2498 (Kagan, J., dissenting); *see also* Wilson, *supra* note 62 ("Now that *Abood* is overturned, *Southworth* would logically follow it . . . .").
171. Baude & Volokh, *supra* note 7, at 198.
172. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822 (1995) ("[T]he University has taken pains to disassociate itself from the private speech involved in this case."); Bd. of Regents v. Southworth, 529 U.S. 217, 220–21 (2000) (noting that the "constitutional questions arising from a program designed to facilitate extracurricular [involve] *student speech* at a public university" (emphasis added)).
173. *Janus*, 138 S. Ct. at 2486.
174. *See, e.g.*, *id.* at 2486; Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 789–90 (1961).

system altogether; (2) roll the separate activity fees into tuition; (3) require students to pay a set amount of activity fees, but allow them to allocate those fees as they see fit; (4) provide students with the opportunity to opt-out of paying activity fees; or (5) require students to furnish a constitutional waiver to opt in to paying the activity fees. The first four possible solutions have either constitutional or practical problems, or both. The fifth solution is the only appropriate solution that holds weight constitutionally and practically.

A. Other 'Solutions' Are Less Than Ideal

The simplest way for a public university to comply with the First Amendment regarding student activity fees is simple: eliminate the fees. Completely eliminating the mandatory student activity fees would, obviously, be consistent with the First Amendment right not to speak. But this option is neither preferable nor practical. Indeed, universities are meant to cultivate a marketplace of ideas, and none of the plaintiffs from any case cited in this article have seriously suggested totally defunding student groups.[175]

Rather, just like a supermarket—which offers a wide array of foods in the same store—where the operator of the market cannot force its patrons to spend their hard-earned money on any particular food item, a university cannot force its students to fund any particular group. Consistent with the Court's discussion in *Janus*, someone who is compelled to pay mandatory fees against her conscience is, as is worth repeating, "not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[176] In criminal law, the supermarket example would be theft and the bus example would be kidnapping. Students attending public universities should experience a wide array of ideas and opinions—just like in a supermarket—and learn how to critically engage with culture to ultimately discern what is noble, true, and worth pursuing.[177] But those students should not be "shanghaied" into supporting those ideas that they ultimately find to be objectionable or in conflict with their deeply held beliefs.

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175. Adams, *supra* note 73, at 17, 24; *see, e.g.*, Complaint ¶ 3, Students for Life at Ball State Univ. v. Hall, No. 1:18-cv-01799-SEB-TAB; Complaint ¶ 1, Turning Point USA at Grand Valley St. Univ. v. Trustees of Grand Valley St. Univ., No. 1:16-cv-01407.

176. *Janus*, 138 S. Ct. at 2466.

177. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630, (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

Furthermore, student activity fees are deeply entrenched in the world of higher education, and it is unnecessary and likely impractical for universities to outright eliminate any system for directly supporting student groups.[178] To be clear, all compelled fees that are not part of tuition are unconstitutional, but if the statistics are comparable to the statistics for public employees who voluntarily agree to pay the fees, many students will voluntarily pay the fees as well.[179] Further, student activity fees began as a way to support student life in ways that did not invoke politics, ideology, and expression.[180] For the above reasons, this approach solves the constitutional problem by eliminating the fees, but not the practical problems that would arise.

Additionally, while rolling student activity fees into the cost of tuition seems like an amicable solution, it is also not adequate.[181] Combining the fees with tuition would rectify the constitutional issue by eliminating the scheme whereby *all* students fund the views of *some* students, but this approach allows for one speaker and one speaker alone: the public university.[182] Because the fees would become part of the university's budget, collected as part of tuition and voluntarily paid by students by nature of their enrollment at the university, the university would be free to use those fees in whichever way it chooses.[183] Even though it would become government speech and thus no longer a constitutional public forum issue,[184] this 'solution' is not ideal for at least five reasons: (1) tuition is already ballooning at an alarming rate, (2) some students are interested in a transactional college experience, (3) the marketplace of ideas becomes nonexistent, (4) universities are not keen on this approach, and (5) the change is not substantive.[185]

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178. *See* Kaufman, *supra* note 64, at 759.

179. *Compare* Daniel DiSalvo, *Public-Sector Unions After Janus: An Update*, MANHATTAN INST. (Feb. 14, 2019) https://www.manhattan-institute.org/public-sector-unions-after-janus (noting that even a year after *Janus*, union membership has not been affected, and may have actually increased) *with* Wilson, *supra* note 62 (writing a couple months after *Janus* was decided that "[o]nly an idiot thinks that the loss of fair share fees will have and economic cost to unions . . . which will completely disappear").

180. *See supra* Part II(B)(i) (explaining the history of student activity fees and their more recent trend toward politicization).

181. Kaufman, *supra* note 64, at 758.

182. Wilson, *supra* note 62 (noting that rolling the fees into tuition "would amplify one of the worst trends affecting higher education in recent decades: the growth in administrative power").

183. Baude & Volokh, *supra* note 7, at 200.

184. *Id.*; Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000).

185. *See infra* text accompanying notes 189–206.

First, the cost of higher education is already increasing at a near exponential rate.[186] This increased cost only makes the thought of earning a post-secondary degree more distant for potential students coming from lower socioeconomic backgrounds. Although some commentators suggest that students won't know the difference between paying $30,300 for tuition or $30,000 for tuition plus $300 for a compelled activity fee,[187] students are well aware of the increasing cost of tuition.[188] An additional $1,200 added to a four-year student loan will cost the student an additional $292 in interest over the life of the loan.[189]

Second, and somewhat related to the first point, in a country where some form of education after high school—whether trade school or a more traditional four-year college—is almost required, some students are looking for opportunities to get that additional training without all the fluff.[190] Especially for a nontraditional student who either delayed her college education or is returning to school for a second or third degree, paying compelled fees for any student group—let alone a political or ideological group—may be a waste of money in her eyes if she is attending school solely for a degree and not for the social and extracurricular activities.[191]

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186. *See, e.g.*, Camilo Maldonado, *Price of College Increasing Almost 8 Times Faster Than Wages*, FORBES (July 24, 2018, 8:23 AM EDT), https://www.forbes.com/sites/camilomaldonado/2018/07/24/price-of-college-increasing-almost-8-times-faster-than-wages/?sh=a4ae1bf66c1d ("[T]he cost to attend a university increased nearly eight times faster than wages did."); Briana Boyington, Emma Kerr, & Sarah Wood, *20 Years of Tuition Growth at National Universities*, U.S. NEWS (Sept. 17, 2021, 9:30 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities ("Out-of-state tuition and fees at public National 6 Universities have risen 171%."); Emmie Martin, *Here's How Much More Expensive It Is For You To Go To College Than It Was For Your Parents*, CNBC, https://www.cnbc.com/2017/11/29/how-much-college-tuition-has-increased-from-1988-to-2018.html (last updated Nov. 29 2017, 9:57 AM EST) (noting that "the current cost [of education is] more than two-and-a-half times as much as it was in 1988—a markup of 163 percent.").

187. Baude & Volokh, *supra* note 7, at 200.

188. *See* sources cited *supra* note 186.

189. *See Student Loan Calculator*, Bankrate, https://www.bankrate.com/calculators/college-planning/loan-calculator.aspx (last visited Jan. 10, 2022) (comparing the interest for $121,200 with the interest for $120,000 over a 10 year loan term at 4.5%).

190. *See, e.g.*, Open Data Pa., Improve Access, Affordability, and Completion In Post-secondary Education and Training, COMMW. OF PA. ("[I]n the 21st century, most family-sustaining jobs will require some education or training beyond high school."); *see also* Wilson, *supra* note 62 ("But students who care nothing about extracurricular activities have no benefit from student fees and must purely suffer the 'harm' of forced money/speech.").

191. Wilson, *supra* note 62 ("But students who care nothing about extracurricular activities have no benefit from student fees and must purely suffer the 'harm' of forced money/speech.").

Third, many colleges in the country, especially public colleges, have a clear political and ideological character.[192] Eliminating student fees or rolling them into tuition will destroy any remaining vestige of a marketplace of ideas by allowing the university to internally censor the types of expressive activities that occur on campus.[193] The politics and ideologies of whoever is in the majority at a particular university will reign supreme. From the inception of our country to the present, many have cautioned against allowing a majority to exercise unfettered control in any context.[194] Commentators from either side of the political aisle have cautioned against eliminating the marketplace of ideas within schools especially.[195]

Fourth, many public universities do not want to roll student activity fees into tuition, and for good reason.[196] Universities are in existence by and for their students, and as such, they want to promote student groups and student speech.[197] In this time of rapid inflation, universities are competing to keep their costs low and would not want the additional fee wrapped into the sticker price they advertise, and eventually charge, prospective students.[198]

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192. Baude & Volokh, *supra* note 7, at 199 (noting that "there's little reason to think that all or even most universities will be politically balanced").

193. One university issued a press release in anticipation of a controversial event funded by student activity fees, which condemned the rhetoric of the speakers, but recognized that "we must continue to uphold the right to free speech—even speech we find abhorrent—because [the university] fully supports the fundamental right of free speech. To do otherwise not only violates the Constitution but would erode the basic freedom each of us shares to think and express ourselves as we wish." Press Release, Frank Guadagnino, et al., *supra* note 67.

194. THE FEDERALIST NO. 10 (James Madison) ("If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution."); THE FEDERALIST NO. 51 (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure."); Malcolm Gladwell, *Young Leftists Should Go to the University of Austin*, OH, MG (Nov. 15, 2021), https://malcolmgladwell.bulletin.com/263138299110591 (writing about the need for students to attend a college where they will be in the minority, so as to learn "more from those whom [they] disagree with than from those [they] agree with").

195. Lauren Camera, *Republicans, Democrats Agree Campuses Should Embrace Controversial Speech*, U.S. NEWS (June 20, 2017, 4:59 PM), https://www.usnews.com/news/education-news/articles/2017-06-20/republicans-democrats-agree-campuses-should-embrace-controversial-speech; Isaac Willour, *What We Can Learn from the Campus Free-Speech War*, NAT'L REV. (Aug. 22, 2021, 6:30 AM), https://www.nationalreview.com/2021/08/what-we-can-learn-from-the-campus-free-speech-war/.

196. Baude & Volokh, *supra* note 7, at 200.

197. A cursory look at any college's website and admissions recruiting materials reveals that universities want students to know about all the student groups on campus.

198. *See* sources cited *supra* note 186.

Furthermore, they don't want to be the ones to shoulder the blame for controversial speakers.[199] Universities must make the choice whether they want diverse and independent student organizations or ubiquitous university-funded speech.[200] And they have already made that choice.[201] Universities separate student activity fees from tuition because they do not want student groups to become government actors, which would result in more liability for the university and more hassle in maintaining control and oversight of the hundreds of student organizations often present on a public university campus.[202] Furthermore, if student groups became government actors such that the private speech of the students was imputed to the government, there may also be potential constitutional violations under the Establishment Clause.[203] Universities make it clear that student organizations are "controlled and directed by students."[204]

And fifth, this change is a change only of accounting, not of substance.[205] Students would otherwise still pay the same amount of

199. *See* Press Release, Frank Guadagnino, et al., *supra* note 67; Chappell, *supra* note 70 (describing how officials at one university refused to cancel controversial speakers, even when those officials described the speakers' rhetoric as "repugnant and denigrating," because all student groups have the right to invite speakers using student fees and the student activity fee committee's "task was to focus on the budget, not the speakers' content or ideology"); *see also* Baude & Volokh, *supra* note 7, at 200.

200. Baude & Volokh, *supra* note 7, at 200.

201. *See, e.g.*, Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833–35 (1995); Brief for Petitioners at 11–12, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 155 ("The [student activity fee] enables the University of Wisconsin-Madison to provide services that are *initiated and operated by students*" (emphasis added)); Press Release, Frank Guadagnino, et al., *supra* note 67 ("The University Park Allocation Committee, a student-led group that can provide funds assigned from student fees for events, makes its decisions independent of the University and remains viewpoint-neutral as an integral part of the allocation process.").

202. *See, e.g.*, *Student Organizations*, UNIV. MICH., https://campusinvolvement.umich.edu/managing-your-student-organization (last visited Jan. 22, 2022) ("[We have] 1,600 student organizations here at the University of Michigan."); *Find a Student Organization*, OHIO ST. U., https://activities.osu.edu/involvement/student_organizations/find_a_student_org/ (last visited Jan. 21, 2022) ("There are over 1,400 student organizations at Ohio State"); *Student Organization Resources and Event Planning Guidance*, TEX. A&M, https://studentactivities.tamu.edu/ (last visited Jan. 21, 2022) ("Texas A&M is home to more than 1000 student organizations"); *Campus Life*, UNIV. OF WIS., https://www.wisc.edu/campus-life/ (last visited Jan. 21, 2022) (showing that there are "nearly 900 student organizations" at the university of Wisconsin—Madison); *Rosenberger*, 515 U.S. at 833–35; Chappell, *supra* note 70; Press Release, Frank Guadagnino, et al., *supra* note 67.

203. *See Rosenberger*, 515 U.S. at 827–28 (noting that "[t]he court did not issue a definitive ruling on whether . . . [student activity fees] would or would not have violated the Establishment Clause"); *see generally* Badger Catholic, Inc. v. Walsh, 620 F.3d 775, 777–79 (7th Cir. 2010) (citing U.S. CONST. amend. I).

204. *See e.g.*, *Rosenberger*, 515 U.S. at 833–35; Brief for Petitioners at 22, *Southworth*, No. 98-1189, 1999 U.S. S. Ct. Briefs LEXIS 155; Press Release, Frank Guadagnino, et al., *supra* note 67.

205. *See* Baude & Volokh, *supra* note 7, at 200.

money as they would have paid under current mandatory fee schemes, and many students would still object to the expressive speech that the university would fund, even if that funding is technically constitutional.[206] Rolling the fees into tuition, again, solves the constitutional problem, but practical problems still persist.

Another possible solution would require students to pay a fixed amount toward the activity fund but allow them to allocate those funds as they see fit. One could imagine the university providing a checklist of all the student activities on campus, and then requiring the student to check a box next to a fixed number of those groups. Based on the number of students who select a certain group, that group would receive a percentage of the activity fees. As discussed later, this suggestion proves problematic as well.[207]

The Court outlined a potential iteration of this approach in *Board of Regents v. Southworth* when it wrote, "[i]f the standard of germane speech is inapplicable, then, it might be argued the remedy is to allow each student to list those causes which he or she will or will not support," but the Court eventually rejected this.[208] The Court chose not to impose a system like that because it could render the extracurricular student activities inoperative, but the Court did note that universities are free to allow for an optional or refund system.[209]

While this approach is the most compelling discussed so far, at least in terms of practical application, it still does not quite pass constitutional muster as long as the students are forced to pay *something*. If all the groups listed are expressive or ideological groups, the nonconsenting student is still forced to pay for the private speech of others with which she may disagree. Further, if a student objected to supporting the system at all, she would still be compelled to contribute funding against her will. The Court squarely addresses this notion in *Janus*.[210]

Mr. Janus chose not to join his union because he opposed "many of the public policy positions that [his Union] advocates," he believed that the Union's "behavior in bargaining does not appreciate the current fiscal crisis[,]" and he believed that the collective bargaining structure "does not reflect his best interests or the interests

206. *See id.*; *Southworth*, 529 U.S. at 243 (Souter, J., concurring) ("No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students.").

207. *See infra* text accompanying notes 214–21.

208. *Southworth*, 529 U.S. at 232; Baude & Volokh, supra note 7, at 198.

209. *Southworth*, 529 U.S. at 232.

210. *See generally* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2448 (2018).

of [other] citizens."[211] If he had the choice, Mr. Janus would not fund the union at all.[212] The Supreme Court held that he did have that choice when it wrote, "the First Amendment does not permit the government to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[213] Similarly, requiring students in public universities to pay a fixed amount, even if they had the freedom to allocate the funds as they see fit, is unconstitutional if the student opposes the compelled fee system as a whole. Again, this approach solves the practical problem at the expense of the Constitution.

The final approach that is most convincing, but still inadequate, would provide students with the opportunity to opt-out of paying the student activity fee.[214] Under this approach, the cost of the student activity fee would, by default, be assessed against all students, but the students who decided they did not want to pay the student activity fee could opt-out. One potential benefit to this approach is that it is conceivable that a student group could receive *pro rata* funding based on the number of students who have opted out of paying the fee. In the case involving Nathan Apodaca, his group would not have been denied outright, but instead given funding consistent with the number of students who are members of the group.[215]

Many public unions, however, have implemented a similar approach after *Janus*, perpetuating even more egregious constitutional violations against public employees than had existed prior to *Janus*.[216] Many of these public unions have created an opt-out standard to lock employees into an agreement to pay union dues for an indefinite period of time.[217] The unions' opt-out standard conflicts with the *Janus* requirement that governments and unions must have clear and compelling evidence of a freely given,

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211. *Id.* at 2461 (quoting Petition for Writ of Certiorari app. A at 10a, 18a, *Janus*, 138 S. Ct. 2448 (No. 16-1466)); *see also* Kaufman, *supra* note 64, at 759.

212. *See supra* text accompanying notes 205–06.

213. *Janus*, 138 S. Ct. at 2467.

214. *See* Kaufman, *supra* note 64, at 759.

215. *See* Complaint ¶ 2, Apodaca and Students for Life at California St. Univ.—San Marcos v. White, No. 17-cv-1014-L-NLS.

216. *See, e.g.*, Pet. for Writ of Cert. at 8–9, Troesch v. Chi. Tchrs. Union, et al., No. 20-1786 (U.S. June 23, 2021), ECF No. 1; Complaint ¶¶ 22–30, Biddiscombe v. Serv. Emps. Int'l Union, Loc. 668 et al., No. 4:20-cv-02462-MWB (M.D. Pa. Dec. 30, 2020), ECF No. 1; Complaint ¶¶ 22–30, Barlow v. Serv. Emps. Int'l Union, Loc. 668 et al., No. 1:20-cv-02459-JPW (M.D. Pa. Dec. 30, 2020), ECF No. 1; Complaint ¶¶ 23–30, Yanoski v. Serv. Emps. Int'l Union, Healthcare Pa. et al., No. 1:21-cv-00414-JPW (M.D. Pa. Mar. 5, 2021).

217. *See* sources cited *supra* note 216.

affirmative constitutional waiver in order to seize union dues from employees.[218]

By imposing contractual 15- or 20-day escape periods that roll around only once every 365 days, employees who attempt to both resign from their union and cease dues deductions, but miss their escape period—in some cases by less than a month—passively forfeit their First Amendment rights that they are actively trying to exercise.[219] Because public unions neither informed employees of their constitutional rights nor requested their affirmative waiver of those rights at the time the employees initially waived their right not to pay dues, these employees could not have knowingly, intelligently, and voluntarily waived their First Amendment rights.[220] Automatic renewals of the dues deductions do not allow for employees to affirmatively consent by knowingly, intelligently, and voluntarily waiving their right not to financially supporting the union and its speech.[221]

It is not far-fetched to conceive of public universities employing the same dangerous tactic against students. In fact, it would be worryingly simple: the university adds the student activity fee to the student's bill, the student has no actual knowledge of the charge until halfway through the semester, the student finds out about the charge and decides she does not want to pay the fee to fund the expressive groups, but the university already has the student's money in its possession.

The widely applicable First Amendment standard for a constitutional waiver is based on knowledge and consent. To waive a First Amendment right, a person must "knowingly, intelligently, and voluntarily" provide a waiver of a protected right.[222] The criminal law standard outlined in *Miranda* makes this standard explicit: "A valid waiver will not be presumed simply from . . . silence," and a waiver cannot be the product of the person being "tricked or cajoled into a waiver."[223] Simply signing a document, "which contained a typed-in clause stating that he had 'full knowledge' of his 'legal

218. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018).

219. *See* sources cited *supra* note 216.

220. *See* Curtis Publ'g, 388 U.S. at 143–45, *cited in* Pet. for Writ of Cert. at 18, *Troesch*, No. 20-1786; *see e.g.*, Ex. 7 at 3, Fultz et al. v Am. Fed'n of State, Cnty. and Mun. Emps., Council 13 et al., No. 1:20-cv-02107-JEJ (M.D. Pa. Nov. 12, 2020), ECF No. 1.

221. Pet. for Writ of Cert. at 10–11, *Troesch*, No. 20-1786.

222. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185–86 (1972); Fuentes v. Shevin, 407 U.S. 67, 94–95 (1972); Edwards v. Arizona, 451 U.S. 477, 482–83 (1981); Pet. for Writ of Cert. at 16, *Troesch*, No. 20-1786).

223. Miranda v. Arizona, 384 U.S. 436, 475–76 (1966).

rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights."[224]

While the proposed opt-out solution attempts to solve the practical problems associated with compelled student activity fees, it egregiously perpetuates the constitutional concerns. Each of the proposed solutions discussed in detail above fail for one reason or the other. Thankfully, the Supreme Court has already spoken and provided a standard that tracks with the Constitution.

B. Students Must "Opt In"

In order for a public university to collect student activity fees from a student for use by student groups that promote expressive speech, the student must furnish a knowing, intentional, and voluntary constitutional waiver of her First Amendment right not to speak and instead opt in to paying the student activity fees. The Supreme Court has already made it clear that public employees—and by extension public students—have the right and freedom to make their own decision whether they will provide financial support to expressive organizations.[225] The previous four 'solutions' all had some positive aspects to them, but they ultimately were not ideal for one reason or the other—either practical or constitutional. This opt-in solution is the only way a student fee system is no longer mandatory, but totally voluntary. This option synergizes *Southworth* with *Janus* and what ultimately emerges is a solution where practical meets constitutional. Unless students clearly and affirmatively consent before the student activity fees are taken from them, this "knowing, intentional, and voluntary" standard cannot be met.[226] In theory, this is the same standard that *Janus* established for public employees who choose not to be part of their union,[227] although public unions continue to attempt to limit their employees' First Amendment rights.[228]

The student's waiver must be knowing. She must be apprised of all the material facts before opting-in to the student activity fee scheme. The university should provide, along with the bill for tuition, an addendum that lists the expressive activities and groups,

224. *Id.* at 492.
225. *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2486 (2018); *see also* Pet. for Writ of Cert. at 1–2, *Troesch*, No. 20-1786.
226. Wilson, *supra* note 62 ("[E]ven a refundable fee system would be prohibited; instead, universities would be required to get clear, advance consent to charge any student fees."); *see also D. H. Overmyer Co.*, 405 U.S. at 185–86; *Fuentes*, 407 U.S. at 94–95; *Edwards*, 451 U.S. at 482–83; Pet. for Writ of Cert. at 10–11, *Troesch*, No. 20-1786).
227. *Janus*, 138 S. Ct. at 2486.
228. *See* sources cited *supra* notes 5, 216.

along with the amount of the requested student activity fee, and request that the student affirmatively consent to paying the fee, making it abundantly clear that the fee is voluntary. The student's waiver must be voluntary. There can be no coercion, and the student must not face any adverse action for choosing to express—or not express—her speech in a certain way. Mere participation in a student group is not an affirmative waiver if the student is not made aware of her First Amendment rights. She must intentionally choose to fund the private speech of others.

The university could, as discussed in one of the solutions above, permit the student to select certain student groups that she wants to fund *after* she provides a knowing, intentional, and voluntary waiver.[229] When the university acts as a middleperson between the students and the groups those students wish to fund, the money is still under some control by the university and must be distributed commensurate with the First Amendment viewpoint-neutrality standard.[230] The university would still have an obligation under *Rosenberger v. Rector & Visitors of the University of Virginia* and *Southworth* to distribute the collected voluntary funding in a viewpoint-neutral manner.[231] The difference in this instance would be that the fees were constitutionally collected pursuant to *Rosenberger*.[232]

Mandatory student fees are not essential, and in fact, are obstructive to vibrant student speech. Some who do not agree with the opt-in solution have expressed concern that student groups and student activities will go largely unfunded, but this concern is ill-advised.[233] As mentioned earlier in a comparison to public unions, there has not been a sharp decline in union participation as many predicted.[234] Students in a public university will still be able to share their ideas, they just will not be able to force other students to subsidize those ideas. Furthermore, there are countless ways for student groups to secure funding that do not require an unconstitutional coercion of other students' speech.[235]

And even since the shift toward expressive speech, student groups have flourished without any money from a student activity fund. For example, a majority of the student groups at the

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229. *See supra* Part II(A)(ii).
230. *See supra* Part II(A)(ii).
231. See *supra* Part II(B)(ii).
232. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 840 (1995).
233. *See* Kaufman, *supra* note 64, at 759.
234. *See e.g.*, DiSalvo, *Public-Sector Unions After Janus*, *supra* note 179*;* Wilson, *supra* note 62.
235. *See infra* text accompanying notes 238–39.

University of Wisconsin—71% when the Court heard *Southworth*—did not receive any funding from the existing student activity fund.[236] Student groups do and will continue to advance their ideas on their own, even if they have to raise their own money, accept subsidies from the national office of their organization, or more simply, receive voluntary funding from their members who have opted-in to supporting the group's speech through a voluntary activity fee system. Allowing students to fund and support any group they choose will allow a multitude of different ideas to thrive rather than only those that the university chooses to fund and endorse.[237]

Additionally, students have always been innovative in employing creative fundraising to garner the support they need to keep their club functioning, whether through bake sales, talent shows, contests, and alumni donations.[238] For a student group that is a local chapter of a national organization, the national organization is often willing, able, and eager to provide funding to support the local student chapter.[239] Moreover, most students will likely just check

236. *See* Brief in Opposition at 8–9, Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (No. 98-1189), 1999 U.S. S. Ct. Briefs LEXIS 1026.

237. Press Release, Frank Guadagnino, et al., *supra* note 67 (noting that although a university's officials opposed the rhetoric of the speakers chosen by the student group, they noted that "we are unalterably obligated under the U.S. Constitution's First Amendment to protect various expressive rights, even for those whose viewpoints offend our basic institutional values and our personal sensibilities").

238. *See, e.g.*, Juniata College, *100 Fundraising Ideas: Start Raising Money for a Good Cause Today*, https://www.juniata.edu/campus-life/activities/100-fundraising-ideas.php (last visited Jan. 12, 2022); Student Government Ass'n, *Ideas for Fundraising*, PENN STATE, https://wbsga.psu.edu/ideas-for-fundraising/ (last visited Jan. 22, 2022).

239. *Student Chapter Funding and Reimbursement*, AM. CONST. SOC'Y, https://www.acslaw.org/acs-chapters/student-chapters/student-resources/student-chapter-funding-and-reimbursement/ (last visited Jan. 22, 2022) (providing reimbursement for "approved Student Chapter events"); *AEI Executive Council Conferences and Summits*, AM. ENTER. INST., https://www.aei.org/executive-council-conferences-and-summits/ (last visited Jan. 22, 2022) (providing student group members with fully-funded opportunities to attend conferences); *Chapter Funding*, MED. STUDENTS FOR CHOICE, https://msfc.org/guide/chapter-funding/ (last visited Jan. 12, 2022) ("MSFC chapters . . . are entitled to up to $150 USD every 6 months."); *Initiative on Faith & Public Life*, AM. ENTER. INST., https://faithandpubliclife.com/ (last visited Jan. 22, 2022) ("provides . . . students with formational educational and professional opportunities . . . [by sponsoring] conferences, on-campus events, and other intensive programming that explore topics of politics, public policy, economics, business, and society from a perspective of faith."); *National Field Program*, TURNING POINT USA, https://www.tpusa.com/nfp (last visited Jan. 22, 2022) (providing funding to student groups for activism materials); *RSA Graduate Student Chapter Funding and Award Calendar, 2021-2022*, RHETORIC SOC'Y OF AM., https://rhetoricsociety.org/aws/RSA/pt/sp/student_chapters_funding (last visited Jan. 12, 2022) ("RSA will provide matching grants of $50 to qualified student chapters on an annual basis."); Student Chapter Project Grants, ANIMAL LEG. DEFENSE FUND, https://aldf.org/article/student-chapter-project-grants/ (last visited Jan. 12, 2022) ("Animal Legal Defense Fund's student chapters can apply for funding to support their animal law projects that advance our mission"); Students FAQ, Students for Life, https://studentsforlife.org/students/students-faq/ (last visited Jan. 21, 2022) ("Does it Cost Money to be a Students for Life Group? No—everything Students for Life of America provides

the box anyways and pay the fee.[240] But that does not matter, as long as those students who want to exercise their constitutional right to free speech maintain that right.

V. CONCLUSION

America has always been a beacon for free speech, and with that speech, a vast marketplace for a wide array of ideas.[241] The First Amendment protects both the right *to* speak and the right *not to* speak.[242] A public university—and indeed any educational institution—exists for the purpose of educating students.[243] The ability to share and experience a wide array of ideas is vital to education and critical thinking. However, public universities have begun compelling mandatory fees—not to support their own functions, but to fund the expressive and ideological speech of others—just as public unions had done through mandatory agency fees until the Supreme Court decided *Janus v. AFSCME, Council 31* in 2018.[244]

When a university wants to collect student activity fees that are separate from tuition, it should—indeed must—provide students with the opportunity to opt in to paying the fee by a knowing, voluntary, and intentional waiver of the student's First Amendment rights that is consistent with the standard set forth in *Janus*. When public students are forced to pay these fees against their will, there is no public forum, and students' First Amendment rights are impinged.[245] Although the Supreme Court has not yet revisited *Board of Regents v. Southworth* to expressly establish the same constitutional protections for public students' right not to speak, it has already made that decision through *Janus*.

James Madison, the original drafter of the First Amendment, cautioned, "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment

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to campus groups comes free of charge . . . include[ing] material pro-life resources, access to displays, pro-life training, and personal guidance from an SFLA Regional Coordinator.").

240. *See* Kaufman, *supra* note 64, at 759 n.161 (citing Elizabeth J. Akers & Matthew M. Chingos, *Are College Students Borrowing Blindly?*, BROOKINGS INST. (2014) ("[O]nly a bare majority of respondents (52 percent) at a selective public university were able to correctly identify . . . what they paid for their first year of college.")).

241. *See supra* Part III(A).

242. *Id.*

243. Adams, *supra* note 73, at 17–18, 24.

244. *See, e.g.*, Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2460 (2018) (holding that agency shop fees are compelled speech that violates the First Amendment); Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 13–14 (1990).

245. *See supra* Part III(B).

in all cases whatsoever.[246] And more recently, the Supreme Court held that "[s]tates cannot put individuals to the choice of 'be[ing] compelled to affirm someone else's belief' or 'be[ing] forced to speak when [they] would prefer to remain silent.'"[247] Although the amounts of seized activity fees from students who object to supporting speech with which they disagree are calculable, no dollar amount can be placed on these fundamental rights that all American's have by way of the Constitution.[248]

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246. Irving Brant, James Madison: The Nationalist, 1780–87, 351 (1948), *cited in* Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 790 (1961).

247. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1745 (2018) (citing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980)).

248. *See Janus*, 138 S. Ct. at 2464 (citing Chi. Tchrs. Union, Loc. No. 1 v. Hudson, 475 U.S. 292, 305 (1986)); *see also* Uzuegbunam v. Preczewski, 141 S. Ct. 792, 802 (2021) (holding that even if a First Amendment injury is not quantifiable, "every violation [of a constitutional right] imports damage" (quoting Webb v. Portland Mfg. Co., 29 F. Cas. 506, 507 (1838))).

Rule 4(k)(2) and the Online Marketplace: An Efficient and Constitutional Route to Personal Jurisdiction over Foreign Merchants of Counterfeits

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Abstract

The online marketplace has exploded as an efficient way for U.S. consumers to get the goods they need and want delivered directly to their doors. At the same time, the prevalence of counterfeit goods offered for sale on those marketplaces has grown. Companies in the United States that own the intellectual property rights to products being counterfeited online often use various methods to stop the infringement before court intervention is necessary. Ultimately, however, those companies may need to sue the infringing party to enforce their rights. Without the 1993 addition of Federal Rule of Civil Procedure 4(k)(2), that would not be possible in many situations.

Rule 4(k)(2) serves as the federal long-arm statute, and it is often the best way for aggrieved intellectual property holders in the United States to argue for personal jurisdiction over foreign merchants violating their IP rights. Rule 4(k)(2) bridges the gap where a foreign defendant has sufficient contacts with the United States as a whole, but not sufficient contacts with any particular state to justify personal jurisdiction under any state's long-arm statute. The Rule requires that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction, but that can be a tall order for a plaintiff who does not know the internal operations of the foreign company. To remedy this, courts employ a burden-shifting analysis that requires that the plaintiff make only a prima facie showing that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction.

This Article calls for a more plaintiff-favorable approach wherein the courts presume that the defendant is not subject to jurisdiction in any state's courts of general jurisdiction. This interpretation of Rule 4(k)(2) favors economy and efficiency and accords with the purpose of the Rule. This Article further shows that Rule 4(k)(2) ought to be interpreted as liberally as possible, with constitutional due process providing a limit for its use.

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I. INTRODUCTION

Federal Rule of Civil Procedure 4(k)(2) bridges a personal jurisdiction gap first found in the 1993 Supreme Court Case *Omni Capital International, Ltd. v. Rudolph Wolff & Co., Ltd.*[1] Omni Capital, a New York firm and defendant in the lawsuit, sought to join two English defendants in the case who both had contacts with the United States, but insufficient contacts with the forum state, Louisiana, to justify personal jurisdiction under the state's long-arm statute.[2] Because the exclusion of the London co-defendants created an unfair result, the Supreme Court stated that "those who propose the Federal Rules of Civil Procedure and . . . Congress" should work to modify the rules[3] governing personal jurisdiction.[4] The rule makers and Congress followed suit in a 1993 amendment

1. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments); Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 108 (1987).

2. *Omni Cap. Int'l, Ltd.*, 484 U.S. at 108.

3. The Supreme Court proposes amendments to the Federal Rules of Civil Procedure to Congress by May 1 each year for consideration, pursuant to the Rules Enabling Act. *See* 28 U.S.C. § 2074. Unless Congress acts to modify or block amendments, they take effect on December 1 of that same year. *See id.* Generally, amendments the Supreme Court submits to Congress are at the recommendation of the Judicial Conference of the United States, comprised of federal judges from every circuit, and presided over by the Chief Justice of the Supreme Court. *See* 28 U.S.C. § 331. In turn, the Judicial Conference is empowered to create advisory committees who consider various sets of federal rules and recommend amendments to the Conference. *See* 28 U.S.C. § 2073.

4. *Omni Cap. Int'l*, 484 U.S. at 111.

to the Federal Rules of Civil Procedure.[5] Rule 4(k)(2) now serves as a federal long-arm statute for claims arising under a federal question.[6]

Much has changed since 1993, and the world has seen the rise of the internet age.[7] Commerce has shifted to take advantage of the conveniences of life in this modern time, and with that, a new era of international commerce has emerged.[8] With a few clicks of a mouse, consumers can order a product from the other side of the world and have it shipped directly to their doorstep faster than ever before.[9] While this increase in internet commerce has afforded us the comfort and ease we have now come to expect, unfortunately U.S. merchants have seen a dramatic increase in infringement of the intellectual property rights of their products.[10] Many merchants on Amazon, Alibaba, eBay, and Wish offer products for purchase in the United States that violate domestic trademark and other intellectual property rights of U.S. companies.[11] Rule 4(k)(2) may offer a sound route for aggrieved trademark holders seeking to litigate the infringement in federal court when the infringing merchant is a foreign party. However, the reach of 4(k)(2) is narrow: the plaintiff's claim must arise under federal law.[12] Additionally, the defendant must have sufficient contacts with the United States to pass constitutional due process muster, but not enough contacts with any one state that subjects the defendant to that state's long-arm statute.[13]

Due process requires that a defendant have some "minimum contacts"[14] with the forum and that they "purposefully directed"[15] those actions. When U.S. companies bring an infringement action in

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5. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

6. Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1294 (Fed. Cir. 2012).

7. Max Roser et al., *Internet*, OUR WORLD IN DATA, https://ourworldindata.org/internet (last visited Feb. 12, 2022).

8. Erica D. Klein & Anna K. Robinson, *Combating Online Infringement: Real-World Solutions for an Evolving Digital World*, A.B.A.: LANDSLIDE (Apr. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/combating-online-infringement-real-world-solutions-evolving-digital-world/.

9. *See generally* AMAZON, https://www.amazon.com/ (last visited Feb. 12, 2022); ALIBABA, https://www.alibaba.com (last visited Feb. 12, 2022); EBAY, https://www.ebay.com/ (last visited Feb. 12, 2022).

10. *Trademark Infringement Rising Year-on-Year, Says CompuMark Report*, CLARIVATE (Jan. 14, 2020), https://clarivate.com/compumark/news/trademark-infringement-rising-year-on-year-says-compumark-report/.

11. *See* Klein & Robinson, *supra* note 8.

12. Mark B. Kravitz, *National Contacts and the Internet: The Application of FRCP 4(k)(2) to Cyberspace*, 7 U. BALT. INTELL. PROP. L.J. 55, 56 (1998).

13. *Id.* at 56–57.

14. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

15. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

federal court against merchants, the defendants often move to dismiss for lack of personal jurisdiction, arguing that they did not target any particular state, but instead just hired the third-party platform, which sells the product wherever it happens to sell the product.[16] Rule 4(k)(2) may be the best method for U.S. plaintiffs to advocate for personal jurisdiction over these defendants in federal court.[17] However, courts are not unified in their approach to analyzing a Rule 4(k)(2) argument.[18]

This Article argues that Rule 4(k)(2) should be construed liberally to allow for the burden of proof in personal jurisdiction disputes to shift to the defendant when the plaintiff makes a prima facie showing that the Rule applies. This burden-shifting approach advances economy, efficiency, and the purpose of Rule 4(k)(2). Moreover, 4(k)(2) is not overly broad because it is confined by due process under the Constitution. Section II.A of this Article discusses the factual background surrounding the growing problem of foreign infringement and the devastating results it can have on intellectual property rights holders.[19] Section II.B provides the legal background to Rule 4(k)(2), particularly the requirement that the defendant be subject to personal jurisdiction in no state's court of general jurisdiction ("negation requirement") and the due process concerns under the Rule.[20] Section III.A suggests a framework for courts to properly shift the burden of production when personal jurisdiction is disputed under Rule 4(k)(2).[21] Section III.B addresses concerns that Rule 4(k)(2) is overly broad and that the Rule "guarantees" jurisdiction,[22] and finally, Part IV contains concluding remarks.[23]

II. BACKGROUND

A. The Growing Problem of Online Infringement

In 2019, a study found that 85% of the brands represented in the study had suffered from trademark infringement, a rise of 15% over

16. *See, e.g.*, Ouyeinc Ltd. v. Alucy, No. 20-C-3490, 2021 WL 2633317, at *4 (N.D. Ill. June 25, 2021); Carson Optical, Inc. v. RQ Innovasion Inc., No. 16-CV-1157, 2020 WL 1516394, at *2 (E.D.N.Y. Mar. 30, 2020).

17. FED. R. CIV. P. 4(k)(2).

18. *Compare* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 41 (1st Cir. 1999), *with* ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Section III.A.

22. *See infra* Section III.B.

23. *See infra* Part IV.

a two-year period.[24] This growth comes as little surprise in the internet age; the speed at which an infringement can occur and become known to the public is greater than ever before.[25] An infringing trademark can cause consumer confusion, loss of brand reputation, and direct loss of revenue, potentially having a devastating effect on the party owning the brand.[26]

A party wary of trademark infringement has a few options.[27] First, the party may register the trademark with the United States Patent and Trademark Office.[28] Second, the party may employ site-specific protection measures such as Amazon Brand Registry, Amazon Project Zero, eBay Verified Rights Owner Program, and Alibaba Intellectual Property Protection Platform.[29] But, while using these measures is free for the party, they are "not foolproof," allowing parties only to remove "readily identifiable, low-hanging infringement fruit" from the online marketplace.[30] More detailed monitoring for infringing products on those websites can be an ongoing, costly process, involving training in-house teams to detect infringement and consider fair use before issuing takedown notices.[31] Third, and in response to that problem, a market has emerged of "brand protection" firms that offer a suite of intellectual property protection services.[32] These services are more sophisticated than those that the online marketplaces offer, and they often include machine learning and artificial intelligence-empowered

24. CLARIVATE, *supra* note 10.

25. *See* Klein & Robinson, *supra* note 8.

26. CLARIVATE, *supra* note 10.

27. *See* Klein & Robinson, *supra* note 8.

28. *See Online Brand Protection: Challenges and Solutions*, CORSEARCH (Apr. 11, 2021), https://corsearch.com/online-brand-protection-challenges-and-solutions/.

29. *See* Klein & Robinson, *supra* note 8. Amazon Brand Registry allows sellers to "use information about [their] brand to proactively remove suspected infringing or inaccurate content." AMAZON BRAND REGISTRY, https://brandservices.amazon.com (last visited Feb. 12, 2022). Amazon Project Zero uses "machine learning [and] automated protections [that] continuously scan [Amazon] stores and proactively remove suspected counterfeits." AMAZON PROJECT ZERO, https://brandservices.amazon.com/projectzero (last visited Feb. 12, 2022). The eBay Verified Rights Owner Program "allows owners of intellectual property (IP) rights and their authorized representatives to report eBay listings that may infringe on those rights." *Verified Rights Owner Program*, EBAY, https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html (last visited Feb. 12, 2022). Alibaba's Intellectual Property Protection Platform allows sellers who have submitted proof of identity and documentation of intellectual property rights to "submit takedown notices against suspected infringing product listings" for removal. *IPP Platform Instructions*, ALIBABA GROUP IP PROTECTION PLATFORM, https://ipp.alibabagroup.com/instruction/en.htm#part2 (last visited Feb. 12, 2022).

30. Klein & Robinson, supra note 8.

31. *Id.*

32. *See, e.g.*, *Anti-counterfeiting*, BRANDSHIELD, https://www.brandshield.com/products/anti-counterfeiting/ (last visited Jan. 2, 2022).

software capable of scanning sites like Amazon, eBay, Alibaba, and Wish in pursuit of potential offenders.[33]

Those are great options for the proactive trademark holder, but what of the party that has already suffered harm at the hands of an infringer? Moreover, although these services might discourage counterfeiters from posting products, they do not prevent it.[34] What of the trademark holder whose claim has been denied by the proprietors of the sites allowing the violation of the trademark right? The best way for such a party to stop the counterfeit sales is to obtain a judgment from a court.[35] Three quarters of polled brand owners reported trademark disputes that led to litigation.[36] However, litigation presents a new problem for U.S. trademark holders; when the alleged infringing party is located outside the United States, as is often the case,[37] the trademark holder may have difficulty bringing the alleged infringing party into court in the United States. This article contemplates the situation wherein a U.S. plaintiff and intellectual property holder seeks to hold an alleged foreign infringer (who, for example, operated through an online marketplace like Amazon) liable for damages in a U.S. federal court even when the foreign party has no "minimum contacts" with any particular state. Prior to the 1993 amendment to the Federal Rules of Civil Procedure adding Rule 4(k)(2), holding a foreign infringer liable would have been impossible.[38] However, Rule 4(k)(2) now allows for this type of personal jurisdiction,[39] and ought to be used to allow for the redress of infringement of intellectual property rights in this situation.

B. Personal Jurisdiction over Foreign Defendants & Rule 4(k)(2)

A court hearing a case must have personal jurisdiction over the defendant to enter a valid, enforceable judgment.[40] To satisfy the requirements of personal jurisdiction, a court must comply with the statute controlling the court's jurisdictional reach and with the United States Constitution.[41] The Due Process Clause of the

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33. *See id.*
34. *See id.*
35. *See generally* Spin Master, Ltd. v. Zobmondo Ent., LLC, 944 F. Supp. 2d 830 (C.D. Cal. 2012).
36. CLARIVATE, *supra* note 10.
37. *See, e.g.*, Viahart LLC v. P'ships and Unincorporated Ass'ns Identified on Sched. "A", No. 19-CV-8181, 2021 WL 5113935, at *1 (N.D. Ill. Nov. 3, 2021).
38. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).
39. FED. R. CIV. P. 4(k)(2).
40. *See* J. McIntyre Mach., Ltd. v. Nicastro, 564 U.S. 873, 880 (2011).
41. *See* Rogers v. Indiana, 996 F.3d 812, 818 (7th Cir. 2021).

Constitution protects the individual's right not to be subject to a judgment in a jurisdiction where a defendant has insufficient "contacts, ties, or relations."[42] The principal consideration for courts determining whether an exercise of personal jurisdiction over a defendant would be constitutional is whether the defendant's contacts or ties with the forum are sufficient to make maintenance of the suit "reasonable and just under our traditional notions of fair play and substantial justice."[43] A court exercising personal jurisdiction over a business that "purposefully avails itself of the privilege of conducting activities within the forum State" is generally proper.[44] In determining whether a defendant has "purposefully availed" itself of the benefits and protections of the laws of a forum, courts consider "whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct."[45] Because the states are sovereignties separate from the United States as a whole, this can lead to situations in which a "defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."[46] The Supreme Court, in *J. McIntyre Machinery, Ltd. v. Nicastro*, found that this would be an exceptional situation because "foreign corporations will often target or concentrate on particular States, subjecting them to specific jurisdiction in those forums."[47] However, the Supreme Court has yet to enter an internet-related personal jurisdiction decision.[48]

Federal Rule of Civil Procedure 4(k)(2) provides a bridge to personal jurisdiction where defendants avail themselves of the laws of the United States overall, but not of any particular state.[49] Rule 4(k)(2) was added to the Federal Rules of Civil Procedure in 1993 in response to a recommendation the Supreme Court made in *Omni Capital International. v. Rudolf Wolff & Co., Ltd.*[50] Rule 4(k)(2) "corrects a gap in the enforcement of federal law."[51] The advisory committee noted that a gap existed in a situation where a potential defendant was a non-resident of the United States having sufficient

42. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).
43. *Id.* at 320.
44. Hanson v. Denckla, 357 U.S. 235, 253 (1958).
45. *J. McIntyre Mach., Ltd.*, 564 U.S. at 884.
46. *Id.*
47. *Id.* at 884–85.
48. *See* Walden v. Fiore, 571 U.S. 277, 290 n.9 (2014) ("We leave questions about virtual contacts for another day.").
49. FED. R. CIV. P. 4(k)(2).
50. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).
51. *Id.*

contacts with the nation to justify bringing that defendant into court, but where the defendant did not have sufficient contacts with any state sufficient to support personal jurisdiction there.[52] The Rule, titled "Federal Claim Outside State-Court Jurisdiction," provides:

> For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if the defendant is not subject to jurisdiction in any state's courts of general jurisdiction, and exercising jurisdiction is consistent with the United States Constitution and laws.[53]

This Rule constitutes part of the federal long-arm statute and allows a district court to exercise personal jurisdiction even when a defendant does not have sufficient contacts with the forum when: "(1) the plaintiff's claim arises under federal law, (2) the defendant is not subject to personal jurisdiction in the courts of any state, and (3) the exercise of jurisdiction satisfies due process requirements."[54]

While this reach may be narrow, in the contemporary internet age, a class of defendants has emerged who may be the perfect candidates for the application of Rule 4(k)(2).[55] Foreign merchants who use an online marketplace to offer products for purchase in the U.S. market that violate U.S. intellectual property rights of U.S. companies may fall into the purview of the Rule.[56] When those U.S. companies bring an infringement action in federal court against the merchants, the defendants often move to dismiss for lack of personal jurisdiction, arguing that they did not target any particular state, but that they just hired the third-party platform that sells the product to a purchaser, wherever she may be.[57]

While the first requirement for personal jurisdiction pursuant to Rule 4(k)(2) (that the plaintiff's claim arises under federal law) is established in cases alleging infringement of federal intellectual property laws, the other two requirements require closer analysis before a court can properly exercise personal jurisdiction. This

52. *Id.*
53. FED. R. CIV. P. 4(k)(2).
54. Merial Ltd. v. Cipla Ltd., 681 F.3d 1283, 1294 (Fed. Cir. 2012).
55. *See, e.g.*, ABG EPE IP, LLC v. 3C Smart Store, No. 1:21-CV-1510, 2021 WL 2452636, at *3 (N.D. Ga. Apr. 17, 2021); *but see* Carson Optical, Inc. v. RQ Innovasion Inc., No. 16-CV-1157, 2020 WL 1516394, at *7 (E.D.N.Y. Mar. 30, 2020).
56. *See* Klein & Robinson, *supra* note 8.
57. *See, e.g.*, Ouyeinc Ltd. v. Alucy, No. 20-C-3490, 2021 WL 2633317, at *4 (N.D. Ill. June 25, 2021).

Article considers those two requirements and how courts analyze them.

1. The Negation Requirement

When a defendant challenges personal jurisdiction in a suit, proving whether the defendant is not subject to personal jurisdiction in any state's courts of general jurisdiction (sometimes called the "negation requirement") poses practical difficulties for plaintiffs.[58] When a defendant challenges personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), the plaintiff ordinarily bears the burden of establishing that the court has personal jurisdiction over the defendant.[59] In the case where the plaintiff believes that the defendant is not subject to personal jurisdiction in any one state, but in the United States as a whole, that plaintiff may assert jurisdiction under Rule 4(k)(2).[60] Under the second Rule 4(k)(2) requirement, a plaintiff must prove that the defendant is not subject to personal jurisdiction in any of the states.[61] This is quite a heavy burden, particularly because the defendant, and not the plaintiff, possesses the necessary information.[62] But, shifting the burden to the defendant threatens to force the defendant to "choose between conceding its potential amenability to suit in federal court (by denying that any state court has jurisdiction over it) or conceding its potential amenability to suit in some identified state court."[63]

The First Circuit, in response to this problem, devised a burden-shifting analysis wherein a plaintiff seeking to prove personal jurisdiction under Rule 4(k)(2) must make a prima facie showing: "(1) that the claim asserted arises under federal law, (2) that personal jurisdiction is not available under any situation-specific federal statute, and (3) that the putative defendant's contacts with the nation as a whole suffice to satisfy the applicable constitutional requirements."[64] As part of this showing, a plaintiff "must certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts

58. *See* Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285, 1294 (Fed. Cir. 2009).

59. *Id.*

60. FED. R. CIV. P. 4(k)(2).

61. United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 40 (1st Cir. 1999).

62. *Synthes*, 563 F.3d at 1294.

63. *Swiss Am. Bank*, 191 F.3d at 41. However, a defendant could also maintain that it does not have sufficient contacts with the United States as a whole to support personal jurisdiction constitutionally.

64. *Id.*

of general jurisdiction of any state."[65] When a plaintiff makes this prima facie showing, the burden of production shifts to the defendant to offer evidence that either there is at least one state where it is subject to personal jurisdiction or that it has insufficient contacts with the United States as a whole to support a constitutional exercise of personal jurisdiction.[66] The Fourth Circuit has adopted the same burden-shifting scheme.[67]

The Seventh Circuit adopted a similar burden-shifting scheme, but with a standard more favorable to plaintiffs.[68] Under that court's jurisprudence, although a defendant "[n]aming a more appropriate state would amount to a consent to personal jurisdiction there," when the "defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2)."[69] The Fifth,[70] Sixth,[71] Ninth,[72] Eleventh,[73] and D.C.[74] Circuits have adopted this approach as well. Provided the defendant has sufficient contacts with the United States as a whole, the Seventh Circuit's burden-shifting framework allows for greater efficiency than the First Circuit's because a personal jurisdiction determination can be made immediately when a defendant either admits to a proper forum or refuses to do so.[75] Perhaps most efficiently of all, the U.S. District Court for the Northern District of Georgia, Atlanta Division has issued a string of ex parte temporary restraining orders over the past few years, finding that foreign merchants are subject to personal jurisdiction under Rule 4(k)(2) based solely on the plaintiffs' affidavits.[76]

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65. *Id.*

66. *Id.* at 42.

67. *See* Base Metal Trading v. Ojsc Novokuznetsky Aluminum Factory, 283 F.3d 208, 215 (4th Cir. 2002).

68. ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

69. *Id.*

70. Adams v. Unione Mediterranea Di Sicurta, 364 F.3d 646, 651 (5th Cir. 2004).

71. Lyngaas v. Ag, 992 F.3d 412, 422 (6th Cir. 2021).

72. Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 461 (9th Cir. 2007).

73. Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1218 n.22 (11th Cir. 2009).

74. Mwani v. bin Laden, 417 F.3d 1, 11 (D.C. Cir. 2005).

75. *See* Viahart LLC v. P'ships and Unincorporated Ass'ns Identified on Sched. "A", No. 19-CV-8181, 2021 WL 5113935, at *3 (N.D. Ill. Nov. 3, 2021) (finding 4(k)(2) jurisdiction improper where plaintiff attempted to invoke 4(k)(2), but defendant admitted to having sold a product via Amazon in Maryland); NOCO Co. v. Shenzhen Valuelink E-Com. Co., Ltd., No. 1:20-CV-49, 2021 WL 4699088, at *3 (N.D. Ohio July 22, 2021) (finding 4(k)(2) jurisdiction where the defendant used Amazon to sell products, but refused to name a state in which jurisdiction would be proper).

76. This court uses the same language in justifying ruling on ex parte temporary restraining orders without notice to the defendant and finding "a significant amount of evidence pertaining to the counterfeiting activity is in electronic form, and therefore subject to

In sum, after the plaintiff has made a prima facie showing of the applicability of Rule 4(k)(2), the Seventh Circuit's burden-shifting scheme puts the burden on the party with better access to the evidence: the defendant.[77] This makes the process of determining whether the court has personal jurisdiction over the defendant more efficient and less costly because it requires no jurisdictional discovery.[78] Furthermore, this application of 4(k)(2) aligns with the purpose of the Rule itself: to broaden the jurisdiction of federal courts in federal question cases when foreign defendants are not subject to the jurisdiction of any state, and the exercise of personal jurisdiction would not offend due process.[79]

2. Due Process Requirements

Some courts analyze the due process requirement before they analyze the negation requirement.[80] Courts employing this approach find that if the defendant's contacts do not satisfy due process, it is not necessary to determine whether the requirements for application of Rule 4(k)(2) are met.[81] The Due Process Clause of the Fifth Amendment restricts a federal court's exercise of personal jurisdiction over a defendant,[82] requiring "that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party."[83] Federal courts, however, are largely limited to the reach of their host state's long-arm statute.[84] Thus, the Supreme Court has treated cases brought in federal court as if they had been brought in state court.[85] The Supreme Court has not yet ruled on what restrictions circumscribe the federal courts' exercise of personal jurisdiction with respect to the Fifth

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quick, easy, and untraceable destruction by the Defendants." Est. of Marylin Monroe, LLC v. 123oilpainting, No. 1:21-CV-3824, 2021 WL 5033827, at *2 (N.D. Ga. Sept. 22, 2021); Sportswear Co. - S.p.A v. Act as Purchasing Agency, No. 1:21-CV-00465, 2021 WL 2666885, at *2 (N.D. Ga. Feb. 2, 2021); Moncler S.p.A. v. A15720789095, No. 1:20-CV-2498, 2020 WL 6481537, at *2 (N.D. Ga. June 15, 2020).

77. *See* ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).

78. *Id.* (finding that "[t]his procedure makes it unnecessary to traipse through the 50 states, asking whether each could entertain the suit").

79. FED. R. CIV. P. 4(k)(2).

80. Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285, 1295 (Fed. Cir. 2009).

81. *Id.*

82. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619–20 (1992); Antonini v. Ford Motor Co., No. 3:16-CV-2021, 2017 WL 3633287, at *2 (M.D. Pa. Aug. 23, 2017) (citing Bristol-Myers Squibb Co. v. Superior Court, 137 S. Ct. 1773, 1783–84 (2017)).

83. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

84. *See* FED R. CIV. P. 4(k)(1)(A).

85. *See, e.g.*, Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 463–64 (1985).

Amendment.[86] Circuits that have considered this question have found that the analysis is materially the same as the analysis under the Fourteenth Amendment's Due Process Clause:[87] a minimum contacts test and a "reasonableness" inquiry.[88] The only difference is that while the Fourteenth Amendment limits jurisdiction over a defendant with insufficient contacts in a state, the Fifth Amendment limits jurisdiction over a defendant with insufficient contacts with the "United States as a whole."[89] Rule 4(k)(2), therefore, functions as a federal long-arm statute and ensures that federal claims will have a U.S. forum if sufficient national contacts exist.[90]

Under this federal long-arm approach, courts employ a two-part inquiry to determine if due process is satisfied.[91] First, courts consider whether the defendant had sufficient "minimum contacts" with the United States to support the exercise of personal jurisdiction.[92] For the first requirement, courts distinguish between "general" and "specific" jurisdiction.[93] Under *International Shoe* and its progeny, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."[94] Individuals are at home in their state of domicile; corporations are generally at home in their place of incorporation and where their principal place of business is located.[95] Thus, if a defendant is at home in any state, Rule 4(k)(2) will not be available because the Rule only applies when the defendant is not subject to personal jurisdiction in any state.[96] Rather, a court exercising personal jurisdiction under Rule 4(k)(2) must find that it has specific jurisdiction over the defendant.[97] Specific jurisdiction is the

86. *See Bristol-Myers*, 137 S. Ct. at 1783–84 (considering due process limits on a state but leaving the Fifth Amendment's restrictions on federal courts an open question).

87. *See, e.g.*, Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 238 (5th Cir. 2022); Livnat v. Palestinian Auth., 851 F.3d 45, 55 (D.C. Cir. 2017); Aerogroup Int'l, Inc. v. Marlboro Footworks, Ltd., 956 F. Supp. 427, 438–39 (S.D.N.Y. 1996).

88. *See, e.g.*, *Livnat*, 851 F.3d 45 at 55; *Aerogroup Int'l, Inc.*, 956 F. Supp. at 438–39.

89. *See Livnat*, 851 F.3d 45 at 55.

90. Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285, 1295–96 (Fed. Cir. 2009) (quoting FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments)).

91. Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996).

92. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

93. *Metro. Life Ins. Co.*, 84 F.3d at 567.

94. Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945)).

95. *Goodyear*, 564 U.S. at 924 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 781 (1988)).

96. FED. R. CIV. P. 4(k)(2).

97. *Id.*

exercise of jurisdiction over an out-of-state defendant,[98] and a court must satisfy itself that "the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities."[99] Stated another way, the court must find that the defendant "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]."[100]

In the second inquiry courts undertake to determine satisfactory due process, they determine whether the exercise of specific personal jurisdiction would comport with "traditional notions of fair play and substantial justice."[101] The Supreme Court has found that weighing on this determination of fairness are the following factors: (1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) "the plaintiff's interest in obtaining convenient and effective relief;" (4) "the interstate judicial system's interest in obtaining the most efficient resolution of the controversy;" and (5) "the shared interest of the . . . states in furthering . . . substantive social policies."[102] The Court has further elaborated that the exercise of personal jurisdiction is preferred when the plaintiff has made a showing of the defendant's minimum contacts, but that preference may be overcome by the defendant's showing of "a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[103]

Many district courts approaching the issue of alleged infringement by defendants residing outside the United States have found that the merchant-defendant's sale, and sometimes merely offering for sale, a counterfeit product in a forum state is sufficient to satisfy due process in the forum state, making a 4(k)(2) argument inapposite.[104] Other district courts have found that a sale into the forum is not sufficient to satisfy the forum's long-arm statute, particularly when the seller uses a third party platform like Amazon, and have

98. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

99. *Id.* (first quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984); and then quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

100. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 620 (1992) (alteration in original) (quoting *Burger King Corp.*, 471 U.S. at 475).

101. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

102. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

103. *Burger King Corp.*, 471 U.S. at 477.

104. *See, e.g.*, WowWee Grp. Ltd. v. Meirly, No. 18-CV-706, 2019 WL 1375470, at *4 (S.D.N.Y. Mar. 27, 2019) (finding a "substantial relationship between those offers for sale and the trademark infringement harms alleged to have been inflicted in New York"); Furminator, Inc. v. Wahba, No. 410-CV-01941, 2011 WL 3847390, at *5 (E.D. Mo. Aug. 29, 2011) (finding defendant's use of Amazon and eBay to sell products to the plaintiff in Missouri sufficient to support personal jurisdiction in that state).

found Rule 4(k)(2) appropriate in that situation.[105] Still other courts have found that a defendant who "is willing to sell and ship, [c]ounterfeit [p]roducts to customers in the United States, including in this judicial district" is subject to personal jurisdiction under Rule 4(k)(2).[106] Within this determination is the finding that although these merchant-defendants offered, and perhaps sold, the infringing product into the forum state, these defendants are not subject to personal jurisdiction under the state's long-arm statute.[107]

III. ANALYSIS

The purpose of Rule 4(k)(2) is to expand the jurisdictional reach of federal courts to include personal jurisdiction over foreign defendants in cases arising under a federal question.[108] As such, when a plaintiff makes a prima facie showing that Rule 4(k)(2) applies, courts should apply the Rule to defendants who refuse to name another forum in which personal jurisdiction is proper.[109] Rule 4(k)(2) was adopted to ensure that federal claims will have a U.S. forum if sufficient national contacts exist.[110] As the advisory committee's note to Rule 4(k)(2) explains, in situations where a defendant has sufficient contacts with the United States in total, but insufficient contacts with any one state to confer personal jurisdiction, "the defendant was shielded from the enforcement of federal law by the fortuity of a favorable limitation on the power of state courts, which was incorporated into the federal practice by the former rule."[111] The Supreme Court promulgated Rule 4(k)(2) to bridge this gap in personal jurisdiction.[112]

When a foreign person or entity infringes a U.S. patent or trademark right, that person may evade the U.S. court system on a successful motion to dismiss for lack of personal jurisdiction.[113] However, if that infringer sells a violating product in the U.S. market,

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105. *See, e.g.*, Talavera Hair Prods., Inc. v. Taizhou Yunsung Elec. Appliance Co., Ltd., No. 18-CV-823, 2021 WL 3493094, at *7–8 (S.D. Cal. Aug. 6, 2021).

106. Est. of Marylin Monroe, LLC v. 123oilpainting, No. 1:21-CV-3824, 2021 WL 5033827, at *2 (N.D. Ga. Sept. 22, 2021); ABG EPE IP, LLC v. 3C Smart Store, No. 1:21-CV-1510, 2021 WL 2452636, at *2 (N.D. Ga. Apr. 17, 2021).

107. *Id.*

108. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

109. *See, e.g.*, ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001); *but see* United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 41 (1st Cir. 1999).

110. Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico, 563 F.3d 1285, 1295 (Fed. Cir. 2009).

111. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

112. *Id.*

113. *See* Fraserside IP L.L.C. v. Netvertising Ltd., 902 F. Supp. 2d 1165, 1169, 1181 (N.D. Iowa 2012).

it is availing itself of the laws and protections of the United States and ought to be able to be haled into court without offending due process's guarantee of "traditional notions of fair play and substantial justice."[114]

To further the interests of a plaintiff pursuing litigation against foreign counterfeiters of its products, Rule 4(k)(2) remains as an attractive option for arguing in the alternative against a challenge to personal jurisdiction: should the court find that there are insufficient contacts with any one state, personal jurisdiction may still attach. The use of an online platform for the sale of infringing goods should not create a "virtual moat" for defendants violating U.S. intellectual property rights.[115] Moreover, the intellectual property right holders' interest is vested in the United States; a remedy should be available for the infringement on that interest in the Untied States[116]

A. Burden Shifting: Concerns of Economy, Efficiency, and Purpose

The Supreme Court promulgated Rule 4(k)(2) to expand the reach of federal courts' exercise of personal jurisdiction,[117] and, as such, the Rule should be allowed to have that effect. Placing a heavy burden on a plaintiff to make more than a prima facie showing that the defendant is not amenable to suit in any state is no short order, and can chill meritorious claims, controverting congressional intent.[118] Moreover, a burden-shifting scheme is better equipped to lower costs and free up court resources.[119]

As detailed above,[120] the circuit courts employ a burden-shifting scheme wherein a plaintiff seeking to prove personal jurisdiction under Rule 4(k)(2) must make a prima facie showing that the Rule applies and must certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state.[121]

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114. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980) (introducing and applying the stream-of-commerce analysis for personal jurisdiction to states before the adoption of Rule 4(k)(2)).

115. Dohler S.A. v. Guru, 16-23137-CIV, 2017 WL 4621098, at *6 (S.D. Fla. Oct. 16, 2017).

116. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) (finding in a Lanham Act suit, that "[w]here, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction.").

117. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

118. United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 41 (1st Cir. 1999).

119. Julius Ness Richardson, *Shifting the Burden of Production Under Rule 4(k)(2): A Cost-Minimizing Approach*, 69 U. CHI. L. REV. 1427, 1436–41 (2002).

120. *See supra* Section II.B.1.

121. *Swiss Am. Bank, Ltd.*, 191 F.3d at 40–41.

However, several of the circuits employ a burden-shifting scheme that is more broad in its application: when the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).[122]

One commentator suggests a "simplified version of the *Swiss Bank* approach" (articulated in the First Circuit) based on an economic cost analysis.[123] Under this commentator's approach, the plaintiff must make a prima facie showing of a federal question (not at issue in this article) and satisfaction of constitutional due process.[124] Once a plaintiff has met that initial step, the defendant could challenge either of these prima facie elements, or the negation requirement of 4(k)(2).[125] Of course, a defendant's contention that it would be amenable to suit in another state might defeat the negation requirement.[126] This will put the defendant in a difficult position: argue that personal jurisdiction in another state is proper while simultaneously arguing that the defendant does not have sufficient minimum contacts nationwide.[127] However, this is in accordance with the intent behind Rule 4(k)(2).[128] The Supreme Court promulgated the Rule to expand the jurisdiction of the federal courts, which fundamentally puts the defendant in a "more difficult situation."[129]

Furthermore, if a defendant refuses to proffer evidence refuting personal jurisdiction, it ought to be within the power of the court to exercise personal jurisdiction over the defendant when it has sufficient minimum contacts with the United States such that due process would not be offended, in accordance with the Seventh Circuit's burden-shifting scheme. Allowing the court to make an inference of amenability to suit given a defendant who will not offer evidence further advances efficiency because it does not require plaintiffs, removed from the inner workings of the defendant's business, to make any inquiry into the defendant's amenability to suit in the forum. This makes sense as a defendant is uniquely situated to provide evidence regarding its contacts with the several states. The considerations of cost and congressional intent weigh heavily in

122. ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).
123. Richardson, *supra* note 119 at 1441.
124. *Id.* at 1441–42.
125. *Id.* at 1442.
126. *Id.*
127. *Id.* at 1442 n.111.
128. United States v. Swiss Am. Bank, Ltd., 191 F.3d 30, 41 (1st Cir. 1999).
129. Richardson, *supra* note 119, at 1442 n.111.

favor of a regime that allows for burden shifting even when it disadvantages defendants.[130]

B. Guaranteed Jurisdiction and Right Without Remedy?

A wealth of caselaw interpreting the appropriate "minimum contacts" and "reasonableness" required for personal jurisdiction protects the defendant in litigation from being improperly subject to a court's jurisdiction.[131] However, one critic has questioned the propriety of Rule 4(k)(2) for being overly broad, and unduly guaranteeing personal jurisdiction. In his article on Rule 4(k)(2) and internet intellectual property disputes, Jeffrey R. Armstrong argues that "a foreign defendant will be forced to defend itself on foreign soil for the limited purpose of engaging in pretrial jurisdictional discovery (and quite possibly for the entire lawsuit) based upon the most subtle of contacts with the United States."[132]

However, the Supreme Court promulgated Rule 4(k)(2) in response to the personal jurisdiction gap found in *Omni Capital International*—the gap that a foreigner entity is judgment-proof in the United States if its contacts are spread across the states, and not focused in at least one. [133] This context suggests that the advisory committee sought to expand the reach of the federal courts' personal jurisdiction, and Congress allowed it.[134] It also suggests that the Supreme Court believed this expansion would be constitutional.[135] Provided that the exercise of personal jurisdiction comports with the constitution and the will of the legislature, it is properly exercised.[136]

Armstrong further contends that "by virtue of Rule 4(k)(2), and the extravagant construction placed upon it by federal courts, jurisdiction over foreign defendants for [i]nternet intellectual property disputes has become nearly guaranteed."[137] But, as mentioned above,[138] courts interpret Rule 4(k)(2) in a way that is consistent with the purpose of the Rule, and a way that is workable in light of

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130. *See id.* at 1442.
131. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011).
132. Jeffrey R. Armstrong, *Guaranteed Jurisdiction: The Emerging Role of Fed. R. Civ. P. 4(k)(2) in the Acquisition of Personal Jurisdiction of Foreign Nationals in Internet Intellectual Property Disputes*, 5 MINN. INTELL. PROP. REV. 63, 80 (2003).
133. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).
134. Richardson, *supra* note 119, at 1431.
135. *See* Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 111 (1987).
136. *See* Rogers v. Indiana, 996 F.3d 812, 818 (7th Cir. 2021).
137. Armstrong, *supra* note 132.
138. *See supra* text accompanying notes 78–80.

the fact that defendants possess the evidence necessary to determine whether personal jurisdiction is proper.[139]

Next, Armstrong argues for the establishment of an international treaty that would dictate a choice of laws to determine jurisdiction in international intellectual property disputes.[140] The argument goes as follows. Rule 4(k)(2) has "dramatically escalated" the availability of litigation to U.S. plaintiffs who allege intellectual property infringement by a foreign entity.[141] An Australian court unfairly held Dow Jones liable for defamation in Victoria, Australia when it published an article online that caused damages to an Australian national. That court acted unfairly in that it exercised a "grossly inappropriate exercise of local jurisdiction."[142] The Australian court's jurisdictional reach is analogous to the "aggressive reach of Rule 4(k)(2) for Internet-based intellectual property disputes."[143] That courts are asserting power in this way may result in a jurisdictional arms race, and we could find ourselves in situations where "the rest of the world might haul U.S. citizens into their courts and make those U.S. citizens adhere to the intellectual property regulations of those countries."[144] Therefore, Armstrong argues, now is the time for the "adoption of an international treaty for the uniform treatment of jurisdictional questions involving disputes over intellectual property matters."[145]

Armstrong's analogy to the Australian Dow Jones case is dubious. While that court may have overreached with its jurisdictional exercise, why would it be an overreach of U.S. courts to protect intellectual property rights protected by U.S. laws in the United States? Moreover, why should U.S. courts not offer a remedy for the infringement of intellectual property rights in the United States when the alleged infringer then avails himself of the U.S. market? While Rule 4(k)(2) would extend personal jurisdiction to a foreign counterfeiter of rights held in the United States, damages to the reputation of one U.S. citizen likely would not pass muster because there is a lack of personal availment of the laws of the United States.

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139. *See* ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir., *as amended*, July 2, 2001).
140. Armstrong, *supra* note 132, at 81–85.
141. *Id.* at 81.
142. *Id.*
143. *Id.*
144. *Id.* at 82.
145. Armstrong, *supra* note 132, at 82.

Nineteen years have passed since the publication of Armstrong's article,[146] yet today there is still no international treaty in force for the resolution of personal jurisdiction in the realm of international intellectual property disputes.[147] Meanwhile, we see the growth of patent and trademark infringement cases accompanying the growth of online sales.[148] How then should those holding infringed intellectual property interests seek recourse? While an international treaty would balance the interests of nations and advance comity among them, certainly, it is not adequate to wait for an international treaty when damages have already been done, and plaintiffs often find themselves without recourse. Rather, the property interests are vested here in the United States, are protected by the U.S. federal government, and as such, the U.S. federal court system is the appropriate vehicle for the resolution of infringement claims.

IV. CONCLUSION

The advisory committee drafted Federal Rule of Civil Procedure 4(k)(2) in response to the Supreme Court's suggestion to correct "a gap in the enforcement of federal law" where a foreign defendant could avoid judgment in the United States for lack of a proper forum state with which the defendant had sufficient minimum contacts.[149] The Rule should be interpreted to that full effect. In the interest of broadening the reach of federal courts' personal jurisdiction, efficiency, and reducing costs, courts should employ a burden shifting regime that requires a plaintiff asserting personal jurisdiction under Rule 4(k)(2) to make a prima facie showing that the claim arises under federal law and that the exercise of personal jurisdiction over the defendant would not offend due process.[150] The burden should then shift to the defendant to either contest federal question, due process, or the negation requirement. If the defendant contests the negation requirement, but the defendant does not establish another state in which personal jurisdiction would be proper, the court

146. *Id.* at 63.

147. The U.S. and thirty other nations have signed the proposed Anti-Counterfeiting Trade Agreement, a multilateral treaty for combating intellectual property rights infringement. However, ratification of this treaty remains in a state of uncertainty over a decade later. *See* SHAYERAH ILIAS, CONG. RSCH. SERV., THE PROPOSED ANTI-COUNTERFEITING TRADE AGREEMENT: BACKGROUND AND KEY ISSUES (2012).

148. Matthew Bultman, *Patent Lawsuits on Rise, Buying Spree Hints More to Come*, BL (June 12, 2020, 6:30 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/X8PL7EK4000000?bna_news_filter=ip-law#jcite.

149. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).

150. *See supra* Section III.A.

should presume that the negation requirement is satisfied, as is the law in the Seventh Circuit and others.[151] The contacts that the defendant has with the states are best known to the defendant, and the presumption makes the process more streamlined, eliminating the need for jurisdictional discovery with respect to the negation requirement.

Furthermore, the purpose of Rule 4(k)(2) is to protect rights granted under federal law.[152] To that end, the Rule should be given full effect up to the constitutional due process limits. The Rule was recommended by the Supreme Court,[153] suggesting its constitutionality in situations where foreign defendants have violated federal law in the United States but were able to avoid the federal court system on a loophole. Now that the loophole is closed, rights created by U.S. laws ought to be protected in U.S. courts so long as doing so comports with the Constitution.

151. *See supra* Section II.B.1.
152. FED. R. CIV. P. 4(k)(2) (advisory committee's note to 1993 amendments).
153. *Id.*

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