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NOTE

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PREFACE

As Volume 44 of the *Harvard Journal of Law & Public Policy* reaches its final Issue, we say goodbye to an astonishing year. The months since March 2020 were ones of uncertainty, novelty, and, for far too many of us, grief. But at long last, the COVID-19 pandemic has begun to recede; life in America may soon seem normal once again. And amid this strange new normalcy, we take time to reflect on the crises our country has faced, and on the effects they have had on the law.

Last year, we witnessed doctrinal innovations, as our courts dealt in real time with the unprecedented restrictions on daily life that state and local governments imposed in response to the public health crisis. The year also marked a transition in government, following President Joe Biden's election in November. And the turmoil of the past year brought renewed interest among conservatives in the methodological commitments that judges bring to the table. On each of these questions, we are pleased to say, this Issue has something to offer.

Our first Article, by Professor Josh Blackman, discusses the evolving history of the Supreme Court's caselaw in applying the Free Exercise Clause to the restrictions on religious gatherings during the pandemic. Professor Blackman traces the Court's shift from a regime that was largely deferential to such restrictions to one that now consistently rules in favor of the free exercise of religion. Our second Article, by Paul J. Larkin, Jr., makes use of the change in administrations to address the much-contested issue of whether the President may pardon himself. Larkin argues that such pardons are lawful, which is not to say that they are wise, and that

the proper recourse would be political—namely, impeachment. Finally, our third Article, by Judge Trevor N. McFadden of the District Court for the District of Columbia and Vetan Kapoor, seeks to answer one of the most pressing legal questions raised by the pandemic: What should be the precedential effect of those decisions the Supreme Court issues from its "shadow docket"? Judge McFadden and Kapoor conclude that the Court's decisions regarding emergency relief lie on a spectrum. While some ought to have little precedential force, they argue, many decisions should be regarded as a strong indication of the Court's view on a contested legal matter, and thereby afforded precedential value for lower courts faced with similar matters.

In addition to these Articles, we also have the great pleasure of publishing an Essay by Josh Hammer that makes the case for "common good originalism"—an approach under which judges adhere to the original public meaning of the Constitution but are informed by conservative norms and values in determining that meaning. Such an approach, Hammer argues, would better accomplish the substantive ends of our constitutional order than the value-neutrality that conservative originalists have traditionally promoted.

Finally, we are very happy to conclude this Issue with a Note from Mark C. Gillespie, one of our student editors, in which he discusses the Court's practice of sometimes resolving constitutional violations of unequal treatment by "leveling up" a disfavored group to the benefits enjoyed by a favored group and sometimes by "leveling down," depriving the favored and disfavored groups of the benefits altogether. Gillespie contends that the affirmative right of the Free Exercise Clause requires a presumption that courts level up where religious freedom is concerned.

In the past two Issues, I concluded these Prefaces by thanking the *Journal*'s staff. I will reiterate my gratitude here in briefest form: our student editors have done tremendous work during a time of

massive disruption to their lives, and I cannot express how well-served I have been by them. They are, truly, the heart of this publication. My time with the *Journal* has now come to its close, but I have every confidence that the *Journal*'s staff will continue its legacy of excellence. I particularly look forward to the work the *Journal* will produce under its new Editor-in-Chief, Eli Nachmany, with whom I have had the great privilege of working over the last two years, and who I know will do a superb job running the organization. I cannot wait to see our next Volume.

Max J. Bloom
Editor-in-Chief

THE "ESSENTIAL" FREE EXERCISE CLAUSE

JOSH BLACKMAN*

In the span of a year, COVID-19 would affect every corner of the globe. During this period, governments were confronted with difficult choices about how to respond to the evolving pandemic. In rapid succession, states imposed lockdown measures that ran headlong into the Constitution. Several states deemed houses of worship as non-essential, and subjected them_to stringent attendance requirements. In short order, states restricted the exercise of a constitutional right, but allowed the exercise of preferred economic privileges. And this disparate treatment was premised on a simple line: whether the activity was "essential" or "non-essential." If the activity fell into the former category, the activity could continue. If the activity fell into the latter category, it could be strictly regulated, or even halted immediately. Houses of worship challenged these measures as violations of the Free Exercise Clause of the First Amendment.

This Article provides an early look at how the courts have interpreted the "essential" Free Exercise Clause during the pandemic. This ongoing story can be told in six phases. In Phase 1, during the early days of the pandemic, the courts split about how to assess these measures. And for the first three months of the pandemic, the Supreme Court stayed out of the fray.

In Phase 2, the Supreme Court provided its early imprimatur on the pandemic. In *South Bay Pentecostal Church v. Newsom*, the Court

* Professor, South Texas College of Law Houston. I am grateful to the Liberty & Law Center at the Antonin Scalia Law School, George Mason University, for providing funding to support this publication. I also am in debt to Nelson Lund for his insightful comments and feedback.

declined to enjoin California's restrictions on religious gatherings. Chief Justice Roberts wrote a very influential concurring opinion that would become a superprecedent. Over the following six months, more than one hundred judges would rely on Chief Justice Roberts's opinion in cases that spanned the entire spectrum of constitutional and statutory challenges to pandemic policies.

In Phase 3, the Roberts Court doubled-down on *South Bay*. A new challenge from Nevada, *Calvary Chapel Dayton Valley Church v. Sisolak*, upheld strict limits on houses of worship. Once again, the Court split 5-4. Justice Kavanaugh wrote a separate dissent. He treated the Free Exercise of Religion as a "most-favored" right. Under Justice Kavanaugh's approach, the free exercise of religion is presumptively "essential," unless the state can rebut that presumption. *South Bay* and *Calvary Chapel* would remain the law of the land through November.

Phase 4 began when Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett. The new Roberts Court would turn the tide on COVID-19 cases in *Roman Catholic Diocese of Brooklyn v. Cuomo*. Here, a new 5-4 majority enjoined New York's "cluster initiatives," which limited houses of worship in so-called "red" zones to ten parishioners at a time. Now, Chief Justice Roberts dissented. *Roman Catholic Diocese* effectively interred the *South Bay* superprecedent.

Phase 5 arose in the wake of *Roman Catholic Diocese*. Over the course of five months, the Court consistently ruled in favor of the free exercise of religion. *South Bay II* and *Harvest Rock II* enjoined California's prohibitions on indoor worship. And *Tandon v. Newsom* recognized the right of people to worship privately in their homes.

We are now in the midst of Phase 6. States are beginning to recognize that absolute executive authority cannot go unchecked during ongoing health crises. Going forward, states should impose substantive limits on how long emergency orders can last, and establish the power to revoke those orders.

The COVID-19 pandemic will hopefully soon draw to a close. But the precedents set during this period will endure.

INTRODUCTION

In the span of a year, the coronavirus disease 2019 (COVID-19) would affect every corner of the globe. In December 2019, COVID-19 was identified in Wuhan, China.[1] The first known transmission in the United States occurred in mid-January 2020.[2] On January 31, the United States declared a public health emergency, and placed restrictions on flights from China.[3] By February 6, the first person in America died from COVID-19.[4] On March 11, the World Health Organization declared a pandemic.[5] On March 13, a national emergency was declared.[6] By the end of March, there were confirmed cases in all fifty states, in the District of Columbia, and in the federal territories.[7] By the end of April, there were more than a million confirmed cases nationwide.[8]

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1. *Emergencies Preparedness, Response: Novel Coronavirus-China*, WORLD HEALTH ORG. (Jan. 12, 2020), https://www.who.int/csr/don/12-january-2020-novel-coronavirus-china/en/ [https://perma.cc/L3F2-D7FV].

2. Isaac Ghinai et al., *First known person-to-person transmission of severe acute respiratory syndrome coronavirus 2 (SATRS-CoV-2) in the USA*, NAT'L CTR. FOR BIOTECHNOLOGY INFO. (Mar. 13, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7158585/ [https://perma.cc/H34V-QPHE].

3. Allison Aubrey, *Trump Declares Coronavirus a Public Health Emergency and Restricts Travel from China*, NPR (Jan. 31, 2020), https://www.npr.org/sections/health-shots/2020/01/31/801686524/trump-declares-coronavirus-a-public-health-emergency-and-restricts-travel-from-c [https://perma.cc/PZQ2-995H].

4. Jason Hanna et al., *2 Californians died of coronavirus weeks before previously known 1st US death*, CNN (Apr. 22, 2020), https://www.cnn.com/2020/04/22/us/california-deaths-earliest-in-us/index.html [https://perma.cc/NRZ2-ZP7M].

5. Tedros Adhanom Ghebreyesus, Director-General, World Health Org., Opening remarks at media briefing on COVID-19 (Mar. 11, 2020), https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/S6VU-HL4V].

6. Kevin Liptak, *Trump Declares National Emergency—and Denies Responsibility for Coronavirus Testing Failures*, CNN (Mar. 13, 2020), https://www.cnn.com/2020/03/13/politics/donald-trump-emergency/index.html [https://perma.cc/H4ER-X6ZN].

7. *CDC Weekly Key Messages*, CDC (Mar. 29, 2020), http://www.wvha.org/get-media/98926b62-5e8d-4266-a460-0be3e1f4717d/CDC-Weekly-Key-Messages-March-29,2020.pdf.aspx [https://perma.cc/C478-R9DE].

8. Lynsey Jeffery, *U.S. Surpasses 1 Million Coronavirus Cases*, NPR (Apr. 28, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/04/28/846741935/u-s-surpasses-1-million-coronavirus-cases [https://perma.cc/TXL7-8SPJ].

During this period, local governments were confronted with difficult choices about how to respond to the evolving pandemic. In short order, most of the country was placed under an unprecedented lockdown. On March 15, 2020, New York City public schools were shuttered.[9] On March 17, Virginia banned public gatherings of more than ten people.[10] That same day, Ohio postponed all elective surgeries.[11] On March 19, California issued a statewide stay-at-home order.[12] On March 20, New York ordered that non-essential businesses must close to the public.[13] Essential businesses, however, could remain open.

In rapid succession, most states took similar measures. But some states, with different priorities, approached their lockdowns very differently. Most of these decisions had little bearing on constitutional law. Michigan, for example, deemed hardware stores essential, but prohibited those stores from selling paint or mulch.[14] These classifications were unreasonable but were not susceptible to a constitutional challenge under current doctrine.

Other lockdown measures, however, ran headlong into the

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9. Julia Marsh et al., *Coronavirus in NY: NYC schools will close*, N.Y. POST (Mar. 15, 2020), https://nypost.com/2020/03/15/coronavirus-in-ny-nyc-schools-will-close/ [https://perma.cc/Q277-E58C].

10. Jeff Williamson, *15 New Coronavirus Cases in Virginia, Now 67 Total Cases*, WSLS 10 NEWS (Mar. 17, 2020), https://web.archive.org/web/20200318041135/https://www.wsls.com/news/virginia/2020/03/17/15-new-coronavirus-cases-in-virginia-now-67-total-cases/.

11. *Ohio Barbershops, Hair and Nail Salons Ordered to Close amid Coronavirus Concerns*, WBNS 10 NEWS (Mar. 18, 2020), https://www.10tv.com/article/news/local/ohio/ohio-barbershops-hair-and-nail-salons-ordered-close-amid-coronavirus-concerns-2020-apr/530-744f8bdd-fbd8-4138-bafd-4a2922f8301b/ [https://perma.cc/U3NY-Y469].

12. Paris Martineau, *What's a 'Shelter in Place' Order, and Who's Affected?*, WIRED (Mar. 20, 2020, 6:21 PM), https://www.wired.com/story/whats-shelter-place-order-whos-affected/ [https://perma.cc/B7D7-DLQ2].

13. Bill Chappell & Vanessa Romo, *New York, Illinois Governors Issue Stay At Home Orders, Following California's Lead*, NPR (Mar. 20, 2020, 12:15 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/03/20/818952589/coronavirus-n-y-gov-cuomo-says-100-of-workforce-must-stay-home [https://perma.cc/7CGU-7VBJ].

14. Cody Butler, *Michigan cracking down on non-essential business*, WILX 10 (Apr. 3, 2020, 9:04 PM), https://web.archive.org/web/20200926062440/https://www.wilx.com/content/news/Michigan-cracking-down-on-non-essential-business-569361041.html.

Constitution. Many states restricted the size of *non-essential* public gatherings to promote social distancing. Some of these orders limited how people of faith could assemble—either directly or indirectly. Different states drew different lines. In Texas, for example, houses of worship were exempt from limits on public gatherings.[15] Other states went in the opposite direction. Nevada deemed houses of worship as *non-essential*, and subjected them to stringent attendance requirements. But *essential* casinos were allowed to operate at fifty percent capacity, and could welcome guests by the thousands.[16] Nevada restricted the exercise of a constitutional right but allowed the exercise of preferred economic privileges. And this disparate treatment was premised on a simple line: whether the activity was "essential" or "non-essential." If the activity fell into the former category, the activity could continue. If the activity fell into the latter category, it could be strictly regulated or even halted immediately.

Houses of worship challenged these measures as violations of the Free Exercise Clause of the First Amendment. But these disputes differed from the usual First Amendment cases on the Supreme Court's docket. Long before the pandemic, governments burdened—directly or indirectly—the free exercise of religion in four general ways. First, states prohibited specific religious practices. Second, states targeted specific faiths for disparate treatment. Third, states conditioned the receipt of benefits on compelling people to engage in activity that is forbidden by their religions. Fourth, states compelled people to engage in activities prohibited by their faiths. During the pandemic, however, the novel restrictions imposed on the free exercise of religion did not fit any of these molds.

This Article provides an early look at how the courts have

15. 45 Tex. Reg. 2933 (Apr. 27, 2020), https://gov.texas.gov/uploads/files/press/EO GA-18_expanded_reopening_of_services_COVID-19.pdf/ [https://perma.cc/Y9J7-R6JU].

16. Lisette Voytko, *Nevada Gives Casinos Go-Ahead for June 4 Reopening*, FORBES (May 27, 2020, 8:52 AM), https://www.forbes.com/sites/lisettevoytko/2020/05/27/nevada-gives-casinos-go-ahead-for-june-4-reopening/?sh=1e8bb89d489c/ [https://perma.cc/YQ5P-L3XU].

interpreted the "essential" Free Exercise Clause during the pandemic. This ongoing story can be told in six phases.

In Phase 1, some states deemed religious gatherings to be "non-essential." During the early days of the pandemic, the courts split about how to assess these measures. Some courts compared the restrictions on houses of worship to restrictions imposed on *comparable* secular activities. Other courts compared the restrictions on houses of worship to restrictions imposed on *any* secular activity. Which lower courts were right? The Supreme Court's Free Exercise Clause cases did not provide a clear answer to this question. And for the first three months of the pandemic, the Supreme Court stayed out of the fray.

In Phase 2, the Supreme Court provided its early imprimatur on the pandemic. In *South Bay Pentecostal Church v. Newsom*,[17] the Court declined to enjoin California's restrictions on religious gatherings. The Golden State imposed a 100-person occupancy limit on houses of worship, regardless of their size.[18] The majority per curiam opinion did not include any reasoning. But Chief Justice Roberts wrote what would prove to be a very influential concurring opinion.[19] He determined that houses of worship were treated similarly to "comparable secular gatherings," and were treated better than "dissimilar activities."[20] This opinion sharply divided the Court. Four Justices dissented. Three of them insisted that California treated houses of worship worse than comparable secular gatherings.[21] After *South Bay*, Chief Justice Roberts's opinion became a *superprecedent*. Over the following six months, more than one hundred judges would rely on Chief Justice Roberts's opinion in cases that spanned the entire spectrum of constitutional and statutory challenges to pandemic policies.

In Phase 3, the Roberts Court doubled-down on *South Bay*. A new challenge from Nevada, *Calvary Chapel Dayton Valley Church v.*

17. 140 S. Ct. 1613 (2020) (mem.).
18. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).
19. *Id.* at 1613–14.
20. *Id.* at 1613.
21. *Id.* at 1614–15.

Sisolak,[22] upheld strict limits on houses of worship. Yet the Silver State permitted casinos to open without hard numerical caps.[23] Here, Chief Justice Roberts did not explain his reasoning. Once again, the Court split 5-4. Justice Alito's dissent hewed to the Court's doctrine, including *Employment Division v. Smith*.[24] Justice Kavanaugh wrote a separate dissent. He extended the Court's doctrine, and treated the Free Exercise of Religion as a "most-favored" right.[25] Under this approach, the government has the burden to show why it designated religious worship as "non-essential." If the state cannot articulate a sufficient rationale, then the religious worship must be given the same "essential" status as other related economic privileges. Justice Kavanaugh concluded that the free exercise of religion should be presumptively "essential," unless the state can rebut that presumption. *South Bay* and *Calvary Chapel* would remain the law of the land through November 2020.

Phase 4 began when Justice Ruth Bader Ginsburg was replaced by Justice Amy Coney Barrett. The new Roberts Court would turn the tide on COVID-19 cases in *Roman Catholic Diocese of Brooklyn v. Cuomo*.[26] Here, a new 5-4 majority enjoined New York's "cluster initiatives," which limited houses of worship in so-called "red" zones to ten parishioners at a time. The Court found that New York's directives treated houses of worship worse than they treated comparable secular businesses. The majority reasoned that the policy was not neutral toward religion, and must be reviewed with strict scrutiny.[27] Finally, the per curiam opinion found that New York's regime was far more restrictive than the policies upheld in Nevada and California. Now, Chief Justice Roberts dissented. He suggested that the strict limits on worship may be unconstitutional. But he would not have issued an injunction because the applicants were

22. 140 S. Ct. 2603 (2020) (mem.).

23. *Id.* at 2604.

24. 494 U.S. 872 (1990).

25. *Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

26. 141 S. Ct. 63 (2020) (per curiam).

27. *Id.* at 67.

no longer subject to the hard numerical caps.[28] *Roman Catholic Diocese* effectively interred the *South Bay superprecedent*.

Phase 5 arose in the wake of *Roman Catholic Diocese*. Over the course of five months, the Court consistently ruled in favor of the free exercise of religion. *South Bay II* and *Harvest Rock II* enjoined California's prohibitions on indoor worship. And *Tandon v. Newsom* recognized the right of people to worship privately in their homes. With this last case, the Court formally adopted Justice Kavanaugh's "most-favored" right framework. After *Tandon*, California finally lifted all "location and capacity" limits on places of worship.

We are now in the midst of Phase 6. The pandemic is waning, and soon the separation of powers will be restored. States are beginning to recognize that absolute executive authority cannot go unchecked during ongoing health crises. New York and other states have begun to impose limitations on gubernatorial power. Going forward, states should place substantive limits on how long emergency orders can last, and establish the protocols to revoke those orders.

The COVID-19 pandemic will hopefully soon draw to a close. But the precedents set during this period will endure.

I. PHASE 1: THE CIRCUITS SPLIT IN THE EARLY DAYS OF THE PANDEMIC

During the early days of the pandemic, governors drew bright lines between "essential" and "non-essential" gatherings. The former were permitted with few, if any limitations. The latter were heavily restricted and in some cases prohibited. Were religious gatherings "essential" or "non-essential"? Different states drew different lines. In several states, houses of worship were subjected to strict occupancy limits. Were these restrictions consistent with the Free Exercise Clause? The Supreme Court's precedents did not provide a clear answer. Or more precisely, the Court's precedents did not clarify which questions courts should even ask. Courts can frame the question presented in two different fashions. First,

28. *Id.* at 75 (Roberts, C.J., dissenting).

should courts compare the restrictions on houses of worship to restrictions imposed on *comparable* secular activities? Or second, should courts compare the restrictions on houses of worship to restrictions imposed on *any* secular activity? Initially, the Seventh Circuit followed the first test. And the Sixth Circuit followed the second test.

A. Prohibitions on "Non-Essential" Activities During "Marpril" 2020

The COVID-19 pandemic was new. But governors had longstanding authority to impose public health measures that control the spread of disease. For example, Connecticut law authorizes the state's governor to "order into quarantine or isolation, as appropriate, any individual, group of individuals or individuals present within a geographic area whom the commissioner [of public health] has reasonable grounds to believe to be infected with, or exposed to, a communicable disease."[29] And in 2014, the Connecticut governor authorized the health commissioner "to direct the isolation or quarantine of individuals whom she 'reasonably believe[d] to have been exposed to, infected with, or otherwise at risk of passing the Ebola virus.'"[30]

These delegations of authority were not limited to quarantine and isolations of people infected by communicable diseases. New York law authorizes the governor to issue any directive "necessary to cope with [a state] disaster [emergency]."[31] With this power, the governor can "temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency."[32] Moreover, the legislature does not need to affirmatively approve the governor's actions. Rather, the legislature must vote to halt a directive "by concurrent resolution."[33] The emergency directives sunset after thirty days, "but the Governor

29. CONN. GEN. STAT. § 19a-131b (2012).
30. Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 180 (2d Cir. 2020).
31. N.Y. EXEC. LAW § 29-a (2020).
32. *Id.*
33. *Id.*

may renew them an unlimited number of times."[34]

Historically, governors have "exercised this emergency authority in a limited and localized manner, most often in response to natural disasters such as severe storms or flooding."[35] But the COVID-19 pandemic radically altered how emergency directives have been used. Specifically, governors relied on emergency powers to regulate every facet of human interaction. And they did so under an unfamiliar rubric. Gatherings deemed "essential" could continue, perhaps with restrictions. But "non-essential" gatherings were prohibited, or perhaps permissible with stricter limits. The full scope of these emergency orders is beyond the scope of this Article.[36] Here, I will discuss restrictions on religious assembly, most of which were imposed in late March and early April of 2020. Satirist Dave Barry merged these interminable months as "Marpril."[37]

During this period, some states expressly exempted religious worship from their general prohibitions on gatherings. Alabama prohibited "all non-work related gatherings of any size, including drive-in gatherings, that cannot maintain a consistent six-foot distance between persons from different households."[38] However, "[o]rganizers of religious gatherings [were] strongly encouraged" to follow certain guidelines—encouraged, but not required, to comply.[39] Arkansas excluded places of worship from the lockdown order, and only "strongly encouraged [them] to continue to offer

34. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).

35. *Id.*

36. Elsewhere, I have written about orders that affect the right to keep and bear arms. *See* Josh Blackman, *The "Essential" Second Amendment*, 26 TEX. REV. L. & POL. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827441 [https://perma.cc/4S8W-ZQ9P].

37. *See* Dave Barry, *Dave Barry's Year in Review 2020*, WASH. POST (Dec. 27, 2020), https://www.washingtonpost.com/magazine/2020/12/27/dave-barrys-year-review-2020/ [https://perma.cc/NDA8-7N47].

38. Scott Harris, State Health Officer, Ala. Dep't of Pub. Health, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by Covid-19 (May 21, 2020), https://www.alabamapublichealth.gov/legal/assets/order-adph-cov-gatherings-052120.pdf [https://perma.cc/LW7K-PHJW].

39. *Id.*

online platforms for participation in worship."[40] Colorado generally "limit[ed] gatherings of individuals to no more than (10) people to slow the spread of the COVID-19 virus."[41] However, houses of worship were deemed "critical businesses" that "may remain open."[42] Colorado "encouraged" houses of worship to limit attendance under ten people. In North Carolina, "Executive Order 138 . . . require[d] that all worship services involving more than 10 people must be held 'outdoors unless *impossible*' to hold outdoors."[43] This prohibition seemed to have a very large loophole.

Texas designated "religious services conducted in churches, congregations, and houses of worship" as essential services that could remain open without restrictions.[44] The Texas Attorney General concluded that "[l]ocal governments may not order houses of worship to close."[45] Justice Blacklock of the Texas Supreme Court, joined by three others, observed, "[i]n some parts of the country, churches have been closed by government decree, although Texas is a welcome exception."[46] In December 2020, Ohio enacted a statute that "prohibit[ted] a public official from ordering the closure of all places of worship."[47]

Some states expressly excluded religious worship from "essential" gatherings. The governor of Kentucky, for example, permitted "'normal operations at airports, bus and train

40. *COVID-19 Guidance for Places of Worship*, ARK. DEP'T OF HEALTH (May 4, 2020), https://www.healthy.arkansas.gov/programs-services/topics/covid-19-guidance-for-faith-based-organizations [https://perma.cc/EM8X-NT4A].

41. Lawrence v. Colorado, 455 F. Supp. 3d 1063, 1068 (D. Colo. 2020).

42. *Id.* at n. 12 (quoting PHO 20-24 at 8 (as amended Mar. 26, 2020), https://bit.ly/3i9LkKD [https://perma.cc/2NBR-XQMD]).

43. Berean Baptist Church v. Cooper, 460 F. Supp. 3d 651, 653 (E.D.N.C. 2020).

44. Tex. Executive Order No. GA-18 (Apr. 27, 2020), https://gov.texas.gov/uploads/files/press/EO-GA-18_expanded_reopening_of_services_COVID-19.pdf/ [https://perma.cc/Y9J7-R6JU].

45. Office of the Att'y Gen., *Guidance for Houses of Worship During the COVID-19 Crisis* (Apr. 21, 2020), https://bit.ly/342wq3Y [https://perma.cc/7FDM-XEX2].

46. *In Re* Salon A La Mode, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring in the denial of the petition for writ of mandamus).

47. H.B. 272, 133rd Gen. Assemb., Reg. Sess. (Oh. 2019–20), https://legiscan.com/OH/text/HB272/2019/ [https://perma.cc/WP2D-A8HL].

stations, . . . shopping malls and centers,' and 'typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing.'"[48] But he prohibited "'[a]ll mass gatherings,' 'including, but not limited to, community, civic, public, leisure, *faith-based*, or sporting events.'"[49] The governor also permitted "life-sustaining" organizations to remain open.[50] (Here, "life-sustaining" seems to have the same meaning as *essential*.) "Laundromats, accounting services, law firms, hardware stores, and many other entities count as life-sustaining."[51] However, "religious organizations are not 'life-sustaining' organizations, except when they function as charities by providing 'food, shelter, and social services.'"[52]

Other states imposed specific limitations on religious worship that were not imposed on *essential* secular businesses. Connecticut placed a "49-person limit on religious, spiritual and worship gatherings."[53] In June 2020, that limit was "raised to 25 percent of capacity of the indoor space or a maximum of 100 people, whichever is smaller, and to 150 people for outdoor gatherings, provided in each case that appropriate safety and social distancing measures shall be employed."[54] Delaware required "[h]ouses of worship and other places of religious expression or fellowship [to] comply with all social distancing requirements set forth in" the state's general guidelines for other gatherings.[55] Those rules prohibited "attendance

48. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020).

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.*

52. *Id.*

53. Conn. Exec. Order No. 7TT (Mar. 29, 2020), https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7TT.pdf?la=en [https://perma.cc/M84X-ZGAT].

54. *I Am Planning to Hold/Attend a Large Event in the Next Few Weeks. Am I Still Allowed to do This?*, CONN. STATE: CONN. COVID-19 RESPONSE (June 9, 2020), https://portal.ct.gov/Coronavirus/Covid-19-Knowledge-Base/Social-Events [https://perma.cc/E7XZ-MAMG].

55. Declaration, John C. Carney, Gov. of Delaware, A State of Emergency for the State of Delaware Due to a Public Health Threat (Apr. 6, 2020), https://governor.delaware.gov/health-soe/tenth-state-of-emergency/ [https://perma.cc/SR6K-SAKU].

of . . . more than 10 people for in-person services under any circumstances."[56]

Illinois "limit[ed] the size of public assemblies (including religious services) to ten persons."[57] "Religious services, too, [were] deemed 'essential,' . . . but they [were] not . . . exempted from the size limit."[58] In Maine, "Executive Order 14 stat[ed] that '[g]atherings of more than 10 people are prohibited throughout the State,'" and declared that such a prohibition was mainly aimed at "social, personal, and discretionary events, including those gatherings that are 'faith-based.'"[59]

Massachusetts ordered that "[a]ll businesses and other organizations that do not provide COVID-19 Essential Services shall close their physical workplaces and facilities ('brick-and-mortar premises') to workers, customers and the public."[60] However, the governor created a carveout for "[c]hurches, temples, mosques, and other places of worship."[61] These houses of worship would "not be required to close their brick and mortar premises to workers or the public; provided, however, that such institutions shall be required to comply with all limitations on gatherings."[62] Specifically, no "more than 10 persons [could gather] in any confined indoor or outdoor space."[63] There was no numerical limit on gathering "in an unenclosed, outdoor space."[64] These restrictions would "not apply to the operations or activities of any business or organization in its provision or delivery of COVID-19 Essential Services."[65] These

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56. *Id.*

57. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 342 (7th Cir. 2020).

58. *Id.* at 343 (quoting 44 Ill. Reg. 8415 (Apr. 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx [https://perma.cc/LM6A-KZP8]).

59. Calvary Chapel of Bangor v. Mills, 459 F. Supp. 3d 273, 278–79 (D. Me. 2020).

60. Mass. Exec. Order No. 13 (Mar. 24, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download/ [https://perma.cc/A4V7-QWVP].

61. *Id.* at 2.

62. *Id.*

63. *Id.* at 3.

64. *Id.*

65. *Id.*

businesses could pack in far more than ten people.

Oregon permitted certain retail establishments to open without limitations.[66] For example, "art galleries, boutiques, furniture stores, and jewelry shops" could remain open.[67] However, "[a]ll cultural, civic, and faith-based gatherings of more than 25 people [were still] prohibited."[68] The Edgewater Christian Fellowship challenged the policy in court.[69] Two weeks later, the Oregon governor issued revised guidance. Churches could now open with up to 250 people, so long as they could maintain social distancing.[70]

Nevada "limit[ed] indoor worship services to 'no more than fifty persons.' Meanwhile, the directive cap[ped] a variety of secular gatherings at 50% of their operating capacity, meaning that they are welcome to exceed, and in some cases far exceed, the 50-person limit imposed on places of worship."[71] (*Calvary Chapel Dayton Valley v. Sisolak*, discussed *infra*, upheld those restrictions.)

In Virginia, "'[a]ll public and private in-person gatherings of more than ten individuals are prohibited. This [restriction] includes parties, celebrations, *religious*, or other social events, whether they occur indoor or outdoor."[72] However, "[t]his restriction does not apply . . . [t]o the operation of businesses not required to close to the public."[73]

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66. Or. Exec. Order No. 20-25 (May 14, 2020), https://www.oregon.gov/gov/admin/Pages/eo_20-25.aspx [https://perma.cc/2YT7-52QC].

67. *Id.*

68. *Id.*

69. *See* Plaintiffs' Verified Complaint, Edgewater Christian Fellowship v. Brown, No. 6:20-cv-00831 (D. Or. May 26, 2020), https://www.adflegal.org/sites/default/files/2020-05/Edgewater%20Christian%20Fellowship%20v.%20Brown%20-%20Complaint.pdf [https://perma.cc/F76M-78PF].

70. Donald Orr, *FAQ: What To Expect For Phase 2 Of Oregon's Reopening Plan*, OPB (Jun. 5, 2020), https://www.opb.org/news/article/oregon-reopen-phase-2-faq/ [https://perma.cc/MV5M-ZNVX].

71. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting) (mem.) (quoting Directive 21, http://gov.nv.gov/News/Emergency_Orders/2020/2020-05-28_-_COVID-19_Declaration_of_Emergency_Directive_021_-_Phase_Two_Reopening_Plan_(Attachments) [https://perma.cc/QU74-6M7Z]).

72. Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418, 426 (E.D. Va. 2020) (emphasis added).

73. *Id.*

In March, California "designate[d] '[f]aith based services that are provided through streaming or other technology" as an essential part of the 'Other Community-Based Government Operations and Essential Functions' . . . The list otherwise makes no mention of faith, churches, religion, religious workers, Christianity, worship, or prayer."[74] Later, California "limit[ed] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."[75] And later still, California would prohibit all indoor religious worship.[76]

Many of these restrictions were challenged as violations of the Free Exercise Clause of the First Amendment. At first, the circuits split about how to assess the validity of these measures.[77] Were these measures neutral, because houses of worship were treated similarly to comparable forms of public gatherings, like concerts? Or were these measures not neutral, because houses of worship were treated dissimilarly from non-analogous forms of public gatherings, such as restaurants? The Supreme Court's Free Exercise Clause jurisprudence did not provide a ready answer to this question.

B. COVID-19 restrictions on houses of worship did not neatly fit into the Court's Free Exercise Clause jurisprudence

The Supreme Court's Free Exercise Clause jurisprudence was not prepared for COVID-19. None of the leading precedents neatly mapped onto the novel pandemic restrictions. First, as a threshold matter, the governors did not prohibit a specific religious practice. For example, in *Employment Division v. Smith*,[78] the state generally banned the use of certain controlled substances.[79] The prohibition made it illegal for members of the Native American Church to use

74. Cross Culture Christian Ctr. v. Newsom, 445 F. Supp. 3d 758, 764 (E.D. Cal. 2020).

75. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

76. *Infra* Part IV.I.

77. *See infra* Part I.C (discussing the early circuit splits).

78. 494 U.S. 872 (1990).

79. OR. REV. STAT. § 475.992(4) (1987).

peyote as a sacrament.[80] During the pandemic, governors did not attempt to impose specific restrictions on how people worship. There were no bans on singing, chanting, drinking from a chalice, receiving communion, or laying of hands. Rather, the specific act that was prohibited was not specifically religious: people could not assemble in large numbers.[81] But, by prohibiting people from assembling, the state was, in effect, prohibiting all religious practice that must be performed together. In this fashion, the state was able to stop people from singing, chanting, drinking from a chalice, receiving communion, and laying of hands, by preventing them from assembling in the first instance. Here, the states exercised the power to impose a broad, neutral ban on assembly. And these prohibitions, in effect, gave the state the lesser power to impose non-neutral bans on religious practice.

Second, with one important exception,[82] governors did not target specific faiths for disparate treatment. In *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[83] the government banned animal sacrifice, an important ritual of the Santeria faith.[84] But the government "exempt[ed] kosher slaughter," which was performed in accordance with Jewish dietary laws.[85] During the pandemic, however, all faiths were treated the same in almost all cases: Christians, Jews, Muslims, Hindus, and others were subject to identical limitations on assembly.

Third, states did not condition the receipt of benefits on compelling people to engage in activity that was forbidden by their

80. *Smith*, 494 U.S. at 885 (1990) ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n., 485 U.S. 439, 451 (1988))).

81. *See supra* Part I.A (discussing prohibitions by various state authorities on gatherings, including for religious services).

82. *See infra* Part IV.G (discussing Governor Cuomo's targeting of Orthodox Jewish synagogues).

83. 508 U.S. 520 (1993).

84. *Id.* at 534 ("There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria.").

85. *Id.* at 536.

religion. In *Sherbert v. Verner*,[86] the government put "pressure upon [Sherbert] to forego" observing the Sabbath on Saturday, so she could receive unemployment benefits.[87] This pressure, the Court held, clashed with the Free Exercise Clause.[88] But during the pandemic, the states did not provide any benefits to religious groups that followed certain rules.

Fourth, the governors did not compel people to engage in an activity that was prohibited by their faith. In *United States v. Lee*,[89] an Amish person argued that the "imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees."[90] The Court upheld the mandate: "The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise."[91] During the pandemic, governors did not force anyone to take actions in conflict with their faith.

None of these precedents speak to the novel restrictions imposed on the free exercise of religion during the pandemic: houses of worship were placed under strict attendance requirements, or were completely shut down, for months on end. During a keynote address to the Federalist Society, Justice Alito observed that "the pandemic has resulted in previously unimaginable restrictions on individual liberty."[92] He added, "we have never before seen restrictions as severe, extensive and prolonged as those experienced, for most of 2020."[93] I agree. The sorts of restrictions imposed during Marpril 2020 were unprecedented. And these novel measures cannot be pigeonholed into the facts at issue in *Smith*, *Lukumi*, *Sherbert*, and *Lee*.

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86. 374 U.S. 398 (1963).

87. *Id.* at 404.

88. *Id.* at 406.

89. 455 U.S. 252 (1982).

90. *Id.* at 255.

91. *Id.* at 261.

92. Justice Alito, Keynote Address to the 2020 Federalist Society National Lawyers Convention (Nov. 12, 2020) (transcript available at Josh Blackman, *Video and Transcript of Justice Alito's Keynote Address to the Federalist Society*, REASON: VOLOKH CONSPIRACY (Nov. 12, 2020), https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/ [https://perma.cc/SHL3-HBCG]).

93. *Id.*

Moreover, none of these cases answer the legal question of how to compare the treatment of religion with the treatment of secular activities. Indeed, *Lukumi* declined to "define with precision the standard used to evaluate whether a prohibition is of general application."[94]

Courts can frame the question presented in two different fashions. First, should courts compare the restrictions on houses of worship to restrictions imposed on *comparable* secular activities? Or second, should courts compare the restrictions on houses of worship to restrictions imposed on *any* secular activity? Under the former test, so long as houses of worship are treated similarly to *some* non-religious gatherings, the policy is generally applicable. Under the latter test, if a house of worship is treated worse than any non-religious gathering, then the policy is not generally applicable. What is the correct denominator: *comparable* secular activities or *all* secular activities? The Supreme Court's precedents prior to 2020 do not say.

In the early days of the COVID-19 pandemic, the circuits split about which test to adopt. The Seventh Circuit followed the first test. And the Sixth Circuit followed the second test.

C. Sixth Circuit: Maryville Baptist Church v. Beshear

Shortly after the pandemic began, the Kentucky governor prohibited "[a]ll mass gatherings," including "community, civic, public, leisure, *faith-based*, or sporting events."[95] However, the governor exempted from the closure "normal operations at airports, bus and train stations, . . . [and] shopping malls and centers." He also permitted normal operations at "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing."[96] However, the governor ordered all religious organizations to close because they were not "life-sustaining."[97] Yet those same religious organizations

94. Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543 (1993).

95. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020) (alteration in original) (emphasis added).

96. *Id.* (omission in original).

97. *Id.*

could remain open to provide "food, shelter, and social services."[98] In other words, churches could operate soup kitchens and shelters for the homeless, but could not provide food and fellowship for worshippers.

On Easter Sunday, the Maryville Baptist Church in Kentucky held a drive-in service. "Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker."[99] The police "issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act."[100] The church challenged the governor's orders as a violation of the Free Exercise Clause. (The church also brought suit under the Kentucky Religious Freedom Restoration Act;[101] I will not consider their statutory claim).

On appeal, the Sixth Circuit found that the governor's order violated the Free Exercise Clause.[102] The per curiam opinion focused on the fact that "worship services" were not included in the "definition" of "'life-sustaining' operations."[103] (Here, "life-sustaining" should be read as synonymous with "essential.") However, many "secular activities" were deemed "life-sustaining," even though they "pose *comparable* public health risks to worship services."[104] For example, the governor deemed as "'life-sustaining' . . . law firms, laundromats, liquor stores, and gun shops."[105] (Kentucky law required the governor to treat firearm stores as "life-sustaining.")[106] "But the orders [did] not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 612.

102. *Id.* at 614 ("The Governor's orders also likely 'prohibit[ ] the free exercise' of 'religion' in violation of the First and Fourteenth Amendments, especially with respect to drive-in services.").

103. *Id.*

104. *Id.* (emphasis added).

105. *Id.*

106. KY. REV. STAT. ANN. § 39A.100(3) (West 2020) (prohibiting the Governor from "impos[ing] additional restrictions on the lawful possession, transfer, sale, transport, carrying, storage, display, or use of firearms and ammunition" during an emergency).

health guidelines required of essential services and even when they meet outdoors."[107] The Court drew a series of parallels between the secular gatherings that were permitted, and the religious gatherings that were prohibited:

> Assuming all of the same precautions are taken, why is it safe to wait in a car for a liquor store to open but dangerous to wait in a car to hear morning prayers? Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?[108]

Some parishioners may "use Zoom services or the like."[109] But not "every member of the congregation must see it as an adequate substitute."[110]

In a related opinion, *Roberts v. Neace*,[111] the Sixth Circuit observed, "[t]he Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same."[112] The Court added that the governor could not "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings."[113] This disparate treatment suggests that the governor may have been motivated by animus: "[A]t some point a proliferation of unexplained exceptions turns a generally applicable law into a discriminatory one."[114]

Finally, the panel in *Maryville Baptist Church* disputed the government's rationale, as the "[r]isks of contagion turn on social interaction in close quarters."[115] The coronavirus "does not care" whether

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107. *Maryville Baptist Church*, 957 F.3d at 614.
108. *Id.* at 615.
109. *Id.*
110. *Id.*
111. 958 F.3d 409 (6th Cir. 2020).
112. *Id.* at 414.
113. *Id.*
114. *Id.*
115. *Maryville Baptist Church*, 957 F.3d at 615.

people are at church, Chick-fil-A,[116] or Costco.[117] The court asked why "the orders permit people who practice social distancing and good hygiene in one place but not another?"[118] If there were concerns about the spread of the virus in churches, "there is a straightforward remedy: limit the number of people who can attend a service at one time."[119]

The Sixth Circuit recognized that the governor could presumptively treat houses of worship as "non-essential," but the church could rebut that presumption by pointing out inconsistencies in the policies.[120] In this case, "[t]he way the orders treat comparable religious and non-religious activities suggests that they do not amount to the least restrictive way of regulating the churches."[121] Here, the court looked to "comparable activities."[122] And the numerous exceptions to the policies suggest the governor may have been

116. At a Chick-fil-A in Texas, fifteen employees tested positive for COVID-19. Eleanor Skelton et al., *11 More Beaumont Chick-Fil-A Employees Tested Positive for COVID-19, Bringing Total to 15*, 12 NEWS NOW (Apr. 25, 2020, 12:11 AM), https://www.12newsnow.com/article/news/health/coronavirus/11-more-beaumont-chick-fil-a-employees-tested-positive-for-covid-19-bringing-total-to-15/502-cb97bed8-dffb-4d2b-b862-ad43328ce0b2 [https://perma.cc/KS8P-NZA3].

117. At a Costco in Yakima, Washington, 145 employees tested were likely infected with COVID-19 by a "superspreader event" in the store. *145 employees infected in COVID outbreak at Yakima Co. Costco store*, KOMO NEWS (Dec. 30, 2020), https://komonews.com/news/local/145-workers-infected-in-covid-outbreak-at-yakima-co-costco-store [https://perma.cc/SUK9-VKPJ].

118. *Maryville Baptist Church*, 957 F.3d at 615; *see also Neace*, 958 F.3d at 415 ("There are plenty of less restrictive ways to address these public-health issues. Why not insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the Governor has done for comparable secular activities? Or perhaps cap the number of congregants coming together at one time? If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith. The orders permit uninterrupted functioning of 'typical office environments,' which presumably includes business meetings. How are in-person meetings with social distancing any different from in-person church services with social distancing? Permitting one but not the other hardly counts as no-more-than-necessary lawmaking.").

119. *Maryville Baptist Church*, 957 F.3d at 615.

120. *Id.* at 613.

121. *Id.*

122. *Id.* at 614 ("And many of the serial exemptions for secular activities pose comparable public health risks to worship services.").

motivated by animus toward religion. But, under the Sixth Circuit's rule, a more narrowly tailored order with fewer exceptions could pass constitutional muster.[123] The Kentucky governor blundered by creating so many blatant exemptions to his policy.

The Sixth Circuit assumed that a house of worship was "comparable" to a liquor or grocery store. Yet the panel did not explain why those activities were in fact comparable. What are the similarities between a liquor store and a church? People enter a building to obtain wine? The similarities are thin. Rather, the panel considered whether the risks those activities posed were comparable. In both buildings, people can congregate in close proximity to spread the disease. Still, people tend to spend more time in a church than in a liquor store. Restaurants present a closer comparison—people sit together for extended periods, often unmasked. I think the Sixth Circuit analysis did not really turn on how "comparable activities" were treated. In fact, the Sixth Circuit found a Free Exercise violation when a house of worship was treated dissimilarly from any secular activity. The Court did not require any meaningful degree of fit between the house of worship and the secular activity. Nothing in *Smith* or *Lukumi* dictates the requisite level of fit. Therefore, the Sixth Circuit's decision was entirely consistent with Supreme Court precedent. But the panel's core analysis was largely unexplained. In contrast, the Seventh Circuit refused to compare houses of worship to "essential" services that provide food, shelter, and other necessities.[124] That court required a very close fit between the house of worship and the secular activity. We will consider that precedent next.

D. Seventh Circuit: Elim Romanian Pentecostal Church v. Pritzker I

In Illinois, "essential businesses and operations" could open

123. *Id.* at 613 ("The likelihood-of-success inquiry instead turns on whether Governor Beshear's orders were 'the least restrictive means' of achieving these public health interests . . . All in all, the Governor did not narrowly tailor the order's impact on religious exercise.").

124. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 343 (7th Cir. 2020).

without numerical limits.[125] And "religious . . . nonprofit organizations" were deemed "essential" "when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals."[126] The governor's order also designated "engag[ing] in the free exercise of religion" as an "essential activity."[127] But religious worship was limited to a ten person hard cap, regardless of the size of the church.[128] Somewhat paradoxically, "religious services" were deemed "essential" activities" for which people could assemble.[129] But the religious services were not exempted from the size limit, as were other essential businesses and operations.[130] Still, people could assemble at houses of worship, without limits, to feed the poor.[131] Churches could serve bread to a room full of unmasked homeless people, but could not give communion to eleven parishioners.[132]

Two churches challenged the order. They contended "that a limit of ten persons effectively forecloses their in-person religious services."[133] The churches rejected alternate approaches. For example, they did not find it an adequate substitute to "hold multiple ten-person services every week."[134] The churches also rejected "the Governor's proposed alternatives—services over the Internet or in parking lots while worshipers remain in cars."[135] The churches argued that in-person fellowship was an essential element of their faith.

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125. Ill. Exec. Order No. 2020-32 (Apr. 30, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx [https://perma.cc/AB5U-7YK5].

126. *Elim Romanian*, 962 F.3d at 343.

127. Ill. Exec. Order No. 2020-32, *supra* note 125, at 2(5)(vi).

128. *See Elim Romanian*, 962 F.3d at 342.

129. *Id.* at 343.

130. *See id.*

131. *See id.*

132. *See id.* ("The churches are particularly *put out* that their members may assemble to feed the poor but not to celebrate their faith." (emphasis added)).

133. *Id.* at 342–43.

134. *Id.* at 343.

135. *Id.*; *see* Ill. Exec. Order No. 2020-32, *supra* note 125, at 2(5)(vi) ("Religious organizations and houses of worship are encouraged to use online or drive-in services to protect the health and safety of their congregants.").

The district court ruled against the churches.[136] And the Seventh Circuit denied the churches' motion for an injunction pending appeal.[137] Here, the Seventh Circuit undertook the analysis that the Sixth Circuit did not: were houses of worship in fact "comparable" to other gatherings that were subject to less stringent requirements? The panel explained:

> The Executive Order's temporary numerical restrictions on public gatherings apply not only to worship services but also to the most *comparable* types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus.[138]

The panel continued, "[w]orship services do not seem *comparable* to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods."[139] Critics can quibble with the degree of fit between houses of worship and grocery stores. But the Seventh Circuit tried to draw a line between comparable and non-comparable activities. Yet nothing in the Supreme Court's precedents explain whether activities had to be comparable at all.

Further, the Seventh Circuit seemed to praise the governor for allowing "religious services" to proceed at all, while "concerts [were] forbidden."[140] The Court seems to suggest that the state could have shut down all houses of worship, like it shut down all concerts. This policy was not an act of magnanimity. Closing all churches, synagogues, and mosques would have run afoul of the First Amendment, regardless of the pandemic. No state in the United States had

136. *See Elim Romanian*, 962 F.3d at 341.
137. *See id.* at 347.
138. *Id.* at 344 (emphasis added).
139. *Id.* (emphasis added).
140. *Id.* at 343.

attempted such a measure.[141] At least until California banned all indoor worship, and permitted only *outdoor* worship.[142] The Seventh Circuit's ruling, however, was only temporary. Two weeks later, the Supreme Court would set the nationwide standard in *South Bay Pentecostal Church v. Newsom*.

II. PHASE 2: CHIEF JUSTICE ROBERTS'S *SOUTH BAY* STANDARD

The second phase of COVID litigation began late in the evening on Friday, May 29, 2020. The Supreme Court sharply divided 5-4 in *South Bay Pentecostal Church v. Newsom*.[143] This per curiam opinion upheld California's restrictions on houses of worship. The majority did not explain its reasoning. But Chief Justice Roberts wrote what would prove to be a very influential concurring opinion. He articulated what I will refer to as the *comparator* approach. This framework assesses whether houses of worship were treated similarly to "comparable" non-essential institutions. Critically, the state can presumptively define what is "essential" and what is "non-essential." Chief Justice Roberts determined that houses of worship were treated similarly to "comparable secular gatherings," and were treated better than "dissimilar activities."[144] Justice Kavanaugh wrote a dissent, which was joined by Justices Thomas and Gorsuch.[145] Justice Kavanaugh accepted the general premise of the

141. A viral video reveals that this sort of regime was employed in Italy. *See* La Repubblica, *Coronavirus, il prete non interrompe la messa all'arrivo dei carabinieri: "È abuso di potere"*, YOUTUBE (Apr. 20, 2020), https://www.youtube.com/watch?v=Zyu9l3vAsIc [https://perma.cc/5S7M-3Q6Y]. A police officer interrupts a Mass, and tells the priest to stop the service, and disperse his parishioners. At the time, there were fourteen people, who were spaced out in a huge church. The government had planned to re-open certain businesses, including museums, but not churches. The dialogue is in Italian, but you can follow along. The priest tells the officer, "All right, I'll pay the fine, or whatever there is to pay." The officer says people can watch the live-stream. The priest replies that his parishioners cannot receive communion online. *See* Marc O. DeGirolami, *Temperatures Rising Quickly*, L. & RELIGION F. (Apr. 29, 2020), https://lawandreligionforum.org/2020/04/29/temperatures-rising-quickly/ [https://perma.cc/AA67-LYH7].

142. *See infra* Part IV.I.

143. 140 S. Ct. 1613 (2020) (mem.).

144. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

145. *Id.* at 1614.

comparator approach, but he concluded that houses of worship were in fact treated worse than certain comparable gatherings.[146] In the wake of *South Bay*, Chief Justice Roberts's opinion would became a *superprecedent*. Over the following six months, more than one hundred cases relied on Chief Justice Roberts's opinion in cases that statutory and constitutional challenges to COVID-19 regulations.

A. South Bay United Pentecostal Church v. Newsom

The California governor "place[d] temporary numerical restrictions on public gatherings to address" the COVID-19 pandemic.[147] Subsequently, the state "limit[ed] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."[148] The South Bay Pentecostal Church challenged the constitutionality of these measures. The lower courts upheld the governor's orders.[149] On appeal, the church sought an injunction from the Supreme Court. On May 29, 2020, late on Friday evening, the Court split 5-4.[150] *South Bay United Pentecostal Church v. Newsom*, an unsigned, per curiam opinion denied the injunction.

Chief Justice Roberts wrote what would become an influential concurring opinion. He found that the "restrictions on places of worship . . . appear consistent with the Free Exercise Clause of the First Amendment."[151] He followed the same reasoning that the Seventh Circuit followed. Yet his analysis spanned only two sentences. First, Chief Justice Roberts found that "[s]imilar or more severe restrictions apply to *comparable* secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time."[152] Second, Chief Justice Roberts

146. *Id.* at 1615 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

147. *Id.* at 1613 (Roberts, C.J., concurring in denial of application for injunctive relief).

148. *Id.*

149. *See* S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938, 941 (9th Cir. 2020) (per curiam).

150. 140 S. Ct. at 1613 (mem.).

151. *Id.*

152. *Id.* (emphasis added).

observed that "the Order exempts or treats more leniently only *dissimilar* activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods."[153] In short, church worship is treated similarly to "comparable secular gatherings," but is treated differently from secular "dissimilar activities." Chief Justice Roberts did not engage any of the Court's Free Exercise jurisprudence such as *Smith* or *Lukumi*.

Under Chief Justice Roberts's *comparator* approach, in theory at least, the challengers could rebut the presumption that houses of worship can be deemed "non-essential." But Chief Justice Roberts did not entertain any of the Church's arguments. Rather, the final portion of his analysis urged deference in the unique posture of this case. The Supreme Court should not intervene, he wrote, when "a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground."[154] It was not clear how Chief Justice Roberts's analysis would extend to an appeal that did not seek emergency injunctive relief, but arose on a motion for summary judgment. Yet these sorts of lockdown measures will almost always be resolved on an expedited basis, where facts on the ground are changing. Therefore, the *South Bay* approach would seem to apply to the review of all such measures. Then again, in *Roman Catholic Diocese*, Chief Justice Roberts would minimize the constitutional nature of his opinion.[155] Instead, he would later describe his concurrence as equitable in nature.

In *South Bay*, Justice Kavanaugh wrote a dissenting opinion, which was joined by Justices Thomas and Gorsuch.[156] (Justice Alito would have granted the application, but he did not join Justice

153. *Id.* (emphasis added).

154. *Id.* at 1614.

155. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 75 (2020) (Roberts, C.J., dissenting) (per curiam).

156. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

Kavanaugh's dissent.)[157] As a threshold matter, Justice Kavanaugh accepted the *comparator* approach. (In *Calvary Chapel*, which we will discuss *infra*, Justice Kavanaugh changed course, and rejected the *comparator* approach.) But he would require a lesser degree of fit between houses of worship and other secular gatherings. He found that "California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses."[158] Specifically, "*comparable* secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[159] Justice Kavanaugh did not explain how the activities in a florist shop are similar to activities in a house of worship. Rather, he focused on whether those activities pose a comparable risk. Chief Justice Roberts's concurrence only mentioned *some* of these other "essential" commercial enterprises. He did not mention restaurants, which are more similar to houses of worship. People eat with their masks off for extended periods of time.[160]

In *South Bay*, Justice Kavanaugh grounded his analysis in the Court's Free Exercise Clause jurisprudence. He found that this "discrimination against religion is 'odious to our Constitution.'"[161] He also favorably cited the Sixth Circuit's precedent: "[R]estrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom."[162] Next, Justice Kavanaugh found that the governor's order

157. Justice Alito would also not join Justice Kavanaugh's dissent in *Calvary Chapel*. *See infra* note 160.

158. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting from denial of application for injunctive relief).

159. *Id.* (emphasis added).

160. *Cf.* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2615 (2020) (Kavanaugh, J., dissenting) (mem.) ("I continue to think that the restaurants and supermarkets at issue in *South Bay* (and especially the restaurants) pose similar health risks to socially distanced religious services in terms of proximity to others and duration of visit.").

161. *S. Bay*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting) (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2015 (2017)).

162. *Id.* at 1614–15 (quoting Roberts v. Neace, 958 F.3d 409, 414 (6th Cir. 2020)).

should be reviewed under strict scrutiny: "What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap."[163] Here, the burden was placed on the state to justify why religious worship services are treated worse than comparable secular businesses. And that justification must be "compelling."

Here, the dissenters found that California failed to meet this burden. "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?"[164] In light of these exemptions, the dissenters concluded, "California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment."[165] Chief Justice Roberts did not respond to any of the dissenters' arguments.

B. Seventh Circuit: Elim Romanian Pentecostal Church v. Pritzker II

On May 16, 2020, the Seventh Circuit denied the Elim Romanian Pentecostal Church an injunction pending appeal.[166] Eleven days later, the church filed an application for injunctive relief with Circuit Justice Kavanaugh.[167] Illinois's response was due on May 28. Shortly before the response brief was filed, the Illinois governor signed Executive Order 2020-38.[168] This new policy "permit[ted] the resumption of all religious services" without numerical limits.[169] "What used to be a cap of ten persons became a

163. *Id.* at 1615.

164. *Id.* (quoting *Neace*, 958 F.3d at 414).

165. *Id.*

166. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 344 (7th Cir. 2020).

167. Emergency Application for Writ of Injunction Relief Requested Before May 31, 2020, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811).

168. Ill. Exec. Order No. 2020-38 (May 29, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-38.aspx [https://perma.cc/Y4RL-W79R].

169. *Elim Romanian*, 962 F.3d at 344.

recommendation."[170] The state argued the case was now moot.[171] The plaintiffs countered that the new order was designed to frustrate appellate review, and the challenge remained ripe.[172] On May 29, the Court denied the Illinois petition with a summary order.[173] That same day, the Supreme Court decided *South Bay*.[174]

On remand to the Seventh Circuit, Illinois argued that the new order rendered the case moot. The churches countered that the governor could restore the old executive order at any point. The court agreed with the churches that the case was still ripe, even though the prior order was "no longer in effect."[175] Judge Easterbrook wrote the panel opinion. He explained that under *Employment Division v. Smith*, "the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally

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170. *Id.*; *see* Ill. Dep't of Public Health, *COVID-19 Guidance for Places of Worship and Providers of Religious Services,* (June 30, 2020), https://www.dph.illinois.gov/covid19/community-guidance/places-worship-guidance [https://perma.cc/R9PH-CRUW].

171. Response in Opposition to Emergency Application for Writ of Injunction, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811), https://bit.ly/30B0bHX [https://perma.cc/KAL3-4BB8].

172. Reply in Support of Emergency Application for Writ of Injunction Relief Requested before May 31, 2020 at 1, Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341 (7th Cir. 2020) (No. 20-1811) ("Mere hours before his Response was due in this Court, the Governor announced a sudden change in his 10-person limit on religious worship services (Resp. 1, n.1), after vigorously defending his policy in both lower courts, and having announced barely 3 weeks ago that it would be 12 to 18 months before numerical limits on worship services were lifted (App. 6). What changed? The Governor was summoned to the steps of this Court to give an account."), https://www.supremecourt.gov/DocketPDF/19/19A1046/144431/20200529091521338_Memo%20-%20Reply%20in%20Support%20of%20Emergency%20Application%20for%20Writ%20of%20Injunction%20FINAL.pdf [https://perma.cc/3T7F-28PX].

173. *See* Order in Pending Case at 1, Elim Romanian Pentecostal Church v. Pritzker, No. 19A1046 (U.S. May 29, 2020) ("The application for injunctive relief presented to Justice Kavanaugh and by him referred to the Court is denied. The Illinois Department of Public Health issued new guidance on May 28. The denial is without prejudice to Applicants filing a new motion for appropriate relief if circumstances warrant.").

174. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (mem.).

175. *Elim Romanian*, 962 F.3d at 345.

applicable laws."[176] Moreover, the court found that "Illinois did not set out to disadvantage religious services compared with secular events."[177] At the time, "[f]unerals, weddings, and similar activities [were] subject to the same size limit that applie[d] to worship services."[178] The Court also found that there were no viable claims of animus toward a particular religion.[179]

Yet the churches framed their argument differently. They contended "that the ten-person cap disfavor[ed] religious services compared with" secular economic activities.[180] For example, "more than ten people at a time may be in a [grocery] store."[181] And in "warehouses . . . a substantial staff may congregate to prepare and deliver the goods that retail shops sell."[182] Indeed, the churches could admit more than ten people if they were "feeding and housing the poor."[183] The churches asked why "those businesses, and other essential functions . . . may place ten unrelated persons in close contact," but churches cannot do so for worship?[184] In other words, they asked, why is the Free Exercise of Religion not essential.

Next, the court confronted the question that Chief Justice Roberts only alluded to in *South Bay*: "[W]hat is the right comparison group: grocery shopping, warehouses, and soup kitchens, as plaintiffs contend, or concerts and lectures, as Illinois maintains?"[185] What is the right denominator? The churches relied on the *South Bay* dissent, as well as the Sixth Circuit majorities in *Maryville Baptist Church* and *Roberts v. Neace*.[186] And Illinois cited Chief Justice Roberts's *South*

176. *Id.* (citing Emp. Div. v. Smith, 494 U.S. 872 (1990)).

177. *Id.* at 346.

178. *Id.*

179. *See id.* (citing Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 532 (1993)).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* ("Plaintiffs point us to two opinions of the Sixth Circuit plus two opinions

Bay concurrence.[187]

The Seventh Circuit "line[d] up with Chief Justice Roberts."[188] Judge Easterbrook wrote, "[i]t would be *foolish* to pretend that worship services are exactly like any of the possible comparisons, but they seem most like other congregate functions that occur in auditoriums, such as concerts and movies."[189] In that regard, *South Bay* resolved the case without much further analysis. Yet Judge Easterbrook performed the analysis that Chief Justice Roberts did not.

Judge Easterbrook acknowledged that some "essential" workplaces that were not subject to numerical limits did "present . . . risks."[190] He observed that "[m]eatpacking plants and nursing homes come to mind, and they have been centers of COVID-19 outbreaks."[191] Indeed, the court stated, "we do not deny that warehouse workers and people who assist the poor or elderly may be at much the same risk as people who gather for large, in-person religious worship."[192]

Yet these facilities were allowed to remain open without numerical limits. Judge Easterbrook responded to this argument: "it is hard to see how food production, care for the elderly, or the distribution of vital goods through warehouses could be halted."[193] In short, cooking, elder care, and deliveries were more important to our polity than religious worship. Why? There were adequate substitutes for in-person religious worship, but not for other "essential" functions. Judge Easterbrook distilled what the phrase "essential" actually means: *important*. But not *important* in any objective sense. This concept is entirely subjective, as determined by the

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dissenting from orders denying injunctions pending appeal. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020)); Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020); S. Bay United Pentecostal Church v. Newsom, 959 F.3d 938 (9th Cir. 2020) (Collins, J., dissenting); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.) (Kavanaugh, J., joined by Thomas & Gorsuch, JJ., dissenting).").

187. *Id.*

188. *Id.*

189. *Id.* (emphasis added).

190. *Id.* at 347.

191. *Id.*

192. *Id.*

193. *Id.*

powers that be. And those powers determined that the replacements for in-person religious worship were in fact sufficient. Judge Easterbrook made this point with admirable candor:

> Reducing the rate of transmission would not be much use if people starved or could not get medicine. That's also why soup kitchens and housing for the homeless have been treated as essential. Those activities *must* be carried on in person, while concerts can be replaced by recorded music, movie-going by streaming video, *and large in-person worship services by smaller gatherings, radio and TV worship services, drive-in worship services, and the Internet. Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways*.[194]

"Churches can feed the spirit in other ways." In short, in-person worship is not as important as other activities. Therefore, it is not essential. To be sure, many houses of worship have moved worship services onto Zoom; some with alacrity, others with regret.[195] But the Illinois governor and Judge Easterbrook purported to decide for others whether virtual services are sufficient to "feed the spirit." People of faith do not get to decide if the substitutes are adequate.

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194. *Id.* (second emphasis added).

195. *See, e.g.*, David E. Bernstein, *Is Attending a Political Protest More Important than Attending a Funeral?*, TIMES OF ISR. (June 11, 2020, 7:36 PM), https://blogs.timesofisrael.com/is-attending-a-political-protest-more-important-than-attending-a-funeral/ [https://perma.cc/5VDP-NYPJ] (noting that some rabbis favor in-person protests but not in-person worships); Faith Organizations' Statement Regarding State Legislation Granting Religious Exemptions to Emergency Orders (April 12, 2021), https://interfaithalliance.org/cms/assets/uploads/2021/04/2021-4-12-National-Faith-Orgs-Statement-Opposing-Religious-Exemptions-to-Emergency-Orders-Interfaith-Alliance-FINAL.pdf [https://perma.cc/LS74-7J8E] ("Indeed, all of our denominations have found creative ways to provide opportunities for worship during the pandemic, recognizing the spiritual sustenance and sense of community that religious practices provide."); G. Jeffrey MacDonald, *No pew? No problem. Online church is revitalizing congregations.*, CHRISTIAN SCI. MONITOR (Feb 9, 2021), https://www.csmonitor.com/USA/Society/2021/0209/No-pew-No-problem.-Online-church-is-revitalizing-congregations [https://perma.cc/8VY6-5V8J] ("As congregations have gone online to maintain ministries while social distancing, new worshippers from other regions have been showing up.").

The state makes that determination for them. The comparison between religious and secular activities was secondary. The court primarily focused on how important the state deemed in-person religious worship. And in *Elim II*, the court gladly deferred to the governor's determination that in-person religious worship was not that important, and could be substituted by online worship.

The Sixth Circuit framed the issue very differently: the state must treat so-called "life-sustaining"[196] businesses in the same fashion as "soul-sustaining" groups.[197] Long before the ink dried in Philadelphia, people understood how "soul-sustaining" activities were "life-sustaining." Judge Easterbrook, however, articulated a presumption of secularity that views in-person worship as a trifling convenience. Just another consumption good, like going to a movie or watching a concert. There is nothing intrinsically important about religion. So what if you have to stream a sermon on YouTube? Or be baptized over Zoom? Or download communion by emoji? 🏘️🕌🛕🙏🛐🤲.

In another context, New York City Mayor Bill de Blasio minimized the importance of religious congregation. He argued that a "devout religious person who wants to go back to services" had less of a compelling need to assemble than people protesting for racial justice.[198] Indeed, when Jewish people gathered for a funeral, the police broke up the assembly, and the Mayor publicly criticized those groups.[199] But other public gatherings, such as racial justice

196. Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611 (6th Cir. 2020).

197. *See id.* at 614, 616.

198. Joseph A. Wulfsohn, *De Blasio Slammed for Halting Prayer Gatherings But Not Protests; Mayor Cites '400 Years of American Racism'*, FOX NEWS (June 2, 2020), https://www.foxnews.com/politics/bill-de-blasio-slammed-for-halting-prayer-gatherings-but-allowing-protests-400-years-of-racism-is-not-the-same-as-religion [https://perma.cc/D35V-ECPW]. *But see* Robby Soave, *Democratic Leaders Praise George Floyd Protestors, Show Utter Contempt for Everyone Else Still in Lockdown*, REASON MAG. (June 2, 2020), https://reason.com/2020/06/02/george-floyd-protesters-deblasio-murphy-covid-19-lockdown/ [https://perma.cc/6XQB-S4W5] ("Mourning a deceased person is no less important to that person's loved ones than ending police brutality is for the thousands of people engaged in protest.").

199. Wulfsohn, *supra* note 198.

protests, were encouraged.[200]

In *Calvary Chapel Dayton Valley v. Sisolak*, which we will address *infra*, Justice Alito addressed a position similar to the one taken by the Nevada governor. In that case, the state permitted certain public protests, but imposed strict limits on religious gatherings.[201] Justice Alito addressed the Free Speech Clause. He observed that "[t]he State defends the governor on the ground that the protests expressed a viewpoint on *important issues*, and that is undoubtedly true, but favoring one viewpoint over others is anathema to the First Amendment."[202] He contended that discrimination against religion is a form of viewpoint discrimination. "Here, the Directive plainly discriminates on the basis of viewpoint."[203]

The Department of Justice rebuked this sort of double-standard. The federal government filed a statement of interest in a challenge to Washington's shutdown orders:

> The *value judgment* inherent in providing exemptions for secular activities like dine-in restaurants or taverns, which would seem to implicate the State's public health interests to a similar, if not greater degree, while not providing exemptions for Plaintiff's religious activities, tends to indicate that the State's actions may not be religion-neutral . . . This is equally true for the *value judgment* inherent in approving protests without a

200. *See* Julie Bosman & Amy Harmon, *Protests Draw Shoulder-to-Shoulder Crowds After Months of Virus Isolation*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/us/coronavirus-protests-george-floyd.html [https://perma.cc/RSX6-AWZY]; Michael Powell, *Are Protests Dangerous? What Experts Say May Depend on Who's Protesting What*, N.Y. TIMES (July 6, 2020), https://www.nytimes.com/2020/07/06/us/Epidemiologists-coronavirus-protests-quarantine.html [https://perma.cc/H3SE-RDQB] ("For epidemiologists to turn around and argue for loosening the ground rules for the George Floyd marches risks sounding hypocritical. 'We allowed thousands of people to die alone,' [Dr. Nicholas A. Christakis, professor of social and natural science at Yale] said. 'We buried people by Zoom. Now all of a sudden we are saying, never mind?'").

201. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.).

202. *Id.* at 2608 (Alito, J., dissenting) (emphasis added).

203. *Id.* at 2607–08.

> numerical cap but requiring a cap for outdoor worship services.[204]

Like Judge Easterbrook, governors made "value judgments" about the importance of religious worship. They deemed it less important than other secular activities. They decided that "churches can feed the spirit" over Zoom. We *need* Amazon Prime, but receiving communion is a mere convenience.[205] Where is the line? If priests at a church-run soup kitchen recite a blessing when serving bread to the poor, does an essential activity become non-essential?

Not all worship can be digitized. Regrettably, during the COVID-19 epidemic, some observant Jewish people were not able to perform the Mourner's *Kaddish*, a prayer that requires a quorum of ten men.[206] Justice Gorsuch observed in his *Diocese* concurrence that numerical limits have a particularly harmful effect on Jewish women for that reason: "In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum."[207] Not everyone can attend a limited number of ten-person services.

The *South Bay* comparator approach obfuscated the principal legal analysis. The threshold decision to designate certain economic

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204. The United States' Statement of Interest in Support of Plaintiff's Motion for a Temporary Restraining Order at 12 n.4, Harborview Fellowship v. Inslee (D. Wa. 2021) (No. 3:20-cv-05518-RBL), https://www.justice.gov/opa/press-release/file/1284756/download [https://perma.cc/VZY7-QNF5] (emphasis added).

205. *But see Why We Won't Be Sharing Communion via Zoom*, SANCTUARY BAPTIST CHURCH (Mar. 25, 2020), https://sanctuarybaptist.wordpress.com/2020/03/26/why-we-wont-be-sharing-communion-via-zoom/ [https://perma.cc/2L85-847C] ("[C]ommunion is, in part, about being physically united in Christ's presence: 'communion' just means 'union with'. And let's be honest: we're not physically together. Zoom is great, but we are embodied people whose bodies are far apart right now, and there is a sadness in that.").

206. Yehuda Shurpin, *Why Is a Minyan Need for Kaddish?*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/4721972/jewish/Why-Is-a-Minyan-Needed-for-Kaddish.htm [https://perma.cc/8H39-UGZB] ("In this new era of COVID-19, when virtually all synagogues are closed and almost no one is able to pray with a *minyan* (quorum of 10 men), many are tempted to say the Kaddish (which is chanted in honor of loved ones who have passed on) even while alone. Why can't this be done?").

207. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (per curiam).

privileges as "essential," but in-person worship as "non-essential," was always premised on an inherent "value judgment" that in-person worship was not important. That sentiment does not fit within the traditional mold of animus. In Illinois, the state was not treating one sect more favorably than another. Nor was it treating religion more favorably than secularism. Rather, the state was treating religion *less* favorably than it was treating certain economic activities, because the government simply diminished the significance of religion. Or to state the issue more precisely, in-person worship was deemed less *essential* than certain secular economic activities. The "value judgments" behind this presumption of secularity cannot be reconciled with the Free Exercise Clause.

C. Chief Justice Roberts's unexpected superprecedent from the Shadow Docket

Judge Easterbrook was not alone in lining up with Chief Justice Roberts. From June through November 2020, Chief Justice Roberts's concurrence in *South Bay* rapidly became one of the most influential Supreme Court decisions in the modern era. In this brief span, more than one hundred cases based their decisions on Chief Justice Roberts's solo opinion.[208] And the lower courts relied on Chief Justice Roberts's opinion in cases that spanned across the entire spectrum of constitutional and statutory challenges to pandemic policies. The bulk of the cases involved houses of worship challenging restrictions on public gatherings.[209] In every case but

208. *See* Josh Blackman, *Roman Catholic Diocese Part I: The End of the South Bay "Superprecedent"*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2020, 2:14 AM), https://reason.com/volokh/2020/11/26/roman-catholic-diocese-part-i-the-end-of-the-south-bay-superprecedent/ [https://perma.cc/F96D-UKKN].

209. *See* Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 226 (2d Cir. 2020); Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 346 (7th Cir. 2020); Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228 (9th Cir. 2020); Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 731 (9th Cir. 2020), *vacated*, 981 F.3d 764 (9th Cir. 2020); High Plains Harvest Church v. Polis, 835 F. App'x 372 (10th Cir. 2020); Cty. of L.A. v. Superior Ct. of L.A. Cty., No. B307056, 2020 WL 4876658, at *1 (Cal. Ct. App. Aug. 15, 2020); Harvest Rock Church, Inc. v. Newsom, No. LACV 20-6414 (JGB)(KKX), 2020 WL

one,[210] the courts relied on elements of Chief Justice Roberts's concurrence, and ruled against the house of worship. Consistently, judges treated a solo concurrence to a per curiam summary order as if it were a persuasive, if not binding, Supreme Court precedent.

The *South Bay* concurrence, however, was not limited to Free Exercise Clause cases. Many courts relied on *South Bay* to defer to local governments in many other contexts. For example, many courts upheld various restrictions on voting rights in light of the fast-moving pandemic.[211] In these cases, the court deferred to the governments.

5265564, at *2 (C.D. Cal. filed Sep. 2, 2020), *vacated*, 981 F.3d 764 (9th Cir. 2020); Calvary Chapel San Jose v. Cody, No. 20-CV-03794-BLF, 2020 WL 6508565, at *2 (N.D. Cal. Nov. 5, 2020); Christian Cathedral v. Pan, No. 20-CV-03554-CRB, 2020 WL 3078072, at *2 (N.D. Cal. filed June 10, 2020); S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 6081733, at *10 (S.D. Cal. filed Oct. 15, 2020), *vacated*, 981 F.3d 765 (9th Cir. 2020); Abiding Place Ministries v. Newsom, 465 F. Supp. 3d 1068, 1071 (S.D. Cal. 2020); Denver Bible Church v. Azar, No. 1:20-CV-02362-DDD-NRN, 2020 WL 6128994, at *7 (D. Colo. Oct. 15, 2020); High Plains Harvest Church v. Polis, No. 1:20-CV-01480-RM-MEH, 2020 WL 3263902, at *2 (D. Colo. June 16, 2020); Spell v. Edwards, No. 20-00282-BAJ-EWD, 2020 WL 6588594, at *4 (M.D. La. Nov. 10, 2020); Calvary Chapel Lone Mountain v. Sisolak, 466 F. Supp. 3d 1120, 1123 (D. Nev., 2020), *rev'd*, 831 F. App'x 317 (9th Cir. 2020); Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-CV-00303-RFB-VCF, 2020 WL 4260438, at *2 (D. Nev. June 11, 2020), *rev'd*, 982 F.3d 1228 (9th Cir. 2020); Legacy Church, Inc. v. Kunkel, 472 F. Supp. 3d 926, 996 (D.N.M. 2020); Solid Rock Baptist Church v. Murphy, No. 20-6805(RMB/JS), 2020 WL 4882604, at *8 (D.N.J. Aug. 20, 2020); Roman Cath. Diocese of Brooklyn v. Cuomo, No. 20-CV-4844(NGG)(CLP), 2020 WL 5994954, at *2 (E.D.N.Y. Oct. 9, 2020); Roman Cath. Diocese of Brooklyn v. Cuomo, No. 20-CV-4844(NGG)(CLP), 2020 WL 6120167, at *4 (E.D.N.Y. Oct. 16, 2020); Ass'n of Jewish Camp Operators v. Cuomo, 470 F. Supp. 3d 197, 214 (N.D.N.Y. 2020); Soos v. Cuomo, No. 1:20-CV-651(GLS/DJS), 2020 WL 6384683, at *4 (N.D.N.Y. Oct. 30, 2020); Elkhorn Baptist Church v. Brown, 466 P.3d 30, 34–35 (Or. 2020).

210. Soos v. Cuomo, 470 F. Supp. 3d 268, 279 (N.D.N.Y. 2020) ("To determine whether the aforementioned broad limits have been exceeded, which *Newsom* did not address, the court turns to Free Exercise Clause jurisprudence within the framework of the applicable standard of review.").

211. *See* Tex. Democratic Party v. Abbott, 961 F.3d 389, 393 (5th Cir. 2020) (holding that district court could not "require[] state officials . . . to distribute mail-in ballots to any eligible voter who wants one"); Sinner v. Jaeger, 467 F. Supp. 3d 774, 783–85 (D.N.D. 2020) (challenge to signature requirements for circulating petitions); Democratic Nat'l Comm. v. Bostelmann, 977 F.3d 639, 643 (7th Cir. 2020) (challenge to Wisconsin voter laws); Mi Familia Vota v. Hobbs, 977 F.3d 948, 952 (9th Cir. 2020)

Two district courts that halted restrictions on the franchise cited *South Bay*, but they failed to rely on Chief Justice Roberts's deferential framework.[212] One of those cases was affirmed, and the other was reversed.[213] Another court rejected a challenge brought by Donald J. Trump for President against New Jersey's expansion of mail-in voting.[214]

South Bay also played an important role in prisoner rights litigation. In most cases, district courts relied on Chief Justice Roberts's concurrence to reject challenges to conditions of confinement based on COVID-19.[215] Courts also cited *South Bay* in denying

(challenge to restrictions on voter registration); Tully v. Okeson, No. 1:20-CV-01271-JPH-DLP, 2020 WL 4926439, at *6 (S.D. Ind. Aug. 21, 2020), *aff'd*, 977 F.3d 608 (7th Cir. 2020) (challenge to absentee voting law); Eilenberg v. City of Colton, No. SA CV 20-00767-FMO (DFM), 2020 WL 5802377, at *5 (C.D. Cal. July 9, 2020), *report and recommendation adopted*, No. SA CV 20-00767-FMO (DFM), 2020 WL 5802379 (C.D. Cal. July 29, 2020) (voter challenging restrictions on signature gathering); Clark v. Edwards, 468 F. Supp. 3d 725, 737 (M.D. La. 2020) (voters challenging expansion of absentee ballots).

212. People First of Ala. v. Merrill, 467 F. Supp. 3d 1179, 1193 (N.D. Ala. 2020), *appeal dismissed*, No. 20-12184-GG, 2020 WL 5543717 (11th Cir. July 17, 2020) (finding that some voting restrictions were unlawful during pandemic); Common Cause Ind. v. Lawson, No. 1:20-CV-02007-SEB-TAB, 2020 WL 5798148, at *5 (S.D. Ind. Sep. 29, 2020) (challenge to absentee voting law), *rev'd*, 977 F.3d 663 (7th Cir. 2020).

213. People First of Ala. v. Sec'y of State for Ala., 815 F. App'x 505, 506 (11th Cir. 2020) (stay denied); Common Cause Ind. v. Lawson 977 F.3d 663 (7th Cir. 2020).

214. Donald J. Trump for President, Inc. v. Way, 492 F. Supp. 3d 354, 358–59 (D.N.J. 2020).

215. *See* Swain v. Junior, 961 F.3d 1276, 1293–94 (11th Cir. 2020) (pretrial detainees challenge conditions of confinement); Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *1, *12 (9th Cir. filed June 17, 2020) (Nelson, J., dissenting) (citing deference to elected officials as emphasized by the Chief Justice in *South Bay*, pretrial detainees challenge government's failure "to take adequate measures to prevent the spread of COVID-19 within the jail"); United States v. Mauldin, No. 18-371 (BAH), 2020 WL 2840055, at *4 (D.D.C. June 1, 2020); Hallinan v. Scarantino, 466 F. Supp. 3d 587, 609 (E.D.N.C. 2020) (federal inmates challenging prison conditions); Teague v. Crow, No. CIV-20-441-C, 2020 WL 4210513, at *1 (W.D. Okla. June 24, 2020), *report and recommendation adopted*, No. CIV-20-441-C, 2020 WL 4208941 (W.D. Okla. July 22, 2020) (prisoner "seeking immediate release from confinement for a twenty-one-day period of self-quarantine"); United States v. Myles, No. 3:11-CR-00253, 2020 WL 4350604, at *1 (M.D. Tenn. July 29, 2020) (prisoner seeking reduction in sentencing); Russell v. Harris Cty., Tex., No. H-19-226, 2020 WL 6585708, at *30 (S.D. Tex. Nov. 10, 2020) (pretrial bail).

compassionate release,[216] though some requests were granted.[217] In one case, an inmate challenged the denial of religious services in prison during the pandemic.[218]

District courts also relied on the *South Bay* concurrence in cases that asserted the freedom of association and the right to protest.[219] Other district courts extended Chief Justice Roberts's separate writing to Second Amendment challenges.[220] Several courts relied on *South Bay* to reject challenges to quarantine orders[221] and even mask mandates.[222] And many courts turned away challenges to

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216. *See* United States v. Queen, No. CR 17-58 (EGS), 2020 WL 3447988, at *3 (D.D.C. June 24, 2020) (referencing *South Bay* to describe COVID-19 situation while denying compassionate release); United States v. Pittman, 465 F. Supp. 3d 912, 913 (S.D. Iowa 2020) (same).

217. *See* United States v. O'Neil, 464 F. Supp. 3d 1026, 1030, 1036 (S.D. Iowa 2020); United States v. Ledezma-Rodriguez, 472 F. Supp. 3d 498, 501 (S.D. Iowa 2020); United States v. Clark, 467 F. Supp. 3d 684, 687, 692 (S.D. Iowa 2020); United States v. Jacobs, 470 F. Supp. 3d 969, 971, 976 (S.D. Iowa 2020); United States v. Grauer, No. 3:10-CR-00049, 2020 WL 6060927, at *1, *4 (S.D. Iowa Sept. 29, 2020) (granting compassionate relief); United States v. Dodd, No. 3:03-CR-00018, 2020 WL 5200900, at *1, *5 (S.D. Iowa July 29, 2020).

218. Payne v. Sutterfield, No. 2:17-CV-211-Z-BR, 2020 WL 5237747, at *6 (N.D. Tex. Sept. 2, 2020) (denying claim, citing *South Bay* as persuasive).

219. *See* Ill. Republican Party v. Pritzker, 470 F. Supp. 3d 813, 820–21 (N.D. Ill. 2020), *aff'd*, 973 F.3d 760 (7th Cir. 2020) (Illinois Republican party challenges ban on public assembly); Geller v. Cuomo, 476 F. Supp. 3d 1, 14–15 (S.D.N.Y. 2020) (asserting right to protest).

220. *See, e.g.*, McDougall v. Cty. of Ventura, 495 F. Supp. 3d 881, 885, 889 (C.D. Cal. 2020); Altman v. Cty. of Santa Clara, 464 F. Supp. 3d 1106, 1118–19 (N.D. Cal. 2020); Conn. Citizens Def. League, Inc. v. Lamont, 465 F. Supp. 3d 56, 73 (D. Conn. 2020) (granting preliminary injunction despite the deference that *South Bay* concurrence calls for); Dark Storm Indus. LLC v. Cuomo, 471 F. Supp. 3d 482, 503–04 (N.D.N.Y. 2020) ("In essence, Defendants made a policy decision about which businesses qualified as 'essential' and which did not. In the face of a global pandemic, the Court is loath to second-guess those policy decisions.").

221. *See, e.g.*, Carmichael v. Ige, 470 F. Supp. 3d 1133, 1141–42 (D. Haw. 2020); Armstrong v. Newsom, No. CV 20-3745-GW-ASX, 2020 WL 5585053, at *4 (C.D. Cal. Aug. 3, 2020); Murphy v. Lamont, No. 3:20-CV-0694 (JCH), 2020 WL 4435167, at *10 (D. Conn. Aug. 3, 2020).

222. *See, e.g.*, Vincent v. Bysiewicz, No. 3:20-CV-1196 (VAB), 2020 WL 6119459, at *12 (D. Conn. Oct. 16, 2020); Young v. James, No. 20 CIV. 8252 (PAE), 2020 WL 6572798, at *3 (S.D.N.Y. Oct. 26, 2020).

lockdown measures by various commercial establishments.[223] Courts even relied on *South Bay* in cases that did not assert constitutional rights. A judge on the Court of Appeals for Veterans Claims cited Chief Justice Roberts's opinion to deny an applicant emergency relief.[224] A federal judge rejected a challenge regarding the emergency supplemental nutritional assistance program (SNAP) during the pandemic.[225] Other cases cited *South Bay* and denied challenges to eviction moratoriums.[226]

In less than six months, *South Bay* may have become Chief Justice Roberts's most influential opinion during his entire tenure on the Court. It became a *superprecedent*![227] To be sure, Chief Justice

223. *See, e.g.*, Talleywhacker, Inc. v. Cooper, 465 F. Supp. 3d 523, 537–40 (E.D.N.C. 2020) (dance clubs); Pro. Beauty Fed'n of Cal. v. Newsom, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *9 (C.D. Cal. June 8, 2020) (cosmetology businesses); League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer, 468 F. Supp. 3d 940, 949 (W.D. Mich. 2020) (fitness instructors); PCG-SP Venture I LLC v. Newsom, No. EDCV 20-1138 JGB (KKX), 2020 WL 4344631, at *5 (C.D. Cal. June 23, 2020) (hotels); Bellwether Music Festival, LLC v. Acton, 471 F. Supp. 3d 827, 829 (S.D. Ohio 2020) (musical festival organizers); DiMartile v. Cuomo, 478 F. Supp. 3d 372, 386 (N.D.N.Y. 2020) *vacated, appeal dismissed for mootness* No. 20-2683, 2021 WL 389650, at *1 (2d Cir. Feb. 4, 2021) (wedding planners); 4 Aces Enter., LLC v. Edwards, 479 F. Supp. 3d 311, 329 (E.D. La. 2020) (bars); Nat'l Ass'n of Theatre Owners v. Murphy, No. 3:20-CV-8298 (BRM) (TJB), 2020 WL 5627145, at *16 (D.N.J. Aug. 18, 2020) (theaters); Alsop v. DeSantis, No. 8:20-CV-1052-T-23SPF, 2020 WL 4927592, at *2 (M.D. Fla. Aug. 21, 2020) (vacation rental properties); Paradise Concepts, Inc. v. Wolf, No. 20-2161, 2020 WL 5121345, at *5 (E.D. Pa. Aug. 31, 2020) (retail establishments); Fowler v. Paul, No. 3:20-CV-3042, 2020 WL 5258458, at *4 (W.D. Ark. Sept. 3, 2020) (chuck wagon races); Luke's Catering Serv., LLC v. Cuomo, 485 F. Supp. 3d 369, 379–82 (W.D.N.Y. 2020) (catering services); Bimber's Delwood, Inc. v. James, No. 20-CV-1043S, 2020 WL 6158612, at *6–7 (W.D.N.Y. Oct. 21, 2020) (billiards hall); AJE Enter. LLC v. Justice, No. 1:20-CV-229, 2020 WL 6940381, at *4 (N.D.W. Va. Oct. 27, 2020) (night club); Bocelli Ristorante Inc. v. Cuomo, 139 N.Y.S. 3d 481, 488 (N.Y. Sup. Ct. 2020) (restaurant); Beshear v. Acree, 615 S.W.3d (Ky. 2020) (automobile racing track).

224. Gray v. Wilkie, No. 20-2232, 2020 WL 4033252, at *2 (Vet. App. July 17, 2020).

225. Gilliam v. USDA, 486 F. Supp. 3d 856, 861 (E.D. Pa. 2020).

226. Baptiste v. Kennealy, 490 F. Supp. 353, 372–73 (D. Mass. 2020); Brown v. Azar, No. 1:20-CV-03702-JPB, 2020 WL 6364310, at *11 (N.D. Ga. Oct. 29, 2020).

227. *Cf.* Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES (Oct. 30, 2005), https://www.nytimes.com/2005/10/30/weekinreview/so-do-you-believe-in-superprecedent.html [https://perma.cc/D535-4CEM] ("The term superprecedents first surfaced at the Supreme Court confirmation hearings of Judge John Roberts, when

Roberts has written many important opinions. But those cases affected discrete controversies. *NFIB v. Sebelius*[228] resolved the constitutionality of the ACA.[229] *Shelby County v. Holder*[230] resolved the status of Section 4 of the Voting Rights Act.[231] The Census and DACA cases resolved controversies specific to the Trump era.[232] But *South Bay* settled cases of first impressions that have spanned the entire spectrum of litigation. And judges of all stripes fell in line with Chief Justice Roberts. In disputes between state and localities, *South Bay* served as a tiebreaker. This case was the alpha and omega of COVID-19 adjudication in 2020. It is difficult to account for how broadly governments at all levels have relied on Chief Justice Roberts's opinion when formulating policies. Conservatives and liberals latched onto Chief Justice Roberts's cursory analysis as the alpha and omega of COVID deference. Before *South Bay*, several courts ruled for the religious claimants.[233] But after *South Bay*, houses of worship consistently lost.[234] Truly, the impact of the *South Bay* concurrence was staggering.

In the abstract, it is not clear that the *South Bay* concurrence should have been so influential. First, Chief Justice Roberts wrote a solo concurrence. The views of a single person, even the then-median Justice, cannot represent the views of the Supreme Court. Second, *South Bay* was not an argued case. Rather, the Court denied an

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Senator Arlen Specter of Pennsylvania, the chairman of the Judiciary Committee, asked him whether he agreed that certain cases like Roe had become superprecedents or 'super-duper' precedents—that is, that they were so deeply embedded in the fabric of law they should be especially hard to overturn. In response, Judge Roberts embraced the traditional doctrine of 'stare decisis'—or, 'let the decision stand'—and seemed to agree that judges should be reluctant to overturn cases that had been repeatedly reaffirmed.").

228. 567 U.S. 519 (2012).

229. *See generally id.*

230. 570 U.S. 529 (2013).

231. *See generally id.*

232. Dep't of Com. v. New York, 139 S. Ct. 2551 (2019); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1915 (2020).

233. *See supra* note 186 (discussing Sixth Circuit precedent).

234. *See supra* notes 208–226 and accompanying text.

injunction on the so-called "shadow docket."[235] It is not clear that orders from the shadow docket should ever be precedential.[236] These decisions merely decide whether to grant or deny preliminary injunctive relief. Even a grant of relief does not represent a decision on the merits. And relief can be denied for a host of equitable factors that are not necessarily explained. A one-sentence per curiam opinion does not give the courts any guidance. I agree with Judge O'Scannlain that *South Bay* was "precedential only as to 'the precise issues presented and necessarily decided.'"[237] The per curiam opinion should not, by its own force, have extended to different cases and to different contexts.

Third, Chief Justice Roberts's opinion was remarkably narrow. The sole question presented was whether the Supreme Court should issue an injunction pursuant to the All Writs Act.[238] Chief Justice Roberts wrote that an injunction should only issue if the Church's claim for relief was "indisputably clear."[239] At the Supreme Court, such extraordinary relief requires a "more demanding standard than that which applies to the motion for an injunction pending appeal" in the court of appeals, or a motion for a preliminary injunction in the district court.[240] In other words, the Supreme Court should rarely intervene in an interlocutory fashion. The lower courts, however, do not face such restraints. The overwhelming majority of lower court decisions that cited Chief Justice Roberts's concurrence failed to account for the unique posture under the All Writs Act. Fourth, Chief Justice Roberts did not engage any of the Court's Free Exercise Clause jurisprudence. Chief Justice

235. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1 (2015).

236. *See id.*

237. Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 732 (9th Cir. 2020) (O'Scannlain, J., dissenting), *vacated on denial of reh'g en banc*, 981 F.3d 764 (9th Cir. 2020) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam)).

238. 28 U.S.C. § 1651 (2018).

239. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020 (Roberts, C.J., concurring in denial of application for injunctive relief)) (mem.) (quoting Stephen M. Shapiro et. al., SUPREME COURT PRACTICE § 17.4 at 17-9 (11th ed. 2019)).

240. *Harvest Rock Church*, 977 F.3d at 732 (O'Scannlain, J., dissenting).

Roberts said nothing at all about whether the lockdown measure was generally applicable. He relied entirely on equitable considerations to deny the injunction: "The notion that it is 'indisputably clear' that the Government's limitations are unconstitutional seems quite improbable."[241] Chief Justice Roberts did not definitively rule how *Smith* should be applied to pandemic measures in all contexts.

Chief Justice Roberts wrote for a very specific context, yet more than a hundred judges cited it in unrelated circumstances. The *South Bay* concurrence took on a life of its own, far beyond Chief Justice Roberts's likely intentions. In *Roman Catholic Diocese*, Chief Justice Roberts would confirm the narrow reading of his opinion.[242] Chief Justice Roberts, however, would do nothing to disabuse courts of relying on a broad reading of *South Bay* over the ensuing months.

III. PHASE 3: *CALVARY CHAPEL* AND THE "MOST-FAVORED" RIGHT

During June and July, Chief Justice Roberts's *South Bay* concurrence remained the law of the land. At the end of July, the Supreme Court would decide another Free Exercise Clause case on appeal from the Ninth Circuit.[243] The Nevada governor permitted casinos and other commercial establishments to open at reduced capacity, but without numerical limits. Houses of worship, however, were subject to fixed numerical limits. The Calvary Chapel Dayton Valley Church in Nevada challenged this order as a violation of the Free Exercise Clause of the First Amendment. The lower courts, relying on the *South Bay* concurrence, upheld this regime.[244] On appeal, *Calvary Chapel Dayton Valley v. Sisolak* once again sharply divided the Court. Like in *South Bay*, Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan denied the

241. *S. Bay*, 140 S. Ct. at 1614.

242. *See infra* Part IV.

243. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.).

244. Calvary Chapel Dayton Valley v. Sisolak, No. 3:20-CV-00303-RFB-VCF, 2020 WL 4260438, at *2 (D. Nev. June 11, 2020), *appeal denied*, 2020 WL 4274901 (9th Cir. 2020), *cert. denied*, 140 S. Ct. 2603, rev'd, 982 F.3d 1228 (9th Cir. 2020).

application.[245] However, in this case, Chief Justice Roberts did not write a concurrence to explain his thinking. Justices Thomas, Alito, Gorsuch, and Kavanaugh would have enjoined the Nevada directives. There were three dissents by Justices Alito, Gorsuch and Kavanaugh. Justice Alito's dissent hewed to the Court's doctrine and followed the comparator approach.[246] Justice Gorsuch thought the case was "simple."[247] Justice Kavanaugh extended the Court's doctrine and treated the Free Exercise of Religion as a "most-favored" right.[248]

A. Lower Court proceedings in Calvary Chapel

In May 2020, the governor of Nevada began "Phase Two" of the state's reopening plan.[249] Under this regime, "[c]ommunities of worship and faith-based organizations [were] allowed to conduct in-person services so long as no more than fifty people [were] gathered, while respecting social distancing requirements."[250] But the order "allow[ed] casinos to reopen at 50% their capacity," without a fixed numerical limit.[251] The casinos were also "subject to further regulations," such as "regular and explicit inspection of all aspects of the respective casino's reopening plan."[252] As a result, "a casino with a 500-person occupancy limit may let in up to 250 people," but "a church with a 500-person occupancy limit may let in only 50 people, not 250 people."[253]

The Calvary Chapel Dayton Valley Church challenged this disparate treatment. The district court upheld the order in light of *South Bay*.[254] Indeed, the district court did not even note that Chief Justice's opinion was a concurrence. The separate writing was

245. *Calvary Chapel*, 140 S. Ct. at 2603.
246. *Id.* at 2605–07 (Alito, J., dissenting).
247. *Id.* at 2609 (Gorsuch, J., dissenting).
248. *Id.* at 2612–13 (Kavanaugh, J., dissenting).
249. *Calvary Chapel*, 2020 WL 4260438 at *1.
250. *Id.*
251. *Id.*
252. *Id.* at *3.
253. *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).
254. *Calvary Chapel*, 2020 WL 4260438 at *2.

treated as if it were controlling.[255] The district court found that the governor's order was "neutral and generally applicable and does not burden Plaintiff's First Amendment right to free exercise."[256] Next, the district court determined that casinos were not comparable to houses of worship. But "even if the Court were to accept casinos as the nearest point of comparison for its analysis of similar activities and their related restrictions imposed by the governor, the Court would nonetheless find that casinos are subject to much greater restrictions on their operations and oversight of their entire operations than places of worship."[257] The Ninth Circuit Court of Appeals denied the plaintiff's motion for injunctive relief pending appeal with a one sentence order that cited *South Bay*.[258]

B. The Supreme Court denies injunctive relief in Calvary Chapel

Calvary Chapel sought an application for an injunction from the Supreme Court. Chief Justice Roberts, as well as Justices Ginsburg, Breyer, Sotomayor, and Kagan, denied the application.[259] Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented; they would have granted the application for injunctive relief.[260] There were three separate dissenting opinions by Justices Alito, Gorsuch, and Kavanaugh. Justice Alito's dissent was joined by Justices Thomas and Kavanaugh but not by Justice Gorsuch. It is not clear that Justice Gorsuch would have disagreed with anything Justice Alito said. Rather, Justice Gorsuch thought the case was "simple."[261] His solo dissent did not cite any cases.[262] Justice Kavanaugh also wrote

255. *Id.* ("The Supreme Court examined the relationship between COVID-19 related executive orders and the Free Exercise Clause in its recent order in *South Bay United Pentecostal Church v. Newsom*.").

256. *Id.*

257. *Id.* at *3.

258. Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 4274901, at *1 (9th Cir. July 2, 2020).

259. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2603 (2020) (mem.).

260. *Id.*

261. *Id.* at 2609 (Gorsuch, J., dissenting).

262. *Id.*

a solo dissent. He provided a novel way to consider the lockdown measures. Rather than presuming that the state can define religious institutions as non-essential, Justice Kavanaugh contended that the starting presumption should be that religion is essential.[263] Moreover, the state bears the burden of showing why the free exercise of religion was not afforded the "most-favored" status that was afforded to the exercise of other secular activities.[264]

C. Justice Alito's dissent

Justice Alito's principal dissent seemed to accept the general premise of Chief Justice Roberts's *South Bay* concurrence: the courts should compare religious worship to *comparable* secular activity. He wrote "[t]he Governor's directive specifically treats worship services differently from other activities that involve extended, indoor gatherings of large groups of people."[265] Justice Alito contended that the governor's directive was not "neutral" toward religion.[266] Still, this comparator approach is somewhat circular: "neutral" with respect to what? Are churches and casinos analogous? What is the correct denominator? The district court found that casinos are heavily regulated in ways that churches are not. Justice Alito did not acknowledge the existence of these regulations. Perhaps the district court was correct that churches were more closely comparable to movie theaters, which were subject to strict numerical caps. This counterargument highlights the shortcomings of the *South Bay* comparator approach: there is no neutral baseline by which to compare religious worship to other activities. Any comparison requires some "value judgment" about comparative risks and the importance of certain activities.

Justice Alito concluded that "the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause."[267] Given this rigid standard, he

263. *Id.* at 2609–13 (Kavanaugh, J., dissenting).
264. *Id.*
265. *Id.* at 2605 (Alito, J., dissenting).
266. *Id.*
267. *Id.* at 2607.

contended that the directive was not narrowly tailored: "[W]hile Calvary Chapel cannot admit more than 50 congregants even if families sit six feet apart, spectators at a bowling tournament can *sit together in groups of 50* provided that each group maintains social distancing *from other groups*."[268] Justice Alito would have enjoined the directive.

D. Justice Gorsuch's dissent

Justice Gorsuch did not join either Justice Alito's dissent, or Justice Kavanaugh's dissent. Instead, he wrote a single paragraph. It began, "This is a simple case."[269] And he did not cite any cases. Respectfully, this case is not simple. This case is difficult. I am inclined to agree with the dissenters, but there is a lot of analytical work necessary to reach that conclusion. *Calvary Chapel* was not the first time Justice Gorsuch dismissed a complex question as "simple."[270] This case warranted more attention than a single, citationless paragraph—even one I ultimately agree with.

E. Justice Kavanaugh's dissent

Justice Kavanaugh wrote a solo dissent in *Calvary Chapel*. Though he "join[ed] Justice Alito's dissent in full,"[271] his separate writing was in some tension with the principal dissent. Justice Kavanaugh's analysis did not rely on *South Bay*'s comparator approach. Instead, he advanced a novel framework. I will refer to it as the *Calvary Chapel* approach.

Justice Kavanaugh provided a taxonomy to understand different types of laws that favor or disfavor religion. The most relevant

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268. *Id.*

269. *Id.* at 2609 (Gorsuch, J., dissenting).

270. Bostock v. Clayton Cty., 140 S. Ct. 1731, 1741 (2020) ("The [Civil Rights Act of 1964's] message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."); *cf.* Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461/ [https://perma.cc/UT6A-V82A]; Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158 (2020).

271. *Calvary Chapel*, 140 S. Ct. at 2609 (Kavanaugh, J., dissenting).

category for the COVID cases is the fourth: when the government "divv[ies] up organizations into a favored or exempt category and a disfavored or non-exempt category."[272] Justice Kavanaugh explained that if *any* secular activity is given the favored status, then religious institutions must presumptively be afforded the same favored status.[273] The state has the burden to demonstrate why the religious institution should be deemed non-essential. The *Calvary Chapel* approach flips the presumption of constitutionality from *South Bay* into a presumption of liberty. Justice Kavanaugh suggested this doctrine was grounded in *Employment Division v. Smith*.[274] I respectfully disagree. His approach is novel, but salutary.

1. Four categories of law that favor or disfavor religion

Justice Kavanaugh distinguished between "four categories of laws" that favor or disfavor religion. First, there are "laws that expressly discriminate against religious organizations because of religion."[275] Such laws are "straightforward examples of religious discrimination" and will almost always violate the Free Exercise Clause.[276] The COVID-19 lockdown measures did not fall in this first category. No state overtly stated that they were subjecting houses of worship to stricter regulations *because* they were religious. Rather, the states cited other factors related to religion. For example, states argued that a distinct risk is posed when people congregate for long periods in close proximity.[277]

Second, there are "laws that expressly favor religious

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272. *Id.* at 2611–12.

273. *Id.* at 2612 ("Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category.").

274. *Id.*

275. *Id.* at 2610.

276. *Id.* (citing, *inter alia*, Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246 (2020); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017)).

277. *See* Harvest Rock Church, Inc. v. Newsom, 977 F.3d 728, 730 (9th Cir. 2020), *vacated on denial of reh'g en banc*, 981 F.3d 764 (9th Cir. 2020) ("However, the Governor offered the declaration of an expert, Dr. James Watt, in support of the claim that the risk of COVID-19 is elevated in indoor congregate activities, including in-person worship services.").

organizations over secular organizations."[278] Such laws will often run afoul of the Establishment Clause.[279] One court suggested that exempting a large church from social-distancing measures may impermissibly advance religion.[280] Consider a hypothetical: what if the state permitted people to assemble in a house of worship in larger numbers if they agreed to not sing, chant, drink from a chalice, receive communion, or lay hands. This sort of arrangement could raise entanglement concerns under the Establishment Clause. That is, monitoring whether churches are in fact adhering to social distancing guidelines could run afoul of the Establishment Clause. (I assume for present purposes that the *Lemon* test still has vitality under the Supreme Court's current jurisprudence.)[281] There is a perverseness to this position: in order to prevent burdening free exercise with intrusive monitoring, the state will burden religion even more so by shutting down services altogether. Yet the government raised this exact concern in *Lukumi*. The city contended that monitoring the Church for compliance with sanitation laws would create entanglement concerns under the Establishment Clause.[282] Therefore, its preferred remedy was to prohibit the ritual slaughter

278. *Id.* at 2611.

279. *Id.* (citing, *inter alia*, Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092–94 (2019) (Kavanaugh, J., concurring)).

280. Spell v. Edwards, 460 F. Supp. 3d 671, 677 (M.D. La.), *vacated, appeal dismissed*, 962 F.3d 175 (5th Cir. 2020) ("Shielding Plaintiffs' congregation of 2,000 from the Governor's orders based solely upon their preference to assemble larger groups for their services may amount to a carveout that is not available to other non-religious businesses, in violation of the Establishment Clause.").

281. *But see* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2097 (2019) (Thomas, J., concurring) ("I would take the logical next step and overrule the *Lemon* test in all contexts.").

282. Brief of Respondent at *40, Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (No. 91-948) ("The City could not enforce less restrictive ordinances which permitted but regulated animal sacrifices without locating members of the Santeria Church, constantly monitoring their activities and closely administrating the ordinances. Clearly, this would constitute an excessive entanglement with religion and would be unconstitutional. *See, e.g.*, *Hernandez*, 490 U.S. at 696–97; *Aguilar*, 473 U.S. at 414.").

outright.[283] The Supreme Court did not find this position persuasive. Indeed, the Court did not even mention this countervailing concern.

Justice Kavanaugh identified a third category of laws that "present no impermissible discrimination or favoritism."[284] Rather, they "apply to religious and secular organizations alike without making any classification on the basis of religion."[285] Still, laws in this third category may "sometimes impose substantial burdens on religious exercise. If so, a religious organization may seek an exemption . . . ."[286] Justice Kavanaugh explained that some of the laws in this third category may appear "facially neutral [but were] actually motivated by animus against religion and [are] unconstitutional on that ground."[287] Many of the COVID-19 lockdown measures fall into this third category: governors who permitted political gatherings but prohibited religious gatherings may have been motivated by an animus against—or at least disfavor—of more orthodox faiths that require in-person assembly.

Justice Kavanaugh found that Nevada's regulations fell into the fourth category. The governor's order "suppl[ied] no criteria for government benefits or action, but rather divv[ied] up organizations into a favored or exempt category and a disfavored or non-exempt category."[288] During the pandemic, the former category has been designated as "essential" or "life-sustaining."[289] The latter category has been designated as "non-essential" or "non-life-

283. *Id.* at *36 ("Even if such alternatives were workable, they necessarily would "enmesh government in religious affairs." Jimmy Swaggart Ministries v. California Bd. of Equalization, [493 U.S. 378, 395 (1990)]. Entanglement of city and church through "comprehensive measures of surveillance and contacts", Lemon v. Kurtzman, 403 U.S. 602, 621 (1971), is unconstitutional in its own right. *See also* Hernandez v. C.I.R., 490 U.S. 680, 696–97 (1989); Aguilar v. Felton, 473 U.S. 402, 414 (1985).").

284. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2611 (2020) (Kavanaugh, J., dissenting) (mem.).

285. *Id.*

286. *Id.* (citing Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020)).

287. *Id.* at 2611–12 (citing *Lukumi*, 508 U.S. 520).

288. *Id.*

289. *See supra* Part I.A.

sustaining."[290] This sort of regime "expressly treat[ed] religious organizations equally to some secular organizations but better or worse than other secular organizations."[291] Justice Kavanaugh explained that "[t]hose laws provide[d] benefits only to organizations in the favored or exempt category and not to organizations in the disfavored or non-exempt category."[292] Stated differently, houses of worship exercising religion are treated worse than commercial enterprises engaging in economic activity. When courts review this fourth category of regulations, they are not required to compare in-person religious worship to any specific secular business. Justice Kavanaugh's framework avoids the *South Bay* comparator approach.

In this fourth category, the state does not discriminate against the religious institutions because they are religious. Rather, they are discriminating against those institutions based on a "value judgment" that in-person religious worship is simply not as important—as *essential*—as certain retail establishments.[293] Stimulating economic recovery is deemed more worthwhile than stimulating spiritual recovery.

Next, Justice Kavanaugh posed the critical question: is the government "*required* to place religious organizations in the favored or exempt category rather than in the disfavored or non-exempt category"?[294] According to Justice Kavanaugh, "[t]he Court's free-exercise and equal-treatment precedents" suggest that the answer to this question is yes: "Unless the State provides a sufficient justification otherwise, it must place religious organizations in the favored or exempt category."[295] But he did not cite a case to support this proposition. Rather, Justice Kavanaugh cited a thirty-year-old law review article by Professor Douglas Laycock, which was written

290. *See id.*
291. *Calvary Chapel*, 140 S. Ct. at 2610 (Kavanaugh, J., dissenting).
292. *Id.* at 2612.
293. *Id.* at 2614.
294. *Id.* at 2612.
295. *Id.*

shortly after *Smith* was decided.[296] Professor Laycock argued that *Smith* "would seem to require that religion gets something analogous to most favored-nation status."[297] In the context of international trade, a country afforded "most-favored" status under a treaty can enjoy the same privileges that the treaty "accords to other countries under similar circumstances."[298] For example, if a treaty grants Country #1 a certain benefit, Country #2 with most-favored status should receive that same benefit. Professor Laycock explained that "[r]eligious speech should be treated as well as political speech, religious land uses should be treated as well as any other land use of comparable intensity, and so forth."[299] Professor Laycock cited several examples in which zoning boards treated religious buildings worse than certain secular structures. "Alleged distinctions—explanations that a proposed religious use will cause more problems than some other use already approved—should be subject to strict scrutiny."[300]

2. *Calvary Chapel* and *Smith*

Justice Kavanaugh attempted to square his position with *Smith*. Justice Kavanaugh cited *Smith*, which stated that "where the State has in place a system of *individual* exemptions, it may not refuse to extend that system to cases of religious hardship *without compelling reason*."[301] I emphasize the word "individual," because Justice Scalia's majority opinion was discussing a very specific factual situation: "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an [individual] applicant's unemployment."[302] Here is the full sentence from which Justice Kavanaugh

296. *Id.* (citing Douglas Laycock, *The Remnants of Free Exercise*, 1990 S. CT. REV. 1, 49–50 (1990)).

297. Laycock, *supra* note 296, at 49.

298. *Most favored nation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

299. Laycock, *supra* note 296, at 49–50.

300. *Id.*

301. *Calvary Chapel*, 140 S. Ct. at 2612 (Kavanaugh, J., dissenting) (first emphasis added; second emphasis in *Calvary Chapel*) (quoting Emp. Div. v. Smith, 494 U.S. 872 (1990)).

302. *Smith*, 494 U.S. at 884.

quoted: "As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of *individual* exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[303]

Justice Scalia was not making a broad pronouncement about Free Exercise Clause jurisprudence. He was speaking about a specific aspect of unemployment compensation. There may be other regimes with a series of individualized assessments that cannot be viewed as generally applicable. But *Smith* did not hold that the Free Exercise Clause *in all contexts* affords the free exercise of religion "something analogous to most-favored nation status."[304]

In *Calvary Chapel*, Justice Kavanaugh concluded: "[W]hen a law on its face favors or exempts some secular organizations as opposed to religious organizations, a court entertaining a constitutional challenge by the religious organizations must determine whether the State has sufficiently justified the basis for the distinction."[305] Stated differently, "the First Amendment requires that religious organizations be treated *equally* to the favored or exempt secular organizations, unless the State can sufficiently justify the differentiation."[306] Justice Kavanaugh did not conclude that the "sufficient justification" test translates to *strict scrutiny*, but I think that is a fair reading of his opinion. Indeed, Justice Kavanaugh joined Justice Alito's dissent, which expressly reviewed the directive with strict scrutiny.[307]

Justice Kavanaugh did not accurately describe the current state of Free Exercise jurisprudence. But the COVID-19 cases identified a gap in the Court's precedents: when the state treats secular retail businesses more favorably than religious institutions, because the

303. *Id.* (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)) (emphasis added).

304. Laycock, *supra* note 296, at 49.

305. *Calvary Chapel*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting).

306. *Id.* at 2613.

307. *Id.* at 2607 (Alito, J., dissenting) ("In sum, the directive blatantly discriminates against houses of worship and thus warrants strict scrutiny under the Free Exercise Clause.").

former is deemed more "important." Justice Kavanaugh's framework would extend *Smith*'s framework to fill that gap.

Consider a counterfactual based on *Smith*. Imagine that the state adopted a rule of general applicability in which people who were terminated from their jobs for using an illegal controlled substance could not collect unemployment benefits. Under this regime, a Rastafarian who smokes ganja as part of a religious ritual and is subsequently fired would not be allowed to collect benefits. This regime would be constitutional under *Smith*, because the law applies generally to all religions. No single faith is targeted for disparate treatment. Later, the state legalizes the use of medicinal marijuana for those who obtain a license from a doctor. Under this new regime, a person who is fired for using licensed medicinal marijuana would be able to collect unemployment benefits—his use was not illegal. However, the Rastafarian who smokes ganja without a license would still be in violation of the law. Therefore, he could not collect unemployment benefits. Once again, the unemployment law is still one of general applicability: only those who use *illegal* controlled substances are denied benefits. But as a practical matter, some people are allowed to use marijuana, and some people are not. Specifically, secular usage is permitted by obtaining a license. But religious usage is prohibited.

Does the unemployment program comply with *Smith*? Yes. It employs a rule of general applicability. The medicinal marijuana law includes a large exemption, but it would still be generally applicable. Indeed, many states have legalized medicinal marijuana without legalizing religious usage of marijuana. Does this regime display any animus toward religion under *Lukumi*? I think the answer is no. This framework was established to ensure that doctors could prescribe marijuana for medicinal purposes, not to prevent Rastafarians from exercising their ritual. As a result, I think this regime complies with the Court's current Free Exercise Clause jurisprudence. (I table for now whether this regime complies with the more stringent requirements of the federal Religious Freedom Restoration Act).

This counterfactual illustrates why the COVID cases do not fit

into the *Smith-Lukumi* framework. For the most part, the lockdown orders could be viewed as rules of general applicability. Houses of worship were treated in the same fashion, or perhaps even better, than some comparable secular activities. And all faiths were subject to the same constraints. For purposes of this analysis, I will presume that the governors did not issue their orders with animus toward religion. I hedge only slightly. New York's orders targeted Orthodox Jews.[308] Moreover, other states implicitly favored sects that could worship on Zoom and disfavored those sects that required in-person congregation.[309] Certain worship services require face-to-face interactions. Other worship services do not require face-to-face interactions. For example, a holy communion cannot be delivered over email. The Jewish mourner's prayer, known as the *Kaddish*, requires a quorum of ten people in person to recite;[310] a breakout room would not suffice. Moreover, certain sects *cannot* use electricity on days of prayers.[311] Zoom is not an alternative for Orthodox Jews. But I will presume there is a lack of hostility. Given these facts, the comparison between a house of worship and a movie theater would fail to account for how the COVID regulations affected houses of worship. Justice Kavanaugh's *Calvary Chapel* framework provides a more realistic account of how governors treated houses of worship.

3. The *Calvary Chapel* Two-Step

Justice Kavanaugh's *Calvary Chapel* approach has two steps. First, the courts should ask whether a law fails to treat "religious organizations" as part of a "favored . . . class of organizations." If so, then second, the government must prove, with a "sufficient justification," why the religious organization was not treated with the favored status. Again, I do not think this approach is required by *Smith*. That case considered whether a law is neutral and generally

308. *See infra* Part IV.

309. *See supra* Part II.B.

310. *See* Shurpin, *supra* note 206.

311. Aryeh Citron, *Electricity on Shabbat*, CHABAD.ORG, https://www.chabad.org/library/article_cdo/aid/1159378/jewish/Electricity-on-Shabbat.htm [https://perma.cc/X8QP-94RA].

applicable toward religion or whether the law intentionally discriminates against religion. But Justice Kavanaugh's first step here looks beyond neutrality or intentional discrimination. Rather, the failure to give religious organizations the same favored treatment other institutions receive—even if the law is facially neutral—is *presumptively* unconstitutional, unless the state can prove otherwise. *Smith* provides that neutral laws are reviewed with something akin to rational basis scrutiny. And, with rational basis scrutiny, the individual has the burden to show disparate treatment.[312] The *Calvary Chapel* dissent placed the burden on the state to defend its disparate treatment.[313] In this fashion, Justice Kavanaugh inverted *Smith*'s presumption of constitutionality and replaced it with a presumption of liberty. The burden is not on the challenger to show bias. Rather, the burden is on the state to prove why they did not privilege the religious organization.

The *Calvary Chapel* framework has a significant advantage over the *South Bay* comparator approach. The first step "does not require judges to decide whether a church is more akin to a factory or more like a museum, for example."[314] The comparator approach was always circular. There are countless ways to compare and contrast different establishments. And it was never clear what the proper denominator was. Nor was it clear how much deference the state should be afforded to draw different types of lines. Can the court second-guess the government's determination that a grocery store should not be comparable to a church? But with the *Calvary Chapel* framework, the only question presented is whether the free exercise of religion was being disfavored. Or, stated differently, whether

312. *Cf.* Emp. Div. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., dissenting) (noting that prior to *Smith*, the Court had "respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by *requiring the government to justify* any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." (emphasis added)).

313. *Id.* at 2613 (Kavanaugh, J., dissenting) ("[T]he First Amendment requires that religious organizations be treated equally to the favored or exempt secular organizations, *unless the State can sufficiently justify the differentiation*." (emphasis added)).

314. *Id.*

religion was denied a benefit that was given to secular groups.

Moreover, the second step of *Calvary Chapel* cannot be resolved in a conclusory fashion: "[I]t is not enough for the government to point out that other secular organizations or individuals are also treated *unfavorably*."[315] Once again, Justice Kavanaugh cited Professor Laycock and his co-author, Professor Steven T. Collis: "The point 'is not whether one or a few secular analogs are regulated. The question is whether a *single* secular analog is *not* regulated.'"[316] So long as a *single* secular institution is given favorable treatment, then the state must sufficiently justify why the religious institution is denied that same favorable treatment. Here, the denominator is not limited to comparable gatherings. Rather, the denominator would include *all* regulated entities that are afforded some benefit. Justice Kavanaugh concluded that this "point is subtle but absolutely critical."[317] He added, "if that point is not fully understood, then cases of this kind will be wrongly decided."[318] He is right. Judge Easterbrook did not acknowledge this point.

The *South Bay* comparator approach allows the state to shield a novel form of religious discrimination, under the guise of economic recovery. I agree with Professors Laycock and Collis: "It is not enough to treat a constitutional right like the least favored, most heavily regulated secular conduct."[319] If *any* secular conduct receives an exemption, the state must explain why religious conduct is denied an exemption.

4. The *Calvary Chapel* framework as applied to the Nevada directives

Justice Kavanaugh applied his new framework to the Nevada directives. According to the regulations, houses of worship were denied a benefit that secular casinos were granted. There is no need to compare churches to casinos. Nor must the court smoke out an

315. *Id.*

316. *Id.* (first emphasis added) (quoting Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1, 22 (2016)).

317. *Id.*

318. *Id.*

319. Laycock & Collis, *supra* note 316, at 23.

improper animus toward religion. The fact that houses of worship were denied a benefit afforded to secular businesses satisfies the first step. Next, Justice Kavanaugh moved to the second step. The state "gestured at two possible justifications for that discrimination: public health and the economy."[320] First, Nevada had "not explained why a 50% occupancy cap is good enough for secular businesses where people congregate in large groups or remain in close proximity for extended periods—such as at restaurants, bars, casinos, and gyms—but is not good enough for places of worship."[321] With the *Calvary Chapel* approach, the government has the burden to explain why the houses of worship were not exempted. In contrast, under the *South Bay* approach, the religious institution has the burden to show that the government acted irrationally by not exempting the house of worship.

Next, Justice Kavanaugh turned to the second proffered "economic rationale."[322] Nevada, a tourism-dependent state, "want[ed] to jump-start business activity and preserve the economic well-being of its citizens."[323] Therefore, it "loosened restrictions on restaurants, bars, casinos, and gyms in part because many Nevada jobs and livelihoods, as well as other connected Nevada businesses, depend on those restaurants, bars, casinos, and gyms being open and busy."[324] But Justice Kavanaugh did not find this justification persuasive. "[N]o precedent," he wrote, "suggests that a State may discriminate against religion simply because a religious organization does not generate the economic benefits that a restaurant, bar, casino, or gym might provide."[325]

Justice Kavanaugh suggested that the governor's directives "reflect an *implicit judgment* that for-profit assemblies are important and religious gatherings are less so; that moneymaking is more

320. *Calvary Chapel*, 140 S. Ct. at 2613.
321. *Id.*
322. *Id.* at 2614.
323. *Id.*
324. *Id.*
325. *Id.*

important than faith during the pandemic."[326] In short, the state cannot prefer money-making activities over religious activities. Justice Kavanaugh forcefully rejected this premise: "[t]he Constitution does not tolerate discrimination against religion merely because religious services do not yield a profit."[327]

There is a third possible justification, which Justice Kavanaugh folded into the second justification, but is really distinct: the governor of Nevada thought people of faith should be able to substitute in-person religious worship for online worship. This determination reflects a separate "implicit judgment."[328] Judge Easterbrook candidly admitted what Nevada would not: "Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways."[329] This claim does not precisely map onto the third category, in which laws are motivated by *animus* toward religion. The governor no doubt thought he was being magnanimous toward religion. He simply did not see why in-person worship was essential when Zoom services were a viable alternative. Here, the governor failed to appreciate how public assembly was *essential* to the free exercise of religion. Justice Kavanaugh hinted at this dynamic. He wrote, "The legal question is not whether religious worship services are all alone in a disfavored category, but why they are in the disfavored category to begin with."[330] To use the language from the Sixth Circuit, the presumption must be that "soul-sustaining" activities are treated with the same consideration as "life-sustaining" activities.[331] Stated differently, the exercise of enumerated rights must be placed on the same plane as the exercise of economic privileges.

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326. *Id.* (emphasis added).

327. *Id.*

328. *See id.*

329. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020).

330. *Calvary Chapel*, 140 S. Ct. at 2614 (citing Emp. Div. v. Smith, 110 S. Ct. 1595, 1603 (1990)). *Smith* does not support this proposition.

331. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 614 (6th Cir. 2020) ("But the orders do not permit *soul-sustaining* group services of faith organizations, even if the groups adhere to all the public health guidelines required of essential services and even when they meet outdoors." (emphasis added)).

Before the District of Nevada, the governor did not have to explain *why* he chose not to exempt churches. Under *South Bay*, the burden was on the challenger. But the *Calvary Chapel* framework would require the governor to state this point plainly. Now, "tradeoffs that can be unpleasant to openly discuss" would have to be openly discussed.[332] Or, if the governor fails to make his case, then the presumption goes unrebutted. Thus, the directives would violate the Free Exercise Clause. The starting point under *Calvary Chapel* is a presumption of liberty: religious institutions should be given the same favorable status that other organizations are given. This principle should be the default rule. To depart from this default rule, the state needs to provide a sufficient justification.

Chief Justice Roberts did not respond to Justice Kavanaugh's powerful dissent.

IV. PHASE 4: *THE ROMAN CATHOLIC DIOCESE OF BROOKLYN* TURNS THE TIDE

South Bay, as reinforced by *Calvary Chapel*, would remain the law of the land through November. But the tide would turn after Justice Amy Coney Barrett replaced Justice Ruth Bader Ginsburg on the Supreme Court. On Thanksgiving Eve, the new Roberts Court changed course in *Roman Catholic Diocese of Brooklyn v. Cuomo*. This case divided 5-4 in the other direction.[333] The Court enjoined[334] New York's "cluster action initiative."[335] This policy imposed hard caps on the number of people who could attend a house of worship in "red" and "orange" zones.[336] The Court found that New York treated houses of worship worse than comparable secular

332. *See Calvary Chapel*, 140 S. Ct. at 2614.

333. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68–69 (2020) (per curiam).

334. *See id.* at 69.

335. *See Cluster Action Initiative*, N.Y. FORWARD, https://forward.ny.gov/cluster-action-initiative [https://web.archive.org/web/20201015001507/https://forward.ny.gov/cluster-action-initiative].

336. *See Roman Cath.*, 141 S. Ct. at 65–66.

businesses.[337] The majority also reasoned that Governor Cuomo's initiative was "far more restrictive" than the regimes from California and Nevada.[338] Justices Gorsuch and Kavanaugh wrote separate concurring opinions. They attempted to reconcile the majority's opinion with the Court's Free Exercise Clause precedents.[339] But *Smith* and *Lukumi* do not tell us how to compare prohibited religious activities with permitted secular activities. There were three dissenting opinions. First, Justice Sotomayor lamented the Court's abandonment of *South Bay*.[340] She added, correctly in my view, that *Smith* and *Lukumi* did not create the rule cited by Justices Gorsuch and Kavanaugh.[341] Second, Chief Justice Roberts dissented that there was no need to enjoin the directive.[342] New York had moved the petitioners out of the restrictive red and orange zones.[343] Yet Chief Justice Roberts cast doubt on the validity of Governor Cuomo's policy.[344] Third, Justice Breyer dissented along similar equitable grounds, but expressed some agreement with Justice Sotomayor's analysis.[345]

The Court was unwilling to expressly overrule *South Bay* or *Calvary Chapel*. But this decision effectively interred the *South Bay superprecedent*.

A. Governor Cuomo's Cluster Action Initiative

On March 7, 2020, New York Governor Andrew Cuomo declared a disaster in light of the pandemic.[346] This declaration "allow[ed] him to exercise extraordinary executive powers."[347] Over the duration of eleven months, and counting, Governor Cuomo's 90+

337. *See id.* at 66–67.
338. *See id.* at 67.
339. *Id.*
340. *See id.* at 79 (Sotomayor, J., dissenting).
341. *See id.* at 80 n.2.
342. *See id.* at 75 (Roberts, C.J., dissenting).
343. *See id.*
344. *See id.*
345. *See id.* at 78 (Breyer, J., dissenting).
346. *See* Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).
347. *Id.*

executive orders were "unprecedented in their number, breadth, and duration."[348] The Second Circuit observed that "[t]hose orders affect[ed] nearly every aspect of life in the State, including restrictions on activities like private gatherings and travel."[349]

On October 6, 2020, New York Governor Andrew Cuomo announced a new "Cluster Action Initiative."[350] This policy imposed increasingly stringent restrictions or specific areas, or *clusters*, with higher COVID-19 infection rates. (The state never specified what precise metrics would trigger new restrictions). These clusters would be color-coded. In so-called *red* zones, "[n]on-essential gatherings" were prohibited and "non-essential businesses" were required to close their storefronts.[351] Restaurants could only serve "takeout or delivery."[352] Houses of worship would be subject to two types of capacity limits: "25% of maximum occupancy or 10 people, whichever is fewer."[353] I will refer to the former as the *percentage* limit, and the latter as the *numerical* limit. However, "essential" businesses could remain open, subject to restrictions that apply statewide.[354] The state explained that "essential" businesses "provid[e] products or services that [were] required to maintain the health, welfare and safety of the citizens of New York State."[355]

In so-called *orange* zones, "[n]on-essential gatherings" were limited to ten people, and certain "non-essential" businesses were closed.[356] Restaurants could "provide outdoor service."[357] Houses of

348. *Id.*

349. *Id.*

350. Press Release, N.Y. State, Governor Cuomo Announces New Cluster Action Initiative (Oct. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative [https://perma.cc/2VWA-5FYX].

351. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

352. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

353. N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

354. *See Agudath*, 983 F.3d at 626 n.6.

355. *See Frequently Asked Questions for Determining Whether a Business Subject to a Workforce Reduction Under Recent Executive Order Enacted to Address COVID-19 Outbreak*, EMPIRE STATE DEV., https://esd.ny.gov/sites/default/files/ESD_EssentialEmployer-FAQ_032220.pdf [https://perma.cc/7QT4-5DTG]; *Agudath*, 983 F.3d at 626.

356. *See Agudath*, 983 F.3d at 626 (quoting N.Y. Exec. Order No. 202.68 (Oct. 6, 2020)).

357. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

worship were restricted to "33% of maximum occupancy or 25 people, whichever is fewer."[358] Finally, in so-called *yellow* zones, "non-essential gatherings" were limited to twenty-five people.[359] Restaurants could remain open. Houses of worship were not subject to a numerical limitation, only a fifty percent capacity limitation.[360]

Initially, Governor Cuomo created "restricted zones in Brooklyn and Queens in New York City," but later "changed the zone designations at least nine times."[361] The governor's regime was challenged by the Roman Catholic Diocese of Brooklyn and Agudath Israel of America.[362] The former group operates churches in Brooklyn and Queens.[363] The latter operates Orthodox Jewish synagogues in both boroughs.[364] Several of these houses of worship are huge.[365] Even before the governor's order, these houses of worship voluntarily adopted measures to prevent the spread of COVID-19. For example, "the Diocese voluntarily limited all church services to twenty-five percent of building capacity."[366] And Agudath Israel synagogues "shortened the length of services, and . . . split services into multiple separate gatherings to decrease the number of congregants present at one time."[367] These large facilities can practice social distancing. Two churches can seat more than 1,000 people, and two churches can seat more than 700.[368] One synagogue in

358. *See* N.Y. Exec. Order No. 202.68 (Oct. 6, 2020); *Agudath*, 983 F.3d at 626.

359. *Agudath*, 983 F.3d at 626.

360. *See id.*

361. *See id.* at 628.

362. I represent parents and a Jewish school that also challenged Governor Cuomo's orders. I also filed an amicus brief in support of Agudath Israel before the Second Circuit. *See* Josh Blackman, *Briefs Filed in Lebovits v. Cuomo and Agudath Israel of America v. Cuomo*, REASON: VOLOKH CONSPIRACY (Oct. 27, 2020, 9:00 AM), https://reason.com/volokh/2020/10/27/briefs-filed-in-lebovits-v-cuomo-and-agudath-israel-of-america-v-cuomo/ [https://perma.cc/CDA9-J9FU].

363. *Agudath*, 983 F.3d at 628.

364. *See id.*

365. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (per curiam).

366. *Agudath*, 983 F.3d at 628.

367. *Id.* at 628–29.

368. *See Roman Cath.*, 141 S. Ct. at 67.

Queens can serve up to 400 people.[369] Before the cluster initiative, neither institution had seen any evidence of COVID-19 outbreaks.[370]

Two district court judges ruled against the religious organizations,[371] and the Second Circuit affirmed.[372] These cases were bound for the Supreme Court. But first, the composition of the Court would change.

B. The New Roberts Court in Red November

From May through November, Chief Justice Roberts's concurrence in *South Bay* remained the law of the land. But that consensus would soon be unsettled. By the time Governor Cuomo announced the cluster initiative on October 6, that change was already underway. On September 18, Justice Ruth Bader Ginsburg passed away.[373] Nine days later, on September 26, President Trump nominated Judge Amy Coney Barrett to fill the vacancy.[374] On October 9, the U.S. District Court for the Eastern District of New York ruled against the Plaintiffs.[375] Three days later, Judge Barrett's confirmation hearing began.[376] On October 26, Justice Barrett was confirmed.[377] And on November 9, the Second Circuit ruled against the

369. *See id.*

370. *Id.* at 628–29.

371. *See* Roman Cath. Diocese of Brooklyn v. Cuomo, 495 F. Supp. 3d 118, 132 (E.D.N.Y. 2020), *rev'd and remanded sub nom.* Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 637 (2d Cir. 2020).

372. *See* Agudath Israel of Am. v. Cuomo, 979 F.3d 177, 181–82 (2d Cir. 2020).

373. *See* Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html [https://perma.cc/8JTZ-8EF8].

374. *See* Peter Baker & Nicholas Fandos, *Trump Announces Barrett as Supreme Court Nominee, Describing Her as Heir to Scalia*, N.Y. TIMES (Sept. 28, 2020), https://www.nytimes.com/2020/09/26/us/politics/amy-coney-barrett-supreme-court.html [https://perma.cc/Z6XC-ATW9].

375. *Roman Cath.*, 495 F. Supp. 3d 132, *rev'd and remanded sub nom. Agudath*, 983 F.3d 620.

376. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/6HFA-57T9].

377. *Id.*

Plaintiffs, relying on *South Bay*.[378] At that time, Chief Justice Roberts's concurrence was on its last legs.

On November 12, the Roman Catholic Diocese of Brooklyn sought an injunction from the Supreme Court.[379] Four days later, Agudath Israel filed a similar request.[380] Soon, Justice Barrett would cast the first consequential vote of her Supreme Court tenure.[381]

On November 25, shortly before midnight, the Supreme Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo*.[382] The majority issued an unsigned per curiam opinion. But, by the process of elimination,[383] we can infer that Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett were in the majority. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan were in dissent.[384] Justice Ginsburg could no longer maintain the *South Bay* majority. Now, Justice Barrett helped the new conservative Court form a new 5-4 majority. The close of the prior term had been marked by a decided turn to the left. I dubbed this period *Blue June*.[385] Now, Justice

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378. *Agudath*, 980 F.3d at 227–28.

379. Docket No. 20A87, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a87.html [https://perma.cc/4R3A-JDD9].

380. Docket No. 20A90, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a90.html [https://perma.cc/4TDJ-GEXU].

381. On October 28, only two days after she was confirmed, Justice Barrett recused herself from an election case. Republican Party of Pa. v. Boockvar, 141 S. Ct. 1 (2020) (mem.); *see* Adam Liptak, *Supreme Court Allows Longer Deadlines for Absentee Ballots in Pennsylvania and North Carolina*, N.Y. TIMES (Dec. 11, 2020), https://www.nytimes.com/2020/10/28/us/supreme-courtpennsylvania- north-carolina-absentee-ballots.html [https://perma.cc/S8UU-4HLL] ("Justice Barrett had not participated 'because of the need for a prompt resolution' and 'because she has not had time to fully review the parties' filings.'").

382. 141 S. Ct. 63 (2020) (per curiam).

383. Josh Blackman, *Invisible Majorities: Counting to Nine Votes in Per Curiam Cases*, SCOTUSBLOG (July 23, 2020, 3:23 PM), https://www.scotusblog.com/2020/07/invisible-majorities-counting-to-nine-votes-in-per-curiam-cases/ [https://perma.cc/HN74-GV2Q] ("But short of a 5-4 split in which all four dissenters note their dissent, it is impossible to know for certain how all of the justices voted in a per curiam opinion.").

384. *Roman Cath.*, 141 S. Ct. at 75–76.

385. Josh Blackman, *October Term 2019 in Review: Blue June*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), https://lawreviewblog.uchicago.edu/2020/08/27/seila-blackman/ [https://perma.cc/3J4Q-X8BP].

Barrett's addition to the Court ushered in *Red November* shortly before Thanksgiving 2020.

The unsigned per curiam opinion was very short. At less than 2,000 words, this decision appeared to be the byproduct of a series of compromises. The opinion managed to repudiate Chief Justice Roberts's *South Bay* framework without articulating a coherent replacement. Justices Gorsuch and Kavanaugh wrote separate concurring opinions. There were three separate dissenting opinions. Chief Justice Roberts would have denied the application because he determined that the dispute was moot. Chief Justice Roberts did not address the merits. But he did respond to Justice Gorsuch's concurrence, which had harshly criticized his *South Bay* concurrence. Justices Breyer and Sotomayor wrote separate dissents.

C. The Per Curiam Majority Opinion

The majority opinion concluded that the Roman Catholic Diocese and Agudath Israel—the applicants—had "clearly established their entitlement to relief."[386] The Court's analysis, alas, was thin. Indeed, the majority "provide[d] only a brief summary of the reasons why immediate relief [was] essential" in order to "issue an order promptly."[387] The per curiam had four primary parts.

1. New York's regulations were not "neutral"

The Court found that the "applicants [had] made a strong showing that the challenged restrictions violate[d] 'the minimum requirement of neutrality' to religion."[388] Why? Because the restrictions "single[d] out houses of worship for especially harsh treatment."[389] In red zones, houses of worship were limited to a hard limit of ten people. But "essential" businesses in red zones could "admit as many people as they wish[ed]."[390] And in orange

386. *Roman Cath.*, 141 S. Ct. at 66.

387. *Id.*

388. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

389. *Id.*

390. *Id.*

zones, "[w]hile attendance at houses of worship [was] limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit."[391]

The majority explained that these "categorizations" amounted to "disparate treatment."[392] But "disparate" how? Here, the Court did not attempt to compare churches and synagogues to comparable businesses.[393] Instead, the Court listed a wide range of "essential" secular businesses: "acupuncture facilities, camp grounds, [and] garages."[394] Why these three entities? Who knows? Acupuncture services are provided indoors. Camp grounds are outdoors. And garages store cars, not people. The Court also compared houses of worship to stores, "factories[,] and schools."[395] All of these businesses were "treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which ha[d] admirable safety records."[396]

The majority went further and suggested that other businesses deemed "essential" in fact provide[d] "services [that were] not limited to those that can be regarded as essential."[397] In other words, the Court declined to defer to the State's determination of what is and is not essential. For example, New York had deemed essential "plants manufacturing chemicals and microelectronics and all transportation facilities."[398] The Court's adoption of this eclectic list implicitly rejected the *South Bay* comparator approach. A lower court can read between the lines and recognize that Chief Justice Roberts's comparator approach was repudiated. These disparate entities have little in common, other than the fact that the state treated them more favorably.

Justice Gorsuch concurred. He feigned surprise that the governor's judgment about what is "essential" "would so perfectly align

391. *Id.*
392. *Id.*
393. *See id.*
394. *Id.*
395. *Id.* at 67.
396. *Id.*
397. *Id.* at 66.
398. *Id.*

with secular convenience."[399] He further expanded the scope of possible comparators: "hardware stores, acupuncturists, and liquor stores," and "bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents."[400] Justice Gorsuch quipped, "So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians."[401] He concluded, "[t]he only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces."[402] After all, houses of worship could operate soup kitchens and homeless shelters without strict limits, but could not hold worship services. The former were deemed "essential," but the latter were not. Perhaps the state would argue that people need to eat, but do not need to worship. Judge Easterbrook made just this argument in *Elim* II.[403] But the First Amendment "forbids" this sort of "value judgment." The state must treat so-called "life-sustaining" businesses in the same fashion as "soul-sustaining" groups.[404] Justice Gorsuch explained that the State cannot deem "traditional religious exercises" as not "essential" while "laundry and liquor, travel and tools" are "essential."[405]

Justice Sotomayor dissented. She described the *South Bay* rule as "clear and workable."[406] She explained that the government "may restrict attendance at houses of worship so long as *comparable* secular institutions face restrictions that are at least equally as strict."[407] The *Roman Catholic* majority eliminated the requirement to

399. *Id.* at 69 (Gorsuch, J., concurring).

400. *Id.*

401. *Id.*

402. *Id.*

403. *See infra* Part II.B.

404. *See* Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610, 611, 614–15 (6th Cir. 2020).

405. *Roman Cath.*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

406. *Id.* at 79 (Sotomayor, J., dissenting).

407. *Id.* (emphasis added).

compare houses of worship to "comparable secular institutions."[408] Any secular institution will now suffice. I agree with Justice Gorsuch: "[A] majority of the Court makes . . . plain" that "courts must resume applying the Free Exercise Clause" and get rid of "a nonbinding and expired concurrence from *South Bay*."[409]

2. The Court reviewed New York's orders with strict scrutiny

The majority found that the regulations "must satisfy 'strict scrutiny'" because they were "not 'neutral' and of 'general applicability.'"[410] Therefore, the regulations "must be 'narrowly tailored' to serve a 'compelling' state interest."[411] New York's directives satisfied the latter requirement: "[s]temming the spread of COVID-19 is unquestionably a compelling interest."[412] But the regime was not narrowly tailored. In the previous paragraph, the majority effectively interred the *South Bay* comparator standard. But here, the Court suggested that New York's regime was "far more restrictive" than the regimes from California, as well as from Nevada.[413] The majority was unwilling to expressly overrule *South Bay* or *Calvary Chapel*.

The Court also observed that New York's restrictions were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic."[414] No specific restrictions were cited here. Moreover, the majority seemed skeptical that the measures were really necessary. New York's regulations, the Court observed, were "far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services."[415] Indeed,

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408. *Id.*

409. *Id.* at 70 (Gorsuch, J., concurring).

410. *Id.* at 67 (per curiam) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)).

411. *Id.* (quoting *Lukumi*, 508 U.S. at 546).

412. *Id.*

413. *Id.* at 67 n.2 (citing Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (mem.); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (mem.)).

414. *Id.* at 67.

415. *Id.*

the applicants had voluntarily implemented safety measures, and there had not been any known outbreaks.[416] Here, the Court was willing to second guess the state's judgment, given the past success of these churches and synagogues.

The second-guessing continued. The Justices proposed "other less restrictive rules that could be adopted to minimize the risk to those attending religious services."[417] For example, "the maximum attendance at a religious service could be tied to the size of the church or synagogue."[418] The majority observed, "It is hard to believe that admitting more than 10 people to a 1,000-seat church or 400-seat synagogue would create a more serious health risk than the many other activities that the State allows."[419] Here, the Court further expanded the relevant scope for comparisons. Not only did the Court compare New York churches to New York "secular" businesses,[420] but the Court compared New York churches to churches in other states.[421] Of course, different states had different COVID-19 conditions. And different states place different levels of importance on the free exercise of religion. For example, Texas, which has a Religious Freedom Restoration Act, was required to treat houses of worship more favorably.[422] It is unclear how the Court saw fit to compare New York, which lacks an RFRA, to other states that are bound by an RFRA.

3. The directives inflicted irreparable harm

Next, the majority found that New York's restrictions "[would] cause irreparable harm."[423] As a threshold matter, restricting attendance to ten people will prevent "the great majority of those

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.* at 69 (Gorsuch, J., concurring).

421. *Id.* at 72–73 (Kavanaugh, J., concurring).

422. TEX. ATT'Y GEN., GUIDANCE FOR HOUSES OF WORSHIP DURING THE COVID-19 CRISIS (2020), https://www.dallascounty.org/Assets/uploads/docs/covid-19/community/RevisedGuidanceforHousesofWorshipDuringtheCOVID-19Crisis-Final.pdf [https://perma.cc/E2R3-Q8VJ].

423. *Roman Cath.*, 141 S. Ct. at 67.

who wish to attend Mass on Sunday or services in a synagogue on Shabbat."[424] But what about Zoom? Judge Easterbrook observed that "large in-person worship services" "can be replaced by" "radio and TV worship services, drive-in worship services, and the Internet."[425]

The Supreme Court emphatically rejected Judge Easterbrook's equivalency. The majority observed that "while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance."[426] For example, "Catholics who watch a Mass at home cannot receive communion."[427] And Orthodox Jewish people are prohibited from using electricity on holidays. This faith's "important religious traditions . . . require personal attendance."[428] Here, the Court rejected the implicit value judgment that many governors and judges embraced: online worship is a sufficient substitute for in-person worship.

4. An injunction was in the public interest

Finally, the Court found that an injunction would not "harm the public."[429] This analysis repeated two of the Court's prior findings. First, "the State ha[d] not claimed that attendance at the applicants' services ha[d] resulted in the spread of the disease."[430] It is unclear how the analysis would have shifted if *one* person contracted COVID-19 at one of the applicants' houses of worship. And it also seems irrelevant to the Court whether other houses of worship, who were not before the Court, adopted less stringent protocols. The Court's injunctions would, as a legal matter, only apply to the named plaintiffs.[431] But as a practical matter, the governor would

424. *Id.*

425. Elim Romanian Pentecostal Church v. Pritzker, 962 F.3d 341, 347 (7th Cir. 2020).

426. *Roman Cath.*, 141 S. Ct. at 68.

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *See* Josh Blackman & Howard Wasserman, *The Process of Marriage Equality*, 42 HASTINGS CONST. L.Q. 243 (2015).

likely be forced to stop enforcing the directives statewide.[432]

Second, the "State ha[d] not shown that public health would be imperiled if less restrictive measures were imposed."[433] Again, this element seems duplicative of the narrow tailoring analysis discussed earlier. Here, the state has a very difficult burden to satisfy. The government must show that allowing more people into houses of worship would "imperil" the public health. Proving such a counterfactual in the midst of a dynamic pandemic is a tall order. Here, strict scrutiny is fatal in fact.

The members of the majority acknowledged that they were "not public health experts."[434] And, the Court said it "should respect the judgment of those with special expertise and responsibility in this area."[435] But there is always a "[b]ut."[436] The Court explained that "even in a pandemic, the Constitution cannot be put away and forgotten."[437] And the Justices had "a duty to conduct a serious examination of the need for such a drastic measure."[438] The Court concluded that New York's restrictions, "by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty."[439] Therefore, an injunction was warranted.

5. Justice Gorsuch's concurrence

Justice Gorsuch wrote a solo concurring opinion. He began with this brief synopsis of the Court's Free Exercise Clause jurisprudence: The First Amendment "prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the

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432. Soos v. Cuomo, No. 20-3737, 2021 WL 37592 (2d Cir. Jan. 5, 2021) (enjoining restrictions as to other houses of worship in New York in light of Roman Catholic Diocese).

433. *Roman Cath.*, 141 S. Ct. at 68.

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

least restrictive means available."[440] Citing *Lukumi*, Justice Gorsuch described these "principles" as "long-settled."[441] In my view, Justice Gorsuch misread the Court's precedents. The Supreme Court did not state this exact position, but Justice Gorsuch's analysis does flow from *Lukumi*.

Let's revisit the structure of *Lukumi*. Part II.A of Justice Kennedy's majority opinion concluded that the Hialeah ordinances targeted the Santeria faith.[442] Based on this finding of targeting, Part II-B determined that the City did not impose a "requirement of general applicability."[443] In other words, the law was not neutral because it targeted a specific religion. Part III laid out the relevant standard: "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[444] Next, the Court reviewed the ordinances with strict scrutiny. The strict scrutiny analysis in Part III began by discussing narrow tailoring. Here, the Court found that "all four ordinances are overbroad or underinclusive in substantial respects."[445] Specifically, "[t]he proffered objectives are not pursued with respect to *analogous non-religious conduct*, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."[446] Justice Kennedy concluded, "[T]he absence of narrow tailoring suffices to establish the invalidity of the ordinances."[447]

Justice Gorsuch's reading of *Lukumi* suggests a circularity. He wrote, the First Amendment "prohibits government officials from

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440. *Id.* at 69 (Gorsuch, J., concurring) (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)). Gorsuch later stated the test in similar terms. *Id.* at 70 ("The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest." (quoting *Lukumi*, 508 U.S. at 546)).

441. *Id.* at 69.

442. *Lukumi*, 508 U.S. at 542 ("The pattern we have recited discloses animosity to Santeria adherents and their religious practices. . . .").

443. *Id.* at 545–46.

444. *Id.* at 546.

445. *Id.*

446. *Id.* (emphasis added).

447. *Id.*

treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available."[448] First, the Court must determine if the law is generally applicable. If the answer is yes, then the law is reviewed with rational basis scrutiny. If the answer is no, then the law is reviewed with strict scrutiny. And, as part of the strict scrutiny analysis, the Court must consider if the law is narrowly tailored. The Court has followed a well-established method to determine if a law is narrowly tailored: to consider if the regime is overinclusive or underinclusive.[449] And one way to determine overinclusiveness or underinclusiveness is, as Justice Kennedy wrote, to compare how the religious conduct and "analogous non-religious conduct" are treated.[450] This approach resembles *South Bay's* comparator approach—with a twist. In *Lukumi*, this comparison takes place *after* determining that a non-neutral law must be reviewed with strict scrutiny. *Lukumi* did not use the comparator approach to determine if the law was neutral. But Justice Gorsuch seems to be saying that under *Lukumi*, the Court can consider narrow tailoring at Step #1. If "religious exercise [is treated] worse than comparable secular activities," then strict scrutiny is appropriate.[451]

The Sixth Circuit stated Justice Gorsuch's point more directly: "A rule of general application, in this sense, is one that restricts religious conduct the same way that 'analogous non-religious conduct'

448. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (per curiam) (citing *Lukumi*, 508 U.S. at 546). The Sixth Circuit adopted a similar reading of *Lukumi*. Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477, 480 (6th Cir. 2020). ("A rule of general application, in this sense, is one that restricts religious conduct the same way that 'analogous non-religious conduct' is restricted." (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993))); *see also* Josh Blackman, *Sixth Circuit Declares Closure of Religious Schools in Toledo Violates Free Exercise Clause*, REASON: VOLOKH CONSPIRACY (Jan. 1, 2021, 6:17 PM), https://reason.com/volokh/2021/01/01/sixth-circuit-declares-closure-of-religious-schools-in-toledo-violates-free-exercise-clause/ [https://perma.cc/4LXR-7SXU].

449. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–803 (2011) (holding that California law limiting the sale of violent video games was both "seriously underinclusive" and "vastly overinclusive.").

450. *Lukumi*, 508 U.S. at 546.

451. *Roman Cath.*, 141 S. Ct. at 69.

is restricted."[452] The Sixth Circuit panel plucked the phrase "analogous non-religious conduct" from *Lukumi*'s strict scrutiny analysis and used the comparator approach to determine whether strict scrutiny was warranted in the first place.[453] The panel put the cart before the horse. The question of narrow tailoring becomes relevant only after the Court determines that the law is not generally applicable. But the Sixth Circuit used the narrow tailoring analysis to find the law was not general applicable.

Yet my criticism is muted. The Sixth Circuit and Justice Gorsuch adopted a plausible reading of Justice Kennedy's muddled majority opinion. After all, Part II-B of *Lukumi*, which considered whether the ordinances were generally applicable, did consider one facet of narrow-tailoring: underinclusiveness. Justice Kennedy found that the Hialeah ordinances were "underinclusive" to accomplish the government's stated "interests: protecting the public health and preventing cruelty to animals."[454] Specifically, the laws "fail to prohibit *nonreligious conduct* that endangers these interests in a similar or greater degree than Santeria sacrifice."[455] In other words, Justice Kennedy used a tool of strict scrutiny—narrow tailoring—to conclude that strict scrutiny was warranted. *Lukumi* adopted a circular analysis. COVID-19 made that circularity patent.

Is the "nonreligious conduct" in Part II-B equivalent to the "analogous non-religious conduct" in Part III? Perhaps. Part III specifically invites comparisons. In Part II-B, the requirement for comparison is less obvious. For this reason, I think Justice Gorsuch adopts a plausible reading of *Lukumi*. But this reading is not "long-settled."

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452. *Monclova Christian Acad.*, 984 F.3d at 480 (quoting *Lukumi*, 508 U.S. at 546); *see also* Josh Blackman, *Sixth Circuit Declares Closure of Religious Schools in Toledo Violates Free Exercise Clause*, REASON: VOLOKH CONSPIRACY (Jan. 1, 2021, 6:17 PM), https://reason.com/volokh/2021/01/01/sixth-circuit-declares-closure-of-religious-schools-in-toledo-violates-free-exercise-clause/ [https://perma.cc/4LXR-7SXU].

453. *Monclova*, 984 F.3d at 480.

454. *Lukumi*, 508 U.S. at 543.

455. *Id.* (emphasis added).

D. Justice Kavanaugh's concurrence

Justice Kavanaugh also wrote a concurring opinion. He followed his framework from *Calvary Chapel*. Under his view, the free exercise of religion should be viewed as a "favored" right, akin to "most-favored" nation status.[456] Thus, there is no need to compare houses of worship to "comparable" or "analogous" secular activities. The state "impermissibly discriminated against religion" even if "*some* secular businesses are subject to similarly severe or even more severe restrictions."[457] Justice Kavanaugh explained that "under this Court's precedents, it does not suffice for a State to point out that" "some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship."[458] New York created a "favored class of [essential] businesses."[459] At that point, "the State must justify why houses of worship are excluded from that favored class."[460] Specifically, "the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses."[461] And, he concluded, "the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake."[462] Specifically, "New York's restrictions discriminate against religion by treating houses of worship significantly worse than *some* secular businesses."[463] The key word is "some." He does not limit the comparisons of houses of worship to comparable, or analogous secular gatherings. If *any* secular business is given preferential treatment, the state must justify its failure to give the house of worship the same benefit. The denominator includes all businesses that are afforded favorable treatment.

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456. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2612–13 (2020) (Kavanaugh, J., dissenting) (mem.).

457. *Roman Cath.*, 141 S. Ct. at 73 (citing *Lukumi*, 508 U.S. at 537–38; *Smith*, 494 U.S. at 884) (emphasis in original).

458. *Id.*

459. *Id.*

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.* (emphasis added).

How does the majority's approach differ from that of Justice Kavanaugh's concurrence? The majority compares houses of worship to an eclectic ensemble of secular businesses that are *not* comparable. Justice Kavanaugh states, expressly, that it is irrelevant whether the comparators are comparable. There is thus little daylight between the two opinions. In effect, the majority adopted Justice Kavanaugh's "most favored" right approach without saying so expressly. (The Supreme Court would expressly adopt Justice Kavanaugh's concurrence in *Tandon v. Newsom*.[464])

Justice Kavanaugh contends that his reading of the First Amendment is consistent with "this Court's precedents."[465] To support this reading, Justice Kavanaugh cited pages 537–38 of *Lukumi* and page 884 of *Smith*.[466] These citations are different from the pages that Justice Gorsuch cited. Justice Kavanaugh's *Lukumi* citation refers to Part II-A. This was the correct portion of the opinion to cite. In this section, Justice Kennedy found that the Hialeah ordinance targeted the Santeria faith.[467] Justice Kennedy observed that the government determined that "[k]illings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition."[468] In Hialeah, secular killings, such as "hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia [are] necessary."[469] And, the Court observed, hunting and fishing for sport were also likely necessary.[470] Or, in COVID-speak, these secular activities are *essential*. And *essential* is simply a synonym for *important*. Justice Kennedy explained that the "test of necessity devalues religious reasons for killing by judging them to be *of lesser import* than nonreligious reasons."[471] Lesser import means less important. Or, stated differently, non-essential. Justice Kavanaugh cited the language from *Lukumi* that bears most directly on the COVID-19

464. *See infra* Part V.D.
465. *Id.* at 73.
466. *Id.*
467. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 537–38 (1993).
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.* (emphasis added).

restrictions.

But the City also treated favorably another type of non-secular activity: "kosher slaughter" was expressly exempted.[472] Here, Hialeah was not just treating religious activity worse than a comparable secular activity. Rather the government was only treating one sect's religious activity worse than comparable secular *and* religious activity. The Court did not base its decision on "differential treatment of two religions."[473] Instead, this disparate treatment showed that the law was "gerrymander[ed]" to target the Santeria faith.[474]

Next, Justice Kennedy turned to the analysis upon which Justice Kavanaugh appears to rely. At page 884 of *Smith*, Justice Scalia explained that the unemployment insurance program from *Sherbert* involved an "individualized governmental assessment" of individual conduct.[475] In other words, the government had to consider "the particular circumstances behind an applicant's unemployment."[476] In *Lukumi*, Justice Kennedy expanded on this standard: when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'"[477] Hialeah's ordinances "require[d] an evaluation of the particular justification for the killing."[478] These individualized exemptions placed Hialeah's policy closer to the insurance policy in *Sherbert* than to the generally applicable criminal law in *Smith*. Therefore, "religious practice is being singled out for discriminatory treatment."[479]

Yet this citation is unhelpful for Justice Kavanaugh's analysis. New York's cluster initiative does not permit individualized exemptions, like the regime at issue in *Sherbert*. Some "essential" gatherings were permitted, without regard to particular circumstances. Other "non-essential" gatherings were prohibited, without regard

472. *Id.* at 536.
473. *Id.* (citing Larson v. Valente, 456 U.S. 228, 244–46 (1982)).
474. *Id.*
475. Emp. Div. v. Smith, 494 U.S. 872, 884 (1990).
476. *Id.*
477. *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).
478. *Id.*
479. *Id.*

to particular circumstances. For example, a church could not ask to increase the occupancy limit for Easter Sunday or Christmas Mass.

The Justice Gorsuch and Justice Kavanaugh concurrences flow from the reasoning of *Lukumi*. But neither Justice Kennedy clerk accurately stated the holding of *Lukumi*.

E. Justice Sotomayor's dissent

There were three separate dissents. Chief Justice Roberts wrote a solo dissent. Justice Breyer wrote a dissent joined by Justices Sotomayor and Kagan. And Justice Sotomayor wrote a dissent joined by Justice Kagan. The former two opinions did not engage the Free Exercise Clause arguments. Justice Breyer referred to New York's rules as "severe restrictions."[480] And he wrote that the occupancy "numbers are indeed low."[481] But whether those low numbers are unconstitutional, Justice Breyer queried, was "far from clear" in the unique context of this request for an injunction pending appeal.[482] Justice Breyer seemed noncommittal of how this case would have been resolved on a motion for summary judgment. Chief Justice Roberts also agreed with Justice Kavanaugh that New York's regulations were "distinguishable from those [the Court] considered" in *South Bay* and *Calvary Chapel*.[483] We will return to Chief Justice Roberts's and Justice Breyer's dissents later. Justice Sotomayor, however, responded to Free Exercise Clause analyses in the majority and concurring opinions. Let's start there.

Justice Sotomayor saw "no justification for the Court's change of heart" from *South Bay* and *Calvary Chapel*.[484] These precedents "provided a clear and workable rule."[485] Governments may "restrict attendance at houses of worship so long as comparable secular

480. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 77 (2020) (Breyer, J., dissenting) (per curiam).

481. *Id.*

482. *Id.*

483. *Id.* at 75 (Roberts, C.J., dissenting).

484. *Id.* at 79 (Sotomayor, J., dissenting).

485. *Id.*

institutions face restrictions that are at least equally as strict."[486] According to Justice Sotomayor, New York treated houses of worship like "comparable secular gatherings."[487] That analogous treatment, she wrote, "should be enough to decide this case."[488]

Next, Justice Sotomayor rejected the Diocese's argument that the regulations were not "neutral with respect to the practice of religion."[489] True enough, the regulation "refers to religion on its face."[490] But that reference, by itself, does not trigger strict scrutiny. "New York treats houses of worship far more favorably than their secular comparators."[491] The state, she wrote, does not "discriminate[] against" houses of worship.[492]

Justice Sotomayor further criticized Justice Kavanaugh for developing a new standard. She contended that *Lukumi* and *Smith* did not hold "that states must justify treating even noncomparable secular institutions more favorably than houses of worship."[493] Those precedents "created no such rule."[494] Justice Sotomayor was correct, and Justices Kavanaugh and Gorsuch were wrong.

F. Equitable dissents from Chief Justice Roberts and Justice Breyer

New York announced the cluster initiative on October 6, 2020.[495] The state zealously defended its policy in the district court and in the court of appeals. On November 16, Agudath Israel filed an

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486. *Id.* (citing S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.)).

487. *Id.*

488. *Id.*

489. *Id.* at 80.

490. *Id.*

491. *Id.*

492. *Id.*

493. *Id.* at 80 n.2.

494. *Id.*

495. Press Release, N.Y. State, Governor Cuomo Announces New Cluster Action Initiative, New York State Governor's Press Office (Oct. 6, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-cluster-action-initiative [https://perma.cc/UFK7-PNC9].

application for injunctive relief with the Supreme Court.[496] The state filed its response November 20.[497] Also on November 20, New York downgraded certain neighborhoods in Brooklyn from an orange zone to a yellow zone.[498] The brief explained, "Consequently, there are currently no red or orange zones anywhere in New York City, and both of the synagogues for which Agudath Israel seeks relief are now located in yellow zones."[499] As cases skyrocketed throughout the country, and families were urged to stay home for Thanksgiving, New York removed restrictions in the very "cluster" that was currently before the Supreme Court.[500]

In *Diocese*, both Chief Justice Roberts and Justice Breyer dissented, largely on equitable grounds. Chief Justice Roberts found that there was "simply no need" to "grant injunctive relief under the present circumstances."[501] At present, none of the applicants were subject to the "fixed numerical restrictions."[502] Chief Justice Roberts acknowledged that "[t]he Governor might reinstate the numerical restrictions."[503] At that point, "the applicants can return to this Court, and we could act quickly on their renewed applications."[504] But for now, "it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic."[505] Chief Justice Roberts concluded, "An order telling the Governor not to do what he's not doing fails to meet [the] stringent standard" for "'the

496. Emergency Application for Writ of Injunction, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 16, 2020).

497. Opposition to Application for Writ of Injunction, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 20, 2020).

498. *Id.* at 17.

499. *Id.*

500. Press Briefing Transcript, Centers for Disease Control and Prevention (Nov. 19, 2020), https://www.cdc.gov/media/releases/2020/t1118-covid-19-update.html [https://perma.cc/7BZH-FRZ6].

501. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 75 (2020) (Roberts, C.J., dissenting) (per curiam).

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

extraordinary remedy of injunction.'"[506]

Justice Breyer likewise found that "there [was] no need now to issue any such injunction."[507] He explained, "[N]one of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications."[508] And were the state to "reimpose the red or orange zone restrictions," the parties "could refile their applications."[509] Justice Breyer suggested that the "Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours."[510] Justice Breyer was unduly optimistic. On average, it took weeks, and not days for the Court to decide COVID-19 Free Exercise Clause cases.[511] (*Tandon v. Newsom*, however, which we will discuss *infra*, was decided hours after briefing concluded.)[512] Finally, Justice Breyer urged New York to "seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York."[513]

The majority found there was "no justification" to "deny relief at this time" in light of New York's changed policy.[514] The Court explained, "[i]t is clear that this matter is not moot."[515] Moreover, "injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange."[516] Indeed, the Court observed that Governor Cuomo "regularly change[d] the classification of particular areas without

506. *Id.* (quoting Nken v. Holder, 556 U.S. 418, 428 (2009)).

507. *Id.* at 77 (Breyer, J., dissenting).

508. *Id.*

509. *Id.*

510. *Id.*

511. Josh Blackman, *How The Briefing Schedule Stole Christmas!*, REASON: VOLOKH CONSPIRACY (Dec. 12, 2020, 1:53 PM), https://reason.com/volokh/2020/12/24/how-the-briefing-schedule-stole-christmas/ [https://perma.cc/YJH7-5H3J].

512. Josh Blackman, *Breaking: SCOTUS Grants Injunction in Tandon v. Newsom*, REASON: VOLOKH CONSPIRACY (Apr. 10, 2021), https://reason.com/volokh/2021/04/10/breaking-scotus-grants-injunction-in-tandon-v-newsom/ [https://perma.cc/XHF2-TMKX].

513. *Roman Cath.*, 141 S. Ct. at 78 (Breyer, J., dissenting).

514. *Id.* at 68 (majority opinion).

515. *Id.*

516. *Id.*

prior notice."[517]

The Court cited two cases that relied on two exceptions to the mootness doctrine. First, the Court cited *Federal Election Commission v. Wisconsin Right to Life, Inc.*,[518] which invoked "the established exception to mootness for disputes capable of repetition, yet evading review."[519] Second, the Court cited *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[520] This case stated the test for the voluntary cessation doctrine: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[521] The Court did not reference either doctrine by name but embraced both doctrines.

In his concurrence, Justice Kavanaugh added that the applicants "face an imminent injury *today*" because their neighborhoods may be " classified as red or orange zones in the very near future."[522] He wrote, there "is no good reason to delay issuance of the injunctions."[523]

Agudath Israel characterized the government's "abrupt" change of policy as a cynical "feign[ed] retreat."[524] This reversal was all-too familiar. Over the prior nine months of COVID litigation, there had been a familiar pattern. The governor of Illinois modified the restrictions on houses of worship shortly before the Supreme Court would consider the policy.[525] The California governor also

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517. *Id.*

518. 551 U.S. 449 (2007).

519. *Id.* at 462; *see Roman Cath.*, 141 S. Ct at 68.

520. 528 U.S. 167, 189 (2000); *see Roman Cath.*, 141 S. Ct at 68.

521. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass'n, Inc., 393 U.S. 199, 203 (1968)).

522. *Roman Cath.*, 141 S. Ct at 74 (Kavanaugh, J., concurring).

523. *Id.*

524. Reply Brief in Support of Emergency Application For Writ of Injunction at 2, Agudath Israel of Am. v. Cuomo, No. 20-3572 (Nov. 22, 2020), https://www.supremecourt.gov/DocketPDF/20/20A90/161477/20201122083829884_Reply%20Brief%20iso%20Emergency%20Application%20for%20Writ%20of%20Injunction-FINAL.pdf [https://perma.cc/C9T8-FDM4].

525. *See supra* Part II.B.

attempted to moot the *South Bay* case.[526] The churches argued that "[t]he eleventh hour attempts by California and Illinois to moot the applications to this Court do not impact the analysis."[527] However, Chief Justice Roberts (apparently) found the controversy was live and ruled for the government. There were several other efforts to moot COVID-19 cases before they reached the Supreme Court.[528]

When a case is on the doorstep of the Supreme Court, the government suddenly realizes that the restrictive measures zealously defended in the lower court were no longer necessary. And, graciously, the government relaxes the policy. An optimist would praise such government flexibility. A cynic would counter that these reversals are motivated, at least in part, by a desire to moot the case. Justice Gorsuch expressed that cynicism in *Roman Catholic Diocese I*. He wrote, "To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the 'off' switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty."[529] Justice Gorsuch reiterated this point in *South Bay II*, which we will discuss *infra*: "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just

526. Josh Blackman, *Mooting Corona Cases Before They Reach the Supreme Court*, REASON: VOLOKH CONSPIRACY (June 3, 2020, 8:30 AM), https://reason.com/volokh/2020/06/03/mooting-corona-cases-before-they-reach-the-supreme-court/ [https://perma.cc/WYC3-RAM8] ("First, on May 26, the South Bay United Pentecostal Church in California filed an application for injunctive relief with Circuit Justice Kagan. That same day, the County of San Diego adopted a new policy: a limited number of people could meet in houses of worship so long as they comply with certain social distancing guidance. Unsurprisingly, California argued that the appeal is now moot, or at least in flux because of the new policy. As a result, relief should be denied.").

527. Reply Brief in Support of Emergency Application For Writ of Injunction at 1, S. Bay Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (No. 20-55533) (mem.) (footnote omitted).

528. Blackman, *supra* note 526; *see also* Josh Blackman, *The "Essential" Second Amendment*, 26 TEX. REV. L. & POL. (forthcoming 2021), http://ssrn.com/abstract=3827441 [https://perma.cc/MT8B-DKEG].

529. *Roman Cath.*, 141 S. Ct at 72 (Gorsuch, J., concurring).

around the corner."[530] Alas, people of faith are stuck playing this never-ending game of constitutional Whac-a-Mole.[531]

G. The majority declined to consider Agudath Israel's targeting claim

The majority concluded that New York's law was not neutral, and that strict scrutiny was thus warranted. But the Court declined to address an alternate theory advanced by Agudath Israel: that Governor Cuomo's policy targeted Orthodox Jews.[532]

Judge Park dissented from the Second Circuit's denial of an injunction. He observed that prior to "issuing the order, the Governor

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530. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 720 (2021) (Gorsuch, J., concurring) (mem.).

531. *See* Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L.J. 1135, 1153 (2019) ("The Justices attempted to thwart the massive-resistance game of whack-a-mole, whereby officials who were not directly bound by federal court judgments would sequentially refuse to voluntarily comply with the precedent."); Josh Blackman, *New York's COVID-19 Microcluster Whac-A-Mole Game*, REASON: VOLOKH CONSPIRACY (Nov. 22, 2020, 5:02 PM), https://reason.com/volokh/2020/11/22/new-yorks-covid-19-microcluster-whac-a-mole-game/ [http://perma.cc/F4SU-NNMD]. New York Times columnist Bret Stephens used the same imagery. Bret Stephens, *Thank You, Justice Gorsuch*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/opinion/cuomo-gorsuch-coronavirus.html [https://perma.cc/5LXP-5GBD] ("Another was the game of Hot Zone *Whac-a-Mole* that Cuomo tried to play with the court as the case was working its way through the legal system, by switching the affected areas' designations back to 'yellow.'" (emphasis added)); Josh Blackman, *About Two Hours After Bible Worship Groups Seeks Emergency Injunction, California Relaxes Guidance for April 15–After Easter, of Course*, REASON: VOLOKH CONSPIRACY (Apr. 2, 2021, 11:21 PM), https://reason.com/volokh/2021/04/02/about-two-hours-after-bible-worship-group-seeks-emergency-injunction-california-relaxes-guidance-for-april-15-after-easter-of-course/ [https://perma.cc/3XTH-P6VZ] (noting that two hours after Bible Worship group filed appeal with Supreme Court, California revised challenged gathering guidance).

532. According to reports, Governor Cuomo has sometimes voiced anti-Semitic sentiments. *See* Matt Flegenheimer, *Andrew Cuomo's White-Knuckle Ride*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/magazine/andrew-cuomo.html [https://perma.cc/JT2G-VF4F] ("[Cuomo] could also bridle at the indignity of voter courtship, growing especially irritated about an event celebrating Sukkot, the Jewish harvest holiday when the faithful gather outdoors beneath temporary shelters of branches and greenery. 'These people and their fucking tree houses,' Cuomo vented to his team, according to a person who witnessed it and another who was briefed on his comments at the time.").

said that if the 'ultra-Orthodox [Jewish] community' would not agree to enforce the rules, 'then we'll close the institutions down.'"[533] Judge Park cited these statements to show that Governor Cuomo "intended to target the free exercise of religion."[534] However, the Court said even if those "those comments [are put] aside," the regulations, on their face, still "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment."[535]

In dissent, Justice Sotomayor claimed that the Diocese's argument deviated from *Trump v. Hawaii*.[536] That case, she wrote,

> declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[537]

She added that if President Trump's "statements did not show 'that the challenged restrictions violate the 'minimum requirement of neutrality' to religion,' it is hard to see how Governor Cuomo's do."[538]

Here, Justice Sotomayor compared apples and oranges. *Hawaii*

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533. Agudath Israel of Am. v. Cuomo, 980 F.3d 222, 229 (2d. Cir. 2020); *see also* Josh Blackman, *Understanding Governor Cuomo's Hostility Towards Jews*, REASON: VOLOKH CONSPIRACY (Oct. 8, 2020, 8:56 PM), https://reason.com/volokh/2020/10/08/understanding-governor-cuomos-hostility-towards-jews/ [https://perma.cc/8YAD-ZW9S]; Josh Blackman, *Revisiting Governor Cuomo's Hostility Towards Orthodox Jews In Light of His "Fucking Tree Houses" Comment*, REASON: VOLOKH CONSPIRACY (Apr. 13, 2021, 5:08 PM), https://reason.com/volokh/2021/04/13/revisiting-governor-cuomos-hostility-towards-orthodox-jews-in-light-of-his-fucking-tree-houses-comment/ [https://perma.cc/46EN-EXS9].

534. *Agudath*, 980 F.3d at 229.

535. *Roman Cath.*, 141 S. Ct at 66.

536. 138 S. Ct. 2392 (2018).

537. *Roman Cath.*, 141 S. Ct. at 80 (Sotomayor, J., dissenting) (citation omitted) (quoting *Hawaii*, 138 S. Ct. at 2417).

538. *Id.* (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).

was an Establishment Clause challenge.[539] Those seeking entry to the United States could not assert Free Exercise rights. Therefore, the precedents do not line up neatly. Moreover, the Court generally reviews with deference policies that implicate "the admission and exclusion of foreign nationals," which "is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[540] In *Hawaii*, the Court followed its longstanding precedent, *Kleindienst v. Mandel*,[541] and not Establishment Clause cases. These precedents provide the appropriate "circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."[542] The analogy to *Lukumi* heightened scrutiny is simply inapt.

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Roman Catholic Diocese provided some answers to the lower courts, but still left many issues unresolved. Over the next five months, the Court would provide some clarity about how the Free Exercise Clause governs COVID-19 conflicts.

V. PHASE 5: THE AFTERMATH OF *ROMAN CATHOLIC DIOCESE*

In the wake of *Roman Catholic Diocese*, the Court's approach to Free Exercise cases would radically change. In December 2020, the Court remanded three cases for reconsideration in light of *Roman Catholic Diocese*: *Harvest Rock Church, Inc. v. Newsom*,[543] *High Plains Harvest Church v. Polis*,[544] and *Robinson v. Murphy*.[545] A fourth case, *Danville Christian Academy, Inc. v. Beshear*,[546] was dismissed because

539. *Hawaii*, 138 S. Ct. at 2416. My position is that the Establishment Clause has no bearing on immigration law. *See* Josh Blackman, *The Domestic Establishment Clause*, 23 ROGER WILLIAMS U. L. REV. 345 (2018).

540. *Hawaii*, 138 S. Ct. at 2418 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

541. 408 U.S. 753 (1972).

542. *Id.* at 2419 (citing Kleindienst v. Mandel, 408 U.S. 753, 769 (1972)).

543. 141 S. Ct. 889 (2020) (mem.).

544. 141 S. Ct. 527 (2021) (mem.).

545. 141 S. Ct. 972 (2021) (mem.).

546. 141 S. Ct. 547 (2021) (mem.).

the order would soon expire. However, the next four months would bring four victories for houses of worship. In February 2021, the Court decided *South Bay II* and *Harvest Rock II*. These orders enjoined California's absolute ban on indoor worship. Later that month, *Gateway City Church v. Newsom*[547] halted Santa Clara County's ban on indoor worship. Finally, in April, *Tandon v. Newsom*[548] held that California could not restrict private, in-home worship.[549] After that last case, California lifted all "location and capacity" limits on places of worship.[550] At long last, the California COVID-19 cases seem to have drawn to a close.

A. The Advent after Roman Catholic Diocese

Roman Catholic Diocese was decided on November 25, 2020. Almost immediately, the 5-4 case turned back the *South Bay* tide. A Ninth Circuit panel observed that *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law."[551] And, relying on that new precedent, the panel declared unconstitutional Nevada's directives that the pre-Barrett Court declined to enjoin in *Calvary Chapel*.[552] "The Supreme Court's decision in *Roman Catholic Diocese* compels" that result, the panel found.[553] And the Second Circuit declared unconstitutional other aspects of New York's restrictions on houses of worship. The panel observed *Roman Catholic Diocese* "has supplanted" the "Chief Justice's concurring opinion in *South*

547. 141 S. Ct. 1460 (2021) (mem.).

548. 141 S. Ct. 1294 (2021).

549. Id. at 1296–98.

550. *See* John Blackman, *Breaking: California Lifts All "Location" and Capacity Limits on Places of Worship*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2021, 6:53 PM), https://reason.com/volokh/2021/04/12/breaking-california-lifts-all-location-and-capacity-limits-on-places-of-worship/ [https://perma.cc/4B8W-98B5].

551. Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020).

552. Josh Blackman, *Ninth Circuit Rules for Calvary Chapel, Calls Diocese Case "Seismic Shift in Free Exercise Law" (Updated)*, REASON: VOLOKH CONSPIRACY (Dec. 15, 2020, 3:51 PM), https://reason.com/volokh/2020/12/15/ninth-circuit-rules-for-calvary-chapel-calls-dioecese-case-seismic-shift-in-free-exercise-law/ [https://perma.cc/GSY3-QPVS].

553. *Calvary Chapel*, 982 F.3d at 1233.

Bay."[554] During the month of December, as the pandemic waned, the Supreme Court would decide four Free Exercise cases on the shadow docket.

1. *Harvest Rock II*

On December 3, 2020, the Court ruled on another case from California, *Harvest Rock Church, Inc. v. Newsom*.[555] The lower court had upheld restrictions on houses of worship. Here, the Court issued an unsigned order. The Court "treated" an "application for injunctive relief" as a "petition for a writ of certiorari before judgment," and then "granted" that petition.[556] The Court then vacated the district court's decision and remanded the case to the Ninth Circuit "with instructions to remand to the district court for further consideration in light of" *Roman Catholic Diocese*. There were no recorded dissents from this order. I described the unusual GVR as a "creative punt."[557] I surmise that the Justices hoped the lower courts would follow *Roman Catholic Diocese* and enjoin California's directives. However, on remand, the lower courts upheld an expanded version of the governor's order. As a result, this case would come back to the Court in February.

2. *High Plains Harvest Church* and *Robinson*

On December 15, 2020, the Court ruled on appeals from Colorado and New Jersey, respectively.[558] In *High Plains Harvest Church v.*

554. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 635 n.20 (2d Cir. 2020); *see also* Josh Blackman, *Second Circuit Rules for Agudath Israel and Brooklyn Diocese*, REASON: VOLOKH CONSPIRACY (Dec. 28, 2020, 2:58 PM), https://reason.com/volokh/2020/12/28/second-circuit-rule-for-agudath-israel-and-brooklyn-diocese/ [https://perma.cc/6T4Z-JNP3].

555. 141 S. Ct. 889 (2020) (mem.).

556. *Id.*

557. Josh Blackman, *SCOTUS Creatively Punts in COVID Appeal from 9th Circuit: Grants Cert Before Judgment, then Vacates and Remands*, REASON: VOLOKH CONSPIRACY (Dec. 3, 2020, 12:36 PM), https://reason.com/volokh/2020/12/03/scotus-creatively-punts-in-covid-appeal-from-9th-circuit-grants-cert-before-judgment-then-vacates-and-remands/ [https://perma.cc/W7MT-E52A].

558. Josh Blackman, *SCOTUS GVRs COVID Cases from Colorado and New Jersey*, REASON: VOLOKH CONSPIRACY, (Dec. 15, 2020, 12:07 PM),

Polis,[559] the Court ordered the Tenth Circuit to reconsider Colorado's restrictions on houses of worship in light of *Roman Catholic Diocese*.[560] Justice Kagan dissented, joined by Justices Breyer and Sotomayor.[561] She found that state had "lifted all" of the challenged limits, and therefore the case was moot.[562] The other case, *Robinson v. Murphy*, arose in New Jersey.[563] This case had not become moot. Unlike Colorado, New Jersey did not modify its policies in light of *Roman Catholic Diocese*. Here, the unsigned order remanded the case to the Third Circuit to reconsider New Jersey's restrictions in light of *Roman Catholic Diocese*. The Supreme Court did not enter an injunction in *Murphy*. As a result, New Jersey could continue enforcing its policy, notwithstanding *Roman Catholic Diocese*. There were no recorded dissents in *Murphy*.

3. *Danville Christian Academy*

Fourth, on December 17, 2020, the Court decided *Danville Christian Academy, Inc. v. Beshear*.[564] In this case, the Kentucky governor closed all schools, secular and non-secular alike.[565] But other businesses were allowed to remain open. The district court preliminarily enjoined the policy.[566] On appeal, the Sixth Circuit stayed the injunction,[567] based on what I described as a flawed reading of *Roman Catholic Diocese*.[568] The Supreme Court found that the "school-closing Order effectively expires this week or shortly thereafter,

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https://reason.com/volokh/2020/12/15/scotus-gvrs-covid-cases-from-colorado-and-new-jersey/[https://perma.cc/TD79-FJWW].

559. 141 S. Ct. 527, 527 (2020) (mem.).

560. *See id.*

561. *See id.*

562. *Id.*

563. Robinson v. Murphy, 141 S. Ct. 972 (2020) (mem.).

564. 141 S. Ct. 527 (2020) (mem.).

565. *See id.*

566. Danville Christian Acad., Inc. v. Beshear, No. 3:20-CV-00075-GFVT, 2020 WL 6954650, at *1 (E.D. Ky. Nov. 25, 2020).

567. Commonwealth v. Beshear, 981 F.3d 505, 511 (6th Cir. 2020).

568. *See* Josh Blackman, *Sixth Circuit Buries South Bay, but Distinguishes Diocese*, REASON: VOLOKH CONSPIRACY, (Nov. 29, 2020, 6:01 PM), https://reason.com/volokh/2020/11/29/sixth-circuit-buries-south-bay-but-distinguishes-diocese/ [https://perma.cc/TD79-FJWW].

and there is no indication that it will be renewed."[569] The Court, therefore, denied the application in light of "the timing and the impending expiration of the Order."[570] Justice Alito wrote a dissent, which was joined by Justice Gorsuch. He explained that the applicants proceeded "expeditiously," and it was "unfair to deny relief on this ground since this timing is in no way the applicants' fault."[571] Briefing had concluded in this case on December 9. It did not take the Justices nine days to write a short per curiam opinion. I surmised that "the Court held this order till the day-before-the order expired."[572] Once again, the Court manipulated the timing of the shadow docket, and "found a creative way to punt the case away."[573] Justice Gorsuch wrote a separate dissent, which Justice Alito joined. He wrote that Kentucky's order likely violated the Free Exercise Clause in light of *Roman Catholic Diocese*.

After the Kentucky case, the Supreme Court would take a two month hiatus from Free Exercise decisions. In February 2021, however, *South Bay* and *Harvest Rock* came roaring back to a very fractured bench.

B. The return of South Bay II *and* Harvest Rock II

On the morning of December 3, the Supreme Court GVR'd[574] *Harvest Rock Church, Inc. v. Newsom*, which challenged California's restrictions on houses of worship.[575] The Court asked the lower courts

569. Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527, 527 (2020) (mem.).

570. *Id.* at 528.

571. *Id.* (Alito, J., dissenting).

572. *See* Josh Blackman, *Making Sense of* Danville Christian Academy v. Beshear, REASON: VOLOKH CONSPIRACY, (Dec. 18, 2020, 2:10 AM), https://reason.com/volokh/2020/12/18/making-sense-of-danville-christian-academy-v-beshear/ [https://perma.cc/FR5W-H3CH].

573. *Id.*

574. *See* Erin Miller, *Glossary of Supreme Court terms*, SCOTUSBLOG (Dec. 31, 2009), *https://www.scotusblog.com/2009/12/glossary-of-legal-terms/* [https://perma.cc/C2BS-5KQ2] ("When the Court 'GVRs,' it 'grants certiorari, vacates the decision below, and remands' a case to the lower court without hearing oral argument or deciding its merits.").

575. Harvest Rock Church, Inc. v. Newsom, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020).

to reconsider Governor Newsom's policies in light of *Roman Catholic Diocese*. Did Governor Newsom take this opportunity to wind back his orders to comply with the New York case? No. He did the exact opposite. Several hours later, Governor Newsom announced a new "regional stay-at-home order" that would prohibit *all* indoor religious worship.[576] Churches were no longer limited to a certain number of worshippers at a time. Now they must shutter altogether in certain zones. But, the governor permitted "places of worship and political expression" to "allow outdoor services only."[577]

Two district courts found the ban on indoor worship was consistent with *Roman Catholic Diocese*. And the Ninth Circuit agreed. On appeal, the Supreme Court enjoined the prohibitions by a 6-3 vote. But the Court's conservatives split 3-3 about whether the state could prohibit singing and chanting in houses of worship.

1. *Harvest Rock II* District Court proceedings

On December 3, the Harvest Rock church sought a Temporary Restraining Order in the district court, but the court declined to rule on the motion right away.[578] That same day, the church bypassed the Ninth Circuit and asked the Supreme Court for an emergency

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576. Amy Graff & Eric Ting, *Newsom reveals what California's impending stay-at-home order will look like*, S.F. GATE (Dec. 3, 2020, 2:32 PM), https://www.sfgate.com/bayarea/article/Newsom-California-shelter-in-place-order-purple-15773220.php [https://perma.cc/HP5G-77SQ]; Josh Blackman, *A Few Hours After SCOTUS Punts on California Case, Governor Newsom Announces that "Regional Stay Home" Order That Would Prohibit All Indoor Religious Services*, REASON: VOLOKH CONSPIRACY (Dec. 3, 2020, 5:49 PM), https://reason.com/volokh/2020/12/03/a-few-hours-after-scotus-punts-on-california-case-governor-newsom-announces-that-regional-stay-home-order-that-would-prohibit-all-indoor-religious-services/ [https://perma.cc/P59C-Q4BJ].

577. *Governor Newsom Issues Regional Stay-at-Home Order Pending ICU Capacity*, CITY OF IRVINE (December 3, 2020), https://www.cityofirvine.org/news-media/news-article/governor-newsom-issues-regional-stay-home-order-pending-icu-capacity [https://perma.cc/U9DR-PD5L].

578. Josh Blackman, *Harvest Rock Files Renewed Emergency Application for Injunction with Supreme Court in light of California's New Restrictions*, REASON: VOLOKH CONSPIRACY (Dec. 9, 2020, 6:04 PM), https://reason.com/volokh/2020/12/09/harvest-rock-files-renewed-emergency-application-for-injunction-with-supreme-court-in-light-of-californias-new-restrictions/ [https://perma.cc/3W48-QBXR].

injunction.[579] Five days later, the Court rejected the submission without explanation. A note on the docket stated that the application was "not accepted for filing."[580] An attorney for Harvest Rock told me there was an "unwritten rule" that the Supreme Court will not grant emergency relief before the district court had an opportunity to decide.

On December 21, 2020, the district court denied Harvest Rock's request for a temporary restraining order.[581] It found that a complete prohibition of indoor worship was consistent with *Roman Catholic Diocese*. Why? California's "[b]lueprint offers something the New York and Nevada Orders did not: the ability to legally congregate in unlimited numbers for worship—so long as that worship occurs outside."[582] The district court failed to address the elements. During inclement weather, it is impossible to worship outside.[583] For example, on Christmas in San Francisco, the forecast predicted an eighty percent chance of rain, wind gusts up to twenty-five miles per hour, and temperatures below fifty degrees.[584] Moreover, obtaining peace and serenity in an urban jungle may be impossible.

Finally, outdoor worship is a poor substitute. Observant Jewish people may not be able to carry religious texts to outdoor locations during holidays.[585] And in Mormonism, certain rituals can only be

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579. Renewed Emergency Application for Writ of Injunction Relief, Harvest Rock Church, Inc. v. Newsom, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020).

580. Docket No. 20A94, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20a94.html [https://perma.cc/NSY3-Q92C].

581. Harvest Rock Church, Inc. v. Newsom, No. EDCV206414JGBKKX, 2020 WL 7639584, at *1 (C.D. Cal. Dec. 21, 2020).

582. *Id.* at *7.

583. Josh Blackman, *Federal Judge in California Flouts Catholic Diocese, Dares SCOTUS to Reverse Him*, REASON: VOLOKH CONSPIRACY (Dec. 23, 2020, 2:00 PM), https://reason.com/volokh/2020/12/23/federal-judge-in-california-flaunts-catholic-diocese-dare-scotus-to-reverse-him/ [https://perma.cc/N77E-VZM4].

584. *See* Screenshot of Weather Forecast for December 25, 2020 in San Francisco, REASON, https://reason.com/wp-content/uploads/2020/12/weather.png [https://perma.cc/VES7-P8WV].

585. Josh Blackman, *The Prohibition on Carrying on the Sabbath Makes it Virtually Impossible for Jewish People to Worship Outside*, REASON: VOLOKH CONSPIRACY (Dec. 25, 2020,

performed inside a temple.[586] The district court judge also misread *Diocese*. He wrote that California "treats religious activity better than *comparable* secular activity and even better than essential services."[587] Chief Justice Roberts's *South Bay* concurrence asked if religious worship was treated differently than a "comparable secular" activity. [588] But *Roman Catholic Diocese* eliminated that requirement. Now, the religious activity must be compared to any secular activity, whether "comparable" or not.[589] Later that day, another federal court in California turned away the South Bay Pentecostal Church's challenge to the new policy.[590]

2. *Harvest Rock II* before the Ninth Circuit

On December 23, 2020, Harvest Rock sought an injunction pending appeal with the Ninth Circuit.[591] And the church requested relief by December 24, so there could be worship services for Christmas. The Ninth Circuit, however, set a briefing schedule that made such relief impossible: the government's response was not due till December 28.[592] I referred to this order as the briefing schedule that stole Christmas.[593] Judge O'Scannlain dissented from the order. He

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2:22 AM), https://reason.com/volokh/2020/12/25/the-prohibition-on-carrying-on-the-sabbath-makes-it-virtually-impossible-for-jewish-people-to-worship-outside/ [https://perma.cc/SUJ4-QHJG].

586. *Id.*

587. Harvest Rock Church, Inc. v. Newsom, EDCV206414JGBKKX, 2020 WL 7639584, at *4 (C.D. Cal. Dec. 21, 2020) (emphasis added).

588. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

589. Josh Blackman, *Why Exactly Was New York's COVID-19 Regime Not "Neutral"?*, REASON: VOLOKH CONSPIRACY (Nov. 26, 2020, 4:45 PM), https://reason.com/volokh/2020/11/26/why-exactly-was-new-yorks-covid-19-regime-not-neutral/ [https://perma.cc/HZJ4-XG34].

590. S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 7488974, at *1 (S.D. Cal. Dec. 21, 2020), *aff'd*, 985 F.3d 1128 (9th Cir. 2021).

591. Emergency Motion for Injunction Pending Appeal, Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020) (No. 20-56357), https://drive.google.com/file/d/1FSegn_FicN1WCtJ80fdHh_Wr3r2PrY7O/view [https://perma.cc/R989-4LX5].

592. Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020).

593. Josh Blackman, *How The Briefing Schedule Stole Christmas!*, REASON: VOLOKH

would have "granted the church at least the temporary relief it needs to ensure that its members can exercise freely the fundamental right to practice their Christian religion on one of the most sacred Christian days of the year."[594]

The *South Bay* panel moved more expeditiously because "the issues presented in this appeal 'strike at the very heart of the First Amendment's guarantee of religious liberty.'"[595] The briefing would conclude by December 14, 2020 and oral argument would be held on January 15, 2021. Still, there would be no relief by Christmas. Silent night would be spent on the chilly streets of San Francisco.[596]

On January 22, 2021 the Ninth Circuit ruled against South Bay.[597] The panel agreed with the district court: "California's restrictions differ markedly from the New York order under review in *Roman Catholic Diocese*."[598] Three days later, on January 25, 2021 the Ninth Circuit ruled against *Harvest Rock*.[599] Here, the *Harvest Rock* panel found itself bound by the new *South Bay* circuit precedent. Judge O'Scannlain concurred. He wrote that *South Bay* was "woefully out of step with" *Roman Catholic Diocese*.[600] Later that day on January 25, California lifted the regional stay at home order.[601] At the time, I questioned "if this timing was occasioned by the Ninth Circuit's

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CONSPIRACY (Dec. 24, 2020, 1:53 PM), https://reason.com/volokh/2020/12/24/how-the-briefing-schedule-stole-christmas/ [https://perma.cc/Y7JE-U5V3].

594. Harvest Rock Church, Inc. v. Newsom, 982 F.3d 1240 (9th Cir. 2020) (O'Scannlain, J., concurring in part and dissenting in part).

595. S. Bay United Pentecostal Church v. Newsom, 982 F.3d 1239, 1239 (9th Cir. 2020) (quoting Roman Cath. Diocese of Brooklyn v. Cuomo, 41 S. Ct. 63, 68 (2020) (per curiam)).

596. Alix Martichoux, *Will It Rain on Christmas? Bay Area Weather Forecast Looks Wet*, 7NEWS (Dec. 23, 2020), https://abc7news.com/rain-forecast-bay-area-will-it-on-christmas-sf-weather/9007154/ [https://perma.cc/7HGB-FZ2K].

597. S. Bay United Pentecostal Church v. Newsom, 985 F.3d 1128, 1131 (9th Cir. 2021).

598. *Id.* at 1148.

599. Harvest Rock Church, Inc. v. Newsom, 985 F.3d 771, 771 (9th Cir. 2021).

600. *Id.* at 772 (O'Scannlain, J., dissenting).

601. Thomas Fuller & Jill Cowan, *California Ends Strict Virus Restrictions as New Cases Fall*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/california-covid-restrictions.html [https://perma.cc/6FUG-ALTR].

double-rulings."[602] However, even though the statewide order was lifted, certain local counties continued to enforce the state's prohibition on indoor worship.[603] However, even though the statewide order was lifted, certain local counties continued to enforce the state's prohibition on indoor worship.[604] California would agree that the controversy was not moot.[605]

3. *Harvest Rock II* before the Supreme Court

Both Harvest Rock and South Bay sought injunctions from the Supreme Court. And on February 5, 2021, the Court granted relief in both *South Bay II* and *Harvest Rock II*.[606] First, the Court blocked Governor Newsom from prohibiting indoor worship.[607] Second, the Court allowed the state to limit attendance in churches to twenty-five percent.[608] Third, the Court allowed the state to prohibit "singing and chanting" in houses of worship.[609]

Several justices wrote separately. Justices Thomas and Gorsuch would have granted "the application in full."[610] In other words, they would have enjoined the percentage caps, and the ban on singing and chanting indoors. Justice Alito would have given the state thirty days to prove that the percentage caps and ban on singing

602. Josh Blackman, *Is SCOTUS Done with Emergency COVID-19 Free Exercise Litigation? (Updated)*, REASON: VOLOKH CONSPIRACY, (Jan. 26, 2021, 3:03 AM), https://reason.com/volokh/2021/01/26/is-scotus-done-with-emergency-covid-19-free-exercise-litigation/ [https://perma.cc/Y7LQ-2KY9].

603. *Id.*

604. *Id.*

605. *See* Josh Blackman, *South Bay and Harvest Rock Are Now Fully Briefed Before the Supreme Court*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/01/30/south-bay-and-harvest-rock-are-now-fully-briefed-before-the-supreme-court/ [https://perma.cc/4LJP-GZCX].

606. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.); Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289 (2021) (mem.); *see also* Josh Blackman, *SCOTUS Decides* South Bay v. Newsom II*, Enjoins Complete Prohibition on Indoor Worship Services*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/02/06/scotus-decides-south-bay-v-newsom-ii-enjoins-complete-prohibition-on-indoor-worship-services/ [https://perma.cc/3KK9-BJMC].

607. *Harvest Rock*, 141 S. Ct. at 1289.

608. *Id.* at 1290.

609. *Id.*

610. *Id.*

would absolutely essential to prevent community spread.[611] If the state could not meet that burden, then in thirty days, the stay would lift. Critically, Justice Alito would have placed the burden on the state to justify its policy.[612]

Justice Gorsuch wrote a statement, which was joined by Justices Thomas and Alito. He found that the complete prohibition on indoor worship was not narrowly tailored. For example, California cannot "explain why the less restrictive option of limiting the number of people who may gather at one time is insufficient for houses of worship, even though it has found that answer adequate for so many stores and businesses."[613] Further, Justice Gorsuch wrote that California could not rely on its "mild climate."[614] (Justice Kagan cited California's "mild climate" to defend the policy.) This disparate treatment, he concluded, ran afoul of *Roman Catholic Diocese*: "this Court made it abundantly clear that edicts like California's fail strict scrutiny and violate the Constitution."[615]

Justice Barrett wrote a concurrence, which was her first separate writing on the Court.[616] She was joined by Justice Kavanaugh. Justice Barrett seemed to agree with the bulk of Justice Gorsuch's statement. But she wrote that the churches had "the burden of establishing their entitlement to relief from the singing ban."[617] And the applicants had not yet met their burden.[618]

Chief Justice Roberts wrote a two-paragraph concurring opinion, in which he repeated his call for "significant deference" from *South Bay I*. Chief Justice Roberts saw "no basis" to enjoin the prohibition on "singing indoors," which the state found "poses a heightened

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611. *Id.*

612. *See id.*

613. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.) (mem.).

614. *Id.*

615. *Id.* at 719.

616. Josh Blackman, *Justice Barrett's First Opinion as a Justice*, REASON: VOLOKH CONSPIRACY (Mar. 10, 2021), https://reason.com/volokh/2021/02/06/justice-barretts-first-opinion-as-a-justice/ [https://perma.cc/7QFD-RC98].

617. 141 S. Ct. at 717 (Barrett, J., concurring in the partial grant of application for injunctive relief).

618. *Id.*

risk of transmitting COVID–19."[619] But Chief Justice Roberts rejected the absolute prohibition on indoor worship: reducing the "maximum number of adherents who can safely worship in the most cavernous cathedral" to "zero . . . appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake."[620] Chief Justice Roberts did not explain what those "interests at stake" were. Nor did he cite the Free Exercise Clause of the First Amendment. The precise basis of his analysis is unclear.

The votes in this case were complicated. Six Justices immediately enjoined the ban on indoor worship: Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Barrett. Two justices (Thomas and Gorsuch) would have also immediately enjoined the percentage caps and ban on singing. One justice (Alito) would have enjoined the ban on singing and put the burden on the state to defend the percentage caps. Three justices (Roberts, Kavanaugh, and Barrett) would have put the burden on the church to introduce evidence showing that the percentage caps and ban on singing were not generally applicable.

Justice Kagan wrote a five-page dissent, which was joined by Justices Breyer and Sotomayor.[621] She began with the same refrain from *Roman Catholic Diocese*: the Justices are not scientists, and religious worship is treated more favorably than secular activities.[622] She wrote that the "mandate defies our caselaw, exceeds our judicial role, and risks worsening the pandemic." Justice Kagan contended that California's prohibition differs from the policy set aside in *Roman Catholic Diocese*: "California has treated houses of worship identically to other facilities with the same risk."

Nine months elapsed from *South Bay I* to *South Bay II*. In that period, the Roberts Court underwent a religious liberty revolution. Over the following two months, the Supreme Court would decide two more COVID-19 cases on the shadow docket—both from

619. *Id.* (Roberts, C.J., concurring in the partial grant of application for injunctive relief).

620. *Id.*

621. *Id.* at 720 (Kagan, J., dissenting).

622. *Id.*

California.

C. Gateway City Church v. Newsom

In the wake of *South Bay II* and *Harvest Rock II*, California ceased to enforce the complete prohibition on indoor prayer. However, Santa Clara, California continued to shutter all houses of worship. On February 12, 2021, a panel of the Ninth Circuit found that Santa Clara's ban was consistent with *South Bay II* and *Roman Catholic Diocese*. Why? Judges Canby, Graber, and Friedland found that the "County's prohibition on indoor gatherings is a neutral law of general applicability and therefore properly subject to rational basis review."[623] On February 17, the Gateway City Church sought an injunction from the Supreme Court.[624] On February 24, the County filed a reply.[625] And on February 25, the County informed the Court that the restrictions would be lifted on March 3.[626] Once again, the government tried to play COVID-19 Whac-a-mole.[627] However, the better practice is to rescind the policy before the reply brief is due.

The Court, however, did not wait. On February 26, the Court enjoined the Santa Clara policy. The unsigned order stated that "[t]he Ninth Circuit's failure to grant relief was erroneous. This outcome is *clearly dictated* by" *South Bay II*.[628] Here the Court used very strong

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623. Gateway City Church v. Newsom, No. 21-15189, 2021 WL 781981, at *1 (9th Cir. Feb. 12, 2021), *disapproved in later proceedings sub nom.* Gateway City Church v. Newsom, No. 20A138, 2021 WL 753575 (U.S. Feb. 26, 2021).

624. Emergency Application for Injunction, Gateway City Church v. Newsom, No. 20A138, 2021 WL 753575 (U.S. Feb. 21, 2021).

625. Opposition to Emergency Application for Injunction, Gateway City Church v. Newsom, No. 20A138, 2021 Westlaw 753575 (U.S. Feb. 25, 2021), http://www.supremecourt.gov/DocketPDF/20/20A138/169877/20210224152237242_Gateway%20SCOTUS%20Opp.pdf [https://perma.cc/3GG3-T56B].

626. Letter from James R. Williams, Cty. Counsel, to Hon. Scott S. Harris, Clerk of the Court, Supreme Court of the United States (Feb. 25, 2021), https://www.supremecourt.gov/DocketPDF/20/20A138/170114/20210225220817920_2021.02.25%20Gateway%20Letter%20-%20To%20File.pdf [https://perma.cc/N33N-G3Z6].

627. *See supra* note 531.

628. Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.) (emphasis added).

language. I was not able to find the phrase "clearly dictated" used in any other ruling on the shadow docket. Justice Kagan dissented for the reasons set out in her *South Bay II* dissent.[629] She was joined by Justices Breyer and Sotomayor.[630]

There would be one more COVID-19 case on the Court's shadow docket from California.

D. Tandon v. Newsom

By April 2021, the COVID-19 pandemic had entered its denouement. Vaccination rates were on the upswing.[631] Hospitalization rates were on the downswing.[632] And cities and states began to lift pandemic-related restrictions.[633] Nearly one year to the date after the last in-person oral argument,[634] the Supreme Court would decide its last COVID-19 case. And once again, the appeal would arise from California. Governor Newsom's latest restrictions "prohibit[ted] indoor gatherings and limits outdoor gatherings to three households."[635] Once again, the district court upheld the restrictions. Once again, the Ninth Circuit found the prohibition consistent with *Roman Catholic Diocese*. And once again, the Supreme Court summarily reversed the Ninth Circuit. In this case, the Court formally adopted Justice Kavanaugh's "most-favored" right framework from *Calvary Chapel* and found that California's restrictions

629. *Id.*

630. *Id.*

631. Liz Hamel et al., *KFF COVID-19 Vaccine Monitor–April 2021*, KAISER FAM. FOUND. (May 6, 2021), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-april-2021/ [https://perma.cc/JM67-Z9DD].

632. *See, e.g.*, *Going Once? Going Twice? Vaccinated!*, CDC (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html#print [https://perma.cc/37HW-RRKL].

633. Tim Fitzsimmons & The Associated Press, *These states are rolling back Covid restrictions, including mask mandates and indoor capacity caps*, NBC (Apr. 20, 2021, 2:23 PM), https://www.nbcnews.com/news/us-news/these-states-are-rolling-back-covid-restrictions-including-mask-mandates-n1259751 [https://perma.cc/4N8Q-S6YQ].

634. *Calendar of Events*, SCOTUSBLOG (Feb. 2020), https://www.scotusblog.com/events/2020-03/ [https://perma.cc/9JCJ-LPVG].

635. Tandon v. Newsom, No. 20-CV-07108-LHK, 2021 WL 411375, at *13 (N.D. Cal. Feb. 5, 2021).

were not neutral and generally applicable.

1. *Tandon* district court proceedings

In October 2020, Pastor Jeremy Wong and Karen Busch challenged the constitutionality of California's restrictions on in-home worship.[636] They held "Bible studies, theological discussions, collective prayer, and musical prayer at their homes."[637] The Plaintiffs argued that the state's restrictions violated the Free Exercise Clause. The case lingered in the district court for four months, as the Supreme Court decided *Roman Catholic Diocese*. On February 5, 2021—the same day the Supreme Court decided *South Bay II*—the district court rejected the Free Exercise challenge.[638]

2. *Tandon* before the Ninth Circuit

Nearly two months later, on March 30, 2021, a divided Ninth Circuit panel declined to grant an injunction pending appeal.[639] At this point, the Supreme Court had already decided *Gateway City Church*. That decision halted the governor's restrictions on houses of worship.[640] Yet the Ninth Circuit found that the restrictions on in-home worship were distinguishable from the restrictions on houses of worship: "When compared to analogous secular in-home private gatherings, the State's restrictions on in-home private religious gatherings are neutral and generally applicable and, thus, subject to rational basis review."[641] And the court found this decision consistent with *Roman Catholic Diocese*, *South Bay II*, and *Gateway City Church*.[642]

Judge Bumatay dissented from the denial of the injunction. He contended that "[t]he instructions provided by the Court are clear and, by now, redundant."[643] Judge Bumatay distilled three

636. *Id.* at *11.
637. *Id.* at *13.
638. *Id.* at *38–40.
639. Tandon v. Newsom, 992 F.3d 916, 930 (9th Cir. 2021).
640. Gateway City Church v. Newsom, 141 S. Ct. 1460, 1460 (2021) (mem.).
641. *Tandon*, 992 F.3d at 930.
642. *Id.*
643. *Id.* at 932 (Bumatay, J., dissenting).

principles from the Court's cases. "First, regulations must place religious activities on par with the *most favored class* of comparable secular activities, or face strict scrutiny."[644] Here, Judge Bumatay cited the majority opinion from *Roman Catholic Diocese*, but the discussion of the "most favored" right came from Justice Kavanaugh's concurrence in *Calvary Chapel*.[645] "Second, the fact that a restriction is itself phrased without reference to religion is not dispositive."[646] California's restrictions should be reviewed with strict scrutiny because "*some* comparable secular activities are less burdened than religious activity."[647] Judge Bumatay selected the correct comparator: not *all* comparable secular activities, but *any* comparable secular activities. "Third, businesses are analogous comparators to religious practice in the pandemic context."[648] On appeal, the Supreme Court would recognize each of these three principles.

3. *Tandon* rockets through the shadow docket

On April 2, Pastor Wong and Karen Busch sought an emergency injunction from the Supreme Court.[649] Right away, California engaged in yet another game of whac-a-mole.[650] The petitioners filed their application around 5:00 PM PT. About two hours later, California changed course, and announced it would lift the restrictions on in-home worship. The state issued a new guidance document. The Metadata on the PDF indicated the document was modified at 4:56 PM PT.[651] Soon enough, the petitioners would be allowed to

644. *Id.* (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) (per curiam)).

645. *See supra* text accompanying notes 294–300.

646. *Tandon*, 992 F.3d at 932.

647. *Id.* (emphasis added).

648. *Id.* (citing *Roman Cath. Diocese*, 141 S. Ct. at 67).

649. Docket No. 20A151, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/ html/Public/20A151.html [https://perma.cc/YQ5E-2KD3].

650. *See* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021) ("California officials changed the challenged policy shortly after this application was filed . . . .").

651. Josh Blackman, *About Two Hours After Bible Worship Group Seeks Emergency Injunction, California Relaxes Guidance for April 15–After Easter, of Course*, REASON: VOLOKH

worship in their homes. Alas, not in time for Easter Sunday, which was on April 4. The new rules would go into effect on Monday, April 15.[652] At the time, I doubted the timing was coincidental.[653] Thirteen days later, the case for injunctive relief would become much weaker. I speculated that California was "once again, trying to frustrate Supreme Court review."[654]

Here, the briefing schedule would be very important. Had the Supreme Court granted California two weeks to file a reply, the state could have arguably run out the clock. However, Circuit Justice Kagan moved with dispatch. She ordered the governor to file his response by April 8.[655] And on noon pacific time on April 9, the Petitioners filed their reply brief. How long would the Court take to resolve this dispute? In prior COVID-19 cases, the Court took several days after briefing concluded to resolve emergency applications. *Danville Christian Academy* took nine days.[656] *Roman Catholic Diocese* took six days.[657] *South Bay II* also took six days.[658] The one paragraph order in *Gateway City Church* took one day.[659]

Tandon, however, would rocket through the shadow docket. On the evening of April 9, shortly before midnight eastern time, the

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CONSPIRACY (Apr. 2, 2021), https://reason.com/volokh/2021/04/02/about-two-hours-after-bible-worship-group-seeks-emergency-injunction-california-relaxes-guidance-for-april-15-after-easter-of-course/ [https://perma.cc/AB9Y-MS8J].

652. *Blueprint for a Safer Economy*, REASON: VOLOKH CONSPIRACY (Apr. 13, 2021), https://reason.com/wp-content/uploads/2021/04/Dimmer-Framework-September_2020-1.pdf [https://perma.cc/B78A-QQT2].

653. *See* Blackman, *supra* note 651.

654. *Id.*

655. Docket No. 20A151, *supra* note 649.

656. Docket No. 20A96, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/ public/20a96.html [https://perma.cc/GNX3-99H6].

657. Docket No. 20A87, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/20a87.html [https://perma.cc/7645-NQ7Y].

658. Docket No. 20A136, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/ public/20a136.html [https://perma.cc/PG9Q-S6QM].

659. Docket No. 20A138, SUPREME COURT OF THE UNITED STATES.

Court granted the injunction.[660] The vote was 5-4. Justice Kagan wrote a two-page dissent, which Justices Breyer and Sotomayor joined.[661] Chief Justice Roberts dissented without writing a separate opinion.[662]

Over the prior year, no other COVID case moved as quickly on the Supreme Court's docket. Indeed, it is fair to speculate that the Justices decided *Tandon* and circulated draft opinions before the parties had even submitted their briefs. Less than nine hours after briefing was completed, the Court issued a four-page per curiam opinion.[663] Here, the Court concluded that the Ninth Circuit clearly erred.[664] The majority seemed ready to reverse the lower court, regardless of what California argued. The timing of this case also differed from the timing in *Danville Christian Academy*. On April 15, the case for emergency injunctive relief would become weaker. At that point, the state would no longer enforce the restrictions on private gatherings.[665]

The Court could have dragged its feet till the last minute, and found that there was no longer any need to decide the case. *Danville* executed that punt.[666] But in *Tandon*, the Court waited barely nine hours before enjoining the governor's restrictions.

4. The *Tandon* per curiam opinion

The per curiam opinion had four principal elements. First, the Court formally embraced Justice Kavanaugh's *Calvary Chapel*

660. Josh Blackman, *Breaking: SCOTUS Grants Injunction in* Tandon v. Newsom, REASON: VOLOKH CONSPIRACY (Apr. 10, 2021), https://reason.com/volokh/2021/04/10/breaking-scotus-grants-injunction-in-tandon-v-newsom/ [https://perma.cc/6UJV-HDPR].

661. Tandon v. Newsom, 141 S. Ct. 1294, 1298 (2021).

662. *See id.*

663. Blackman, *supra* note 660.

664. *Id.* at 1296 ("The Ninth Circuit's failure to grant an injunction pending appeal was *erroneous*." (emphasis added)).

665. *See* Adam Beam & Janie Har, *California to allow indoor gatherings as virus cases plummet*, ASSOCIATED PRESS (Apr. 2, 2021), https://www.usnews.com/news/best-states/california/articles/2021-04-02/california-to-allow-indoor-gatherings-as-virus-cases-plummet [https://perma.cc/LA79-MSWU].

666. *See supra* Part V.A.3 (discussing the *Danville* punt).

framework. The opinion explained that "government regulations are not neutral and generally applicable . . . whenever they treat *any* comparable secular activity more favorably than religious exercise."[667] Here, the key word is "any." If "*any* comparable secular activity" is given some special status, then the free exercise of religion must also be afforded that "most-favored" status. The Court explained that "[i]t is no answer that a State treats *some* comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[668] Here, the per curiam Court relied on Justice Kavanaugh's *Roman Catholic Diocese* concurrence. Now, Justice Kavanaugh's framework became the Court's framework. The Court had come full circle since *South Bay I* and *Calvary Chapel*. And I suspect *Tandon* was decided in the shadow of the not-yet-decided *Fulton v. City of Philadelphia*.[669]

In light of this standard, California's regulation was not neutral. "California treats *some* comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time."[670] Again, the most important word in that sentence is *some*. If some, or any comparable businesses are treated "more favorably" than the house of worship, the regulation is not neutral.

Next, the Court identified a second principle. It was irrelevant "*why* people gather."[671] Rather, courts should perform the comparison analysis based on the "risks various activities pose."[672] Here, the Court formally embraced Justice Gorsuch's framework from

667. *Tandon,* 141 S. Ct. at 1296 (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67–68 (2020) (per curiam)) (emphasis added).

668. *Id.* (citing *Roman Cath. Diocese*, 141 S. Ct. at 66–67 (Kavanaugh, J., concurring)).

669. Docket No. 19-123, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/19-123.html [https://perma.cc/FT2M-SCAU].

670. *Tandon*, 141 S. Ct. at 1297 (emphasis added).

671. *Id.* at 1296 (emphasis added) (citing *Roman Cath. Diocese*, 141 S. Ct. at 66 (Gorsuch, J., concurring)).

672. *Id.*

Roman Catholic Diocese. The Ninth Circuit erred. The panel did not consider whether "comparable secular activities," such as restaurants and movie theaters, "pose a lesser risk of transmission" than "religious exercise at home" pose.[673] Instead, "[t]he Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings."[674] This distinction was immaterial. A person's choice to pray in a church or at home does not affect the analysis.

Third, under this form of strict scrutiny, the government bears the burden of proof to defend the policy. The house of worship does not have the burden of proof to attack the policy. The Court explained that the government's arguments must go beyond generalities of the pandemic. The state cannot simply identify "certain risk factors [that] 'are always present in worship, or always absent from the other secular activities' [that] the government may allow."[675] Rather, "narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID."[676] This test resembles the least-restrictive means standard.[677]

For example, it is not enough to simply assert that people gather for extended periods of time in private at-home worship. People also gather in close quarters for extended periods of time in theaters and restaurants. The government permits these activities with precautionary measures, such as distancing and mask-wearing. "Where the government permits other activities to proceed with precautions," the Court explains, "it must show that the religious

673. *Id.* at 1297.

674. *Id.*

675. *Id.* at 1296 (citing S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 718 (2021) (statement of Gorsuch, J.) (mem.); *id.* at 717 (Barrett, J., concurring) (mem.)).

676. *Id.* at 1297.

677. Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the *least restrictive* means of achieving some compelling state interest." (emphasis added)); *see also* 42 U.S.C. 2000bb-1(b) (2018) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest; and is the *least restrictive means* of furthering that compelling governmental interest." (emphasis added)).

exercise at issue is *more dangerous* than those activities even when the same precautions are applied."[678] Whatever "precautions [may] suffice for" permitted activities should "suffice for religious exercises too."[679] To satisfy this test, the government must prove that prohibiting indoor worship is the *only* way to achieve its interests. Of course, this standard cannot be met. Distancing, mask wearing, and other precautionary measures could help the government reduce the spread of COVID-19. The ban on indoor worship was not the least restrictive means to accomplish the state's goal.

In this case, the Plaintiffs "were more than willing to . . . require[e] attendees to wear masks, socially distance and stay away if symptomatic."[680] They were even willing to worship outside. But the state did not afford them the same accommodations that other, preferred secular activities were afforded. And "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work.'"[681] Here, the Court formally embraces the Sixth Circuit's opinion in *Roberts v. Neace*, which predated *South Bay I*.[682]

Finally, the Court turned to a fourth principle: the controversy was still live. Here, even if California *planned* to withdraw the restrictions, the case was not yet moot. The Plaintiffs "'remain[ed] under a constant threat' that government officials will use their power to reinstate the challenged restrictions."[683] Thus, they remained "entitled to emergency injunctive relief."[684] The Court stressed that relief was especially appropriate because California had a "track record of 'moving the goalposts,'" and "retain[ed] authority to

678. *Tandon*, 141 S. Ct. at *1297.*

679. *Id.* (citing Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69–70; *South Bay*, 141 S. Ct. at 719 (statement of Gorsuch, J.)).

680. Robert Dunn, *Op-Ed: Supreme Court decision on at-home worship wisely supported religious liberty*, L.A. TIMES (Apr. 13, 2021, 12:47 PM), https://www.latimes.com/opinion/story/2021-04-13/supreme-court-california-worship-covid-bible-study [https://perma.cc/D6D8-SWMA].

681. *Tandon*, 141 S. Ct. at 1297 (quoting Roberts v. Neace, 958 F. 3d 409, 414 (6th Cir. 2020)).

682. *Id.*; *see supra* Part I.C (discussing Sixth Circuit precedent).

683. *Tandon*, 141 S. Ct. at 1297 (quoting *Roman Cath. Diocese*, 141 S. Ct. at 68).

684. *Id.*

reinstate those heightened restrictions at any time."[685] California would lose this final game of whac-a-mole.

The per curiam opinion concluded that "[t]his Court's decisions have made" these four "points clear."[686] Moreover, "[t]hese [four] principles dictated the outcome in this case."[687] I would not say the principles were "clear." Nor did the prior cases "dictate" the result. I think *Tandon* elucidated the necessary reasoning underlying *Roman Catholic Diocese*. Up to this point, the Court had been somewhat cagey about how to define neutrality. Justice Kavanaugh was the only member of the Court who tried to answer this question. And I think Justice Kavanaugh's framework was the only way to understand why New York's policies were unconstitutional. Relief, in *Tandon*, was not "unsurprising." Judge Bumatay accurately read *Roman Catholic Diocese*. The Ninth Circuit panel majority did not.

5. Justice Kagan's *Tandon* dissent

Justice Kagan wrote a two-page dissent in *Tandon*. And she "den[ied] the application largely for the reasons stated in" her *South Bay II* dissent.[688] Justice Kagan acknowledged that "finding the right secular analogue may [sometimes] raise hard questions."[689] But, she reasoned, this case was not tough. California "ha[d] adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike."[690] Religious in-home gatherings were treated the same as secular in-home gatherings. Justice Kagan was not willing to compare religious *indoor* gatherings to other types of secular *indoor* gatherings, such as restaurants or movie theaters. She narrowed the scope of comparisons to "gatherings in homes," which she labelled the "obvious comparator."[691] California, Justice Kagan wrote, was not required to "treat at-home religious gatherings the same as

685. *Id.* (citing *South Bay*, 141 S. Ct. at 720 (2021) (statement of Gorsuch, J.)).
686. *Id.* at 1296.
687. *Id.* at 1297.
688. *Id.* at 1298 (Kagan, J., dissenting).
689. *Id.*
690. *Id.*
691. *Id.*

[indoor gatherings at] hardware stores and hair salons."[692]

Justice Kagan also shined a light on the shadow docket. She wrote that the Court "reli[ed] on separate opinions and *unreasoned orders*."[693] This criticism rings hollow, and comes a bit late. For much of 2020, Chief Justice Roberts's separate opinion was the law of the land. Dozens of federal courts cited it, without hesitation. Indeed, Justice Kagan had cited Chief Justice Roberts' separate opinion.[694] The *Tandon* majority should be entitled to at least as much respect, if not more, than a solo concurrence.

* * *

For the "fifth time" in four months, the Supreme Court "summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."[695] Two days after the Court ruled, California lifted all "location and capacity limits on places of worship."[696] At long last, California's pandemic restrictions on the free exercise of religion had drawn to a close.

VI. PHASE VI: THE PANDEMIC WANES, THE SEPARATION OF POWERS ARE RESTORED

In time, the COVID-19 pandemic will draw to a close. And this sixth, and final phase will afford our polity an opportunity to assess the legal strictures that endured for more than a year. And this introspection should let the states carefully consider a foundational question: which branch of government should decide how to restrict civil liberties during an ongoing emergency. In the past, it was

692. *Id.*

693. *Id.* (emphasis added).

694. S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 721 (2021) (Kagan, J., dissenting).

695. *Tandon,* 141 S. Ct. at 1297 (citing Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.); South Bay, 141 S. Ct. 716 (2021) (mem.); Gish v. Newsom, 141 S. Ct. 1290 (2021); Gateway City Church v. Newsom, 141 S. Ct. 1460 (2021)).

696. Josh Blackman, *Breaking: California Lifts All "Location and Capacity Limits on Places of Worship"*, REASON: VOLOKH CONSPIRACY (Apr. 12, 2021), https://reason.com/volokh/2021/04/12/breaking-california-lifts-all-location-and-capacity-limits-on-places-of-worship/ [https://perma.cc/89GG-GT4S].

widely assumed that governors should have wide latitude.[697] Unitary executives could react nimbly to short-term crises like hurricanes or earthquakes.[698] But in light of a viral outbreak that lasted for months on end, the legislature must be able to assert itself. Indeed, in the spring of 2021, New York and other states began to impose limitations on gubernatorial power during health emergencies. Going forward, states should consider three models to bring balance to state government. First, state legislatures can preemptively define certain activities as "essential" or "life-sustaining." Second, states should require legislative approval for emergencies that extend beyond x days. Third, states should make it easier for legislatures to terminate emergency executive orders. As the pandemic wanes, legislatures can restore the separation of powers.

A. Which branch of government decides during the pandemic?

During the pandemic, courts largely deferred to government's determinations of what policies would best promote public health. Chief Justice Roberts expressed this sentiment in *South Bay I*. "The precise question of when restrictions on particular social activities should be lifted," he wrote, "is a dynamic and fact-intensive matter subject to reasonable disagreement."[699] Chief Justice Roberts explained that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials

697. *See* John Farmer Jr., *9/11 commission official calls on government to change response to coronavirus immediately: OPINION*, ABC NEWS (Mar. 28, 2020, 5:06 AM), https://abcnews.go.com/Politics/911-commission-official-calls-government-change-response-coronavirus/story?id=69822778 [https://perma.cc/U3QP-NVRR] ("Our national emergency response system, which rests on the normally sound assumption that governors are best equipped to make critical decisions, has been overrun by a global pandemic that by definition respects no political boundaries.").

698. NAT'L GOVERNORS ASS'N, A GOVERNOR'S GUIDE TO HOMELAND SECURITY 3 (2019), https://www.nga.org/wp-content/uploads/2010/11/NGA_HomelandSecurityGuide_2.19_update.pdf [https://perma.cc/T96R-KK28] ("Governors have considerable authority to call for additional resources. . . . Knowing how to effectively and expediently use these assets and assistance is essential to how quickly a state can respond to an event.")

699. S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (mem.).

of the States 'to guard and protect.'"[700] But which politically accountable officials made these decisions?

For the most part, state legislatures stayed on the sidelines. Rather, during the COVID-19 pandemic, governors exercised sweeping authority to regulate all aspects of human existence. The Second Circuit observed that New York Governor Andrew Cuomo's executive orders were "unprecedented in their number, breadth, and duration."[701] A 1979 law stated that "the governor may by executive order temporarily suspend any" law if that suspension was "necessary to assist or aid in coping with such disaster."[702] And in March, the New York state legislature gave Cuomo the power to "issue any directive . . . necessary to cope with the disaster."[703] Between March and December 2020, the governor "issued almost 90 executive orders" that "affect[ed] nearly every aspect of life in the State, including restrictions on activities like private gatherings and travel."[704] And he issued "500 directives, modifications or suspensions of state regulations."[705]

And were these decisions made solely on the basis of science? Of course not. Politically accountable politicians make political decisions. In a press conference, Governor Cuomo admitted that he does not blindly follow the recommendations of scientists.[706] "When I say 'experts' in air quotes, it sounds like I'm saying I don't really trust the experts. Because I don't. Because I don't."[707] All

700. *Id.* (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905)).

701. Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 625 (2d Cir. 2020).

702. N.Y. EXEC. LAW § 29-a (McKinney 2020), https://www.nysenate.gov/legislation/laws/EXC/29-A [https://perma.cc/QM4L-XGN5].

703. Edward McKinley, *Democrats Forge Deal to Strip Cuomo's Emergency Powers*, TIMES UNION (Mar. 2, 2021, 6:14 PM), https://www.timesunion.com/news/article/Democrats-forge-deal-to-strip-Cuomo-emergency-15994351.php [https://perma.cc/8BFH-MLRZ]; EXEC. § 29-a, https://www.nysenate.gov/legislation/laws/EXC/29-A [https://perma.cc/QM4L-XGN5].

704. *Id.*

705. McKinley, *supra* note 703.

706. J. David Goodstein et al., *9 Top Health Officials Have Quit as Cuomo Scorns Expertise*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/nyregion/cuomo-health-department-officials-quit.html [https://perma.cc/55KP-3MVR].

707. *Id.*

politicians are motivated by politics. And politicians can find experts who submit declarations that support their views.

Consider an example from New York. In December 2020, the Buffalo Bills made the National Football League's playoffs.[708] Sport venues in New York could not host fans for games. But Governor Cuomo established an elaborate scheme that would permit nearly 7,000 fans to watch the game in Bills Stadium.[709] During this time, the state was urging people not to congregate with family and friends for Christmas or New Year's.[710] But New York established an elaborate scheme to let fans watch football in person. Why? My guess is politics. Voters in upstate New York are an influential voter bloc, and Cuomo wanted to appease this constituency. Why did Governor Cuomo not approach Christian groups about hosting large gatherings for Christmas? What about a large Menorah lighting for Chanukah? To the governor, people of faith were apparently not as important as the Bills Mafia.[711] Likewise, in California, Governor Newsom began to roll back COVID restrictions in the face of a recall movement.[712] Politicians are not scientists. Nor should they

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708. *See* Ken Belson, *The Bills will play in the A.F.C. championship game for the first time in 27 years*, N.Y. TIMES (Jan. 16, 2021, 11:40 PM), https://www.nytimes.com/live/2021/01/16/sports/nfl-playoffs [https://perma.cc/99XB-6ES5].

709. *See* Marcel Louis-Jacques, *Buffalo Bills Granted Permission to Have Fans at Playoff Game, First Crowd of Season*, ESPN (Dec. 30, 2020), https://www.espn.com/nfl/story/_/id/30625221/buffalo-bills-granted-permission-fans-playoff-game-first-crowd-season [https://perma.cc/K2PB-UFLN].

710. *See, e.g.*, Press Release, N.Y. State, Governor Cuomo Announces 89,000 New Yorkers Have Received First COVID-19 Vaccine Dose (Dec. 23, 2020), https://www.governor.ny.gov/news/video-audio-rush-transcript-governor-cuomo-announces-89000-new-yorkers-have-received-first [https://perma.cc/BF7H-RQSA] ("More travel is a proxy for more social gatherings, more social gatherings, fewer precautions, more spread. . . . Celebrate. But just be smart about the way you celebrate, right? Avoid the density, open the windows, take a walk outside.").

711. *See* Adam Kilgore, *'Bills Mafia' Waited a Generation for a Team Like This. It Has Had to Embrace It from Afar.*, WASH. POST (Jan. 7, 2021), (https://www.washingtonpost.com/sports/2021/01/07/bills-mafia-fans-coronavirus/ [https://perma.cc/J98N-RJHV].

712. *See* Taryn Luna, *As Recall Threat Grows, California Gov. Gavin Newsom Shifts his Governing Style, Pushing Reopenings*, YAHOO NEWS (Feb. 27, 2021), https://news.yahoo.com/recall-threat-grows-california-gov-130019079.html [https://perma.cc/D3T5-

be. Yet courts should take stock of these simple dynamics when considering emergency measures that were not approved by the legislatures. Blind deference is not warranted.

In the midst of a crisis, the unitary executive can be more energetic and nimbler than the bicameral legislature.[713] Andy Beshear, the governor of Kentucky, stated that state executives "have done the right things in trying times and circumstances, and their willingness and courage to do it is exactly why their authority has to remain with them."[714]

However, as time lapsed, and governments began to learn more about COVID-19, this unilateral action became harder to defend. As 2020 turned to 2021, state legislatures began to assert themselves. And unaccountable governors became accountable.

B. New York and other states reclaim power from the governors

In the spring of 2021, statehouses began to restore the separation of powers. In New York, the Democratic-controlled legislature reached a compromise to cabin the Democratic governor's powers.[715] The *New York Times* observed, "In a kind of rear-guard action, legislatures in more than 30 states are trying to restrict the power of governors to act unilaterally under extended emergencies that have traditionally been declared in brief bursts after floods, tornadoes or similar disasters."[716] Specifically, the legislation barred the "the governor from unilaterally issuing new executive orders related to the pandemic without legislative review."[717] This statute

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R37K] ("Newsom flatly rejects the suggestion that politics have played a role in his pandemic decisions and has not publicly acknowledged the recall effort even as he shifts to campaign-style events in major media markets across the state. But his aides have acknowledged the obvious: Newsom's chances of beating back the effort would be higher if schools are open and Californians are widely vaccinated before a possible election, allowing fatigued voters to resume their daily lives.").

713. *See* THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

714. *See* Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html [https://perma.cc/HR6G-NMVD].

715. McKinley, *supra* note 703.

716. Gabriel, *supra* note 714.

717. McKinley, *supra* note 703.

stripped the governor's power to "issue any directive during a state disaster emergency."[718] But Cuomo still "retain[ed] the ability to tweak or renew existing orders relating to slowing the spread of COVID-19."[719] Andrew Stewart-Cousins, the state Senate Majority Leader, acknowledged that the situation had changed since March 2020.[720] "The public deserves to have checks and balances," he said.[721] "Our proposal would create a system with increased input while at the same time ensuring New Yorkers continue to be protected."[722] Carl E. Heastie, the Assembly Speaker, expressed a similar sentiment. In March, "temporary emergency powers were granted as New York was devastated by a virus we knew nothing about."[723] But by February 2021, it became "time for our government to return to regular order."[724]

In March 2021, the New York legislature enacted Chapter 71.[725] The statute "declares that it is time to restore the pre-pandemic balance of power of the governor and legislature."[726] Now the governor cannot impose measures unilaterally. Rather, the Commissioner of Health must certify how the changes will "address the spread and/or reduction of the COVID–19 virus."[727] And the governor must submit those modifications to the legislature for notice and comment.[728] Moreover, "No directive may be extended or modified more than once unless the governor has responded, including electronically, to any comments provided" by the legislature.[729] Finally, "The legislature may terminate by concurrent resolution executive orders issued under this section at any time."[730] This statute

718. S. 4888, 2021 Leg., 244th Sess. (N.Y. 2021).
719. McKinley, *supra* note 703.
720. *Id.*
721. *Id.*
722. *Id.*
723. *Id.*
724. *Id.*
725. 2021 N.Y. Sess. Laws Ch. 71 (McKinney).
726. *Id.* § 1.
727. *Id.* § 2.1.
728. *Id.* § 2.2(b).
729. *Id.* § 2.2(f).
730. *Id.* § 2.2(g).

should prevent Governor Cuomo from unilaterally deciding all aspects of public health policy.

Other states have taken similar steps to restrict gubernatorial emergency powers. The Kansas legislature revoked all emergency orders and created a specific process by which the governor could reissue those orders.[731] The Ohio legislature made it tougher for the governor to issue emergency orders.[732] Now, the legislature can cancel any health orders that last more than thirty days, and the governor must seek legislative authorization to extend his order beyond sixty days.[733] The Utah legislature terminated the state's mask mandate, and curbed emergency powers.[734] The executive branch now has to give notice to the legislature before imposing public health constraints.[735] Moreover, emergencies can expire thirty days after they are declared.[736] North Dakota seems to have enacted the *Roman Catholic Diocese* standard into law. Now, the government cannot "[t]reat religious conduct more restrictively than any secular conduct of reasonably comparable risk, unless the government demonstrates through clear and convincing scientific evidence that

731. *Governor Kelly signs emergency response bill, will reissue executive orders to protect COVID-19 recovery*, KSN News (Mar. 24, 2021, 5:00 PM), https://www.ksn.com/news/local/governor-kelly-signs-emergency-response-bill-to-re-issue-executive-orders-to-protect-covid-19-recovery [https://perma.cc/5KR8-W9LF]; 2021 Kan. Sess. Laws 7 (SB40), http://kslegislature.org/li/b2021_22/measures/documents/sb40_enrolled.pdf [https://perma.cc/3XWW-P4E9].

732. Jeremy Pelzer, *Ohio lawmakers override DeWine veto, pass limits on governor's coronavirus powers*, CLEVELAND.COM (Mar. 24, 2021), https://www.cleveland.com/open/2021/03/ohio-lawmakers-override-dewine-veto-pass-limits-on-governors-coronavirus-powers.html [https://perma.cc/KUW7-YW4U].

733. OHIO REV. CODE ANN. §§ 107.42(D)(1), 107.42(E) (West 2021), https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/sb22/EN/05?format=pdf [https://perma.cc/5K45-2TTH].

734. Bethany Rodgers, *Utah's statewide mask mandate will end April 10 after Gov. Spencer Cox signed pandemic 'endgame' bill*, SALT LAKE TRIB. (Mar. 24, 2021), https://www.msn.com/en-us/news/us/utah-e2-80-99s-statewide-mask-mandate-will-end-april-10-after-gov-spencer-cox-signed-pandemic-e2-80-98endgame-e2-80-99-bill/ar-BB1eVTRY [https://perma.cc/S4R5-UJYC].

735. 2021 Utah Laws ch. 437 (S.B. 195) (amending UTAH CODE ANN. § 26-23b-104(b)(i) (West 2021)), https://le.utah.gov/~2021/bills/static/SB0195.html [https://perma.cc/8GP3-ZYZ9].

736. *Id.* (amending UTAH CODE ANN. § 26-23b-104(4)(a)(ii) (West 2021)).

a particular religious activity poses an extraordinary health risk."[737]

As this Article goes to print, more than 300 measures were being considered nationwide.[738] Pennsylvania voters approved a constitutional amendment to limit the governor's authority.[739] This measure forces an emergency declaration to automatically expire after twenty-one days, regardless of the severity.[740] Finally, the Pacific Legal Foundation, a libertarian public interest law firm, has proposed model legislation.[741]

C. How legislatures should respond to COVID-19

Going forward, state governments should glean some lessons from the pandemic. And, in the process, legislatures should reclaim their station in the separation of powers. I think there are three general approaches states can follow.

First, state legislatures can preemptively define certain activities as "essential" or "life-sustaining." As a result, state governors would not be able to shutter, on an ad hoc basis, certain activities deemed as non-essential. Ohio and Arkansas enacted laws that

737. 2021 N.D. Legis. Serv. 195 (West) (S.B. 2181), https://legiscan.com/ND/text/2181/2021 [https://perma.cc/N72M-72K3].

738. Michael Wines, *State lawmakers take aim at the emergency powers governors have relied on in the pandemic.*, N.Y. TIMES (Mar. 27, 2021), https://www.nytimes.com/2021/03/26/world/covid-governors-emergency-powers.html [https://perma.cc/R6NU-PFQH].

739. Josh Blackman, *Pennsylvania Voters Can Approve Constitutional Amendment To Limit Governor's Emergency Powers*, REASON: VOLOKH CONSPIRACY (Mar. 28, 2021, 9:00 PM), https://reason.com/volokh/2021/03/28/pennsylvania-voters-can-approve-constitutional-amendment-to-limit-governors-emergency-powers/ [https://perma.cc/8QPC-SSMR]; Sarah Anne Hughes, *Voters back curtailing Wolf's emergency powers in win for GOP lawmakers*, SPOTLIGHT PA (May 19, 2021), https://www.spotlightpa.org/news/2021/05/pa-primary-2021-ballot-question-disaster-declaration-results/ [https://perma.cc/4CU9-A243].

740. *Proposed Amendments to the Constitution of Pennsylvania*, PENN. DEP'T OF STATE, https://www.dos.pa.gov/VotingElections/Pages/Joint-Resolution-2021-1.aspx [https://perma.cc/CW9R-TZ87].

741. PAC. LEGAL FOUND., EMERGENCY POWER LIMITATION ACT (2021), https://pacificlegal.org/wp-content/uploads/2021/02/PLF-Model-Legislation-Emergency-Power-Limitation-Act-10-09-20.pdf [https://perma.cc/7TVQ-MFGE].

restrict governors from limiting the free exercise of religion.[742]

States can look to prior treatment of the Second Amendment for direction. In the wake of Hurricane Katrina, several states enacted laws that prevented governors from restricting access to firearms during a pandemic.[743] During that catastrophe, New Orleans police officers seized firearms from civilians.[744] Other states had similar policies. On March 23, 2020, the governor of Kentucky explained that his shut-down order did not "interfere with the lawful sale of firearms and ammunition."[745] But the order did not designate firearm stores as "life-sustaining."[746] Rather, Kentucky law specifically prohibited its governor from "impos[ing] additional restrictions on the lawful possession, transfer, sale, transport, carrying, storage, display, or use of firearms and ammunition" during an emergency.[747] The Kentucky governor's hands were tied.

A similar dynamic played out in Nevada. The Nevada governor did not designate firearm stores as essential businesses.[748] But a 2007 state law limited the governor's emergency powers. Specifically, the governor could not "impos[e] additional restrictions as to the lawful possession, transfer, sale, carrying, storage, display or

742. *See* Act of Sept. 1, 2020, No. 272, 2020 Ohio Laws 44, sec. 1, § 9.57; Act of Feb. 11, 2021, No. 1211, 2021 Ark. Acts 94, sec. 2, § 12-75-134.

743. Riley Snyder, *Guns and Ammunition Sellers Allowed to Operate, Exempted in Law From 'Nonessential' Business Shutdown*, NEV. INDEP. (Mar. 23, 2020), https://thenevadaindependent.com/article/guns-and-ammunition-sellers-allowed-to-operate-exempted-in-law-from-nonessential-business-shutdown [https://perma.cc/57SF-QE6A].

744. Alex Berenson & John M. Broder, *Police Begin Seizing Guns of Civilians*, N.Y. TIMES (Sep. 9, 2005), https://www.nytimes.com/2005/09/09/us/nationalspecial/police-begin-seizing-guns-of-civilians.html [https://perma.cc/U8CW-B5RQ]; *see also* Adam Weinstein, *The NRA Twisted a Tiny Part of the Katrina Disaster to Fit Its Bigger Agenda*, TRACE (Aug. 31, 2015), https://www.thetrace.org/2015/08/nra-hurricane-katrina-gun-confiscation/ [https://perma.cc/4XQ9-K2J8].

745. Ky. Exec. Order 2020-246 (Mar. 22, 2020), https://governor.ky.gov/attachments/20200322_Executive-Order_2020-246_Retail.pdf [https://perma.cc/G278-G9SJ].

746. *Id.*

747. KY. REV. STAT. ANN. § 39A.100(3) (West 2021).

748. *See* Steve Sisolak, Governor of Nevada, Declaration of Emergency for COVID-19- Directive 003 (Mar. 20, 2020), https://gov.nv.gov/News/Emergency_Orders/2020/2020-03-20_-_COVID-19_Declaration_of_Emergency_Directive_003_(Attachments)/ [https://perma.cc/6Z6X-CQ4S].

use of: (a) Firearms; (b) Ammunition; or (c) Components of firearms or ammunition."[749] One Nevada sheriff referenced this statute, and said "[W]e haven't seen anything that indicates it's going to be a problem."[750] According to one report, gun sales in Nevada had tripled after the COVID-19 outbreak.[751] Other states should consider enacting similar laws. Texas, for example, empowers the governor to restrict the sale of firearms during an emergency.[752]

State legislatures can consider a second model based on the War Powers Resolution. Under this important federal law, the President can engage in armed conflict for up to sixty days without express congressional authorization.[753] If Congress approves, the President can continue his actions. If Congress disapproves, the President has an additional thirty-day withdrawal period. In December 2020, I suggested a possible extension of this regime to state laws: "The Governor's emergency powers would expire unless the legislature approves an extension of those powers."[754] For example, a state could allow the governor to suspend state laws for up to thirty days after the declaration of an emergency. Beyond that initial grace period, the state legislature would have to approve the extension of emergency orders beyond thirty days.

Now, I do not think this proposal is foolproof. I acknowledge risks to it. Governors could seek to skirt this regime in much the

749. NEV. REV. STAT. § 414.155 (2007).

750. Jeremy Chen, *Nevada Law Allowing Gun Stores to Remain Open During COVID-19 Outbreak*, KTNV 13 NEWS (Mar. 29, 2020), https://www.ktnv.com/news/nevada-law-allowing-gun-stores-to-remain-open-during-covid-19-outbreak [https://perma.cc/DGE6-4VGX].

751. Anjeanette Damon & Amy Alonzo, *Coronavirus May be Driving Up Gun Sales in Nevada Amid Pandemic Concerns*, RENO GAZETTE J. (Mar. 18, 2020), https://www.rgj.com/story/news/2020/03/18/nevada-gun-sales-spike-during-coronavirus-pandemic/2870320001/ [https://perma.cc/87MM-NKZF].

752. *See* TEX. GOV'T CODE ANN. § 418.019 (1987) ("The governor may suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles.").

753. 50 U.S.C. § 1541–1548 (1973).

754. Josh Blackman, *Second Circuit Rules for Agudath Israel and Brooklyn Diocese*, REASON: VOLOKH CONSPIRACY (Dec. 28, 2020), https://reason.com/volokh/2020/12/28/second-circuit-rule-for-agudath-israel-and-brooklyn-diocese/ [https://perma.cc/CDA9-J9FU].

same way that Presidents broadly construe the War Powers Resolution. For instance, governors could simply issue a new emergency every thirty days, thus resetting their powers. Precise legislation may avoid potential abuse. But legislative manacles may prove harmful during a pending crisis. Still, legislatures should be able to reach some happy medium, short of gubernatorial carte blanche. The risk could also cut in the other direction. A significant disaster could prevent the legislature from assembling. If the legislature cannot extend the governor's power, he would be rendered impotent. Still, if the legislature is unable to meet for more than a month, then it is safe to assume that our system of government has collapsed. Even during the height of the pandemic, some state governments found ways to assemble, even if virtually.[755] States should adopt continuity of operations plans to make sure that the governor's powers can be carefully reviewed, even during a crisis. So far, we have seen progress on this front. During the pandemic, nearly thirty states adopted measures to allow virtual voting.[756]

State legislatures could consider a third model, based on the Congressional Review Act.[757] This federal statute created a fast-track process by which Congress can overrule federal regulations. Avi Weiss has proposed that states could create a similar fast-track process, by which legislatures can terminate emergency executive orders.[758] This regime would "keep the origination of emergency response proposals in the hands of the executive, while preserving the right—and responsibility—of the legislature to deliberate over emergency policy, leading to a more representative and

755. *2020 State Legislative Session Calendar*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/2020-state-legislative-session-calendar.aspx [https://perma.cc/7X8Y-RA43].

756. *Continuity of Legislature During Emergency*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx [https://perma.cc/K45L-7PMZ].

757. Pub. L. No. 104–121, 110 Stat. 847 (1996) (codified at 5 U.S.C. § 801 (2018)).

758. *See* Avi Weiss, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 COLUM. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3791065 [https://perma.cc/Y7XY-5C5B].

democratically legitimate response."[759] This regime would avoid the risk of the legislature being unavailable to extend emergency powers.[760]

Going forward, states should consider some, or all of these approaches to ensure the separation of powers endures during never-ending emergencies.

CONCLUSION

Historically, constitutional law has developed at a glacial pace. Change could be measured in years and decades. But during the COVID-19 pandemic, courts were rapidly confronted with novel and difficult questions. Did the state have the power to restrict religious assembly, but permit other type of commercial gatherings? These cases were resolved in a manner of days and weeks. Judges reached to longstanding First Amendment doctrine. But none of these cases were well suited for the unprecedented nature of COVID-19 lockdown measures. Initially, courts largely deferred to the states. But as this pandemic stretched from weeks to months, that restraint inevitably waned. And the patience for unilateral executive action faded. The journey from *South Bay* to *Tandon* tells the story of the American experience with civil liberties and COVID-19. And as this Article goes to press in May 2021, our polity can begin to reflect on this remarkable journey.

759. *Id.*

760. *Id.* ("During a pandemic, legislatures will meet even less frequently. Relying on the state legislature to initiate a quick reaction to an emergency would thus likely mean an intolerable delay in changing the status quo.").

THE LEGALITY OF PRESIDENTIAL SELF-PARDONS

PAUL J. LARKIN, JR.*

I. THE CURIOUS CASE OF PRESIDENTIAL SELF-PARDONS

November and December bring the onset of winter, the promise of Thanksgiving turkeys and hams, the anticipation of gifts at Christmas or Hanukkah, and the issuance of presidential pardons.[1] Every fourth year we also might see a transition in administrations, which can lead to dubious clemency grants. Presidents sometimes misuse their pardon power because they see it as a prerogative of

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1. *See* P.S. Ruckman, Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUD. 21, 27 (2011) (noting that a majority of presidential clemency grants over the preceding forty years were in December or in the last year of their term in office); P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 258 (1997) [hereinafter Ruckman, *Clemency Origins*] ("Interestingly, timing may contribute to both the willingness of the president to think in humanitarian terms and the willingness of the public to accept a pardon defended on such grounds. Lincoln and Johnson certainly counted on the Christmas season to soften hearts toward grants of amnesty."). Sometimes more turkeys are pardoned than people. *See* Douglas A. Berman, *Justified complaints that Obama's first pardon will be of a turkey*, SENT'G L. & POL'Y (Nov. 24, 2009), https://sentencing.typepad.com/sentencing_law_and_policy/2009/11/justified-complaints-that-obamas-first-pardon-will-be-of-a-turkey.html [https://perma.cc/NJ4C-BMCY].

their office—viz., an exclusive and unreviewable power—that they can exercise without relying on the bureaucracy for implementation.[2] Plus, outgoing Presidents, no longer accountable to the electorate and effectively immune from congressional oversight, are freed from any political restraint on their behavior. Some chief executives grant clemency to parties who would never have received it while the political guardrails channeling presidential conduct were still in effect.[3]

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2. The presidential pardon power is plenary. If a good President uses it to clear the record of civil rights protesters, convicted years ago, let us say, of trespassing on federal land, neither the Congress nor the courts may sit in review. If a wicked President uses it to shield white supremacists from a courageous federal prosecutor, there is no recourse. If the President uses the power to make amends for the society's unwillingness to acknowledge religious differences, as President George Bush did on Christmas Eve of 1992, no entity but the public can bring him to brook; and if he uses it to prevent the prosecution of those who carried out a controversial and probably illegal policy, as President Bush also did on Christmas Eve of 1992, that is his right. In particular, there is nothing even constitutionally fishy in the President's use of the pardon power to frustrate the will of the other branches, or to limit their ability to inquire into executive affairs—as President Bush plainly did when he granted pardons to several of the major figures in the Iran-Contra scandal. To say that it cannot be used that way is as silly as saying that the Congress should not use its legislative power to criminalize policy disputes with the executive branch—the rather thin explanation that President Bush offered for his last-minute decision.

Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 883 (1992).

3 . Editors, *Reform the Pardon Power*, NAT'L REV. (Jan. 21, 2021, 5:06 PM), https://www.nationalreview.com/2021/01/reform-the-pardon-power/?utm_source=re-circ-desktop&utm_medium=blog-post&utm_campaign=river&utm_content=more-in&utm_term=fourth [https://perma.cc/CBH4-RNV2]. Several recent Presidents have issued questionable pardons. *See* BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY 116–25 (2020). Two presidents, in particular, stand out.

President Bill Clinton: In his final hours as President, his id overpowered his ego, his superego went on a holiday, and he abused his clemency authority. He could not have been more promiscuous than if he had starred in his own "Presidential Clemency Gone Wild" video. *See, e.g.*, Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1136–37 (2010); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 880–81 (2016) [hereinafter Larkin, *Revitalizing Clemency*]; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195–1200 (2010) [hereinafter Love, *Twilight*] (describing "[t]he Clinton Meltdown"). Acting at the request of private parties who had sought clemency outside of the normal Department of Justice (DOJ) Office of the Pardon Attorney process, some of whom either possessed personal White House connections or had

contributed to his party or presidential library, President Clinton pardoned a host of people, including fugitive from justice Marc Rich, who would not have received a favorable recommendation from the Justice Department. *See* Alschuler, *supra*, at 1136–37. That was not Clinton's only questionable exercise of his clemency authority. *Id.* at 1157 & n.171 (discussing Clinton's grant of conditional commutations to 16 members of FALN, a Puerto Rican terrorist group responsible for 130 bombings at a time when his wife Hillary was running for the Senate from New York state, which has a large Puerto Rican voting bloc); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1484 (2000) ("The President defended his decision in terms of 'equity and fairness,' but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife's expected Senate candidacy." (footnote omitted)). Congress condemned the FALN commutations by votes of 311-to-41 in the House and 95-to-2 in the Senate. Alschuler, *supra*, at 1157.

President Donald Trump: It's questionable that he has an ego and superego. He acted largely without the advice of the Office of the Pardon Attorney of the U.S. Department of Justice, which was created to counsel the President on his treatment of clemency petitions. Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 463–65 (2020) [hereinafter Larkin, *Guiding Clemency*]. There was little traditional rhyme or reason explaining when or why Trump granted clemency. *See id.* at 498 ("President Trump seems to use his clemency power only when a family member, a friend, an acquaintance, or *Fox News* highlights what one or the other believes is an appealing case for mercy."). He issued his first pardon to former County Sheriff Joe Arpaio, who was convicted of criminal contempt of court for willfully violating an injunction forbidding him from following a discriminatory practice in arresting supposedly illegal aliens. Some of Trump's late 2020 pardons were for personal associates Paul Manafort and Roger Stone, who were convicted of or pleaded guilty to crimes uncovered by an investigation into Russia's influence in the 2016 presidential campaign (discussed *infra* at text accompanying notes 31–37). The Wall Street Journal reported that "[i]n response to Mr. Trump's pardons of his associates, Sen. Ben Sasse (R., Neb.) said in a statement: 'This is rotten to the core.'" Rebecca Ballhaus & Byron Tau, *Trump Issues 26 More Pardons, Including to Paul Manafort, Roger Stone*, WALL ST. J. (Dec. 24, 2020, 12:10 AM), https://www.wsj.com/articles/trump-issues-26-more-pardons-including-to-paul-manafort-roger-stone-11608769926?mod=hp_lead_pos3 [https://perma.cc/R34S-CLWY]. Trump also pardoned Charles Kushner, father of Trump's son-in-law Jared, who was convicted of evading taxes, making illegal campaign contributions, and tampering with a witness. The last crime involved hiring a prostitute to seduce his brother-in-law, videotaping the encounter, and sending the tape to his sister to persuade her not to testify against him in an investigation of his business. "'Other presidents have occasionally issued abusive, self-serving pardons based on insider connections,' Harvard Law School professor Jack Goldsmith, who has tracked Trump's pardons and commutations, said via email. 'Almost all of Trump's pardons fit that pattern. What other presidents did exceptionally, Trump does as a matter of course.'" Michael Kranish, *Trump vowed to drain the swamp. Then he granted clemency to three former congressmen convicted of federal crimes*, WASH. POST (Dec. 23, 2020, 8:33 PM),

When that occurs, such transparently opportunistic abuses of a prerogative—one intended to be used, not selfishly for the President's own personal advancement, but compassionately for others[4]—have justly drawn fire from critics across the political spectrum.[5] Mercy is an ancient and revered trait,[6] and executive clemency is the legal embodiment of mercy,[7] so abuse[8] of the clemency

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https://www.washingtonpost.com/politics/trump-pardon-hunter-collins-stockman/2020/12/23/dc2ff8e0-4538-11eb-975c-d17b8815a66d_story.html [https://perma.cc/RZV5-9PC5]; *see also infra* note 10.

4. *See, e.g.*, Biddle v. Perovich, 274 U.S. 480, 486 (1927) (quoted *infra* at text accompanying note 72); Robert Weisberg, *The Drama of the Pardon, the Aesthetics of Governing and Judging*, 72 STAN. L. REV. ONLINE 80, 80 (2020) ("The venerable purpose of clemency (including pardons and commutations) is for the ruler to harmonize justice and mercy, and often in doing so to solidify his political power by displaying his moral power." (footnote omitted)).

5. *See, e.g.*, BAUER & GOLDSMITH, *supra* note 3, at 116–25; JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 114–17 (2009); Alschuler, *supra* note 3; Hamilton Jordan, *The First Grifters*, WALL ST. J. (Feb. 20, 2001, 12:01 AM), http://www.wsj.com/articles/SB982638239880514586 [https://perma.cc/49V3-JB86]; Steven G. Calabresi & Norman L. Eisen, *The Problem With Trump's Odious Pardon of Steve Bannon*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/opinion/trump-bannon-pardon.html [https://perma.cc/6P45-QZTZ]; Larkin, *Revitalizing Clemency*, *supra* note 3, at 880–81; Love, *Twilight*, *supra* note 3, at 1195–1200.

6. *See, e.g.*, *Genesis* 4:13–15 (King James) (describing the Mark of Cain as a merciful shield); *Matthew* 27:15–23 (King James) (describing Pontius Pilate's decision to pardon Barabbas during Passover); CHARLES L. GRISWOLD, ANCIENT FORGIVENESS: CLASSICAL, JUDAIC, AND CHRISTIAN (2011); NAOMI HURNARD, THE KING'S PARDON FOR HOMICIDE BEFORE AD 1307 (1969); DAVID KONSTAN, BEFORE FORGIVENESS: THE ORIGINS OF A MODERN IDEA (2010); Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51 (1963). *See generally* Larkin, *Guiding Clemency*, *supra* note 3, at 475–96 (describing the history of and rationales for clemency).

7. *See, e.g.*, Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (per curium) ("[Clemency is] a prerogative granted to executive authorities to help ensure that justice is tempered by mercy.").

8. Of course, what is an "abuse" is subject to debate. Everyone would deem some practices—selling pardons is the obvious example—as abusive. *See* U.S. CONST. art. II, § 4 (specifying "Bribery" as a ground for impeaching and removing a President). Yet there are instances where one political party might treat certain categories of pardons as reflecting policy preferences, even though the other party disagrees vehemently over the policy. For example, one party might deem cannabis offenses to be particularly deserving of clemency, because the party's leadership believes that federal law ought not to ban its cultivation, sale, or possession. *See* Marijuana Opportunity Reinvestment and Expungement Act of 2020 (MORE Act of 2020), H.R. 3884, 116th Cong. (2020) (passed

power not only tarnishes that practice but also violates an almost sacred trust.[9] Atop that, by abusing one of the few unreviewable powers of their office, Presidents poison the well for their successors, creating the impression that clemency is a reward for personal friends, political cronies, or the rich and shameless.[10]

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by the House of Representatives on December 4, 2020, the Act would remove cannabis from the Controlled Substances Act of 1970, 21 U.S.C. § 841 (2018)). The other party might prefer to prohibit cannabis because it has not been proven safe. *See* H.R. Rep. No. 116–604, Pt. 2, at 346–48 (2020) (Minority Views). One party might deem strict liability offenses to be unjust because they do not require proof of any "evil intent" on the part of the defendant. *See* Paul J. Larkin, Jr., *Mistakes and Justice—Using the Pardon Power to Remedy a Mistake of Law*, 15 GEO. J.L. & PUB. POL'Y 651, 663–68 (2017) (arguing that the President should pardon someone for conviction of a strict liability offense if no reasonable person would have known that the charged acts were illegal). The other party might believe that eliminating strict liability crimes "could undermine public safety and harm progressive goals." Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 829 n.89 (2017). Clemency grants should not be deemed "abuses" if the President makes a reasonable policy choice no matter how contentious the issue might be.

9. *See, e.g.*, CROUCH, *supra* note 5, at 114 (former President Jimmy Carter described Clinton's pardon of fugitive Marc Rich as "despicable"); Mark Osler, *The Flynn Pardon Is a Despicable Use of an Awesome Power*, ATLANTIC (Nov. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/11/corruption-of-mercy/617210/ [https://perma.cc/Z5JU-F4UL].

10. *See, e.g.*, Alschuler, *supra* note 3, at 1168 ("In 1215, the Magna Carta declared, 'To no one will we sell, to none will we deny or delay, right or justice.' In the administration of President Bill Clinton, the charter's pledge was broken." (footnote omitted)); Calabresi & Eisen, *supra* note 5 ("Donald Trump is exiting office with a final outburst of constitutional contempt. Like a Borgia pope trading indulgences as quid pro quos with corrupt cardinals, Mr. Trump on Wednesday used one of the most sweeping powers of the presidency to dole out dozens of odious pardons to a roster of corrupt politicians and business executives as well as cronies and loyalists like Steve Bannon."); Maggie Haberman et al., *With Hours Left in Office, Trump Grants Clemency to Bannon and Other Allies*, N.Y. TIMES (last updated Jan. 26, 2021), https://www.nytimes.com/2021/01/20/us/politics/trump-pardons.html [https://perma.cc/55MC-V6K3] ("President Trump used his final hours in office to wipe away convictions and prison sentences for a roster of corrupt politicians and business executives and bestow pardons on allies like Stephen K. Bannon, his former chief strategist, and Elliott Broidy, one of his top fund-raisers in 2016."); Elie Honig, *Opinion: The worst of Trump's pardons*, CNN (Jan. 20, 2021, 3:18 PM), https://www.cnn.com/2021/01/20/opinions/trump-abuses-pardon-powers-last-day-honig/index.html [https://perma.cc/J9T5-E8XE] ("With his final batch of 73 pardons and 70 sentence commutations, Trump offered up one last burst of cronyism and self-dealing. While Trump issued pardons to several recipients whose cases had been rightly advocated by criminal justice reform groups,

A particularly questionable action would be a President's decision to pardon *him- or herself* for any federal offenses committed while in office. Aside from being "an act of unprecedented chutzpah,"[11] the practice is treacherous as a practical matter because it implies that the President might have committed a crime, possibly forever making him a pariah within his political party and in the eyes of history.[12] It is also dubious as a legal matter because there is no clear answer whether a self-pardon is lawful. No President has yet pardoned himself, and for most of our history, the issue of whether one may do so was not a remotely significant public policy issue. In fact, it would not even have been a serious hypothetical on a law school final exam.

The issue could not have arisen in pre-Revolutionary England because, under the common law, the crown could do no wrong.[13] It

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he also doled out free passes to an unseemly lineup of criminals who apparently have been granted mercy based largely on their personal connections to Trump, their wealth and access or their status as celebrity objects of fascination."); Andrew C. McCarthy, *Trump Does His Part in Scandalizing the Presidential Pardon Power*, NAT'L REV. (Jan. 20, 2021, 12:39 AM), https://www.nationalreview.com/2021/01/trump-does-his-part-in-scandalizing-the-presidential-pardon-power/ [https://perma.cc/YTT4-HKDB] ("The most notable grantee on the list is former Trump aide Steve Bannon. . . . The only salient difference between the three codefendants and Bannon is that Bannon is an insider: a Trump 2016 campaign official and former top White House adviser. . . . Also making the cut were Elliott Broidy, a major Trump fundraiser paid millions of dollars by foreign actors to lobby the Trump administration . . . and Ken Kurson, a convicted cyberstalker who just happens to be a friend of Trump son-in-law Jared Kushner.").

11. Brian C. Kalt, Note, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 779 (1996) [hereinafter Kalt, *Pardon Me*] (quoting James Gill, *Walsh's Quarry*, NEW ORLEANS TIMES-PICAYUNE, Jan. 1, 1993, at B7).

12. *See* Burdick v. United States, 236 U.S. 79, 91 (1915) (noting that there is a "confession of guilt implied in the acceptance of a pardon"); *id.* at 94 (stating that "the differences" between "legislative immunity" and a "pardon" are "substantial": "[t]he latter carries an imputation of guilt; acceptance a confession of it").

13. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 458 (1793) (Wilson, J.) ("The law, says Sir *William Blackstone*, ascribes to the *King* the attribute of sovereignty . . . . [N]o *suit* or action can be brought against the *King*, even in civil matters; because no Court can have jurisdiction over him: for all jurisdiction implies superiority of power." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *241, *242)); 1 WILLIAM BLACKSTONE, COMMENTARIES *239, *244; JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 5 (London, Joseph Butterworth & Son 1820). In 1649, Charles I learned to his dismay that England could discipline errant royalty in other, far more

does not appear to have been an issue for royal governors before the Revolution.[14] The Articles of Confederation did not create an office of chief executive, so the issue also could not have surfaced during the nation's early days.[15] There was limited discussion of any aspect of the pardon power at the Constitutional Convention of 1787, and no one raised this precise issue.[16] Finally, no one asked this question during the state ratifying conventions.[17]

The issue did not become a serious possibility until Richard Nixon was in his second term as President. The investigation of the 1972 burglary of the Democratic National Committee headquarters

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unpleasant ways. SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 52 (2015) ("The English tried and executed Charles I, thus highlighting a somewhat underappreciated dimension of life tenure.").

14. At least historical treatments of the criminal justice systems operating during that period make no mention of the issue arising. *See, e.g.*, DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691–1776, at 127–32 (1976); CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 498–500 (1977); Ruckman, *Clemency Origins*, *supra* note 1, at 252.

15. *See Articles of Confederation & Perpetual Union* (1781), *in* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 263–70 (1940).

16. *See, e.g.*, 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 419, 626 (1911); Duker, *supra* note 14, at 501–06. Everyone expected George Washington to become the first President, so perhaps no one wanted to insult him by suggesting that he might someday break the law and need to be pardoned. *See* PRAKASH, *supra* note 13, at 38 (noting that when James Wilson proposed a single chief executive instead of a council, the Convention "fell silent, perhaps realizing that because George Washington likely would serve as the first chief magistrate, any comments could be seen as reflecting the speaker's views about the presiding chair"). Whatever the reason, the Convention delegates did not discuss this specific matter.

17. James Iredell, who later became one of the nation's first Justices of the Supreme Court of the United States, came the closest to discussing the issue at the North Carolina ratifying convention. He remarked that the likelihood of the President being in league with traitors was sufficiently low that there was no need to deny him the power to issue pardons for treason. Noah Feldman, *Trump's Pardoning Himself Would Trash Constitution*, BLOOMBERG (July 21, 2017, 12:25 PM), https://www.bloomberg.com/opinion/articles/2017-07-21/trump-s-pardoning-himself-would-trash-constitution [https://perma.cc/BXZ9-96NW]. It is possible that Iredell was aware of the possibility that a President could and would pardon his treasonous confederates *and* himself but kept silent to persuade the convention members to approve the Constitution. The answer is lost to history.

at the Watergate office building resulted in the discovery that Nixon had attempted to cover up the involvement of his administration's officials in the crime.[18] That discovery raised the issues of whether Nixon had violated federal criminal law by obstructing justice and whether, as a sitting President, he could be prosecuted for a federal offense without first being impeached and removed from office by Congress. When criminal prosecution of the President became a real possibility, the media speculated that Nixon would pardon himself for his role in Watergate.[19] The Justice Department's Office of Legal Counsel issued an opinion addressing both ends of that possibility. In what might have been intended to serve as a Solomonic resolution, the Department concluded that a sitting President cannot be prosecuted until he is impeached and removed from office,[20] but a President cannot pardon himself.[21]

18. The discovery came after investigators heard Nixon's taped conversations, which he turned over to the Watergate Special Prosecutor after the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), rejected Nixon's claim of privilege. For a discussion of the pardon issues that arose during the end of the Nixon presidency and the early days after Gerald Ford became President, see BARRY WERTH, THIRTY-ONE DAYS: GERALD FORD, THE NIXON PARDON, AND A GOVERNMENT IN CRISIS (2007).

19. *See, e.g.*, Timothy H. Ingram, *Could Nixon Pardon Nixon?*, WASH. POST (June 30, 1974).

20. *See* MEMORANDUM FROM ROBERT G. DIXON, JR., ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., U.S. DEP'T OF JUSTICE, REGARDING THE AMENABILITY OF THE PRESIDENT, VICE PRESIDENT AND OTHER CIVIL OFFICERS TO FEDERAL CRIMINAL PROSECUTION WHILE IN OFFICE (Sept. 24, 1973), http://www.fas.org/irp/agency/doj/olc/092473.pdf [https://perma.cc/ZM4U-8DB7] (concluding that the indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions). The Justice Department reaffirmed that conclusion toward the end of the Clinton presidency. *See* RANDOLPH D. MOSS, ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., A SITTING PRESIDENT'S AMENABILITY TO INDICTMENT AND CRIMINAL PROSECUTION, MEMORANDUM FOR THE ATTORNEY GENERAL (Oct. 16, 2000), https://www.justice.gov/olc/opinion/sitting-president%E2%80%99s-amenability-indictment-and-criminal-prosecution [https://perma.cc/5X3L-FWTH].

21. *See* MARY C. LAWTON, ACTING ASSISTANT ATT'Y GEN., OFF. OF LEGAL COUNS., PRESIDENTIAL OR LEGISLATIVE PARDON OF THE PRESIDENT, MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL (Aug. 5, 1974), https://www.justice.gov/olc/opinion/presidential-or-legislative-pardon-president [https://perma.cc/93D8-XQS3] [hereinafter LAWTON OLC OPINION]. A second possibly Solomonic feature of the Justice Department's memorandum is the conclusion that a President can pardon himself via

With regard to the latter issue, the Justice Department offered merely a one-sentence conclusion: "Under the fundamental rule that no one may be a judge in his own case, it would seem that the question should be answered in the negative."[22] The Justice Department did not explain why the text and structure of the Pardon Clause foreclosed self-pardons or why the role of a President in the pardon process should be analogized to that of a judge.[23] The issue went away when Nixon resigned without pardoning himself and President Gerald Ford later pardoned Nixon for crimes that he might have committed in connection with Watergate.[24]

The issue arose again late in the presidency of George H.W. Bush. A scandal arose toward the end of Ronald Reagan's second term as President. Termed L'affaire Iran-Contra, a National Security Council official encouraged Israel to sell arms to Iran with the proceeds ultimately transferred to the Contras, anti-communist guerilla fighters in Nicaragua, all in violation of federal law.[25] An

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what pool players would call a "two-corner" shot: "A different approach to the pardoning problem could be taken under Section 3 of the Twenty-Fifth Amendment. If the President declared that he was temporarily unable to perform the duties of his office, the Vice President would become Acting President and as such he could pardon the President. Thereafter the President could either resign or resume the duties of his office." *Id.* at 2. The Justice Department did not discuss whether that pas de deux would or should be disregarded as a sham. *Cf., e.g.*, Tumey v. Ohio, 273 U.S. 510, 514–15, 523 (1927) (ruling that a judge whose salary rests upon the number of judgments of conviction entered in his court is not an impartial adjudicator); Frank v. Magnum, 237 U.S. 309, 335 (1916) (ruling that a mob-dominated proceeding is not the type of "trial" that the Constitution requires).

22. LAWTON OLC OPINION, *supra* note 21, at 1. By contrast, Nixon's lawyer advised him that he could pardon himself. BRIAN KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 40 (2012) [hereinafter KALT, CONSTITUTIONAL CLIFFHANGERS].

23. The conclusions are not obvious. *See infra* note 84 and accompanying text; *see also* notes 66, 77–80 & 136–153 and accompanying text.

24. Proclamation 4311, 39 Fed. Reg. 32, 601 (Sept. 8, 1974).

25. In an act known as the Boland Amendment, Congress had prohibited the transfer of funds to an insurgency known as the "Contras" who were rebelling against the Marxist government in Nicaragua. Along with senior Reagan Administration officials, Oliver North, a Marine lieutenant colonel assigned to the National Security Council, used Israel as a go-between to sell weapons to Iran, which was subject to an embargo. Israel then sent the money to the National Security Council, which diverted it to the

Independent Counsel obtained indictments of several former senior government officials, including Caspar Weinberger, Reagan's Secretary of Defense, and the conviction of several others. There was considerable media speculation that then-Vice President Bush knew about the arms sale and could wind up either being charged or brought into court as a witness after he left office as President or that he might pardon himself to avoid prosecution or embarrassment.[26] On Christmas Eve in 1992, however, President Bush pardoned Weinberger and several other officials but not himself.[27] Again, the issue went away.

The issue resurfaced during the tenure of President Bill Clinton. Independent Counsel Kenneth Starr, later succeeded by Robert Ray, investigated Clinton for potential perjury and obstruction of justice charges based on conduct that occurred both before and while Clinton was President.[28] When asked whether Clinton would

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Contras in an effort to skirt the Boland Amendment. *See* 1 & 2 LAWRENCE E. WALSH, INDEPENDENT COUNSEL, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (Aug. 4, 1993); SENATE SELECT COMMITTEE ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMMITTEE TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN CONTRA AFFAIR, S. Rep. No. 100–216, H.R. Rep. No. 100–433 (1987).

26. *See, e.g.*, Daniel J. Hemel & Eric A. Posner, *Presidential Obstruction of Justice*, 106 CALIF. L. REV. 1277, 1323–24 (2018) ("There was widespread speculation at the time that the true motive for the pardons was to stall the independent counsel's probe into Bush's own wrongdoing—and in particular, to prevent the independent counsel from reviewing a diary Bush kept that had recently surfaced. Roughly half of respondents in a late 1992 Gallup poll said they thought Bush granted the pardons 'to protect himself from legal difficulties or embarrassment resulting from his own role in Iran-Contra.'" (footnote omitted)); Kalt, *Pardon Me*, *supra* note 11, at 799–800.

27. Proclamation No. 6518, 57 Fed. Reg. 62,145 (1992); *see* David Johnston, *Bush Pardons 6 in Iran Affair, Aborting a Weinberger Trial; Prosecutor Assails 'Cover-Up'*, N.Y. TIMES (Dec. 25, 1992), https://archive.nytimes.com/www.nytimes.com/books/97/06/29/reviews/iran-pardon.html [https://perma.cc/WXW4-ZP89].

28. Starr began by investigating alleged illegalities arising out of real estate transactions in which Clinton, his wife Hillary, and other associates had participated while he was the Arkansas governor—viz., the "Whitewater Investigation." That investigation later branched out to include the potential obstruction of justice charges. *See, e.g.*, *Impeachment Inquiry: William Jefferson Clinton, President of the United States, Presentation on Behalf of the President: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998).

pardon himself, Clinton's White House Counsel represented that he would not.[29] On his last full day in office, Clinton entered into an agreement with then-Independent Counsel Ray to surrender his license to practice law for five years in exchange for immunity in connection with all of the outstanding investigations.[30] The agreement avoided any self-pardon issue.

The issue surfaced for a fourth time after Donald Trump became our forty-fifth President. Concern arose that Russia had attempted to influence the outcome of the 2016 presidential election, and congressional Democrats claimed that the Trump Campaign had been in cahoots with the Russians.[31] Deputy Attorney General Rod Rosenstein, acting in place of recused Attorney General Jeff Sessions, appointed former FBI Director and Justice Department Assistant Attorney General Robert Mueller to investigate the matter.[32] Although the claim ultimately turned out to be bogus,[33] during the course of that inquiry President Donald Trump publicly stated that he had the legal authority to pardon himself to end the Justice Department investigation.[34] A flurry of media commentary followed,

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29. *Id.* at 450 (Charles Ruff, White House Counsel, assuring Rep. Steve Chabot that Clinton would not pardon himself).

30. *See, e.g.*, Pete Yost, *Clinton Accepts 5-Year Law Suspension*, WASH. POST (Jan. 19, 2001), https://apnews.com/article/7fa4addca900dbc81e78ab73f5795307 [https://perma.cc/DD3T-ETQ3] ("President Clinton has reached a deal with prosecutors to avoid an indictment, requiring him to make a written acknowledgment [that he may have misled investigators] in the Monica Lewinsky matter and agree to a suspension of his law license, government sources said.").

31. *See* U.S. HOUSE OF REPRESENTATIVES PERMANENT SELECT COMM. ON INTEL., THE IMPEACHMENT REPORT, THE HOUSE INTELLIGENCE COMMITTEE'S REPORT ON THE TRUMP-UKRAINE INVESTIGATION, WITH THE HOUSE REPUBLICANS' REBUTTAL (2019).

32. *See* ROBERT S. MUELLER III, THE MUELLER REPORT: REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019).

33. *See, e.g.*, Edit. Bd., *All the Adam Schiff Transcripts*, WALL ST. J. (May 12, 2020), https://www.wsj.com/articles/all-the-adam-schiff-transcripts-11589326164 [https://perma.cc/RZD4-UHQA] ("Americans expect that politicians will lie, but sometimes the examples are so brazen that they deserve special notice. Newly released Congressional testimony shows that Adam Schiff spread falsehoods shamelessly about Russia and Donald Trump for three years even as his own committee gathered contrary evidence.").

34. Miranda Green, *Trump tweets mention his 'complete power' to pardon and bemoan 'leaks'*, CNN (July 24, 2017), https://www.cnn.com/2017/07/22/politics/trump-tweets-

taking opposing positions on the legitimacy of self-pardons. [35]

pardon-powers/index.html [https://perma.cc/6UUM-HTHQ]; *see also* Jeffrey Crouch, *President Donald J. Trump and the Clemency Power: Is Claiming "Unfair" Treatment for Pardon Recipients the New "Fake News"?*, *in* PRESIDENTIAL LEADERSHIP AND THE TRUMP PRESIDENCY: EXECUTIVE POWER AND DEMOCRATIC GOVERNMENT 91, 104–06 (Charles M. Lamb & Jacob R. Neiheisel eds., 2020); Charlie Savage, *Can Trump Pardon Himself? Explaining Presidential Clemency Powers*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/us/politics/trump-pardon-himself-presidential-clemency.html [https://perma.cc/ME3D-RQT3]; Michael D. Shear, *Trump Says Appointment of Special Counsel Is 'Totally Unconstitutional'*, N.Y. TIMES (June 4, 2018), https://www.nytimes.com/2018/06/04/us/politics/trump-pardon-power-constitution.html?searchResultPosition=10 [https://perma.cc/U232-3TKD].

35. For the argument that a President cannot pardon himself, see Philip Bobbitt, *The President Can't Pardon Himself, So Why Do People Think He Can?*, LAWFARE (June 20, 2018), https://www.lawfareblog.com/self-pardons-president-cant-pardon-himself-so-why-do-people-think-he-can [https://perma.cc/9VTW-L5YC]; Norman Eisen, *Unpacked: Can a President Pardon Himself?*, BROOKINGS INST. (Aug. 13, 2018), https://www.brookings.edu/blog/unpacked/2018/08/13/unpacked-can-a-president-pardon-himself/ [https://perma.cc/X942-HAP5]; Garrett Epps, *The Self-Pardoning President*, ATLANTIC (Jan. 14, 2019), https://www.theatlantic.com/politics/archive/2019/01/can-president-pardon-himself/579757/ [https://perma.cc/GHW2-8GXK]; Feldman, *supra* note 17; David Frum, *Trump Crosses a Bright-Red Line*, ATLANTIC (Jan. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/01/trumps-georgia-call-crosses-red-line/617536/ [https://perma.cc/QG4K-T5BT]; Andrew Hyman, *The President May Not "Grant" Himself a Pardon*, ORIGINALISM BLOG (July 30, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/07/the-ability-to-self-pardon-is-not-absurd-but-it-is-nevertheless-not-allowed-by-the-us-constitution-t.html [https://perma.cc/X2LS-4U7W]; Brian Kalt, *Can Trump Pardon Himself?*, FOREIGN POL'Y (May 19, 2017), https://foreignpolicy.com/2017/05/19/what-would-happen-if-trump-pardoned-himself-mueller-russia-investigation/ [https://perma.cc/D44W-MWUU]; Eric Muller, *Can Donald Trump "Grant" Himself a Pardon? I Doubt It*, FAC. LOUNGE (June 5, 2018), https://www.thefacultylounge.org/2018/06/can-donald-trump-grant-himself-a-pardon-i-doubt-it.html [https://perma.cc/2UTA-Y538]; Jed Shugerman & Ethan J. Leib, *This Overlooked Part of the Constitution Could Stop Trump from Abusing His Pardon Power*, WASH. POST (Mar. 14, 2018), https://www.washingtonpost.com/opinions/this-overlooked-part-of-the-constitution-could-stop-trump-from-abusing-his-pardon-power/2018/03/14/265b045a-26dd-11e8-874b-d517e912f125_story.html [https://perma.cc/48BY-6H9F]; Laurence H. Tribe et al., *No, Trump Can't Pardon Himself. The Constitution Tells Us So*, WASH. POST, July 24, 2017, https://www.sltrib.com/opinion/commentary/2017/07/24/washington-post-op-ed-no-trump-cant-pardon-himself-the-constitution-tells-us-so/ [https://perma.cc/FQ66-CG6L].

For the argument that a President can pardon himself, see Richard A. Epstein, *Pardon Me, Said the President to Himself*, WALL ST. J. (June 5, 2018), https://www.wsj.com/articles/pardon-me-said-the-president-to-himself-1528239773 [https://perma.cc/9XGW-RF8Q]; Andrew C. McCarthy, *Yes, the President May Pardon Himself*, NAT'L REV. (June

Trump did not pardon himself, and the Special Counsel found no evidence that Trump or members of his campaign had colluded with Russia.[36] The issue again arose during the closing weeks of the Trump Administration when speculation arose that Trump might pardon himself for actions that he took in January 2021 when contesting the results of the 2020 election.[37] Trump ended his

4, 2018), https://www.nationalreview.com/2018/06/can-a-president-pardon-himself-yes-trump-can/ [https://perma.cc/3D8H-BCNM]; Michael Stokes Paulsen, *The President's Pardon Power Is Absolute*, NAT'L REV. (July 25, 2017), https://www.nationalreview.com/2017/07/donald-trump-pardon-power-congressional-impeachment/ [https://perma.cc/PB6E-DPDH]; Michael Ramsey, *David Weisberg on Presidential Self-Pardons*, ORIGINALISM BLOG (July 29, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/07/david-weisberg-on-presidential-self-pardonsmichael-ramsey.html [https://perma.cc/68M6-B9W8]; David B. Rivkin, Jr. & Lee A. Casey, *Begging Your Pardon, Mr. President*, WALL ST. J. (Oct. 29, 2017), https://www.wsj.com/articles/begging-your-pardon-mr-president-1509302308 [https://perma.cc/N7NM-DU78]; Jonathan Turley, *Yes, Donald Trump Can Pardon Himself, But It Would Be a Disastrous Idea*, USA TODAY (June 4, 2018), https://www.usatoday.com/story/opinion/2018/06/04/donald-trump-self-pardon-constitutional-impeachment-column/667751002/ [https://perma.cc/G9JY-WKFW]; David Weisberg, *More on Presidential Self-Pardons*, ORIGINALISM BLOG (July 31, 2017), https://originalismblog.typepad.com/the-originalism-blog/2017/07/more-on-presidential-self-pardonsbrmichael-ramsey.html [https://perma.cc/Z8DH-4D72]; John Yoo, *Trump Can Pardon Manafort. He Shouldn't*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/opinion/trump-pardon-manafort.html [https://perma.cc/6ZZS-UMRV].

36. *See* THE MUELLER REPORT, *supra* note 32.

37. For Trump's January 2 effort to cajole or bully the Georgia secretary of state to "find" a sufficient number of 2020 ballots for Trump to carry the state, see, for example, Zachary Evans, *Raffensperger Hints Trump Could Face Prosecution over Call to 'Find' Votes*, NAT'L REV. (Jan. 4, 2021), https://www.nationalreview.com/news/raffensperger-hints-trump-could-face-prosecution-over-call-to-find-votes/ [https://perma.cc/4QWN-6QX5]; Eric Lipton, *Trump Call to Georgia Official Might Violate State and Federal Law*, N.Y. TIMES (Jan. 3, 2021), https://www.nytimes.com/2021/01/03/us/politics/trump-call-georgia.html [https://perma.cc/F6SQ-DY7Y]; Rich Lowry, *Trump's Shameful Georgia Call*, NAT'L REV. (Jan. 5, 2021), https://www.nationalreview.com/2021/01/trumps-shameful-georgia-call/ [https://perma.cc/HZD2-AYZK]; Ruth Marcus, *What a Prosecutor Could Do About Trump's Phone Call*, WASH. POST (Jan. 4, 2021), https://www.washingtonpost.com/opinions/what-a-prosecutor-could-do-about-trumps-phone-call/2021/01/04/4c00451c-4ed5-11eb-bda4-615aaefd0555_story.html [https://perma.cc/Y3WT-EZPG]; Cameron McWhirter & Lindsay Wise, *Trump Pressured Georgia Secretary of State to 'Find' Votes*, WALL ST. J. (Jan. 4, 2021), https://www.wsj.com/articles/trump-urged-georgia-secretary-of-state-to-overturn-election-results-11609707084?mod=searchresults_pos3&page=1

presidency without pardoning himself, so the issue will (hopefully) remain undecided for the foreseeable future.[38]

[https://perma.cc/YZ6D-SU3K]; 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-raffensperger-call-georgia.html?searchResultPosition=3 [https://perma.cc/595A-XAEP]; Kevin Williamson, *Trump's Final Insult*, NAT'L REV (Jan. 5, 2021), https://www.nationalreview.com/the-tuesday/trumps-final-insult/?utm_source=recirc-desktop&utm_medium=article&utm_campaign=river&utm_content=more-in-tag&utm_term=first [https://perma.cc/3HEH-DLS6]. *See generally* Amy Gardner & Paulina Firozi, *Here's the full transcript and audio of the call between Trump and Raffensperger*, WASH. POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html [https://perma.cc/DW7Z-29QN].

For the Trump-inspired January 6 assault on the Capitol, see, for example, Peter Baker, *A Mob and the Breach of Democracy: The Violent End of the Trump Era*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-congress.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/AX7B-6Y4E]; Dan Barry & Sheera Frenkel, '*Be There. Will Be Wild!': Trump All but Circled the Date*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html?searchResultPosition=1 [https://perma.cc/8WEE-VG27]; Maggie Haberman, *Trump Told Crown 'You Will Never Take Back Our Country with Weakness'*, N.Y. TIMES, (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/trump-speech-capitol.html [https://perma.cc/GX6S-4AVZ]; Kevin D. Williamson, *The Trump Presidency's Inevitable, Wretched End*, NAT'L REV. (Jan. 7, 2021), https://www.nationalreview.com/2021/01/the-trump-presidencys-inevitable-wretched-end/#slide-1 [https://perma.cc/QYE9-D936]; WSJ Video, *When Rioters Stormed the Capitol: How the Day Unfolded*, WALL ST. J. (Jan. 7, 2021), https://www.wsj.com/video/when-rioters-stormed-the-capitol-how-the-day-unfolded/3437DB4C-4F9C-440D-B062-6D6DD0E3C879.html?mod=trending_now_video_pos4./ [https://perma.cc/9BFN-ARTE]; Lindsay Wise et al., '*The Protesters Are in the Building.' Inside the Capitol Stormed by a Pro-Trump Mob*, WALL ST. J. (Jan. 6, 2021), https://www.wsj.com/articles/the-protesters-are-in-the-building-inside-the-capitol-stormed-by-a-pro-trump-mob-11609984654?mod=article_inline/ [https://perma.cc/48G6-MA6A].

38. There is, of course, a possibility that Trump signed a pardon for himself and his family members but did not make his action public. Commentators have disagreed over whether a secret pardon has legal effect. *Compare* Jeffrey Crouch, *If Trump issued secret pardons, they won't work*, WASH. POST (Jan. 20, 2021), https://www.washingtonpost.com/opinions/2021/01/20/trump-secret-pardons-validity/ [https://perma.cc/7MCU-Z5R5] (arguing that secret pardons are ineffective), *with* Greg Walters, *Trump Didn't Pardon Himself. Now His Legal Nightmare Begins*, VICE (Jan. 20, 2021), https://www.vice.com/en/article/v7mx78/why-didnt-trump-pardon-himself-what-happens-now [https://perma.cc/BD8X-JVUU] (arguing that they have effect). The Presidential Records Act, 44 U.S.C. §§ 2202–2207 (2018), requires that all presidential

That a President would need to consider immunizing himself against a federal criminal prosecution is, generally speaking, a disturbing prospect, even in today's toxic political environment.[39] Unlike what has happened in some countries (after, for instance, the Communist takeover in Cambodia), new administrations do not bring politically motivated prosecutions against former government officials. There also is no clear answer to the question whether a self-pardon is lawful. Neither the Supreme Court of the United States nor any lower court has had occasion to decide whether a President can pardon himself. (Ironically, we should consider ourselves fortunate that the issue has not arisen with the regularity necessary to generate a body of case law.) No act of Congress takes a position on the subject, and, in any event, any statute would have no more legal force or effect than a "sense of the Congress" resolution.[40] As might be expected, commentators have taken all sides of

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records be maintained as federal property, but the Pardon Clause does not require publication for a pardon to become effective. All that Article II requires for a pardon to be effective is for it to be *issued*, not publicized. The Constitution requires *Congress* to act in public. *See* U.S. CONST. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."); *id.* § 9, cl. 7 ("[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."). The Pardon Clause imposes no similar requirement on executive clemency. Of course, publishing a pardon is valuable because it enables a recipient to prove its issuance and informs the public what the President has done, thereby promoting accountability. *See* United States v. Wilson, 32 U.S. (7 Pet.) 150, 159–63 (1833) (stating that a defendant must plead the existence of a pardon to receive its protection). But it is not constitutionally required. We might not know whether Trump issued a secret pardon to himself and his family members unless the government criminally charges them or he publishes his memoirs. But if he did and can prove that he did so before President Biden became our 46th President, the pardon(s) would likely be valid.

39. For explanations of what has happened and why, see, for example, ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY (2021); YUVAL LEVIN, THE FRACTURED REPUBLIC (2016); KENNETH R. MAYER & DAVID T. CANON, THE DYSFUNCTIONAL CONGRESS? (1999); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2313–14 (2006). For an insider's viewpoint, see Mike Gallagher, *How to Salvage Congress*, ATLANTIC (Nov. 13, 2018), https://www.theatlantic.com/ideas/archive/2018/11/gallagher-congress/575689/ [https://perma.cc/SF9J-UZJR].

40. *See, e.g.*, Bank Markazi v. Peterson, 136 S. Ct. 1310, 1323 (2016) ("Congress, no doubt, may not usurp a court's power to interpret and apply the law to the

the issue. A large number of scholars have concluded, like the Justice Department, that a president cannot pardon himself;[41] a comparable number of legal experts have come out the other way;[42] and

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circumstances before it, for those who apply a rule to particular cases, must of necessity expound and interpret that rule." (internal citations and punctuation omitted)); City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress . . . has been given the power to enforce, not the power to determine what constitutes a constitutional violation."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). That rule applies to pardons. *See* The Laura, 114 U.S. 411, 413–14 (1885) (explaining that the President's "constitutional power" under the Pardon Clause "cannot be interrupted, abridged, or limited by any legislative enactment."); United States v. Klein, 80 U.S. (13 Wall.) 128, 148 (1872) ("Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law.").

41. *See*, *e.g.*, *Examining the Constitutional Role of the Pardon Power, Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 116th Cong. (Mar. 27, 2019) (statement of Caroline Frederickson, President, Am. Const'l Soc'y.) [hereinafter *House Pardon Hearing*]; *id.* (prepared Testimony of Justin Florence, Legal Dir., Protect Democracy); *id.* (statement of James P. Pfiffner, Univ. Professor, Geo. Mason Univ.); *id.* (written Statement by Prof. Andrew Kent, Fordham L. Sch.); KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 22, at 39–60; Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 804 (1999); Frank O. Bowman III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728908 [https://perma.cc/9HXD-S57Q]; Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J.L. & PUB. POL'Y 463, 469–76 (2019); Bernadette Meyler, *Trump's Theater of Pardoning*, 72 STAN. L. REV. ONLINE 92, 99–101 (2020); Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 404 n.196 (1993).

42. *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 173–74 (2020); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON *passim* (2000); PRAKASH, *supra* note 13, at 107–08; Michael Conklin, *Please Allow Me to Pardon . . . Myself: The Constitutionality of a Presidential Self-Pardon*, 97 U. DET. MERCY L. REV. 291 (2020); Crouch, *supra* note 34, at 108–09; Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Any Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71 (2019); Alberto R. Gonzales, *Presidential Powers, Immunities, and Pardons*, 96 WASH. L. REV. 905, 933–36 (2019); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345 (1993); Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999); *cf.* Adrian Vermeule, Essay, *Contra* Nemo Iudex in Sua Causa: *The Limits of Impartiality*, 122 YALE L.J. 384, 388 (2012) ("[T]he President arguably has the power to pardon himself and clearly has the power to pardon his friends, family, and advisers."); *id.* at 411–13.

some have been agnostic on the matter.[43] The disagreement has lasted for decades.[44]

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43. *See, e.g.*, Duker, *supra* note 14, at 504; Mike Rappaport, *Epstein on Self Pardons*, L. & LIBERTY (June 8, 2018), https://www.lawliberty.org/2018/06/08/epstein-on-self-pardons/ [https://perma.cc/T88N-9WUT]; *cf.* Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 166–67 (2017) (presidential self-pardons that are "effectively and predominantly acts of self-dealing" are impermissible but would be lawful "[i]n the improbable situation that a self-pardon truly is an act of justice"); Jonathan H. Adler, *The Pardon Power May Be Broad, But that Does Not Mean a Self-Pardon Would Be Legit*, REASON: VOLOKH CONSPIRACY (Nov. 30, 2020), https://reason.com/volokh/2020/11/30/the-pardon-power-may-be-broad-but-that-does-not-mean-a-self-pardon-would-be-legit/ [https://perma.cc/M2TH-PKMS] (dubitante).

44. And still continues. *See, e.g.*, Byron Tau, *Can President Trump Pardon Himself and His Family?*, WALL ST. J. (Dec. 2, 2020), https://www.wsj.com/articles/can-president-trump-pardon-himself-and-his-family-11606947916?page=1 [https://perma.cc/MKF2-Q6Z6] (arguing that the President likely can pardon himself); Josh Gerstein, *Self-Pardon? It Might Not Go How Trump Thinks*, POLITICO (Jan. 13, 2021), https://www.politico.com/news/2021/01/13/can-trump-pardon-himself-458591 [https://perma.cc/LG87-TGHZ]; J. Michael Luttig, *No, President Trump Can't Pardon Himself*, WASH. POST (Dec. 7, 2020), https://www.washingtonpost.com/opinions/no-president-trump-cant-pardon-himself/2020/12/07/774c7856-38d9-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/93SZ-4PM9]; Tessa Berenson, *What Donald Trump Can—And Can't—Do with the Pardon Power*, TIME (Dec. 2, 2020), https://time.com/5916785/donald-trump-presidential-pardon-questions/ [https://perma.cc/R9NH-SCNN] (noncommittal); Brian Naylor, *Talk of 'Preemptive' Pardons By Trump Raises Questions: What Can He Do?*, NPR (Dec. 2, 2020), https://www.npr.org/2020/12/02/941290291/talk-of-preemptive-pardons-by-trump-raises-questions-what-can-he-do [https://perma.cc/3TVY-S5KE] (same); Kristine Phillips & Kevin Johnson, *Can Trump Pardon Himself? What's a Preemptive Pardon? Experts Explain the Sweeping Power*, USA TODAY (Dec. 2, 2020), https://www.usatoday.com/story/news/politics/2020/12/02/can-trump-pardon-himself-can-pardons-reversed-power-explained/3792550001/ [https://perma.cc/EB2T-BMBB] (same); Asha Rangappa, *If Trump Pardons Himself Now, He'll Walk into a Trap*, WASH. POST (Jan. 8, 2021), https://www.washingtonpost.com/outlook/trump-raffensperger-pardon-prosecute/2021/01/06/a32388fe-4f9d-11eb-bda4-615aaefd0555_story.html [https://perma.cc/EY3P-EPWG] (same, but arguing that a self-pardon would encourage the Justice Department to charge Trump with a crime to challenge a self-pardon); David Smith, *I Beg Your Pardon? Does Trump Really Plan to Absolve Himself and His Family?*, GUARDIAN (Dec. 5, 2020), https://www.theguardian.com/us-news/2020/dec/05/donald-trump-pardons-giuliani-ivanka-joe-exotic [perma.cc/N8XU-MVFR] (noncommittal); Jan Wolfe, *Explainer: Can Trump Pardon Himself? Would the Courts Reject the Move?*, REUTERS (Jan. 16, 2021), https://www.reuters.com/article/uk-usa-trump-pardon-explainer/explainer-can-trump-pardon-himself-would-the-courts-reject-the-move-idUSKBN29L0D4 [https://perma.cc/TR9R-Y5E9]. *See generally* Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, LAWFARE (June 5, 2018),

The legitimacy of presidential self-pardons merits serious debate.[45] Ideally, that issue should arise infrequently, for two reasons. One is our hope that the electorate would select as chief executive only people who steer clear of the line of illegality. The other is our hope that the relationship between the opposing major political parties does not become so fractured that transfers of power from one to the other would result in the civilian version of war crimes trials as each new administration prosecutes its predecessor as a form of retaliation or out of sheer vitriol. A self-pardon would not become a live issue unless a President were at serious legal risk of being charged with a crime. But the issue has now arisen during the terms of four of our last nine presidents,[46] members and supporters

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https://www.lawfareblog.com/smorgasbord-views-self-pardoning [https://perma.cc/U7FT-XN2Y]; Sean Illing, *President Trump Says He Can Pardon Himself. I Asked 15 Experts If That's Legal*, VOX (June 4, 2018), https://www.vox.com/policy-and-politics/2017/7/21/16007934/trump-president-pardon-himself-limits-power-constitution [https://perma.cc/MF8E-WLBC].

45. A closely related issue is whether the President can pardon family members. That possibility has occurred quite infrequently, in large part because Presidents have rarely appointed family members as federal officials. There are a few exceptions. President John Kennedy appointed his brother Robert to be Attorney General, Bill Clinton appointed his wife Hillary to chair the President's Task Force on National Health Care Reform, and President Trump's daughter Ivanka and son-in-law Jared Kushner were White House advisors. *See, e.g.*, Ass'n of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898 (D.C. Cir. 1993); White House—Senior Advisor: Jared Kushner, Global Leadership Coalition, https://www.usglc.org/positions/white-house-senior-advisor-president/ [https://perma.cc/JT4Z-DY42]. Nonetheless, while the possibility arises less often than a blue moon, it does present itself more frequently than Haley's Comet. In 1993, Clinton pardoned his half-brother Roger for a drug offense, while Trump pardoned his son-in-law's father. *See* Alschuler, *supra* note 3, at 1131, 1145; Ballhaus & Tau, *supra* note 3; Maggie Haberman & Michael S. Schmidt, *Trump Has Discussed With Advisers Pardons for His 3 Eldest Children and Giuliani*, N.Y. TIMES (Dec. 1, 2020), https://www.nytimes.com/2020/12/01/us/politics/rudy-giuliani-pardon.html [https://perma.cc/ZL63-NPG2]; *infra* note 49.

46. The issue potentially could have arisen had Hillary Clinton become president. During the 2016 campaign, the FBI conducted a criminal investigation into the question whether she had violated federal law by using a private email server for classified communications, rather than the official Department of State server, and by later erasing evidence of those communications. *See, e.g.*, U.S. DEP'T OF STATE, OFF. OF INFO. SECURITY, UNCLASSIFIED DS REPORT ON SECURITY INCIDENTS RELATED TO POTENTIALLY CLASSIFIED EMAILS SENT TO FORMER SECRETARY OF STATE CLINTON'S PRIVATE EMAIL SERVER (Sept. 13, 2019); FBI NAT'L PRESS OFF., STATEMENT BY FBI DIRECTOR JAMES B.

of each of our major political parties routinely demonize their counterparts as evil,[47] and some members of Congress and the public are looking to take scalps.[48] To be sure, the issue might not excite the same passions as some of the incendiary issues that burned during the 2020 presidential election, such as "*Defund the Police!*" But it is a sad testament to our present political world that the legitimacy of a presidential self-pardon is a real issue and that (however much we wish it would) it is not likely to disappear any time soon.[49] As such,

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COMEY ON THE INVESTIGATION OF SECRETARY HILLARY CLINTON'S USE OF A PRIVATE E-MAIL SYSTEM (July 5, 2016).

47. *See, e.g.*, William McGurn, *Joe Biden's Bitter Harvest*, WALL ST. J. (Nov. 9, 2020), https://www.wsj.com/articles/joe-bidens-bitter-harvest-11604963930?mod=searchresults_pos1&page=1 [https://perma.cc/3MA3-UPTF] ("It isn't over, either. At the same moment President Biden is being applauded for his Lincolnesque call to come together, Michelle Obama, in her own congratulatory message, reminded President Biden that millions of Trump voters chose to support 'lies, hate, chaos, and division.' Mrs. Obama appears not to have got the memo about not demonizing people on the other side."); David A. Walsh, *How the Right Wing Convinces Itself that Liberals Are Evil*, WASH. MONTHLY (July/Aug. 2018), https://washingtonmonthly.com/magazine/july-august-2018/how-the-right-wing-convinces-itself-that-liberals-are-evil/ [https://perma.cc/ZG2W-ESCK].

48. *See, e.g.*, Alexandria Ocasio-Cortez (@AOC), TWITTER, Nov. 6, 2020, https://twitter.com/aoc/status/1324807776510595078 ("Is anyone archiving these Trump sycophants for when they try to downplay or deny their complicity in the future? I foresee decent probability of many deleted Tweets, writings, photos in the future[.]"); Edit. Bd., *Cancel Culture Comes After the Trump Administration*, WALL ST. J. (Nov. 15, 2020), https://www.wsj.com/video/series/journal-editorial-report/wsj-opinion-cancel-culture-comes-after-the-trump-administration/1C982B02-9B37-4A5C-B92A-20029608E8F0?mod=searchresults_pos3&page=1 [perma.cc/5T2N-MXRK] (Video No. 146); Hana Levi Julian, *AOC Wants an 'Enemies List' of Trump Supporters*, JEWISHPRESS (Nov. 8, 2020), https://www.jewishpress.com/news/us-news/aoc-calls-for-archiving-trump-sycophants-before-tweets-are-deleted/2020/11/08/ [https://perma.cc/UND8-FGEC]; Samuel Dorman & Lydia Moynihan, *Petition Circulating at Harvard to Stop Former Trump Administration Officials from Attending, Teaching, or Speaking at the University*, FOX BUS. (Nov. 17, 2020), https://www.foxbusiness.com/lifestyle/harvard-petition-ban-trump-officials [https://perma.cc/X5CJ-YWLZ]; Sam Dorman, *AOC, Others Pushing for Apparent Blacklist of People who Worked with Trump*, FOX NEWS (Nov. 9, 2020), https://www.foxnews.com/politics/aoc-blacklist-trump-supporters [https://perma.cc/TR6M-DWQP].

49. A related issue could arise during President Biden's term as President. In 2019, the FBI opened a criminal investigation into money laundering and subpoenaed a laptop and computer hard drive that once belonged to President Biden's son Hunter. Late in 2020, Hunter Biden acknowledged that the U.S. Attorney's Office in Delaware was

it is far better to examine that subject during President Joe Biden's honeymoon period, before he accumulates his own brigade of compliant apparatchiks and his own share of relentless nemeses. That time is now.

In my opinion, Article II allows the President to pardon himself, but Article I permits Congress to impeach and remove him for doing so—not because issuance of a self-pardon itself is unlawful, but for the underlying offense and the public's resulting lack of confidence in a President who broke the law.[50] There would be no legal judgment holding a president accountable for his misdeeds, but there would be the contemporary, practical judgment of Congress and the political judgment of history that the person elected President is no longer fit to hold that office. That result would be insufficient for anyone who believes that a President, like any other individual, must be held legally accountable for his crimes, but it

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investigating (as he put it) "his tax affairs." Ken Thomas & Sabrina Siddiqui, *Hunter Biden Says His Taxes are Under Investigation*, WALL ST. J. (Dec. 9, 2020), https://www.wsj.com/articles/hunter-biden-says-u-s-attorney-s-office-investigating-my-tax-affairs-11607548376?mod=searchresults_pos1&page=1 [https://perma.cc/8SZ2-D7EE]; *see also* Roger Kimball, *Hunter Becomes the Hunted*, SPECTATOR (Dec. 10, 2010), https://spectator.us/hunter-biden-tax-investigation/?utm_source=Spectator+USA+Email+Signup&utm_campaign=1407954aec-EMAIL_CAMPAIGN_8_31_2020_19_27_COPY_01&utm_medium=email&utm_term=0_edf2ae2373-1407954aec-154827651&mc_cid=1407954aec&mc_eid=171f5e6311 [https://perma.cc/5G6E-4F4J]; Ian Schwartz, *James Rosen: FBI Has an Active Criminal Investigation Into Hunter Biden For Money Laundering*, REAL CLEAR POL. (Oct. 29, 2020), https://www.realclearpolitics.com/video/2020/10/29/james_rosen_fbi_has_an_active_criminal_investigation_into_hunter_biden_for_money_laundering.html [https://perma.cc/X9E7-E94F]. A presidential pardon of a family member raises the same policy concerns as a presidential self-pardon.

50. Whether Congress can impeach and convict a President *after* he or she has left office is an interesting and unanswered question that is beyond the scope of this Article. *Compare, e.g.*, Keith E. Whittington, *Yes, the Senate Can Try Trump*, WALL ST. J. (Jan. 22, 2021), https://www.wsj.com/articles/yes-the-senate-can-try-trump-11611356881?mod=searchresults_pos1&page=1 [https://perma.cc/MT8N-R97A], *with, e.g.*, Alan M. Dershowitz, *No, You Can't Try an Impeached Former President*, WALL ST. J. (Jan. 20, 2021), https://www.wsj.com/articles/no-you-cant-try-an-impeached-former-president-11611167113?mod=searchresults_pos1&page=1 [https://perma.cc/3VR2-8GPY]; Paul J. Larkin, Jr., *Impeachment Follies: Why the Senate Cannot Try Trump*, DAILY SIGNAL (Jan. 29, 2021), https://www.dailysignal.com/2021/01/29/impeachment-follies-why-the-senate-cannot-try-trump/ [https://perma.cc/NK2N-XUUN].

would have been adequate for the Framers, whose principal concern was with removing from office any executive official, including the chief executive, caught abusing his authority.

II. THE COMPETING ARGUMENTS REGARDING THEIR VALIDITY

When interpreting the Constitution, courts turn for potential illumination to a variety of traditional sources. Among them are the text, the Founders' debates at the Convention of 1787 and the state Ratifying Conventions, eighteenth-century dictionaries, early practice under the new charter, the Court's precedents, and constitutional theory.[51] In this case, the supply of useful sources is a small one. Just as there are few guideposts to assist a President in deciding whether clemency is appropriate for a particular applicant,[52] there is little in the traditional interpretative sources that bears on the legitimacy of self-pardons.

Start with the text of the Pardon Clause.[53] Some scholars have maintained that the text of the clause itself bars self-pardons. The argument is that the term "grant" implies that the grantor and grantee must be different individuals, making a self-pardon

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51. For a discussion of those sources, see, for example, CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); Thomas R. Lee, *Corpus Linguistic & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. FORUM 20 (2016); Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014). For examples of the Supreme Court's reliance on them, see Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 381 (1821) (describing the text as the "authoritative language of the American people"); INS v. Chadha, 462 U.S. 919, 946 (1983) (evaluating the structure of the Article I lawmaking process); Bowsher v. Synar, 478 US. 714, 723–24 (1986) (relying on the "Decision of 1789"); Schick v. Reed, 419 U.S. 256, 266 (1974) (relying on "unbroken practice").

52. *See* Larkin, *Guiding Clemency*, *supra* note 3, at 465–96.

53. "The President . . . shall have power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment." U.S. CONST. art. II, § 2, cl. 1; *cf.*, *e.g.*, Nixon v. United States, 506 U.S. 224, 229 (1993) (beginning its analysis of the Impeachment Trial Clause, U.S. CONST. art. I, § 3, cl. 6, with its text).

linguistically incoherent and constitutionally impossible.[54] That conclusion, the argument goes, is also consistent with common sense. We do not "grant" ourselves what is already ours.

The cornerstone of the argument against self-pardons is the tenet that no one, including the President, is above the law.[55] That principle arose at common law[56] and took formal shape in Chapter 39 of Magna Carta. That provision kept the king, colloquially speaking, "from taking the law into his own hands"[57] by prohibiting the Crown from depriving anyone of life, liberty, or property except in accordance with "the law of the land."[58] Allowing a President to

54. *See, e.g.*, Bowman, *supra* note 41, at 21–26, 32–33.

55. *See* Feldman, *supra* note 17 ("The basic problem with self-pardon is that it would make a mockery of the very idea that the U.S. operates under the rule of law. A president who could self-pardon could violate literally any federal law with impunity, knowing that the only risk was removal from office by impeachment."); *cf., e.g.*, United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 149–50 (1803) ("It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, should be above the compulsion of law in the exercise of those duties."). To some extent, every pardon could be said to place someone above the law, because it removes the legal effect of a conviction. That interpretation, however, is not a reasonable one. Pardons serve multiple interests, such as rewarding metanoia, and it serves the law to allow a chief executive to recognize that someone has turned his life around for the better.

56. *See, e.g.*, A.J. CARLYLE, POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES 53 (1941) ("{T}he supreme authority in political society was not that of the ruler, but that of the law"); JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 4–6 (2005); JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 12 (2004). *See generally* Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–32 (2016) [hereinafter Larkin, *Lost Doctrines*].

57. Paul J. Larkin, Jr., *The Private Delegation Doctrine*, 73 FLA. L. REV. 31, 71 (2021) [hereinafter Larkin, *Private Delegation*].

58. J.C. HOLT, MAGNA CARTA 2 (2d ed. 1992) ("[N]o free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land."); *see also, e.g.*, CARLYLE, *supra* note 56, at 53 (quoting sixteenth-

immunize himself from prosecution would largely nullify that principle. It also would frustrate the Framers' expectation that Congress can impeach and remove a President so that he can be made to stand in the dock for any crimes he committed in office.[59] Finally, presidential self-pardons would eviscerate the Supreme Court's 1974 ruling in *United States v. Nixon* that a President cannot forestall a criminal investigation into potentially criminal conduct by invoking executive privilege.[60]

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century legal commentator Richard Hooker that the King owed his sovereign power to the law, which meant "the supreme authority in political society was not that of the ruler, but that of the law"); WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 123 (2d ed. 1914) ("The 'value' of the Charter . . . lay, not in the exact terms of any or all of its provisions, in the fact that the agreement enunciated a definite body of law, claiming to be above the King's will and admitted as such by John."); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914) ("The main point in this [provision], the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*.").

59. U.S. CONST. art. I, § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."). The Convention debated the issue of whether the President may pardon traitors. Edmund Randolph proposed an amendment providing an exception for that scenario. Madison's notes on the Convention contain the following account of the debate:

> Mr Randolph moved to "except cases of treason". The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his own instruments.
>
> Col: [George] Mason supported the motion.
>
> Mr Govr Morris had rather that there should be no pardon for treason, than let the power devolve on the Legislature.
>
> Mr [James] Wilson. Pardon is necessary for cases of treason, and is best placed in the hands of the Executive. If he himself be a party to the guilt, he can be impeached and prosecuted.

Randolph's motion failed by a vote of 8-2. 2 FARRAND, *supra* note 16, at 626; *see* KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 22, at 52–53. In my view, that exchange is the strongest argument against presidential self-pardons.

60. 418 U.S. 683, 703–07 (1974); *see also* Trump v. Vance, 140 S. Ct. 2412, 2424–31 (2020) (reaffirming the holding in *United States v. Nixon*, 418 U.S. 683 (1974), that the President must respond to a federal grand jury subpoena and extending that ruling to a state criminal investigation).

The argument against self-pardons also invokes the ancient ethical precept of *nemo iudex in causa sua*, a Latin phrase meaning "no one should be a judge in his own cause." That tenet has deep roots in Anglo-American law. Legal titans such as William Blackstone,[61] Edward Coke,[62] James Madison,[63] and Justice Samuel Chase,[64] as well as political philosopher Thomas Hobbes,[65] endorsed that principle long ago. It remains vital today, undergirding the due process rule, repeatedly applied by the Supreme Court, that no one can adjudicate a case in which he has a financial or personal interest.[66] Moreover, aware of the risk that federal officials might give in to the temptation of unseemly political self-dealing, the Framers

61. *See* 1 BLACKSTONE, *supra* note 13, at *91 ("[I]t is unreasonable that any man should determine his own quarrel.").

62. *See, e.g.*, Dr. Bonham's Case (1608) 77 Eng. Rep. 638 (K.B.), 8 Co. Rep. 107a, 108a (Coke, C.J.).

63. *See* THE FEDERALIST No. 10, at 44 (James Madison) (Clinton Rossiter ed., 2003) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

64. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("[A] law that makes a man a Judge in his own cause . . . is against all reason and justice . . . .").

65. *See* THOMAS HOBBES, LEVIATHAN 102 (Michael Oakeshott ed., Macmillan 1946) (1651) ("[S]eeing every man is presumed to do all things in order to his own benefit, no man is a fit arbitrator in his own cause; and if he were never so fit; yet equity allowing to each party equal benefit, if one be admitted to be judge, the other is to be admitted also . . . . For the same reason, no man in any cause ought to be received as arbitrator, to whom greater profit, or honour, or pleasure apparently ariseth out of the victory of one party, than of the other: for he hath taken, though an unavoidable bribe, yet a bribe; and no man can be obliged to trust him.").

66. *See, e.g.*, Williams v. Pennsylvania, 136 S. Ct. 1899, 1905–06 (2016); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876–77 (2009); Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 428–29 (1995); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822 (1986); Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Ward v. Vill. of Monroeville, 409 U.S. 57, 60 (1972); *In re* Murchison, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (ruling that the Due Process Clause incorporates the common law rule that a judge must recuse himself if he has "a direct, personal, substantial pecuniary interest" in a case); Spencer v. Lapsley, 61 U.S. (20 How.) 264, 266 (1857) ("The act of Congress [in question] proceeds upon an acknowledgement of the maxim, 'that a man should not be a judge in his own cause[]' . . . ."). *See generally* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 611–12 (1947).

adopted several constitutional provisions barring federal officials from advancing themselves by using the powers of their offices.[67] And the precept that no one can judge his own case takes on additional cachet as the rationale that persuaded the Department of Justice in 1974 to conclude that Nixon could not pardon himself.[68]

Finally, the argument against self-pardons looks outside the Pardon Clause to other constitutional provisions, which can limit that provision.[69] The most relevant one is the Article II Take Care Clause, which directs the President to see to the faithful

67. Members of Congress cannot simultaneously hold an office in the Executive Branch. U.S. CONST. art. I, § 6, cl. 2. Congress cannot vote itself a pay raise that takes effect before the next congressional election. *Id.* amend. XXVII. The President can neither receive a raise in salary without an intervening presidential election, nor can he receive any other "emolument" atop his salary. *Id.* art. II, § 1, cl. 7. The Chief Justice presides over a Senate trial of an impeached President, *id.* art. I, § 3, cl. 6, because the Vice President, who otherwise would preside over the Senate, *id.* § 3, cl. 4, would benefit from the President's removal, *id.* amend. XXV, § 1 (upon removal of the President, the Vice President becomes President). *See* Kalt, *Pardon Me*, *supra* note 11, at 794–96; *see also, e.g.*, Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 122 n.59 (1995) (arguing that the Vice President may not preside over his own impeachment trial).

68. *See supra* notes 19–22 and accompanying text.

69. *See* Schick v. Reed, 419 U.S. 256, 266 (1974) (assuming that other constitutional provisions can limit the Pardon Clause); Larkin, *Guiding Clemency*, *supra* note 3, at 468–69 (so arguing). *See generally* Amar, *supra* note 41. The Appropriations Clause bars the President from disbursing unauthorized funds. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"). That keeps him from remitting criminal fines and penalties to a clemency applicant without express statutory authority. *See* Knote v. United States, 95 U.S. 149, 154–55 (1877). *But see* United States v. Padleford, 76 U.S. (9 Wall.) 531, 543 (1869) (ruling that a presidential amnesty and implementing legislation entitles a claimant to return of funds paid into the Treasury from the sale of his seized property). Several Bill of Rights provisions also limit the President's Pardon Clause power. *See* Larkin, *Guiding Clemency*, *supra* note 3, at 469 ("The Bill of Rights is also relevant—in particular, the First Amendment, the Second Amendment, the Fourth Amendment, and the Fifth Amendment Due Process Clause. Those provisions grant people certain constitutional rights against the government. The President, therefore, cannot grant clemency only to people of his own political party or faith, to people who work for media outlets who do not criticize his performance, to people who have never owned firearms, to people who will allow the police to tramp through their homes or lives without good cause, or to people of only one race or sex." (footnote omitted)).

implementation of federal law.[70] A variety of scholars have argued that the Take Care Clause imposes on the President a body of fiduciary obligations, either one that is comparable to the responsibilities that the eighteenth-century common law imposed on private trustees or that constitutes its own discrete body of law governing public officeholders requiring the President always to act in the best interests of the public.[71] That rule applies no less to the President's

70. U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . ."). There has been a recent surge of scholarly treatment of the clause. *See, e.g.*, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Robert G. Natelson, *The Original Meaning of the Constitution's "Executive Vesting Clause"—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1 (2009) (concluding that the Constitution generally imposes fiduciary duties on government officials). That is atop the continued interest in the general subject of presidential power. *See, e.g.*, BAUER & GOLDSMITH, *supra* note 3; SUSAN HENNESSEY & BENJAMIN WITTES, UNMAKING THE PRESIDENCY (2020); HAROLD J. KRENT, PRESIDENTIAL POWERS (2005); MCCONNELL, *supra* note 42; SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020).

71. *See* GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017); Andrew Kent et al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Leib & Shugerman, *supra* note 41, at 469–76; *cf.* Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL'Y 239 (2007) (discussing the law governing fiduciaries at the nation's founding); Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004). Not everyone agrees with that thesis. *See, e.g.*, Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020); John Mikhail, *Is the Constitution a Power of Attorney or a Corporate Charter?*, 17 GEO. J.L. & PUB. POL'Y 407 (2019); Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL'Y 373 (2019); Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J.L. & PUB. POL'Y 441 (2019). But that disagreement is not important here.

The Take Care Clause is not the only provision imposing (or assuming) a fiduciary duty on the President. The Presidential Oath Clause makes that obligation explicit. U.S. CONST. art. II, § 1, cl. 8 (requiring the President to swear or affirm that he or she will "preserve, protect and defend the Constitution of the United States"). For other provisions, *see id.* art. I, § 3, cl. 7 (impeachment and removal can disqualify someone from holding "Office of honor, Trust or Profit under the United States"); *id.* § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); *id.* art. II, § 1, cl. 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall

exercise of his pardon authority than to any other power he possesses. As Justice Holmes explained in *Biddle v. Perovich*, clemency is appropriate only if "the ultimate authority" decides that "the public welfare will be better served" by modifying a court's judgment.[72] A fiduciary that places his personal interest ahead of the public interest violates the most elementary duty any fiduciary possesses.[73]

Together those arguments make a powerful case against the legitimacy of presidential self-pardons. That is particularly true if a chief executive pardons himself the morning of, or while riding en route to, his successor's inauguration. That would also be especially galling if doing so enabled him to escape scot-free from any and all criminal responsibility for serious misdeeds while in office.

Nonetheless, there is a difference between an unwise use of clemency and an unlawful use.[74] Conflating the two is a common legal mistake. First-year courses in contracts and torts steep law students in the common-law decision-making process, which identifies and balances the logic, equities, benefits, and costs of every potential rule in the effort to select the one that best advances the public welfare. From that point on, many lawyers expect that there should always be a legal remedy available to redress every instance of wrongdoing and that the courts are the preferred forum for devising and applying it.[75] Yet that is not always the case. In fact, the Supreme Court decision first reiterating the old saw that there is a

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be appointed an Elector."); *id.* art. VI, § 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

72. 274 U.S. 480, 486 (1927) ("A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."). Technically, *Perovich* involved a commutation, not a pardon. The principle, however, is the same.

73. *See* Leib & Shugerman, *supra* note 41, at 469–76.

74. As Professor Stephen Carter once put it, "To say that the President's pardoning power is plenary—not subject to review—and that it is part of the system of checks and balances—available to frustrate the other branches—is not to say that every use of the pardon power is a good use of the pardon power." Carter, *supra* note 2, at 885.

75. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9 (Amy Gutmann ed., 1997).

judicial remedy for every legal wrong, *Marbury v. Madison*, denied William Marbury the relief that the Court concluded he was entitled to receive—delivery of his judicial commission—because the text of the Constitution did not permit the Supreme Court to award it to him.[76]

That principle has force in this context too. Some controversies pose, in the Supreme Court's words, only "political questions," not legal ones—viz., disputes that are not amenable to resolution by an Article III court. *Marbury* itself recognized that such issues exist. As Chief Justice Marshall wrote, in the exercise of some presidential powers, our chief executive "is accountable only to his country in his political character, and to his own conscience."[77] One example of what the Court has labeled the "political question" doctrine exists where the Constitution textually and explicitly assigns decision-making responsibility to one of the other two branches.[78]

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76. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." (quoting 3 BLACKSTONE, *supra* note 13, at *23)), *with id.* at 162, 180 (ruling that the text of Article III prohibited Congress from granting the Supreme Court original jurisdiction over Marbury's case).

77. *Id.* at 165–66.

78. In an attempt to synthesize its rulings on this subject, the Court devised a standard in *Baker v. Carr*, 369 U.S. 186, 217 (1962), to define issues properly characterized as raising only "political questions." It is unclear how much of that standard has survived later cases. *See, e.g.*, Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (stating, in a case raising the issue whether the political questions doctrine barred judicial resolution of a dispute between Congress and the President over whether to recognize Jerusalem as the capital of Israel, that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case."). The tests that clearly still have life are the ones involving a "textually demonstrable constitutional commitment of the issue to a coordinate political department" or a "lack of judicially discoverable and manageable standards for resolving it." *See* Nixon v. United States, 506 U.S. 224, 229–38 (1993) (ruling that the legality of Senate removal procedures fits into the first category); Rucho v. Common Cause, 139 S. Ct. 2484, 2498–2508 (2019) (ruling that the legality of political gerrymandering fits into the second category). The issue of who should receive a pardon could arguably fit into Category 1 or 2. If the issue were viewed simply as whether the Take Care Clause bars the President from pardoning himself, that narrow issue likely would not be deemed a political question. It would be characterized as the antecedent issue of whether answering the

Other issues are susceptible to judicial review, but require the courts to afford the chief executive extraordinary deference when he exercises an inherent power. The classic example is the President's exercise of his authority to represent and protect the nation when dealing with other countries or the nation's foes.[79] Such

question is "what courts do." By contrast, if the issue included an inquiry into whether clemency is appropriate for a particular President, a strong argument can be made that the inquiry falls into either category. The Pardon Clause specifically vests the President with the clemency power, and there is widespread agreement that the clause does not offer the President any standard for deciding when clemency is appropriate. *See, e.g.*, Jody C. Baumgartner & Mark H. Morris, *Presidential Power Unbound: A Comparative Look at Presidential Pardon Power*, 29 POL. & POL'Y 209, 215 (2001) ("As with other provisions of the Constitution, except for the impeachment exclusion, the Framers were very general in their draft and omitted any specifics regarding the definition and use of the pardon power, the use and understanding of which would evolve over time."); Erin R. Collins, *Clemency and the Administration of Hope*, 29 FED. SENT'G REP. 263, 264 (2017) ("Clemency is a completely discretionary power; there is no 'clemency law,' no precedent we could use to interpret the [Obama Administration Clemency Project 2014] criteria."); Paul J. Haase, Note, "*Oh My Darling Clemency": Existing or Possible Limitations on the Use of the Presidential Pardon Power*, 39 AM. CRIM. L. REV. 1287, 1293 (2002) ("The language of the Constitution provides no real guidance regarding the manner in which the appropriateness of a pardon should be determined."); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567, 567 (2000) (describing clemency as a "largely unprincipled, almost standardless component in our justice system"); Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993) ("[T]he Framers provided no criteria for distinguishing between proper and improper uses of the pardoning power and put no constitutional limit on the president's use of that power, except to prohibit pardons in cases of impeachment."); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 597 (2012); Ruckman, *Clemency Origins*, *supra* note 1, at 258. *See generally* Larkin, *Guiding Clemency*, *supra* note 3, at 465–69. However that issue is resolved, there is a reasonable argument that a President may pardon himself, as explained in the text.

79. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2419–20 (2018) ("'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." (quoting Mathews v. Diaz, 426 U.S. 67, 81–82 (1976))); *id*. at 2421 ("[P]laintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive's predictive judgments on such matters, all of which are 'delicate, complex, and involve large elements of prophecy.'" (quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948))).

deference is appropriate here as well, because the Pardon Clause grants the President a prerogative over clemency.[80]

Several features of the Pardon Clause text are illuminating in that regard. The first one is that the clause specifically identifies the President as the particular individual responsible for federal clemency decisions.[81] The Framers knew that the President could not personally execute every responsibility placed on him and would need to rely on "Officers of the United States" in different "executive Departments" for assistance.[82] The Pardon Clause, however, singles out the President as the one person who may forgive offenders on behalf of the nation.[83] The President exercises that power on his own, not as a collegial body, like Congress, or as a judicial tribunal, like the Supreme Court, but as an individual holding the office of the nation's chief executive. That designation carries forward "the British model" in which pardon authority resided in the Crown, which had a prerogative over forgiveness.[84]

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80. *See infra* notes 85–86 and accompanying text; *see also, e.g.*, 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873) ("Congress cannot limit or impose restrictions upon the President's power to pardon."); Larkin, *Guiding Clemency*, *supra* note 3, at 455–56, 472–74.

81. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *cf. id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives.").

82. U.S. CONST. art. II, § 2, cl. 1 ("[The President] may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"); *id.* art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law"); *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.' 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).").

83. United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1873) (quoted *infra* at text accompanying note 137).

84. *See* Herrera v. Collins, 506 U.S. 390, 412 (1993). The Pardon Clause creates an executive power, not a judicial one, and therefore is not subject to the core *nemo iudex* criticism. *See* Conklin, *supra* note 42, at 294–95 ("Even if a vague notion against self-

Second, the lean text of the Pardon Clause suggests that the Framers well understood the institution of clemency under British law,[85] sought to incorporate that meaning wholesale into the Pardon Clause, and thereby carried forward the Crown's prerogative over its use.[86] Aside from two narrow exceptions (whose significance is

judging could supersede parts of the Constitution, the president's power to self-pardon is not an act of self-judging. A presidential pardon is an executive action, not a judicial one."(footnote omitted)). Plus, the *nemo iudex* principle is more a rule of thumb than a law of physics; other considerations can outweigh it. *See* Vermeule, *supra* note 42, at 400–20.

85. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350, 358 (2015) ("The colonists brought the principles of Magna Carta with them to the New World[.]"); Kerry v. Din, 576 U.S. 86, 91 (2015) (plurality opinion) ("Edward Coke['s] . . . Institutes 'were read in the American Colonies by virtually every student of law[.]'"(quoting Klopfer v. North Carolina, 386 U.S. 213, 225 (1967)); Alden v. Maine, 527 U.S. 706, 715 (1999) (noting that Blackstone's "works constituted the preeminent authority on English law for the founding generation."); BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1992). That knowledge is particularly important in the case of the Pardon Clause. *See* Schick v. Reed, 419 U.S. 256, 262 (1974) ("The history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law practice.").

86. *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855) ("At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. Prior to the revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms, as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the crown. Hence, when the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."); Wilson v. United States, 32 U.S. 150, 160 (1833) (Marshall, C.J.) ("As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."); *cf.* PRAKASH, *supra* note 13, at 153 ("The absence of an explanation of the [commander-in-chief's] office's contours suggests that the Framers drew upon prevailing conceptions of what it meant to be a commander in chief.").

discussed below)—one for state crimes, the other for impeachment and removal—the text does not limit whom or how the President may forgive, nor does it establish any conditions that he must satisfy before exercising that authority.

Third, the Framers placed the Pardon Clause in the same provision of Article II as the Commander-in-Chief and Opinion Clauses.[87] That placement is critical because the latter clauses are presidential prerogatives. The President may issue commands to American service members engaged in a congressionally authorized use of military force without obtaining antecedent approval from Congress on an operation-by-operation basis,[88] and he can ask his principal lieutenants for their opinions as he sees fit.[89] The

87. U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

88. There is a longstanding disagreement between Congress and the President whether Congress must authorize the use of military action. When Congress has done so, as it did with the Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001), there is no serious disagreement over who may command military operations. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 26 (1942) ("The Constitution . . . invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."); LOUIS HENKIN, FOREIGN AFFAIRS & THE UNITED STATES CONSTITUTION 123 (2d ed. 1996) ("When the President acts by Congressional authority he has the sum of the powers of the two branches, and can be said 'to personify the federal sovereignty,' and in foreign affairs, surely, the President then commands all the political authority of the United States." (footnotes omitted) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952) (Jackson, J., concurring))).

89. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 672–75 (1996) (describing the clause's breadth). Alexander Hamilton found the Opinion Clause unnecessary since the ability to obtain advice from subordinates inheres in the authority granted the President by the Article II, § 1, Executive Vesting Clause. *See* THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("This I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office."). Regardless, there is no prerequisite for or limitation on its use.

President does not share those authorities with anyone else.[90] Those powers sharply contrast with other Article II authorities, such as the appointment of federal officials or the adoption of treaties, both of which require Senate approval before they may take effect.[91] The Framers also distinguished the President's commander-in-chief, advice-seeking, and clemency authority from many of Congress's Article I powers, which are limited to particular uses[92] or which require specific features of implementing legislation,[93] and from the federal courts' Article III adjudicative power, which is limited to specified "Cases" and "Controversies."[94]

Fourth, the existence of the two exceptions noted above—for state crimes and impeachment—is quite important. Consider the former.

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90. *See, e.g.*, *Ex parte* Quirin, 317 U.S. at 25 ("[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.").

91. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

92. *See, e.g.*, *id.* art. I, § 8, cl. 1 (authorizing Congress to impose "Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States"); *id.* art. I, § 8, cl. 3 (authorizing Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); *id.* art. I, § 8, cl. 15 (authorizing Congress to pass laws federalizing the "Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions").

93. *See, e.g.*, *id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 8, cl. 4 (requiring that the laws governing "Naturalization" and "Bankruptcies" be "uniform"); *id.* art. I, § 8, cl. 8 (authorizing Congress to create patent and copyright protections "for limited Times"); *id.* art. I, § 8, cl. 12 (prohibiting appropriations for the Army to last "for a longer Term than two Years"); *id.* art. I, § 8, cl. 18 (authorizing Congress to pass legislation that is "necessary and proper" to implement federal law); *id.* amends. XIII, XIV, XV (authorizing Congress to "enforce" via "appropriate" legislation the substantive guarantees of those provisions).

94. *Id.* art. III, § 2, cl. 1; *see infra* notes 142, 149.

In "a bow to federalism,"[95] the Framers limited the Pardon Clause to only federal offenses. The states retain the ability to decide whether, when, and how to excuse anyone, including the President, for state law crimes. States can adopt a criminal code that largely mirrors the federal one[96]—in some respects, states can even exceed the breadth of federal criminal law[97]—and states may prosecute a President for any crimes he committed while holding office. The result is that a President cannot escape potential criminal liability by pardoning himself.[98] Accordingly, a presidential self-pardon is not a "Get Out Of Jail Free" card because a state can prosecute a President under the state penal code for any crimes he committed.[99]

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95. MCCONNELL, *supra* note 42, at 172.

96. The principal limitation on the states' criminal lawmaking authority is geographic. The states must prove that a crime occurred, at least in part, within its borders or had an actual or intended in-state effect. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law, and the Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 342 n.19 (2015). In theory, a state could incorporate by reference the entire federal criminal code. *Cf.* Federal Assimilative Crimes Act, 18 U.S.C. § 13 (2018) (incorporating by reference state criminal code provisions for federal enclaves).

97. *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000) (holding portions of the Violence Against Women Act unconstitutional as exceeding Congress Article I Commerce Clause power); United States v. Lopez, 514 U.S. 549, 567–68 (1995) (same, Gun-Free School Zones Act).

98. Indeed, that proposition is perhaps implicit in the Supreme Court's 2020 ruling in *Trump v. Vance*, 140 S. Ct. 2412 (2020) that the President is not absolutely immune from responding to a state criminal subpoena. *Id.* at 2425–31. *Vance* involved conduct that Trump undertook before becoming President and did not involve the issue of whether a state can force a sitting chief executive to stand trial during his presidency, rather than after he leaves office. That question remains open.

99. That possibility might come into play, given Trump's conduct on January 2, 2021. *See supra* note 37; Richard Fausset & Danny Hakim, *Georgia Prosecutors Open Criminal Inquiry into Trump's Efforts to Subvert Election*, N.Y. TIMES (Feb. 10, 2021), https://www.nytimes.com/2021/02/10/us/politics/trump-georgia-investigation.html [https://perma.cc/FYA3-PKPW]. It might be seen as solicitation of voter fraud, which is a felony under federal and state law. *See, e.g.*, 52 U.S.C. § 20511 (2018) ("A person, including an election official, who in any election for Federal office . . . knowingly and willfully deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process, by . . . the procurement, casting, or tabulation of ballots that are known by the person to be materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with Title 18 . . . or imprisoned not more than 5 years, or both."); GA. CODE ANN. § 21-2-604(a)(1) (West 2021) ("A person commits the offense of criminal

The state offenses exception also means that allowing presidential self-pardons does not make the President more powerful than the English Crown.[100] Keep in mind that the Crown would never need a self-pardon because the common law deemed the Crown incapable of committing a crime.[101] Moreover, the Framers could not have foreseen the extraordinary breadth of today's federal criminal code. The first federal criminal law had a quite limited reach.[102] Given the narrow scope of federal criminal law at the time of the founding and the fact that every state carried forward the crimes known to the common law,[103] state criminal law defined the only exposure a President faced. As such, the Framers' decision to deny the President the ability to pardon himself for state-law offenses paid respect to the principle that the President is accountable to the law.

The impeachment and removal exception is also important. The

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solicitation to commit election fraud in the first degree when, with intent that another person engage in conduct constituting a felony under this article, he or she solicits, requests, commands, importunes, or otherwise attempts to cause the other person to engage in such conduct."); *id.* § 21-2-604(b)(1) ("A person convicted of the offense of criminal solicitation to commit election fraud in the first degree shall be punished by imprisonment for not less than one nor more than three years.").

100. *See* Conklin, *supra* note 42, at 300 ("Comparing the president's ability to self-pardon with the King of England's absolute immunity only serves to demonstrate that the power to self-pardon is far less tyrannical. A president only has the power to self-pardon for a limited time, would likely pay a high political cost, can only pardon federal offenses (and therefore would still be subject to state prosecution), and is still liable in civil court for pardoned actions.").

101. *See supra* note 13.

102. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 726 (2013) ("The first federal criminal statute outlawed no more than approximately thirty crimes, and each one was closely tied to the needs of the new enterprise. [¶] As it turned out, that law was just an acorn. Today, there are approximately 3,300 federal criminal statutes. Moreover, those statutes are not limited to the ones listed in Title 18, the federal penal code. Federal criminal laws are interspersed across the fifty-one titles and 27,000 pages that make up the United States Code. There are so many federal criminal laws that no one, including the Justice Department, the principal federal law enforcement agency, knows the actual number of crimes." (footnotes omitted)).

103. *See, e.g.*, BAILYN, *supra* note 85, at 30–31. The Colonies also had rudimentary criminal codes. *See, e.g.*, GREENBERG, *supra* note 14; HUGH RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA (1965).

King and Parliament battled for years over the issue whether the Crown could halt a parliamentary impeachment proceeding by pardoning the official under investigation. Parliament ultimately won that contest in 1701 with the Act of Settlement.[104] The Framers decided to avoid any dispute by answering the question in the text of the Pardon Clause.[105] The exception means that while the President may excuse someone from guilt or jail, he cannot keep Congress from removing him from office and violating the public trust by abusing its powers.[106] Coupled with the state crimes exception, the impeachment exception suggests that the Framers were more worried by the harm that the public could suffer from the continued abuse of government power by a scoundrel working for a President than the possibility that a President might be one himself.[107]

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104. Act of Settlement, 12 & 13 Will. 3 c. 2, § 3 (Eng.) ("That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament."); *see* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 1–55 (1973).

105. *See* Larkin, *Guiding Clemency*, *supra* note 3, at 466 & n.80.

106. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); *id.* § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); *id.* § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); *id.* art. II, § 4 ("The President, Vice President, and all other civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors.").

107. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 121 (1925) (Taft, C.J. and former President) ("Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it."); BERGER, *supra* note 104, at 1 ("Impeachment, with us largely a means for the ouster of corrupt judges, was for the English the chief institution for the preservation of the government." (footnotes and internal punctuation omitted)); Tim Naftali, *Trump's Pardons Make the Unimaginable Real*, ATLANTIC (Dec. 23, 2020), https://www.theatlantic.com/ideas/archive/2020/12/how-abuse-presidential-pardon/617473/ [https://perma.cc/EV4G-S5WK] (referring to Taft's opinion in *Grossman*: "He was certain that no president would ever be so corrupt as to issue bad pardons. . . . And the chief justice thought he was uniquely qualified to say so: William Howard Taft is the only member of the Court ever to have been president. Taft considered himself a gentleman, and he expected his successors to behave like gentlemen, too."); Paul Rosenzweig, *Trump's Pardon of Manafort Is the Realization of the Founders' Fears,* ATLANTIC (Dec. 23, 2020), https://www.theatlantic.com/ideas/archive/

For those reasons, the term "grant" in the Pardon Clause does not have the import that it might possess were it read in isolation from the remainder of the clause. In addition, not every dictionary, including *Black's Law Dictionary*, defines a "pardon" in a way that requires a dyadic relationship.[108] Finally, the Pardon Clause should not be read with the level of granularity or literalness that the "grant"-based argument demands. The Supreme Court certainly has not read the clause in that manner.[109] After all, immediately following the word "grant" are the terms identifying what the President may bestow—"Reprieves and Pardons." A "Reprieve" is merely a delay in the imposition of punishment, while a "Pardon" erases the underlying conviction[110] necessary for any punishment.[111] Yet the Supreme Court has not limited the clause to only

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2020/12/problem-pardons-was-clear-start/617397/ [https://perma.cc/Y7PZ-KD4F] ("[T]he Constitutional Convention, having heard and rejected Mason's prediction [of potential presidential pardon abuse], can reasonably be said to have accepted the possibility of pardon abuse as the collateral cost of having a pardon power in the first place. [¶] And why exactly would the delegates have done that? Why did they disregard Mason's prediction? In the end, his concerns were rejected by his fellow convention delegates because, in their judgment, there were adequate remedies for that type of presidential misbehavior. As James Madison put it: 'There is one security in this case [of misused pardons] to which the gentlemen [i.e., Mason and his supporters] not have adverted: If the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him [with a pardon], the House of Representatives can impeach him; they can remove him if found guilty.' Madison saw Congress as a powerful guard dog capable of preventing executive misconduct. Instead, in terms of pardon abuse, as with so many other instances of Trump's overreach, it has proved little more than a lapdog.").

108. *See Pardon*, BLACK'S LAW DICTIONARY 1137 (11th ed. 2019) ("The act or an instance of officially nullifying punishment or other legal consequences of a crime. . . . A pardon is usu. granted by the chief executive of a government. The President has the sole power to issue pardons for federal offenses, and state governors have the power to issue pardons for state crimes."); KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 22, at 44–45. Besides, the notion of self-forgiveness, as a corollary to divine forgiveness, predates both Article II and English common law. *See* 1 *John* 1:9, 3:20–22 (King James).

109. *See infra* text accompanying notes 134–141.

110. *See, e.g.*, Carlisle v. United States, 83 U.S. 147, 1514 (1872) ("All [justices of the Supreme Court] have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself."); Larkin, *Revitalizing Clemency*, *supra* note 3, at 846–47 & n.46.

111. *See* Chapman v. United States, 500 U.S. 453, 465 (1991) (explaining that a valid

those remedies. The Court has twice ruled that the Pardon Clause also grants the President authority to "commute" a sentence—viz., to shorten it or make it less onerous[112]—even though the text of the clause does not mention that remedy. Under several other Supreme Court decisions, the President may also grant "amnesty"—viz., a category-wide pardon—and remit funds or property to a pardoned individual even though the Pardon Clause is silent as to those forms of relief.[113]

Perhaps that conclusion is easier to understand (and accept) if we see the President's Pardon Clause power as "a bit of the royal prerogative dropped into our generally law-bound constitutional system."[114] The Framers certainly did not want the President to be a king, and they made sure of that in several ways: they required that he or she be elected to that office, rather than born into it.[115] They limited the period that anyone can hold that office, rather than grant someone a life estate.[116] They specified the powers that a President may exercise, rather than grant him or her absolute authority

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conviction is a prerequisite for any criminal punishment).

112. *See* Schick v. Reed, 419 U.S. 256 (1974); Biddle v. Perovich, 274 U.S. 480 (1927); RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION 343 (1973) ("[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general grant of the pardoning power in the states whose constitutions do not mention commutation and in the federal system . . . .").

113. *See* Burdick v. United States, 236 U.S. 79, 91 (1915); The Laura, 114 U.S. 411, at 413–14 (1885) ("It may be conceded that, except in cases of impeachment, and where fines are imposed by a co-ordinate department of the government for contempt of its authority, the president, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress . . . ."); Knote v. United States, 95 U.S. 149, 152–54 (1877); United States v. Klein, 80 U.S. 128, 147 (1871) ("Pardon includes amnesty."); Carlisle v. United States, 83 U.S. 147, 153 (1872) (ruling that "claimants [are] restored to their rights of property, by the pardon of the President"); United States v. Paddleford, 76 U.S. 531, 542–43 (1869); *In re* Armstrong's Foundry, 73 U.S 766, 770 (1867) ("[T]he claimant of property seized under the act of August 6th, 1861, is entitled to the benefit of amnesty to the same extent as, under like pleading and proof, he would be entitled to the benefit of pardon.").

114. John Harrison, *Pardon as Prerogative*, 13 FED'L SENT'G REP. 147, 147 (2000–2001).

115. U.S. CONST. art. II, § 1, cls. 1–2; *id.* amend. XII.

116. *Id.* art. II, § 1, cl. 1; *id.* amends. XII, XX.

or leave the matter unresolved.[117] And they identified when and how a President can be lawfully removed from office, rather than leave abdication or violent revolution as the only routes.[118] The Framers also acted against an English common law background in which a nation's chief executive was immune from criminal or civil liability,[119] and they rejected every proposed limitation on the Pardon Clause but the two they placed into its text addressing state offenses and impeachment.[120] Moreover, the authority to award clemency cannot be used to increase a party's sentence, only to reduce it, so a President cannot use it to harm an individual recipient.[121] Perhaps most importantly, members of the Founding Generation deemed an individual's "Honor" to be "sacred"[122] and presumed that whoever the nation elected President would hold the same view.[123] At the end of the day, the Framers believed that removal from office alone would stain a former President's reputation throughout history without the additional need for a criminal conviction and punishment.[124] However we might treat the

117. *Id.* art. II, § 1, cl. 2.

118. *Id.* art. II, § 4; *id.* amend. XXV. *See generally* Larkin, *Guiding Clemency*, *supra* note 3, at 452–53.

119. *See* Larkin, *Guiding Clemency*, *supra* note 3, at 480–81; *supra* note 13.

120. *See supra* notes 59, 81.

121. Schick v. Reed, 419 U.S. 256, at 266– 67 (1974) ("The plain purpose of the broad power conferred by [the Pardon Clause] was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable. . . . Of course, the President may not aggravate punishment . . . .").

122. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) ("And for the support of this Declaration, with a firm Reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.").

123. *See supra* note 16.

124. *See* Jeffrey A. Engel, *The Constitution*, *in* IMPEACHMENT: AN AMERICAN HISTORY 42–43 (2018) ("To the Constitution's framers the greatest dishonor a president could suffer would be not the criminal consequences of nefarious acts, but rather the judgment of his peers that he had violated the people's trust."); *see also* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 610 (1838) ("The executive power is vested in a President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power.").

deterrent and retributive effect of removal today, the Framers saw it as a fitting punishment all by itself.[125]

It is no argument that removal is an insufficient remedy for presidential misconduct because there is too little time between the November election and the January 20th inauguration for Congress to investigate and hold the necessary proceedings. The Framers cannot be faulted for leaving only two months for Congress to hold the President accountable. The Convention of 1787 did not know when (or even whether) the proposed Constitution would be ratified, so the Confederation Congress set March 4 as the date for the commencement of a new Congress and the President's inauguration.[126] The Twentieth Amendment, which took effect in 1933, advanced the inauguration from March 4 to January 20 to lessen the "lame duck" period between different administrations.[127] Today's Congresses must act within the constraint set by that amendment even if it means working through the holidays.[128]

Focusing on the need for prosecution of a scoundrel who becomes President is also the wrong way to consider this problem. A far superior approach is to make sure that the person we elect as President has the character not to approach the line of illegality and not to subordinate the public's welfare to his personal interests. The best way to keep Presidents from using their clemency power as a tool for protecting themselves and for rewarding friends, cronies, and campaign contributors is to elect people who would never even think of doing so because they find such conduct morally reprehensible. The Framers assumed that America would elect only such people. They did not discuss the issue during Constitutional

125. What the Framers believed, whether or not deemed conclusive, matters to everyone across the legal spectrum. *See* PRAKASH, *supra* note 13, at 2.

126. BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 117–18 (2005); Edward J. Larson, *The Constitutionality of Lame-Duck Lawmaking: The Text, History, Intent, and Original Meaning of the Twentieth Amendment*, 2012 UTAH L. REV. 707, 717.

127. *See* U.S. CONST. amend. XX, § 1 ("The terms of the President and Vice President shall end at noon on the 20th day of January . . . .").

128. Besides, an outgoing president could sign a self-pardon warrant in the limousine en route to the Capitol for the inauguration of the incoming chief executive whenever that event occurs.

Convention probably because, as Harvard Law School Professor Mark Tushnet put it, they believed that it was "unthinkable" that "the American people would elect the kind of person who would pardon himself,"[129] particularly since the likely first President, George Washington, was the presiding officer at the Convention.[130]

Unfortunately, we have learned that the Framers' confidence in the electorate was misplaced. Perhaps that is because the number of issues the federal government addresses is far beyond what the Framers thought would fall within the province of the federal government and those issues are of greater concern to different interest groups than the character of the people who run for that office.[131] Whatever the reason might be, we shortchange ourselves and our fellow citizens if we do not treat the character of the people we elect as being a critically important factor when we cast our ballots. If we do and if we elect people with a sterling personal moral character, the self-pardon issue should disappear.[132]

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129. Eric Tucker, *Does Trump Have Power to Pardon Himself? It's Complicated*, ABC NEWS (Dec. 7, 2020), https://abcnews.go.com/Politics/wireStory/trump-power-pardon-complicated-74590139 [https://perma.cc/2BC4-9RMU].

130. *See supra* note 16.

131. *See* Larkin, *Revitalizing Clemency*, *supra* note 3, at 915–16.

132. Consider what Hamilton Jordan, Chief of Staff for President Jimmy Carter, wrote when describing Carter's likely response to Jordan's attempt to obtain a pardon for fugitive Marc Rich:

> I could not imagine walking into the Oval Office and raising the subject of a pardon with President Carter. Nor could I imagine other chiefs of staff in this modern era—Dick Cheney, Howard Baker, Jim Baker or Leon Panetta—discussing with their president the political pros and cons of a pardon for a fugitive who had renounced his citizenship and fled the country to escape prosecution on tax fraud and racketeering charges.
>
> If I'd have had the nerve to walk into the Oval Office to discuss a pardon with Mr. Carter, I would have been peppered with questions:
>
> "Hamilton, why on earth are you bringing this to me?"
>
> "What does (Attorney General) Griffin Bell think?"
>
> "Why isn't Lloyd Cutler (the White House counsel) here?"
>
> "What is the case history and rationale for this pardon?"
>
> "What are the extenuating circumstances that merit my overturning the judgment of a jury and our court system?"
>
> "Do the former prosecutors favor a pardon, and if so, why?"

Turn now to what the Supreme Court has said about the Pardon Clause. The Court has not addressed the self-pardon issue. In fact, with the exception of the wrongful conviction of an innocent person, the Supreme Court has never attempted to define when clemency is necessary or appropriate or what type of relief should be granted (such as a pardon versus a commutation).[133] Instead, the Court has described the president's authority in dramatically expansive, virtually unlimited terms.

Chief Justice Marshall described a pardon as the "private, though official act of the executive magistrate," an "act of grace" that "proceed[s] from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[134] Writing in his treatise on the Constitution, Justice Story concluded that "Congress cannot limit or impose restrictions upon the President's power to pardon."[135] Then, there is Chief Justice Chase's pithy

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> After a series of my answering "I don't know," President Carter would have surely given me one of his famous icy stares and admonished me, "Pardons are serious legal business and not your business, Hamilton. Don't ever come in here again to talk to me about a pardon."
>
> If I had summoned the courage to say, "But Mr. President, this pardon is for someone who contributed generously to our campaign and has even promised to contribute to the Carter Presidential Library," he would have thrown me out of the Oval Office and probably fired me on the spot.

Jordan, *supra* note 5.

133. *See* Cavazos v. Smith, 565 U.S. 1, 8–9 (2011) (describing clemency in a state case: "It is not for the Judicial Branch to determine the standards for this discretion. If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention."); Herrera v. Collins, 506 U.S. 390, 412, 415 (1993) (describing clemency as "the historic remedy for preventing miscarriages of justice where judicial process has been exhausted" and as the "'fail safe' in our criminal justice system" (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 131 (1989))); Kansas v. Marsh, 548 U.S. 163, 193 (2006) (Scalia, J., concurring) ("Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.").

134. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833).

135. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1504, at 324 n.4 (Thomas M. Cooley ed., 4th ed. 1873).

description of the Pardon Clause in *United States v. Klein*[136]: "To the executive alone is intrusted the power of pardon; and it is granted without limit."[137] More recently, Chief Justice Burger concluded that the pardon power "flows from the Constitution alone, not from any legislative enactments," and gives the president "plenary authority" to forgive an offender.[138] He added that the Framers "spoke in terms of a 'prerogative' of the President, which ought not to be 'fettered or embarrassed'" by anyone else, including the courts, and that any limitations on the Pardon Clause must be found in the Constitution's text.[139] Those descriptions, however, were quite modest compared to what Justice Field wrote in *Ex parte Garland*[140]:

> The power thus conferred is unlimited, with the exception [in cases of impeachment]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.[141]

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136. 80 U.S. (13 Wall.) 128 (1872).

137. *Id.* at 147.

138. Schick v. Reed, 419 U.S. 256, 266 (1974).

139. *Id.* at 263 (quoting 2 FARRAND, *supra* note 16, at 626), 266.

140. *Ex parte* Garland, 71 U.S. 333 (1867).

141. *Id.* at 380; *see also* Larkin, *Guiding Clemency*, *supra* note 3, at 473–74 ("It would be difficult to find a Supreme Court decision describing a different presidential power in more sweeping terms. Certainly, nothing in the canonical decision defining general presidential authority—*Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*—contains any passage in the majority opinion by Justice Hugo Black, or the renowned concurring opinion by Justice Robert Jackson, that remotely approximates the Court's description of the imperial scope of the President's clemency authority. Indeed, the breadth of the Court's description of the President's pardon authority in *Ex parte Garland* brings to mind the way Chief Justice Marshall described some of the President's inherent powers in *Marbury v. Madison*. There, he concluded that, in some instances, the President is accountable only to the nation and his own conscience when he acts. Marshall specifically referred to the President's authority over foreign affairs and

The result is that the Supreme Court's description of the Pardon Clause's text is sufficiently capacious to allow for a self-pardon.[142]

Interestingly, the text, purposes, and case law discussing the "judicial Power" created by Article III support the conclusion that the question of who should receive a pardon, including the President, should be subject to, at most, extremely deferential judicial review. Article III grants federal courts the "judicial Power" to adjudicate identified types of "Cases" and "Controversies."[143] Those terms draw meaning from cognate provisions of the Constitution, as well as the history of the English common-law and equity courts.[144] The English courts presided over the resolution of criminal prosecutions and civil disputes, and American federal courts may adjudicate issues arising at "Trial[s]" in "criminal prosecutions" or in "Suits at common law."[145]

Not every issue, however, poses a matter "of a Judiciary Nature,"

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did not identify the pardon power as another example of that authority. Yet, given the expansive understanding of the Pardon Clause that he later endorsed in *United States v. Wilson,* one that the Court reiterated in *Ex parte Garland* and *Schick v. Reed,* if asked Marshall might have included the Pardon Clause in that category as well." (footnotes omitted)).

142. The breadth of that power proves that even time travel is possible. *See* PRAKASH, *supra* note 13, at 99 ("The pardon power extends the president's command of law execution across time. If predecessors secured punishments that seem unwise, unjust, or unconstitutional, the incumbent may wipe them away with pardons. Likewise, the president may revisit his own administration's successful prosecutions and modify or efface them. Finally, if the president grants pardons for any successful governmental prosecution, he extends his control of law execution into the future. No successor may prosecute someone for pardoned offenses.").

143. *See* U.S. CONST. art. III, § 2, cl. 1.

144. *See, e.g.*, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999) ("The Judiciary Act of 1789 conferred on the federal courts jurisdiction over 'all suits . . . in equity.' . . . We have long held that '[t]he "jurisdiction" thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" (first quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78; and then quoting Atlas Life Ins. Co. v. W.I. S., Inc., 306 U.S. 563, 568 (1939))); Coleman v. Miller, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring).

145. U.S. CONST. art. III, § 2, cl. 1; *id.* art. III, § 2, cl. 3; *id.* amend. VI; *id.* amend. VII.

in James Madison's words.[146] The Constitution assigns some tasks to the Article I and II branches. That principle is relevant here because, in the Supreme Court's words, where the Constitution contains "a textually demonstrable constitutional commitment" of the power to decide an "issue to a coordinate political department,"[147] the federal courts must stand aside. That is true even though, as Chief Justice Marshall wrote, it is "the province and duty of the judicial department to say what the law is."[148] The reason is that occasionally "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[149] Both factors arguably are present here. Article II creates a presidential prerogative, and "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution" of someone else.[150]

That conclusion is a sensible one. As the Supreme Court has explained, federal courts cannot trespass on the bailiwicks of the other branches; the courts' role is to resolve lawsuits, not solve social problems. [151] As such, federal courts cannot assume the

146. James Madison, *Monday Augst. 27th, 1787 In Convention*, *in* 2 FARRAND, *supra* note 16, at 426, 430 (referencing the United States Supreme Court).

147. Nixon v. United States, 506 U.S. 224, 228 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962), *abrogated on other grounds by* Rucho v. Common Cause, 139 S. Ct. 2884 (2019)).

148. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

149. *Rucho*, 139 S. Ct. at 2494 (quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion)).

150. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973); *see also* Town of Castle Rock v. Gonzales, 545 U.S. 748, 767 n.13 (2005); Diamond v. Charles, 476 U.S. 54, 64 (1986).

151. As the Court explained in *Arizona Christian School Tuition Organization. v. Winn*, 563 U.S. 125 (2011),

> Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.' This language restricts the federal judicial power 'to the traditional role of the Anglo-American courts.' . . . In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . If the judicial power were 'extended to every question under the constitution,' Chief Justice Marshall once explained, federal courts might take possession of 'almost every subject proper for legislative discussion and decision.' The legislative and executive departments

responsibilities placed on Congress to decide whether to pass legislation, to impose a tax, whom to select as its legislative officers, or to declare war.[152] Nor may the federal courts make decisions entrusted to the President, such as whether and how to wage war, what advice to seek from his lieutenants, whether to appoint an official during a congressional recess, and whether to recognize a foreign nation.[153] In each instance, Congress vested exclusive decision-making power outside of the Article III courts in an Article I body or an Article II individual. [154] Clemency fits into the same

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> of the Federal Government, no less than the judicial department, have a duty to defend the Constitution.

See U.S. CONST. art. VI, cl., 3. That shared obligation is incompatible with the suggestion that federal courts might wield an 'unconditioned authority to determine the constitutionality of legislative or executive acts.'" *Id.* at 132–33 (quoting Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009), then quoting 4 PAPERS OF JOHN MARSHALL 95 (Charles T. Cullen ed., 1984)).

152. U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers."); *id.* art. I, § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States."); *id.* art. I, § 7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."); *id.* art. I, § 7, cls. 2 & 3 (requiring all bills to be submitted to the President for his signature or veto); *id.* art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . . .").

153. *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *id.* art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."); *id.* art. II, § 3, cl. 1 ("[The President] shall receive Ambassadors and other public Ministers."); Zivotofsky v. Kerry, 576 U.S. 1 (2015) (upholding the President's right to decide whether to recognize Jerusalem as the capital of Israel).

154. *See* Paul J. Larkin, Jr. & GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55, 58–59 (2020) ("Several provisions grant exclusive adjudicative, managerial, or remedial authority to Congress or the President, which impliedly forecloses supplementary judicial solutions. . . . [N]o court may order Congress to pass a law, expel a member, impeach and remove an executive officer, raise taxes, or declare war. Nor may a court direct the President how to grant mercy, manage the prosecution of a war, make foreign-policy decisions for the nation, or staff the government.").

category.[155] In any event, even if some clemency issues are subject to judicial review, the President should be afforded extraordinary deference regarding whom should receive that relief, even if he is the recipient.

There are two other points to keep in mind. First, we hope that self-pardons would ordinarily become an issue only when there is at least an objectively justified reasonable suspicion that the President has broken the law, as occurred during the Watergate Investigation.[156] Yet, as our recent presidential campaigns show, supporters of either major political party can use social media to generate suspicion of criminality among the public where none exists solely to serve their own partisan interests.[157] That is troublesome. The range of scenarios in which the issue can arise should give us pause before concluding that every self-pardon is motivated only or

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155. *See* Cavazos v. Smith, 565 U.S. 1, 9 (2011) (quoted *supra* note 133).

156. *See, e.g.*, United States v. Arvizu, 534 U.S. 266, 274 (2002) ("Although an officer's reliance on a mere hunch is insufficient to justify a [*Terry*] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard . . . ."); United States v. Cortez, 449 U.S. 411, 417–18 (1981) ("The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. [¶] The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as fact-finders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. [¶] The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, [392 U.S. 1, 21 n.18 (1968)], said that, '[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*.'") (emphasis added in *Cortez*)).

157. Engel, *supra* note 124, at xii ("Lies told often enough form a reality of their own . . . .").

entirely by a President's desire to immunize himself for conduct that he knew was a crime when he acted.[158] It could be that a President desires to save the nation of the same type of turmoil that the nation endured during the impeachment and removal proceedings against Nixon, Clinton, and Trump. That is hardly an illegitimate motive for a self-pardon.[159]

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158. A "mixed motive" problem would arise if a President acts to benefit the public *and* himself. That scenario often arises in employment cases when an employer dismisses a worker for an impermissible reason (such as race or sex) but defends the action on a permissible ground (such as incompetence or absenteeism). *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285–87 (1977). The same analysis would be appropriate here, even though (except in exceptional circumstances, *see infra* text following note 181) the issue would not arise in litigation. It is worth noting, however, that labeling as illegitimate a President's motive to benefit himself by exercising the powers of his office would invalidate many actions that a President, or any other elected official, takes.

159. *See, e.g.*, Murphy v. Ford, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (describing Ford's pardon of Nixon as a "prudent public policy judgment" and "within the letter and the spirit" of the Pardon Clause); GERALD R. FORD, A TIME TO HEAL (1979) ("I wasn't motivated primarily by sympathy for his plight or by concern over the state of his health. It was the state of the *country's* health at home and abroad that worried me. . . . America needed recovery, not revenge. The hate had to be drained and the healing begun."); *id.* at 173 ("Although I respected the tenet that no man should be above the law, public policy demanded that I put Nixon—and Watergate—behind us as quickly as possible."); *id.* at 179 ("[C]ompassion for Nixon as an individual hadn't prompted my decision at all"); WERTH, *supra* note 18, at 234, 244, 317, 320–21, 329, 333 (noting that President Ford pardoned Nixon to end our travails over Watergate). In the immediate aftermath of the Nixon pardon, numerous critics assailed Ford for immunizing Nixon from legal accountability. *Id.* at 331–33. History, however, looks favorably on what Ford did. *See, e.g.*, MARTHA MINOW, WHEN SHOULD LAW FORGIVE? 119–20 (2019); WERTH, *supra* note 18, at 344 ("The [*Washington*] *Post*'s Bob Woodward, after interviewing Ford in 1998 concluded: 'If Ford mishandled some of the details and disclosures, he got the overall absolutely right—the pardon was necessary for the nation.'"); Carter, *supra* note 2, at 887 ("[A]lthough it was politically wrenching at the time, President Ford probably made the right decision in pardoning Richard Nixon shortly after Nixon's resignation. Although our national anger seemed to demand punishment for Nixon's crimes, Ford believed that in the long run, the national interest would be better served by enabling the ex-President to avoid prosecution, leaving him untouched by legal proceedings that would otherwise have kept alive our national obsession with Watergate, which, in retrospect, it was plainly time to put aside."). (In fact, one commentator has argued that President Biden should seriously consider following President Ford's lead in pardoning President Trump if President Biden believed that doing so would "heal the country's pain and, to coin a phrase, build back better." Jonathan

For example, suppose Congress enacts legislation that imposes duties on the President or one of his lieutenants, with noncompliance punishable as a criminal offense, and that he refuses to comply with the law because he believes that it trespasses on Article II. A President could refuse to comply with the statute (or order his subordinates not to comply) and pardon his noncompliance (or theirs) in order to force members of Congress to concede that the legislation is unconstitutional or to initiate impeachment and removal proceedings and face potential retribution at the polls for a partisan stunt.[160] There might be other examples as well. The point is that some self-pardons could serve *both* the public interest *and* the

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Rauch, *The Case for Pardoning Trump*, LAWFARE (Jan. 22, 2021), https://www.lawfareblog.com/case-pardoning-trump. [https://perma.cc/3TM9-8CM8].) Some scholars have argued that Nixon could and should have "spared Gerald Ford the odious task of issuing the pardon for his predecessor" by pardoning himself. Nida & Spiro, *supra* note 42, at 219; *see also* Vermeule, *supra* note 42, at 412.

160. That possibility is a realistic one, because Congress and the President can disagree on separation of powers issues. They certainly have in the past. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2187 (2020) (holding unconstitutional the for-cause limitations on the President's Article II removal power imposed by the Dodd-Frank Wall Street Reform and Consumer Protection Act); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 478–481 (2010) (holding unconstitutional limitations on the President's Article II removal power imposed by the Sarbanes Oxley Act); INS v. Chadha, 462 U.S. 919, 920–22 (1982) (holding unconstitutional the "legislative veto"). They could do so again even under existing law. For example, the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1–11 (2018) (FACA), imposes various open-meeting and records-disclosure requirements on "advisory committees," including ones on which a president might rely. The FACA would be unconstitutional as applied if it were interpreted to limit the President's ability to obtain the advice he needs to carry out his Article II duties. *See* Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 467–89 (1989) (Kennedy, J., concurring in the judgment) (so concluding); *cf. In re* Cheney, 406 F.3d 723, 727–28 (D.C. Cir. 2005) (en banc) (narrowly construing the FACA to avoid creating a constitutional problem with its application to the Vice President). The Independent Counsel provisions of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, is another example. It required the U.S. Attorney General to apply to a special court created by the act to appoint an Independent Counsel to conduct an investigation into potentially criminal conduct by certain Executive Branch officials. If a President believed that the statute was unconstitutional, as Justice Scalia later concluded, *see* Morrison v. Olson, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting), the President could have ordered the Attorney General to refuse to comply with the law and then pardoned himself for any crime that he might have committed in the process. That would have put Congress to the choice noted in the text.

President's self-interest. Where that is true, we should not hesitate to conclude that the President has acted lawfully.[161]

Second, even when the President violates his fiduciary duty to the public to always use the powers of his office for their benefit, not his own,[162] the remedial question remains: Does the violation retroactively nullify his self-pardon? In answering that question, it is significant that the President has not taken a client's money or tangible property. Had he done so, he would certainly have no right to keep it or profit from using it even on a temporary basis.[163] What is at stake in the case of a self-pardon, however, is intangible. It is "society's general interest in assuring that the guilty are punished."[164] There are various occasions in which society has decided that even guilty parties must go free because countervailing interests outweigh that "general interest." Offenses barred from prosecution by statutes of limitations are a prominent example,[165] but not the only one.[166] Those laws recognize that, at times, the importance

161. Professors Ethan Leib and Jed Shugerman recognize that possibility. *See* Leib & Shugerman, *supra* note 41, at 476 ("[A] presidential self-pardon as a good-faith constitutional defense of the Executive Branch might arguably be valid, but would also raise complicated questions about motives, departmentalism, and judicial deference."). I would go further and say that, in such a case, the self-pardon would definitely be valid.

162. The Presidential Oath and Take Care Clauses obligate him or her to do this. *See supra* notes 70–73 and accompanying text.

163. *Cf.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.").

164. Heckler v. Chaney, 470 U.S. 821, 847 (1985) (Marshall, J., concurring in the judgment).

165. *See, e.g.*, 18 U.S.C. § 3282 (2018) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.").

166. Diplomatic immunity for foreign officials in the United States is another example. Under the Vienna Convention on Diplomatic Relations of April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 7310, and its implementing legislation, the Diplomatic Relations Act,

of enforcing the criminal law is subordinate to other national interests. Not forcing the nation to endure the spectacle of a President standing trial and being imprisoned is one of those interests.

Accordingly, just as Article I makes Congress the final authority when it comes to deciding whether to impeach and remove a President,[167] Article II makes the President the exclusive decision maker when it comes to clemency. Moreover, even if the President's clemency decisions do not technically constitute classic "political questions," the Pardon Clause gives the President sufficient discretion to decide how best to exercise that power that he is entitled to special deference when granting clemency, even if he is the intended recipient.

Where does that leave us? Would the foregoing discussion lead the Supreme Court to uphold a self-pardon? The answer is, "We don't know."

The generally plain vanilla Pardon Clause does not contain the word "sole" or a phrase such as "to anyone, including himself" that would make the argument for a self-pardon a layup.[168] Moreover, the Pardon Clause is only slightly less laconic than the Due Process Clauses;[169] the meaning those clauses had at common law was only that the Crown must comply with "the law of the land" before trespassing on one's life, liberty, or property;[170] and the Supreme Court

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22 U.S.C. §§ 254a–258a (2018), diplomatic and consular officials, as well as their families, are entitled to immunity from criminal prosecution in a host nation's courts.

167. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole power of Impeachment."); *id.* art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments."); Nixon v. United States, 506 U.S. 224, 229 (1993) ("The language and structure of this [Removal] Clause are revealing. The first sentence is a grant of authority to the Senate, and the word 'sole' indicates that this authority is reposed in the Senate and nowhere else.").

168. *Cf. Nixon*, 506 U.S. at 229 (quoted *supra* note 167). Interestingly, the word "alone" does appear in the Supreme Court's opinion in *United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1872), when the Court describes the pardon power. *See supra* text accompanying note 137 (quoting *Klein*).

169. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id*. amend. XIV ("No State shall deprive any person if life, liberty, or property, without due process of law . . . .").

170. *See* Larkin, *Private Delegation*, *supra* note 57, at 71–72.

has read those clauses far beyond their limited (albeit important) common law meaning.[171] The result is that the Court has never felt itself trapped by the common law[172]—or even by its own precedents[173]—when it becomes persuaded that the Constitution requires a different result. That could happen here. Sometimes the realities of the controversy the Court is asked to referee are too striking to be disregarded, and those facts influence the Court's view of the law.[174] The Court might find itself unable to swallow the prospect that a President could go scot-free for a federal crime, unwilling to interpose itself between outgoing and incoming administrations, reluctant to fend off an overwhelming public demand that a former President be held accountable, or fearful of the loss to its prestige from upholding a self-pardon. For those reasons, and probably others, the Court might rule that a President cannot pardon himself.[175] But if it does, the Court would be wrong.

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171. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Roe v. Wade, 410 U.S. 113 (1973). *See generally* Larkin, *Lost Doctrines*, *supra* note 56, at 297–303.

172. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and requiring a state to appoint counsel for an indigent defendant charged with a felony even though there was no such right at common law, *id.* at 466); Powell v. Alabama, 287 U.S. 45, 60–61 (1932)).

173. *See, e.g.*, Obergefell, 576 U.S. at 675–76 (overruling *Baker v. Nelson*, 409 U.S. 810 (1972), which had upheld a state law limiting marriage to heterosexual couples over a constitutional challenge); Lawrence v. Texas, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld a state anti-sodomy law against a constitutional challenge).

174. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 110 (2000) (finding the ballot recount procedure ordered by the Florida Supreme Court "cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work" that was impossible to complete before a state-law deadline); *Powell*, 287 U.S. at 49, 53, 56 (ruling that the appointment of "all the members of the bar for the purpose of arraigning" five black defendants accused of the capital crime of rape, with the "anticipat[ion]" that they would "continue to help" the defendant "if no counsel appears," with no specific attorney designated until the "the morning of the trial," was "little more than an expansive gesture" and did not satisfactorily afford the defendant counsel for their defense).

175. For an excellent discussion of how and why that could occur, see Benjamin Wittes, *Trump's Self-Pardon Fantasy Will Meet a Harsh Reality*, ATLANTIC (Jan. 7, 2021), https://www.theatlantic.com/ideas/archive/2021/01/a-self-pardon-wont-save-trump/617592/[https://perma.cc/F6UB-L5MR].

Yet the Supreme Court need not reach that conclusion to decide that self-pardons are permissible. The last issue in this regard involves the question of how the Court should proceed in the face of constitutional uncertainty. The text of the Constitution does not answer the self-pardon issue with the same precision as it does regarding presidential pardons for state-law crimes or presidential efforts to fend off impeachment and removal. We therefore need to decide what approach courts should follow when deciding whether to impose limitations on the actions of the political branches in the face of uncertainty as to the meaning of the relevant constitutional provision.

I believe that the best approach is to leave to the political process the authority to act as elected officials see fit unless there is a clear constitutional impediment in their way. We have become accustomed to entreating the courts to resolve not just legal disputes but political controversies, in part because the deep polarization that is the current state of affairs on Capitol Hill makes almost impossible the political accommodations and compromises necessary to produce legislation. That practice resembles using opiates for their euphoric effect without regard to the long-term addictive problems created by a short-term fix. By resolving issues for them, courts would only enable members of Congress to avoid taking responsibility for their actions. Besides, were the Supreme Court to adopt a self-pardon exception to the text of the Pardon Clause, the decision would be a precedent for creating other exceptions, such as ones excluding certain types of crimes (like treason or mass murder) or certain types of offenders (like recidivists or serial killers). Were the Court to do so, it might turn the Pardon Clause into the Free Speech Clause, a provision whose text does not limit the courts from endorsing whatever speech policies they find most appealing.

It is far better, in my opinion, for the judiciary to decide "matters of a Judiciary Nature"[176] and leave political disputes to the political branches. The courts must respect and follow an express

176. *Supra* note 146 and accompanying text.

constitutional provision where one exists.[177] But where, as here, there is no clear textual answer to an issue, the courts should not attempt to devise one. Chief Justice and former President William Howard Taft took that approach in *Ex parte Grossman*[178] in ruling that the President does not abuse his clemency power and violate separation of powers principles by pardoning someone for being held in criminal contempt of a federal court.[179] Impeachment was the proper remedy for a President who abuses his clemency power, he concluded, not the creation of a nontextual restriction on clemency.[180] Where the text does not illuminate a controversy or guide a court's path like the North Star to the correct resolution, the risk is too great that judges will find their own personal policy preferences to be constitutional commands. Discretion is the better part of valor not only for warriors but also for judges.

Unfortunately, that approach might not work in this case.[181] A President who pardons himself might be succeeded by one who believes that a self-pardon is invalid. The new President might order

177. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 436–47 (1998) (holding unconstitutional the Line Item Veto Act on the ground that it conflicts with the text of the Article I bicameral and presentment clauses).

178. *Ex parte* Grossman, 267 U.S. 87 (1925).

179. *Id.* at 121 ("An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery. A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common-law origin and long years of practice and acquiescence.").

180. *Id.* ("If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

181. I am indebted to Brian Kalt for pointing this scenario out to me.

the Attorney General to file charges against his predecessor if justified by the evidence. Once he is charged with a federal crime, the former President would move to dismiss the indictment on the ground that his pardon covers all of the relevant crimes. In that scenario with different Presidents disagreeing about the correct answer to this issue, a political resolution would not be possible. The federal courts would be called upon to decide whether a self-pardon is lawful.[182]

At that point, the Supreme Court would be forced to determine whether to create an additional but implicit exception for presidential self-pardons. The exception would need to be implicit, of course, because there is no such express limitation. At common law, that prospect would have raised no one's eyebrows, because the English courts regularly created rules governing contracts, torts, wills, estates, and crimes.[183] But this context is materially different. It has been a fundamental rule of law since *Marbury v. Madison* that the text of the Constitution has crucial importance in matters of constitutional law.[184] Ordinarily, courts interpret the terms found in that text and leave full-scale revisions to the Article V amendment process.

Consider the Double Jeopardy Clause. It provides that no "person" may "be subject for the same offence to be twice put in

182. There is another, intriguing possibility. The new President could *withdraw* the self-pardon issued by his or her predecessor and order the Attorney General *not* to prosecute the president. *See* Ken Gormley, *If Trump Pardons Himself, Biden Should Un-Pardon Him*, WASH. POST (Dec. 18, 2020), https://www.washingtonpost.com/opinions/2020/12/18/if-trump-pardons-himself-biden-should-un-pardon-him/ [https://perma.cc/NM8Z-2WMG]. This would allow the new President to express his disagreement with the legality of a self-pardon while denying his predecessor the opportunity to defend its legality in a criminal case. The predecessor President might try to bring an action for declaratory relief to establish the legality of his self-pardon, but he or she would have difficulty establishing an Article III "Case" or "Controversy" absent proof of a concrete action adversely affecting him other than the alleged illegality of withdrawing an already-issued self-pardon. The reason is that the courts might conclude that the withdrawal itself merely expresses a difference of opinion as to the legality of a government action. *See supra* notes 133, 141 and 179.

183. *See, e.g.*, THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 56, 238, 455–56 (Lib. Fund 2010) (1929).

184. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803).

jeopardy of life or limb."[185] In cases raising issues under that clause, the Court must decide issues such as whether a "corporation" is a "person,"[186] how to define "the same offence,"[187] when is a person "in jeopardy" of a second punishment,[188] and if separate charges filed by the federal and state governments "twice" place someone at risk of multiple punishments.[189] Those inquiries, and others like them,[190] are materially different from questions asking whether

185. U.S. CONST. amend. V.

186. *See* United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (ruling by implication that a corporation can invoke the Double Jeopardy Clause).

187. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) (different charges are not the "same offence" if each one requires proof of an element not required by the other); United States v. Dixon, 509 U.S. 688, 696 (1993) (explaining that the *Blockburger* test applies in the context of multiple punishment and multiple prosecution); U.S. CONST. amend. V.

188. *See* Crist v. Bretz, 437 U.S. 28, 32–38 (1978) (ruling that jeopardy attaches when the jury is empaneled and sworn).

189. *See* Gamble v. United States, 139 S. Ct. 1960, 1964–80 (2019) (ruling that successive prosecutions by the state and federal governments for the same crime do not violate the Double Jeopardy Clause).

190. The Sixth Amendment Jury Trial Clause guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district" where the crime was committed. U.S. CONST. amend. VI. That text forces the Court to answer questions such as when does a person become "the accused," *see, e.g.*, United States v. Marion, 404 U.S. 307, 313 (1971) (ruling that a person does not become "the accused" until he is formally charged with a crime, such as by the filing of an indictment), how many people are necessary to constitute a "jury," *compare* Williams v. Florida, 399 U.S. 78, 86–103 (1970) (ruling that a six-person jury satisfies the Jury Trial Clause) *with* Ballew v. Georgia, 435 U.S. 223 (1978) (ruling that a five-person jury does not), *and* what deprives a jury of its required "impartial[ity]," *see, e.g.*, Rivera v. Illinois, 556 U.S. 148, 158–60 (2009) (ruling that the mistaken deprivation of a defendant's right to exercise peremptory challenges to members of the venire does not deny a defendant an impartial jury); Holland v. Illinois, 493 U.S. 474, 477–84 (1990) (ruling that the use of peremptory challenges to excuse racially identifiable members of the venire violates the Equal Protection Clause but does not necessarily violate the Sixth Amendment guarantee of an "impartial" jury); Lockhart v. McCree, 476 U.S. 162, 177–83 (1986) (ruling that the exclusion from the jury in capital cases of jurors unalterably opposed to capital punishment does not violate the guarantee of an "impartial" jury). For similar cases deciding whether particular law enforcement practice constitutes a "search" or a "seizure" for purposes of the Fourth Amendment, see, for example, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining "searches" and "seizures"); Burdeau v. McDowell, 256 U.S. 465, 475–76 (1921) (ruling that conduct by a private party cannot constitute a "search" or "seizure").

certain conduct nowhere mentioned in the text of the Constitution should nonetheless be treated as if the text in fact did mention it.[191] To be sure, there will be close cases where the proper interpretation of the text will lead to a rule that might not itself be found in the constitutional text when read literally.[192] But a difference in degree can become a difference in kind when that difference exceeds a reasonable range.

In my opinion, the latter would occur if courts were to add a third limitation to the Pardon Clause's text. After all, there will always be strong policy arguments for denying some parties clemency. Prominent examples include individuals who commit certain especially heinous crimes (treason, espionage, terrorism, mass murder, serial killings, child abuse, rape, to name a few), the individuals who stand atop large-scale criminal enterprises, sociopaths, and repeat offenders. If the Supreme Court were to rule that it may create a new, third category of exclusions (for self-pardons) in addition to the two already identified in the text (for state crimes and congressional impeachments), it would be a small step for lower courts—or legislatures, for that matter—to add additional exceptions. If so, the result would be to abandon the rule of *Marbury* because courts and legislatures would be free to amend the constitutional text in a common-law like manner rather than limit themselves to interpreting the Framers' words. The Supreme Court cannot follow that path without abandoning the importance that *Marbury* placed on fidelity

191. *Compare, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (creating a constitutional right to same-sex marriage), *and* Roe v. Wade, 410 U.S. 113 (1973) (creating a constitutional right to have an abortion), *with, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (refusing to create a constitutional right to protection against violent harm by private parties), *and* Harris v. McRae, 448 U.S. 297 (1980) (refusing to create a constitutional right to public funding of abortions).

192. *See, e.g.*, Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (ruling that a jury verdict in a "serious" criminal case (where there is the potential of more than six-months confinement) must be unanimous despite the absence of that requirement in the text of the Jury Trial Clause); Taylor v. Louisiana, 419 U.S. 522, 527–31 (1975) (ruling that the automatic disqualification of women from service as jurors denied the defendant an "impartial" jury by denying him a "fair possibility" of a petit jury representing a cross-section of the community).

to the constitutional text as the justification for judicial review.[193] To paraphrase Justice Kagan, the Framers could have written the Pardon Clause differently, but they didn't, and we have to live with the text they chose.[194] Otherwise, we would be guilty of writing fiction rather than honestly interpreting a legal text.

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193. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained. The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

194. *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2325–26 (2020) (discussing the problem of the so-called "faithless presidential elector": "The Framers could have done [the Twelfth Amendment] differently . . . Whether by choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be.").

III. GOING FORWARD

At one time, the prospect of an adverse judgment by history (or the Almighty) about a President might have been a sufficient deterrent to (and adequate punishment for) any presidential misuse of clemency. Today, however, few people deem adequate an unfavorable judgment by posterity on either side of the River Styx. Most people offended by a President's decisions may take to social media to express their outrage, but some will look for a more traditional vehicle to bring the chief executive to heel.

One option is to pursue litigation challenging a self-pardon. Elected officials might be among the first plaintiffs, if only to appease their constituents who believe that what the President has done is disgraceful. It would cost an elected official nothing—they can always find someone to represent them pro bono—and would allow a member of Congress to display outrage and garner media attention. Nowadays most political disputes wind up as lawsuits alleging a constitutional violation of some sort,[195] so there is a fair chance that someone would sue a federal official—perhaps the Secretary of the Treasury and the Director of the Office of Personnel Management, to enjoin his retirement checks—were the President to pardon himself. Litigation, however, is not likely to prove successful.[196] It would be an insuperable challenge just to find a

195. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835 & 1840) ("There is almost no political question in the United States that is not resolved sooner or later into a judicial question.").

196. It is difficult to sue the President himself. *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) (ruling that the President is not an "agency" for purposes of the Administrative Procedure Act); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 501 (1866) ("[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); Kendall v. United States, 37 U.S. (12 Pet.) 524, 610 (quoted *supra* note 124); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1569, at 372 (Thomas M. Cooley ed., 4th ed. 1873) ("There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these must necessarily be included the power to perform them. . . . The President cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose

plaintiff who could establish the requisite Article III injury-in-fact necessary to enable a federal court to consider the merits of the claim.[197] Of course, were the Justice Department to prosecute a former president for a federal offense arguably within the scope of a self-pardon, the former President could raise that pardon as a complete defense to the charge, and the legality of a self-pardon would become an issue for the federal courts (and very likely the Supreme Court) to resolve. Otherwise, the prospects are not good for anyone who hopes that a court will adjudicate the legality of and nullify a self-pardon.

Nor may Congress outlaw self-pardons by legislation. Parliament has imposed limitations on the Crown's clemency power,[198] but

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his person must be deemed, in civil cases at least, to possess an official inviolability."); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1196–97 (2006) (explaining challenges to executive power often do not result in judiciable issues).

197. *See, e.g.*, Hollingsworth v. Perry, 570 U.S. 693, 706 (2013) ("A litigant 'raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.'" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992))); Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 597–615 (2007) (plurality opinion) (ruling that taxpayers lack standing to challenge an agency's use of federal funds to underwrite a conference promoting the President's faith-based initiatives); Raines v. Byrd, 521 U.S. 811, 818–30 (1997) (ruling that members of Congress lack standing to challenge the constitutionality of the Line Item Veto Act); Allen v. Wright, 468 U.S. 737, 754 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); City of Los Angeles v. Lyons, 461 U.S. 95, 105–13 (1983) (ruling that a plaintiff seeking injunctive relief must show that he will be subject to the government's allegedly unlawful actions); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215–28 (1974) (ruling that private citizens cannot bring suit to challenge the military reserve officer commissions held by members of Congress, on the ground that the commissions violate the Incompatibility Clause, U.S. CONST. art. I, § 6); United States v. Richardson, 418 U.S. 166, 171–80 (1974) (same, alleged violation of the Statement of Accounts Clause, U.S. CONST. art. I, § 9, cl. 6, for not expressly identifying the Central Intelligence Agency's budget); Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973) ("The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.").

198. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 260–61 (1974); Feldman, *supra* note 17 (both listing examples).

Parliament is the supreme lawmaking body in England since that nation has no written Constitution. This nation does, and that fact is critically important. The Supreme Court made it clear in *Marbury* that the Constitution limits Congress's legislative power.[199] That principle applies in full to the President's clemency power.[200] Because Article II grants the President a prerogative over clemency, Congress can no more obstruct his exercise of that power than the President can disrupt Congress's impeachment authority. Congress might chafe at its inability to regulate the President's clemency decisions, but the Framers made that choice for them.[201]

Finally, there is the possibility of revising the Pardon Clause via a constitutional amendment. In response to past clemency abuses, some parties called for constitutional limitations on a President's clemency authority, particularly during the end of his or her administration.[202] The amendment process, however, is quite rigorous. Article V requires a two-thirds vote by each House of Congress to submit a proposed constitutional amendment to the states.[203] Then, three-fourths of the state legislatures must vote in its favor for it to become law.[204] That is a steep hurdle to overcome for a proposed amendment to be eligible for consideration by the states.

Members of Congress have tried without success. After President Gerald Ford pardoned Richard Nixon for any crimes that the latter

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199. *See supra* note 193; *supra* note 40.

200. *See, e.g.*, *Schick*, 419 U.S. at 266 ("A fair reading of the history of the English pardoning power, from which our Art. II, §2, cl. 1, derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); United States v. Klein, 80 U.S. (13 Wall.) 128, 152 (1872) (quoted *supra* at text accompanying note 137); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) (quoted *supra* at text accompanying note 141); 2 STORY, *supra* note 80, § 1504, at 324 n.4 (quoted *supra* at text accompanying note 135); *cf.* LAWTON OLC OPINION, *supra* note 21, at 3 (arguing that "a concurrent resolution [recommending a pardon] would be only hortatory and have no legal effect").

201. Congress could, however, make clear that federal offenses, such as bribery, do apply to the President, as Bob Bauer and Jack Goldsmith have suggested. *See* BAUER & GOLDSMITH, *supra* note 3, at 130–31, 361, 373–75.

202. *See infra* text accompanying notes 205–07.

203. U.S. CONST. art. V.

204. *Id.*

might have committed in connection with Watergate, Senator Walter Mondale proposed an amendment to the Pardon Clause that would have allowed Congress to overrule a grant of clemency by a two-thirds vote. Mondale's proposal failed.[205] After Clinton left the White House, Congress held hearings into his profligate use of the clemency power during his final days in office.[206] Representative Barney Frank proposed a constitutional amendment to bar the President from granting clemency between October 1 in an election year and January 21 in the following year.[207] Frank's proposed amendment also did not become law.

The upshot is this: a constitutional amendment is highly unlikely. No proposal to amend the Pardon Clause has made it out of Congress, even in times that were as politically sulfuric as we are witnessing today. Hope may spring eternal, but reality is a cruel mistress.

CONCLUSION

The clemency power that President Biden came to possess when he took the oath of office is the same one enjoyed by George Washington and every successor. It stands as perhaps the last surviving remnant of the English Crown's royal prerogatives. Hopefully, President Biden will not need to consider pardoning himself. If he were to take that step, he might pay a short-term political price of being impeached and removed from office, as well as the long-term reproach of history for having disgraced the office of the presidency. But whatever price he might pay, he would not be acting unlawfully simply by pardoning himself. The Pardon Clause gives him that power. We often forget that there is a difference between

205. MOORE, *supra* note 133, at 217; Larkin, *Guiding Clemency*, *supra* note 3, at 462 n.60.

206. *See* S. REP. NO. 106-231, at 2 (2000) (report on Pardon Attorney Reform and Integrity Act, (2000)); *Recent Presidential Pardons: Testimony Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of Roger C. Adams, Pardon Attorney); *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. 342 (2001); *Presidential Pardon Power: Hearing Before the H. Subcomm. on the Const. of the H. Comm. on the Judiciary*, 107th Cong. (2001).

207. *See* Crouch, *supra* note 34, at 109–10.

a President who acts unwisely and one who acts unlawfully. Only time will tell whether we will need to be reminded of that difference.

THE PRECEDENTIAL EFFECTS OF THE SUPREME COURT'S EMERGENCY STAYS

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INTRODUCTION

The Supreme Court of the United States makes two types of decisions with far-reaching effects on American life. We are all familiar with the first type. In keeping with the Court's "paramount role" as the nation's "supreme federal appellate" tribunal, these decisions are rulings on the merits of a case and each constitutes the culmination of a petition for certiorari of final decisions made by lower federal or state supreme courts.[1]

But, with "notable frequency" in recent years, the Supreme Court has issued consequential decisions of a different kind: emergency relief staying the effect of a lower court ruling.[2] Stays are part of the Court's so-called "shadow docket," the important but understudied orders and decisions issued without oral argument and with little briefing.[3] While the immediate impact of these stays may be self-evident, the Supreme Court's pronouncements are often less important for their effects on the specific cases before it than the precedent they set for lower courts in future cases.

How should lower courts treat these stay decisions? This question is now particularly pressing. By all appearances, we are in a new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits. Consider the types of cases that have resulted in emergency relief from

1. Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 505 (1971). The Court has a small docket of original jurisdiction cases that would also fall within this first category.

2. Little v. Reclaim Id., 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

3. *See* William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1–2 (2015); Ian Millhiser, *The Supreme Court's enigmatic 'shadow docket,' explained*, VOX (Aug. 11, 2020, 8:30 AM), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman [https://perma.cc/7T8H-26ET].

the Supreme Court during the past few terms. These cases "follow[] a now-familiar pattern."[4] Groups of plaintiffs file high-profile lawsuits challenging an Executive Branch action in multiple district courts across the country, often securing from at least one court a judgment granting them broad equitable relief, such as a nationwide injunction.[5] The government then seeks a stay of the order, first from the lower courts and, if unsuccessful there, from the Supreme Court.

Lower courts have just begun to grapple with this issue. In August 2020, the Fourth Circuit considered what effect, if any, the Supreme Court's decision to grant a stay of preliminary injunctions preventing enforcement of the Trump Administration's "public charge" rule should have on the court's evaluation of the rule.[6] Writing for the majority, Judge Wilkinson suggested that while the Fourth Circuit "may of course have the technical authority" to disregard the Supreme Court's stay, "every maxim of prudence suggests that we

4. Wolf v. Cook Cty., 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

5. *See, e.g.*, New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) (granting plaintiffs a nationwide injunction); East Bay Sanctuary Covenant v. Barr, 385 F. Supp. 3d 922, 960 (N.D. Cal. 2019) (same); U.S. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 599 (2020) (Gorsuch, J., concurring in the grant of stay) (mem.) (noting that plaintiffs in four different jurisdictions sought universal injunctions against the Department of Homeland Security's proposed "public charge" rule).

6. CASA de Md., Inc. v. Trump, 971 F.3d 220, 229–30 (4th Cir. 2020). The Immigration and Nationality Act says that an alien who is "likely at any time to become a public charge is inadmissible." 8 U.S.C. § 1182(a)(4)(A) (2018). In a rulemaking, the Department of Homeland Security defined "public charge" as any alien likely to receive certain public benefits for more than twelve months over any thirty-six-month period. District courts in the Second and Seventh Circuits granted nationwide injunctions against the Department's rule. *See* Cook Cty. v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019); New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334, 353 (S.D.N.Y. 2019) The Supreme Court stayed these injunctions after the Second and Seventh Circuits declined to do so. *See supra* note 5.

should decline to take [that] aggressive step."[7] Judge Wilkinson added that the decision to grant a stay "gives us a window into the Supreme Court's view of the merits," and that the Fourth Circuit "should not cultivate the appearance of denying the Supreme Court action its obvious and relevant import."[8]

Judge King disagreed. In dissent, he argued that "assigning such significance to perfunctory stay orders is problematic," and that treating a Supreme Court stay order as controlling would obviate the need for an intermediate appellate court to consider the merits of an issue where the Court has granted such a stay.[9]

Beyond this Fourth Circuit case and the handful of examples we discuss below, the judiciary has said little else about the possible precedential effects of Supreme Court stays. And the issue has largely escaped academic review, perhaps because it is only recently that the Court's shadow docket has so frequently touched on hot-button topics.

Two articles have considered the authority of individual Justices to grant stays,[10] but neither one focused on the precedential weight such decisions should be accorded in the lower courts. Others have considered the justification for stays more generally,[11] but again there was little discussion of the impact of stays on future cases. A student note from the early 1990s considered the weight Supreme Court stays should be accorded by lower courts,[12] but that article was limited to the

7. *CASA de Md.*, 971 F.3d at 230.

8. *Id.*

9. *Id.* at 281 n.16 (King, J., dissenting).

10. *See* Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. CIN. L. REV. 1159 (2008); Lois J. Scali, *Prediction-Making in the Supreme Court: The Granting of Stays by Individual Justices*, 32 UCLA L. REV. 1020 (1985).

11. *See* Portia Pedro, *Stays*, 106 CALIF. L. REV. 869 (2018).

12. *See* Beverly Bryan Swallows, *Stays of Execution: Equal Justice for All*, 45 BAYLOR L. REV. 911 (1993).

unusual milieu of capital punishment cases. And its conclusions may be undermined by the Court's recent practice, discussed below, of ruling on stay applications en banc rather than through an individual Justice.

This Article seeks to fill this gap in the literature about the Supreme Court's shadow docket and further the broader conversation regarding the role of precedent in the American justice system.[13] We argue that the Court's stay decisions are sortable into the following categories, representing a spectrum of precedential force: those that have little value for lower courts, those that are useful as persuasive authority, and those that are authoritative with respect to future cases considering the same legal questions,[14] even if they might "have considerably less precedential value than an opinion on the merits."[15] At the least, stays in the third category should be treated as strong signals from the Court about how to resolve an ambiguity in the law.[16]

The first category includes denials of stay applications and decisions issued by a single Justice without any opinion. Stays with persuasive authority include those granted by a single Justice who issues an opinion explaining his or her views on the merits of the case. Concurrences in, dissents from, and statements respecting a decision to grant a stay also fall into this second category. The third category includes stay grants

13. *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (2016).

14. *See* Hicks v. Miranda, 422 U.S. 332, 344–45 (1975); Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

15. Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 180–81 (1979) (discussing the Court's summary decisions).

16. *See* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942–45 (2016) (describing the "signals" model of vertical stare decisis, which suggests that the Justices sometimes "act in their official, adjudicatory capacity without establishing conventional precedent, but nonetheless indicate some aspect of how lower courts should decide cases").

in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented.

In the pages that follow we explain the reasons for this categorization and offer examples of stays we believe belong in each group. Part I of the Article reviews the Supreme Court's authority to grant emergency stays, how they work, and the standard of review the Court applies. Part II elaborates on our proposal for how lower courts should think about Supreme Court stays: courts should evaluate three factors to determine what effect to give an emergency stay decision. These include (1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's view of the merits. These factors help answer a single, relatively straightforward question: can the lower court say with confidence that a majority of the Supreme Court has expressed a view on the merits of the stay applicant's case? When the answer to that question is "yes," the lower court should defer to that view or explain why deference is unwarranted.

Late last year, the Supreme Court itself provided a strong indication that shadow docket decisions can have precedential effects. Consider *Roman Catholic Diocese of Brooklyn v. Cuomo*,[17] which involved a church's emergency application for injunctive relief from an Executive Order issued by New York Governor Andrew Cuomo.[18] The Executive Order imposed "very severe restrictions on attendance at religious services" in parts of New York in response to the COVID-19 pandemic.[19] The church argued that the restrictions "treat houses

17. 141 S. Ct. 63 (2020) (per curiam).
18. *Id.* at 65–66.
19. *Id.*

of worship much more harshly than comparable secular facilities," and that they therefore violate the First Amendment's "'minimum requirement of neutrality' to religion."[20]

The Court granted the church's application for emergency relief.[21] In a three-page *per curiam* opinion followed by another twelve pages of concurrences and dissents, the Court held that the church was likely to succeed on the merits of its First Amendment claim.[22] The Court's opinion found that the church "made a strong showing" that the Executive Order "cannot be viewed as neutral because [it] single[s] out houses of worship for especially harsh treatment."[23]

The Court noted that, under the Executive Order, "while a synagogue or church may not admit more than 10 persons" within so-called "red zones," "businesses categorized as 'essential' may admit as many people as they wish."[24] The list of essential businesses included "acupuncture facilities, camp grounds, garages" and a wide variety of other enterprises.[25] More strikingly, in so-called "orange zones," the Executive Order required houses of worship to restrict attendance to twenty-five people, even though non-essential businesses in these zones were free to decide for themselves how many persons to admit.[26]

The Court explained that though "[s]temming the spread of COVID-19 is unquestionably a compelling [state] interest," it is "hard to see how the challenged regulations can be regarded as 'narrowly tailored,'" as they are "far more restrictive

20. *Id.* at 66 (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*

than any COVID-related regulations" the Court had previously considered.[27] It therefore enjoined New York from enforcing the Executive Order.[28]

Despite its emergency posture, lack of oral argument, and truncated briefing schedule, *Diocese of Brooklyn* has been quickly recognized as a watershed decision.[29] The Supreme Court and other courts have cited the opinion over one hundred times.[30] The Ninth Circuit, in striking down similar COVID-related regulations in Nevada, found that *Diocese of Brooklyn* "compels the result in this case."[31]

And, critically, the Court vacated other lower court decisions and remanded them for further consideration in light of its *Diocese of Brooklyn* opinion.[32] These "GVR" orders,[33] typical after the

27. *Id.* at 67.

28. *Id.* at 69.

29. *See, e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 982 F.3d 1228, 1232 (9th Cir. 2020) (describing *Diocese of Brooklyn* as "arguably represent[ing] a seismic shift in Free Exercise law"); Ian Milhiser, *Religious conservatives have won a revolutionary victory in the Supreme Court*, VOX (Dec. 2, 2020, 8:00 AM), https://www.vox.com/2020/12/2/21726876/supreme-court-religious-liberty-revolutionary-roman-catholic-diocese-cuomo-amy-coney-barrett [https://perma.cc/DSX7-KMRM] (calling *Diocese of Brooklyn* "one of the most significant religion cases in the past 30 years").

30. *See, e.g.*, Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam); Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't, 984 F.3d 477, 480 (6th Cir. 2020); Calvary Chapel v. Mills, 984 F.3d 21 (1st. Cir. 2020).

31. *Calvary Chapel*, 982 F.3d at 1232.

32. *See* Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 889 (2020) (mem.); Robinson v. Murphy, 141 S. Ct. 972 (2020) (mem.). Indeed, in a recent case, Justice Gorsuch explained that *Diocese of Brooklyn* "made it abundantly clear" that COVID-related restrictions on worship similar to New York's "fail strict scrutiny and violate the Constitution," adding that "the lower courts in these cases should have followed the extensive guidance this Court already gave." S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 719 (2021) (Gorsuch, J., statement respecting the grant in part of the application for injunctive relief) (mem.). And the full Court later chided the Ninth Circuit for failing to follow *Diocese of Brooklyn. See* Tandon v. Newsom, 141 S. Ct. 1294, 1297 (per curiam) (applying *Diocese of Brooklyn* and noting "[t]his is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise").

33. "GVR" stands for granting a petition for certiorari, vacating the lower court's

Court issues a major decision with implications for other pending cases, would be nonsensical if *Diocese of Brooklyn* was "good for one ride only" and irrelevant for subsequent cases. Nor would the lengthy and strongly worded concurrences and dissents be warranted if the emergency relief granted had no implications for the merits of the First Amendment questions the Court considered. In fact, by the time the Court issued its opinion, the red and orange zones at issue in New York no longer covered the plaintiffs' houses of worship.[34] This further supports the view that the Justices expected the opinion to be relevant to, and likely controlling for, similar cases. Thus, the actions of the Court and lower courts suggest that emergency decisions like the one made in *Diocese of Brooklyn* can have significant precedential weight.

I. STAY PROCESS AND RULES

A. The Basics

The Supreme Court's power to stay the enforcement of a judgment by a lower court stems from the All Writs Act, 28 U.S.C. § 1651, and from 28 U.S.C. § 2101(f), which allow for stays of lower court judgments subject to review by the Court on a writ of certiorari.[35] Stays can be granted either by the full Court, or by an individual Justice.[36] Parties seeking a stay from the Supreme Court apply to the "Circuit Justice," the Justice assigned to the Circuit in which the case arose.[37] The

judgment, and remanding the case for further consideration in light of the Court's related ruling. *See, e.g.*, Stutson v. United States, 516 U.S. 193, 194 (1996) (per curiam).

34. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 68 (2020) (per curiam).

35. *See* Magnum Import Co. v. Coty, 262 U.S. 159, 162 (1923); Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers).

36. *See* 28 U.S.C. § 2101(f) (2018); SUP. CT. R. 23.1.

37. SUP. CT. R. 22.3; *see also* Bennett Boskey, *Stays—General Comment*, 1A WEST'S FED. FORMS, SUPREME COURT § 322 (5th ed.).

applicant must "set out with particularity why the relief sought is not available from any other court or judge."[38] Except in "the most extraordinary circumstances," the applicant must first seek relief from the appropriate lower court(s).[39]

The Circuit Justice to whom the application is addressed may grant the application, deny it, or refer it to the full Court for consideration.[40] If the Circuit Justice elects to grant or deny the application, the Justice will typically issue an "in-chambers" opinion noting that decision.[41] An in-chambers opinion "is written by an individual Justice to dispose of an application by a party for interim relief, e.g., for a stay of the judgment of the court below, for vacation of a stay, or for a temporary injunction."[42] If a Circuit Justice denies an application for a stay, the applicant may renew the application to any other Justice.[43] But reapplications are discouraged[44] and are rarely successful.[45]

Though it was once common for a single Justice to grant or deny a stay, the practice in recent years appears to be that non-trivial stay applications received by a Circuit Justice are referred to the full Court for consideration as a matter of course.[46] In fact, no in-chambers opinion has been published

38. SUP. CT. R. 23.3.

39. *Id.*

40. *See* SUP. CT. R. 22.

41. *See* SUP. CT. R. 22.4.

42. *In-Chambers Opinions*, U.S. SUPREME COURT, https://www.supremecourt.gov/opinions/in-chambers.aspx [https://perma.cc/3JBR-P8D6].

43. SUP. CT. R. 22.4.

44. *See* Holtzman v. Schlesinger, 414 U.S. 1316, 1316 (1973) (Douglas, J., opinion in chambers); Frank Felleman & John C. Wright, *The Powers of the Supreme Court Justice Acting in an Individual Capacity*, 112 U. PA. L. REV. 981, 986 (1964).

45. *See, e.g.*, Dayton Bd. of Educ. v. Brinkman, 439 U.S. 1358, 1358–59 (1978) (Rehnquist, C.J., opinion in chambers) (denying a reapplication for a stay); New York Times v. Jascalevich, 439 U.S. 1331, 1337 (1978) (Marshall, J., opinion in chambers) ("[A] single Justice will seldom grant an order that has been denied by another Justice." (citation omitted)).

46. *See* Ira B. Matetsky, *The Current State of In-Chambers Practice*, 1 J. IN-CHAMBERS

since 2014.[47]

This trend is itself noteworthy. No formal change in Court rules seems to have caused the change. Perhaps it reflects a preference of Chief Justice Roberts or a consensus amongst the current Justices that, with the lower active caseload the Court now carries,[48] it is no longer necessary or appropriate for individual Justices to act unilaterally on behalf of the full Court. Or it might reflect the growing public awareness of the shadow docket and the importance of the Court's emergency decisions. Indeed, while Supreme Court stays historically often concerned individual death penalty cases,[49] they are now more likely to target a nationwide injunction of a high-profile Executive Order.[50] Regardless of the reason, this recent shift in stays being issued by the full Court rather than a single Justice corresponds with the increased importance of these stays.

Opinions issued with stay decisions vary greatly. As most

PRAC. 11 (2016) (noting that "under current practices, the justices frequently refer applications for stays or injunctions to the full Court for disposition").

47. *See In-Chambers Opinions*, *supra* note 42.

48. *See, e.g.*, Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest In 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/ [https://perma.cc/NU57-TFQN].

49. *See, e.g.*, Cole v. Texas, 499 U.S. 1301, 1301 (1991) (Scalia, J., opinion in chambers) (explaining that, as Circuit Justice for the Fifth Circuit, he would grant "in every capital case on direct review . . . a stay of execution pending disposition by this Court of the petition for certiorari.").

50. *See, e.g.*, Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 2020 WL 7640460 (N.D. Cal. Dec. 22, 2020) (barring enforcement of most of E.O. 13950 ("Advancing Racial Equity and Support for Underserved Communities Through the Federal Government")); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2427 (Thomas, J., concurring) (noting that "[f]or most of our history, courts understood judicial power as fundamentally the power to render judgments in individual cases," and concluding that nationwide injunctions "are legally and historically dubious" (cleaned up)); Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124 (2019) (noting that the Office of the Solicitor General under Noel Francisco was criticized by some for filing "an unprecedented number of requests for emergency or extraordinary relief from the Justices ").

applications for a stay are denied, most opinions are, unsurprisingly, short statements with no discussion of the merits of the applicant's position or the reasons a stay was granted or denied.[51] Others are longer and look more like the opinions the Court typically issues when it resolves a merits dispute.[52] Some stay decisions issued by the full Court feature a short opinion along with concurrences, dissents, or statements respecting the Court's decision.[53]

B. The Standard of Review

The Supreme Court has described the standard of review for evaluating stay applications in a number of different and sometimes conflicting ways. It is therefore unclear whether the Court employs a uniform standard, complicating the question of the precedential weight of stay rulings. But regardless of which of the standards discussed below applies, successful stay applicants must show that they are likely to succeed on the merits of their claims. That is the crucial point for our purposes.

In *Nken v. Holder*,[54] the Court described the "traditional" standard that federal courts use to determine whether to grant a stay.[55] This standard has four factors: "(1) whether the stay applicant has made a strong showing that he is likely to

51. *See, e.g.*, Powe v. Deutsche Bank Nat'l Trust Co., 140 S. Ct. 992 (2020) (mem.); *In re* Giordani, 139 S. Ct. 2629 (2019) (mem.); Rucho v. Common Cause, 138 S. Ct. 923 (2018) (mem.); Kwasnik v. Fed. Nat'l Mortg. Assoc., 568 U.S. 1153 (2013) (mem.); Rodriguez v. Pereira, 548 U.S. 937 (2006) (mem.).

52. *See, e.g.*, Heckler v. Lopez, 463 U.S. 1328 (1983) (Rehnquist, C.J., opinion in chambers); Hollingsworth v. Perry, 558 U.S. 183 (2010) (per curiam); *In re* United States, 139 S. Ct. 452 (2018) (mem.).

53. *See, e.g.*, Valentine v. Collier, 140 S. Ct. 1598 (2020) (mem.); Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.); Barr v. Roane, 140 S. Ct. 353 (2019) (mem.); Hamm v. Dunn, 138 S. Ct. 828 (2018) (mem.).

54. 556 U.S. 418 (2009).

55. *Id.* at 425.

succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[56] The Court noted that the "first two factors of the traditional standard are the most critical."[57] Thus, under the traditional test for stays, the movant must make a "strong" showing that he will succeed on the merits and that he will suffer irreparable harm without a stay.[58]

But while the *Nken* factors are regularly applied by lower courts considering stay applications, the Supreme Court has never explicitly used the *Nken* formulation in granting or denying the emergency applications it has received. Nor, however, has the Court said that the "traditional" stay analysis does not apply.

In the stay opinions the Supreme Court has issued, the most common formulation of the standard of review is that the stay applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."[59]

But there have also been other formulations. For example,

56. *Id.* at 426 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

57. *Id.* at 434.

58. *See id.* at 435.

59. Hollingsworth v. Perry, 558 U.S. 183, 190 (2010); *see also* Philip Morris USA Inc. v. Scott, 561 U.S. 1301, 1302 (2010) (Scalia, J., opinion in chambers) (describing as "settled practice" the Court's requirement that these three conditions be met); Little v. Reclaim Id., 140 S. Ct 2616, 2616 (2020) (Roberts, C.J., concurring in the grant of stay) (mem.) (calling the standard "well-settled"); STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 16-1–16-14 (11th ed. 2019).

some Justices have required there be a "significant possibility" that the judgment below will be reversed.[60] This "significant possibility" language has also been used in the death penalty context.[61] It is unclear whether a "significant possibility" requires a higher showing than a "fair prospect," or whether either of these phrases requires something different than *Nken*'s "strong showing." Some cases have suggested that the Court must "balance the equities" and "determine on which side the risk of irreparable injury weighs most heavily."[62] But the Court has, at other times, suggested that balancing the equities need only be performed "in a close case."[63]

When the stay request arrives at the Court following a denial by a lower court, as is almost always the case, some Justices have said that the movant faces an "especially heavy" burden.[64] In these circumstances, the lower court's decision to

60. *See, e.g.*, Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers); Times-Picayune Pub. Corp. v. Schulingkamp, 419 U.S. 1301, 1305 (1974) (Powell, J., opinion in chambers); McNary v. Haitian Centers Council, Inc., 505 U.S. 1234, 1234 (1992) (Blackmun, J., dissenting from the grant of stay).

61. *See, e.g.*, Barefoot v. Estelle, 463 U.S. 880, 885 (1983) (White, J., opinion in chambers).

62. Holtzman v. Schlesinger, 414 U.S. 1304, 1308–09 (1973) (Marshall, J., opinion in chambers); *see also* Buchanan v. Evans, 439 U.S. 1360, 1361 (1978) (Brennan, J., opinion in chambers); INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Lab., 510 U.S. 1301, 1304 (1993) (O'Connor, J., opinion in chambers).

63. Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam) (quoting Conkright v. Frommert, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., opinion in chambers)); *see also* SHAPIRO ET AL., *supra* note 59, at 17–42.

64. Packwood v. Senate Select Comm. on Ethics, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., opinion in chambers); Edwards v. Hope Medical Grp. for Women, 512 U.S. 1301, 1302 (1994) (Scalia, J., opinion in chambers) (quoting *Packwood*, 510 U.S. at 1320); *Reclaim Id.*, 140 S. Ct at 2616, 2618 (Roberts, C.J., concurring in the grant of stay) (quoting *Packwood*, 510 U.S. at 1320).

deny the stay has been described as "presumptively correct,"[65] meriting reversal "only under extraordinary circumstances."[66]

Complicating matters further, it is unclear whether the standard used by the full Court is the same as that used by an individual Justice. As an example, some cases have stated that a "single Justice will grant a stay only in extraordinary circumstances."[67] It is not clear whether this means that stay applications considered by a single Justice must meet a higher threshold than those considered by the full Court.

So what can we say about the standard of review the Supreme Court uses in determining whether to grant a stay? First, it is unclear whether *Nken* applies to the Supreme Court's own decisions to grant or deny a stay. That is, we do not know if irreparable harm and the probability of success on the merits are the two most critical factors in the Court's analysis. Nor do we know whether *Nken*'s "strong showing" of success on the merits is the standard the Court uses, or how this standard differs from those discussed below. The Court has never explicitly used the *Nken* formulation in granting or denying stay applications. But in other areas of the law, the Court does itself utilize the same standards of review it expects the lower courts to employ.[68]

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65. Whalen v. Roe, 423 U.S. 1313, 1316 (1975) (Marshall, J., opinion in chambers).

66. Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1316 (1983) (Blackmun, J., opinion in chambers) (citation omitted).

67. *Whalen*, 423 U.S. at 1316; Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (Rehnquist, C.J., opinion in chambers) (quoting *Whalen*, 423 U.S. at 1316); *see also* Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., opinion in chambers) (calling it "well established" that "[r]elief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct" (citing *Whalen*, 423 U.S. at 1316–17)).

68. *See, e.g.*, United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (applying the "clearly erroneous" standard set out by FED. R. EVID. 52(a)); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (explaining that appellate judges and

In any event, there are good reasons to think the Supreme Court's own stay criteria are at least as demanding as *Nken*. The Supreme Court is the final arbiter on questions of federal law and the Constitution, the ultimate court of last resort.[69] It would be perverse and illogical for its stay decisions to be triggered by a lower standard than stays issued by the intermediate federal courts. Such a situation would invite Supreme Court stay requests as a matter of course, even when the stay was properly denied by a lower court. It would invert the pyramidal structure of the Judicial Branch. And it would do so in a subset of cases that a single, national court is least well equipped to handle: emergency decisions based on fact-specific, evolving disputes.

Regardless of the specific formulations, several themes emerge. Applicants must show that they will suffer irreparable harm absent a stay.[70] They must also show that the Court will likely consider the merits question important enough to grant certiorari.[71] It is unclear whether they need to demonstrate that the balance of the equities tips in their favor, but given that this factor appears in the *Nken* formulation and in several in-chambers opinions, it is likely that some showing is advisable.

For the purposes of this Article, however, the crucial theme concerns the likelihood of success on the merits. Whether it is using the *Nken* formulation, the "fair prospect" language, or the "significant possibility" version, the Court has consistently indicated that it will not grant a stay unless the movant has shown *some* probability of prevailing on the merits. Thus,

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Supreme Court Justices must exercise de novo review on questions of constitutional law).

69. *Cf.* GARNER ET AL. *supra* note 13, at 28.

70. *See supra* note 59.

71. *Id.*

whatever the strength of the movant's application may be with respect to the other factors, success on the merits is a necessary consideration for a stay.

In seeking to show that they will succeed on the merits, applicants face a heavy burden, particularly where an intermediate appellate court has denied the request for a stay. They must, at the least, show that there is a "fair prospect" that a majority of the Court will share their view of the merits. Given that the Court has often emphasized the extraordinary nature of a decision to grant a stay and the movant's heavy burden, and given the various formulations discussed above, it is likely that a "fair prospect" is not too different from a "strong showing" of success on the merits. That is, unless a movant is very likely to prevail on the merits, the Court (or a single Justice) will not grant the stay.

II. ASSESSING A STAY'S PRECEDENTIAL EFFECTS

A. Precedent Defined

The idea of lower courts' "obedience" or deference to higher courts and their rulings is foundational to the American justice system.[72] This rule is grounded in English common law: Sir William Blackstone explained that it was "an established rule" that courts should "abide by former precedents."[73] *The Federalist Papers* taught that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents."[74] And it is reflected in the Constitution: "the judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior

72. GARNER ET AL., *supra* note 13, at 27–28.

73. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

74. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Courts as the Congress may from time to time ordain and establish."[75]

Deference to the Supreme Court is warranted not because the high court is always right or because its opinions are always convincing. If this were so, no deference would be necessary. Rather, as Justice Jackson explained, "[w]e are not final because we are infallible, but we are infallible only because we are final."[76]

While the foregoing is common ground for American legal practitioners, jurists, and academics, there are differing theories of vertical stare decisis, or the weight to be accorded to higher courts' rulings. For those who ascribe to the predictive theory of stare decisis—that is, that lower courts "should decide cases according to their reasoned view of the way the Supreme Court would decide the pending case today,"[77]—treating the Court's stay orders as precedential should be especially compelling. After all, these orders are a very recent, and thus highly indicative, insight into the Court's likely resolution of the issue on the merits.[78]

A newer theory about vertical stare decisis looks to higher courts for "signals" for the appropriate resolution in a particular case.[79] Signals can include summary orders, separate opinions, dicta, and even statements during oral arguments.[80]

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75. U.S. CONST. art III, § I, cl. 1 (emphasis added).

76. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

77. Vukasovich, Inc. v. Comm'r, 790 F.2d 1409, 1416 (9th Cir. 1986); *see also* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (as modified) (L. Hand, J., dissenting) (arguing that "the measure of [a lower court's] duty is to divine, as best it can, what would be the event of an appeal in the case before [it]").

78. 18 MOORE'S FEDERAL PRACTICE § 134.03[4] (3d ed. 2011) ("As a practical matter, the predictive approach requires the lower courts to weight most heavily the recent decisions of the courts that the lower courts are bound to follow.").

79. *See* Re, *supra* note 16, at 942.

80. *Id.*

They are entitled to precedential force but yield to conventional precedent.[81] Stay orders would fit comfortably in this theory, too; indeed, the Eighth Circuit appears to have utilized the signals model when it relied in part on a Supreme Court stay to uphold a preliminary injunction on the enforcement of the contraceptive mandate in the Affordable Care Act.[82]

But even for those who ascribe to the traditional, "authority model" of vertical stare decisis, we believe that Supreme Court stays can—and often should—be entitled to precedential weight.[83] The traditional model recognizes the potential for ambiguity in precedent,[84] and that brief opinions or even orders can count as precedent.[85] For instance, the Supreme Court has explained that

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. . . . [T]he lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not.[86]

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81. *Id.* at 943.

82. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., 801 F.3d 927, 944 (8th Cir. 2015), *vacated and remanded*, 2016 WL 2842448 (U.S. May 16, 2016) (mem.) ("Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests." (citation omitted)); Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 257 (D.C. Cir. 2014), *vacated and remanded sub nom.* Zubik v. Burwell, 136 S. Ct. 1557 (2016) (finding no substantial burden but acknowledging that "the Supreme Court's recent order in *Wheaton College* might be read to signal a different conclusion").

83. Under the "authority model," "the holdings of the Supreme Court majority opinions are not just relevant to legal correctness, but constitutive of it. The authority model thus calls for lower courts to treat the Court's majority holdings as law in much the way that a statute is law." Re, *supra* note 16, at 936. For a fuller discussion of the various theories of vertical stare decisis, *see id.* at 936–45.

84. *Id.* at 937.

85. *See* GARNER ET AL., *supra* note 13, at 217–18.

86. Hicks v. Miranda, 422 U.S. 332, 344–45 (1975) (cleaned up).

This means that lower courts are not just bound by legal reasoning or the explication for a holding: the Supreme Court expects lower courts to defer even to its summary affirmances and dismissals encapsulated in one-line orders.[87]

One important way in which a summary order is binding is its effect on the precedential value of the lower court opinion under review. While a summary affirmance is not necessarily an endorsement of the reasoning of the court below,[88] a summary reversal carries clear repercussions for the lower court's opinion.[89] Just as any subsequent court or party would be wary of citing or relying upon a lower court opinion that has been summarily reversed by the Court, so should judges and practitioners be cautious about relying upon lower court decisions that are subsequently stayed by the Supreme Court.

To be sure, not all precedential rulings are of equal value, and a mere order or brief *per curiam* opinion may not be entitled to the same weight as full-length opinions on the merits.[90] After all, it is a "judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."[91] But if one-line, summary affirmances can have precedential effects, why not shadow docket stays?

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87. A common description of the four essential elements of a legal holding is "(1) it must be a ruling on a point of law; (2) it must be expressly or impliedly given by a judge; (3) it must relate to an issue raised in the litigation; and (4) it must be necessary as a justification for the decision reached." GARNER ET AL., *supra* note 13, at 46 (citing John Bell, *Precedent*, *in* THE NEW OXFORD COMPANION TO LAW 923 (Peter Cane & Joanne Conaghan eds., 2008)). This definition may anticipate a reasoned opinion, but it does not require it. Indeed, stays and summary affirmances and dismissals will often meet these criteria even without an explanatory opinion.

88. *See* Comptroller of the Treasury v. Wynne, 135 S. Ct. 1787, 1801 (2015) (explaining that a summary affirmance is an affirmance of the judgment only, rather than the reasoning of the lower court).

89. *See* GARNER ET AL., *supra* note 13, at 308; *id.* at 241 ("[I]f a high court or appellate court disapproves of a lower court's decision, the disapproval may render the lower court's opinion virtually worthless.").

90. *Id.* at 214.

91. Ramos v. Louisiana, 140 S. Ct. 1390, 1404 (2020).

Consider also the rules regarding dicta. Dicta are not essential to the reasoning of a court's decision and are therefore not considered binding.[92] But the "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."[93] If lower courts must dutifully abide by what Francis Bacon called the "vapors and fumes of law"[94] that emit from the Court, how can they ignore such vapors and fumes merely because they emanate from the Court's orders, terse or otherwise? The key question lower courts should ask is whether a majority of the Court has issued a clear explanation of its views on the merits of a claim.

Regardless of one's preferred theory of stare decisis or views about what, exactly, makes something "precedent," there is another reason to accord the Court's preliminary orders significant weight: other courts are likely to see substantially similar litigation in the aftermath of a shadow docket stay. Seeking broad-based, emergency relief has become a new normal in high-stakes litigation. The rise of nationwide injunctions against the Executive Branch is a notable example.[95] Cases seeking this relief often arise in multiple jurisdictions around the same time.[96] If one plaintiff achieves a nationwide injunction, all plaintiffs are

92. *See* GARNER ET AL., *supra* note 13, at 44.

93. United States v. Dorcely, 454 F.3d 366, 375 (D.C. Cir. 2006) (quoting Sierra Club v. EPA, 322 F.3d 718, 724 (D.C. Cir. 2003)).

94. *See* GARNER ET AL., *supra* note 13, at 44 (quoting Francis Bacon, "The Lord Keeper's Speech in the Exchequer" (1617), *in* 2 THE WORKS OF FRANCIS BACON 477, 478 (Basil Montagu ed., 1887)).

95. *See* William P. Barr, *The Role of the Executive*, 43 HARV. J.L. & PUB. POL'Y 605, 626 (2020) ("It is no exaggeration to say that virtually every major policy of the Trump Administration has been subjected to immediate freezing by the lower courts.").

96. *See* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (mem.) (describing how plaintiffs in these suits are not bound by adverse decisions to which they are not parties, allowing them a "nearly boundless opportunity to shop for a friendly forum to secure a win nationwide").

successful.[97] In other words, the government must "run the table" to be able to implement an Executive Order or agency decision.[98]

Until 1963, no federal court had ever issued a nationwide injunction, and until the early 2000s, they were exceedingly rare.[99] But in recent years, the number of such injunctions has skyrocketed.[100] By one estimate, for instance, twelve nationwide injunctions were issued against the administration during President George W. Bush's eight years in office, nineteen during President Barack Obama's eight years, and fifty-five during the first three years of the Trump Administration.[101] In other words, lower courts are issuing nationwide injunctions at over twelve times the rate today as they did during the George W. Bush Administration.

It is no surprise that the rise of the nationwide injunction has coincided with the increasing prominence of the Supreme Court's shadow docket. In cases involving suits against the Executive Branch, emergency stays by the Supreme Court are particularly instructive. When the Court elects to stay a nationwide injunction, the decision speaks both to the stay applicant's likelihood of success on the merits *and* the availability of that form

97. *See id.*

98. Jeffrey A. Rosen, Deputy Attorney General, U.S. Dep't of Justice, Opening Remarks at Forum on Nationwide Injunctions and Federal Regulatory Programs (Feb. 12, 2020), https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-opening-remarks-forum-nationwide [https://perma.cc/3TR6-6YRG].

99. *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 437–44 (2017). *But see* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924–26 (2020).

100. *See* Rosen, *supra* note 98.

101. *Id.*; *see also* Amanda Frost, *Academic Highlight: The Debate Over Nationwide Injunctions*, SCOTUSBLOG (Feb. 1, 2018, 10:21 AM), https://www.scotusblog.com/2018/02/academic-highlight-debate-nationwide-injunctions [https://perma.cc/TBC7-H5VZ] (noting agreement among legal scholars that nationwide injunctions "are a relatively new phenomenon and have been used with increasing frequency over the last decade").

of relief to other litigants pressing the same or substantially similar legal claims in lower courts.

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Beyond the various articulations of the standards of review it uses, the Supreme Court has not said much about shadow docket stays. We do not know, therefore, what the Justices intend the precedential effects of these stays to be. In the absence of such guidance, we believe that a lower court should consider three factors when determining what effect, if any, a Supreme Court stay decision should have on its own decisionmaking. These are: (1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's view of the merits. When the lower court can conclude by assessing these factors that a majority of the Court has expressed a clear view on the merits, the lower court should defer to that view or explain why deference is unwarranted. A clear statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

B. Factors to Consider

1. Single Justice or Full Court

As an initial matter, decisions by either a single Justice or the full Court to *deny* a stay application cannot have any precedential or persuasive effect. A stay denial is "not a decision on the merits of the underlying legal issues."[102] More, the Court may deny a stay application if the movant fails to show

102. Ind. State Police Pension Tr. v. Chrysler LLC, 556 U.S. 960, 960 (2009) (per curiam).

any one of the *Nken* stay factors. For instance, a stay application may be denied based on the first factor alone—a reasonable probability that at least four Justices will consider the issue sufficiently meritorious to grant certiorari. And the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."[103]

More still, the rules of the Supreme Court allow a denied movant to resubmit a stay application to another Justice or to the full Court. The full Court could then, in theory, elect to grant the stay.[104] Since it is impossible to determine the Court's view of the merits of a case from a denial of a stay application, the denial offers lower courts little guidance.[105] Of course, the Court receives thousands of applications on its discretionary docket each year, but it grants only a small fraction of them.[106] It is from this narrow pool of grants that lower courts may find persuasive or authoritative guidance from the Supreme Court.

A decision by a single Justice to stay a lower court's order cannot have binding precedential effect. This is because individual Justices do not have the authority to revise or modify the judgments of the lower courts.[107] Nor can they bind the

103. United States v. Carver, 260 U.S. 482, 490 (1923); *see also* 18 MOORE'S FEDERAL PRACTICE § 134.05 (3d ed. 2011) (stating that stare decisis does not apply to a decision denying certiorari).

104. *See* SUP. CT. R. 22.4.

105. *Cf.* DeBoer v. Snyder, 772 F.3d 388, 402 (6th Cir. 2014) ("But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not.").

106. *See The Supreme Court, 2018 Term—The Statistics*, 133 HARV. L. REV. 412, 420 (2019).

107. *See, e.g.*, Locks v. Commanding General, Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., opinion in chambers) ("As Circuit Justice I have no authority to revise, modify, or reverse the order of the Court of Appeals on the merits of this controversy."); Kimble v. Swackhamer, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., opinion in chambers) ("[A] single Justice has authority only to grant interim relief in order to preserve the

Court.[108] But these opinions certainly have value as persuasive authority. After all, if the rulings of a single district judge can have persuasive value in subsequent cases,[109] so too can the considered opinion of a sitting Justice of the Supreme Court.

More, the Court "is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices."[110] When writing alone, then, a single Justice "bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them."[111] In this way, a single Justice "act[s] not for [him]self alone but as a surrogate for the entire Court."[112]

Indeed, in-chambers opinions are often cited by lower courts for various substantive propositions.[113] Take Justice Blackmun's opinion in *CBS, Inc. v. Davis* as an example.[114] In 1994, a state court entered a temporary restraining order and

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jurisdiction of the full Court to consider an applicant's claim on the merits.").

108. For instance, a petitioner disappointed by the in-chambers decision of a Circuit Justice may reapply to any other Justice. *See supra* note 104.

109. *See, e.g.*, Alperin v. Vatican Bank, 410 F.3d 532, 546 n.8 (9th Cir. 2005) (explaining that district court decisions from other circuits are not precedential, but courts may refer to them and consider principles applied in those decisions); TMF Tool Co. v. Muller, 913 F.2d 1185, 1191 (7th Cir. 1990) (explaining that decisions of district judges from this or other circuits are only persuasive, not controlling).

110. Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., opinion in chambers).

111. *Id.*

112. *Id.*

113. *See, e.g.*, United States v. Motamedi, 767 F.2d 1403, 1405 (9th Cir. 1985) (citing Sellers v. United States, 89 S. Ct. 36, 38 (1968) (Black, J., opinion in chambers)); *In re* Sherwin-Williams Co., 607 F.3d 474, 477 (7th Cir. 2010) (quoting Cheney v. United States Dist. Ct., 541 U.S. 913, 924 (2004) (Scalia, J., opinion in chambers)); Dotson v. Clark, 900 F.2d 77, 79 (6th Cir. 1990) (quoting Aronson v. May, 85 S. Ct. 3, 5 (1964) (Douglas, J., opinion in chambers)); Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (citing New York Times Co. v. Jascalevich, 439 U.S. 1331, 1335 (1978) (Marshall, J., opinion in chambers)); *In re* Air Crash Off Long Island, 209 F.3d 200, 206 (2d Cir. 2000) (quoting *Holtzman*, 414 U.S. at 1312 n.13).

114. 510 U.S. 1315 (1994) (Blackmun, J., opinion in chambers).

preliminarily enjoined a television station from airing an exposé about a meat packing company's unsanitary practices.[115] The court reasoned that the footage could result in national chains "refusing to purchase beef processed at" the company's factory, likely resulting in the factory's closure.[116]

The television station moved for a stay of the injunction, arguing that the state court's order was a prior restraint on free speech that violated the First Amendment of the U.S. Constitution.[117] Justice Blackmun agreed. He explained that "the gagging of publication" is permissible only in "'exceptional cases,'" and that even "where questions of allegedly urgent national security" are implicated, prior restraint of speech is justified "only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures."[118] Speculative economic harm to a meat processing factory, the Justice explained, was insufficient.[119]

Justice Blackmun's opinion in *CBS* has been cited over seventy times, including in decisions about the prior restraint doctrine issued by the First, Sixth, and Ninth Circuits.[120] In short, while these types of in-chambers opinions cannot bind lower courts, they do provide useful data. They offer a Justice's prediction about how his or her colleagues will view the likelihood of the movant's success on the merits. And they can present a persuasive view of the law, particularly if the Justice opines about an underdeveloped or complex legal issue.

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115. *Id.* at 1315–16.

116. *Id.*

117. *See id.*

118. *Id.* at 1317 (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).

119. *Id.* at 1318.

120. *See* Sindi v. El-Moslimany, 896 F.3d 1, 32 (1st Cir. 2018); Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219, 225 (6th Cir. 1996); *In re* Dan Farr Prods., 874 F.3d 590, 596 n.8 (9th Cir. 2017).

Unlike decisions by a single Justice, decisions by the full Court can, of course, bind lower courts. As we argue below, when the Court grants a stay application, the decision should be considered authoritative when it is clear that a majority of the Court has expressed a view on the merits of the movant's case. But before moving on to the types of stays that should be accorded precedential weight, there is one complicating circumstance to consider.

When four Justices support granting a stay, sometimes a fifth will vote to grant the stay as a courtesy.[121] In these situations, a lower court cannot say with certainty that a majority of the Justices believe there is a significant possibility the movant will prevail on the merits of his claim. But the stay decision may nonetheless be useful as persuasive authority.

In *Gloucester County School Board v. G.G. ex rel. Grimm*,[122] for instance, Justice Breyer explained in his concurrence that "[i]n light of the facts that four Justices have voted to grant the [stay] application," "that we are currently in recess," "and that granting a stay will preserve the status quo . . . I vote to grant the application as a courtesy."[123] The case concerned a Virginia school board policy that required transgender students to use the bathroom corresponding to their biological sex.[124] G.G., a transgender student, sought a preliminary injunction to prevent the policy from taking effect.[125] The district court denied the motion for a preliminary injunction, but it was reversed by the Fourth Circuit.[126] On remand, the district

121. *See, e.g.*, Arthur v. Dunn, 137 S. Ct. 14 (2016) (Roberts, C.J., statement respecting the grant of the application for stay) (mem.); Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 136 S. Ct. 2442 (2016) (Breyer, J., concurring) (mem.).

122. 136 S. Ct. 2442 (2016) (mem.).

123. *Id.* (Breyer, J., concurring) (mem.).

124. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 714–15 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

125. *Id.*

126. *Id.* at 715.

court enjoined the school board from enforcing the policy, and the Fourth Circuit denied the school board's request for a stay of the injunction.[127] The Supreme Court then granted the stay.[128]

In *Dodds v. U.S. Department of Education*,[129] a panel of the Sixth Circuit considered what effect to give the *Gloucester County* stay.[130] *Dodds* involved an Ohio school district rule that was substantially similar to the Virginia policy.[131] The majority declined to accord the stay precedential effect, opining that it "does nothing more than show a possibility of relief."[132] It added that the transgender student in the Ohio case's "young age, mental health history, and unique vulnerabilities" differentiated her from the student in *Gloucester County*.[133] It is not clear whether the majority's view of *Gloucester County* was influenced by the fact that one of the five Justices voted to grant the stay as a courtesy.

Judge Sutton dissented.[134] He argued that "[o]urs is a hierarchical court system, one that will not work if the junior courts do not respect the lead of the senior court."[135] By granting the stay in *Gloucester County*, Judge Sutton reasoned, the Supreme Court "necessarily found that the school board was reasonably likely to succeed on the merits and that it would suffer irreparable harm without a stay. So, it follows, in our case."[136] Like the majority, Judge Sutton did not discuss what

127. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 654 Fed. App'x. 606 (4th Cir. 2016).

128. *Gloucester Cty.*, 136 S. Ct. at 2442.

129. 845 F.3d 217 (6th Cir. 2016).

130. *Id.*

131. *Id.*

132. *Id.* at 221.

133. *Id.*

134. *See id.* at 222–24 (Sutton, J., dissenting).

135. *Id.* at 222–23.

136. *Id.* at 223.

effect, if any, Justice Breyer's courtesy fifth vote had on his view.[137] Instead, he offered a warning about the possible consequences of an intermediate appellate court electing to ignore a Supreme Court stay decision:

> If we decline to respect the Supreme Court's lead in granting a stay request in precisely the same type of case, why should we expect the district courts in our circuit to respect *our* lead in granting stay requests in related cases? Middle-management courts that ignore instructions from a higher court will eventually learn how it feels and how poorly such a system works.[138]

From both the majority and dissenting opinions in *Dodds*, it is clear that the panel did not believe it could simply ignore the Supreme Court's decision in *Gloucester County*. That the majority felt compelled to distinguish the two cases on factual grounds may suggest an implicit recognition that the Supreme Court's pronouncements on questions of law, even those issued indirectly through a stay grant, can bind lower courts. In our view, Judge Sutton was correct to urge caution about implementing an injunction indistinguishable from one the Supreme Court recently stayed elsewhere. Indeed, even if lower courts believe that stay decisions should not be accorded any precedential weight in subsequent merits determinations, these decisions can and should be considered binding with respect to subsequent *stay* requests concerning the same legal question. But the fact that only a minority of the Justices had signaled their views on the merits of the case in *Gloucester County* lessened the relevance and weight of the Court's stay to future cases.

Apparently, when a Justice votes to grant a stay as a courtesy, the Justice indicates in a separate opinion that the vote is

137. *Id.* at 222–24.
138. *Id.* at 224.

merely a courtesy. In *Arthur v. Dunn*,[139] for example, Chief Justice Roberts made his position abundantly clear: "I do not believe that this application meets our ordinary criteria for a stay," he explained, because "the claims set out in the application are purely fact specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three."[140] But because four Justices voted to grant a stay, the Chief Justice supplied the courtesy fifth vote "[t]o afford [the other Justices] the opportunity to more fully consider the suitability of this case for review."[141]

It is conceivable that Justices regularly vote to grant stays as a courtesy without making it explicit that their votes reflect no view on the merits. Many shadow docket stays are unaccompanied by opinions altogether. But this seems unlikely given the high-profile and contentious nature of the cases in which litigants have successfully sought stays in recent years. Stays have been issued relating to President Trump's "travel ban,"[142] the public charge rule,[143] injunctions prohibiting federal executions,[144] and voting deadlines.[145] Given that these cases often result in hotly-contested and closely-divided rulings at the merits stage, it seems unlikely that a Justice who thought the lower court had acted correctly nonetheless cast

139. 137 S. Ct. 14 (2016) (mem.).

140. *Id.* at 15 (Roberts, C.J., respecting the grant of the application for stay).

141. *Id.*

142. *See* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (per curiam).

143. U.S. Dep't of Homeland Security v. New York, 140 S. Ct. 599, 599 (2020) (mem.).

144. *See, e.g.*, Barr v. Lee, 140 S. Ct. 2590, 2590–92 (2020) (per curiam).

145. *See, e.g.*, Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28 (2020) (mem.). Just under one in every five non-administrative stay decisions the Supreme Court issued over the past five years involved the Executive Branch as a party. *See* Appendix. The Solicitor General must generally personally authorize any appeal by the United States to the Supreme Court, suggesting that many of the Supreme Court's stay decisions involved issues of critical importance to the federal government. *See* 28 C.F.R. § 0.20(a) (2020).

the deciding vote to stay the injunction, much less that they did so without issuing an opinion. As will be discussed below, litigants who successfully seek a Supreme Court stay almost invariably go on to win if the case does proceed to the merits before the Court.[146] This further undermines the suggestion that Justices are granting courtesy stays *sub silentio*. At the very least, that the Justices have felt compelled to issue statements explaining courtesy votes on more than one occasion supports the notion that, in the absence of such an opinion, a vote in favor of granting a stay is a vote implying a view that the movant is likely to succeed on the merits of his claim.

Thus, *Gloucester County* offers a cautionary note for lower courts: they must consider whether any of the Justices who vote to grant a stay have done so for non-merits reasons. When that is the case, the lower courts cannot say one way or another what a majority of the Court believes with respect to the merits of the movant's case.[147]

2. The Type of Underlying Merits Dispute

When a majority of the Supreme Court has expressed its view on a stay applicant's likelihood of success on the merits, lower courts seeking to determine the stay's precedential effect should examine the underlying merits dispute. If the stay grant makes it clear that the movant's position on a legal question is likely correct, lower courts can—and should—treat the Court's decision as precedential.

Consider a couple of examples. Relying on Section 8005 of

146. *See infra* notes 215–18 and accompanying text.

147. Of course, even if one of the Justices votes to grant an application for non-merits reasons, a Supreme Court stay may still guide lower courts considering a stay application in a substantially similar case. A Supreme Court stay indicates, at the very least, that the merits question warrants further study. In such circumstances, it may be prudent for a lower court to await that further consideration before allowing a similar case to proceed.

the Department of Defense Appropriations Act of 2019, the U.S. Department of Defense (DoD) sought to transfer roughly $2.5 billion to the U.S. Department of Homeland Security to build border barriers in several Southern states.[148] The Sierra Club and the Southern Border Communities Coalition sued the Government to prevent this transfer of funds, and a federal district court permanently enjoined DoD and DHS from using the monies to build a border wall.[149] The Government sought a stay of the injunction from the Ninth Circuit, but this request was denied.[150]

The Government then sought a stay from the Circuit Justice, Justice Kagan, who referred the application to the full Court.[151] In a one-paragraph opinion, the Court granted the stay and noted that "[a]mong the reasons" for its decision was "that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of [DoD's] compliance with Section 8005."[152] Justices Ginsburg, Sotomayor, and Kagan indicated that they would have denied the stay application, while Justice Breyer concurred in part and dissented in part.[153]

What can lower courts glean from the Supreme Court's decision to grant this stay? Recall that because the stay application arrived at the Court after first being denied by the Ninth Circuit, the Government faced an especially heavy burden.[154] Nonetheless, a majority of the Justices apparently thought that the Government met this burden, in part because it showed that the plaintiffs lacked a cognizable cause of action

148. *See* Sierra Club v. Trump, 929 F.3d 670, 676 (9th Cir. 2019).
149. *Id.*; *see also* Sierra Club v. Trump, 2019 WL 2715422 (N.D. Cal. June 28, 2019).
150. *Sierra Club*, 929 F.3d at 676–77.
151. *See* Trump v. Sierra Club, 140 S. Ct. 1, 1 (2019).
152. *Id.*
153. *Id.* at 1–2.
154. *See supra* notes 58–60 and accompanying text.

to challenge DoD's use of funds pursuant to Section 8005.[155] That is, the plaintiffs had not shown that their alleged harm was within the zone of interests protected or regulated by Section 8005.[156]

In subsequent cases before district courts across the country, organizations like the Sierra Club challenged DoD's transfer of funds under Section 8005.[157] In at least one of these cases, a lower court treated the Supreme Court's stay in *Sierra Club* as binding.[158] A district judge in Texas considered claims about DoD's use of Section 8005 funds brought by El Paso County and the Border Network for Human Rights.[159] The judge considered the Supreme Court's stay, and held that, in light of the Court's reasoning, the plaintiffs' Section 8005 claims were "unviable."[160]

Treating the *Sierra Club* stay in this manner makes sense if a judge views shadow docket stays as precedential. The Supreme Court considered the following question: do non-profit organizations like the Sierra Club and the Southern Border Communities Coalition have a cause of action to challenge DoD's use of funds under a particular statute?[161] By granting the stay, a majority of the Court signaled that it believed such organizations do not. Thus, in cases involving the same statute and similarly situated non-profit entities, adopting a view of the law ex-

155. *Sierra Club*, 140 S. Ct. at 1.

156. *See* Gov't's Application for a Stay Pending Appeal at 24, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A-60), 2019 WL 3451617 (arguing that because Section 8005 is the "provision whose violation forms the legal basis for the complaint," to have a cause of action the respondents' "asserted interests must fall within the zone of interests protected by Section 8005 to maintain this suit"); *id*. at 17–20.

157. *See, e.g.*, El Paso Cty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019); Ctr. for Biological Diversity v. Trump, 453 F. Supp. 3d 11 (D.D.C. 2020).

158. *See El Paso Cty.*, 408 F. Supp. 3d at 846.

159. *See id.* at 843–45.

160. *Id.* at 846.

161. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).

pressed by a majority of the Supreme Court is reasonable, prudent, and in accord with traditional notions of precedent.[162]

Or consider another example. In *Trump v. International Refugee Assistance Project* (*IRAP*),[163] the Executive Branch asked the Supreme Court to stay nationwide injunctions issued by lower courts against President Trump's Executive Order banning the entry into the United States of foreign nationals from countries deemed to present a heightened risk to national security.[164] The Court granted the Government's stay applications in part.[165] Finding that the scope of the injunctions was too broad, the Court emphasized that a lower court "need not grant the total relief sought by the applicant," but instead may "mold its decree to meet the exigencies of the particular case."[166] The Court stayed the injunctions with respect to foreign nationals with no connection to the United States, but it left the injunctions intact as they applied to foreign nationals with ties to the country.[167]

The Fourth, Seventh, and Eleventh Circuits all treated the

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162. But contrast the district court's decision in *El Paso Cty.* with the Ninth Circuit's subsequent decision in *Sierra Club*, 963 F.3d 874, 887 (9th Cir. 2020). The Ninth Circuit panel acknowledged that the Supreme Court "suggest[ed] that Sierra Club may not be a proper challenger here." *Id.* Though it purported to "heed the words of the [Supreme] Court," the panel nonetheless found that the Sierra Club has a "constitutional and an *ultra vires* cause of action." *Id.* The panel reached this conclusion despite the fact that, in seeking a stay before the Supreme Court, the government argued that the Sierra Club had failed to adequately allege a constitutional or equitable cause of action. *See* Gov't's Reply in Support of Application for a Stay at 5–10, Trump v. Sierra Club, 140 S. Ct. 1 (2019) (No. 19A-60), 2019 WL 3451617. The Supreme Court has since granted the government's petition for writ of certiorari in response to the Ninth Circuit's latest decision, Trump v. Sierra Club, 141 S. Ct. 618 (2020) (mem.), although further briefing has since been held in abeyance and the case removed from the Court's 2021 argument calendar.

163. 137 S. Ct. 2080 (2017) (per curiam).

164. *Id.* at 2082–86.

165. *Id.* at 2087.

166. *Id.* (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2947 (3d ed. 2013)).

167. *Id.* at 2088.

IRAP decision as precedential. But they disagreed on exactly what *IRAP* stands for. In *Roe v. Department of Defense*,[168] the Fourth Circuit held that *IRAP* "affirmed the equitable power of district courts, in appropriate cases, to issue nationwide injunctions extending relief to those who are similarly situated to the litigants."[169] The court called *IRAP* "binding precedent" that "require[d]" it to reject the Government's arguments against the legality of nationwide injunctions.[170]

Similarly, in *Chicago v. Barr*,[171] the Seventh Circuit suggested that the Supreme Court's *IRAP* decision "should put to rest any argument that the courts lack the authority to provide injunctive relief that extends to non-parties."[172] By contrast, in *Democratic Executive Committee of Florida v. Lee*,[173] the Eleventh Circuit cited *IRAP* in support of an injunction that was challenged as being too narrow.[174] Relying on *IRAP*, the court called it "axiomatic" that a limited injunction granting only some of the relief the plaintiffs sought was within the district court's discretion.[175]

Despite their differing views on *IRAP*'s meaning, all three circuits agreed that the decision to grant a stay had precedential value. Again, this reflects a view that Supreme Court stay grants should compel results in lower courts. In the abstract, identifying the limits of a federal court's equitable powers is an inquiry that does not depend on the facts of the particular case before the court. Thus, guidance from a majority of the

168. 947 F.3d 207 (4th Cir. 2020).
169. *Id.* at 232.
170. *Id.*
171. 961 F.3d 882 (7th Cir. 2020).
172. *Id.* at 916 (emphasis omitted).
173. 915 F.3d 1312 (11th Cir. 2019).
174. *Id.* at 1327–29.
175. *Id.* at 1327.

Justices on the permissible scope of an injunction can be controlling, even if it comes in the context of a decision to grant an emergency application for a stay.

However, there is at least one category of merits dispute in which some lower courts have held that Supreme Court stays are not authoritative: capital punishment cases.[176] In the 1980s, the Fifth Circuit typically voted to stay executions when the Supreme Court had issued a stay in a prior case presenting the same or similar legal claims.[177] For example, in 1985, the Supreme Court stayed an execution to consider whether the practice of excluding from a capital jury opponents of the death penalty violated a defendant's Sixth Amendment rights.[178] While the issue was pending before the Supreme Court, multiple defendants obtained stays of execution from the Fifth Circuit by relying on the same merits issue.[179]

But in *Wicker v. McCotter*,[180] the Fifth Circuit reversed course. The court stated that the "significance" of the Supreme Court's stays "is not clear," and that "[i]n the absence of a declaration by the Supreme Court that executions should be stayed in cases presenting the [same or similar] issue," the Fifth Circuit would continue to "follow our circuit's precedents" and deny a stay.[181] It added that, in its view, "the fact that the [Supreme] Court has agreed to consider [the stayed] cases does not alter the authority of our prior decisions."[182]

It is unclear whether the Fifth Circuit panel believed that the *Wicker* view should be extended beyond death penalty cases.

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176. *See* Wicker v. McCotter, 798 F.2d 155, 157–58 (5th Cir. 1986); Swallows, *supra* note 12, at 916–20.

177. *See, e.g.*, Rault v. Louisiana, 774 F.2d 675, 677 (5th Cir. 1985).

178. Celestine v. Blackburn, 473 U.S. 938 (1985); *see also* Lockhart v. McCree, 476 U.S. 162 (1986).

179. *See Rault*, 774 F.2d at 677; Wingo v. Blackburn, 783 F.2d 1046, 1052 (5th Cir. 1986).

180. 798 F.2d 155 (5th Cir. 1986).

181. *Id.* at 157.

182. *Id*. at 158.

The *Wicker* panel emphasized that it was "releasing this opinion in time to permit [the defendant] to seek review by the Supreme Court so that, if that Court considers it advisable to review our opinion, it may issue a writ."[183] It may be that the Circuit intended to confine its reasoning to the unique nature of capital punishment jurisprudence. After all, these cases are particularly fact-intensive and thus stand apart from the Court's typical shadow docket matters.

More, the Court has long espoused a "death is different" attitude when reviewing capital cases.[184] For instance, as Circuit Justice for the Fifth Circuit, Justice Scalia announced his intention to grant "in every capital case on direct review . . . a stay of execution pending disposition by this Court of the petition for certiorari."[185] Such a policy of automatic stays certainly does not exist in other areas of the law. More still, it is unclear whether other circuit courts treat Supreme Court stays of execution as a separate class of decisions. Given the finality of capital punishment, the fact-intensive nature of sentencing generally, and the Court's unique treatment of this class of cases in the past, it would not be surprising if stays of execution would be treated both by the Supreme Court and lower courts as *sui generis*. Additionally, because the death penalty is "exacted with great infrequency," decisions to stay these executions may not, as a practical matter, offer lower courts much precedential value.[186] Stays in the capital punishment context may thus create an unusual subset of issues warranting further study.

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183. *Id*.

184. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").

185. Cole v. Texas, 499 U.S. 1301, 1301 (1991).

186. *Gregg*, 428 U.S. at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

In sum, while death penalty disputes may be an example of a situation in which the Court stays a lower court decision simply to preserve jurisdiction to allow it to make a decision on the merits, other stays likely have no such justification. These stays are best understood as signaling disapproval of the lower court's judgment and a desire to allow the disputed action to proceed. Lower courts hearing similar matters would do well to heed this guidance rather than following the reasoning of the now-stayed judgment of the initial court.

3. The Reasoning or Explanation Offered

When determining what effect to accord a Supreme Court stay grant, lower courts should evaluate any rationale or explanation the Court's opinion offers in support of its decision. In general, a thorough and well-reasoned opinion is likely more instructive than a decision with little or no analysis. This is true for all judicial opinions, in the stay context or otherwise. But ultimately, even a decision with little or no reasoning can be authoritative if it is clear from the decision that the Supreme Court has expressed a view on the merits of a question.

The more detail and clarity the Supreme Court provides about why it is granting a stay, the more confident a lower court can be in treating the Court's opinion as precedential. This insight flows from the general standard that shorter, unsigned opinions are ordinarily entitled to less weight than a signed opinion that details its reasoning and analysis.[187] As one leading treatise on precedent explains: "The more thoroughly an opinion explains its holding, the less likely it should be overruled or distinguished on the ground that its

187. GARNER ET AL., *supra* note 13, at 214–15 (discussing relative precedential weights to be assigned to per curiam opinions and summary dispositions).

holding was not thoroughly considered."[188] That is true in the merits context as much as in the context of stays, preliminary injunctions, and other forms of emergency relief.

One reason why the quality of analysis matters is the vexing problem of distinguishing between an opinion's holding and dicta.[189] While it is axiomatic that lower courts are bound by the holding of a Supreme Court merits opinion, "[h]oldings are rarely presented in neatly packaged statements."[190] Instead, lower courts "must analyze the facts, issues, rationales, and result" of a case to determine the scope of its holding.[191] Such an undertaking is difficult if not impossible without a detailed rationale or explanation of the holding.

Thus, a lower court can confidently rely on *IRAP*'s discussion about the scope of injunctions[192] in part because the discussion reads much like the Supreme Court's traditional merits opinions.[193] Similarly, in *Republican National Committee v. Democratic National Committee*,[194] the Court offered several paragraphs of reasoning for a stay in an election-related case.[195] This reasoning made clear the Court's view of the merits and provided a roadmap for lower courts considering similar election law issues. The Court stayed a district court order requiring the State of Wisconsin to: (1) count absentee ballots postmarked after April 7, 2020, in an election scheduled to be

188. *Id.* at 158.

189. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1258 (2006) ("There is no line demarcating a clear boundary between holding and dictum. What separates holding from dictum is better seen as a zone, within which no confident determination can be made whether the proposition should be considered holding or dictum.").

190. Judith M. Stinson, *Why Dicta Becomes Holding & Why It Matters*, 76 BROOK. L. REV. 219, 222 (2010).

191. *Id*.

192. *See supra* note 151.

193. *See* Int'l Refugee Assistance Project v. Trump, 137 S. Ct. 2080, 2087–89 (2017).

194. 140 S. Ct. 1205 (2020) (per curiam).

195. *Id.*

held on that day; and (2) keep secret any election results until at least six days after election day.[196]

The high court "emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," explaining that to do so is to ensure "judicially created confusion."[197] And it added that while the Supreme Court itself "would prefer not to" intervene in a state's elections, "when a lower court intervenes and alters the election rules so close to the election date, our precedents indicate that this Court, as appropriate, should correct that error."[198]

In *Texas Democratic Party v. Abbott*,[199] the Fifth Circuit relied on the Supreme Court's reasoning to stay a preliminary injunction issued by a district court.[200] In response to challenges posed by the COVID-19 pandemic, the district court "intervene[d] just weeks before an election, entering a sweeping preliminary injunction that requires state officials, *inter alia*, to distribute mail-in ballots to any eligible voter who wants one."[201] The circuit court noted that whether or not all citizens should have the right to vote by mail is a question of public policy, and that a federal district court lacks the power to compel a state to adopt such a policy against its will.[202] The court then quoted *Republican National Committee* to emphasize that lower courts should not alter election rules on the eve of an election, and that appellate courts must intervene to correct that error when it occurs.[203]

196. *Id.* at 1206–08.
197. *Id.* at 1207.
198. *Id*.
199. 961 F.3d 389 (5th Cir. 2020).
200. *Id.* at 394.
201. *Id*.
202. *Id*. at 411–12.
203. *Id*.

Like the Fifth Circuit, the Sixth Circuit also relied on *Republican National Committee* to stay a district court's "rewriting" of Ohio's election laws "with its injunction."[204] It explained that, because of the potential unintended consequences of such equitable relief, the court felt compelled to "heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach."[205]

But even when the Supreme Court grants a stay without offering much explanation, the decision may still be accorded significant weight. *Sierra Club*, discussed above, offers one example of this. The decision to grant a stay was explained in a single paragraph and included just one sentence about the merits.[206] Yet because it provided a clear indication of a majority of the Justices' views on a legal issue, that sentence was relied upon as authoritative by a district court.[207]

Or consider *Barr v. Lee*.[208] In that case, a federal prisoner sentenced to death sought an injunction against his execution on the ground that the use of pentobarbital sodium—the drug the government planned to use to execute him—constituted cruel and unusual punishment in violation of the Eighth Amendment.[209] The district judge granted the injunction, and the court of appeals declined to stay it.[210]

A majority of the Supreme Court found that a stay or vacatur of the injunction was "appropriate because, among other reasons, the plaintiffs have not established that they are likely to succeed on the merits of their Eighth Amendment claim."[211]

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204. Thompson v. DeWine, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam).
205. *Id*. at 813.
206. Trump v. Sierra Club, 140 S. Ct. 1 (2019) (mem.).
207. El Paso Cty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019).
208. 140 S. Ct. 2590 (2020) (per curiam).
209. *Id*. at 2590.
210. *Id*.
211. *Id*. at 2591.

The Court did not provide a detailed assessment of the plaintiffs' claims about the health effects of pentobarbital.[212] Nonetheless, in a subsequent case brought by similarly situated federal prisoners, the district court correctly explained that it "is bound by the Supreme Court's holding that . . . [the] risk [of experiencing a pulmonary edema from the pentobarbital] does not justify last-minute judicial intervention."[213]

What about cases in which the Supreme Court grants a stay without any discussion of the merits? On the one hand, the absence of any substantive reasoning makes it difficult for a lower court to determine why the Supreme Court reached the decision it did. On the other hand, the standard of review makes clear that the Court will not grant a stay unless a majority of the Justices believe there is at least a "fair prospect"[214] or a "significant possibility"[215] that the movant will prevail on the merits. And if a lower court has first denied the movant a stay, as is the norm before the Supreme Court will entertain the application, the lower court's decision to deny the stay is "presumptively correct" and will be reversed only under "extraordinary circumstances."[216] In other words, even without any reasoning, the decision to stay a lower court ruling is not one the Court will take without a compelling reason to do so.

More, if the *Nken* standard applies to decisions of the Supreme Court, then a stay grant means that the movant has shown a strong likelihood of success on the merits and that this showing was a critical factor in the Court's decision. And

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212. *See id.*

213. *In re* Fed. Bureau of Prisons' Execution Protocol Cases, No. 19-mc-145 (TSC), 2020 WL 4004474, at *4 (D.D.C. July 15, 2020), *order vacated on other grounds sub nom.* Barr v. Purkey, 141 S. Ct. 196 (2020).

214. *See* Hollingsworth v. Perry, 558 U.S. 183, 190 (2010).

215. *See, e.g.*, Barnes v. E-Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1302 (1991) (Scalia, J., opinion in chambers).

216. *See supra* notes 58–60 and accompanying text.

as explained above, regardless of the standard that applies, a stay grant from the Court almost certainly implies appellants have shown a significant probability of success on the merits.[217] Thus, even stay grants without any reasoning or explanation can provide the lower courts with guidance about the Supreme Court's views on the merits.

In fact, a decision by the full Court to grant a stay almost invariably foreshadows how the Court will eventually decide the case on the merits. In 2018, the Fifth Circuit found that a Louisiana law requiring physicians performing abortions to have admitting privileges at a nearby hospital did not impose a constitutionally undue burden on women seeking abortions.[218] The text of the Louisiana law was largely identical to a Texas law that the Supreme Court struck down as unconstitutional in 2016.[219]

After the Fifth Circuit denied a request to rehear the case and allowed the Louisiana law to stand,[220] the Supreme Court stayed the lower court's mandate.[221] The stay decision did not offer any discussion of the merits of the case.[222] But the stay grant itself suggested that a majority of the Court believed the Louisiana law was unconstitutional. Sure enough, a little over a year after granting the stay, the full Court struck down the law.[223] Indeed, both the decision to grant a stay and the decision to strike down the law were supported by the same five Justices.

A few weeks before the Supreme Court issued its merits de-

217. *See supra* notes 51–55 and accompanying text.
218. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787 (5th Cir. 2018).
219. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
220. *See* June Med. Servs. L.L.C. v. Gee, 913 F.3d 573 (5th Cir. 2019).
221. June Med. Servs. L.L.C. v. Gee, 139 S. Ct. 663 (2019) (mem.).
222. *Id.* at 663–64.
223. *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

cision, the Sixth Circuit considered a case about the constitutionality of a Kentucky abortion law.[224] The Circuit cited the Supreme Court's stay decision in support of its own holding, noting that "the [Supreme] Court does not stay a decision absent a 'significant possibility that the judgment below will be reversed.'"[225]

Or consider the litigation surrounding the so-called "travel ban."[226] In 2017, President Trump issued multiple Executive Orders and a Proclamation that temporarily restricted foreign nationals deemed to be a national security risk from entering the country.[227] The legality of the Proclamation and the Executive Orders was immediately challenged, and a federal district court in Hawaii issued a nationwide preliminary injunction barring enforcement of the ban.[228] The Ninth Circuit partially denied a motion by the government to stay the injunction, leaving it in effect with respect to all foreign nationals with any plausible connection to the United States.[229]

The Supreme Court stayed the injunction without any discussion on the merits of the government's position.[230] A month later, in a case before a district court about a similar Executive Order, the government relied on the Supreme Court's stay decision to argue that national security interests justify certain executive actions restricting the entry of foreign

224. EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785 (6th Cir. 2020).

225. *Id.* at 804 (citation omitted) (quoting Philip Morris U.S.A., Inc. v. Scott, 561 U.S. 1301, 1302 (2010)).

226. *See supra* Part II.B.

227. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

228. *See* State v. Trump, 265 F. Supp. 3d 1140, 1147–48, 1160–61 (D. Haw. 2017).

229. *See* State v. Trump, No. 17-17168, 2017 WL 5343014, at *1 (9th Cir. Nov. 13, 2017).

230. Trump v. Hawaii, 138 S. Ct. 542 (2017) (mem.).

nationals into the country.[231] The district court rejected this argument.[232] It "declined to speculate on the reasons for the Supreme Court's" decision, calling the stay "devoid of any analysis."[233]

As it turns out, it would have been appropriate for the district court to rely on the Supreme Court's stay decision. The Court later confirmed in a merits decision that the President has the authority to temporarily suspend entry into the country by certain foreign nationals upon making a finding that such entry would be detrimental to national security.[234]

These cases show that once the Supreme Court decides a movant is likely to succeed on the merits, the movant typically ends up being the prevailing party when a merits decision is issued.

Available data about recent stay decisions support this claim. From 2015 until August 2020, Westlaw reports that the Supreme Court made roughly 250 non-administrative stay decisions.[235] Except in the death penalty context, stay grants issued by the full Court forecasted the eventual merits decision in *every instance* that the Court went on to rule on the merits.[236] In fact, it appears that the only time a stay decision did not forecast the eventual merits decision in the last fifteen years was in *Phillip Morris USA Inc. v. Scott*.[237] In that case, Justice Scalia issued an in-chambers opinion staying the Fourth Circuit's judgment.[238] Justice Scalia found it "reasonably prob-

231. Doe v. Trump, 284 F. Supp. 3d 1172, 1180 (W.D. Wash. 2018).
232. *Id.* at 1180–81.
233. *Id.*
234. Trump v. Hawaii, 138 S. Ct. 2392, 2408–09 (2018).
235. See the Appendix for a compilation of these decisions.
236. *See id.*
237. 561 U.S. 1301 (2011).
238. *Id.* at 1305 (Scalia, J., opinion in chambers).

able that four Justices will vote to grant certiorari, and significantly possible that the judgment below will be reversed."[239] Ultimately, the full Court denied the petition for certiorari.[240]

In short, some of the Supreme Court's stay decisions should be treated by lower courts much as other *per curiam* opinions and summary dispositions are treated. Even a brief *per curiam* opinion can be precedential if it sets forth the Court's view regarding the applicable legal principles.[241]

C. Objections Considered

To be sure, weighty objections can be raised to granting precedential status to the Court's stay orders. We address some of them below.

First, in contrast to the Court's normal opinions, which issue after lengthy briefing from the parties and often *amici*, as well as oral arguments, the Court's shadow docket involves rushed briefing deadlines, and oral arguments almost never occur. Should we really be according decisions that issue from such a process precedential weight? A fair question, but principles of stare decisis are rarely grounded on the quality or timeliness of briefing and argument before the higher court.[242]

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239. *Id.* at 1304.

240. *See* Philip Morris USA Inc. v. Jackson, 561 U.S. 1037 (2011). It is noteworthy that while recent stay grants issued by the full Court have almost invariably predicted the final ruling on the merits, the sole example of a stay grant that did not predict the eventual outcome was an in-chambers opinion. This further supports our view that in-chambers opinions can be useful as persuasive, but not precedential, authority. And even there, the Court ultimately decided not to hear the case on the merits, rather than actually ruling against the party that had successfully sought a stay.

241. *See* GARNER ET AL., *supra* note 13, at 214.

242. *See, e.g.*, U.S. Court of Appeals—Cases Terminated on the Merits After Oral Arguments or Submission on Briefs, by Circuit, During the 12-Month Period Ending September 30, 2020, https://www.uscourts.gov/sites/default/files/data_tables/jb_b10_0930.2020.pdf [https://perma.cc/4RY5-MP2X] (During the 12 months ending on September 30, 2019, only 20.4 percent of cases were terminated on the merits by U.S. Courts of Appeals after oral arguments, and 79.6 percent of cases were so terminated after submissions of briefs.).

Indeed, courts—including the Supreme Court—routinely issue precedential opinions after condensed briefing schedules and without oral argument.[243]

Consider *Bush v. Gore*,[244] for instance, which effectively decided the 2000 presidential election.[245] Simultaneous briefing took place the day after the petition for certiorari was granted with oral argument occurring the day after that.[246] The Court issued its opinion the following day, just three days after the writ was originally granted.[247] Despite this abbreviated schedule, lower courts regularly cite the decision as binding precedent, and the Ninth Circuit has recognized it as "the leading case on disputed elections."[248] Indeed, while many commentators at the time and since suggested *Bush v. Gore* was a ticket "good for one ride only," someone forgot to tell lower courts: it is still very much alive and relied upon by them in election cases.[249]

Or take *Cheney v. U.S. District Court for the District of Columbia*.[250] Judicial Watch and the Sierra Club sued Vice President

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243. *Id.*

244. Bush v. Gore, 531 U.S. 98, 105–11 (2000) (per curiam) (striking down an order by the Florida Supreme Court to manually recount votes because the order violated the Equal Protection Clause).

245. *Id.*

246. *See* Bush v. Gore, 531 U.S. 1046 (2000) (order granting certiorari and stay, on Dec. 9, 2000).

247. *Bush*, 531 U.S. at 98.

248. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc); *see also* Baten v. McMaster, 967 F.3d 345, 351–52 (4th Cir. 2020) (relying on *Bush v. Gore* for proposition that when a state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental); League of Women Voters v. Brunner, 548 F.3d 463, 476 (6th Cir. 2008) (relying on *Bush v. Gore* for claim that a state may not arbitrarily value one person's vote over another after granting the right to vote on equal terms).

249. *See* Ian MacDougall, *Why Bush v. Gore Still Matters in 2020*, PROPUBLICA (Nov. 1, 2020, 5:00 AM), https://www.propublica.org/article/why-bush-v-gore-still-matters [https://perma.cc/E5FB-9LGR].

250. 541 U.S. 913 (2004) (Scalia, J., opinion in chambers).

Dick Cheney, seeking certain records relating to the National Energy Policy Development Group, which the Vice President headed.[251] The case made its way to the Supreme Court, and the Sierra Club asked Justice Scalia to recuse himself from hearing the case.[252] The Sierra Club suggested that because Justice Scalia was friends with Cheney, and because the pair had gone on a duck-hunting trip shortly before the case began, the Justice was required to "resolve any doubts" about his impartiality "in favor of recusal."[253]

The Sierra Club's brief was submitted to the Court on March 11, 2004.[254] No oral argument on the recusal issue was held, and Justice Scalia issued an in-chambers opinion declining to recuse himself just seven days later.[255] Yet despite this rushed briefing and the lack of oral argument, Justice Scalia's opinion is regularly cited when lower courts consider recusal questions.[256]

Second, Supreme Court stay grants typically include little to no reasoning or analysis.[257] Decisions issuing from the Court's shadow docket rarely involve the same lengthy discussions and back-and-forth between the majority and dissenting Justices that characterize the Court's merits docket.[258] Perhaps these factors militate against precedential weight? But while a short opinion or order may sometimes be entitled to less precedential weight than a lengthier opinion,[259] that does not

251. *Id.* at 918.

252. *See id.* at 914–15.

253. *Id.*

254. *See* Brief of Respondent Sierra Club, *Cheney*, 541 U.S. 913 (No. 03-475).

255. *See Cheney*, 541 U.S. at 926–27.

256. *See, e.g.*, United States v. Ciavarella, 716 F.3d 705, 719 (3d Cir. 2013); United States v. Toohey, 448 F.3d 542, 546 (2d Cir. 2006); Perry v. Schwarzenegger, 630 F.3d 909, 915 (9th Cir. 2011).

257. *See supra* Part I.A.

258. *See id.*

259. *See* GARNER ET AL., *supra* note 13, at 215.

mean that the Court's view of the merits of the matter is automatically unclear, nor that lower courts may simply ignore it.[260] Inferior federal courts owe "obedience" to the Supreme Court as a matter of constitutional principle and long-recognized common law practice, not just when the Supreme Court's reasoning is pellucid or persuasive.[261] After all, deference only when the lower court is convinced by the higher court's reasoning is no deference at all.

Third, the Court does not treat its stay orders as binding on itself, so perhaps lower courts need not treat them as precedential, either. To begin with, after *Diocese of Brooklyn*, this assumption may no longer be correct. Recall that shortly after issuing this ruling, the Court vacated two similar lower court opinions and remanded them for further consideration in light of *Diocese of Brooklyn*.[262] The natural conclusion from the Court's remands is that it believed these lower court cases were now governed by *Diocese of Brooklyn* and should thus be decided using a similar analysis.

But in any event, the Supreme Court is always free to revisit or ignore its prior rulings, and it frequently does.[263] This is especially true in the context of *per curiam* opinions or summary affirmances. For instance, in *John Baizley Iron Works v. Span*,[264] the Court reversed a compensation award under the Workmen's Compensation Act of Pennsylvania for an injured employee.[265] Justice Stone dissented, arguing that the Court

260. *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (relying on per curiam decision in N.Y. Times Co. v. United States, 403 U.S. 713 (1971), to recognize that prior restraints are presumptively unconstitutional).

261. *See* GARNER ET AL., *supra* note 13, at 7–8, 28.

262. *See supra* note 32 and accompanying text.

263. *See* GARNER ET AL., *supra* note 13, at 214–15; 18 MOORE'S FEDERAL PRACTICE § 134.04[4] (3d ed. 2011).

264. 281 U.S. 222 (1930).

265. *Id.* at 230.

should have followed *Rosengrant v. Havard*, a summary affirmance without opinion.[266] The majority did not even acknowledge *Rosengrant* in its opinion.[267] But lower courts must "do as [the Court] says, not as it does."[268] And while the Supreme Court is of course free to overrule or even ignore its prior decisions, lower courts have no such luxury.[269]

More, while it is true that the Justices themselves are not bound by their preliminary views on a case, a decision to grant a stay is at least, as we argue, a signal of their views. Indeed, it is intended to be such a signal, as the standard for granting a stay requires the Court to consider whether the movant will prevail on his or her view of the merits. Absent compelling reasons, it will typically be prudent for lower courts to address these signals when considering the same merits question.[270]

Fourth, stays are by nature preliminary orders that typically maintain the status quo. One might suggest that these quick, initial reviews should not bind lower courts that can consider similar matters with the benefit of more time and fuller briefing and factual development. This is essentially the objection raised by Judge King in *CASA de Maryland*.[271]

But this objection overlooks the fact that appellate courts

266. *Id.* at 232 (citing Rosengrant v. Havard, 273 U.S. 664 (1927) (per curiam)).

267. *Id.* at 222–232.

268. Penkoski v. Bowser, 486 F. Supp. 3d 219, 234 (D.D.C. 2020).

269. GARNER ET AL., *supra* note 13, at 28, 40–41.

270. *See* Sharpe Holdings, Inc. v. U.S. Dep't of Health & Hum. Servs., 801 F.3d 927, 944 (8th Cir. 2015), *vacated and remanded*, 2016 WL 2842448 (U.S. May 16, 2016) (mem.) ("Although the Court's orders were not final rulings on the merits, they at the very least collectively constitute a signal that less restrictive means exist by which the government may further its interests." (citing Priests for Life v. U.S. Dep't of Health & Hum. Servs., 808 F.3d 1, 25 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

271. *See supra* note 9 and accompanying text.

frequently issue precedential opinions on preliminary injunctions and stays, often after expedited briefing by the parties.[272] And the Supreme Court has cited legal conclusions made in interlocutory appeals without suggesting that they are due less weight.[273] Indeed, it is not unusual for cases to settle after a definitive ruling on a preliminary injunction.[274]

It is not clear why a lower court's ruling on a preliminary injunction after expedited briefing should have precedential effect, but a preliminary order from the Supreme Court—which at least has the benefit of the briefing and rulings from the lower courts—should not. Of course, if the Supreme Court subsequently indicates that it has a different view of the merits of the matter, either through a later merits opinion in the same case or an opinion in another case, then the initial order would no longer be entitled to precedential weight.[275]

Relatedly, some might argue that, as a formal matter, preliminary orders do not technically dispose of the underlying merits dispute, speaking instead only to the *likely* outcome when the merits questions are eventually addressed.[276] But as discussed above, these initial determinations typically predict—if not predetermine—the actual merits decision. This is likely especially true when the major questions at issue are ones of law, rather than factual questions that can develop as the case evolves.

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272. *See, e.g.*, Celebrity, Inc. v. Trina, Inc., 264 F.2d 956 (1st Cir. 1959).

273. GARNER ET AL., *supra* note 13, at 156.

274. *See, e.g.*, John M. Newman, *Raising the Bar and the Public Interest: On Prior Restraints, "Traditional Contours," and Constitutionalizing Preliminary Injunctions in Copyright Law*, 10 VA. SPORTS & ENT. L.J. 323, 328 (2011) (stating that "an order regarding the plaintiff's motion for a preliminary injunction often facilitates settlement"); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. CHI. L. REV. 197, 202 n.14 (2003) ("Preliminary hearings—whether or not they lead to injunctions—surely do promote settlement by increasing the information available to the parties.").

275. GARNER ET AL., *supra* note 13, at 301, 303.

276. Cook Cty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020).

More, in many contexts, decisions on preliminary relief are as important, if not more so, than a final determination on the merits. Cases about elections are a prime example.[277] "Few areas of law are as consistently dominated by one crucial date,"[278] and emergency decisions made before, on, or immediately after an election day about how and by when votes must be counted often prove decisive. It was, after all, the stay the Supreme Court issued in *Bush v. Gore* that halted Florida's recount and placed at issue the state's vote-counting deadline.[279] Similarly, Executive Orders are often intended to address temporary situations[280] or are unlikely to be willingly adopted by a subsequent presidential administration.[281] Preliminary relief barring such an order may, as a practical matter, prevent it from ever being implemented. Thus, while it is of course true that stay grants are not formally decisions on the merits of a case, they can nonetheless be instructive and should not simply be ignored.

Finally, one might worry that treating Supreme Court stays as precedent will unnaturally freeze the development of the caselaw and rob the Court of the benefit of conflicting lower court opinions to consider when reaching its own, ultimate determination. Judges and commentators have recognized this value in the multi-tiered structure of federal courts and suggested that the Court may use circuit splits to crystalize issues before it takes them up.[282]

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277. *See* Edward Foley, *The Particular Perils of Emergency Election Cases*, SCOTUSBLOG (Oct. 23, 2020 5:28 PM), https://www.scotusblog.com/2020/10/symposium-the-particular-perils-of-emergency-election-cases/ [https://perma.cc/M9J8-ZBBB].

278. *Id.*

279. *See id.*

280. *See, e.g.*, Exec. Order No. 13,945, 85 Fed. Reg. 49,935 (Aug. 8, 2020) ("Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners").

281. *Cf.* William P. Barr, *supra* note 95, at 628 (describing how Trump Administration has been forced to maintain Obama Administration's DACA regime by court order).

282. *See, e.g.*, Barnes v. Ahlman, 140 S. Ct. 2620, 2623 (2020) (Sotomayor, J., dissenting

But the decision to grant a stay, an extraordinary action for the Court to take, is itself suggestive that the issue is sufficiently crystallized that a majority of the Court believes specific action by the Court is necessary. More, the Court will presumably have the considered opinions of one, and probably two, lower courts in the record of the case before rendering its stay decision. At least one of those lower court opinions will present the opposite view from the one the Court is poised to take. More still, other courts can show their hand without also ignoring the Court's stay order. Lower courts occasionally discuss their misgivings about a Supreme Court decision even while faithfully applying it;[283] there is no reason they cannot do so in this context, too.

D. A Note on Concurrences, Dissents, and Statements Respecting Stay Decisions

Justices frequently author concurrences, dissents, and statements respecting the full Court's decision to grant or deny a stay.[284] As with the Court's normal merits docket, concurrences and dissents are, of course, not binding on lower

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from grant of stay) (mem.) (discussing whether the Ninth Circuit had created a "certworthy circuit split"); Nunez v. United States, 554 U.S. 911, 911 (2008) (Scalia, J., dissenting) (mem.) ("I had thought that the main purpose of our certiorari jurisdiction was to eliminate circuit splits, not create them."); White v. Finkbeiner, 753 F.2d 540, 546 n.1 (7th Cir. 1985) (Swygert, J., dissenting) ("By allowing issues to percolate up through the various circuits, the Supreme Court is able to benefit from observing the treatment of issues in different contexts, the alternative resolutions of issues, and even the mistakes of appellate courts.").

283. GARNER ET AL., *supra* note 13, at 28–29 (citing Lyons v. City of Xenia, 417 F.3d 565, 582–84 (6th Cir. 2005) (Sutton, J., concurring)); Khan v. State Oil Co., 93 F.3d 1358, 1363–64 (7th Cir. 1996) (relying on Albrecht v. Herald Co., 390 U.S. 145 (1968), despite its "increasingly wobbly, moth-eaten foundations" because the Supreme Court had not "expressly overruled it").

284. *See, e.g.*, Wolf v. Cook County, 140 S. Ct. 681, 681 (2020) (Sotomayor, J., dissenting from the grant of stay) (mem.).

courts.[285] But generally, these opinions will be useful as persuasive authority.[286]

In *Department of Homeland Security v. New York*,[287] for instance, Justice Gorsuch wrote an opinion concurring in the grant of a stay.[288] The opinion questioned whether nationwide injunctions fall within the scope of a federal court's Article III powers, noting that such injunctions "have little basis in traditional equitable practice."[289] Justice Gorsuch added that this form of equitable relief necessarily requires "high-stakes, low-information" decisionmaking, and that our justice system typically "encourages multiple judges and multiple circuits to weigh in only after careful deliberation, a process that permits the airing of competing views that aids [the Supreme] Court's own decisionmaking process."[290]

More, if nationwide injunctions are permitted, Justice Gorsuch reasoned, nothing stops groups of plaintiffs from forum shopping, filing repeated lawsuits in district after district until a sympathetic judge agrees to ban an Executive Branch policy or action from taking effect anywhere in the country.[291] For these reasons, Justice Gorsuch, joined by Justice Thomas, expressed deep concern about the constitutionality of nationwide injunctions.[292] Of course, the Supreme Court has not yet ruled on whether such injunctions are constitutionally permissible. Nonetheless, courts have cited Justice Gorsuch's concurrence in *Department of Homeland Security* to explain de-

285. *See* 18 MOORE'S FEDERAL PRACTICE § 134.05[2] (3d ed. 2011).
286. *Id.*
287. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).
288. *Id.* at 599–601 (Gorsuch, J., concurring in the grant of stay).
289. *Id.* at 600.
290. *Id.*
291. *Id.* at 601.
292. *Id.* at 600–602.

cisions to issue narrowly tailored, rather than broad, injunctive relief, or to deny plaintiffs' requests for nationwide injunctions.[293]

Concurrences, dissents, and statements signed by multiple Justices are also useful as a source for understanding the views on the merits held by the Court. In *Barr v. Roane*,[294] the Court declined to stay an injunction issued by the U.S. District Court for the District of Columbia preventing the federal government from executing four prisoners convicted of murder.[295] Justice Alito, joined by Justices Gorsuch and Kavanaugh, issued a statement respecting the denial of the stay.[296] At issue in *Roane* was how to interpret 18 U.S.C. § 3596(a), which requires that federal executions be performed "in the manner prescribed by the law of the State in which the sentence is imposed."[297] The government argued that this statute required only that the *mode* of execution must be the same as that required by the law of the State in question.[298] The prisoners argued that the statute required also that all procedures used in an execution in the State in question must be followed by the federal government.[299]

Justice Alito wrote that the government "has shown that it is very likely to prevail when this question is ultimately decided," in part because the prisoners' interpretation "would demand that the [Bureau of Prisons] pointlessly copy minor

293. *See, e.g.*, Mayor of Baltimore v. Azar, 439 F. Supp. 3d 591, 610 n.8 (D. Md. 2020); Guilford College v. Wolf, No. 1:18CV891, 2020 WL 586672 at *11 (M.D.N.C., Feb. 6, 2020); CASA de Maryland, Inc., v. Trump, 971 F.3d 220, 256–57 (4th Cir. 2020).

294. Barr v. Roane, 140 S. Ct. 353 (2019) (mem.).

295. *Id.* at 353.

296. *Id.* (Alito, J., statement respecting the denial of stay or vacatur).

297. See *In re* Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 109–111 (D.C. Cir. 2020).

298. *Id.* at 109.

299. *Barr*, 140 S. Ct. at 353 (Alito, J., statement respecting the denial of stay or vacatur).

details of a State's protocol; and it could well make it impossible to carry out executions of prisoners sentenced in some States."[300] That at least three Justices believed the government's interpretation of the statute to be correct is useful information for any lower courts that are required to consider the question. Indeed, on remand the D.C. Circuit vacated the trial court's injunction, and Judge Katsas relied in part upon Justice Alito's statement for his concurrence in the panel opinion.[301]

* * *

In sum, we argue that decisions to deny a stay have no precedential value. Nor do decisions to grant a stay issued by a single Justice without an explanatory opinion. In-chambers opinions can be quite useful as persuasive authority, as can concurrences, dissents, and statements respecting stay decisions. When the full Supreme Court grants a stay application, lower courts should accord that decision great weight, unless there is compelling reason not to do so. This is true even if the stay grant features little legal reasoning, and may well be true even when there is no reasoning. Of course, any discussion of the merits of a question increases the confidence with which a lower court can act. But a statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

CONCLUSION

As requests for emergency relief are becoming the new normal in Supreme Court litigation, the importance of stay deci-

300. *Id.*

301. *See In re* Federal Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 119–20 (D.C. Cir. 2020) (Katsas, J., concurring).

sions issued by the Court will increase. Some of these decisions—those in which a majority of the Court makes clear that it believes the movant has shown a strong possibility of prevailing on the merits—should be treated as precedential by the lower courts until the Court tells them otherwise.

The alternative view, that these stays can be ignored until the Supreme Court issues a final decision on the merits, is problematic for at least two reasons. First, following the Supreme Court's lead promotes national uniformity and faith in the rule of law.[302] These ideals are especially important in high-profile litigation on the hot-button topics of the day, where litigants and the public are particularly likely to suspect that judges are just applying their personal policy preferences. Rulings that seem to conflict with pronouncements by the Supreme Court on similar topics may appear calculated to flout the Court's authority and invite the public to similarly question the legitimacy of the justice system.[303] Different courts coming to different conclusions on the same legal question, one that the Supreme Court has already expressed a view on, are likely to lead to a decrease in faith in the judiciary.[304] Indeed, given that these cases are often pitted

302. *Cf.* Hutto v. Davis 454 U.S. 370, 375 (1982) (per curiam) ("[U]nless we wish anarchy to prevail within the federal judiciary system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."); Cohens v. Virginia, 19 U.S. 264, 416 (1821) ("[T]he necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved."); *see also* Re, *supra* note 16, at 945 ("To a great extent, the Supreme Court exists to promote uniformity"); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 10 (1962).

303. *See e.g.*, CASA de Maryland, Inc., v. Trump, 971 F.3d 220, 230 (4th Cir. 2020).

304. *See, e.g.*, Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. (forthcoming 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3554027 [https://perma.cc/M48F-YQ7U] (noting the "considerable risks to the lower courts" in terms of their perceived legitimacy when they "take the lead on the content of federal law in high-profile areas").

against the Executive Branch, permitting lower court actions to restrain the Executive after the Supreme Court has stayed similar actions in similar cases also encourages a lack of due respect for a coordinate branch of government[305] and may erode the public's faith in the constitutional power structure as a whole.

Second, ignoring the possible precedential effects of Supreme Court stay grants could also create confusion for litigants. It often takes the Court years to fully consider and resolve the merits of a legal question. Until such resolution, the clearest statement of what the law is may well be an emergency decision, issued by the full Court, signaling that a movant is likely to prevail on the merits of the question. Decisions by lower courts that ignore this signal effectively treat a majority of the Supreme Court's preliminary views on the merits as "perfunctory," thereby "denying the Supreme Court action its obvious and relevant import."[306] Beyond violating traditional notions of vertical stare decisis, decisions ignoring the Supreme Court's actions also create uncertainty about prevailing law, increasing the possibility of splits among the federal courts. Such splits are needlessly resource-consuming if, as we suggest, the Supreme Court's stay grants serve as effective and reliable predictors of the Court's ultimate decision on the merits question presented. Lower courts, in other words, are compelled by judicial restraint and principles of prudence to not issue judgments that they are aware will likely be overturned by the Supreme Court.

Decisions that ignore Supreme Court stays can also undermine the reasonable reliance interests that may adhere to the

305. *Cf.* United States v. Nixon, 418 U.S. 683, 702 (1974) ("[W]here a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous.").

306. *CASA de Maryland, Inc.*, 971 F.3d at 230.

Court's action.[307] Consider, for instance, the practical difficulties a federal agency must no doubt face when it is enjoined from enacting an intended policy after the Supreme Court has stayed a prior injunction regarding the policy. More, individuals, companies, and state and local governments must continually modify their behavior and expectations when confronted with conflicting rulings emanating from various courts around the country.

To be sure, some commentators question the need for prioritizing uniformity within federal caselaw.[308] But even they recognize there "are cases for which standardizing federal law is important," including situations in which inconsistent interpretations would "be too difficult for interstate actors to follow [or] would lead to confusion."[309] And since many of the shadow docket stays involve the federal government—the ultimate interstate actor—as a party, and are usually high profile enough to lead to confusion should they be disregarded by lower courts, both of these provisos would likely apply. In any event, once the Supreme Court has made the extraordinary decision to intervene in an issue, lower courts no longer have the same latitude to explore an array of possible interpretations to a common legal problem.[310] Rather, they owe obedience to the higher court's decision.[311]

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307. Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597 (1987) ("When a decisionmaker must decide this case in the same way as the last, parties will be better able to anticipate the future. The ability to predict what a decisionmaker will do helps us plan our lives, have some degree of repose, and avoid the paralysis of foreseeing only the unknown.")

308. *See generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (arguing that neither fairness to the litigants, nor the perceived legitimacy of federal law and the justice system require federal courts to strive to maintain uniformity in decisionmaking).

309. *Id.* at 1637.

310. *Cf. id.* at 1604.

311. 18 MOORE'S FEDERAL PRACTICE 3D § 134.02[2] (3d ed. 2011).

A final note is in order. Though we have focused only on stays, the analysis presented here applies to any order or decision from the Supreme Court's shadow docket that requires the Court to make a preliminary determination about the movant's likelihood of success on the merits.[312] That is, we believe that any time a majority of the Court signals that a party is likely to succeed on a legal question, lower courts should carefully consider whether this determination should be accorded controlling weight by them in subsequent cases. Doing so will reduce the risk of reversal, promote confidence in the rule of law, and ensure that judicial resources are marshaled effectively and efficiently.

312. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam).

APPENDIX

NON-ADMINISTRATIVE SUPREME COURT STAYS (2015–AUGUST 2020)

Case	Full Court or Single Justice	Stay Granted (Y/N)	Merits Discussion in Opinion (Y/N)	Stay Cited by Lower Courts (Y/N)	Citing Court(s)	Notes
Raysor v. DeSantis, 2020 WL 4006868 (2020)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor (joined by Justices Ginsburg and Kagan).
Hartkemeyer v. Barr, 2020 WL 4006836 (2020)	Full Court	N	N	N	N/A	
Barr v. Purkey, 2020 WL 4006809 (2020)	Full Court	Y	N	N	N/A	Dissent by Justice Breyer (joined by Justice Ginsburg); Dissent by Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan).
Barr v. Lee, 2020 WL 3964985 (2020)	Full court	Y	Y	Y	*In re Federal Bureau of Prisons' Execution Protocol Cases*, 2020 WL 4004474 (D.D.C. 2020).	Dissent by Justice Breyer (joined by Justice Ginsburg); Dissent by Justice Sotomayor (joined by Justices Ginsburg and Kagan).
Peterson v. Barr, 2020 WL 3964236 (2020)	Full Court	N	N	N	N/A	
Lee v. Watson, 2020 WL 3964235 (2020)	Full Court	N	N	N	N/A	

Wardlow v. Davis, 2020 WL 3818898 (2020)	Full Court	N	N	N	N/A	
Wardlow v. Texas, 2020 WL 3818897 (2020)	Full Court	N	N	N	N/A	
Army Corps of Engineers v. N. Plains Res. Council, 2020 WL 3637662 (2020)	Full Court	In part	N	N	N/A	
Merrill v. People First of Alabama, 2020 WL 3604049 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Bourgeois v. Barr, 2020 WL 3492763 (2020)	Full Court	N	N	N	N/A	Justices Ginsburg and Sotomayor would grant the application.
Bugarenko v. Barr, 2020 WL 3492637 (2020)	Full Court	N	N	N	N/A	
Gutierrez v. Saenz, 2020 WL 3248349 (2020)	Full Court	Y	N	Y	*Murphy v. Collier*, 2020 WL 3448582 (S.D. Tex. 2020).	The Supreme Court's stay opinion said: "The District Court should promptly determine, based on whatever evidence the parties provide, whether serious security problems would result if a prisoner facing

						execution is permitted to choose the spiritual adviser the prisoner wishes to have in his immediate presence during the execution."
Williams v. Wilson, 2020 WL 2644305 (2020)	Full Court	N	N	N	N/A	Justices Thomas, Alito, and Gorsuch would grant the application.
Perry-Bey v. Norfolk, VA, 2020 WL 2621674 (2020)	Full Court	N	N	N	N/A	
ID DOC v. Edmo, 2020 WL 2569747 (2020)	Full Court	N	N	N	N/A	Justices Thomas and Alito would grant the application.
DOJ v. House Comm. on Judiciary, 2020 WL 2550408 (2020)	Full Court	Y	N	N	N/A	
Barton v. Stange, 2020 WL 2536738 (2020)	Full Court	N	N	N	N/A	
Friends of Danny DeVito v. Wolf, 2020 WL 2177482 (2020)	Full Court	N	N	N	N/A	
Texas Democratic Party v. Abbott, 140 S. Ct. 2015 (2020)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.

Valentine v. Collier, 140 S. Ct. 1598 (2020)	Full Court	N	N	Y	▪*Maney v. Brown*, 2020 WL 2839423 at *2 (D. Ore. 2020).▪ *Duvall v. Hogan*, 2020 WL 3402301 at *8 (D. Md. 2020)▪ *United States v. Monge*, 2020 WL 3872168 at *3 (S.D.N.Y. 2020).	Justice Sotomayor (joined by Justice Ginsburg) wrote statement respecting denial of application.
Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020)	Full Court	Y	N	N	N/A	Justice Sotomayor would deny the application.
Actavis Holdco U.S., Inc. v. Connecticut, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Woods v. Stewart, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Woods v. Dunn, 140 S. Ct. 1290 (2020)	Full Court	N	N	N	N/A	
Goad v. Steel, 140 S. Ct. 1260 (2020)	Full Court	N	N	N	N/A	

Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205 (2020)	Full Court	Y	Y	Y	▪ *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020).▪ *Clark v. Edwards*, 2020 WL 3415376 at *5 (M.D. La. 2020).▪ *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020).	Dissent by Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan).
Pratt v. Barr, 140 S. Ct. 1100 (2020)	Full Court	N	N	N	N/A	
Powe v. Deutsche Bank Nat'l Trust Co., 140 S. Ct. 992 (2020)	Full Court	N	N	N	N/A	
Sutton v. Tennessee, 140 S. Ct. 991 (2020)	Full Court	N	N	N	N/A	
In re Sutton, 140 S. Ct. 991 (2020)	Full Court	N	N	N	N/A	
Ochoa v. Collier, 140 S. Ct. 990 (2020)	Full Court	N	N	N	N/A	
Lance v. Ford, 140 S. Ct. 990 (2020)	Full Court	N	N	N	N/A	
Lance v. Georgia, 140 S. Ct. 989 (2020)	Full Court	N	N	N	N/A	
Roberts v.	Full	N	N	N	N/A	

Texas, 140 S. Ct. 952 (2020)	Court					
Henry Schein, Inc. v. Archer and White Sales, Inc., 140 S. Ct. 951 (2020)	Full Court	Y	N	N	N/A	Justice Ginsburg would deny the application.
Jefferson v. Sup. Ct. of Georgia, 140 S. Ct. 930 (2020)	Full Court	N	N	N	N/A	
Wolf v. Cook County, Illinois, 140 S. Ct. 681 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. Dissent by Justice Sotomayor.
DHS v. New York, 140 S. Ct. 599 (2020)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. Justice Gorsuch (joined by Justice Thomas) concurred.
Trump v. Deutsche Bank AG, 140 S. Ct. 660 (2019)	Full Court	Y	N	N	N/A	
Runnels v. Texas, 140 S. Ct. 659 (2019)	Full Court	N	N	N	N/A	
Geimah v. Barr, 140 S. Ct. 603 (2019)	Full Court	N	N	N	N/A	
In re Hall, 140 S. Ct. 602 (2019)	Full Court	N	N	N	N/A	

Trump v. Mazars USA, LLP, 140 S. Ct. 581 (2019)	Full Court	Y	N	N	N/A	
Cromartie v. Shealy, 140 S. Ct. 519 (2019)	Full Court	N	N	N	N/A	
Bank of America Corp. v. City of Miami, Florida, 140 S. Ct. 450 (2019)	Full Court	N	N	N	N/A	
BP P.L.C. v. Mayor and City Council of Baltimore, 140 S. Ct. 449 (2019)	Full Court	N	N	N	N/A	Justice Alito was recused.
Barr v. Roane, 140 S. Ct. 353 (2019)	Full Court	N	N	N	N/A	Justice Alito (joined by Justices Gorsuch and Kavanaugh) wrote statement respecting the denial.
Rams Football Co. v. St. Louis Regional Convention and Sports Complex Auth., 140 S. Ct. 338 (2019)	Full Court	N	N	N	N/A	
Morgan v. Morgan, 140 S. Ct. 131 (2019)	Full Court	N	N	N	N/A	
Newsome v. RSL Funding, LLC, 140 S. Ct. 130 (2019)	Full Court	N	N	N	N/A	

Xiao-Ying Yu v. Neall, 140 S. Ct. 130 (2019)	Full Court	N	N	N	N/A	
Sankara v. Barr, 140 S. Ct. 129 (2019)	Full Court	N	N	N	N/A	
Crutsinger v. Texas, 140 S. Ct. 32 (2019)	Full Court	N	N	N	N/A	
In Re Gary R. Bowles, 140 S. Ct. 27 (2019)	Full Court	N	N	N	N/A	
In Re Larry Swearingen, 140 S. Ct. 26 (2019)	Full Court	N	N	N	N/A	
Cannon v. Seay, 140 S. Ct. 26 (2019)	Full Court	Y	N	N	N/A	
West v. Parker, 140 S. Ct. 25 (2019)	Full Court	Y	N	N	N/A	
Rhines v. Young, 140 S. Ct. 8 (2019)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.
Sparks v. Davis, 140 S. Ct. 6 (2019)	Full Court	N	N	N	N/A	Justice Sotomayor wrote statement respecting denial of application.

Trump v. Sierra Club, 140 S. Ct. 1 (2019)	Full Court	Y	Y	Y	▪*El Paso Cty. v. Trump*, 408 F. Supp. 3d 840, 844 (W.D. Tex. 2019)▪*Ctr. for Biological Diversity v. Trump*, 2020 WL 1643657 at *4 (D.D.C. 2020).	Stay opinion says: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Justices Ginsburg, Sotomayor, and Kagan would deny the application. Justice Breyer concurred in part and dissented in part.
Ford v. United States, 139 S. Ct. 2764 (2019)	Full Court	N	N	N	N/A	
Wilson v. Georgia, 139 S. Ct. 2738 (2019)	Full Court	N	N	N	N/A	
Presbyterian Church USA v. Edwards, 139 S. Ct. 2686 (2019)	Full Court	N	N	N	N/A	
Chatfield v. League of Women Voters of Michigan, 139 S. Ct. 2636 (2019)	Full Court	Y	N	N	N/A	
Chabot v. Ohio A. Philip Randolph Institute,	Full Court	Y	N	N	N/A	

139 S. Ct. 2635 (2019)						
Long v. Inch, 139 S. Ct. 2635 (2019)	Full Court	N	N	N	N/A	
In re Giordani, 139 S. Ct. 2629 (2019)	Full Court	N	N	N	N/A	
In re Samra, 139 S. Ct. 2049 (2019)	Full Court	N	N	N	N/A	
Price v. Dunn, 139 S. Ct. 1794 (2019)	Full Court	N	N	N	N/A	Dissent by Justice Breyer (joined by Justice Ginsburg and joined in part by Justices Sotomayor and Kagan).
Morrow v. Ford, 139 S. Ct. 1651 (2019)	Full Court	N	N	N	N/A	
Smith v. Daniel, 139 S. Ct. 1646 (2019)	Full Court	N	N	N	N/A	
King v. Texas, 139 S. Ct. 1617 (2019)	Full Court	N	N	N	N/A	
Murphy v. Collier, 139 S. Ct. 1475 (2019)	Full Court	Y	N	Y	*Murphy v. Collier*, 942 F.3d 704, 708–09 (5th Cir. 2019).	Justice Kavanaugh wrote opinion concurring in the grant and wrote a statement (joined by Chief Justice Robert) respecting the grant. Dissent by Justice Alito (joined by Justices Thomas and Gorsuch).
Guedes v. ATF,	Full Court	N	N	N	N/A	Justices Thomas and Gorsuch

139 S. Ct. 1474 (2019)						would grant the application.
Republic of Hungary v. Simon, 139 S. Ct. 1474 (2019)	Full Court	N	N	N	N/A	
Gun Owners of America, Inc. v. Barr, 139 S. Ct. 1406 (2019)	Full Court	N	N	N	N/A	
Dressler v. Circuit Court of Wisconsin, 139 S. Ct. 1402 (2019)	Full Court	N	N	N	N/A	
Coble v. Texas, 139 S. Ct. 1289 (2019)	Full Court	N	N	N	N/A	
Golz v. Carson, 139 S. Ct. 1235 (2019)	Full Court	N	N	N	N/A	
Harihar v. US Bank NA, 139 S. Ct. 123 (2019)	Full Court	N	N	N	N/A	
Ray v. Alabama, 139 S. Ct. 953 (2019)	Full Court	N	N	N	N/A	
Jennings v. Texas 139 S. Ct. 952 (2019)	Full Court	N	N	N	N/A	
Trump v. Karnoski, 139 S. Ct. 950 (2019)	Full Court	Y	N	Y	*Stone v. Trump*, 2019 WL 5697228 at *2 (D. Md. 2019); *Roe v. Shanahan*, 359 F. Supp. 3d	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.

					382, 420 n.45 (E.D. Va. 2019).	
Trump v. Stockman, 139 S. Ct. 950 (2019)	Full Court	Y	N	Y	*Stone v. Trump*, 2019 WL 5697228 at *2 (D. Md. 2019).	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
In re Grand Jury Subpoena, 139 S. Ct. 914 (2019)	Full Court	N	N	N	N/A	
Virginia House of Delegates v. Golden Bethune-Hill, 139 S. Ct. 914 (2019)	Full Court	N	N	N	N/A	
Zodhiates v. United States, 139 S. Ct. 857 (2019)	Full Court	N	N	N	N/A	
June Medical Services, LLC v. Gee, 139 S. Ct. 663 (2019)	Full Court	Y	N	Y	*EMW Women's Surgical Ctr., P.S.C. v. Friedlander, 960 F.3d 785, 804* (6th Cir. 2020).	Justices Thomas, Alito, Gorsuch, and Kavanaugh would deny the application. Dissent by Justice Kavanaugh.
Trump v. East Bay Sanctuary Covenant, 139 S. Ct. 782 (2018)	Full Court	N	N	N	N/A	Justices Thomas, Alito, Gorsuch, and Kavanaugh would grant the application.
Jimenez v. Jones, 139 S. Ct. 659 (2018)	Full Court	N	N	N	N/A	*See also Jimenez v. Florida*, 139 S. Ct. 659.
In re Garcia, 139 S. Ct. 625	Full Court	N	N	N	N/A	*See also* 139 S. Ct. 626.

(2018)						
Ramos v. Davis, 139 S. Ct. 499 (2018)	Full Court	N	N	N	N/A	*See also Ramos v. Texas*, 139 S. Ct. 499.
Keyes v. Banks, 139 S. Ct. 473 (2018)	Full Court	N	N	N	N/A	
In re United States, 139 S. Ct. 452 (2018)	Full Court	N	Y	Y	*Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020).	Justices Thomas and Gorsuch would grant the application.
In re Dep't of Commerce, 139 S. Ct. 452 (2018)	Full Court	N	N	N	N/A	Justices Thomas, Alito, and Gorsuch would grant the application. *See also* 139 S. Ct. 16.
Yackel v. South Dakota, 139 S. Ct. 449 (2018)	Full Court	N	N	N	N/A	
Miller v. Parker, 139 S. Ct. 399 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor.
In re Acker, 139 S. Ct. 52 (2018)	Full Court	N	N	N	N/A	*See also Acker v. Texas*, 139 S. Ct. 52.
Crossroads Grassroots Policy Strategies v. Citizens for Responsibility and Ethics in Washington, 139 S. Ct. 50 (2018)	Full Court	N	N	N	N/A	
Michigan State A. Philip Randolph Insti-	Full Court	N	N	N	N/A	Justices Ginsburg and Sotomayor would grant the application.

tute v. Johnson, 139 S. Ct. 50 (2018)						
Chasson v. Sessions, 139 S. Ct. 44 (2018)	Full Court	N	N	N	N/A	
Qorane v. Sessions, 139 S. Ct. 38 (2018)	Full Court	N	N	N	N/A	
Zagorski v. Haslam, 139 S. Ct. 20 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 139 S. Ct. 11; 139 S. Ct. 360.
Brakebill v. Jaeger, 139 S. Ct. 10 (2018)	Full Court	N	N	N	N/A	Justice Kavanaugh did not participate in the case. Dissent by Justice Ginsburg (joined by Justice Kagan).
Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 5 (2018)	Full Court	Y	N	N	N/A	Justices Ginsburg, Sotomayor, and Kagan would deny the application.
Irick v. Tennessee, 139 S. Ct. 1 (2018)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 139 S. Ct. 4.
United States v. U.S. Dist. Ct. for Dist. of Oregon, 139 S. Ct. 1 (2018)	Full Court	N	Y	Y	*Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020).	The stay opinion says: "The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion.

						The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions."
Bible v. Davis, 138 S. Ct. 2700 (2018)	Full Court	N	N	N	N/A	
Jovel-Jovel v. Sessions, 138 S. Ct. 2040 (2018)	Full Court	N	N	N	N/A	
Butts v. Georgia, 138 S. Ct. 1975 (2018)	Full Court	N	N	N	N/A	*See also Butts v. Sellers*, 138 S. Ct. 1975.
Davila v. Texas, 138 S. Ct. 1611 (2018)	Full Court	N	N	N	N/A	
In re Moody, 138 S. Ct. 1590 (2018)	Full Court	N	N	N	N/A	*See also Moody v. Alabama* and *Moody v. Stewart*, 138 S. Ct. 1590.
Qorane v. Sessions, 138 S. Ct. 1584 (2018)	Full Court	N	N	N	N/A	
In re Rodriguez, 138 S. Ct. 1347 (2018)	Full Court	N	N	N	N/A	
Bucklew v. Precythe, 138 S. Ct. 1323 (2018)	Full Court	Y	N	N	N/A	Justices Roberts, Thomas, Alito, and Gorsuch would deny the application.

Turzai v. League of Women Voters of Pennsylvania, 138 S. Ct. 1323 (2018)	Full Court	N	N	N	N/A	
Timbes v. Deutsche Bank Nat. Trust Co., 138 S. Ct. 1316 (2018)	Full Court	N	N	N	N/A	
Eggers v. Alabama, 138 S. Ct. 1278 (2018)	Full Court	N	N	N	N/A	
In re Gary, 138 S. Ct. 1278 (2018)	Full Court	N	N	N	N/A	*See also Gary v. Georgia*, 138 S. Ct. 1278.
Henry Schein, Inc. v. Archer and White Sales, Inc., 138 S. Ct. 1185 (2018)	Full Court	Y	N	N	N/A	
Branch v. Florida, 138 S. Ct. 1164 (2018)	Full Court	N	N	N	N/A	
Battaglia v. Texas, 138 S. Ct. 943 (2018)	Full Court	N	N	N	N/A	*See also Battaglia v. Davis*, 138 S. Ct. 943.
In re Rayford, 138 S. Ct. 943 (2018)	Full Court	N	N	N	N/A	*See also Rayford v. Davis*, 138 S. Ct. 943.
Hamm v. Dunn, 138 S. Ct. 828 (2018)	Full Court	N	N	N	N/A	Justice Breyer wrote statement respecting denial of stay. Dissent by Justice Ginsburg (joined by Justice Sotomayor).

North Carolina v. Covington; 138 S. Ct. 974 (2018)	Full Court	In part	N	N	N/A	Justices Thomas and Alito would grant the application in full. Justices Ginsburg and Sotomayor would deny the application in full.
Madison v. Alabama, 138 S. Ct. 943 (2018)	Full Court	Y	N	N	N/A	Justices Thomas, Alito, and Gorsuch would deny the application.
Rucho v. Common Cause, 138 S. Ct. 923 (2018)	Full Court	Y	N	N	N/A	Justices Ginsburg and Sotomayor would deny the application.
Rothbard v. United States, 138 S. Ct. 569 (2017)	Full Court	N	N	N	N/A	
Trump v. Hawaii, 138 S. Ct. 542 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg and Sotomayor would deny the application. *See also Trump v. IRAP*, 138 S. Ct. 542 .
Campbell v. Jenkins, 138 S. Ct. 466 (2017)	Full Court	N	N	N	N/A	
Hannon v. Jones, 138 S. Ct. 442 (2017)	Full Court	N	N	N	N/A	*See also Hannon v. Florida*, 138 S. Ct. 441.
Cardenas Ramirez v. McCraw, 138 S. Ct. 442 (2017)	Full Court	N	N	N	N/A	*See also Cardenas Ramirez v. Texas*, 138 S. Ct. 442.
Smith v. HSBC Bank, 138 S. Ct. 418 (2017)	Full Court	N	N	N	N/A	

In re United States, 138 S. Ct. 371 (2017)	Full Court	Y	N	N	N/A	Dissent by Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan).
McNabb v. Dunn, 138 S. Ct. 370 (2017)	Full Court	N	N	N	N/A	
In re Pruett, 138 S. Ct. 353 (2017)	Full Court	N	N	N	N/A	*See also Pruett v. Choate*, 138 S. Ct. 353.
In re Lambrix, 138 S. Ct. 312 (2017)	Full Court	N	N	N	N/A	*See also Lambrix v. Florida*, *Lambrix v. Jones*, 138 S. Ct. 312.
Saro v. Sessions, 138 S. Ct. 287 (2017)	Full Court	N	N	N	N/A	
Tharpe v. Sellers, 138 S. Ct. 53 (2017)	Full Court	Y	N	N	N/A	Justices Thomas, Alito, and Gorsuch would deny the application.
Trump v. Hawaii, 138 S. Ct. 49 (2017)	Full Court	Y	N	N	N/A	
Abbott v. Perez, 138 S. Ct. 49 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Asay v. Florida, 138 S. Ct. 41 (2017)	Full Court	N	N	N	N/A	
Preyor v. Davis, 138 S. Ct. 35 (2017)	Full Court	N	N	N	N/A	
Phillips v. Ohio, 138 S. Ct. 35 (2017)	Full Court	N	N	N	N/A	*See also Phillips v. Jenkins*, 138 S. Ct. 35.
Anderson v.	Full	Y	N	N	N/A	Justices Ginsburg

Loertscher, 137 S. Ct. 2328 (2017)	Court					and Sotomayor would deny the application.
Otte v. Morgan, 137 S. Ct. 2238 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor (joined by Justice Ginsburg). *See also Otte v. Ohio*, 138 S. Ct. 49.
Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017)	Full Court	In part	Y	Y	*Roe v. Dep't of Defense*, 947 F.3d 207, 231–33 (4th Cir. 2020); *City of Chicago v. Barr*, 961 F.3d 882, 915-16 (7th Cir. 2020); *Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1327–29 (11th Cir. 2019).	Justice Thomas (joined by Justices Alito and Gorsuch) concurred in part and dissented in part.
Gill v. Whitford, 137 S. Ct. 2289 (2017)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application.
Ledford v. Dozier, 137 S. Ct. 2156 (2017)	Full Court	N	N	N	N/A	*See also Ledford v. Sellers*, 137 S. Ct. 2156.
Tartt v. Magna Health Systems, 137 S. Ct. 1836 (2017)	Full Court	N	N	N	N/A	Justice Gorsuch took no part in the consideration of the application.
Melson v. Dunn,	Full Court	N	N	N	N/A	

137 S. Ct. 1664 (2017)						
Lee v. Hutchinson, 137 S. Ct. 1623 (2017)	Full Court	N	N	N	N/A	*See also Lee v. Jegley; Lee v. Kelley; Lee v. Arkansas*, 137 S. Ct. 1623.
Johnson v. Kelley, 137 S. Ct. 1622 (2017)	Full Court	N	N	N	N/A	Justices Breyer, Sotomayor, and Kagan would grant the application. Dissent by Justice Breyer.
Arkansas v. Davis, 137 S. Ct. 1621 (2017)	Full Court	N	N	N	N/A	
Arthur v. Dunn, 137 S. Ct. 1521 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also* 137 S. Ct. 2185.
Jones v. Kelley, 137 S. Ct. 1284 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also Jones v. Arkansas*, 137 S. Ct. 1284.
Williams v. Kelley, 137 S. Ct. 1284 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Sotomayor. *See also Williams v. Arkansas*, 137 S. Ct. 1842 ; *In re Williams*, 137 S. Ct. 1841.
McGehee v. Hutchinson, 137 S. Ct. 1275 (2017)	Full Court	N	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would grant the application. Dissent by Justice Sotomayor.
Ruiz v. Texas, 137 S. Ct. 1246 (2017)	Full Court	N	N	N	N/A	Dissent by Justice Breyer. *See also Ruiz v. Davis*, 137 S. Ct. 1247.
Fisch v. United States, 137 S. Ct. 1127 (2017)	Full Court	N	N	N	N/A	
Christeson v.	Full	N	N	N	N/A	Justice Ginsburg

Griffith, 137 S. Ct. 910 (2017)	Court					would grant the application.
Edwards v. Collier, 137 S. Ct. 909 (2017)	Full Court	N	N	N	N/A	*See also Edwards v. Davis*, 137 S. Ct. 909.
Gray v. McAuliffe, 137 S. Ct. 826 (2017)	Full Court	N	N	N	N/A	
North Carolina v. Covington, 137 S. Ct. 808 (2017)	Full Court	Y	N	N	N/A	
Wilkins v. Davis, 137 S. Ct. 808 (2017)	Full Court	N	N	N	N/A	
Smith v. Alabama, 137 S. Ct. 588 (2016)	Full Court	N	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would grant the application.
Sallie v. Sellers, 137 S. Ct. 588 (2016)	Full Court	N	N	N	N/A	
Arizona Sec'y of State v. Feldman, 137 S. Ct. 446 (2016)	Full Court	Y	N	N	N/A	
Lawler v. Sellers, 137 S. Ct. 368 (2016)	Full Court	N	N	N	N/A	
Zhenli Ye Gon v. Dyer, 137 S. Ct. 347 (2016)	Full Court	N	N	N	N/A	
Tilton v. SEC, 137 S. Ct. 29 (2016)	Full Court	N	N	N	N/A	

Ferrer v. Senate Permanent Subcomm. on Investigations, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	Justice Alito took no part in consideration of the application.
Johnson v. Michigan State A. Philip Randolph Institute, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	Justices Thomas and Alito would grant the application.
Ohio Democratic Party v. Husted, 137 S. Ct. 28 (2016)	Full Court	N	N	N	N/A	
Dignity Health v. Rollins, 137 S. Ct. 28 (2016)	Full Court	Y	N	N	N/A	
North Carolina v. North Carolina State Conference of NAACP, 137 S. Ct. 27 (2016)	Full Court	N	N	N	N/A	Chief Justice Roberts and Justices Kennedy and Alito would grant the stay in part. Justice Thomas would grant the stay in full.
Libertarian Party of Ohio v. Husted, 137 S. Ct. 27 (2016)	Full Court	N	N	N	N/A	
Ohio Democratic Party v. Donald J. Trump for President, 137 S. Ct. 15 (2016)	Full Court	N	N	N	N/A	Justice Ginsburg wrote a statement respecting denial of application.

Coalition for Homeless v. Husted, 137 S. Ct. 14 (2016)	Full Court	N	N	N	N/A	
Arthur v. Dunn, 137 S. Ct. 14 (2016)	Full Court	Y	N	N	N/A	Justices Thomas and Alito would deny the application. Chief Justice Roberts wrote statement respecting grant of application.
J&K Admin. Mgmt. Servs., Inc. v. Robinson, 136 S. Ct. 2483 (2016)	Full Court	N	N	N	N/A	
Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016)	Full Court	Y	N	N	N/A	Justice Breyer concurred. Justices Ginsburg, Sotomayor, and Kagan would deny the application.
Conner v. Sellers, 136 S. Ct. 2440 (2016)	Full Court	N	N	N	N/A	Justice Breyer dissented.
Matta v. Matta, 136 S. Ct. 2404 (2016)	Full Court	N	N	N	N/A	
Adekunle Olufemi Adetiloye v. United States, 136 S. Ct. 2044 (2016)	Full Court	N	N	N	N/A	
Weston Educational, Inc. v. U.S. ex rel Miller, 136 S. Ct. 1841 (2016)	Full Court	Y	N	N	N/A	
Forrest v.	Full	N	N	N	N/A	

Griffith, 136 S. Ct. 1841 (2016)	Court					
Sibley v. U.S. Dist. Ct. for Dist. of Columbia, 136 S. Ct. 1837 (2016)	Full Court	N	N	N	N/A	
Veasey v. Abbott, 136 S. Ct. 1823 (2016)	Full Court	N	N	N	N/A	
Lucas v. Chatman, 136 S. Ct. 1731 (2016)	Full Court	N	N	N	N/A	
Taylor v. Taylor, 136 S. Ct. 1702 (2016)	Full Court	N	N	N	N/A	
In re Fults, 136 S. Ct. 1539 (2016)	Full Court	N	N	N	N/A	
Vasquez v. Texas, 136 S. Ct. 1538 (2016)	Full Court	N	N	N	N/A	
Bishop v. Chatman, 136 S. Ct. 1512 (2016)	Full Court	N	N	N	N/A	
In re Ward, 136 S. Ct. 1407 (2016)	Full Court	N	N	N	N/A	*See also Ward v. Texas*, 136 S. Ct. 1407.
June Medical Services, LLC v. Gee, 136 S. Ct. 1354 (2016)	Full Court	Y (vacatur of stay)	N	Y	*Comprehensive Health of Planned Parenthood Great Plains v. Williams*, 2017 WL 3475500 at *1 n.3 (W.D. Mo. 2017).	

Robinson v. Superior Ct. of California, 136 S. Ct. 1239 (2016)	Full Court	N	N	N	N/A	
Sherbow v. United States, 136 S. Ct. 1238 (2016)	Full Court	N	N	N	N/A	
McCrory v. Harris, 136 S. Ct. 1001 (2016)	Full Court	N	N	N	N/A	
Hittson v. Chatman, 136 S. Ct. 1000 (2016)	Full Court	N	N	N	N/A	
Garcia v. Stephens, 136 S. Ct. 1000 (2016)	Full Court	N	N	N	N/A	
West Virginia v. EPA, 136 S. Ct. 1000 (2016)	Full Court	Y	N	N	N/A	Justices Ginsburg, Breyer, Sotomayor, and Kagan would deny the application. *See also Murray Energy Corp. v. EPA, North Dakota v. EPA, and Chamber of Commerce v. EPA*, 136 S. Ct. 999 ; *Basin Elec. Power Co-Op v. EPA*, 136 S. Ct. 998.
Gutierrez v. United States, 136 S. Ct. 998 (2016)	Full Court	N	N	N	N/A	
Jones v. Bryson, 136 S. Ct. 998 (2016)	Full Court	N	N	N	N/A	*See also Jones v. Chatman*, 136 S. Ct. 998 .
Wittman v. Personhuballah,	Full Court	N	N	N	N/A	

136 S. Ct. 998 (2016)						
In re Masterson, 136 S. Ct. 927 (2016)	Full Court	N	N	N	N/A	*See also Masterson v. Texas*, 136 S. Ct. 927.
Bolin v. Florida, 136 S. Ct. 790 (2016)	Full Court	N	N	N	N/A	*See also Bolin v. Jones*, 136 S. Ct. 790.
Brooks v. Alabama, 136 S. Ct. 708 (2016)	Full Court	N	N	N	N/A	Justice Breyer dissented. *See also Brooks v. Dunn*, 136 S. Ct. 979.
Smith v. E.L., 136 S. Ct. 701 (2015)	Full Court	Y	N	N	N/A	
Terrell v. Bryson, 136 S. Ct. 614 (2015)	Full Court	N	N	N	N/A	*See also Terrell v. Chatman*, 136 S. Ct. 613.
Sorensen v. United States, 136 S. Ct. 606 (2015)	Full Court	N	N	N	N/A	
Johnson v. Chatman, 136 S. Ct. 532 (2015)	Full Court	N	N	N	N/A	
Israni v. 960 Crystal Lake Assoc., 136 S. Ct. 524 (2015)	Full Court	N	N	N	N/A	
Duncan v. Owens, 136 S. Ct. 500 (2015)	Full Court	Y	N	N	N/A	
Johnson v. Griffith, 136 S. Ct. 444 (2015)	Full Court	N	N	N	N/A	
Johnson v. Lombardi, 136 S. Ct. 443 (2015)	Full Court	Y	Y	N	N/A	

Holiday v. Stephens, 136 S. Ct. 387 (2015)	Full Court	N	N	N	N/A	Justice Sotomayor wrote a statement respecting denial of stay.
Watson v. Florida Judicial Qualifications Comm'n, 136 S. Ct. 352 (2015)	Full Court	N	N	N	N/A	
Manska v. Minnesota, 136 S. Ct. 352 (2015)	Full Court	N	N	N	N/A	
Correll v. Florida, 2015 WL 6111441 (2015)	Full Court	N	N	N	N/A	Justice Breyer dissented.
In re Prieto, 136 S. Ct. 29 (2015)	Full Court	N	N	N	N/A	*See also Prieto v. Zook*, 136 S. Ct. 28.
Glossip v. Oklahoma, 136 S. Ct. 26 (2015)	Full Court	N	N	N	N/A	Justice Breyer dissented.
Gissendaner v. Bryson, 136 S. Ct. 25 (2015)	Full Court	N	N	N	N/A	Justice Sotomayor would grant the application. *See also Gissendaner v. Chatman*, 136 S. Ct. 26.
Venezuela v. Helmerich & Payne Intern. Drilling Co., 136 S. Ct. 24 (2015)	Chief Justice Roberts	N	N	N	N/A	Though unclear from the text of the stay order, it appears that the application for a stay was not referred to the whole Court.
FibroGen, Inc. v. Akebia Theraputics, Inc., 136 S. Ct. 24 (2015)	Full Court	N	N	N	N/A	Justice Kennedy initially granted stay. *See* 136 S. Ct. 1. The full court vacated Justice Kennedy's order a

month later.

Nunley v. Griffith, 136 S. Ct. 24 (2015)	Full Court	N	N	N	N/A	*See also In re Nunley*, 136 S. Ct. 24; *Nunley v. Bowersox*, 136 S. Ct. 23.
McDonnell v. United States, 136 S. Ct. 23 (2015)	Full Court	Y	N	N	N/A	
Davis v. Miller, 136 S. Ct. 23 (2015)	Full Court	N	N	N	N/A	
Arkaji v. Hess, 136 S. Ct. 18 (2015)	Full Court	N	N	N	N/A	
Mellouli v. Lynch, 136 S. Ct. 18 (2015)	Full Court	Y	N	N	N/A	
Duncan v. Owens, 136 S. Ct. 18 (2015)	Full Court	N	N	N	N/A	
Lopez v. Stephens, 136 S. Ct. 17 (2015)	Full Court	N	N	N	N/A	
Roeder v. Kansas, 136 S. Ct. 8 (2015)	Full Court	N	N	N	N/A	
Zink v. Steele, 136 S. Ct. 6 (2015)	Full Court	N	N	N	N/A	*See also In re Zink*, *Zink v. Griffith*, 136 S. Ct. 7.
Dahlgren v. Lynch, 136 S. Ct. 1 (2015)	Justice Ginsburg	N	N	N	N/A	
Whole Women's Health v. Cole,	Full Court	Y	N	N	N/A	Chief Justice Roberts and Justices Scalia, Thomas,

135 S. Ct. 2923 (2015)	and Alito would deny the application.

COMMON GOOD ORIGINALISM: OUR TRADITION AND OUR PATH FORWARD

JOSH HAMMER*

Herewith, a paradox. On the one hand, legal conservatism, originalism, and textualism have never been more ascendant and better-positioned within the legal academy and mainstream political discourse. But on the other hand, the state of conservative jurisprudence in America has reached a crisis point.[1]

The crisis point did not arrive overnight. The modern Republican Party's judicial nominations apparatus has often failed conservatives and constitutionalists, dating all the way back to President Dwight D. Eisenhower's fateful twin Supreme Court nominations of Justice William Brennan and Chief Justice Earl Warren. "I made two mistakes, and both of them are sitting on the Supreme Court," President Eisenhower famously said.[2] Justice Harry Blackmun, author of *Roe v. Wade*,[3]

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1. *See, e.g.*, Josh Hammer, *The Crisis of the Conservative Legal Movement*, AM. GREATNESS (July 30, 2020), https://amgreatness.com/2020/07/30/the-crisis-of-the-conservative-legal-movement/ [https://perma.cc/J9H8-UKJZ]; *see also* Josh Hammer, *Undoing the Court's Supreme Transgression*, AM. MIND (June 19, 2020), https://americanmind.org/memo/undoing-the-courts-supreme-transgression/ [https://perma.cc/2ULQ-WM4A].

2. Raymond J. de Souza, *Supremacy of the Court*, FIRST THINGS (Dec. 4, 2020), https://www.firstthings.com/web-exclusives/2020/12/supremacy-of-the-court [https://perma.cc/65E6-PCXM].

3. 410 U.S. 113 (1973).

the twentieth century's moral and jurisprudential successor[4] to the *Dred Scott*[5] case, was a President Richard Nixon nominee. Justice John Paul Stevens, liberal lion of the Court for three and a half decades, was nominated by President Gerald Ford. President Ronald Reagan nominated the moderate Justice Sandra Day O'Connor and the idiosyncratic Justice Anthony Kennedy, the latter of whom would encapsulate both a gnostic relativism in metaphysics[6] and a jurisprudential commitment to individual autonomy maximalism[7] over the course of his Court tenure. President George H.W. Bush greatly erred in nominating Justice David Souter—he of the eponymous "No more Souters" fame—to the Supreme Court in lieu of the stalwart Edith H. Jones. President George W. Bush was similarly mistaken in selecting John G. Roberts over J. Michael Luttig for the position of Chief Justice of the Supreme Court. Suffice it to say that this is hardly a track record of sustained excellence.

According to prevailing mythology, everything changed when Donald Trump became President. At long last, conservatives and constitutionalists had a White House that was unambiguously, passionately committed to stacking the federal judiciary with principled originalists and textualists. This purported well-oiled machine, aided by outside actors with putative expertise in separating the would-be Souters from the true believers, was finally to deliver conservatives to the judicial promised land.

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4. *See, e.g.*, Robert P. George, *A Republic . . . if You Can Keep It*, FIRST THINGS (Jan. 22, 2016), https://www.firstthings.com/blogs/firstthoughts/2016/01/a-republic-if-you-can-keep-it [https://perma.cc/9ST2-DHQR]; Josh Hammer, *Abortion Is a Grave Injustice. We Must Treat* Roe *Just Like* Dred Scott., DAILY WIRE (Jan. 25, 2020), https://www.dailywire.com/news/hammer-abortion-is-a-grave-injustice-we-must-treat-roe-just-like-dred-scott [https://perma.cc/929T-3NAY]. *See generally* JUSTIN DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING (2013).

5. 60 U.S. (19 How.) 393 (1857).

6. *See, e.g.*, William Haun, *The "Mystery of Life" Makes Law a Mystery*, PUB. DISCOURSE (July 26, 2013), https://www.thepublicdiscourse.com/2013/07/10091/ [https://perma.cc/N6C7-GZHF].

7. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Windsor v. United States, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

Then came *Bostock v. Clayton County*,[8] last summer's bitter disappointment in which the Court implausibly[9] wove both sexual orientation and transgenderism into a key plank of the nation's civil rights statutory edifice. The opinion, of course, was written by none other than President Trump's first nominee to the Court and the man who replaced Justice Antonin Scalia himself, Justice Neil M. Gorsuch. With one stroke of a pen, the Justice Gorsuch-led Court majority misconstrued the proscription of private employment discrimination on the basis of "sex" in Title VII of the 1964 Civil Rights Act as encompassing not merely "sex," but also "sexual orientation" and "gender identity."[10] In so doing, this highly touted product of the conservative legal movement evinced and highlighted for all the shortcomings of a literalist, acontextual, overtly positivist jurisprudence.[11]

That a man like Justice Gorsuch—closely vetted, with sterling academic credentials, formal natural law training, and top-flight social conservative support at the time of his nomination[12]—could

8. 140 S. Ct. 1731 (2020).

9. *See, e.g.*, Ryan T. Anderson, *The Simplistic Logic of Justice Neil Gorsuch's Account of Sex Discrimination*, SCOTUSBLOG (June 16, 2020), https://www.scotusblog.com/2020/06/symposium-the-simplistic-logic-of-justice-neil-gorsuchs-account-of-sex-discrimination/ [https://perma.cc/3J44-YXQ2]; Josh Hammer, *Neil Gorsuch Slapped Conservatives by Creating New Gay Rights*, N.Y. POST (June 15, 2020, 8:28 PM), https://nypost.com/2020/06/15/neil-gorsuch-slapped-conservatives-by-creating-new-gay-rights/ [https://perma.cc/4RBZ-RSF8].

10. *See Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous.").

11. *See, e.g.*, Hadley Arkes, Josh Hammer, Matt Peterson, & Garrett Snedeker, *A Better Originalism*, AM. MIND (Mar. 18, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/a-better-originalism/ [https://perma.cc/XY3U-7T8W]; Hadley Arkes, *A Morally Empty Jurisprudence*, FIRST THINGS (June 17, 2020), https://www.firstthings.com/web-exclusives/2020/06/a-morally-empty-jurisprudence [https://perma.cc/U4HM-BLA5]; Hadley Arkes, *Conservative Jurisprudence Without Truth*, FIRST THINGS (July 20, 2020), https://www.firstthings.com/web-exclusives/2020/07/conservative-jurisprudence-without-truth [https://perma.cc/UPE9-JJGM]; Hadley Arkes, *What Hath Gorsuch Wrought?*, FIRST THINGS (Oct. 13, 2020), https://www.firstthings.com/web-exclusives/2020/10/what-hath-gorsuch-wrought [https://perma.cc/H5P3-3DST].

12. *See, e.g.*, Robert P. George, *Ignore the Attacks on Neil Gorsuch. He's an Intellectual*

write an opinion like *Bostock* ought to serve as a wake-up call not only for those who prize the necessity of interpreting legal texts according to those texts' original public meaning, but also for all conservatives who prioritize above all the pursuit of the classical substantive goals of *politics qua politics*: justice, human flourishing, and the common good.[13] The time has indeed come for those in America's modern legal conservative movement to engage in sober, contemplative self-reflection—to reassess our first principles, retire our outmoded bromides, and rebalance prudence and dogma[14] anew to reach a jurisprudence that actually serves our substantive goals.[15]

Too often, contemporary "legal conservatism"—as a *methodology*, not necessarily a specific judicial result—redounds against the interests of substantive conservatism itself. Legal conservatives too often pat themselves on the back for seizing a purported moral high ground of positivist neutrality,[16] content to brush aside every high-profile defection as an unfortunate but inevitable byproduct of our sacrosanct neutrality principle. By contrast, legal progressives, marching in lockstep to the inherently outcome-oriented methodology of Dworkinian living constitutionalism, never make such a first-order confusion of substance and "neutrality." Perhaps those

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Giant—and a Good Man., WASH. POST (Feb. 1, 2017, 7:50 AM), https://www.washingtonpost.com/posteverything/wp/2017/02/01/ignore-the-attacks-on-neil-gorsuch-hes-an-intellectual-giant-and-a-good-man/ [https://perma.cc/2CHU-K8DR].

13. *See, e.g.*, Josh Hammer, *Who's Afraid of the Common Good?*, AM. MIND (Nov. 23, 2020), https://americanmind.org/salvo/whos-afraid-of-the-common-good/ [https://perma.cc/J4JK-8SB8].

14. *See, e.g.*, Josh Hammer, *Conservatism Must Be Chastened by Humility*, AM. COMPASS (Oct. 14, 2020), https://americancompass.org/the-commons/conservatism-must-be-chastened-by-humility/ [https://perma.cc/6E5J-RKFE].

15. *See, e.g.*, Josh Hammer, *Judicial Carnage*, AM. MIND (Oct. 30, 2020), https://americanmind.org/features/what-comes-next/judicial-carnage/ [https://perma.cc/4TN4-D2TT].

16. *See, e.g.*, Ed Whelan, *The Unsoundness and Imprudence of "Common-Good Originalism"*, PUB. DISCOURSE (Mar. 1, 2021), https://www.thepublicdiscourse.com/2021/03/74424/ [https://perma.cc/FF7F-E5EK]; Ilya Shapiro, *After* Bostock, *We're All Textualists Now*, NAT'L REV. (June 15, 2020), https://www.nationalreview.com/2020/06/supreme-court-decision-bostock-v-clayton-county-we-are-all-textualists-now/ [https://perma.cc/7WCU-4L8B].

perpetually pollyannaish legal conservatives would do well to consider why exactly it is that the legal Left has never had its "*Bostock* moment."

Fortunately, despite the precarity of our situation, our path forward is reasonably clear. That path forward is not a break with our tradition; rather, it *is* a rediscovery and implementation of our tradition and our true Anglo-American constitutional inheritance, properly understood and as previously intuited and promulgated by many of the greatest statesmen in American history. I call it "common good originalism."[17]

* * *

The post-1982 era[18] of the modern legal conservative movement has seen the doctrinal advancement of at least three distinct forms of originalism: progressive, libertarian, and conservative.[19] Progressive originalism's champions, namely Professor Jack Balkin, essentially argue that the Constitution's original public meaning paradoxically *requires* an interpretive methodology of Dworkinian living constitutionalism.[20] Progressive originalism is thus substan-

17. *See* Josh Hammer, *Common Good Originalism*, AM. MIND (May 6, 2020), https://americanmind.org/features/waiting-for-charlemagne/common-good-originalism/ [https://perma.cc/3YJ6-FXP3]; Josh Hammer, *A Conservative Jurisprudence Worthy of a Conservative Economics*, AM. COMPASS (Sept. 21, 2020), https://americancompass.org/the-commons/a-conservative-jurisprudence-worthy-of-a-conservative-economics/ [https://perma.cc/28HT-A5SU]; Josh Hammer, *Toward a New Jurisprudential Consensus: Common Good Originalism*, PUB. DISCOURSE (Feb. 18, 2021), https://www.thepublicdiscourse.com/2021/02/74146/ [https://perma.cc/S59P-2Z57].

18. The Federalist Society was founded in 1982 by students at Yale Law School, Harvard Law School, and the University of Chicago Law School. *See* David Montgomery, *Conquerors of the Courts*, WASH. POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/ [https://perma.cc/P2RQ-LFML].

19. *See* Ilan Wurman, *The Founders' Originalism*, NAT'L AFFS. (Spring 2014), https://www.nationalaffairs.com/publications/detail/the-founders-originalism [https://perma.cc/CN6N-FGME] ("In contemporary legal thinking, there have been broadly speaking three schools of originalism—libertarian, progressive, and conservative.").

20. *See generally* JACK M. BALKIN, LIVING ORIGINALISM (2011).

tively, and not merely procedurally, progressive insofar as the interpretive precepts of Dworkinian living constitutionalism necessarily redound to substantive progressive priorities such as privacy, individual autonomy, and sexual liberation. Libertarian originalism's champions, namely Professors Randy Barnett and Richard Epstein, argue that the Constitution must be interpreted in light of an underlying presumption of liberty or an underlying normative framework of Lockean classical liberalism.[21] Libertarian originalism, much like progressive originalism, is thus substantive, and not merely procedural, to the extent that the concomitant interpretive precepts of individual liberty and government minimization are at the core of substantive libertarianism (or what most political theorists would call classical liberalism). By contrast, "conservative" originalism, frequently associated with the late Judge Robert Bork and the late Justice Scalia, has historically been understood as a popular sovereignty-based positivist approach that often entails some conception of judicial modesty or judicial restraint.[22] Perhaps above all else, "conservative" originalism has historically prioritized the notion that there is only one "true" and historically honest answer to most questions of constitutional interpretation.[23] "Conservative" originalism, defined as such, thus fails to confront the obvious question of whether human beings are generally even capable of engaging in such stolid, substantively detached interpretations.

The careful reader should notice something curious. "Progressive" originalism has its idiosyncratic conception of morality built into its framework; such is the inherent nature of the claim that the original public meaning of sweeping constitutional clauses actually requires interpreters to judicially impose "evolving" notions of mo-

21. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003); RICHARD EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014).

22. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

23. *See id.* at 17.

rality from the bench. Similarly, "libertarian" originalism is expressly rooted in the claim that normative ideals of individual liberty and Lockean liberalism serve as the background conceptual framework needed to reach the Constitution's legitimate original public meaning. But conservative originalists are left with nothing more than the thinnest gruel of rote proceduralist positivism. With only small and occasional exceptions, such as Justice Thomas's belief, *contra* that of Justice Scalia, in the nature of the Declaration of Independence and its natural law theoretical undergird as an "authoritative guide for judges,"[24] conservative originalism, as it has been conceived and taught, has abandoned the realm of more avowedly moralistic exegeses. Progressive originalism and libertarian originalism—not to mention non-originalist methodologies, such as unabashed progressive Dworkinian "living constitutionalism"—have filled the void. Self-described *conservative* originalists have thus been left without resort to any *normative* argumentation in constitutional interpretation. We have wholly denuded ourselves of conservative *substance*.

This is wrong. As a consequentialist matter, it undermines conservatives' interests to synonymize their preferred approach with the bland dictates of positivism; human beings, as Aristotle discussed at length so long ago, are at their core moral creatures, and preemptively foreclosing legal actors the ability to make overtly moralistic argumentation is "an attempt to deprive us of the very faculties that make us human in the first instance."[25] Moreover, the conflation of *any* purportedly legitimate jurisprudence with the barest form of positivism—illustrated by Justice Scalia's decades-long vehement arguments against any role for the Declaration in constitutional interpretation—is a higher-order philosophical mistake of first principle. The rule of law, like any other societal institution—such as the market—is best conceptualized not as an end

24. Steven F. Hayward, *Two Kinds of Originalism*, NAT'L AFFS. (Winter 2017), https://www.nationalaffairs.com/publications/detail/two-kinds-of-originalism [https://perma.cc/YG68-2MYS].

25. Hammer, *Common Good Originalism*, *supra* note 17.

unto itself, but rather as an instrumental means to achieve the historically understood substantive goals of any worthy politics: justice, human flourishing, and the common good. Much as the free market must be regulated when it is not sufficiently serving these ends—antitrust law, for example—so too must the bare-bones positive law be modified or exegetically re-imbued with substantive vigor when it is not sufficiently serving these timeless ends. The American rule of law and our American constitutional order must conform with the teleology of mankind—not the other way around.

A more descriptively apt and genealogically fitting "conservative" originalism, which ought to be branded as "common good originalism," would thus operate differently than would any of the three extant general categories of originalist jurisprudence. Just as progressive originalism invokes substantive progressivism and libertarian originalism invokes substantive libertarianism, so too must conservative legal theorists first understand what substantive "conservatism," rightly understood, even is.[26] Second, we must understand the historical extent to which background substantive norms of conservatism, rightly understood, are, or should be, ingrained in the extant U.S. constitutional order.

A comprehensive explication of conservatism, rightly understood, is beyond the scope of this Essay. For present purposes, let us stipulate that "conservatism," as opposed to classical liberalism

26. *See, e.g.*, Ofir Haivry & Yoram Hazony, *What Is Conservatism?*, AM. AFFS. (Summer 2017), https://americanaffairsjournal.org/2017/05/what-is-conservatism/ [https://perma.cc/2ZK8-VTP8] (defining the centuries-long Anglo-American conservative tradition as principally concerned with historical empiricism, nationalism, religion, limited executive power, and individual freedoms); *see also* Chris Buskirk, *Conservatism Defends the Natural Order*, AM. CONSERVATIVE (July 9, 2020, 2:46 PM), https://www.theamericanconservative.com/articles/conservatism-defends-the-natural-order/ [https://perma.cc/XTE9-X4TX] ("[W]hat is American conservatism? It is simply this: the belief that human nature is immutable, is knowable in its most important distinctiveness, that legitimate government exists to secure the life and property of its citizens, to protect the family, the church, and to enable them to exercise authority within their rightful domains. It requires a recognition of the independence but also interdependence of the three main institutions—government, family, church—that are together the pillars of civilization.").

or libertarianism, is wary of "reason"-based claims of rationalist abstraction and is more empirically rooted in the historical customs, norms, and traditions of distinct communities, tribes, and nations. While certainly valuing individual liberty (above all, religious liberty), conservatism strictly distinguishes liberty from libertinism and conceives of most forms of individual liberty (including economic liberty) more as instrumentalities than as intrinsic ends to be pursued unto themselves. Rather, conservatism in the Anglo-American tradition is preeminently concerned with the societal health and intergenerational cohesion of the nation-state,[27] with the structural integrity and formative capability to inculcate sound republican habits of mind in the intermediary communitarian institutions that exist between citizen and state,[28] and with the flourishing of individual citizens in a way that serves God and nation and comports with the great Western religions' conceptions of the teleological ends of man. Conservatism is thus more open to wielding state power, when need be, to "enforce our order,"[29] or even to "reward friends and punish enemies (within the confines of the rule of law)."[30] Classical liberalism and libertarianism, by contrast, are almost singularly defined by the view that a robust conception of individual liberty and the concomitant pursuits of limited government and globalized markets necessarily define the very ends that a just and proper government ought to pursue.[31]

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27. *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 29 (Frank M. Turner ed., Yale Univ. Press 2003) (1790) ("People will not look forward to posterity, who never look backward to their ancestors.").

28. *See, e.g.*, *id.* at 40 ("To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind.").

29. Sohrab Ahmari, *Against David French-ism*, FIRST THINGS (May 29, 2019), https://www.firstthings.com/web-exclusives/2019/05/against-david-french-ism [https://perma.cc/HV9X-9R4H].

30. David Azerrad, *American Conservatism Is Fiddling While Rome Burns*, AM. CONSERVATIVE (July 30, 2020, 1:36 PM), https://www.theamericanconservative.com/articles/american-conservatism-is-fiddling-while-rome-burns/ [https://perma.cc/QT7E-9MPB].

31. *See id.*

The Lockean natural rights language of the Declaration, famously penned by Thomas Jefferson, provides the strongest Founding-era evidence to buttress libertarian originalists' central claims. The Declaration is undoubtedly important, and it is impossible to understand both the Constitution and the American republic at-large without understanding the Declaration. For President Abraham Lincoln, our greatest statesman, the Declaration was the "apple of gold" around which the Constitution was but a surrounding frame of silver.[32] The Declaration is obviously an invaluable asset in understanding the American way of life, the American regime, and the American constitutional order.

At the same time, "one cannot escape the rudimentary fact that the Constitution of 1787 was written under circumstances tangibly different than those surrounding the drafting of the Declaration in 1776."[33] Not only had the early republic already experienced the ratification and subsequent failure of the Articles of Confederation, but Jefferson himself was also not even present at the 1787 Constitutional Convention in Philadelphia—he was gallivanting overseas in pre-revolutionary France.[34] James Madison, generally lionized as the preeminent father of the Constitution and "Jefferson's once and future protégé," thus "fell under the interstitial influence of the men who came to be the Federalist Party, led by Anglophilic, common good-oriented statesmen such as Alexander Hamilton."[35] One can see this lasting influence upon Madison by Hamilton in the *Federalist Papers*, as well, as Madison opined in *The Federalist No. 57* that "[t]he aim of every political constitution is, or ought to be, first to

32. *See, e.g.*, Tony Williams, *An Apple of Gold in a Picture of Silver*, LAW & LIBERTY (Aug. 7, 2020), https://lawliberty.org/book-review/an-apple-of-gold-in-a-picture-of-silver/ [https://perma.cc/G4AS-JCUX].

33. Hammer, *supra* note 13.

34. *See* Haivry & Hazony, *supra* note 26 (While "the Articles of Confederation . . . embod[ied] a radical break with the traditional English constitution," they also "came close to destroying the United States.").

35. Hammer, *supra* note 13; *see also* Carson Holloway & Bradford P. Wilson, *Hamiltonian Nationalism: A Response to Samuel Gregg*, PUB. DISCOURSE (July 15, 2020), https://www.thepublicdiscourse.com/2020/07/65565/ [https://perma.cc/8ATB-BRR9] (arguing that Hamilton is best understood as a leading nationalist, common good-oriented statesman).

obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."[36] And that is to say nothing of the ubiquity with which appeals to the "public good" abound in Madison's *magnum opus* written contribution to the post-convention effort to ratify the Constitution: *The Federalist No. 10*.[37]

Although the First Party System that quickly emerged after ratification of the Constitution and Jefferson's return stateside from France, pitting the Federalists against the Democratic-Republicans, was sharply divided along ideological (and geographic) lines, the men who met in Philadelphia during that sweltering 1787 summer were relatively unified. Consider, for instance, that the five members of the Convention's Committee on Style were Gouverneur Morris (who chaired it), Hamilton, Rufus King, Madison, and William Samuel Johnson: four nationalist, common good-oriented, Anglo-inspired conservatives and one moderate (Madison).[38] The Committee on Style was responsible for drafting the Constitution's Preamble, which is "the closest we might come to an express enunciation of the charter's intent and purpose":[39]

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[40]

The reader will note that at no time in the Preamble is individual

36. THE FEDERALIST No. 57 (James Madison) (Clinton Rossiter ed., 2003).

37. *See* THE FEDERALIST No. 10 (James Madison) (Clinton Rossiter ed., 2003). The phrase "public good" appears six times in the essay, and the phrase "common good" also appears once. *See id.*

38. William Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2021). During the Convention, Madison was pulled toward Hamilton's camp due to the absence of his sometime mentor Jefferson. *See* Lee Wilkins, *Madison and Jefferson: The Makings of a Friendship*, 12 POL. PSYCH. 593, 601–05 (1991).

39. Hammer, *supra* note 13.

40. U.S. CONST. pmbl.

liberty put forth as an intrinsic substantive end of the U.S. constitutional order. The end of "secur[ing] the Blessings of Liberty to ourselves and our Posterity" is the closest, but even here "Liberty" is an instrumental means through which to attain the sole true substantive goal, the appurtenant "Blessings" thereof.[41] It seems, rather, that the Founders who drafted the Constitution viewed the protection of natural rights and the expansion of individual liberty less as intrinsic *ends*, and more as a "*means* by which citizens could pursue a common good."[42] And the citizenry's common good is necessarily oriented toward, among ends, the overt nationalism of the Preamble's very first purposive enumeration: "to form a more perfect Union."[43] This was drafted, after all, by men all too familiar with the infamous shortcomings of the antecedent Articles of Confederation, including its enfeebled national government. These were men concerned with augmenting and fortifying the common good, by which they meant the health of the "commonwealth"—a term roughly synonymous with and barely linguistically distinguishable from the "common good."[44] In the Preamble, the "common good" and the "commonwealth" are merged into the first enumerated end of governance: the attainment of a "more perfect Union" itself.

In total, there are seven enumerated ends of government in the Preamble: a more perfect Union, establishing justice, insuring domestic tranquility, providing for the common defense, promoting the general welfare, securing the blessings of liberty for us, and securing the blessings of liberty for our posterity. Each and every one

41. The deliberate inclusion of "and our Posterity" is also profoundly Burkean. *See, e.g.*, Burke, *supra* note 27.

42. Tony Woodlief, *Against the Libertarian-Pajama-Boy Consensus*, AM. MINDSET (Nov. 17, 2020), https://americanmind.substack.com/p/against-the-libertarian-pajama-boy [https://perma.cc/G2JX-UEZG].

43. U.S. CONST. pmbl.

44. The linguistic link between the commonwealth and the common good has continued into modern American English. *See Commonwealth*, Merriam Webster Online Dictionary (2021), https://www.merriam-webster.com/dictionary/commonwealth [https://perma.cc/WWW5-9EYA] (defining commonwealth as a "nation, state, or other political unit: such as one founded on law and united by compact or tacit agreement of the people for the common good").

of these seven pronounced aims represents the statesman's view and description of the common good of the nation as a whole. There is, quite simply, nothing in the Preamble that reduces to the protection and promotion of individual rights. Nor is there anything in the Preamble—or the Declaration, of course—supporting the positivist claim that values-neutral liberal proceduralism, redolent of John Stuart Mill's famous "harm principle," is an end, let alone *the* end, of our constitutional order. Rather, the Preamble affirmed for its contemporaries and progeny alike the well-understood, historical notion that the collective substantive ends of governance amount to the defining trait of any legitimate political order—and that these substantive ends prioritize the true flourishing of the communitarian whole over the temporal satisfaction of the individualist self.

To drive home the point of how profoundly and earnestly conservative the U.S. Constitution's Preamble is, consider the uncanny similarities between it and the functional equivalent that the corporeal embodiment of Anglo-American conservatism, Edmund Burke, wrote just a few years later in 1791:

> But none, except those who are profoundly studied, can comprehend the elaborate contrivance of a fabric fitted to unite [i-ii] private and public liberty with [iii] public force, [iv] with order, [v] with peace, [vi] with justice, and above all, [vii] with the institutions formed for bestowing permanence and stability through the ages, upon this invaluable whole.[45]

The similarities in the substantive ends of self-governance—what Burke calls here the society's "fabric"—are simply remarkable. What the Preamble refers to as the "general Welfare," for example, Burke calls "this invaluable whole"; both are unmistakable directives for the statesman—and the judge—to look to the overall health of the whole body politic and the whole nation-state, even when contemplating the good of specific individuals. And of

45. EDMUND BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS, *in* 4 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 61, 211 (Little, Brown & Co. 1866) (1791).

course, the Preamble's reference to "our Posterity" evokes a distinctly Burkean conception of "the nature of a people as a partnership of generations dead, living, and yet unborn."[46]

The Preamble is infrequently invoked in legal argumentation, and rarely appears in judicial opinions. Large swaths of the legal academy—and the legal profession, more broadly—are content to act as if it simply does not exist.[47] This is wrong. Much intellectual groundwork has been laid over the decades in arguing for the legal relevance and moral significance of the Declaration—what President Lincoln famously called the "electric cord" that "links the hearts of patriotic and liberty-loving men together . . . as long as the love of freedom exists in the minds of men throughout the world"[48]—in constitutional interpretation.[49] This is, of course, salutary; even the most dogmatic of positivists ought to take solace in the fact that the Declaration has long been defined by the U.S. Code as an "Organic Law[] of the United States of America."[50] But it would be very peculiar to act as if the Declaration commands deep and meaningful significance in constitutional interpretation, while the Preamble—which quite literally *commences* the Constitution—accords no such status. Consider, for instance, how Justice Joseph Story, in his renowned *Commentaries on the Constitution*, describes the craft of construing statutory preambles:

> The importance of examining the preamble, for the purpose of expounding the language of a statute, has

46. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1735 (1994).

47. For a notable exception, see John W. Welch & James Heilpern, *Recovering Our Forgotten Preamble*, 91 CAL. L. REV. 1021 (2020).

48. *Lincoln on the Independence Generation: 'They Were Iron Men'*, AM. GREATNESS (July 3, 2019), https://amgreatness.com/2019/07/03/lincoln-americas-founders-iron-men-2/ [https://perma.cc/Y7W3-YRVS].

49. *See, e.g.*, John C. Eastman, *The Declaration of Independence as Viewed from the States*, *in* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 96 (2002). *See generally* THE REDISCOVERY OF AMERICA: ESSAYS BY HARRY V. JAFFA ON THE NEW BIRTH OF POLITICS (Edward J. Erler & Ken Masugi eds., 2019).

50. UNITED STATES CODE: THE ORGANIC LAWS OF THE UNITED STATES OF AMERICA (1952), https://www.loc.gov/item/uscode1952-001000003/ [https://perma.cc/E262-6QS7].

> been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers."[51]

Similarly, Story described the Constitution's Preamble as "not adopted as a mere formulary; but as a solemn promulgation of a fundamental fact, vital to the character and operations of the government."[52]

It is worth further emphasizing the peculiar nature of the legal academy and extant constitutional scholarship, in this respect. In the eyes of many, the Declaration has (not necessarily incorrectly) come to take on a mythical status not only as a political and historical document but also as an indispensable tool of constitutional interpretation itself. Many leading natural lawyers and natural law scholars, echoing President Lincoln, appeal to its immortal language in arguing that the Constitution can only be properly understood through the interpretive prism of natural law, abstract natural rights, and the concomitant governmental pursuit of securing negative liberty.[53] American civic life has long cherished the Declaration, and it is hardly an accident that its 1776 drafting still marks our annual Independence Day celebration. But as a pure matter of constitutional interpretation, it is frankly bizarre that so much intellectual capital has been deployed by lawyers and historians who argue on behalf of the Declaration's interpretive salience, whereas comparatively little effort has been made to argue on behalf of the Preamble's substantive heft. Not only were the five members of the Constitutional Convention's Committee on Style dramatically more important in helping to shape the original understanding of the Constitution than was Jefferson (who, it is again worth emphasizing, was not even in the country during the Convention), but the

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51. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 459 (Boston, Hilliard, Gray, & Co. 1833).

52. *Id.* § 463.

53. *See, e.g.*, Eastman, *supra* note 49, at 96; THE REDISCOVERY OF AMERICA, *supra* note 49.

Preamble is of course *part* of the Constitution itself. To put into writing this exceedingly simple point is only to accentuate the bizarreness of how seldom the point is made. The Declaration is a document of soaring political rhetoric to which many of America's greatest leaders have looked, at times of great national strife or fissure, for inspirational succor and perspicacity; but if it is substantively important as a legal tool of constitutional interpretation, then how curious would it be to pretend that the Preamble does not attain similar, or quite likely *greater*, interpretive significance.

The Preamble is but one example, albeit a striking one, evincing the intellectual dominance in the nascent American republic of Hamilton—the "original originalist"[54]—and what emerged as his Anglophilic, prudential, nationalist, common good-oriented Federalist Party.[55] This is crucial, because Hamilton "did more than any other American to plant [Edmund] Burke's ideas firmly in American soil," and "shared a worldview so similar [to Burke's] that it's often difficult to distinguish between their thoughts and statements."[56] Specifically, "Hamilton, like Burke, was suspicious of abstract theories and preferred practical systems tested by history," and also "like Burke, was [above all] a nationalist."[57] Just as Burke's iconic *Reflections on the Revolution in France* was, in part, a rebuttal to the contemporary universalist and rationalist claims of men such

54. Robert E. Wright, *Who Is the Real Alexander Hamilton?*, AM. INST. FOR ECON. RES. (Jan. 12, 2012), https://www.aier.org/article/who-is-the-real-alexander-hamilton/ [https://perma.cc/HD4N-BW2W]; *accord* Alexander Hamilton, *Hamilton's Opinion as to the Constitutionality of the Bank of the United States*, *in* THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES BY ALEXANDER HAMILTON, JAMES MADISON AND JOHN JAY 655, 664 (Paul Leicester Ford ed., Henry Holt & Co. 1898) (1791) ("[W]hatever may have been the intention of the framers of a constitution, or of a law, that intention is to be sought for in the instrument itself, according to the usual and established rules of construction. Nothing is more common than for laws to *express* and *effect* more or less than was intended.").

55. *See, e.g.*, Ofir Haivry & Yoram Hazony, *American Nationalists*, AM. CONSERVATIVE (July 2, 2020, 12:01 AM), https://www.theamericanconservative.com/articles/american-nationalists/ [https://perma.cc/Q2AT-NCT8].

56. David Brog, *Up from Laissez-Faire: Reclaiming Conservative Economics*, 4 AM. AFFS. NO. 4, 63 (Winter 2020).

57. *Id.*; *accord* Holloway & Wilson, *supra* note 35.

as Thomas Paine,[58] so too did Hamilton's vehement opposition to Jeffersonian universalism emerge during the contentious early republic fight over the national bank: "[I]n all questions of this nature, the practice of mankind ought to have great weight against the theories of individuals."[59]

Hamilton's general preference for prudence over dogma was not absolute,[60] but it was nonetheless a hallmark of his worldview and an omnipresent leitmotif throughout his public career. Crucially, for our purposes, this staunch preference for circumstantial prudence over unyielding dogma heavily affected Hamilton's views on constitutional interpretation. Contrasted with the "strict constructionist" approach of Virginian rivals Jefferson and (post-ratification) Madison, Hamilton "construe[ed] the Constitution expansively but respectfully"[61]—as something roughly akin to a "comfortable garment that allows [more] flexibility"[62] for political actors to prudentially pursue, within the realm of interpretive reasonableness, their substantive vision of the good. That circumstantial, as-applied interpretive "flexibility" is dependent upon what is necessary, at a given moment in time, to effectuate and operationalize the classical goals of politics enumerated in the Preamble. As Hamilton said in his *Opinion as to the Constitutionality of the Bank of the United States*:

> [A] restrictive interpretation of the word necessary [in the Necessary and Proper Clause of Article I, Section 8, as construed by Jefferson and Madison] is also contrary to

58. *See* Haivry & Hazony, *supra* note 26.

59. Brog, *supra* note 56 (quoting *Hamilton's Opinion as to the Constitutionality of the Bank of the United States*, *supra* note 54).

60. *See, e.g.*, THE FEDERALIST NO. 31, at 193 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend.").

61. George F. Will, *George Will: Texas's Ted Cruz Gives Tea Party a Madisonian Flair*, WASH. POST (Aug. 1, 2012), http://www.washingtonpost.com/opinions/george-will-texass-ted-cruz-gives-tea-party-a-madisonian-flair/2012/08/01/gJQApiwePX_story.html [https://perma.cc/4RKS-KB8R].

62. Adrian Vermeule, *Publius as an Exportable Good*, NEW RAMBLER (Dec. 3, 2015), https://newramblerreview.com/component/content/article?id=104:publius-as-an-exportable-good [https://perma.cc/A72L-SKAP].

> this sound maxim of construction, namely, that the powers contained in a constitution of government, especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc., *ought to be construed liberally in advancement of the public good*. . . . The means by which national exigencies are to be provided for, national inconveniences obviated, national prosperity promoted, are of such infinite variety, extent, and complexity, that *there must of necessity be great latitude of discretion in the selection and application of those means*. Hence, consequently, the necessity and propriety of exercising the authorities [e]ntrusted to a government on principles of liberal construction.[63]

The dispute over the constitutionality of the First Bank of the United States, centered on rivalrous interpretations of the Necessary and Proper Clause, was one of the most contentious of all during the First Party System. Jefferson, a vociferous opponent of the national bank, posited that the national government "could do nothing which was not either specifically granted as a power or was not *absolutely necessary* to carry out the enumerated powers."[64] Hamilton, by contrast and as aforementioned, believed that "in construing a Constitution, it is wise, as far as possible, to pursue a course, which will reconcile essential principles with convenient modifications."[65] (It is worth briefly emphasizing the inherent limitation of Hamilton's formulation: The inclusion of the "as far as possible" qualifier implies interpretive guardrails of intellectual honesty, historical legitimacy, and sheer reasonableness, thus foreclosing much of the Dworkinian living constitutionalism interpretive enterprise.)

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63. Hamilton, *supra* note 54 (emphasis added).

64. MORTON J. FRISCH, THE HAMILTON-MADISON-JEFFERSON TRIANGLE: THEIR THREE-CORNERED PERSPECTIVES ON THE CONSTITUTION (2014), https://ashbrook.org/viewpoint/hammilton-madison-jefferson-triangle/ [https://perma.cc/8K4V-AEWS] (emphasis added).

65. Alexander Hamilton, *The Examination, No. XVI*, *in* 25 THE PAPERS OF ALEXANDER HAMILTON 566 (Harold C. Syrett ed., 1977), https://founders.archives.gov/documents/Hamilton/01-25-02-0305 [https://perma.cc/VYY7-EPTP].

At the same time, this debate was but a microcosm, and intellectually downstream, of a higher-order early American republic debate over the very genealogical nature of the U.S. Constitution's provenance: "Paine and Jefferson asserted that the Constitution resulted from rationalist ideals about 'rights of man,'" while "Burke, with Hamilton and [John] Adams, insisted that the American Constitution was not written on a blank slate," but was deeply inspired by the English constitution and the English Bill of Rights.[66] Similarly, these men profoundly disagreed on the extent to which the early American republic inherited, at its conception, the English common law—a debate in which the more Anglophilic Federalists were clear victors, as partially evidenced by the fact that American law students, nearly two and a half centuries later, devote large swaths of their first year of study to classic common law subjects such as property, contracts, and torts.

Serendipitously, it was on the very issue of the constitutionality of the national bank that Hamilton's conception of an Anglo-inspired, prudential, non-rationalist, common good-oriented originalist jurisprudence was most clearly vindicated,[67] in the canonical case of *McCulloch v. Maryland*.[68] In *McCulloch*, Chief Justice John Marshall, himself a former Federalist Party political leader and a judicial appointee of a leading Federalist, President John Adams, came down decisively on the side of Hamilton: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[69] Chief Justice Marshall even channeled the Preamble's common good-centric ends for self-governance, rhetorically asking earlier in his opinion: "Can we adopt

66. Ofir Haivry, *American Restoration: Edmund Burke and the American Constitution*, AM. AFFS. (Feb. 17, 2020), https://americanaffairsjournal.org/2020/02/american-restoration-edmund-burke-and-the-american-constitution/ [https://perma.cc/52Z9-VLK6].

67. Vindication came posthumously for Hamilton, who was famously killed in an 1804 duel with then-Vice President Aaron Burr.

68. 17 U.S. (4 Wheat.) 316 (1819).

69. *Id.* at 421.

that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when *granting these powers for the public good*, the intention of impeding their exercise by withholding a choice of means?"[70] Notably, *McCulloch* is not seriously contested today in originalist circles of any variety; even Justice Thomas, for instance, has referred to Marshall's handiwork in *McCulloch* as having "carefully and effectively refuted" the Jeffersonian "absolute necessity" construction.[71]

Chief Justice Marshall's prudential, nationalist, common good conservatism was, if anything, surpassed by that of Justice Joseph Story, a "proponent of constitutional nationalism"[72] and "perhaps the most conservative member of Marshall's bench."[73] Justice Story's highly influential *Commentaries on the Constitution* were "overtly conservative in spirit, citing Burke with approval and repeatedly criticizing not only Locke's theories, but Jefferson himself."[74] Justice Story was a staunch advocate of public morality and public religiosity, and a scathing critic of the ahistorical[75] Jeffersonian promotion of a constitutional "wall of separation" between church and state.[76] An Anglophile and dedicated student of the

70. *Id.* at 408 (emphasis added).

71. Sabri v. United States, 541 U.S. 600, 611 (2004) (Thomas, J., concurring in the judgment).

72. *The Idea of the Senate: The Senate as a Balance Wheel*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/idea-of-the-senate/1833Story.htm [https://perma.cc/A6LT-MFKT].

73. Sandra F. VanBurkleo, Book Review, 3 CONST. COMMENT. 244, 245 (1986) (reviewing KENT NEWMEYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985)).

74. Haivry & Hazony, *supra* note 26; *accord* William Story (ed.), *Letter written by Justice Joseph Story to Judge Fay, February 15, 1830*, *in* 2 LIFE AND LETTERS OF JOSEPH STORY 33 (1851) ("Have you seen Mr. Jefferson's Works? If not, sit down at once and read his fourth volume. It is the most precious melange of all sorts of scandals you ever read. It will elevate your opinion of his talents, but lower him in point of principle and morals not a little.").

75. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

76. *See* Story, *supra* note 51, § 1875 ("It yet remains a problem to be solved in human affairs, whether any free government can be permanent, where the public worship of God, and the support of religion, constitute no part of the policy or duty of the state in any assignable shape.")

common law tradition, Justice Story also believed that "there has never been a period of history, in which the common law did not recognize Christianity as lying at its foundation."[77] Here, Justice Story, much like Chief Justice Marshall before him, was channeling Sir William Blackstone and the other great common lawyers, all of whom understood the obvious truth that the common law was itself directly influenced by biblical morality, biblical justice, and the broader tradition of Judeo-Christian ethical principles.

It would not be a stretch to aver that President Lincoln, the most paradigmatic national conservative in American history and nonpareil practitioner of Scripture-infused public political rhetoric,[78] was in some ways a political personification of Justice Story's legal ideals. In his famous 1858 U.S. Senate candidacy debates with Senator Stephen Douglas, President Lincoln repeatedly resorted to substantive, justice-oriented argumentation as a rhetorical cudgel against Senator Douglas's rote, morally hollow pleas for "popular sovereignty" in the Western territories.[79] In so doing, President Lincoln appealed to a "kind of constitutional common sense that[,] while respecting the requirements of procedural regularity and formal legality" was important, "preserving the substance of republican liberty" was the preeminent goal of our constitutional order.[80] Senator Douglas dedicated immense prolixity to the proposition that amoral proceduralist norms of "popular sovereignty" were intrinsic ends to be pursued unto themselves, but as President Lincoln put it in his 1854 Peoria speech:

> The doctrine of self-government is right—absolutely and eternally right—but it has no just application, as here

77. HARMON KINGSBURY, SABBATH: A BRIEF HISTORY OF LAWS, PETITIONS, REMONSTRANCES AND REPORTS, WITH FACTS, AND ARGUMENTS, RELATING TO THE CHRISTIAN SABBATH 124 (1840).

78. *See, e.g.*, Rafi Eis, *National Unity and National Perpetuation*, NAT'L AFFS. (Spring 2021), https://www.nationalaffairs.com/publications/detail/national-unity-and-national-perpetuation [https://perma.cc/J2CW-8YYG].

79. *See* HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 347 (1959).

80. HERMAN BELZ, LINCOLN AND THE CONSTITUTION: THE DICTATORSHIP QUESTION RECONSIDERED 24 (1984).

> attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is *not* or *is* a man. If he is *not* a man, why in that case, he who is a man may, as a matter of self-government, do just as he pleases with him. But if the negro *is* a man, is it not to that extent, a total destruction of self-government, to say that he too shall not govern *himself*? When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the negro is a *man*, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.[81]

Economically, President Lincoln's successful enactment of his political hero Henry Clay's tripartite "American System" program—a national bank, an internal improvements system, and protective tariffs—was necessarily dependent upon Marshall's earlier legitimization of Hamiltonian originalism, and its more permissive construction of the Necessary and Proper Clause in particular, in *McCulloch*.[82] President Lincoln's common-good, whole-of-the-citizenry oriented statesmanship reached its zenith, of course, in his Civil War leadership to preserve that "more perfect Union" to which the Preamble so expressly refers. But he would never have been able to wage his successful campaign to preserve the Union were it not for his vehement, career-defining opposition to the most morally denuded and trite forms of proceduralism—nor would he have been able to implement his indispensable wartime domestic economic program had he subscribed to the interpretive straitjacket of Jeffersonian "strict constructionism."

A nationalist, common-good-oriented, whole-of-the-citizenry jurisprudence, with its eye carefully attuned toward justice and hu-

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81. JAFFA, *supra* note 79, at 347–48.

82. *See* Brog, *supra* note 56; Wells King, *Rediscovering a Genuine American System*, AM. COMPASS (May 4, 2020), https://americancompass.org/essays/rediscovering-a-genuine-american-system/ [https://perma.cc/N5Q9-4V6H].

man flourishing, rather than either bland positivism or ever-evolving expansionist conceptions of individual autonomy, is thus our true historical inheritance—and "historical consciousness is a fundamental basis of law."[83] Common good originalism—the interpretation of the Constitution and its subordinate statutes enacted pursuant thereto through the prism of, and in accordance with, the substantive political aims of the American political regime, as enumerated in the Constitution's common-good-centric Preamble—*is* the modern-day manifestation of our conservative Anglo-American legal tradition. Common good originalism is, in any meaningful sense of the term, a more authentically "conservative" originalism than the banal strand of positivism, which all too often redounds to the interests of individual autonomy maximalism, that has pervaded originalist discourse for decades—and which would have been anathema to common good conservatives such as Hamilton, Justice James Wilson, Chief Justice Marshall, Justice Story, and President Lincoln, all of whom were well versed in the natural law tradition, the very antithesis of positivism.[84]

Such a desiccated positivism would also have been anathema to the leading English forebears whose views on jurisprudence so pro-

83. Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 23 (2005).

84. President Lincoln's transcendent belief in the exceptionalism of the natural law undergirded Declaration, already referred to, has been the study of immense modern scholarship, centered around the teachings of Harry Jaffa and the Claremont Institute. *See, e.g.*, Eastman, *supra* note 53; THE REDISCOVERY OF AMERICA, *supra* note 53. Hamilton's belief in natural law can be seen in THE FEDERALIST NO. 31, *supra* note 60. Chief Justice Marshall's reliance on a natural law leitmotif in *McCulloch* was noted by no less a positivist than the late Judge Bork: "[A] method of reasoning from the implications of written constitutional principles to subsidiary principles is indispensable and was brilliantly demonstrated by Marshall's opinion in *McCulloch v. Maryland*." Robert H. Bork, *Natural Law and the Law: An Exchange*, FIRST THINGS (May 1992), https://www.firstthings.com/article/1992/05/natural-law-and-the-law-an-exchange [https://perma.cc/5YMW-6NUN]. And Justice Wilson, one of the more underappreciated American Founders and a man of great wisdom, once said: "Human law must rest its authority, ultimately, upon the authority of that law, which is divine. . . . Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants." James Wilson, *Of the General Principles of Law and Obligation*, *in* THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 55, 104–06 (Bird Wilson ed., 1804).

foundly shaped the Founding generation and our own constitutional order. Consider, for instance, how Sir William Blackstone, perhaps the single most influential of all the English common lawyers known to the U.S. Constitution's Framers, begins his famous *Commentaries on the Laws of England* with general accounts of legal corpuses, followed by specific interpretive guidelines. In the context of statutory construction,[85] Blackstone's view urged jurists to "[f]irst look at the text, then consider the intention of its authors, then weigh a whole list of factors: such are the general canons."[86] More generally, "in the Anglo-American legal tradition the most important conventions for interpreting legal documents embody various mixtures of text, tradition and logic," which "[a]ll have the sole purpose of directing courts in their search for the legislative will."[87] Modern adherents of positivist textualism and originalism, by contrast, "absolutize one of the several canons Blackstone and his followers identified," thereby zealously excluding legitimate and complementary tools of construction from the overarching interpretive enterprise *in toto*.[88] This sort of insipid positivism, which traces its roots to the nineteenth century, exists in an irreconcilable state of tension with the common law tradition, which was predicated on the notion that law was not made, but found.[89]

Far too often, the wholly legitimate legal interpretive guideposts of teleology and purposivism are subsumed into kneejerk positivist

85. England, of course, has no written constitution compiled in one comprehensive document (most of the constitution is indeed written down across several well-known documents).

86. James Stoner, *Why You Can't Understand the Constitution Without the Common Law*, L. & LIBERTY (Dec. 3, 2012), https://lawliberty.org/forum/why-you-cant-understand-the-constitution-without-the-common-law/ [https://perma.cc/YCH2-5S6M].

87. Robert Lowry Clinton, *Textual Literalism and Legal Positivism: On* Bostock *and the Western Legal Tradition*, PUB. DISCOURSE (July 5, 2020), https://www.thepublicdiscourse.com/2020/07/66630/ [https://perma.cc/7TBD-7XTQ].

88. Stoner, *supra* note 86.

89. *See, e.g.*, Jeremy Rozansky, *Precedent and the Conservative Court*, NAT'L AFFS. (Winter 2021), https://www.nationalaffairs.com/publications/detail/precedent-and-the-conservative-test [https://perma.cc/HDX5-SY2M].

denunciations of "legislative intent."[90] It is true that only the statutory text emerging from the Constitution's prescribed presentment and enactment process binds the polity as "supreme law of the land," but it is impossible to properly understand what a specific legal provision *meant*, at a specific point in time, without understanding both the distinct meaning ascribed to the provision by the relevant legislative body (or plebiscite or, perhaps in modern times, administrative agency) and the broader societal role and function for which the law was devised in the first instance. To the extent originalists have failed to incorporate this obvious truism into their theoretical framework, they have gone astray.

As Blackstone put it, a law can only be genuinely understood if the interpreter rejects acontextual literalism and instead considers "the cause which moved the legislator to enact it."[91] In the context of American constitutional interpretation, this means understanding why the balkanized Articles of Confederation failed; why nationalist, common-good-oriented statesmen accordingly came to dominate the Constitutional Convention of 1787; and why the Preamble of the Constitution—the charter's "statement to explain 'whither we are going'"[92]—reads the way that it does. Only then might we understand the *ratio legis*, or "reason of the law," which undergirds our entire constitutional edifice—and, by extension, comprehend the "objective truth" of what that legal edifice conveys.[93] Anything to the contrary undermines the "primary source of the validity of law" itself, which is "its historical character, its source in the customs and traditions of the community whose law it is."[94] Consider, for example, long-running originalist disagreements over the weight afforded to the *Federalist Papers* in the context of constitutional interpretation. Here, an interpreter ascribing substantive heft to the *Federalist Papers* would faithfully channel Blackstonian *ratio legis* and the unique contextual circumstances of the

90. *See, e.g.*, Scalia, *supra* note 22, at 17.

91. Clinton, *supra* note 87 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

92. Woodlief, *supra* note 42.

93. Clinton, *supra* note 87.

94. Berman, *supra* note 46, at 1655.

Founding era, such as the dueling motivations to forestall a reprise of a British-style monarch while also sufficiently empowering the federal government so as to avoid a reprise of the failed Articles of Confederation.[95] Such an interpreter would better intuit the true original public meaning—one, that is, imbued with the substantive aims and political *telos* that the *Federalist Papers* authors broadly shared, as encapsulated by the Preamble.

These are, broadly speaking, the central tenets of common good originalism as a distinctive methodology of constitutional (and statutory) interpretation: a Preamble-imbued, non-positivist reading of the Constitution—and statutes passed pursuant thereto—that is rooted in the teleology and *ratio legis* of a legal enactment, and which redounds to the common good and national weal of the citizenry when such outcomes are in direct tension with the maximization of individual autonomy. It would now be instructive to expound upon this methodology's underlying interpretive mechanics, as well as the contemporary ramifications of what a praxis of common good originalism might entail—including some specific examples pertaining to highly contentious constitutional provisions.

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In recent decades, the originalist methodological enterprise has oftentimes been theorized and promulgated as the belief that there are unassailable, clear-cut "right" and "wrong" answers to questions of constitutional interpretation, wherein "right" answers are necessarily those to which the clear bulk of the historical evidence points. In other words, post-1982 originalism has taken on a historicist tint and has frequently been conceived as a logical corollary of a hermeneutics of basic textual determinacy.[96] For instance, Justice

95. *See* Welch & Heilpern, *supra* note 47.

96. *See, e.g.*, Michael Stokes Paulsen, *Originalism: A Logical Necessity*, NAT'L REV. (Sept. 13, 2018, 11:20 AM), https://www.nationalreview.com/magazine/2018/10/01/originalism-a-logical-necessity/ [https://perma.cc/3745-NY3C] (opining that originalism is the "only method consistent with the very idea of written constitutionalism").

Scalia once opined that "the original public meaning of a constitutional provision is 'usually . . . easy to discern and simple to apply.'"[97] Similarly, Justice Thomas has stated that his "vision of . . . judging is unabashedly based on the proposition that there are right and wrong answers to legal questions."[98]

In many circumstances, this is undoubtedly true. There are any number of constitutional provisions where one need not have much more than an elementary school education to ascertain the sole possible construction. For example, Article II, Section 1 unambiguously sets the minimum age for presidential eligibility at thirty-five years old, the Seventh Amendment unambiguously sets the minimum amount in controversy for a civil suit jury trial at twenty dollars, and the Fifteenth Amendment unambiguously forbids any state from denying or in any way abridging the right to vote on the basis of "race, color, or previous condition of servitude."[99] There is very little room for interpretive ambiguity in any of these provisions. Even many interpretive quandaries that may superficially appear thorny, such as the question whether the Second Amendment's so-called "prefatory clause" limits the individual right expressly enumerated in its so-called "operative clause," are not actually all that thorny when one engages in a sober analysis of the historical meaning of the relevant language at issue.[100]

Enter common good originalism. The first core tenet of common good originalism is to channel rudimentary Burkean conceptions of epistemological humility and forthrightly concede that the original

97. Josh Hammer, *Overrule* Stare Decisis, NAT'L AFFS. (Fall 2020), https://www.nationalaffairs.com/publications/detail/overrule-stare-decisis [https://perma.cc/U59W-9J3D] (quoting Scalia, *supra* note 22, at 45).

98. Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1, 5 (1996).

99. U.S. CONST. art. II, § 1; U.S. CONST. amend. VII; U.S. CONST. amend. XV.

100. *See* District of Columbia v. Heller, 554 U.S. 570, 576–600 (2008); TED CRUZ, ONE VOTE AWAY: HOW A SINGLE SUPREME COURT SEAT CAN CHANGE HISTORY 44–48 (2020) (demonstrating, based on historical logic and widely accepted canons of construction, that the Second Amendment's prefatory clause does not in any way undermine the force of the Amendment's clearly written operative clause); *see also* 10 U.S.C. § 246 (2018) (refuting the dissenting opinions in *Heller* of Justices Stevens and Breyer in its very existence as the extant version of the First Militia Act of 1792).

public meaning of many other clauses in our majestic national charter is more susceptible to competing interpretations that are well within the range of historical plausibility. This is because, quite simply, not every constitutional provision is written in an expressly rule-like fashion—sometimes "the original meaning is rather abstract, or at a higher level of generality."[101] Indeed, originalism's attimes inconsistent approach to the proper level of interpretive abstraction is a frequent point made by some of its leading contemporary conservative critics, such as Harvard Law School Professor Adrian Vermeule. Originalists should become more comfortable with this reality; in fact, a proper conception of epistemological humility likely makes inconsistency on such things as the level of abstraction a feature, not a bug, of *any* constitutional interpretive methodology.

The first common good originalist move is thus to accept epistemological humility and admit that many leading originalists have likely overstated the extent to which the originalist methodology will always arrive at the one, true, historically "right" legal answer. It is in these situations, in trying to delineate the endpoints and all intervening possible interpretations within the breadth of exegetical possibilities that some originalist scholars refer to as the "construction zone,"[102] that "constitutional constructions or doctrines" can help ascertain the soundest, most teleologically appropriate, most purposively suitable "original meaning of the text."[103] The act of interpreting non-explicit, more abstruse constitutional provisions through the Preamble-inspired prism of the common good, and with a more Blackstonian conception of the validity and moral relevance of *ratio legis*, can often help to narrow down a provision's interpretive endpoint possibilities from a broader starting point of

101. Randy E. Barnett, *Trumping Precedent With Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 263 (2005).

102. *See, e.g.*, Mike Rappaport, *Original Methods Originalism Part III: The Minimization of the Construction Zone Thesis*, L. & LIBERTY (June 2, 2017), https://lawliberty.org/original-methods-originalism-part-iii-the-minimization-of-the-construction-zone-thesis/ [https://perma.cc/3JJL-SVTK].

103. Barnett, *supra* note 101, at 264.

openly confessed epistemological humility. From within that narrowed down starting point, furthermore, political and judicial actors utilizing common good originalism can then attempt to construct the soundest distillation of a genuinely common good-oriented jurisprudence, including the possible deployment therein of substantive moralistic argumentation. In other words, common good originalism counsels express and unapologetic use of the "very faculties that make us human in the first instance" in furtherance of authentic constitutional (and statutory) interpretation consonant with the *telos* of the American regime and constitutional order.[104] Some concrete examples will hopefully help demystify and explicate.

The First Amendment is a natural place to begin.[105] In the modern era, left-leaning liberals and right-leaning liberals alike have oftentimes coalesced around an ahistorical re-envisioning of the American Founding as some sort of libertarian paradise, wherein private citizens' free speech is maximally secured, no matter the objective value or worth of the underlying speech (or as the case may be, "speech"). This oftentimes assumes either a banal form of morally neutered positivism—"it is . . . often true that one man's vulgarity is another's lyric"[106]—or an emotive appeal to Voltaire-esque Enlightenment norms—"it is our law and our tradition that more speech, not less, is the governing rule."[107] But this is simply not our tradition: at the time of its ratification, "the First Amendment did not enshrine a judgment that the costs of restricting expression outweigh the benefits. At most, it recognized only a few established rules, leaving broad latitude for the people and their representatives to determine which regulations of expression would promote

104. Hammer, *Common Good Originalism*, *supra* note 17; *see also* Josh Hammer, *The Telos of the American Regime*, AM. MIND (Apr. 7, 2021), https://americanmind.org/features/a-new-conservatism-must-emerge/the-telos-of-the-american-regime/ [https://perma.cc/6HRJ-F9DT].

105. U.S. CONST. amend. I.

106. *Cohen*, 403 U.S. at 25.

107. Citizens United v. FEC, 558 U.S. 310, 361 (2010).

the public good."[108] A natural corollary is that natural law-undergirded substantive argumentation about the moral worth of any particular flavor of speech is wholly appropriate. And if that is true, then it is highly dubious, at best, whether most non-vocal human actions, such as flag burning, ought to be construed as "speech" at all. Justice Samuel Alito's solo dissents in the "crush video" case of *United States v. Stevens*[109] and the Westboro Baptist Church case of *Snyder v. Phelps*[110] are archetypes for common good originalism operationalized at the highest level. Hyper-literalist free speech absolutism must be rejected, and substantive argumentation about the low public value of certain forms of speech ought to be encouraged. As Justice Alito argued in *Snyder*, for example, "[o]ur profound national commitment to free and open debate is not a license for . . . vicious verbal assault[s]" such as those "that occurred in [that] case."[111] Nor, *a fortiori*, is "[o]ur profound national commitment to free and open debate" a constitutional "license" for nonvocalized, "speech"-resemblant human action that debases public morals, harms the national interest, or undermines the common good—such as flag burning.[112]

Similarly, common good originalism supports revisiting modern conceptions of the substantive protections afforded by the Free Press Clause. At the time of the Founding, the "freedom to express thoughts [in writing] . . . was limited to *honest* statements—not efforts to deceive others."[113] This had strong implications for the Sedition Act, another legal and political debate that characterized the First Party System, because, in the eyes of leading Federalists like John Allen and then-President John Adams, "[s]edition laws were . . . facially consistent with the freedom of opinion when confined to false and malicious speech."[114] Common good originalism

108. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 257 (2017).

109. 559 U.S. 460, 482–99 (2010) (Alito, J., dissenting).

110. 562 U.S. 443, 463–75 (2011) (Alito, J., dissenting).

111. *Id.* at 463.

112. *See* Texas v. Johnson, 491 U.S. 397, 435 (1989) (Rehnquist, C.J., dissenting).

113. Campbell, *supra* note 108, at 282.

114. *Id.* at 283.

also supports revisiting modern defamation law doctrine, following the lead of Justice Thomas's 2019 concurrence in the denial of a writ of certiorari in *McKee v. Cosby*,[115] wherein he persuasively relied on Founding-era authority to inveigh against the doctrinal legitimacy of the "actual malice" defamation standard for public figures fabricated by the Warren Court in *New York Times Co. v. Sullivan*.[116] In general, then, the early republic by and large took a view of reconciling natural rights and the common good that would make today's right and left leaning civil libertarians alike positively blench: "[W]hen expressive conduct caused harm and governmental power to restrict that conduct served the public good, there is no reason to think that the freedom of opinion nonetheless immunized that conduct."[117] That view—"that every author is responsible when he attacks the security or welfare of the government or the safety, character, and property of the individual"[118]—ought to be revitalized today in the name of promoting the common good of the polity. The Founding generation, whether in the context of freedom of speech or freedom of the press, was thus far more fastidious than today's right- and left-leaning civil libertarians about reasonably construing and delimiting natural and positive rights, as well as harmonizing both with the common good.

Consider also the Fourth Amendment, with its enshrined protection against "unreasonable searches and seizures."[119] As has been noted at length in other legal scholarship, the paramount colonial-era malady that the Fourth Amendment sought to remedy—in other words, its *ratio legis*—was the noxious practice of the "general warrant," wherein a government agent was afforded wide latitude to search or seize unspecified places or persons.[120] But modern-day

115. 139 S. Ct. 675, 675–82 (2019) (Thomas, J., concurring in the denial of certiorari).

116. 376 U.S. 254 (1964).

117. Campbell, *supra* note 108, at 287.

118. *Id.* at 289 (quoting Pennsylvania Ratification Convention Debates (Dec. 1, 1787) (statement of James Wilson), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 455 (Merrill Jensen, ed. 1976)).

119. U.S. CONST. amend. IV.

120. *See, e.g.*, Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 1, 79

analogues of the "general warrant" are exceedingly rare; indeed, as a prophylactic tool, the Fourth Amendment has been remarkably successful. Perhaps it is due to the resoundingly successful abolition of "general warrants" that much in the realm of Fourth Amendment litigation today, including but hardly limited to Section 1983[121] qualified immunity litigation pertaining to underlying alleged Fourth Amendment violations, deals with government conduct that is plainly permissible. Much of the underlying police conduct at issue in these cases is not necessarily *correct* as a black-letter matter, let alone consequentially or morally *ideal*, but it is usually at least "*reasonable*" under any recognizable conception of the balancing test explicitly required by the Amendment's text.[122] Consider, for instance, how the common law "allowed the use of whatever force was necessary to effect the arrest of a fleeing felon."[123] The Founders would have positively guffawed at large swaths of contemporary Fourth Amendment and Section 1983 litigation; *ratio legis* can be immensely helpful here.

In the realm of Fourth Amendment jurisprudence, then, judges implementing an approach of common good originalism should be highly deferential to the good-faith, "reasonable," split-second, on-the-spot decisions of law enforcement officers.[124] Officers' robust presence on the street and performance of their jobs without great fear of recriminatory civil action or punitive prosecution secure law and order, with the attendant substantive goods of a law-abiding

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(Spring 1999) ("[The Fourth A]mendment repudiates general warrants."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 214 (1993) ("The framers undoubtedly feared general warrants.").

121. 42 U.S.C. § 1983 (2018).

122. *See, e.g.*, Cole v. Carson, 957 F.3d 484, 485 (5th Cir. 2020) (Ho, J., dissenting) ("We should have granted qualified immunity to the police officers in this case—not because there is no 'clearly established' violation, . . . but because there was no Fourth Amendment violation at all.").

123. Tennessee v. Garner, 471 U.S. 1, 12 (1985).

124. *Cf.* Adrian Vermeule, *Deference and the Common Good*, MIRROR OF JUSTICE (May 8, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/a-confusion-about-deference.html [https://perma.cc/7QY4-62BT] ("[T]he common good may itself suggest that judges should defer to other actors under various circumstances, as when those other actors are engaged in reasonable specifications of legal principles . . . .").

and well-secured societal order—a civic ethos of communitarianism, culture of solidarity, family, and religious piety—inherently redounding to the "establish[ment of] Justice"[125] and the common good of the society.[126] The very term "reasonable" helps operationalize this, as some degree of mandated deference toward the governmental actors tasked with "search[ing]" or "seiz[ing]" offending citizens is seemingly implicit in the very word itself. Common good originalism thus rejects the privacy-maximizing civil libertarianism of legal groups like the left-liberal American Civil Liberties Union and the right-liberal Institute for Justice alike, opting to substantively prioritize societal order and follow the sagacity of those who exalt the moral imperative of the rule of law, such as President Calvin Coolidge: "[O]ur success in establishing self-government . . . [is] predicated upon [our being] a law-abiding people." [127]

Next consider the Eighth Amendment's ban on the government infliction of "cruel and unusual punishments."[128] Here, the two interpretive endpoints of the "construction zone," which are for all intents and purposes the only two plausible originalist interpretations, are the traditional conservative positivist viewpoint, in which effectively any form of punishment that was permissible at the time of the Founding is thus necessarily permissible today, and the progressive originalist viewpoint, in which the original public meaning of the provision *was* to establish an "evolving standards of decency"[129] judicial test. Much like common good originalism is generally comfortable deferring to the good-faith decisions of govern-

125. U.S. CONST. pmbl.

126. *See, e.g.*, Charles Fain Lehman, *Beat Cops Cut Crime*, CITY J. (Nov. 30, 2020), https://www.city-journal.org/how-police-presence-maintains-public-order [https://perma.cc/C7YK-GWZ3] ("[W]hen it comes to how cops control crime, simply walking the beat is one of the most powerful tools available."). *See generally* HEATHER MAC DONALD, THE WAR ON COPS: HOW THE NEW ATTACK ON LAW AND ORDER MAKES EVERYONE LESS SAFE (2016).

127. Calvin Coolidge, *Address at Gettysburg Battlefield*, CALVIN COOLIDGE FND. (May 30, 1928), https://coolidgefoundation.org/resources/address-at-gettysburg-battlefield [https://perma.cc/GFK7-U5FD].

128. U.S. CONST. amend. VIII.

129. Trop v. Dulles, 356 U.S. 86, 101 (1958).

mental actors in the context of the Fourth Amendment's "reasonable[ness]" requirement for searches and seizures,[130] so too is common good originalism generally comfortable deferring to the good-faith republican or plebiscitary decisions of those tasked with deciding the propriety and probity of the death penalty, as well as the specific methods employed therein when the practice is bestowed legitimacy in the first instance. There will of course be reasonable—and justiciable—dispensations to this baseline rule of deference; judges deploying common good originalism will be called upon, at least in extreme cases, to provide an objective definition of "cruel" and adjudicate a specific case or controversy accordingly.

But here, the common good is generally best served—and we best "establish Justice" and "insure domestic Tranquility"[131]—when conscientious citizens and legislators decide what the most proper punitive measures are for their own distinctive communities, bearing in mind the various penological goals of retribution, deterrence, incapacitation, and rehabilitation. How to balance these interests as a matter of principle, and how to implement that balancing effort as a matter of praxis, is inherently a prudential judgment generally best left to be determined, within reason, by majorities acting within their legitimate spheres of influence as agents of a sovereign people. Where the Founding-era history with respect to a provision's original public meaning does not overwhelmingly support an "evolving" clausal construction, as is quite clearly the case in the Eighth Amendment context, that is precisely what ought to happen. The *ratio legis* of the Eighth Amendment is also best realized through such a deferential approach, as the historical impetus for the proscription of "cruel and unusual punishments" was quite plainly the perpetual abolition of the horrid forms of torture that had too often tarnished the bloody landscape of medieval Europe. Much like the abolition of the "general warrant" in the Fourth Amendment context, this laudable goal has been realized. We thus

130. *See, e.g.*, Vermeule, *supra* note 124.

131. U.S. CONST. pmbl.

see that the common good is oftentimes, though of course not always, best served when judges defer to the "reasonable" good-faith decisions of public actors attempting to effectuate ancient or biblical principles of natural justice,[132] whether in the Fourth Amendment context or outside of the Fourth Amendment context.

It is worth emphasizing that common good originalism is of course not synonymous, or even broadly coextensive, with a strong form of Thayerian judicial deference. Consider the example of abortion, the affirmative taking of an innocent human life and an action thus manifestly contrary to both natural justice and the substantive precepts of the Declaration and Preamble alike. Here, common good originalism would likely support "The Lincoln Proposal," according to which state-sanctioned abortion is itself unconstitutional, regardless of what plebiscitary majorities purport to decide.[133] Consider as another example Professor John Eastman's long-standing constitutional argument against Fourteenth Amendment-mandated birthright citizenship for illegal aliens.[134] Here too, common good originalism would more readily support Professor Eastman's argument due to the reasonable "construction zone" interpretive ambiguity and the profound substantive harms that a mandated birthright citizenship interpretation would wreak upon cherished common good concepts such as national sovereignty and the sanctity of national citizenship, notwithstanding the alternative

132. *See, e.g.*, Leviticus 24:19-21 (King James) ("And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him; Breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him again. And he that killeth a beast, he shall restore it: and he that killeth a man, he shall be put to death.").

133. *See* Catherine Glenn Foster, Chad Pecknold, & Josh Craddock, *The Lincoln Proposal: Pro-Life Presidents Must Take Ambitious and Bold Action to Protect the Constitutional Rights of Preborn Children*, PUB. DISCOURSE (Nov. 8, 2020), https://www.thepublicdiscourse.com/2020/11/72631/ [https://perma.cc/E6NF-B6DT]; *see also* John Finnis, *Abortion is Unconstitutional*, FIRST THINGS (Apr. 2021), https://www.firstthings.com/article/2021/04/abortion-is-unconstitutional [https://perma.cc/4V7C-TW63].

134. *See, e.g.*, John Eastman, *From Feudalism to Consent: Rethinking Birthright Citizenship*, HERITAGE FOUNDATION (Mar. 30, 2006), https://www.heritage.org/the-constitution/report/feudalism-consent-rethinking-birthright-citizenship [https://perma.cc/JAD6-FR6G].

argument that Congress perhaps adopted the birthright citizenship presumption when it borrowed the near-verbatim contested language of the Fourteenth Amendment's Citizenship Clause in Section 301 of the Immigration and Nationality Act of 1952.[135]

For one final constitutional example, consider also the crux of the Fourteenth Amendment, whose sweeping and majestic clauses—the Due Process Clause and the Equal Protection Clause, in particular—and the subsequent judicial misinterpretations thereof have cumulatively amounted to the greatest shift in constitutional structure since New Hampshire became the ninth of the original thirteen states to ratify the Constitution as the law of the land. Common good originalism of course rejects the most risible of the Fourteenth Amendment claims that have been advanced over the decades, from the ludicrous "penumbras" and "emanations" of *Griswold v. Connecticut*[136] to *Planned Parenthood of Southeastern Pennsylvania v. Casey*'s[137] farcical casuistry that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[138] On the contrary, common good originalism seeks true human flourishing in a well-ordered society and solidaristic polity, even when those goals are contrary to the prioritization or maximization of individual autonomy expansionism. Common good originalism is thus deeply hostile to natural-law-subversive, individual-autonomy-centralizing cases that structurally undermine the family—the very wellspring of any legitimate societal conception of the common good—such as *United States v. Windsor* and *Obergefell v. Hodges*.[139] While common good originalism is distinct from Professor Vermeule's own "common good constitutionalism" theory of interpretation, it nonetheless shares Professor Vermeule's belief that solipsistic citizens' "own

135. U.S. CONST. amend. XIV; 8 U.S.C. § 1401 (2018).

136. 381 U.S. 479, 484 (1965).

137. 505 U.S. 833 (1992).

138. *Id.* at 851.

139. *See supra* note 7. *Windsor* is of course a Fifth Amendment—not Fourteenth Amendment—case, but the same principles apply with respect to a cabined Due Process Clause interpretation that redounds to the interests of establishing justice and promoting the common good, not maximizing individual autonomy.

perceptions of what is best for them" are, for all intents and purposes, constitutionally irrelevant.[140] The Fourteenth Amendment, whose *ratio legis* was not to transmogrify Hamilton's "least dangerous"[141] branch into an all-powerful super-legislature, but rather to achieve the much less ambitious goal of merely legitimating the Civil Rights Act of 1866, is perfectly compatible with the notion that "all legislation is necessarily founded on some substantive conception of morality, and . . . the promotion of morality is a core and legitimate function of authority."[142] Common good originalism, which generally supports a more robust constitutional ambit for the actions of the federal government than other originalist interpretive methodologies,[143] thus also takes a strong view of state police powers over regulatory matters of health, safety, and morals, similar to James Madison in *The Federalist No. 45*.[144] Indeed, common good originalism is, if anything, skeptical of the so-called "incorporation" doctrine of the Bill of Rights in the first instance.[145]

Crucially, and perhaps counterintuitively, the common good originalism framework can (and should) also apply to *statutory* interpretation. Common good originalism takes its cue from Senator

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140. Adrian Vermeule, *Beyond Originalism*, ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ [https://perma.cc/F48A-6PCG].

141. THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

142. Vermeule, *supra* note 140.

143. For example, consider the triumph of a Hamiltonian interpretation of the Necessary and Proper Clause, best encapsulated by THE FEDERALIST NO. 33, in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional." 17 U.S. (4 Wheat.) 316, 421 (1819).

144. THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 2003) ("The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."); *cf.* Keith E. Whittington, *Can the Government Just Close My Favorite Bar?*, REASON (Mar. 16, 2020, 2:03 PM), https://reason.com/volokh/2020/03/16/can-the-government-just-close-my-favorite-bar/ [https://perma.cc/2AEZ-5Z4S].

145. *See generally* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989).

Josh Hawley of Missouri, who lamented the day after the *Bostock* ruling that "if textualism and originalism give you this decision, if you can invoke textualism and originalism in order to reach such a decision—an outcome that fundamentally changes the scope and meaning and application of statutory law—then textualism and originalism and all of those phrases don't mean much at all."[146] Indeed, it is now past time to retire the outmoded taxonomical dichotomy of "textualism" as a mere method of statutory interpretation, and "originalism" as a mere method of constitutional interpretation. Instead, it would be better to conceive of "textualism" as an acontextual, amoral, ahistorical, non-purposive, non-*ratio legis*-undergirded reading of a legal provision—whether in a statute or in the Constitution. Similarly, it would be better to conceive of "originalism"—with common good originalism being the truest form, both our inheritance and our future—as a more properly contextualized, historical, purposive, *ratio legis*-undergirded, moralistic reading of a legal provision—whether in a statute or in the Constitution. For example, Justice Gorsuch's majority opinion in *Bostock* ought to be thought of as "textualist," and Justice Alito's lead dissent in *Bostock* ought to be thought of as (common good) "originalist." In our constitutional order, statutes are necessarily subordinate to the Constitution itself—the very crux of Chief Justice Marshall's correct, if frequently misunderstood,[147] ruling in *Marbury v. Madison*[148]—and they thus ought to be construed through the prism of the Constitution's *ratio legis* and substantive aims, as expressed in the Preamble. In this sense, the substantive

146. Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65043/ [https://perma.cc/U242-GY3D].

147. *See generally* Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706 (2003).

148. 5. U.S. (1 Cranch) 137 (1803); *see* Hammer, *Overrule* Stare Decisis, *supra* note 97 ("The proper interpretation of *Marbury* . . . amounts to a conflict-of-laws analysis by which Marshall was forced to choose between competing sources of law that are each enumerated in the Supremacy Clause of Article VI of the Constitution. In choosing the Constitution as superior to federal statute, Marshall properly discharged his conflict-of-laws analytical duty.").

goals of the nation's enduring intergenerational compact may rightfully imbue with meaning the statutes, rules, and regulations enacted by the people's more transient political agents, who adopt more prudential policies at a given moment in time, in response to an idiosyncratic and ever-evolving set of specific circumstances.

Indeed, the dueling opinions in *Bostock* of Justices Gorsuch and Alito provide something of an archetype for a prospective distinction between a revised conception of "textualism," that is acontextual literalism, and a revised conception of "originalism," that is common good originalism. Justice Gorsuch's majority opinion is profoundly un-conservative—it pays no heed to the historical context of the 1964 Civil Rights Act, is woefully indifferent to the legislation's overarching telos, discards any consideration whatsoever of pertinent enactment-era social norms and customs about homosexuality and gender dysphoria, ignores the plain fact that Congress repeatedly declined to legislate what plaintiffs expressly argued was intrinsic and needed no further legislative modification, eschews the most rudimentary conceptions of Burkean epistemological humility, and deploys hyper-literalism and sophistic logical "reasoning" to reach a manifestly absurd result. Justice Alito's leading dissent, by contrast, is profoundly conservative—it is tethered in the specific historical context, social norms, societal customs, and *telos* of the congressional enactment of the 1964 Civil Rights Act; it is attuned to the fact that Congress repeatedly declined to amend Title VII to add sexual orientation and "gender identity" as additional protected classes; and it reaches a result that defers to political actors attuned to the common good, longstanding canons of interpretation, and broader notions of prioritizing the national weal over idiosyncratic, fashionable conceptions of personal identity. Justice Alito's dissent is directly in line with both the substantive ends of politics articulated in the Constitution's Preamble and the *ratio legis* of the 1964 Civil Rights Act; Justice Gorsuch's majority opinion, by contrast, fails mightily at both. Justice Alito's dissent rightfully (if only implicitly) recognizes the transcendental axioms lying just beneath the text—namely, who is a "man" and who is a

"woman"—while Justice Gorsuch's majority opinion is at best indifferent, and at worst hostile, to them.[149] Justice Alito's path in *Bostock*, much like his path in *Snyder*, illustrates common good originalism's path forward. Indeed, to the extent traditional "conservative" originalism had Justice Scalia as its greatest champion from the bench, one could envision Justice Alito as a modern champion of something roughly approximating common good originalism.[150]

To be sure, utilizing the Constitution's Preamble as a tool of *statutory* construction can only go so far. Statutes themselves generally have their own preambles, and the same aforementioned exegetical framework of interpreting a legal provision's words through the substantive prism of a statutory preamble ought to similarly apply. For example, as part of the ongoing political debate over the legal immunity afforded by Section 230 of the Communications Decency Act of 1996,[151] many commentators and scholars alike who argue in favor of substantial reform or outright repeal have often referenced the fact that Congress noted in Section 230's preambulatory "Findings"—in other words, the *ratio legis* or stated purpose for why this extralegal immunity was deemed valuable—that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[152] This

149. *See Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting) ("The Court's opinion is like a pirate ship" that "sails under a textualist flag.").

150. *See generally* Adam J. White, *The Burkean Justice*, WKLY. STANDARD (July 18, 2011), https://www.washingtonexaminer.com/weekly-standard/the-burkean-justice [https://perma.cc/KZ74-XJU7].

151. 47 U.S.C. § 230 (2018).

152. *Id.* § 230(a)(3); *see also* Rachel Bovard, *Section 230 Protects Big Tech From Lawsuits. But It Was Never Supposed To Be Bulletproof.*, USA TODAY (Dec. 13, 2020), https://www.usatoday.com/story/opinion/2020/12/13/section-230-big-tech-free-speech-donald-trump-column/3883191001/ [https://perma.cc/ZS38-CSCL] ("[Section 230] was enacted nearly 25 years ago as something akin to an exchange: Internet platforms would receive a liability shield so they could voluntarily screen out harmful content accessible to children, and in return they would provide a forum for 'true diversity of political discourse' and 'myriad avenues for intellectual activity.'"); *see also Stifling*

is an example of a proper invocation of a statutory structure's articulated goals to help imbue the statutory text itself with meaning and, as is the case with present Section 230 discourse, to make public policy arguments accordingly.[153] This model ought to be followed in statutory construction; ideally, in attempting to decipher the truest original public meaning and the truest expression of the legislative will of a particular piece of legislation, interpreters would consult *both* the relevant statute's preamble provisions and the Constitution's Preamble. Future scholarship in this area might explore further the interpretive intersection of statutory preamble provisions, the Constitution's Preamble, and, of course, the statutory text itself. Ideally, judges might attempt to reconcile the *ratio legis* of a transient legislative act with the telos of the American political order and its Constitution—the "supreme Law of the Land"[154]—and thus read the statute's text through that harmonized prism. This is a more complex and nuanced exercise than the ambit of constitutional construction, but the basic interpretive frameworks are highly analogous, if not identical.

A fuller explication is perhaps impossible absent the inevitable trial and error that attends to the practical judicial and political implementation of this theory of law. But I hope that this Part has at least helped illuminate *some* tangible aspects of what a constitutional and statutory interpretive methodology of common good originalism would look like in practice. It is a methodological ap-

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Free Speech: Technological Censorship and the Public Discourse: Hearing Before the Subcomm. on the Const. of the S. Judiciary Comm., 116th Cong. 3 (2019) (statement of Eugene Kontorovich, Professor of Law, George Mason University Antonin Scalia School of Law). ("Section 230's blanket presumption is not mandatory, and certainly open to revision in a different environment more than two decades after its passage. In enacting the immunity provisions, Congress assumed that protected internet services provide 'a forum for a true diversity of political discourse.' To the extent that assumption is weakened by online companies filtering out viewpoints that they deem ideologically impermissible, the assumptions behind Section 230 may need to be revisited.").

153. For a recent attempt at judicial construction of Section 230, see Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020) (Thomas, J., statement respecting the denial of certiorari).

154. U.S. CONST. art. VI.

proach with great promise for the flourishing of the American citizenry and the common weal of the American republic—greater promise, that is, than any of the three extant forms (progressive, libertarian/classical liberal, and conservative/positivist) of originalism on display today.

* * *

President Trump's successful 2020 confirmation of Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg was the single most profound ideological shift in a Supreme Court seat since Justice Thomas replaced Justice Thurgood Marshall in 1991, if not earlier. Indeed, social and religious conservatives are already seeing the results.[155]

But let us not lose the forest for the trees. The judicial deck is systemically stacked against conservatives for a myriad of reasons. As Senator Ted Cruz, a former Supreme Court clerk and highly accomplished appellate litigator, has put it, speaking of judicial nominations: "To borrow from baseball, Republicans at best bat .500. . . . Democrats, on the other hand, bat nearly 1.000."[156] For those conservatives who prioritize the goals of *substantive conservatism* above any specific conception of liberal proceduralism, it is long past time to reassess first principles and attempt to calibrate a forward-looking strategy that stands a chance of success of protecting and effectuating conservative principles over the long term. We must leave no stone unturned, including curricular reform of America's sclerotic legal education status quo, reform of the specific criteria conservatives consider before settling on Supreme Court nominees, and ending once and for all the anti-constitutional but nonetheless widely held post-*Cooper v. Aaron*[157] belief in judicial

155. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam) (enjoining Governor Andrew Cuomo's enforcement of ten and twenty-five person occupancy limits for religious services during the COVID-19 pandemic).

156. Cruz, *supra* note 100, at 199.

157. 358 U.S. 1 (1958).

supremacy.[158] Crucially, reform of the tenets and underlying precepts of originalist jurisprudence must itself also be on the table. None of the three general forms of originalism on the menu today—progressive, libertarian, or positivist conservative—has been anywhere near successful at retaining and promoting the substantive ends of conservatism. None of these forms of originalism has been particularly successful in staving off cunning legal assaults—from both avowed legal progressives and purported legal "conservatives"—against the common good and human flourishing of the American citizenry.

One is forced to recall, in anguish, the (perhaps apocryphal) Albert Einstein aphorism about the definition of insanity as trying the same thing over and over again and expecting different results. Justice Barrett's propitious confirmation success notwithstanding, the legal conservative movement today remains beset by twin crises of intellectual cogency and political legitimacy. Unfortunately for conservative legal types, there are no panaceas to be found amidst the rubble. But common good originalism presents our best chance yet for a truly, substantively conservative jurisprudence that is faithful to our traditions, cognizant of where we have gone astray, and clear-eyed about our future. Let's get to work.

158. *See* Hammer, *Undoing the Court's Supreme Transgression*, *supra* note 1; *see also* Josh Hammer, *Standing Athwart History: Anti-Obergefell Popular Constitutionalism and Judicial Supremacy's Long-Term Triumph*, 16 U. ST. THOMAS L.J. 178 (2020).

LEVEL-UP REMEDIES FOR RELIGIOUS DISCRIMINATION

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[1]
>
> —Chief Justice John Marshall

Few words lie closer to the American heart than the affirmation that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness."[2] Less commonly quoted is the corollary that immediately follows: "That *to secure these rights*, Governments are instituted among Men . . . ."[3] One of the principal purposes of government is to vindicate the fundamental rights of its subjects. As Chief Justice John Marshall remarked in *Marbury v. Madison*,[4] "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[5] *Marbury*'s reasoning emphasized that "[f]or every right, there must be a judicial remedy."[6] Rights not given life by remedies become merely theoretical to the individuals asserting them.

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
3. *Id.* (emphasis added).
4. 5 U.S. (1 Cranch) 137 (1803).
5. *Id.* at 163; *see also id.* ("One of the first duties of government is to afford that protection.")
6. Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 10 (2003) (emphasis added) (citing *Marbury*, 5 U.S. (1 Cranch) at 163).

The lack of an effective remedy can nullify even vital rights, such as those guaranteed under the Equal Protection Clause.[7] In weighing such discrimination cases, the Supreme Court has consistently maintained that courts may choose between two "effectively equivalent" remedies: "to 'level up' by extending [a] benefit to the excluded class . . . or to 'level down'" by removing the benefit even from the included class.[8] In colloquial terms, these two options have been called "the nice remedy" and the "the mean remedy," respectively.[9] Scholars, commentators, and common sense agree that "leveling down is not always consistent with the meaning of equality" and that, in many cases, the choice to level up or down determines whether plaintiffs actually get relief.[10]

Yet despite occasional dicta to the contrary, the Supreme Court has not erred on the side of leveling up.[11] Consider the recent case of Patrick Henry Murphy, a Buddhist death row inmate in Texas.[12] Unlike the Christian inmates of the prison, Murphy was not allowed to have a religious adviser of his faith with him during his execution. But while the Supreme Court stayed Murphy's execution in 2019 due to the "denominational discrimination" evinced by

7. *See, e.g.*, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 298 (1955) (noting that while the Court had held the previous year that "racial discrimination in public education is unconstitutional, . . . [t]here remain[ed] for consideration the manner in which relief is to be accorded" before that decision could be put into effect).

8. Kristin A. Collins, *Equality, Sovereignty, and the Family in* Morales-Santana, 131 HARV. L. REV. 170, 175 (2017).

9. Ian Samuel, *SCOTUS Symposium: Morales-Santana and the "Mean Remedy,"* PRAWFSBLAWG (June 12, 2017, 5:04 PM), https://prawfsblawg.blogs.com/prawfsblawg/2017/06/scotus-symposium-morales-santana-and-the-mean-remedy.html [https://perma.cc/TJB7-TPTN].

10. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 516 (2004); *see also, e.g.*, Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2027–29 (1998); Tracy A. Thomas, *Leveling Down Gender Equality*, 42 HARV. J.L. & GENDER 177, 201 (2019).

11. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1699 (2017) (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)) (claiming that a level-up approach is generally favored, but approving a level-down remedy).

12. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (mem.).

the Texas policy,[13] it prescribed no particular remedy.[14] Rather than allow Buddhist inmates access to religious advisers of their faith, Texas chose to revoke the privilege from Christian inmates.[15] This level-down solution demonstrates how ineffective remedies can satisfy the letter of the Constitution while denying its spirit: despite a victory in the Supreme Court, Murphy is no better off.

This Note argues that where substantive, explicit constitutional rights guaranteed by the Free Exercise Clause have been violated alongside the Equal Protection Clause, the Constitution may *require* courts to favor a level-up approach. In other words, courts should presumptively apply level-up remedies in religious discrimination cases involving free exercise violations. Part I examines the development of remedies for discrimination claims and sketches the contours of the Supreme Court's current position, which gives no legal preference to leveling either up or down. Part II proposes a presumptive level-up framework for approaching religious discrimination cases implicating free exercise violations. Part III applies this framework to recent cases (including Murphy's) and shows that leveling up can produce more equitable outcomes—a principle illustrated by the Supreme Court's recent ruling in *Espinoza v. Montana Department of Revenue*.[16]

I. A BRIEF HISTORY OF EQUAL PROTECTION REMEDIES

Judicial remedies have become a vital tool for enforcing constitutional rights in equal protection cases. Courts attempting to fashion such remedies, however, receive little direction from the Supreme Court. While the Court has expressed a loose preference for level-up remedies, it has never committed itself to a clear rule or standard requiring them.

13. *Id.* (Kavanaugh, J., concurring in grant of application for stay).
14. *Id.* at 1475–76.
15. *See* Murphy v. Collier, 942 F.3d 704, 706 (5th Cir. 2019).
16. 140 S. Ct. 2246 (2020).

A. The Role of Courts in Fashioning Remedies

In the early Republic, the legislative branch assumed the primary responsibility for defining remedial mechanisms. The Constitution itself refers explicitly to only two remedies:[17] habeas corpus;[18] and the "just compensation" required by the Fifth Amendment.[19] The Framers expected that constitutional rights would be vindicated through legal structures that already existed (such as actions at common law or at equity).[20] They also believed that Congress had the power to create statutory remedies and causes of action to afford relief to victims deprived of their rights, including constitutional rights.[21] Nearly a century later, the Reconstruction Congress exercised this power by passing the Enforcement Act of 1871,[22] which imposed civil liability on state actors who deprived a person of "any rights, privileges, or immunities secured by the Constitution of the United States."[23] This cause of action has since been codified at 42 U.S.C. § 1983[24] and is now perhaps "the most powerful

17. *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 755–56 (7th ed. 2015); Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779 & n.224 (1991) (observing that "the Constitution generally makes no reference to remedies," *id.* at 1779, and explaining the two major exceptions).

18. *See* U.S. CONST. art. I, § 9, cl. 2.

19. U.S. CONST. amend. 5; *see also* First English Evangelical Lutheran Church v. L.A. Cty., 482 U.S. 304, 316 n.9 (1987) ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking.").

20. *See* FALLON ET AL., *supra* note 17, at 756; Fallon & Meltzer, *supra* note 17, at 1779 ("To the [F]ramers, special provision for constitutional remedies probably appeared unnecessary, because the Constitution presupposed a going legal system, with ample remedial mechanisms, in which constitutional guarantees would be implemented.").

21. For instance, the remedy so famously discussed in *Marbury* was established by—and sought under—congressional statute rather than the Constitution itself. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 154 (1803); Fallon & Meltzer, *supra* note 17, at 1779.

22. An Act to Enforce the Provision of the Fourteenth Amendment to the Constitution of the United States, and Other Purposes, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (2018)).

23. *Id.*

24. The current statute contains minor changes to the original language; for instance, it now protects the "rights, privileges, or immunities secured by the Constitution *and laws*." 42 U.S.C. § 1983 (2018) (emphasis added).

offensive remedy" available to plaintiffs seeking redress for constitutional violations.[25]

While Congress did not hesitate to create new remedies, courts were historically less eager to step forward. The early judicial role in fashioning remedies was comparatively limited, perhaps in part because of *Marbury*'s assertion that some remedies were beyond the power of the Supreme Court to grant.[26] The Enforcement Act of 1871 included both a clause creating a cause of action for plaintiffs and a clause explicitly creating federal jurisdiction to *hear* such claims. The inclusion of both clauses suggests that, as late as the mid-nineteenth century, Congress may have been unsure about the role of the courts in remedying constitutional injuries.[27] But as suits based on constitutional violations increased, courts began to take a more active role in shaping remedial mechanisms. By the mid-twentieth century, the Supreme Court could confidently instruct federal courts to use "equitable principles . . . characterized by a practical flexibility in shaping . . . remedies" to counteract public school segregation.[28] And in *Bivens v. Six Unknown Named Agents*,[29] the assertive Warren Court boldly declared that "federal courts may use any available remedy to make good the wrong done" when vital constitutional rights are at stake, even if such a remedy is outside the scope of any current statutory scheme.[30] In recent years, a more cautious Court has backed away from the leading role it envisioned for itself in *Bivens*.[31] Nevertheless, the judiciary continues to play an important role in crafting remedies—a role that

25. Nicholas R. Battey, Note, *A Chink in the Armor? The Prosecutorial Immunity Split in the Seventh Circuit in Light of* Whitlock, 2014 U. ILL. L. REV. 553, 558.

26. *See Marbury*, 5 U.S. (1 Cranch) at 176.

27. *See* Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1156 (1969).

28. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300 (1955).

29. 403 U.S. 388 (1971).

30. *Bivens*, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)); *see also* Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1540–43 (1972).

31. While the Court has not overtly rejected the *Bivens* remedy itself, it has become far more skeptical of inferring causes of action allowing its application. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) ("In both statutory and constitutional cases, our watchword is caution.").

Congress recognizes and occasionally modifies through legislation.[32]

B. "Two Remedial Alternatives:" Judicial Remedies for Equal Protection Violations

As the judicial power to create remedies developed, the Supreme Court repeatedly grappled with the difficulties inherent in designing remedies that effectively vindicate equal protection rights. These difficulties have engendered a jurisprudence of inconsistency: while the Court has repeatedly spoken to the importance of ending discrimination, its rulings have not always provided effective relief.

One of the first major cases illustrating the challenge of fashioning antidiscrimination remedies was *Cumming v. Richmond County Board of Education*.[33] Decided in 1899, *Cumming* involved an attempt to appropriate tax money for the establishment of a high school exclusively for white children.[34] White children thus received a tax-supported educational opportunity that African-American children did not. But in considering possible remedies, the *Cumming* Court faced a difficult dilemma. If it decided that African-American taxpayers had suffered discrimination, it would have only two options: level *up* (by requiring the Board of Education to establish a similar school for African-American children); or level *down* (by closing the existing school for white children). Neither option appealed to the Court. Leveling down by taking existing educational opportunities away from children seemed morally repugnant and politically disastrous. But a level-up remedy would be similarly unpopular in the Jim Crow South and economically impractical.[35]

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32. Examples of such legislation include the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996), the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). *See* Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2537 (1998).

33. 175 U.S. 528 (1899).

34. *See id.* at 542, 544.

35. *See id.* at 544.

Faced with this choice of evils, the Court ducked the question by refusing to find a constitutional violation under the Equal Protection Clause altogether.[36] The shadow of *Plessy v. Ferguson*,[37] decided three years previously, loomed large over *Cumming*. Perhaps it is unsurprising that the Supreme Court was unwilling to find racial discrimination in public education so soon after its infamous decision enshrining that very discrimination.[38] But *Cumming* is notable for its logic, not its outcome. Rather than a principled constitutional basis for its decision, the *Cumming* Court offered only a frank acknowledgment that it did not feel comfortable with any available remedy:

> The substantial relief asked is an injunction that would either impair the efficiency of the high school provided for white children or compel the Board to close it. But if that were done, the result would only be to take from white children educational privileges enjoyed by them, without giving to colored children additional opportunities for the education furnished in high schools. The colored school children of the county would not be advanced in the matter of their education by a decree compelling the defendant Board to cease giving support to a high school for white children.[39]

The Court reasoned that granting relief would necessarily curtail available educational opportunities, whether that meant closing the segregated white high school or reallocating educational funds and thus denying children other existing educational opportunities. In other words, *any* remedy would be a level-down remedy. Even in the early stages of equal protection litigation, when the Court was not yet ready to enforce minority rights, it instinctively understood that level-down remedies often fail to provide relief.

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36. *See id.* at 545.

37. 163 U.S. 537 (1896).

38. *See id.* at 548 (holding that "the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws").

39. *Cumming*, 175 U.S. at 544.

The Court expanded this nascent preference for level-up remedies several decades later in *Iowa-Des Moines National Bank v. Bennett*,[40] a case in which plaintiffs claimed they had been unfairly taxed at a higher rate than their competitors.[41] After finding that a constitutional violation had indeed occurred,[42] the Court noted that "[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced."[43] But while there were two paths to equal treatment, a level-down remedy in this case would be no remedy at all. A victim of tax discrimination could not "be required himself to assume the burden of seeking an increase of the taxes which the others should have paid[,] . . . [n]or [could] he be remitted to the necessity of awaiting such action by the state officials upon their own initiative."[44] The only viable option, therefore, was a level-up remedy.

Bennett signified the high-water mark of the Court's enthusiasm for level-up remedies. The modern Court has usually framed its discussion of equal protection remedies by emphasizing its ambivalence. For instance, in the sex discrimination case of *Heckler v. Mathews*,[45] the Court emphasized that "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against,"[46] and that the "mandate of equal treatment"[47] may be expressly fulfilled by a level-down remedy:

> [W]e have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives:

40. 284 U.S. 239 (1931).
41. *Id.* at 240.
42. *Id.* at 245–47.
43. *Id.* at 247.
44. *Id.* (citations omitted).
45. 465 U.S. 728 (1984).
46. *Id.* at 739.
47. *Id.* at 740 (emphasis omitted).

> [it] may either declare [the statute] a nullity and order that its benefits *not extend* to the class that the legislature intended to benefit, or it may *extend* the coverage of the statute to include those who are aggrieved by the exclusion."[48]

While no remedy was actually granted in *Heckler*, it has since become a touchstone of remedies jurisprudence. Over the past three and a half decades, the Court has repeatedly treated its discussion of remedies in *Heckler* as authoritative.[49] The Court backed away from level-up remedies in *Heckler* in two significant ways. First, it clearly established the constitutionality of level-down remedies by affirming that courts could grant relief in cases where level-up remedies are off the table. *Heckler* held that a severability clause allowing only level-down remedies granted standing to sue because redressability was possible in the form of the desired benefit being withheld from others.[50] Second, it instructed courts to look for legislative intent in crafting remedies, at least before granting a level-up remedy where a statute might more easily facilitate leveling down instead. In a footnote, the Court tempered its stated position that "extension, rather than nullification, is the proper course" by

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48. *Id.* at 738 (quoting Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in the result)) (second and third alterations in original) (emphasis added).

49. *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017); Levin v. Commerce Energy, Inc., 560 U.S. 413, 426–27 (2010) (citing *Heckler* and stating that "when unlawful discrimination infects . . . legislative prescriptions, the Constitution simply calls for *equal treatment*," and that "[h]ow equality is accomplished—by extension or invalidation of the unequally distributed benefit or burden, or some other measure—is a matter on which the Constitution is silent"); Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 817–18 (1989) (quoting *Heckler*); s*ee also* FALLON ET AL., *supra* note 17, at 756 & n.3 (citing only *Bennett* and *Heckler* in a brief summary of equal protection remedies).

50. *See Heckler*, 465 U.S. at 738–40 ("[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. Because the severability clause would forbid only the latter and not the former kind of relief in this case, the injury caused by the unequal treatment allegedly suffered by appellee may 'be redressed by a favorable decision,' and he therefore has standing to prosecute this action." (first quoting *Bennett*, 284 U.S. at 247 (1931), and then quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1975))).

emphasizing that no court should "use its remedial powers to circumvent the intent of the legislature."[51]

While relatively uncommon, the Court has occasionally chosen not only to consider a level-down remedy, but to *uphold* one. Perhaps the most infamous example is the Court's widely disparaged 1971 ruling in *Palmer v. Thompson*.[52] In *Palmer*, the city of Jackson, Mississippi refused to integrate its public swimming pools when faced with a federal judgment that its segregation policy constituted an equal protection violation. Instead, it chose to enact a level-down remedy by closing or divesting from all its pools rather than allowing African-Americans to use them.[53] The Supreme Court denied relief to plaintiffs alleging an equal protection violation, holding that racial integration of public services was not required so long as the ultimate outcome was equal as between races and there was "no state action affecting blacks differently from whites."[54] Because the swimming pools were equally closed to all citizens of all races, the Court reasoned, equality had been achieved.

Contemporary and modern critics have disparaged *Palmer* for its outcome and its reasoning,[55] including its "tendentious handling of precedent"[56] and use of "leveling down as a dubious equal protection remedy."[57] The substantive equal protection arguments that prevailed in *Palmer* have aged poorly; it would be impossible to argue today that "a legislative act may [not] violate equal protection

51. *Id.* at 739 n.5 (first quoting Califano v. Westcott, 443 U.S. 76, 89 (1979), and then quoting *id.* at 94 (Powell, J., concurring in part and dissenting in part)).

52. 403 U.S. 217 (1971).

53. *Id.* at 218–19.

54. *Id.* at 225; *see id.* at 225–26.

55. *See, e.g.*, Paul Brest, Palmer v. Thompson*: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 131–33 (1971) (explaining how *Palmer* had been wrongly decided and analyzing its logical flaws); John-Paul Schnapper-Casteras, *The Problem with Palmer*, TAKE CARE (May 7, 2017), https://takecareblog.com/blog/the-problem-with-palmer [https://perma.cc/R2WC-ZP6V] (labeling *Palmer* "an odious and obsolete decision" and calling its endorsement of level-down remedies "jaw-dropping and wrong").

56. Randall Kennedy, *Reconsidering* Palmer v Thompson, 2018 SUP. CT. REV. 179, 200; *see id.* at 200–02.

57. *Id.* at 204; *see id.* at 204–06.

solely because of the motivations of the men who voted for it."[58] While the Court has never formally overruled *Palmer*, later decisions have so squarely contradicted it that it can no longer be considered good law.[59]

Nevertheless, the remedial stance adopted in *Palmer* has never been directly repudiated by the Court. Instead, it has endured in the Court's tolerance for leveling down in cases such as *Heckler*. "The current understanding of leveling down's compatibility with equality norms may be traced to *Palmer*," in the sense that the Court has quietly accepted the idea that equal treatment may be achieved by making everyone worse off.[60] At the very least, the Court frequently considers level-down remedies as viable options rather than viewing them, as Justice White did in his powerful *Palmer* dissent, as being "at war with the Equal Protection Clause."[61]

C. The Supreme Court's Current View: Sessions v. Morales-Santana

The Court decided a landmark case in 2017 involving a choice

58. *Palmer*, 403 U.S. at 224. To the contrary, the Court has since held that discriminatory intent is *necessary* to prevail on an equal protection claim. *See* Washington v. Davis, 426 U.S. 229, 241 (1976) (holding that disproportionate impact without "the necessary discriminatory . . . purpose" is insufficient); *see also* Pers. Adm'r v. Feeney, 442 U.S. 256 (1979) (citing *Davis* for the proposition that "a neutral law does not violate the Equal Protection Clause solely because it results in a . . . disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate," *id.* at 260, and holding that a discriminatory law must have been enacted "at least in part *because* of, not merely in spite of" its adverse effect, *id.* at 279 (emphasis added)).

59. *See* Hernandez v. Woodard, 714 F. Supp. 963, 970 (N.D. Ill. 1989) (observing that "[t]he Supreme Court has never expressly overturned *Palmer*, but it has all but done so" and citing *Davis* and *Hunter v. Underwood*, 471 U.S. 222 (1985), to show that "facially neutral laws may run afoul of the Equal Protection Clause if they are enacted or enforced with a discriminatory intent"). Notably, the Department of Justice cited *Palmer* for the proposition that government intent is irrelevant in its defense of the Trump Administration's "travel ban" on six countries with predominantly Muslim citizens in 2017. *See* Brief for Appellants at 46–47, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017) (No. 17-1351), *vacated sub nom.* Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.).

60. Brake, *supra* note 10, at 518.

61. *Palmer*, 403 U.S. at 240 (White, J., dissenting).

between equal treatment remedies: *Sessions v. Morales-Santana*.[62] The eponymous plaintiff in *Morales-Santana* moved to the United States from the Dominican Republic while young; his father was a United States citizen, but he nonetheless faced deportation. Under federal law, a child born outside the United States could gain citizenship if one of his parents was an American citizen and the other was not, provided that the citizen parent met a physical-presence requirement prior to the child's birth.[63] At the relevant time, the physical-presence requirement for all married parents and unwed fathers was five years.[64] Unwed mothers, however, were held to a less exacting standard: only one year of physical presence was necessary to grant citizenship to their children born abroad.[65]

Morales-Santana, whose father was an American citizen, brought an equal protection claim arguing that the government could not treat him differently than a similarly-situated person with a citizen *mother*.[66] The Supreme Court readily agreed that Congress's sex-dependent scheme was "incompatible with the requirement that the Government accord to all persons the equal protection of the laws."[67] It admonished Congress to create a standard "uniformly applicable to all children born abroad with one U.S.-citizen and one alien parent, wed or unwed," and required that, in the meantime, the current laws be enforced "in a manner free from gender-based discrimination."[68] But in considering a remedy for the plaintiff himself, the Court balked at the proposal of leveling up, explaining that it was "not equipped to grant the relief Morales-Santana seeks, *i.e.*, extending . . . the benefit . . . reserve[d] for unwed mothers."[69] In other words, while Congress was empowered to lower the

62. 137 S. Ct. 1678.

63. *See* 8 U.S.C. § 1401(g) (2012); *Morales-Santana*, 137 S. Ct. at 1686.

64. *See* 8 U.S.C. § 1409(a); *Morales-Santana*, 137 S. Ct. at 1687.

65. *See* 8 U.S.C. § 1409(c); *Morales-Santana*, 137 S. Ct. at 1687.

66. *Morales-Santana*, 137 S. Ct. at 1686. The plaintiff's father was only twenty days short of meeting the statutory physical-presence requirement. Had the plaintiff's mother been a citizen, the requirement would have been met.

67. *Id.*

68. *Id.*

69. *Id.* at 1698.

physical-presence requirement across the board, the Court could only *raise* it.

To explain this outcome, the Court returned to its familiar position in *Heckler* that level-down remedies could provide just as much relief for a constitutional remedy as their level-up counterparts.[70] While it once again stated that "the preferred rule in the typical case is to *extend* favorable treatment" when fashioning remedies, the Court declined to do so on the rationale that *Morales-Santana* was "hardly the typical case."[71] "The choice between . . . outcomes [wa]s governed by the legislature's intent, as revealed by the statute at hand,"[72] and on this issue Congress had spoken clearly by creating a five-year requirement for everyone except unwed mothers. The Court reasoned that leveling up would "would render the special treatment Congress prescribed . . . the general rule, no longer an exception,"[73] and thus only leveling down would faithfully preserve legislative intent and keep the exception from swallowing the rule. Like Murphy, Morales-Santana prevailed on his legal claim but was denied any practical relief. His "empty victory" resulted only in the denial to others of the favorable treatment he sought.[74]

Morales-Santana highlights the tensions behind the Court's indifferent attitude toward antidiscrimination remedies. Commentators and scholars have excoriated *Morales-Santana*'s "resurrect[ion]" of the *Palmer* level-down approach and underscored the limited ability of level-down remedies to provide redress.[75] It may be that the

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70. *Id.* (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979), and Heckler v. Mathews, 465 U.S. 728, 740 (1984), to emphasize that level-up and level-down remedies are both viable options to achieve equality).

71. *Id.* at 1701 (emphasis added) (footnote omitted).

72. *Id.* at 1699.

73. *Id.* at 1701.

74. Collins, *supra* note 8, at 171.

75. Thomas, *supra* note 10, at 177; *see also, e.g.*, *id.* at 178–80 (criticizing the outcome and level-down remedy of *Morales-Santana*); Sandy De Sousa, Comment, *An Analysis of* Sessions v. Morales-Santana*'s Implications on the Plenary Power Doctrine and the Supreme Court's Approach to Equal Protection Challenges*, 49 SETON HALL L. REV. 1123, 1151–55 (2019) (same); Linda Greenhouse, *Justice Ginsburg and the Price of Equality*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/opinion/ruth-bader-ginsburg-supremecourt.html [https://perma.cc/A6Y5-RXN7] ("Formal equality was achieved, to be

Court's recent decision in *Espinoza v. Montana Department of Revenue* is responsive to such concerns (at least in some First Amendment cases), and that the Court's "preference" for level-up remedies may become more than mere words.[76] But given the consistency of its past approach to remedies, the Court may not yet be ready to abandon wholly the logic of *Morales-Santana*.

II. A REMEDIAL APPROACH TO FREE EXERCISE EQUAL PROTECTION CASES

An analysis of the Supreme Court's remedies jurisprudence through *Morales-Santana* reveals two contradictory themes. First, the Court firmly maintains that "[h]ow equality is accomplished . . . is a matter on which the Constitution is silent," and therefore that no constitutional preference exists between level-up and level-down remedies.[77] The Court thus tends to give lower court judges relatively little guidance in constructing remedies for constitutional injuries. Second, the Court frequently states, at least in dicta, that level-up remedies are preferred.[78] But while it sometimes applies this preference in cases involving "federal financial assistance benefits,"[79] the Court is not firmly bound to this principle and has never fully explained its origin.[80]

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sure, but it was equality with a price—a high price for many."); Samuel, *supra* note 9 (calling the remedy portion of *Morales-Santana* "an early contender for the worst thing Justice Ginsburg has ever written for the Court" and lamenting that "[t]here is not a single human being whose life will be made better because of this opinion").

76. *See infra* Part III.C.

77. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698 (2017) (quoting Levin v. Commerce Energy, Inc., 560 U.S. 413, 426–27 (2010) (omission in original)).

78. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1699, 1701; Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984).

79. *Morales-Santana*, 137 S. Ct. at 1699 (collecting cases).

80. *See* Thomas, *supra* note 10, at 180 (commenting on "the Court's general, but unexplained, impression that leveling up is ordinarily the proper remedial course"). A third theme that emerges on viewing these cases is that deference to legislative intent is the favored course in choosing a remedy, though, like the apparent preference for level-up remedies, this rule has not been consistently applied or fully clarified. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1699 ("On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institutional competence, to implement what the

The tension between the Court's insistence that the Constitution is silent on remedies and its stated preference for level-up remedies is untenable. Even an observer with no legal training may be struck by the incongruity of "preferring" level-up remedies while simultaneously professing that the Constitution offers no justification for this practice. This Part argues that at least on Free Exercise Clause claims, the Constitution is not silent at all; instead, it provides the missing foundation for the Court's stated preference for level-up remedies.

A. The Constitutional Basis for a Level-Up Presumption

The Court's stated preference for level-up remedies makes sense only if it is grounded in the Constitution itself. Congress has passed no legislation that requires it. Indeed, in *Morales-Santana*, the Court interpreted the relevant statutory scheme to require a level-*down* remedy.[81] In the absence of statutory guidance, policy may sometimes support a level-up presumption—for instance, Professor Deborah Brake has argued that the "expressive meaning" of a level-down remedy may undercut any literal equality by "express[ing] selective disdain or disregard" for the people to whom it is applied, defeating the purpose of giving those people equal treatment in the first place.[82] But the problem with policy is that it cuts both ways; in *Morales-Santana*, the Court may have considered policy implications in selecting its *level-down* remedy.[83] The Court often quotes its own previous cases rather than citing policy-based or statutory reasons, hinting that stare decisis may justify its preference.[84] With the

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legislature would have willed had it been apprised of the constitutional infirmity." (quoting *Levin*, 560 U.S. at 427)). The role of deference to legislative intent in fashioning remedies demands further attention, but it is beyond the scope of this Note.

81. *See Morales-Santana*, 137 S. Ct. at 1699–1700.

82. Brake, *supra* note 10, at 571; *see id.* at 570–85.

83. *See* Collins, *supra* note 8, at 220–21 (arguing that the Court may have leveled down to avoid drawing attention to the citizenship issue in a political climate that could result in an outcome "disappointing to progressives").

84. *See, e.g.*, *Morales-Santana*, 137 S. Ct. at 1699 (quoting Califano v. Westcott, 443 U.S. 76, 89 (1979)).

possible exception of *Bennett*,[85] however, the Court's prior cases provide no more support for preferring level-up remedies than its more recent decisions have. If the basis is precedent, then it is precedent all the way down.

This leaves the Constitution as the only candidate for any level-up preference in fashioning remedies—and indeed, this makes intuitive sense. It is disingenuous to say that the Constitution has nothing to say about the enforcement of its own substantive rights; to do so would be tantamount to what Chief Justice Marshall described as "prescribing limits[] and declaring that those limits may be passed at pleasure."[86] If equal protection is to have any practical meaning, it must be that the law's protection, once extended, cannot be lightly withdrawn in cases of unconstitutional discrimination. This was the view expressed by the plaintiffs in *Palmer*, who argued not that it was "unconstitutional to close pools once opened . . . [but] that it was unconstitutional to close pools *for the purpose of avoiding desegregation*."[87] It is also the view apparently favored by the majority in *Espinoza*.[88] On this view, the Constitution prefers level-up remedies in cases where leveling down would gut its protections by denying guaranteed substantive rights.[89]

Even if the Constitution is the proper foundation for a level-up preference, however, it is still accurate to call such a preference a *presumption* rather than a rule. While *Palmer*-like cases of clear discrimination highlight the need to preemptively consider level-up remedies, there are circumstances that may still call for a level-down remedy. First, to preserve the power of courts to

85. *See supra* notes 45–44 and accompanying text.

86. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

87. Kennedy, *supra* note 56, at 205.

88. *See infra* Part III.C.

89. This Note does not break new ground in suggesting that the Constitution is the source of the Court's stated level-up presumption. *See, e.g.*, Thomas, *supra* note 10, at 197–208 (providing "a normative foundation for [a level-up] remedial presumption grounded in the meaning of equal protection and in the due process right to a meaningful remedy," *id.* at 180). Previous work grounding such a presumption in the Constitution, however, has never argued that Free Exercise Clause violations are foremost among the cases in which a constitutional level-up presumption applies. *Cf. infra* Part II.B.

meaningfully perform judicial review, level-down remedies must be on the table in many cases, for "no workable system of judicial review could function without a large role for severability."[90] Too many limits on judicial remedial power could "immunize from judicial review statutes that confer benefits unevenly."[91]

Second, some of those benefits may be simply impossible or impractical to extend to larger groups. The lesson of *Cumming*—that selecting among constitutional remedies can be a thorny problem—remains true.[92] The Court lacks the power to provide every benefit to every citizen. While fighting segregation, the Court held that federal courts had the power to order the opening of closed *public* schools to counteract a *Palmer*-like local policy,[93] but it likely could not have issued an order to establish a program offering *private* education to students regardless of race. In some sense, then, there are pragmatic limits to the Court's ability to choose remedies, and those limits may sometimes justify leveling down.

Third, the Court's deference to legislative intent affirms that Congress has the power to enact legislation prescribing specific remedial schemes, including level-down schemes. For example, Congress might create a program that gives financial support to people that meet certain requirements, but that also includes a *Heckler*-like severability clause. Such a clause would require a level-down remedy if any portion of the program were found unconstitutional. In this case, the Court would likely be justified in upholding a level-down remedy if it found that the program as applied was impermissibly discriminatory against certain groups. Insofar as such deference preserves the separation of powers and prevents judicial policymaking, it serves as a political safeguard that should not be

90. Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 370 (2007).

91. Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 303 (1979).

92. *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1701 & n.28 (2017) (grappling with the difficulty of fashioning a remedy and noting that "[t]he Court of Appeals found the remedial issue 'the most vexing problem in [the] case.'"(quoting Morales-Santana v. Lynch, 804 F.3d 520, 535 (2015), *aff'd in part, rev'd in part sub nom. Morales-Santana*, 137 S. Ct. 1678)).

93. Griffin v. Cty. Sch. Bd., 377 U.S. 218, 232–34 (1964).

discarded. Congress has wide constitutional latitude over the remedies it chooses to make (or not make) available, and courts generally must defer to legislative choices even where a given remedy may be less effective.[94]

B. Presumptive Level-Up Remedies for Religious Discrimination

A strong, indiscriminate level-up requirement is unlikely to emerge in American remedies jurisprudence in the near future.[95] Nevertheless, there are some constitutional rights for which a presumption to level up makes sense, even in the current legal culture. In particular, constitutional rights protected by the First Amendment are adjudicated against a legal backdrop that suggests "[t]he Constitution . . . is *not* always indifferent between extension and nullification"—that is, between leveling up and leveling down.[96]

One substantive right for which the Supreme Court has found underlying constitutional norms requiring a level-up remedial approach is freedom of speech.[97] As the Court famously stated in *New York Times Co. v. Sullivan*,[98] the constitutional guarantee of free speech exists to protect "uninhibited, robust, and wide-open" debate.[99] This protection would be inconsistent with a level-down remedy that, for example, prevented all speech in a public forum.

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94. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366–70 (1953) ("Congress necessarily has a wide choice in the selection of remedies, and . . . a complaint about action of this kind can rarely be of constitutional dimension." *Id.* at 1366). In rare cases, some constitutional protections may impose limits on congressional power to specify remedies; for example, "a defendant convicted under a law classifying on an impermissible basis may assail his conviction without regard to the manner in which the legislature might subsequently cure the infirmity." *Morales-Santana,* 137 S. Ct. at 1699 n.24.

95. The Court of Justice of the European Union, in contrast, follows a strict level-up remedial rule in all equal protection cases except those in which a legislature has enacted a specific remedy. Jerfi Uzman, *Upstairs Downstairs:* Morales-Santana *and the Right to a Remedy in Comparative Law*, 9 CONLAWNOW 139, 144–45 (2018).

96. Evan H. Caminker, Note, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1196 (1986).

97. *See, e.g.*, *id.* at 1194–96.

98. 376 U.S. 254 (1964).

99. *Id.* at 270.

Indeed, such a restrictive remedy would be unthinkable given the Court's commitment to protecting disfavored groups who seek to exercise their constitutional right to speak.[100] Free speech remedies thus tend to follow the rule of "more speech, not enforced silence"[101]—not because such a rule is mandated by statute or precedent, but because the Constitution itself requires it. The preference for level-up remedies is "suggested by an inchoate First Amendment norm underlying the doctrinal mandate of equal treatment."[102]

As in free speech cases, the equal protection claims in religious discrimination cases are "closely intertwined with First Amendment interests"[103] and therefore subject to the underlying norms that animate the Constitution's guaranteed rights. Such claims are intricately linked with a substantive right: that "Congress shall make no law . . . prohibiting the free exercise" of religion.[104] The First Amendment right to free exercise of religion "safeguards an affirmative right for believers to practice their religions—not just a negative right against governmental discrimination largely secured elsewhere by the Equal Protection and Due Process Clauses."[105]

Taken together, this combination of affirmative right and passive protection justifies a presumption that courts should level up when correcting equal protection violations that infringe upon the free exercise of religion. They should also carefully scrutinize *Palmer*-like level-down policies that may give rise to such violations, and invalidate them when necessary to provide relief.[106]

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100. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458 (2011) (affirming that First Amendment protection extends even to "offensive," "disagreeable," "misguided," and "hurtful" speech (citations omitted)).

101. Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

102. Caminker, *supra* note 96, at 1195.

103. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

104. U.S. CONST. amend. I.

105. Petition for a Writ of Certiorari at 15, Ricks v. Id. Bd. of Contractors (2019) (No. 19-66); *see also* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2277 (2020) (Gorsuch, J., concurring) ("The right to *be* religious without the right to *do* religious things would hardly amount to a right at all.").

106. *See infra* Parts III.B and III.C. A constitutional presumption for level-up remedies admittedly raises difficult questions of line-drawing. Which constitutional rights

While the relevant constitutional backdrop suggests that the state "may and should affirm enthusiastically that religious freedom is a good thing and that it should be not only protected, but also nurtured, by law and policy,"[107] the precise contours of that freedom are not fully settled. The fundamental meaning of "free exercise" remains a matter of debate.[108] At minimum, a presumption to level up in free exercise discrimination cases would require that the government remove state-imposed obstacles to the free exercise of religion. Despite such questions, however, the Supreme Court acknowledges the existence of uniquely protected free exercise

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demand a level-up presumption, and what factors or contexts justify its rebuttal? A full analysis of such questions is beyond the scope of this Note, which argues only: (1) such a presumption should exist in some cases, and (2) like free speech claims, equal protection claims implicating the affirmative First Amendment right to the free exercise of religion are particularly strong candidates for a level-up presumption. *Cf.* Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937) ("[W]herever the line may be, this . . . is within it. Definition more precise must abide the wisdom of the future.").

107. Richard W. Garnett, *Freedom "for" Religion: (Yet) Another View of the Cathedral*, *in* RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 21 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2019); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 9 (2000) ("The very text of the Constitution 'singles out' governmental acts respecting an establishment of religion or prohibiting the exercise of religion for special protections that are not accorded to any aspect of human life.").

108. For instance, the petitioner in *Murphy v. Collier* argued that the right guarantees him the opportunity to bring his own spiritual adviser into the execution chamber during his lethal injection. *See* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (Kavanaugh, J., statement respecting grant of application for stay) (mem.). But an even stronger conception of free exercise might argue that Murphy had a right to have the government *provide* a spiritual adviser regardless of his religious affiliation. Does the Constitution's command to avoid "prohibiting" free exercise mean that the government is obligated to provide the means necessary to enjoy it? If so, what limiting principles apply? Alternatively, the right to free exercise could be seen as a guarantee that the state will merely remove all barriers to the free exercise of religion. But here, too, there are questions—is the state then empowered to remove barriers erected by private parties? For contrasting views on the scope of the right, compare Richard W. Garnett, *Do Churches Matter? Towards an Institutional Understanding of the Religion Clauses*, 53 VILL. L. REV. 273 (2008) (emphasizing the importance of protecting religious infrastructure through the First Amendment), with David Pollack, *Is there a right to freedom* from *religion?*, *in* RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 63–75 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2019) (emphasizing the conflicts between the exercise of religious rights and other rights).

rights in *some* form. Laws treating religious adherents differently based on their "religious status" are subject to the "strictest scrutiny."[109] And in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[110] the Court held that a "difference in treatment" by a state agency possibly reflecting animus toward particular religious beliefs gave rise to a free exercise claim.[111] If the First Amendment contains *any* affirmative right to free exercise—even merely an obligation for the government to remove impediments of its own making—then a freedom-of-speech-like approach to fashioning remedies is warranted.

One important limit on the presumption in favor of level-up remedies is that it applies only to *judicial* remedies. Courts become "short-term surrogate[s] for the legislature" when crafting remedies, and should therefore be cautious that they do not abuse their limited power.[112] But legislatures should be given more leeway to consider alternative remedial schemes. Unlike courts, legislatures are well positioned to consider the pragmatic implications of a remedy and are firmly granted policymaking power.[113] They are also directly accountable to the people through a political process from which courts are, by design, insulated.[114] Perhaps most importantly, they are ultimately bounded by the safeguard of judicial review. Legislatures are beholden to the Constitution, and the constitutionality of laws can be tested in the courts. If legislatures enact

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109. *Espinoza*, 140 S. Ct. at 2260 ("[P]recedents have 'repeatedly confirmed' the straightforward rule that we apply today: When otherwise eligible recipients are disqualified from a public benefit 'solely because of their religious character,' we must apply strict scrutiny." (quoting Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017))).

110. 138 S. Ct. 1719 (2018).

111. *Id.* at 1731.

112. Ginsburg, *supra* note 91, at 317.

113. *Cf.* Joshua Dunn, *The Perils of Judicial Policymaking: The Practical Case for Separation of Powers*, HERITAGE FOUND. (Sep 23, 2008), https://www.heritage.org/political-process/report/the-perils-judicial-policymaking-the-practical-case-separation-powers [https://perma.cc/225Y-9ZLX] (arguing that the separation of powers and the prevention of judicial policymaking is a "check on tyranny" and essential to good government).

114. *See, e.g.*, THE FEDERALIST No. 78 (Alexander Hamilton).

a level-down remedy with the "object or purpose . . . [to] suppress[] religion or religious conduct," it will be found unconstitutional.[115] But for *judicially* created remedies that curtail religious freedom, there is often no second opinion.[116] Imposing reasonable limits on the judiciary's ability to create unique (and legally binding) solutions is therefore justified for reasons that do not extend to the legislature.

III. THE LEVEL-UP PRESUMPTION APPLIED

A constitutional presumption favoring level-up remedies in religious discrimination cases would affect plaintiffs in a wide variety of cases. This Part considers three areas of possible application: death row requests for religious advisers, religiously-affiliated student groups on college campuses, and educational funding.

A. Religious Discrimination on Death Row: Murphy v. Collier

Religious discrimination claims for death row inmates have recently become a frontier of equal protection law. Before deciding *Murphy*, the Supreme Court received an application in early 2019 to vacate a stay of execution imposed by the Eleventh Circuit in *Dunn v. Ray*.[117] Similarly to Murphy, Domineque Ray petitioned for a stay of execution because he would not be allowed to have a spiritual adviser of his faith in the execution chamber; the Alabama prison where Ray would be executed allowed only a Christian chaplain into the chamber, but Ray was a Muslim who wanted his imam to be present.[118] The Court allowed Ray's execution to proceed,

115. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

116. A higher court may sometimes review and reverse an improper level-down remedy imposed by a lower one, of course. The Supreme Court did just that in *Espinoza*. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020). But there is often no structural guarantee of independent review, particularly given the Supreme Court's discretionary docket.

117. 139 S. Ct. 661 (2019) (mem.).

118. *Id.* at 661 (Kagan, J., dissenting from grant of application to vacate stay). Ray's

offering a lone citation indicating that the request had not been submitted in a timely manner as rationale.[119] But Justice Kagan, joined by three of her colleagues in dissent, argued that the Court's decision was "profoundly wrong."[120] Acknowledging that prison security was a compelling state interest, she nonetheless found "no evidence to show that [a] wholesale prohibition on outside spiritual advisers is necessary to achieve that goal."[121] Commentators and news outlets largely sided with Justice Kagan, resulting in "bipartisan, ecumenical condemnation" of the Court's decision.[122]

Seven weeks later, the Court was faced with a virtually identical situation in *Murphy v. Collier*. But this time, Chief Justice Roberts and Justice Kavanaugh voted with the *Ray* dissenters to allow a stay of execution for Murphy.[123] Having upheld Murphy's claim, the Court was presented with an opportunity to address the proper remedy for a violation like those alleged by Ray and Murphy. Justice Kagan's dissent in *Ray* offered some simple alternatives to enable a level-up solution: for instance, the prison could provide

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constitutional arguments rested on an Establishment Clause claim. Nevertheless, cases like Ray's also implicate important free exercise concerns. The Fifth Circuit's analysis of the law emphasized the intertwined nature of Establishment Clause and Free Exercise Clause rights, *see* Ray v. Comm'r, 915 F.3d 689, 695 (2019), and the plaintiff in the factually similar case of *Murphy v. Collier* alleged a violation of the Free Exercise Clause, 942 F.3d 704, 706 (5th Cir. 2019). In a statement regarding *Murphy*, Justice Kavanaugh listed the Free Exercise Clause among the legal standards that the state's execution policy must satisfy. *See* Murphy v. Collier, 139 S. Ct. 1475, 1476 (2019) (Kavanaugh, J., statement respecting grant of application for stay) (mem.).

119. *Ray*, 139 S. Ct. at 661 (citing Gomez v. United States Dist. Ct. for N. Dist. of Cal., 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.")).

120. *Id.* at 661 (Kagan, J., dissenting from grant of application to vacate stay).

121. *Id.* at 662.

122. Frederick Mark Gedicks, Dunn v. Ray*: We Should Have Seen This Coming*, AM. CONST. SOC'Y (Feb. 15, 2019), https://www.acslaw.org/expertforum/dunn-v-ray-we-should-have-seen-this-coming/ [https://perma.cc/EJ67-E9G6]. For examples of such bipartisan criticism, compare *id.* with Nicole Kennedy & Collin Slowey, *What Can Dunn v. Ray Teach Us About Religious Freedom and Justice?*, INST. REL. FREEDOM ALL. (Mar. 18, 2019), http://irfalliance.org/what-can-dunn-v-ray-teach-us-about-religious-freedom-and-justice/ [https://perma.cc/GBC9-X7CJ].

123. *See Murphy*, 139 S. Ct. at 1476 (Kavanaugh, J., statement respecting grant of application for stay).

training for outside religious leaders or have them sign a pledge to abide by the prison rules.[124] But none of these options were pursued in *Murphy*. Instead, a concurrence by Justice Kavanaugh fell back on the Court's old habit of presenting level-up and level-down remedies as equally valid options:

> In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. . . .
>
> *[T]he choice of remedy going forward is up to the State.* What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.[125]

So long as the end result is that no denomination is treated differently than any other, Justice Kavanaugh suggested, equal treatment is achieved. This analysis was consistent with the Court's previous holdings, including those in *Palmer* and *Morales-Santana*. But like those cases, it ultimately failed to guarantee Murphy's right to free exercise in a meaningful way. Rather than allow Murphy's adviser into the execution chamber, the state of Texas chose to disallow *all* religious advisers from being present.[126] Consequently, Murphy filed an amended complaint two weeks later alleging further discrimination based on the amount of time he was allowed to spend

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124. *Ray*, 139 S. Ct. at 662 (Kagan, J., dissenting from grant of application to vacate stay) ("Why couldn't Ray's imam receive whatever training in execution protocol the Christian chaplain received? . . . Why wouldn't it be sufficient for the imam to pledge, under penalty of contempt, that he will not interfere with the State's ability to perform the execution?").

125. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in grant of application for stay) (emphasis added) (citation omitted).

126. *See* Murphy v. Collier, 942 F.3d 704, 706 (5th Cir. 2019).

with his adviser.[127] The Fifth Circuit allowed a further stay on Murphy's execution, finding "a strong likelihood of success on the merits of his claim that the [state] policy violates his rights."[128] The question whether a categorical ban on religious advisers in the execution chamber is constitutionally permissible remains undecided, though some Justices have since found it unlawful in cases governed by the Religious Land Use and Institutionalized Persons Act (RLUIPA).[129]

Had the Supreme Court viewed Murphy's claim as an equal protection claim based on First Amendment rights and presumptively granted a level-up remedy, further litigation would have been unnecessary. Murphy, and other prisoners who would later rely on his precedent, would have enjoyed constitutional protection for the "guidance of the soul at the moment of execution."[130] Instead, future inmates who have the misfortune of adhering to a faith other than that favored by established prison policy may someday face their executions alone, as Ray did—not because their claims will be rejected, but because even a legal victory may make no difference.

B. Religious Discrimination on University Campuses: Business Leaders in Christ v. University of Iowa

Murphy provides an example of one religious group being

127. *Id.* Christian inmates were allowed "a single hour" more of total time with a Christian chaplain than non-Christian inmates were with their spiritual advisers. *Id.* at 710 (Elrod, J., dissenting).

128. *Id.* at 708.

129. In early 2021 the Court declined to vacate a stay of execution in Alabama, which banned all religious advisers in the execution chamber. Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.). Applying strict scrutiny under RLUIPA, four Justices explained that in their view, the state could not "carr[y] its burden of showing that the exclusion of all clergy members from the execution chamber is necessary to ensure prison security." *Id.* at 725 (Kagan, J., concurring in denial of application to vacate injunction). Justice Kavanaugh, joined by the Chief Justice, argued that the state's policy was "non-discriminatory" and served the state's compelling safety interests. *Id.* at 726 (Kavanaugh, J., dissenting from denial of application to vacate injunction). Neither opinion considered the constitutional questions raised by *Murphy*.

130. Brief Amicus Curiae for The Becket Fund for Religious Liberty in Support of Petitioner at 22, *Murphy*, 139 S. Ct. 1475 (No. 18A985).

preferred above another—what Justice Kavanaugh referred to as "denominational discrimination."[131] Increasingly more common, however, is another type of discrimination: preference of nonreligious people or groups over religious ones.

Business Leaders in Christ v. University of Iowa (*BLinC*)[132] is one such case. In 2014, a group of students founded the Business Leaders in Christ (BLinC) group at the University of Iowa and gained recognition as an on-campus organization.[133] The group's purpose was "to create a community of followers of Christ" and "to share and gain wisdom on how to practice business that is both Biblical and founded on God's truth."[134] As part of this mission, BLinC required its leaders to adhere to certain religious beliefs, including the group's "biblically based views on sexual conduct."[135] In February 2017, a gay student filed a complaint with the University of Iowa claiming that he had been denied a leadership position in BLinC because of his sexual orientation and asking that the University "[e]ither force BLinC to comply with the non-discrimination policy ([and] allow openly LGTBQ members to be leaders) or take away their status of being a student organization."[136]

After an investigation and a series of unsuccessful negotiations, the University of Iowa deregistered BLinC.[137] In response, BLinC immediately filed suit and requested an injunction ordering the University of Iowa to reinstate it as an on-campus organization.[138] Noting that the loss of First Amendment freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury,"[139] the district court granted the injunction based on "the

131. *Murphy*, 139 S. Ct. at 1475 (Kavanaugh, J., concurring in grant of application for stay).

132. 360 F. Supp. 3d 885 (S.D. Iowa 2019).

133. Bus. Leaders in Christ v. Univ. of Iowa, No. 17-cv-00080, 2018 WL 4701879, at *2 (S.D. Iowa Jan. 23, 2018).

134. *Business Leaders in Christ*, UNIV. OF IOWA, https://tippie.uiowa.edu/student-organizations/business-leaders-christ [https://perma.cc/5U4K-DQER].

135. *Bus. Leaders in Christ*, 2018 WL 4701879, at *3.

136. *Id.*

137. *BLinC*, 360 F. Supp. 3d at 892–93.

138. *Bus. Leaders in Christ*, 2018 WL 4701879, at *6.

139. *Id.* at *15 (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). The district court

University's selective enforcement of an otherwise reasonable and viewpoint neutral nondiscrimination policy," [140] observing that other groups with differing beliefs had apparently not been subject to the same scrutiny. Six months later, the court granted a renewal of the injunction because developing facts revealed that "a large number of student organizations were operating in violation of the University's stated policies" when it had chosen to deregister BLinC and that "[t]he University [did] not reconcile that fact with how the proceedings against BLinC were carried out."[141]

In response, the University of Iowa opted for a level-down policy shift. In 2018, it "scrub[bed] the campus" of groups that maintained leadership requirements it deemed violative of its nondiscrimination policy, eliminating thirty-nine groups in an attempt to enforce the policy more consistently.[142] But the University did not apply this harsher standard to many nonreligious groups such as fraternities and sororities, creating a disparity in treatment that disfavored religious organizations as compared to their peer groups.[143] Seeing that the University had doubled down on its inconsistent enforcement measures, another religious student group—InterVarsity Christian Fellowship (ICF)—filed a separate complaint parallel to BLinC's.[144]

Rulings in both cases arrived in 2019. When the court issued its *BLinC* decision in February 2019, it harshly criticized the University of Iowa's selective enforcement measures, holding that the university's deregistration of BLinC was subject to strict scrutiny under the Free Exercise Clause and that the University's policy failed

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specifically pointed to the immediate possible losses of "freedoms of speech and expressive association," but the religious issues in the case are difficult to ignore. *Id.*

140. *Id.* at *1.

141. Bus. Leaders in Christ v. Univ. of Iowa, No. 17-cv-00080, 2018 U.S. Dist. LEXIS 131934, at *3–4 (S.D. Iowa June 28, 2018).

142. *See InterVarsity Christian Fellowship v. University of Iowa*, BECKET (Apr. 4, 2019), https://www.becketlaw.org/case/intervarsity-christian-fellowship-v-university-iowa [https://perma.cc/4S3D-PVYZ].

143. *See* InterVarsity Christian Fellowship v. Univ. of Iowa, 408 F. Supp. 3d 960, 969–70, 980 (S.D. Iowa 2019).

144. *See id.* at 974.

under such scrutiny.[145] The court granted BLinC a permanent injunction,[146] emphasizing that the selective enforcement of a nondiscrimination policy against groups holding certain religious views was unlawful: "[t]he Constitution does not tolerate the way [the University] chose to enforce the Human Rights Policy."[147] Seven months later, the district court also issued a ruling favorable to ICF, condemning the university's actions in even stronger language:

> [Representatives of the University] proceeded to broaden enforcement of the Human Rights Policy in the name of uniformity—applying extra scrutiny to religious groups in the process—while at the same time continuing to allow some groups to operate in violation of the policy and formalizing an exemption for fraternities and sororities. The Court does not know how a reasonable person could have concluded this was acceptable, as it plainly constitutes the same selective application of the Human Rights Policy that the Court found constitutionally infirm in the preliminary injunction order.[148]

The court denounced the University of Iowa's attempt to level down by enforcing its Human Rights Policy more harshly against religious groups while carving out formal exceptions for nonreligious organizations such as fraternities and sororities. While its analysis also focused on free speech concerns,[149] the court's reasoning in both the BLinC and ICF suits strongly supports the rationale behind a level-up presumption for equal protection claims where

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145. Bus. Leaders in Christ v. Univ. of Iowa (*BLinC*), 360 F. Supp. 3d 885, 899–903 (S.D. Iowa 2019).

146. *See id.* at 905–06.

147. *Id.* at 909.

148. *InterVarsity Christian Fellowship*, 408 F. Supp. 3d at 993. The court also noted that while university officials had "understood the preliminary injunction to mean that the university *could not selectively enforce* the Human Rights Policy against some [student organizations] but not others," *id.* at 993 (emphasis added), they had nonetheless chosen to do just that and therefore were not entitled to qualified immunity against damages claims. *See id.* at 994.

149. *See BLinC*, 360 F. Supp. 3d at 906 ("Defendants have violated Plaintiff's constitutional rights to free speech, expressive association, and free exercise of religion.").

religious groups are treated differently than nonreligious ones. It also demonstrates that voluntary leveling down should not always be blindly accepted by courts as a good-faith effort (as it was in *Palmer*). Instead, it should be carefully scrutinized when circumstances suggest, as they did in *BLinC*, that a level-down remedy was chosen solely to deny benefits on account of a plaintiff's religious character. This same logic would undergird the Supreme Court's ruling in *Espinoza v. Montana Department of Revenue* the following year.

C. Religious Discrimination in Educational Funding: Espinoza v. Montana Department of Revenue

Espinoza is a forceful rejection of level-down remedies in cases involving free exercise violations. The case involved a conflict between the Montana Constitution and a scholarship program enacted by the state legislature. Under the program, Montana citizens could receive up to $150 in tax credit for donations made to qualifying scholarship funds for students at private schools.[150] The Montana Department of Revenue realized, however, that the tax program conflicted with a state constitutional provision prohibiting "any direct or indirect appropriation or payment" to aid any "sectarian" (that is, religiously-affiliated) institution.[151] (Such provisions are often called "Blaine Amendments," named for the nineteenth-century senator who, taking advantage of widespread anti-Catholic prejudice, attempted to introduce a similar amendment into the United States Constitution.)[152] To avoid invalidation of the program under Montana's Blaine Amendment, the state Department of Revenue promulgated a rule excluding religiously-

150. *See The Supreme Court, 2019 Term—Leading Cases*, 134 HARV. L. REV. 410, 470 (2020).

151. MONT. CONST. art. X, § 6.

152. *See* Philip Hamburger, *Prejudice and the Blaine Amendments*, FIRST THINGS (June 20, 2017), https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments [https://perma.cc/4TRJ-V3TJ]. Thirty-eight states have Blaine Amendments in some form. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2037 & n.10 (2017) (Sotomayor, J., dissenting).

affiliated schools from the tax credit program.[153] This created an obvious equal protection problem: religious schools could not receive any scholarship funds, while nonreligious schools could. Accordingly, plaintiffs with children attending religiously-affiliated schools brought suit.[154]

The trial court held that the tax program did not require a discriminatory rule to avoid conflict with the Montana Constitution because a tax credit did not qualify as an "appropriation or payment" under the state constitution. It therefore decided in favor of the plaintiffs and enjoined the state from enforcing its discriminatory rule—a level-up remedy that would have placed religiously-affiliated schools on the same footing as their nonreligious counterparts.[155] On appeal, however, the Montana Supreme Court chose the opposite route, holding that the entire tax credit program was unconstitutional under Montana's Blaine Amendment and that the Department of Revenue could not save it by enacting a discriminatory rule.[156] In essence, the Montana Supreme Court reversed the district court's remedy and enacted a level-down remedy in its place, denying even *nonreligious* schools the benefit of the tax-credited scholarship.

The Supreme Court reversed.[157] The Court had established in previous cases that "expressly denying a qualified religious entity a public benefit solely because of its religious character" violated the Free Exercise Clause.[158] But *Espinoza* allowed the Court to take the next step: it now held that a judicial level-down remedy designed to prevent public benefits from reaching qualified religious entities is *also* unconstitutional. Observing that the level-down remedy was justified only by a Blaine Amendment that itself violated the Free Exercise Clause, Chief Justice Roberts rejected the argument that leveling

153. *See* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 606 (Mont. 2018).

154. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2252 (2020).

155. *See Espinoza*, 435 P.3d at 608.

156. *See id.* at 615.

157. *See Espinoza*, 140 S. Ct. at 2263.

158. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

down "put all private school parents in the same boat."[159] Rather, a level-down remedy here served only to ensure that the plaintiffs could not exercise their rights:

> The program was eliminated by a court, and not based on some innocuous principle of state law. Rather, the Montana Supreme Court invalidated the program pursuant to a state law provision that expressly discriminates on the basis of religious status. . . . [S]eeing no other "mechanism" to make absolutely sure that religious schools received no aid, the court chose to invalidate the entire program. . . . [But] the elimination of the program flowed directly from the Montana Supreme Court's failure to follow the dictates of federal law [under the Free Exercise Clause]. . . .[160]

The Supreme Court's ruling in *Espinoza* is a clear signal to lower courts that level-down remedies designed to prevent the exercise of constitutional rights are "'odious to our Constitution' and 'cannot stand.'"[161] The Montana Supreme Court reasoned that because the state's Blaine Amendment required that no money be granted to religious schools, no program contemplating such a possibility could be constitutional.[162] But its remedy denied benefits to all Montana schools expressly to avoid granting them to religiously-affiliated ones—exactly like the pool closings in *Palmer*. Such a remedy would have served to entrench the underlying problem rather than cure it. As Justice Alito pointedly observed in his concurrence, "[t]he argument that the [level-down] decision below treats everyone the same is reminiscent of Anatole France's sardonic remark that '[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'"[163] The First Amendment requires

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159. *Espinoza*, 140 S. Ct. at 2262 (quoting *id.* at 2281 (Ginsburg, J., dissenting)). Three dissenters would have found the Montana Supreme Court's remedy sufficient. *See id.* at 2281 (Ginsburg, J., dissenting) (joined by Justice Kagan); *id.* at 2293 (Sotomayor, J., dissenting).

160. *Id.* at 2262 (majority opinion).

161. *Id.* at 2263 (quoting *Trinity Lutheran*, 137 S. Ct. at 2025).

162. *See* Espinoza v. Mont. Dep't of Revenue, 435 P.3d 603, 611–14 (2018).

163. *Espinoza*, 140 S. Ct. at 2274 (Alito, J., concurring) (quoting JOHN COURNOS, A MODERN PLUTARCH 35 (1928)).

more respect for free exercise rights than the Montana Supreme Court's level-down remedy could provide.

CONCLUSION

The Supreme Court has often suggested that level-up remedies are preferred to level-down remedies, but it has never given a legal foundation for that assertion. The most likely source of the preference for level-up remedies is the Constitution itself, at least when expressly guaranteed substantive rights are at issue. While it is an open question how far a constitutional level-up presumption extends, claims of religious discrimination inextricably intertwined with underlying free exercise concerns are certainly included. The First Amendment guarantees an affirmative right to religious free exercise that goes beyond mere nondiscrimination, and this right justifies a presumption that courts turn to level-up remedies where religious freedom is concerned.

The idea that "equal treatment" can be achieved through denying as well as extending rights translates all too easily into pyrrhic victories. While leveling down may technically eliminate disparities between groups, it is often no relief in any real sense of the word; "[m]isery loves company, but not that much."[164] To insist on leveling down in the name of equality calls to mind the warning words of Alexis de Tocqueville: "They call for equality in freedom; and if they cannot obtain that, they still call for equality in slavery."[165] At least where religious liberty, our "first freedom,"[166] is concerned, the Constitution guarantees the former.

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164. Karlan, *supra* note 10, at 2028.

165. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 97 (Henry Reeve trans., Alfred A. Knopf 1945) (1840).

166. *See* Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1244 (2000).