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The Constitution, Invasion, Immigration, and the War Powers of States

Robert G. Natelson,[1] Andrew T. Hyman[2]

ABSTRACT

By express and implied reservation, the Constitution permits states to wage defensive war and take other military action in response to invasion, insurrection, and transnational criminal gangs. This article examines the under-researched area of state war powers and how they interact with federal military and other foreign affairs powers. It also recovers the meaning of the Constitution's term "invasion" and demonstrates that several judicial decisions have construed that term far too narrowly. The article ends with reflections on justiciability and remedies in state war power cases.

KEYWORDS

constitutional law, Constitution, allegiance, invasion, immigration, state war powers, Articles of Confederation, aliens

CONTENTS

[1] Professor of Law (ret.) the University of Montana; Senior Fellow in Constitutional Jurisprudence, the Independence Institute (Denver). Professor Natelson is the author of, among many other works, The Original Constitution: What It Actually Said and Meant (3d ed., 2015) and The Law of Article V (2d ed., 2022). Professor Natelson is responsible for this article's translations from the Latin language.

[2] J.D. and Executive Director, The Institute for Intermediate Study. Both authors express gratitude for assistance from Michael Ramsey, Warren Distinguished Professor of Law and Director, International & Comparative Law Programs, at the University of San Diego; Andrew Morriss, former Dean and Professor of Law, Texas A&M University; David Kopel, Research Director, the Independence Institute and Adjunct Professor of Law, Sturm College of Law, the University of Denver; Marsha Frey, Professor Emerita of History, Kansas State University; and Keith R. Obert, J.D., Monroe, Connecticut. Errors and opinions are exclusively those of the authors.

I. Introduction[3]

A. The Subject

Recent events at the southern border of the United States have raised controversy about whether, and to what extent, states may respond without federal cooperation. Central to the controversy are two constitutional questions: (1) Upon ratification of the Constitution, did any state sovereign war powers survive, or was all such authority ceded to the federal government? and (2) if any state war powers did survive, what is their scope?

Thus far, scholarship and Supreme Court jurisprudence have provided no clear answers to those questions.[4] This article tackles them.

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[3] Bibliographical Footnote: This note collects secondary sources employed more than once in this article. For multiple-edition works available to the Founders, we usually cite the latest accessible edition issued before the 1787-1790 ratification debates.
Matthew Bacon, A New Abridgment of the Law (5th ed. 1786) (5 vols.) [hereinafter Bacon]
Nathan Bailey, A Universal Etymological English Dictionary (25th ed. 1783) [hereinafter Bailey]
Timothy Cunningham, A New and Complete Law-Dictionary (3d ed. 1783) (2 vols.) [hereinafter Cunningham]
The Documentary History of the Ratification of the Constitution (John P. Kaminski et al. eds., 1976-2023) (41 vols.) [hereinafter Documentary History]
The Records of the Federal Convention (Max Farrand ed., 1939) [hereinafter Farrand]
Hugo Grotius, The Rights of War and Peace (Richard Tuck ed., 2005) (John Morrice trans., 1738) (1625), (3 vols.) [hereinafter Grotius]
Matthew Hale, The History of the Pleas of the Crown (1778) (2 vols.) [hereinafter Hale]
Samuel Johnson, A Dictionary of the English Language (8th ed. 1786) [hereinafter Johnson]
Journal of the Continental Congress 1774-1789 (Gaillard Hunt ed., 1912) [hereinafter JCC]
James Madison, The Report of 1800, Founders Online, https://founders.archives.gov/documents/Madison/01-17-02-0202 [hereinafter Madison, Report]
Alfred Mathews, Ohio and Her Western Reserve (1902) [hereinafter Mathews]
Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution's Define and Punish Clause*, 11 Br. J. Am. Leg. Studies 209 (2022) [hereinafter *Natelson, Define and Punish*]
Samuel Pufendorf, Of the Law of Nature and Nations (Basil Kennett trans., 1739) (1672) [hereinafter Pufendorf, Nature]
Samuel Pufendorf, The Whole Duty of Man, According to the Law of Nature (Andrew Tooke trans., 1691) (Ian Hunter & David Saunders eds., 2003) [hereinafter Pufendorf, Duty]
Thomas Sheridan, A Complete Dictionary of the English Language (2d ed. 1789) [hereinafter Sheridan]
Emer de Vattel, The Law of Nations (J. Newbery et al. eds., 1760) (1758) (2 vols.) [hereinafter Vattel]

[4] One of the few, and perhaps the only, law journal article dedicated to state war powers is a student comment: Heather Dwyer, *The State War Power: A Forgotten*

B. Background Information: The British Empire and Our Sources

Nearly all the leading Founders had been born and raised under the British flag—either in the North American colonies, Britain, Ireland, or (as in the case of Alexander Hamilton) the British Caribbean. Understanding the Constitution they adopted requires some information on the empire they had inhabited.

The island of Great Britain consisted (as it still consists today) of England, Wales, and Scotland. England and Wales had been united for legal purposes in the sixteenth century. The English and Scottish Crowns were conjoined upon the accession of James I in 1603, but England and Scotland remained separate kingdoms, each with its own parliament. Then in 1707, both parliaments passed Acts of Union, thereby creating the Kingdom of Great Britain with a common British Parliament. Within those limitations, Scotland retained its own legal system, as it does today.[5]

After the territorial losses from the American Revolution, the Empire encompassed the following territories: the island of Great Britain along with small nearby islands, Ireland, Canada, much of India, Bermuda, an incipient colony in and near Australia, and valuable Caribbean islands, including the Bahamas, Jamaica, and Trinidad.

Most colonies enjoyed at least some degree of self-governance, but they usually fashioned their institutions from English (rather than Scottish or Irish) models. Some core legal concepts (such as "allegiance," discussed below in Part IV), were common to the entire empire.

As might be expected, the Constitution's language and structure were influenced heavily by English jurisprudence.[6] One subdivision of that jurisprudence was the *law of nations*, which today we call international law. A subdivision of the law of nations was the *law of war*. For information on the law of nations, including the law of war, English lawyers, judges, and commentators relied principally on a handful of authoritative European treatises,[7] as well as on their own legal precedents.

To assist in reconstructing the Constitution's meaning, we draw heavily on the European "law of nations" treatises and on Anglo-American case reports, law dictionaries, digests, and other legal works used by Founding-era lawyers. We also draw on contemporaneous lay dictionaries and other literary sources.

Constitutional Clause, 33 U. La Verne L. Rev. 319, 320 (2012) (claiming the existence of a "Constitutionally derived State War Power"). Outside the realm of formal scholarship is Mark Brnovich, *The Federal Government's Duty to Protect the States and the State's Sovereign Power of Self Defense When Invaded*, Op. Ariz. A.G. No. I22-001 (Feb. 27, 2022), http://perma.cc/EBG8-VZ9D (concluding that certain activities at the southern border qualify as an "invasion" as the Constitution uses the term); Joshua Treviño, Tex. Pub. Pol. Inst., The Meaning of Invasion Under the Compact Clause of the U.S. Constitution (2022), https://www.texaspolicy.com/wp-content/uploads/2022/11/2022-11-RR-SST-CompactClause-JoshuaTrevino-paper5-.pdf (concluding that certain activities at the southern border qualify as an "invasion" as the Constitution uses the term).

5 Scotland recovered its own parliament in 1999.

6 Robert G. Natelson, *Did the Constitution Grant the Federal Government Eminent Domain Power? Using Eighteenth Century Law to Answer Constitutional Questions*, 19 Fed. Soc'y Rev. 88 (2018).

7 *Natelson, Define and Punish, supra* note 3, at 217-25 (documenting the popularity of the international law treatises cited here).

Courts and lawyers typically refer to Article I, Section 10 of the Constitution as the Compact Clause and Article IV, Section 4 as the Guarantee Clause. Our examination, however, focuses only on selected components of those two provisions. To increase precision, we identify the relevant components as follows: The *Self-Defense Clause* is the part of the Compact Clause that provides, "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[8] The *Protection From Invasion Clause* is the part of the Guarantee Clause that provides, "The United States . . . shall protect each of them [i.e., the states] against Invasion."[9] The *Domestic Violence Clause* is the segment of the Guarantee Clause that reads, "The United States . . . shall protect each of them [i.e., the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[10]

II. The Law of War at the Founding

A. Definitions and Categories of War

The Founders' international law authorities recognized that the term "war" could describe episodes of combat, but for legal purposes they defined it as a continuous state or condition. Hugo Grotius defined war as "the State or Situation of those . . . who Dispute by Force of Arms."[11] Emer de Vattel described it as "that state in which a nation prosecutes its right by force."[12] For a state of war to exist, actual fighting was not necessary.[13]

Wars were classified as private, public, or mixed.[14] A *private war* was prosecuted solely by private parties.[15] Purely private conflict was a subject for natural law or ordinary civilian law, not for the law of nations.[16] In a *public war* all contending parties were sovereigns.[17] *Mixed war* was a clash between a sovereign and private

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8 U.S. Const. art. I, § 10, cl. 3; *cf.* United States v. Abbott, No. 1:23-CV-853-DAE, slip op. at 31 (W.D. Tex. Sep. 6, 2023).

9 U.S. Const. art. IV, § 4, cl. 2; *cf*. Scott R. Bauries, *The Education Duty*, 47 Wake Forest L. Rev. 705, 715 n.44 (2012) (arguing that the Protection From Invasion Clause should not be amalgamated with the preceding provision).

10 U.S. Const. art. IV, § 4, cl. 2.

11 1 Grotius, *supra* note 3, at 134.

12 2 Vattel, *supra* note 3, at 1.

13 1 Grotius, *supra* note 3, at 134; Vaughan's Case (1696) 91 Eng. Rep. 535, 536; 2 Salk. 634, 635 (K.B.) (asserting that a state of war does not require actual fighting).

14 1 Grotius, *supra* note 3, at 240 ("Mixed war is that which is made on one Side by publick Authority, and on the other by mere private Persons.").

15 Grotius recognized even combats among single individuals as "war." 1 Grotius, *supra* note 3, at 135.

16 2 Vattel, *supra* note 3, at 1.

17 *Id.* ("*Public war* is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order . . .*private war*, or that carried on between particulars, or private individuals, properly belonging to the law of nature.") (Italics in original). Pufendorf called public war "solemn war," Pufendorf, Nature, *supra* note 3, at 839.

persons,[18] such as international criminals of the kind denominated "enemies of the human race."[19]

A war could be offensive and just, offensive and unjust, defensive and just, or—in rare cases—defensive and unjust.[20] The mark of a *just war* was that it was a final resort for preventing, obtaining compensation for, or avenging injury.[21] Aggression for the sake of gain, conquest, or glory was unjust.[22]

A *defensive war* was one waged to prevent injury.[23] Usually a party engaged in defensive war was not the first to strike, but defensive war could include a preemptive strike to forestall an imminent assault.[24] A party also engaged in defensive war if he attacked because he was "often alarm'd and harass'd with sudden Incursions upon him, the Enemy retiring always when he appears to oppose him."[25]

Offensive wars were fought to seek compensation for perceived injury or to deter the enemy from inflicting anticipated injury.[26] For an offensive war to be considered lawful, those motivations were necessary; otherwise, the attack was unlawful—akin to robbery—and a nation assaulted in that way was not obliged to observe the rules of war in fighting off the assailant.[27]

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18 1 Grotius, *supra* note 3, at 250 ("But a publick War not Solemn, may be made both without any Formality, and against mere private Persons, and by the Authority of any Magistrate whatever").

19 *See infra* Part II (C) for "enemies of the human race." Pufendorf used the term "less solemn war" to denote either an undeclared war or one against private persons, as in defending against the "Incursion or Depredation of Robbers." Pufendorf, Nature, *supra* note 3, at 839-40.

20 2 Vattel, *supra* note 3, at 35 ("[B]ut this is a case very rarely known among nations. There are few defensive wars without at least some apparent reason for warranting their justice and necessity").

21 *Id.* at 11 ("Let us then say in general, that the foundation or cause of every just war is injury, either already done or threatned" [*sic*]). *See also* Pufendorf, Nature, *supra* note 3, at 834:

> The Causes of just War may be reduc'd to these three Heads: First, To defend ourselves and Properties against others that design to do us Harm, either by assaulting our Persons, or taking away or ruining our Estates. Secondly, To assert our Rights when others, who are justly obliged, refuse to pay them to us. And lastly, To recover Satisfaction for Damages we have injuriously sustained, and to force the Person that did the Injury, to give Caution [security] for his good Behaviour for the future.

22 Pufendorf, Nature, *supra* note 3, at 836 (listing unjust causes of war).

23 1 Vattel, *supra* note 3, at 143 ("[T]he right of a just defence, which belongs to every nation; or the right of making use of force against whoever attacks it, and its privileges. This is the foundation of a defensive war.").

24 *Id.* at 835 (describing as "defensive" an attack when one is "assured that his Enemy hath form'd designs against him, and so disables him for the Attempt, while he is making his Preparation").

25 *Id.*

26 1 Vattel, *supra* note 3, at 143 ("the right to obtain justice by force, if we cannot obtain it otherwise, or to pursue our right by force of arms. This is the foundation of an offensive war").

27 3 *Id*.

Under the law of nations, only a sovereign was privileged to make war or to delegate the power to do so.[28] The sovereign designated the precise officials empowered to begin a war, who might be agents of subordinate units of government.[29] Even without an express authorization, the governor of a political subdivision had implied authority to defend against invaders or insurrectionists.[30] He was not, however, "rashly to carry the War into an Enemy's Country."[31]

Initiation of hostilities might be signaled by a declaration of war—sometimes called a "denunciation," after *denuntio*, the Latin word for a declaration of war. A declaration was not required for a defensive war, but was expected for an offensive one.[32] Hostilities supported by a declaration were referred to as "formal" or "solemn," from the Latin *solemnis*, a word associated with ceremony.[33]

B. The Means of War

A just war empowered the sovereign to undertake nearly all means necessary to accomplish its purpose of preventing or repairing injury or forestalling future injury.[34] ("Nearly all means" because some, such as assassination and poisoning, were prohibited by the law of war.)[35] Vattel wrote of defensive conflicts:

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28 2 Vattel, *supra* note 3, at 2 ("Thus the sovereign power has alone authority to make war").

29 1 Grotius, *supra* note 3, at 253 ("But it may happen, that in a very large State, the inferior Powers may have Authority granted them to begin a War; which, if so, then the War may be reputed [i.e., reckoned] as made by the Authority of the Sovereign Power: *For he that gives to another the Right of doing a Thing, is esteemed the Author of it."* (Italics in original)).

30 *Id.* at 250-51 ("every Magistrate seems to have as much Right, in case of Resistance, to take up Arms in order to execute his Jurisdiction, as to defend the People committed to his Protection.").

31 Pufendorf, Duty, *supra* note 3, at 241.

32 2 Vattel, *supra* note 3, at 22-23. *But see* The Federalist No. 25, N.Y. Packet, Dec. 21, 1787 (Alexander Hamilton), *reprinted in* 15 Documentary History, *supra* note 3, at 62 (claiming that "the ceremony of a formal denunciation of war has of late fallen into disuse"). Hamilton's conclusion is buttressed by Georg Friedrich Martens, whose international law treatise was composed in French contemporaneously with the Constitution's adoption, but not translated into English until 1795. Georg Friedrich von Martens, Summary of the Law of Nations 274 (Wm. Cobbett trans., 1795) ("The universal law of nations acknowledges no general obligation of making a declaration of war to the enemy, previous to the commencement of hostilities"). A declaration "to the enemy" must be distinguished from one directed at all or some of the sovereign's own people.

33 Pufendorf, Duty, *supra* note 3, at 240 ("Solemn or formal wars are those marked by a declaration"). Another distinction was between *perfect* and *imperfect* war. The former entirely disrupts the tranquility of a state, whereas the latter interrupts public tranquility only in certain particulars. Michael D. Ramsey. The Constitution's Text in Foreign Affairs 246 (2007).

34 2 Vattel, *supra* note 3, at 47-48:

> For when the end is lawful, he who has a right to prosecute this end is warranted in the use of all necessary means to attain it . . . On a declaration of war, therefore, this nation has a right of doing against the enemy whatever is necessary to this justifiable end of bringing him to reason, and obtaining justice and security from him.

35 *Id.* at 56.

> The enemy attacking me unjustly, gives me an undoubted right of repelling his violences; and he who opposes me in arms, when I demand only my right, becomes himself the real aggressor by his unjust resistance . . . For if the effects of this force proceed so far as to take away his life, he owes the misfortune to himself; for if by sparing him I should submit to the injury, the good would soon become the prey of the wicked. Hence the right of killing enemies in a just war is derived; when their resistance cannot be suppressed, when they are not to be reduced by milder methods, there is a right of taking away their life . . . . But the very manner by which the right of killing enemies is proved, points out also the limits of this right. On an enemy's submitting and delivering up his arms, we cannot with justice take away his life.[36]

Besides killing enemies who refuse to surrender their arms, a belligerent could capture them,[37] hold them for ransom,[38] make reprisals in certain circumstances,[39] execute war criminals,[40] and seize enemy property.[41] The belligerent could seek out enemies in their territory, in its own territory, or in areas belonging to no one.[42] It could prosecute for treason any of its own subjects caught assisting the enemy.[43] The belligerent also could take many defensive measures that are characteristic of war but which by themselves would fall short of (or be incidental to) full-blown hostilities, such as building protective barriers.[44]

Eighteenth century war was often a brutal exercise[45]—far more so than the relatively controlled conduct of both sides during the American Revolution.[46] International law scholars, among others, sought to curb the brutality.[47] Their

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36 2 Vattel, *supra* note 3, at 48-49.

37 *Id.*

38 *Id.* at 55-56.

39 *Id.* at 49.

40 *Id.* at 49.

41 3 Grotius, *supra* note 3, at 1475; 2 Vattel, *supra* note 3, at 61-62.

42 3 Grotius, *supra* note 3, at 1282. *Cf.* 1 Vattel, *supra* note 3, at 160 ("When a true necessity obliges you to enter into the country of another . . . you may force a passage that is unjustly refused.").

43 *Infra* note 173 and accompanying text.

44 Pufendorf, Nature, *supra* note 3, at 185 ("And if I can defend myself with a Wall or a Gate, 'tis absurd in me to expose my Breast to my Foe.").

45 Dennis Showalter, *Matrices*: *Soldiers and Civilians in Early Modern Europe, 1648-1789*, *in* Daily Lives of Civilians in Wartime Europe, 1618-1900 at 58, 83 (Linda S. Frey & Marshal L. Frey eds., 2007) (describing armies' devastation of areas of Europe.

46 John Fabian Witt, Lincoln's Code: The Laws of War in American History 26 (2012) (describing General Washington's restraint during the Revolutionary War). *But see* Theodore P. Savas & J. David Dameron, A Guide to the Battles of the American Revolution 180 (2006) (describing the massacre in the Wyoming Valley of Pennsylvania after a British/ Iroquois victory: "For the next twelve hours, the British allowed their Indian allies to torture and kill their prisoners.").

47 David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. L. 43, 59 (2007) (mentioning this aspect of the international law commentators' agenda).

writings encouraged belligerents to exercise mercy and restraint whenever possible,[48] and to transport and release enemies in safe locations.[49]

These authorities on the law of nations also laid down the rule that a belligerent should not pursue, seize, or kill enemies in a neutral country.[50] This rule was heavily qualified both in theory and practice. A nation aspiring to neutral status had to "shew [*sic*] an exact impartiality between the parties at war"[51] and not grant to one quarrelling party what it withheld from the other.[52] A neutral nation could not permit its citizens to injure one of the belligerents by, for example, encroaching over its borders.[53] Even if a country met those standards, a belligerent still might legitimately intrude on neutral territory in cases of extreme necessity, so long as the belligerent later provided compensation.[54] A belligerent also could intrude on neutral territory if the enemy regularly fled into that territory or deposited spoil or prisoners there.[55]

C. "Enemies of the Human Race"

Founding-era international law identified persons engaged in particularly reprehensible activities outside ties of national allegiance as "enemies of the human race"—*hostes humani generis*.[56] They included pirates (defined in eighteenth century dictionaries as "sea robbers")[57] and other thieves; deserters;[58] poisoners, assassins, and incendiaries;[59] those who participated in combat merely for depredation;[60] and foreigners who were "unauthorized voluntiers [*sic*] in violence."[61] Modern

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48 Pufendorf, Nature, *supra* note 3, at 850 ("We are not always obliged indeed to make use of the utmost Liberties of War; nay, it is often the greatest Glory to spare an Enemy, when it is in our Power to ruin and destroy him.").

49 2 Vattel, *supra* note 3, at 68 ("Thus, when prisoners, either on ransom or exchange, are sent away, it would be infamous to put them in a dangerous road.").

50 3 Grotius, *supra* note 3, at 1282; 1 Vattel, *supra* note 3, at 151.

51 2 Vattel, *supra* note 3, at 36.

52 *Id.* at 37.

53 1 Vattel, *supra* note 3, at 146 ("[T]he nation in general, is guilty of the base attempt of its members . . . when by its manners or the maxims of its government it accustoms, and authorizes its citizens to plunder, and use ill foreigners indifferently, or to make inroads into the neighboring countries, &c.").

54 2 Vattel, *supra* note 3, at 44.

55 *Id.* at 46.

56 The concept of "enemy of the human race" appears in a 358 C.E. decree of the Roman Emperor Constantius II. The Empire's rulers were then Christian, and they disapproved of magicians: *homines magi, in quacumque sint parte terrarum, humani generis inimici credendi sunt*. Code Just. 9.18.7pr (Constantius II 358) ("Magicians in whatever part of the world they may be, must be believed to be enemies of the human race.") This decree used the word *inimicus* for "enemy," not *hostis,* the Founding-era appellation for an alien enemy. By 1736, sorcery prosecutions had ceased in England. Owen Davies. Witchcraft, Magic and Culture, 1736-1951 at 79, 91 (1999).

57 Bailey, *supra* note 3 (unpaginated) (defining "pirate").

58 3 Grotius, *supra* note 3, at 1609-1610 ("Pirates, Robbers, Fugitives, and Deserters").

59 1 Vattel, *supra* note 3, at 99.

60 2 *id*. at 26 ("A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers.").

61 1 William Blackstone, Commentaries *249 ("[U]nauthorized voluntiers [*sic*] in violence are not ranked among open enemies, but are treated like pirates and robbers . . . .").

analogues include international freelance terrorists and international criminal organizations, such as the Mexican drug and human trafficking cartels.[62]

Wars against enemies of the human race were always just.[63] Enemies of the human race could be attacked wherever they happened to be, even if they had not crossed any international boundary. As Vattel remarked:

> [I]f the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories; we ought to except from this rule, the villains, who by the quality and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized….[64]

A nation capturing enemies of the human race had the choice of treating them as prisoners of war or as common criminals. William Blackstone argued for their being treated as criminals rather than as prisoners of war in the first volume of his Commentaries.[65] In the second volume, however, he implied that civilian-style due process was not required:

> As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.[66]

Treating captured *hostes humani generis* as accused criminals denied them the honorable status of prisoners of war normally accorded captured enemy aliens. Treating them as captured enemy aliens, on the other hand, denied them privileges—such as trial by jury—to which accused criminals were entitled.

D. Allegiance—Cross Reference

The concept of "allegiance" also defined the scope of permissible conduct during war. This subject is addressed in Part IV.

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62 Richard J. Samuels, *Drug Cartel*, Encyclopaedia Britannica, https://www.britannica.com/topic/drug-cartel (2023).

63 2 Grotius, *supra* note 3, at 1022-23 (proclaiming war just against pirates and assorted other malefactors).

64 1 Vattel, *supra* note 3, at 98-99.

65 1 William Blackstone, Commentaries *249; *see also* Calvin's Case (1608) 77 Eng. Rep. 377, 406; 7 Co. Rep. 1, 24b (K.B.) (accounting *proditores* (traitors) and *praedones* (pirates) as excluded from formal enemies in war).

66 2 William Blackstone, Commentaries *71; *see also* 2 Grotius, *supra* note 3, at 893 ("And in this Sense may be admitted the Distinction made by Cicero, between an Enemy in Form, with whom, he says, we have many Rights in common . . . and Pirates and Robbers.")

III. The Contours of Federal and State War Powers

A. Preliminary Comments

The charters of the North American colonies typically granted them authority to wage defensive war. For example, the 1629 royal charter for Massachusetts Bay colony provided in part:

> AND WEE [i.e., the king] DOE further . . . give and graunte to the said Governor and Company, and their Successors, by theis Presents, that it shall and maie be lawfull . . . to incounter, expulse, repell, and resist by Force of Armes, as well by Sea as by Lande, and by all fitting Waies and Meanes whatsoever, all such Person and Persons, as shall at any Tyme hereafter, attempt or enterprise the Destruccon, Invasion, Detriment, or Annoyaunce to the said Plantation or Inhabitants . . . [67]

When the Declaration of Independence was issued, the thirteen colonies signing the document became states. They thereby assumed as a matter of sovereign right what previously had been a subject of grant. Thus, under both the Articles of Confederation and the Constitution, the source of most *state* authority[68]—including

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[67] Mass. Charter (1629), https://avalon.law.yale.edu/17th_century/mass03.asp. *See also* R.I. Charter (1663), https://avalon.law.yale.edu/17th_century/ri04.asp (wording similar to Massachusetts Bay); Conn. Charter (1662), https://avalon.law.yale.edu/17th_century/ct03.asp (granting power to defend against the "Destruction, Invasion, Detriment, or Annoyance of the said Inhabitants or Plantation"); Ga. Charter (1732), https://avalon.law.yale.edu/18th_century/ga01.asp (granting military power to respond to "destruction, invasion, detriment or annoyance of our said colony"); Md. Charter (1632), https://avalon.law.yale.edu/17th_century/ma01.asp (granting power to "build and fortify Castles, Forts, and other Places of Strength . . . for the Public and their own Defence"). *See also* Carolina Charter (1663), https://avalon.law.yale.edu/17th_century/nc01.asp:

> [W]e . . . do give power . . . to levy, muster and train all sorts of men, of what condition or wheresoever born, in the said province for the time being, and to make war and pursue the enemies aforesaid, as well by sea as by land, yea, even without the limits of the said province, and by God's assistance to vanquish and take them, and being taken to put them to death by the law of war, or to save them at their pleasure; and to do all and every other thing, which unto the charge of a captain general of an army belongeth, or hath accustomed to belong, as fully and freely as any captain general of an army hath or ever had the same.

Although several charters authorized the grantees to oppose anyone seeking their "destruction, invasion, detriment, or annoyance," we caution against inferring from the canon *noscitur a sociis* that, for example, all elements in this list require adversarial confrontation. An invasion can occur without initial confrontation and without destruction; *infra* Part III (E); conversely, destructuon and destruction (via a blockade, for example) can occur without invasion.

[68] "Most" because the Constitution does grant a few specific powers to the states. Robert G. Natelson, *Federal Functions: Execution of Powers the Constitution Grants to Persons and Entities Outside the Federal Government*, 23 U. Penn. J. Const. L. 193 (2021)

that pertaining to war—preceded the Union and was largely reserved to the states.[69] The provisions in the Articles and the Constitution addressing state war powers served only as limitations or descriptions, not as grants. By contrast, the source of *federal* authority is the Constitution's enumeration of powers.[70]

To be sure, the controversial "doctrine of inherent sovereign authority" holds that the states never enjoyed power over military and other foreign affairs subjects, and that the federal government received that authority directly from its congressional predecessors—thereby bypassing the Articles and the Constitution entirely.[71] As one of us recently demonstrated, however, this thesis is fatally flawed on every level: historically, legally, and logically.[72] In this article, therefore, we do not address it further.

B. War Powers Under the Articles of Confederation

As the North Atlantic Treaty was to do 168 years later,[73] the Articles of Confederation deputized a central authority with certain prerogatives and limited the signatories accordingly. The rules pertaining to war powers were laid out in Articles VI[74]

(describing the Constitution's grants of specific powers to states and other entities).

69 U.S. Const. amend. X.

70 *E.g.*, National Federation of Independent Business v. Sebelius, 567 U.S. 519, 535 (2012); Kansas v. Colorado, 206 U.S. 46, 81-82 (1907) (both relying on McCulloch v. Maryland, 17 U.S. 316 (1819)).

71 The leading statement of this doctrine appears in United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936).

72 Robert G. Natelson, *The False Doctrine of Inherent Sovereign Authority*, 24 Federalist Soc'y Rev. 346 (2023).

73 The North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, https://www.nato.int/cps/en/natohq/official_texts_17120.htm (creating, among other obligations, mutual assistance in case of an attack on any member and creating the North Atlantic Council as an administering body). For an explanation of why the Articles of Confederation created, rather than a true constitution, a treaty or league somewhat comparable to NATO, see Natelson, *supra* note 72, at 362-65.

74 Article VI of the Articles of Confederation provided:

> No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.
>
> No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.
>
> No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress

and IX.[75] The text of the two articles was somewhat disorganized, but it laid out a coherent scheme in which Congress received general authority to declare and wage war for the Confederation. State war powers were reserved but limited in the following respects:[76]

- Congress could set a maximum on the number of naval vessels states could maintain in time of peace;
- Congress could, upon review, limit the number of state vessels during a state war against pirates;
- states could grant commissions to ships and vessels of war and issue letters of marque and reprisal only after a congressional declaration of war and only against the declared enemy;
- states were required to maintain "a well-regulated and disciplined militia, sufficiently armed and accoutered . . . and constantly . . . ready for use;"
- a state was not to engage in war unless "actually invaded[77] by enemies, or shall have received certain advice of a resolution being formed by some nation of

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> assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.
>
> No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.
>
> No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by *pirates*, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Articles of Confederation of 1781, art. VI.

75 Article IX stated in relevant part: "The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article…." *Id.* at art. IX.

76 *Supra* note 74.

77 *See infra* Part III (E) (discussing the Founding-era meaning of "invade" and its variants).

> Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted."

The upshot was that the states retained virtually unlimited flexibility to engage in defensive land war—even after Congress had been consulted—except for power to strike preemptively at non-Indian enemies. Their naval scope was more constricted: They could maintain navies to fight congressionally-declared wars. They could issue letters of marque and reprisal only against congressionally-declared enemies. They could maintain fleets and launch them to suppress pirates, although limited by congressional review.

As for other powers related to war, the states retained authority to limit foreign immigration, impose embargoes, and suspend the writ of habeas corpus. However, state treaties and alliances were subject to congressional review, and state imposts and duties had to be consistent with congressional treaties.[78]

C. Federal War Powers Under the Constitution

Founding-era international law scholars acknowledged each nation's prerogative of dividing war powers among different administrative levels.[79] The Constitution divided war powers between the federal government and the states by granting authority to the federal government and limiting the reserved authority of the states.

The Protection From Invasion Clause and the Domestic Violence Clause imposed duties on the federal government to wage defensive war under certain circumstances: "The United States . . . shall protect each [state] . . . against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."[80] The mandates were addressed to the United States government as a whole rather than solely to any branch.[81]

The Take Care Clause[82] similarly mandated the President to "take Care that the Laws be faithfully executed." This was another authorization to wage defensive war.

In addition, the Define and Punish Clause deputized Congress to "define and punish Piracies and Felonies committed on the High Seas."[83] This permitted "mixed

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78 *Supra* note 74.

79 *Supra* note 29 and accompanying text.

80 U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

81 One of us (Natelson) believes the Guarantee Clause (U.S. Const. art. IV, § 4, including its three components), conveyed to the U.S. government power beyond that conveyed to Congress and the President elsewhere in the Constitution. *See* Natelson, *supra* note 72, at 357-58. The other (Hyman) would limit the Guarantee Clause to conveying only powers supplemental to those otherwise granted, but necessary to fulfill the Clause's mandates. The difference is not stark.

82 U.S. Const. art. II, § 3. One of us (Hyman) believes the Take Care Clause was only an authorization to wage defensive war if Congress has not enacted valid legislation to the contrary, and if (furthermore) the President seeks only to maintain the operation of federal law rather than state law, using tools lawfully at his disposal.

83 *Id*. I, § 8, cl. 10.

wars" against pirates and any other nautical "enemies of the human race." Finally, the Constitution granted Congress power to "declare War."[84] This enabled Congress to fight both defensive and offensive wars, both public and mixed[85]—although declarations of war were associated primarily with offensive rather than defensive operations.

Other enumerated powers granted Congress the *means* to wage war. Congress could:

- "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"[86]
- "raise and support Armies"[87] and "provide and maintain a Navy;"[88]
- "make Rules for the Government and Regulation of the land and naval Forces;"[89]
- "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"[90]
- "provide for organizing, arming, and disciplining, the Militia,[91] and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

In addition, the Constitution granted Congress and the President certain powers wholly or partly associated with war. Specifically, the Constitution—

- conferred on the President, with the advice and consent of the Senate, sole authority to make treaties;[92]
- designated the President as "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;"[93]
- implicitly granted Congress, as a traditional incident of war-making, the prerogative of suspending the "Privilege of the Writ of Habeas Corpus . . .

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84 U.S. Const. art. I, § 8, cl. 11.

85 *Supra* Part II (A).

86 U.S. Const. art. I, § 8, cl. 11.

87 *Id.* cl. 12.

88 *Id.* cl. 13.

89 *Id.* cl. 14.

90 *Id.* cl. 15 (the Calling Forth Clause).

91 *Id.* cl. 16 (the Militia Organization Clause).

The Militia Organization and Calling Forth Clauses had time frames different from the Guarantee Clause, U.S. Const. art. I, § 4. The Militia Organization and Calling Forth Clauses authorized Congress to establish rules for *future* use of the militia. *Cf.* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1, 15-16 (2003) (discussing the element of futurity in the Founding-era meaning of "provide"). The portion of the Calling Forth Clause after the word "Militia" is a delineation of purpose.

The Guarantee Clause, on the other hand, referred to the power and duty to *immediately* "guarantee" and "protect."

92 U.S. Const. art. II, § 2, cl. 2

93 *Id.* cl. 1.

when in cases of Rebellion or Invasion the public Safety may require it,"[94] thus authorizing suspension during certain defensive, but not offensive, operations;

- granted Congress authority to "regulate Commerce with foreign Nations,"[95] which enabled it to override certain state measures related to war, such as embargos and other trade restrictions[96] and those governing commercial immigration, including the slave trade;[97] and
- granted Congress power to "define and punish . . . Offenses against the Law of Nations."[98] This provision permitted Congress to enact statutes protecting diplomats, fixing protocols of international practice, and restricting non-commercial immigration and emigration.[99] Of course, this clause, like other grants in the Constitution, carried with it incidental powers, recognized under the Necessary and Proper Clause.[100]

D. State War Powers Under the Constitution

To the extent the Constitution did not qualify them, war powers remained in the states by reservation.[101] The ratifiers understood this, as demonstrated by the proceedings of the Virginia ratifying convention. At one point, the discussion turned to the Constitution's grant of power to Congress to

> provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[102]

The Constitution's opponents objected that this clause gave Congress exclusive power over state militias. But the Constitution's advocates pointed out that the opponents were overlooking state reserved powers. The future Chief Justice John Marshall explained:

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94 U.S. Const. art. I, § 9, cl. 2. We presume Congress is in session or available.

95 *Id.* cl. 3.

96 Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 St. John's L. Rev. 789, 823 (2006); Robert G. Natelson, *The Meaning of "Regulate Commerce" to the Constitution's Ratifiers*, 23 Fed. Soc'y Rev. 307, 318, 323 (2022).

97 *Cf. infra* Part V (C) (discussing the limits on congressional power to invade the states' core sovereign power of self-defense).

98 U.S. Const. art. I, § 8, cl. 10.

99 *Natelson, Define and Punish*, *supra* note 3.

100 On the scope of incidental powers generally, *see* Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in Gary Lawson, Geoffrey P. Miller, Robert G. Natelson & Guy I Seidman, The Origins of the Necessary and Proper Clause 60-68 (2010).

101 2 Farrand, *supra* note 3, at 332 (Aug. 18, 1787) (Madison, reporting Roger Sherman as saying, "the States might want their Militia for defence agst invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point").

102 U.S. Const. art. I, § 8, cl. 3.

> The State Legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away …. All the restraints intended to be laid on the State Governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section, of the first article. This power is not included in the restrictions in that section.—But what excludes every possibility of doubt, is the last part of it.—That "no State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." When invaded, they can engage in war; as also when in imminent danger. This clearly proves, that the States can use the militia when they find it necessary.[103]

Marshall's analysis was reinforced by James Madison[104] and Edmund Pendleton, the convention chairman.[105] George Nicholas also affirmed that the states, "are at liberty to engage in war when invaded, or in imminent danger."[106] The popular Federalist essayist Tench Coxe made the same point in the public press: "Any state may repel invasions or commence a war under emergent circumstances, without waiting for the consent of Congress."[107]

The Constitution limited and qualified reserved state war powers in several respects. The result was a balance between federal and state prerogatives roughly similar to that under the Articles of Confederation. But in one way the Constitution constricted the states' war powers further, and in four ways it actually *expanded* them.

The Articles had permitted states to maintain naval vessels in peacetime up to a congressionally-prescribed maximum. The Constitution provided, "No State shall, without the Consent of Congress . . . keep . . . Ships of War in time of Peace."[108] Since the Articles gave Congress authority to fix the peacetime maximum at "zero," the substantive effects of the two restrictions were the same.

The states' sole loss of war power was on the naval side. This was the Constitution's removal of their prerogative to issue letters of marque or reprisal against an enemy upon whom Congress had declared war.[109]

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[103] Debates of the Virginia Convention (Jun. 16, 1788) *in* 10 Documentary History, *supra* note 3, at 1307 (comments of John Marshall). *See also* note 118 *infra* (quoting more of Marshall's speech). Modern commentators sometimes overlook the role of the militia in defending a state from invasion. *E.g.*, Robert Leider, *The Modern Militia* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4362391 (listing three purposes of the militia, but not its role in state defense).

[104] Debates of the Virginia Convention (Jun. 16, 1788) *in* 10 Documentary History, *supra* note 3, at 1273 & 1311 (comments of James Madison).

[105] *Id.* at 1325 (comments of Edmund Pendleton: "But the power of governing the militia, so far as it is in Congress, extends only to such part of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them.—The States then have the sole government of them").

[106] *Id.* at 1313-14 (comments of George Nicholas).

[107] "A Freeman II" (Tench Coxe), Pa. Gazette, Jan. 30, 1788, *reprinted in* 15 Documentary History, *supra* note 3, at 508, 510.

[108] U.S. Const. art. I, § 10, cl. 3.

[109] *Id.* cl. 1 ("No State shall . . . grant letters of marque and reprisal . . ."). Letters of marque and reprisal allowed private ships to attack ships of a target nationality, and seize them or their belongings.

The increases in state war powers were as follows: First, the Constitution did not require a congressional declaration of war for states to build ships. It required only war de facto, with no requirement that the war be one waged by the federal government. Second, the Constitution deprived Congress of its veto over state naval actions against invading pirates.

Third, on the land side, the Constitution preserved general state control over their militias while providing that "No State shall, without the Consent of Congress . . . keep Troops . . . in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[110] This limitation omitted the Articles' contingent requirement of consultation with Congress.[111]

Fourth, while the Articles had permitted state preemptive strikes against imminent invasions by Indians only, the Constitution permitted them against all invasions.

The states also retained unmentioned prerogatives sometimes associated with war. As participants in the ratification debates observed, states would continue to have power to suspend the writ of habeas corpus.[112] In addition, the Constitution implicitly recognized that states could continue to control foreign immigration, subject to some federal preemption before 1808 and more extensive preemption thereafter.[113] The Constitution retained state power to impose embargoes, although subject to federal preemption.[114]

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110 *Id.* cl. 3.

111 Earlier drafts of the Constitution retained the consultation language, but for unspecified reasons it was dropped two days before adjournment. 2 Farrand, *supra* note 3, at 626 (Sept. 15, 1787).

112 Debates of the Massachusetts Convention (Jan. 26, 1788) *in* 6 Documentary History, *supra* note 3, at 1359 (comments of Samuel Adams: "this power, given to the general government to suspend this privilege in cases. of rebellion and invasion, did not take away the power of the several States to suspend it, if they see fit"); Luther Martin, *Genuine Information VIII*, Baltimore Md. Gazette, Jan. 22, 1788, *reprinted in* 15 Documentary History, *supra* note 3, at 433, 434 ("the State governments have a power of suspending the habeas corpus act").

113 U.S. Const. art. I, § 9, cl. 1.

114 2 Farrand, *supra* note 3, at 440-41 (Aug. 28, 1787) (Madison):

> Mr. Madison moved to insert after the word "reprisal" (art. XII) the words "nor lay embargoes". He urged that such acts <by the States> would be unnecessary—impolitic—& unjust—
>
> Mr. Sherman thought the States ought to retain this power in order to prevent suffering & injury to their poor.
>
> Col: Mason thought the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments—He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—
>
> Mr Govr. Morris considered the provision as unnecessary; the power of regulating trade between State & State, already vested in the Genl—Legislature, being sufficient.

Some readers may find the conclusion that the states retained significant military authority to be counterintuitive. In part, this may be due to the fact that the states rarely exercise such authority today. In part, also, it may be due to the general conception of the Constitution as uniformly increasing central power.

The truth, however, is more complicated. In negotiating the constitutional rearrangement, the states sometimes gained as well as lost, and military affairs may not be the only case of this happening.[115] Furthermore, we should not overestimate the extent to which the Constitution increased central power. During the ratification debates, Justice Nathaniel Peaslee Sargent of the Massachusetts Supreme Judicial Court observed that the Constitution conveyed "[v]ery few" more powers than the Articles of Confederation.[116] The more significant difference between the two documents was that, within its sphere, the new federal establishment was a genuine government, rooted in popular consent and able to enforce its power directly on the people. It was not a mere treaty among state legislatures, as the Confederation had been.

Additionally, curbing state prerogatives and strengthening the central power were not the only reasons for the Constitution. The Founders also sought to protect the states, to prevent them from degenerating into monarchy or anarchy, and to improve the quality of their governance. All these policies are evident in the first sentence of Article IV, Section 4.[117]

E. Defining "Invaded" and "Invasion"

The words *invade* and *invasion* served as triggers for both federal and state defensive war powers. Thus, the Constitution's Calling Forth Clause empowered Congress to enlist state militias in federal service "to execute the Laws of the Union, suppress Insurrections and repel *Invasions*."[118] The Suspension Clause

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[115] Arguably Indian affairs was another area. Under the Articles of Confederation, Congress enjoyed plenary authority over Indians outside state boundaries. Under the Constitution, Congress's authority was limited to the scope of its enumerated powers. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201 (2007). Claims such as that made in Haaland v. Brackeen, 599 U.S. 255, 273 (2023), that the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, somehow granted Congress nearly plenary authority over Indian affairs, are not supported by the historical record. *See generally* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause: An Update*, 23 Federalist Soc'y Rev. 209 (2022).

[116] Letter from Nathaniel Peaslee Sargent to Joseph Badger (1788) (exact date uncertain), *in* 5 Documentary History, *supra* note 3, at 563, 567.

[117] U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). *See* Robert G. Natelson, *Guarantee Clause*, *in* The Heritage Guide to the Constitution 368-370 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (discussing the reasons for the clause).

[118] U.S. Const. art. I, § 8, cl. 15. (Italics added).

In Perpich v. Dept. of Defense, 496 U.S. 334 (1990), the Supreme Court held that the National Guard can be federalized also through the congressional power to "raise and support armies," U.S. Const. art. I, § 8, cl. 12, and then used for whatever purposes the federal government may use armies. The authors find this interpretation of the constitutional text problematic. Under the *expressio unius est exclusio alterius* maxim,

acknowledged congressional power to suspend the writ of habeas corpus in certain cases of rebellion or *invasion*.[119] The Protection From Invasion Clause imposed a federal obligation to protect states "from *invasion*."[120] The Self-Defense Clause confirmed that a state could engage in war if "actually *invaded*, or in such imminent Danger as will not admit of delay."[121] The centrality of the words "invasion" and "invaded" renders their constitutional meaning and scope of great importance.

During the eighteenth century, "invasion" and its variants in their broadest sense could include infringements or attacks on rights and privileges—as in the phrase, "The censorship policy was an invasion of the right of free speech."[122] The context of the words in the Constitution itself, however, demonstrates that their constitutional meaning is less metaphorical and more concrete: "Invasion" is an incursion into home territory by outsiders.

But what kind of incursion? Is the meaning limited to intrusion by a foreign army? Several Court of Appeals opinions have said as much, but on very sparse evidence.[123] Or is the meaning wider? And if wider, how is it circumscribed?

Eighteenth-century dictionaries inform us that when "invasion" and its variants applied to physical intrusions, the scope was not limited to incursions by a foreign army. Among the thirteen Founding-era English dictionaries we examined, only one seemed to limit "invasion" and its variants to formal military operations.[124] The

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the Constitution's list of three grounds (in the Calling Forth Clause) for federalizing the state militias should be exclusive.

This construction is reinforced by the modern non-commandeering doctrine and by comments from advocates of the Constitution during the ratification debates. *See, e.g.,* Debates of the Virginia Convention, 10 Documentary History, *supra* note 3, at 1307 (comments of John Marshall: "For Continental purposes Congress may call forth the militia; as to suppress insurrections and repel invasions. But the power given to the States by the people is not taken away"). *See also supra* notes 103-107.

In any event, during a defensive war the state still may raise "Troops" other than its militia. U.S. Const. art. I, § 10, cl. 3. Moreover, part of the state militia is the "sedentary militia," which consists of almost all "males age eighteen to forty-five [and is] protected against federal interference by the Second Amendment…." Glenn Reynolds & Don Kates, *The Second Amendment and States' Rights*, 36 Wm. & Mary L. Rev. 1737, 1761 (1995).

119 U.S. Const. art. I, § 9, cl. 2 (Italics added.)

120 *Id*. art. IV, § 4 (Italics added.)

121 *Id*. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

122 *E.g*., "A Citizen of Philadelphia," *The Weaknesses of Brutus Exposed*, Nov. 8, 1787 *reprinted in* 14 Documentary History, *supra* note 3, at 63, 71 ("The unceasing cry of these designing croakers is, my friends, your liberty is invaded!"); *cf*. The Declaration of Independence, para. 7 ("his invasions on the rights of the people").

123 California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997); Padavan v. United States, 83 F.3d 23, 28 (2d Cir. 1996); New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996) (all interpreting "invasion" as limited to an incursion by a foreign army).

124 Thomas Dyche & William Pardon, A New General English Dictionary (16th ed. 1777) (unpaginated), defining "invade" as

> to come violently, illegally, unfairly, or unjustly, into the lands, possessions, or country of another; and is commonly understood of the army of one nation coming suddenly and unprovoked into another's

other twelve included formal military operations, to be sure; but they also added definitions comprehending many other kinds of encroachments and intrusions. These definitions appear in the footnote below.[125]

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kingdome [sic] or country, and keeping possession of all or part thereof by violence, or driving away the cattle, making prisoners of the people, or doing other acts of hostility.

The same source defined "invasion" as "the violent, sudden, and illegal entering of an army, &c. into another's country and keeping possession, or committing hostilities." *Id.*

[125] All of the following dictionaries are unpaginated, and are listed alphabetically according to the authors' last names.

Francis Allen, A Complete English Dictionary (1765):

> *Invade*: to enter into a country in a warlike manner; to attack; to assail or assault; to seize on like an enemy . . . .
> *Invader*: one who enters into the possessions or dominions of another; one who assails or attacks; one who encroaches or intrudes . . . .
> *Encroach*: to invade the right and property of another . . . .
> *Intrude*: to come in without invitation or permission; to trust one's self rudely into company or business; to undertake a thing without being permitted, called to it, or qualified for it.

John Ash, The New and Complete Dictionary of the English Language (1775) (2 vols):

> *Invade*: To enter with hostile intentions, to attack a country, to assault, to assail, to encroach on another's right or property . . . .
> *Invasion*: An hostile entrance, an assault, the attack of an epidemical disease . . . .
> *Encroach*: To make invasion on the right of another, to advance gradually and by stealth on the property or right of another; *with* on *or*, upon: *as,* "*He was given to* encroach on *his neighbours"* . . . .
> *Hostile*: Suitable to an enemy, warlike, adverse, opposite.

Bailey, *supra* note 3:

> *Invade*: to attack or set upon . . . *Invasion*: a descent upon a country, an usurpation, or encroachment
> *Encroachment*: usurpation.
> *Encroach*: to intrench upon, to make invasion on the right of another."

Frederick Barlow, The Complete English Dictionary or, General Repository of the English Language (1772-73) (2 vols.):

> *Invade*: to enter into a country in a warlike manner. To attack; to assail, or assault. To make the first attack. To seize on like and enemy. To encroach . . . .
> *Invader*: one who enters into the possessions of another and attacks them as an enemy. One who assails or attacks. One who encroaches . . . .
> *Invasion*: the entrance or attack of an enemy on the dominions of another. The act of entering and attacking the possessions of another as an enemy. An incroachment. The attack of an epidemical disease . . . .
> *Encroachment*: in Law an unlawful trespass upon a man's grounds. Extortion, or the insisting upon the payment of more than is due . . . .
> *Encroach*: "to invade the property of another. To advance by stealth to that which a person has no right to. To come upon or seize the territories of another."

James Buchanan, A New English Dictionary (1769) ("*Invade*: 1. To enter by force, 2. To seize or lay hold of . . . . *Invasion*: 1. An inroad, or descent upon a country, &c., 2. Usurpation.")

The reader may observe that some of these definitions required that an invasion be "hostile." For that reason, we included in footnote 125 the entry for "hostile" from each dictionary employing that word when defining "invasion" or

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Edward Cocker, Cocker's English Dictionary (3rd ed. 1724) (a technical publication which did not define "invade") ("*Invasion*: landing, or marching into another Prince's Country; entering upon another Man's right."

Alexander Donaldson, An Universal Dictionary of the English Language (1763):

> *Invade*: to attack a country; to make a hostile entrance. To attack; to assail; to assault . . . .
>
> *Invader*: one who enters with hostility into the possessions of another. An assailant. *Encroacher*; intruder . . . .
>
> *Encroach*: to make invasions upon the right of another. To advance gradually and by stealth upon that to which one has no right. To invade . . . .
>
> *Intrude*: to come in unwelcome by a kind of violence; to enter without invitation or permission. To encroach; to force in uncalled or unpermitted.—*v.a.* to force without right or welcome . . . .
>
> *Hostile*: adverse; opposite; suitable to an enemy.

Johnson, *supra* note 3:

> *Invade*: 1. To attack a country; to make a hostile entrance, 2. To attack; to assail; to assault, 3. To violate with the first act of hostility; to attack . . . .
>
> *Invader*: 1. One who enters with hostility into the possessions of another. 2. An assailant. 3. Encroacher, intruder . . . .
>
> *Encroach*: 1. To make invasions upon the right of another; to put a hook into another man's possessions and draw them away. 2. To advance gradually and by stealth upon that to which one has no right . . . .
>
> *Hostile*: Adverse; opposite; suitable to an enemy.

William Kenrick, A New Dictionary of the English Language (1773):

> *Invade*: To attack a country; to make a hostile entrance.—to attack; to assail; to assault.–To violate with the first act of hostility; to attack, not defend . . . .
>
> *Invasion*: Hostile entrance upon the rights or possessions of another; hostile encroachment.—Attack of an epidemical disease . . . .
>
> *Encroachment*: An unlawful gathering in upon another man.—Advance into the territories or rights of another . . . .
>
> *Hostile*: Adverse; opposite; suitable to an enemy.

John Kersey, A New English Dictionary (2d ed. 1713):

> *Invade*: to attack or set upon, to usurp . . . .
>
> *Invasion*: an invading or setting upon, an encroachment or inroad upon a Country . . .
>
> *Encroachment*: an encroaching.
>
> *Encroach*: to get wrongfully, to usurp."

William Perry, Royal Standard English Dictionary (1st American ed. 1788) (designed for American use):

> *Invade*: to enter in a hostile manner . . . .
>
> *Invasion*: a hostile entrance, an attack . . . .
>
> *Hostile*: adverse, opposite; suitable to an enemy."

Sheridan, *supra* note 3:

> *Invasion*: Hostile entrance upon the rights or possessions of another, hostile encroachment . . . .
>
> *Encroachment*: An unlawful gathering in upon another man; advance into the territories or rights of another . . . .
>
> *Invade*: To attack a country, to make a hostile entrance; to assail, to assault."

its variants. As those entries show, "hostile" often meant merely "adverse." Readers may recognize this as the non-military definition preserved in the modern law of adverse possession and in legal phrases such as "hostile takeover" and "hostile witness." Thus, all we can infer from the requirement of "hostility" is that for an entry to be an invasion it must be unauthorized and uninvited.

Eighteenth-century American political discourse confirms what the dictionaries suggest: the scope of "invasion" and its variants was quite broad.

First: An invasion could be by sea as well as by land. Both the congressional records[126] and participants in the constitutional debates referred to maritime invasions.[127]

Second: An invasion need not be incident to actual warfare, nor an operation of war. The Massachusetts Constitution of 1780, for example, spoke of "time of war *or* invasion" (and it still does).[128]

Third: An invasion need not be launched by a formal military force. Participants in the constitutional debates referred to "invasions of barbarous tribes,"[129] "invasion of the savages,"[130] and "hostile invasions of lawless and ambitious men intending . . . to . . . introduce anarchy, confusion, and every disorder."[131] In *Federalist* No. 41, James Madison referred to attacks along the Atlantic coast by "licencious [*sic*] adventurers . . . daring and sudden invaders."[132] References to invasions by pirates appear in contemporaneous literature.[133]

An "invasion" could refer also to uninvited entry by groups of immigrants.[134] Pennsylvanians used that term to describe the essentially peaceful immigration of

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126 30 JCC, *supra* note 3, at 447 (Jul. 31, 1786) ("That in case of an invasion of any of the middle or eastern states by a marine power the possession of Hudson's River would be an object of the highest importance as well to the invader as to the United States.").

127 Phila. Freeman's J., Jan. 2, 1788, *reprinted in* 15 Documentary History, *supra* note 3, at 230 ("on the Atlantic side from the invasions of a maritime enemy"); "Civis," *To the Citizens of South Carolina*, Charleston Columbian Herald, Feb. 4, 1788, *reprinted in* 16 Documentary History, *supra* note 3, at 21, 24 ("If this state is invaded by a maritime force, to whom can we apply for immediate aid?").

128 Mass. Const., Part the Second, chap. II, § 1, art. VII. (Italics added). *See also infra* notes 134 and 141. This does not imply, of course, that warfare cannot be used to counter an invasion not incident to war; nor does it mean that "peaceful" invaders are not in "enmity."

129 Charles Carroll of Carrollton, *Draft Speech for Maryland Convention*, Jan.-Mar., 1788, *in* 12 Documentary History, *supra* note 3, at 832, 856.

130 "A Democratic Federalist," Pa. Herald, Oct. 17, 1787, *reprinted in* 13 Documentary History, *supra* note 3, at 386, 391. *See also* 12 JCC, *supra* note 3, at 1006 (Oct. 13, 1778) ("repelling the invasions of the savages on the frontiers of New York, New Jersey, and Pensylvania").

131 "Monitor," Hampshire Gazette, Oct. 24, 1787, *reprinted in* 4 Documentary History, *supra* note 3, at 116, 117.

132 The Federalist No. 41, N.Y. Indep. J., Jan. 19, 1788 (James Madison), *reprinted in* 15 Documentary History, *supra* note 3, at 418, 423.

133 *E.g. A Concise History of England*, 3 The Lady's Mag. 404, 500 (1770) ("invasion of these pirates"); William Lithgow, Travels and Voyages Through Europe, Asia, and Africa 84 (11th ed. 1770) ("the invasion of pirates"); 2 Grotius, *supra* note 3, at 735 ("Pirates, or any other Invaders").

134 Because of its insular position, Britain did not need to defend its border against unauthorized crossing by land. But Britain faced similar issues on the coast. Thus, a 1758 essay discussed "invasion by a fleet of unarmed flat-bottomed boats," although denying that the problem was serious enough to justify a large navy. *Number CL*, The Monitor, or British Freeholder, June 3, 1758, at 905, 909.

Connecticut settlers into Pennsylvania's Wyoming Valley, because the settlers were relying on legal title that the Pennsylvania government did not recognize.[135] Thus, in 1754, Benjamin Franklin wrote a plan "to divert the Connecticut Emigrants from their Design of *Invading* this Province [Pennsylvania], and to induce them to go where they would be less injurious and more useful."[136] At the time, the "invaders" had done little more than purchase disputed title.[137] Peace broke down only when the Connecticut settlers sought to defend themselves from local Indians and the Pennsylvania authorities.[138]

In 1775, Congress recommended that Connecticut stop sending settlers until further notice.[139] When, in 1783, the Confederation Congress established a court to adjudicate Wyoming Valley land claims,[140] the Pennsylvania legislature responded in resolutions again charging that the unauthorized Connecticut immigration was an invasion:

> [I]f Congress should consent to establish courts at the instance of persons not first proving themselves to be included in the description aforesaid, the citizens of this State may be harassed by a multitude of pretended claims *at the suit of adventurers or invaders of the State*, and in the present instance at the suit of persons who have settled in defiance of the resolution of Congress of the 23 day of December, 1775.[141]

The Constitution did not limit invasions to large-scale incursions—an aspect of the document specifically criticized during the ratification debates.[142] Perhaps the framers agreed with Sir William Yonge's comment in Parliament that "a

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135 *See generally* Mathews, *supra* note 3, at 53-128 (1902).

136 Letter from Benjamin Franklin to Peter Collinson, Jun. 26, 1755, https://founders.archives.gov/documents/Franklin/01-06-02-0045 (emphasis added). *See also* Benjamin Franklin, *A Plan for Settling Two Western Colonies* (1754), https://founders.archives.gov/documents/Franklin/01-05-02-0132. Franklin's plan came to fruition decades later, when Connecticut's land claims in present-day Pennsylvania were rejected, while Connecticut's claim to the Western Reserve (in what is now Ohio) was granted. The Western Reserve became a destination for many Connecticut emigrants. Visions of the Western Reserve 14 (Robert A. Wheeler, ed., 2000).

137 Mathews, *supra* note 3, at 63.

138 *Id.* at 68-77.

139 3 JCC, *supra* note 3, at 452-53 (Dec. 23, 1775):

> Whereas the colony of Connecticut has, by a certain act of their assembly, resolved that no further settlements be made on the lands disputed between them and Pennsylvania, without license from the said assembly, Resolved, That it be recommended to the colony of Connecticut not to introduce any settlers on the disputed lands with Pennsylvania until further order of Congress, or until the dispute shall be settled.

140 26 JCC, *supra* note 3, at 45 (Jan. 23, 1784).

141 *Id*. at 281 (Apr. 24, 1784). (Italics added).

142 "John DeWitt," *Letter II*, American Herald, Oct. 29, 1787, *reprinted in* 4 Documentary History, *supra* note 3, at 156, 160 (arguing "should an insurrection or an invasion, however small, take place, in Georgia" then habeas corpus could be suspended in Massachusetts).

small Invasion may be as fatal in its Consequences as the most formidable and most successful Invasion at another Time."[143] The passage of time seems to have confirmed the judgment that an intrusion may be small and still be classified as an invasion: In the 1942 case of *Ex Parte Quirin*,[144] the Supreme Court characterized a group of only eight Nazi saboteurs as "invaders."[145]

Nor would it seem that "invaders" had to be armed when crossing the border. Even unarmed persons can cause local disruption, and once they cross the border they may acquire arms and defend their position[146] or cause other damage. By way of illustration, the terrorists of September 11, 2001 arrived unarmed, exceeded the scope of their visas, and hijacked three aircraft on U.S. territory and used them to kill thousands of Americans. Under the Constitution's definition, they qualify as "invaders."

In Federalist No. 43, Madison justified the broad meaning of "invasion" when discussing the Constitution's Protection From Invasion Clause: "The latitude of the expression here used, seems to secure each state not only against foreign hostility, but against ambitious or vindictive enterprizes [*sic*] of its more powerful neighbours."[147]

There were some limiting factors, however. "Invasion" and its variants did not comprehend all unauthorized intrusions. There had to be detriment (loss, harm, or annoyance) beyond the mere fact of intrusion. Franklin's letter referred to the "injurious" consequences of the unauthorized immigration into his state.[148] The Pennsylvania legislature felt "harassed" by the unauthorized immigrants. Invasion that had not yet occurred but was imminent posed some "danger"[149]—risk of detriment[150]—against which "defense" was required.

The actual or threatened detriment from invasion could be injury to persons;[151] physical damage,[152] such as that resulting from plundering;[153] or the breakdown of

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143 William Yonge, *Remarks in Parliament*, Nov. 6, 1742, *in* 14 The History and Proceedings of the House of Commons 70 (1744).

144 317 U.S. 1 (1942).

145 *Id.* at 20.

146 Thus, there seem to have been no resort to arms when the Connecticut "invasion" crossed the Pennsylvania border. However, the settlers subsequently defended themselves with arms. Sydney George Fisher, The Making of Pennsylvania 237-317 (1896); Mathews, *supra* note 3, at 68-77.

147 The Federalist No. 43, N.Y. Indep. J., Jan. 23, 1788 (James Madison) *reprinted in* 15 Documentary History, *supra* note 3, at 439, 442.

148 *Supra* note 136 and accompanying text.

149 *E.g.*, 33 JCC, *supra* note 3, at 532 (Sept. 25, 1787) ("Whereas it has been represented to Congress by the delegates of Georgia that their country is in danger of an invasion").

150 32 JCC, *supra* note 3, at 111 (Mar. 13, 1787) ("Besides its insecurity against a foreign invasion unless strongly garrisoned").

151 26 *id*. at 101 (Feb. 26, 1784) ("to defend the persons, liberty and property of the people of the U. S. against an invading and implacable foe").

152 15 *id*. at 1040 (Sept. 10, 1779) ("when the Enemy invaded the said State, they took or destroyed sundry Loan office certificates"); 24 *id*. at 106 (Jan. 31, 1783) ("the destruction and loss of papers and vouchers for public expenditures sustained by the State of Virginia during the invasion of that State").

153 20 *id*. at 621 (Jun. 12, 1781) ("repelling the invasion of their vindictive and plundering Enemies"); 9 *id*. at 953 (Nov. 22, 1777) ("to resist actual invasion and boundless rapine").

normal processes of law[154] and communication.[155] During the Connecticut invasion of the Wyoming Valley, Pennsylvania president John Dickinson—later one of the Constitution's more important framers[156]—identified another kind of detriment: the Connecticut settlers were occupying land the state otherwise could sell to raise revenue.[157]

Did an incursion have to be organized to qualify as an invasion? We found no evidence that prior coordination was necessary. A spontaneous mob might launch an invasion. On the other hand, prior coordination might demonstrate the existence of detriment or quantify the extent of the risk. Coordination also might demonstrate causation—i.e., that the intrusion was responsible for specified injury.

Relying on the premise that no government in the United States has authority to restrict peaceful immigration, some may exclude non-violent mass immigration from the definition of "invasion."[158] One problem with this conclusion lies in its premise. It overlooks the Constitution' explicit recognition that individual states may restrict immigration.[159] It also overlooks the Constitution's grant to Congress of authority to "define and punish . . . Offenses against the Law of Nations,"[160] which encompasses authority over trans-border migration.[161]

Professor Ilya Somin is among the few who deny any federal authority to restrain peaceful immigration from nations with which the United States is not at war. He relies[162] largely on James Madison's 1800 Virginia legislative report on the Alien and Sedition Acts.[163] However, this document is not useful evidence on the question of whether the Constitution grants Congress authority to restrict

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154 9 *id*. at 784 (Oct. 10, 1777) ("it has been found, by the experience of all states, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty of such traitorous practices").

155 23 *id*. at 541-42 (Sept. 3, 1782) ("the regular line of communication has been interrupted by the invasion of the enemy").

156 *See generally* Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 Penn. State L. Rev. 415 (2003).

157 *Message from the President and the Supreme Executive Council to the General Assembly* (Jan. 24, 1784), in 14 Minutes of the Supreme Executive Council of Pennsylvania 16 (1853):

> Many persons are settling without legal authority upon lands belonging to the State, which have always been considered as a very valuable fund for relieving the Commonwealth from the heavy burthen of public debts. These settlers may become numerous and troublesome, unless some effectual means can be devised for preventing the mischiefs that are to be apprehended from such irregular proceedings.

158 *E.g*., Nikolas Bowie & Norma Rast, *The Imaginary Immigration Clause*, 120 Mich. L. Rev. 1419 (2022).

159 U.S. Const. art. I, § 9, cl. 1 ("The Migration . . . of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight").

160 *Id*. § 8, cl. 10.

161 Robert G. Natelson, *The Constitution's Define and Punish Clause: The Source of the Power to Regulate Immigration*, 11 Brit. J. Am. Leg. Studies 209 (2022).

162 Ilya Somin, *Immigration is Not "Invasion,"* Volokh Conspiracy (May 18, 2023, 10:30 AM), https://reason.com/volokh/2023/05/18/immigration-is-not-invasion/.

163 Madison, Report, *supra* note 3.

immigration. For one thing, it focused not on immigration, but on *deportation*. For another, it was written a decade after ratification, and did not represent any kind of consensus among the Founders; on the contrary, it was highly partisan and its conclusions were disputed hotly.[164]

Nor does the substance of the document provide any evidence on whether Congress has power to restrict immigration.

Madison argued that the Constitution gave Congress no authority to deport "alien friends," and he classified them as such because they had come from countries with which the United States was at peace.[165] But he did not address the fact (because there was no need to) that not all foreigners from friendly countries qualified as alien friends. As explained in Part IV, an alien friend was a person in *allegiance* to the host country, and a person who entered sovereign territory in defiance of its laws thereby refused allegiance.[166] This rendered him an alien enemy, or (if the sovereign preferred) rendered him an alien friend who could be treated as an alien enemy.[167] By contrast, the aliens Madison was defending had, in his word, been "invited" into the United States.[168]

In sum: the modern judicial decisions limiting the term "invasion" only to attacks by an outside sovereignty are clearly erroneous and should not be followed. Rather, as the Constitution employs the words "invasion" and "invaded," those words denote an unauthorized and uninvited intrusion of any size across a border—including significant unauthorized immigration—where the intrusion causes, or threatens to cause, detriment beyond the fact of the intrusion itself. An invasion need not be armed or even formally organized, although organization does tend to show a link between the intrusion and potential or actual detriment.

IV. Allegiance and Individual Rights

The previous discussion has led us to the subject of *allegiance*. This was the primary tool for distinguishing an alien enemy from an alien friend. It could determine whether a sovereign lawfully could kill a person, expel him from the country, seize his property, try him for treason in a civil court, try him for a war crime in a military tribunal, or merely hold him (with or without ransom) as a prisoner of war. As detailed below, allegiance has particular implications for how a state may treat those who cross its borders illegally.[169] However, allegiance is a complicated topic,

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164 *See* Kevin Gutzman, *From Interposition to Nullification: Peripheries and Center in the Thought of James Madison*, 36 Essays in History 89, 91 (1994).

165 Madison, Report, *supra* note 3 ("With respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress, is denied to be constitutional").

166 *See, e.g.,* note 182 *infra*.

167 *See* notes 210 and 211 *infra*.

168 Madison, Report, *supra* note 3. (Italics added).

169 The concept of *allegiance* also is central to other important constitutional questions, including (1) the meaning of the rule that the President be a "natural born Citizen," U.S. Const. art. II, § 1, cl. 5 ("No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.") and (2) the meaning of the Fourteenth Amendment's phrase "subject to the jurisdiction thereof." U.S. Const. amend. XIV, § 1 ("All persons born or

so we must beg the reader's patience.

The location in which an individual was physically present was one factor in determining the sovereign to whom he or she owed allegiance. Other factors included birthplace, parental allegiance, and individual conduct and intent. In Edward Coke's report on *Calvin's Case* (the 1608 decision that became the leading Anglo-American authority on the subject), he emphasized the importance of intent by writing, "ligeance is a quality of the mind, and not confined within any place."[170] The Chief Justice was correct that allegiance was not confined to any one place, but it was not purely a quality of the mind either.

As understood when the Constitution was written, allegiance (or *ligeance*) was a relationship between an individual and a sovereign. The individual agreed, either expressly or by implication,[171] to be loyal to the sovereign and to submit to its laws. In return, the sovereign engaged to protect the individual.[172]

A person in allegiance to a monarch was a *subject*. (This word was a more inclusive term than the republican analogue "citizen.") A subject who betrayed his or her sovereign could be tried and convicted for treason. For example, a British soldier who deserted the army and fled to the enemy might be charged as a traitor.[173] However, a person not in allegiance to a sovereign who committed an offense against that sovereign—by, for example, violating the code of war by spying or slaughtering civilians—was triable only under the laws of war, not as a traitor.

English law recognized four kinds of British subjects: natural born subjects, naturalized subjects, denizens, and resident alien friends. We shall discuss each of these briefly in turn.

The *natural born subject* sometimes was referred to by the Latin terms *subditus natus* (a subject by birth) or *indigena* (native). Writers occasionally denoted natural born subjects by the term *denizens*.[174] However, we follow a less confusing, more common, and more precise understanding: natural born subjects were distinct from *denizens*, who comprised a separate class of subjects.[175]

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naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."); United States v. Wong Kim Ark, 169 U.S. 649, 693 (1898) ("Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States."). However, that case involved only aliens legally in the country.

170 Calvin's Case (1608) 77 Eng. Rep. 377, 388; 7 Co. Rep. 1, 9b (K.B.). Formally, the case was entitled Calvin v. Smith. Although presented in the Exchequer, judges from other courts participated in the argument, including all five judges of the King's Bench, as well as Sir Edward Coke, then Chief Justice of the Court of Common Pleas. Calvin's Case became the leading English authority on alienage and related subjects as well as allegiance.

171 1 William Blackstone, Commentaries *354-57 (describing express and implied allegiance).

172 *Id*. at *354; Calvin's Case (1608) 77 Eng. Rep. 377, 382; 7 Co. Rep. 1, 4b (K.B.) ("*projectio trahit subjectionem, et subjectio protectionem*"). *See also* Calvin's Case 77 Eng. Rep. at 388; 7 Co. Rep. at 9b ("power and protection draweth ligeance").

173 2 Vattel, *supra* note 3, at 51 (stating that fugitives and deserters found by the victor among his enemies may be killed as traitors).

174 1 Cunningham, *supra* note 3 (unpaginated) (defining the word denizen: "He that is *born within the King's ligeance,* is called sometimes a *denizen* . . . for ligeus is ever taken for a natural-born subject, but many times in actions of parliament *denizen* is take for *alien born,* that is *infranchised,* or *denizened by letters patent"*) (emphasis in original).

175 *Infra* note 188 and accompanying text.

A natural born subject usually was an individual born within the Empire[176] of parents then in allegiance to the Crown.[177] But the requirement of birth within the Empire was waived if the father was natural born and not engaged in disloyal activity.[178] Thus, if the father and mother were of different nationalities, in allegiance cases the English courts generally followed the doctrine *partus sequitur patrem*—"the offspring follows the father"—rather than the maxim that prevailed in most other areas of the law: *partus sequitur ventrem:* "the offspring follows the womb," *i.e*., the mother.[179]

Not everyone born within British dominions was natural born. The child born in London of a foreign ambassador's wife was not a natural born Englishman, because his father's allegiance was solely to his homeland.[180] Likewise, the child of a foreign invader born on British territory was not natural born: His parent's act of invasion rebutted any inference of allegiance to the British Crown.[181] More generally, no alien could enter into any sort of allegiance to the British Crown unless "received" into the country.[182]

Natural born subjects enjoyed unique privileges, such as qualification to serve in national office[183] and unfettered power to own land.[184]

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176 1 William Blackstone, Commentaries *357; Calvin's Case (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1, 5b (K.B.) ("they that are born under the obediance, power, faith, ligeality, or ligeance of the King, are natural subjects, and no aliens").

177 Calvin's Case (1608) 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18a (K.B.). Thus, the British-born child of an alien friend living in England and in temporary allegiance (discussed *infra*) was natural born. 1 William Blackstone, Commentaries *361-62.

178 1 William Blackstone, Commentaries *361. To clarify: In 1584, Parliament prescribed that any child born abroad to an Englishman and a foreign woman was a denizen. Bacon v. Bacon (1625) 79 Eng. Rep. 1117, Cr. Car. 601 (K.B.). By 1608, the child of an English ambassador born overseas of an English woman was seen as natural born. Calvin's Case (1608) 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18a (K.B.). Subsequently, the courts construed the word "denizen" in the 1584 statute to mean natural born. Baron Hale's Argument, Case of Collingwood and Pace, (1661-1664), 86 Eng. Rep. 262, 271; 1 Vent. 413, 428 (Ex. Ch.). Thereafter, for a foreign-born child to be natural born only the father need be English. In 1731, Parliament confirmed this by statute. British Nationality Act 1730, 4 Geo. 2, c. 21 (1731).

179 Some commentators have argued that a person who, for any reason, was a citizen at birth is therefore qualified as a natural born citizen and that power to grant such citizenship is unlikely to be abused because Congress "may not declare any person a 'citizen at birth' retroactively." Jill Pryor, *The Natural Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881, 885 (1988) (so asserting without supporting evidence). In fact, however, during the Founding-era naturalization could be retroactive. John Vahoplus, *"Natural Born Citizen": A Response to Thomas H. Lee*, 67 Am. U. L. Rev. F. 15, 27 (2018). Allowing Congress such would undercut the reason for the Constitution's eligibility requirement.

180 *Cf.* 1 William Blackstone, Commentaries *361 ("as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent").

181 1 Bacon, *supra* note 3, at 77.

182 *Id*. at 80 (no alien can "pay any Allegiance to any other Society, unless he be afterwards received into it"); Rex v. Tucker (1693), 90 Eng. Rep. 160; Skinner 360 ("[I]f an alien come here in an hostile manner, and never was under the protection and obedience of the King, there he cannot be indicted omnino [at all], but ought to be try'd by martial law, or ransom").

183 1 Bacon, *supra* note 3, at 80.

184 1 William Blackstone, Commentaries *360.

The second class of subjects were *naturalized subjects*.[185] Naturalization was effected by an act of Parliament. It brought the same privileges enjoyed by a natural born subject, other than the right to hold national office.[186] The naturalized subject's promise of allegiance was express, and his or her new status was for life.[187] His or her children born within the Empire were natural born.

The third class of subjects were *denizens* in the precise sense of that word. William Blackstone described them this way:

> A DENIZEN is an alien born, but who has obtained *ex donatione regis* [by a gift from the king] letters patent to make him an English subject . . . A denizen is in a kind of middle state between an alien, and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance . . . And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant from the crown.[188]

As in the case of naturalized subjects, the denizen's promise of obedience was express. His or her children born on British territory were natural born.

The fourth class of subjects consisted of *resident alien friends.*[189] These were people who were (1) aliens, (2) who entered and remained in the country under circumstances implying submission to British laws, and (3) were not alien enemies.[190]

An alien (Latin: *alienegena*—"foreign born") was a person "born out of the ligeance of the King, and under the ligeance of another."[191] The term "alien" was synonymous with "foreigner."[192] When an alien who was not an enemy entered

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185 1 Bacon, *supra* note 3, at 79.

186 1 William Blackstone, Commentaries *362.

187 1 Bacon, *supra* note 3, at 79.

188 1 William Blackstone, Commentaries *362.

189 Courteen's Case (1618) 80 Eng. Rep. 416, 417; Hobart 270, 271 (Star Chamber) (ruling that Dutch alien friends were subjects, although not natural born subjects); *accord*: 1 Cunningham, *supra* note 3 (unpaginated) (defining "alien"). Thus, the suggestion in Robert W. Heimberger, God and the Illegal Alien 33 (2018) that aliens could not be subjects appears to be erroneous.

190 Every alien was either a friend or an enemy. Calvin's Case (1608) 77 Eng. Rep. 377, 397; 7 Co. Rep. 1, 17a (K.B.). *See also id*. at 25a ("Every stranger born must at his birth be either *amicus* or *inimicus.*").

191 *Id*. at 16a (K.B.).

192 *Id*. at 16a-16b ("*Alienigena est alienae gentis seu alienae ligeantiae, qui etiam dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i.e., potestatem Regis natus est*"—that is, "An alien is one of another people or another allegiance, who also is called 'traveler,' 'stranger,' 'exotic,' 'foreigner,' etc."). Eighteenth century dictionaries confirm the synonymity of the words "alien" and "foreigner." *See, e.g*., Bailey, *supra* note 3 (unpaginated) (defining "alien" as "a foreigner or stranger, one born in a foreign country"); Johnson, *supra* note 3 (unpaginated) (defining "alien" as "A foreigner; not a denizen; a stranger" and "foreigner" as "A man who comes from another country; not a native; a stranger."). Thus, the argument in M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 37 Berkley J. Int. L. 316 (2009) does not reflect eighteenth century law.

or remained within British territories under circumstances implying agreement to comply with British laws, he or she entered *local allegiance*.[193] He or she thereby became a British subject for the duration of the stay.[194] The resident alien friend owed allegiance to his natural sovereign that superseded allegiance to the British Crown, but this was not a problem as long as the two allegiances were not inconsistent.[195]

If a resident alien friend betrayed the duty of allegiance seriously enough, he or she could be convicted of treason.[196] An alien enemy could not be.[197] Moreover, any alien, whether an alien friend or an alien enemy, was "liable to be sent home whenever the king sees occasion."[198]

The two classes of subjects known as denizens and resident alien friends approximately corresponded to the two species Vattel referred to in the wider genus he called "inhabitants:"

> The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country [*cf*. resident alien friends]. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The *perpetual inhabitants* [*cf.* denizens] are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers; and as the state has given to these the right of perpetual residence, their right passes to their posterity.[199]

Perhaps the most famous English case involving a resident alien friend was *Somerset's Case*—the 1772 King's Bench decision that declared that slavery did

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193 1 William Blackstone, Commentaries *357; Calvin's Case (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1, 5b (K.B.) (describing the *ligeantia localis* of the resident alien in amity).

194 1 William Blackstone, Commentaries *357.

195 Conflicting allegiance likewise would not be a problem if an alien friend foreswore allegiance to the nation of his birth, but that generally was not done prior to the U.S. Constitution. James Kettner, The Development of American Citizenship, 1608-1870 at 54 (2014) ("Locke and his successors could agree with Coke that allegiance was binding").

196 *E.g*., Sherleys's Case (1557) 73 Eng. Rep. 315, 2 Dyer 114b (K.B.).

197 Tucker's Case (1693) 91 Eng. Rep. 533; 2 Salk. 630 (K.B.). *See also* 1 Hale, *supra* note 3, at 59.

198 1 William Blackstone, Commentaries *252. Like any other subject, a resident alien friend who was not deported could remain a British subject in allegiance to the king despite committing crimes, but no allegiance to the king was available to people who did not enter the realm legally in the first place, unless received into British society. *See* note 182 *supra*.

199 1 Vattel, *supra* note 3, at 92. Note that everyone in the genus of "inhabitants" was "permitted to settle;" whereas people in the country without permission were not inhabitants. English law was more liberal to the children of denizens than the European law described by Vattel; the children of English denizens were not merely denizens, but natural born subjects. *Supra* note 188.

not exist in England because no positive law authorized it. James Somerset was a native of Africa who had been transported to Virginia to serve as a slave. When he arrived in England he submitted himself to English jurisdiction, and therefore entered allegiance to the Crown. This entitled him to the protection of the privilege of the writ of habeas corpus.[200]

An alien was a friend if not classified as an enemy.[201] The presumptive definition of an alien enemy was a foreigner from a country at war with Britain.[202] However, this definition was presumptive only. Circumstances, including the alien's own conduct, could designate a foreigner as an alien friend or an alien enemy.

Suppose, for example, that a Dutch merchant resided and did business in London during a time of peace between Britain and the Netherlands. This merchant conducted himself according to English law and was classified as an alien friend. Suppose further that war then broke out between Britain and the Netherlands. According to international norms,[203] the merchant was permitted to remain for a while to wrap up his affairs before departing. Parliament fixed the period for Britain at 40 days, extendable to 80.[204] During that time the Dutch merchant remained, or at least was treated as,[205] an alien friend. By the time of the American Founding, this courtesy was extended to all foreigners, not just merchants.[206]

In wartime, resident aliens could petition (either explicitly or implicitly) to remain in Britain indefinitely, promising to obey local law and do nothing contrary to British interests. This was an affirmation of allegiance. If the authorities acquiesced, the alien could remain as long as he conducted himself properly.[207] But if he betrayed that trust and violated his obligation of allegiance to the British Crown, the authorities could opt to treat him either as a traitor who could be tried

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200 Somersett v. Steward (1772), 98 Eng. Rep. 499, 501; Lofft 1, 4 (K.B.) ("From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection").

201 *Supra* note 190.

202 2 Vattel, *supra* note 3, at 27 ("When the head of a state or sovereign declares war against another sovereign, it implies that the whole nation declares war against the other . . . Thus, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other inclusively.").

203 3 Grotius, *supra* note 3, at 1280 ("But they who went thither before the War, are by the Law of Nations a reasonable Time to depart, which if they do not make Use of they are accounted Enemies."); *see also* 2 Vattel, *supra* note 3, at 24.

204 1 Hale, *supra* note 3, at 93-94.

205 Sometimes it is not clear whether a protected person was classified as an alien enemy against whom hostilities are suspended or as an alien friend. *Cf.* 2 Vattel, *supra* note 3, at 27 ("the same rites are not allowable against every kind of enemies."). But some were clearly enemies who were merely entitled to indulgence:

> Women, children, the sick and aged, are in the number of enemies….And there are rights with regard to them, as belong to the nation with which another is at war….But these are enemies who make no resistance; and consequently give us no right to treat their persons ill, or use any violence against them, much less to take away their lives.

2 Vattel, *supra* note 3, at 51.

206 1 Hale, *supra* note 3, at 93 ("all foreigners living or trading here are comprised").

207 *Id*. at 60.

under municipal law[208] or as an alien enemy who could be tried and punished under martial law.[209]

It worked the other way, too: a person from a friendly country could be an alien enemy. If a foreigner participated in an invasion of British territory, this negated any implication of allegiance to the British Crown. The invader was an alien enemy and subject to martial law, even though his home country was in amity with England.[210] For example, as the *Duke of Norfolk's Case* (1603) demonstrated, there was no requirement that an alien act as the agent of a foreign power to be deemed an enemy.[211]

The facts in *Vaughan's Case* (1696) [212] present another instance of persons from a friendly country being classified as enemy aliens. Britain was allied with

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208 *Id*. at 60 & 92.

209 *Id*. at 94. *See also* 1 Bacon, *supra* note 3, at 84 (referring to such a person as an alien enemy, but recognizing him as having the power to sue as an alien friend).

210 Calvin's Case (1608) 77 Eng. Rep. 377, 384; 7 Co. Rep. 1, 6b (K.B.). An excerpt:

> But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted for treason . . . for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law.

Id. See also Stephen Payne Adye, A Treatise on Courts Martial 61 (3rd ed. 1786); 1 William Hawkins, A Treatise of the Pleas of the Crown 51 (6th ed. 1778) ("But it seemeth that aliens, who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law.").

211 Duke of Norfolk's Case (1603), *in* 1 The Library of Entertaining Knowledge: Criminal Trials (David Jardine ed., London 1832) (reproducing transcript). The case arose before the merger of the English and Scottish crowns. The Duke, during a time of amity between Scotland and England, was accused of treason for assisting enemies of the Crown—that is, certain Scots who wished to overthrow Elizabeth I. He questioned whether those Scots, who included Lord Herries, could be classified as enemies, since Scotland was in amity with England. In accordance with the practice of the time, he was denied legal counsel and therefore posed his question to the court. The following appears in the transcript:

> Duke. I beseech you, my Lords the Judges, may a subject be the Queen's Majesty's enemy while the [subject's own] prince is her friend, and in amity with her?
>
> Catline, C. J. In some cases it may be so; as in France, if the dukedom of Brittany should rebel against the French King, and should (during the amity between the French and the Queen's Majesty) invade England, those Britons were the French King's subjects, and the Queen's enemies, though the French King remaineth in amity; and so in your case.

Id. at 226. This opinion was cited as authority by Edward Coke in 3 Institutes of the Lawes of England at 11, and in other English law books as well, *e.g*., 1 Hale, *supra* note 3, at 164 ("so that an enemy extends farther than a king or a state in enmity, namely an alien coming into *England* in hostility") (citing the Duke of Norfolk's Case, italics in original).

212 Vaughan's Case (1696) 91 Eng. Rep. 535; 2 Salk. 634 (K.B.).

the Netherlands and at war with France. Some Dutch citizens[213] joined the French cause. The court stated that they were alien enemies despite the fact that their country and Britain were in amity:

> If the States [i.e., the Netherlands] be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under command of the French King, they are *inimici* [enemies] to us, and *Gallici subditi* [French subjects]: for the French subjection makes them French subjects in respect of all other nations but their own….[214]

The Supreme Court cited *Vaughan's Case* favorably in *Miller v. United States*, relying on it for the Court's own discussion of alien friends and enemies.[215]

The wider principle was, as Vattel stated it, "Whoever offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it."[216] In another passage, Vattel clarified the terms on which one entering a country was to be treated as an alien friend:

> Since the lord of the territory may forbid its being entered when he thinks proper, he has, doubtless, a power to make the conditions on which he will admit of it . . . . But, even in those countries which every stranger freely enters, the sovereign is supposed to allow him access, only upon this tacit condition, that he be subject to the laws . . . The public safety, the rights of the nation, and of the prince, necessarily require this condition; and the stranger tacitly submits to it, as soon as he enters the country, as he cannot presume on having access upon any other footing. The empire has the right of command in the whole country, and the laws are

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213 "Citizens" rather than "subjects" because at the time the Netherlands was a federal republic: the United Provinces of the Netherlands. The echo of that name in "the United States of America" is not accidental. The United Provinces lasted until 1795 with the establishment of the Batavian Republic. The Netherlands became a kingdom in 1806.

214 Vaughan's Case (1696), 91 Eng. Rep. at 536; 2 Salk. at 635.

215 Miller v. United States, 78 U.S. 268 (1870):

> It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war . . . But even in foreign wars persons may be enemies who are not inhabitants of the enemy's territory . . . And it would be strange if they did, for those not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state . . . Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war.

Id. at 310-11. *Cf*. note 211 *supra*, wherein Lord Herries was not in service of any state at war with England but nevertheless was found to be an enemy of England.

216 1 Vattel, *supra* note 3, at 144. *See also id*. at 140 ("a sovereign has a right to treat as enemies those who endeavor to interfere, otherwise than by their good offices, in his domestic affairs").

> not confined to regulating the conduct of the citizens among themselves; but they determine what ought to be observed by all orders of people throughout the whole extent of the state.[217]

V. How the States May Wage Defensive War

We have seen that reserved state power to wage defensive military action is triggered by insurrection, actual or threatened invasion, or challenges from transnational criminal organizations of the kind the founding generation referred to as "enemies of the human race." The discussion below assumes state policy makers have reached a determination that one of these triggers has been pressed.

A. Insurrection

Except in cases of actual civil war, official response to insurrection is generally a matter for the police power rather than the war power. Even during civil war, the punishment of insurrectionists is likely to be handled through the civilian criminal justice system, including the prosecution of civil crimes such as treason and sedition.

To the extent permitted by a state constitution, officials may suspend the writ of habeas corpus or declare martial law,[218] so long as they do not dispense entirely with the due process guarantee of the Fourteenth Amendment.[219] If the circumstances call for it, they also may request that Congress suspend the writ. They may restrict immigration to the extent that doing so does not conflict with federal law. Obviously, they may employ other devices common in wartime, such as curfews and roadblocks.

Under the Domestic Violence Clause, the state legislature may, by due notice ("Application") compel the federal government to suppress "domestic Violence."[220] A state resolution to that effect probably does not need the signature of the

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217 1 Vattel, *supra* note 3, at 154. *Cf.* 8 U.S.C. §1182 (listing dozens of deportable offenses).

218 *See supra* note 112 (remarks of Samuel Adams and Luther Martin). *See also* Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. Richmond L. Rev. 289, 305-306 (1999) ("The Fourteenth Amendment Founders do not seem to have intended to 'incorporate' the Suspension Clause of Article I, Section 9"); *cf.* Moyer v. Peabody, 212 U.S. 78, 84 (1909) (upholding Colorado statute providing that, "when an invasion of or insurrection in the state is made or threatened, the Governor shall order the national guard to repel or suppress the same").

219 Originally "due process of law" referred to all the rights a person held according to the law of the land. *See generally* Andrew Hyman, *The Little Word Due*, 38 Akron Law Rev. 1 (2005). Another way of saying the same thing is that the due process requirement prevented the government from altering or allowing the omission of any aspect of applicable pre-existing rules when proceeding against a person.

The Supreme Court has adopted quite different formulations. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (substantive due process rights are those "deeply rooted in this nation's history and tradition"); Rochin v. California, 342 U.S. 165 (1952) (due process is violated by governmental "conduct that shocks the conscience").

220 U.S. Const. art. IV, § 4, cl. 3.

governor, because an application to Congress is not an act of lawmaking.[221] If the state legislature cannot be convened, then the governor may issue the application.[222]

B. Invasion

The Constitution's Self-Defense Clause specifically recognizes the reserved state power to wage defensive war against invaders.[223] As documented above,[224] the Constitution's definition of "invasion" is quite broad: It is not, as some courts have opined,[225] limited to military attack from another sovereignty. An incursion qualifies as an invasion if it is unauthorized and uninvited and causes or threatens detriment beyond the mere fact of crossing.[226]

If a state is invaded, the Protection From Invasion Clause requires the federal government to protect that state. However, a state's ability to respond to the invasion does not depend on federal compliance with the Protection From Invasion Clause. The state may react with the full panoply of measures traditionally associated with defensive war—that is, with all means necessary to repel the invasion,[227] while avoiding excessive means.[228]

Thus, under the Constitution, a state facing an imminent or actual invasion may issue warnings against further invasion and erect barriers at the border.[229] It may conscript and otherwise raise troops and ships beyond its militia and National Guard establishments.[230] It may deploy those troops in all ways traditionally characteristic of defensive war, other than by issuing letters of marque and reprisal.[231] It may create internal checkpoints, fight the invaders within the state, repel them at the border, or return them whence they came. In the course of military operations, state armed forces may capture invading combatants and seize their property, or kill them if they refuse to surrender their arms.[232] The state may launch preemptive attacks and, under some circumstances, make forays into a neighboring sovereignty (including one claiming to be neutral) if that sovereignty is guilty of harboring the enemy.[233] As in cases of insurrection, the state may, consistently with

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221 *Cf.* Leser v. Garnett, 258 U.S. 130 (1922) (state legislature had power to ratify federal constitutional amendment despite the fact that it contradicted state constitution). *Cf.* Smiley v. Holm, 285 U.S. 355 (1932) (state legislature had no power to disregard governor's veto of redistricting map).

222 U.S. Const. art. IV, § 4, cl. 3. An invasion may spark violence within the borders of the state, thereby qualifying as the "domestic violence" necessary to justify an application.

223 *Id*. art I, § 20, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

224 *Supra* Part III (E).

225 *Supra* note 123.

226 *Supra* Part III (E).

227 *Supra* notes 34 and 36 and accompanying text.

228 *Supra* notes 36, 47, 48, 49 and accompanying text.

229 *Supra* note 44 and accompanying text. The barriers must be such as deter invasion while not preventing legitimate passage at a lawful point of entry. *See also* 2 Vattel *supra* note 3, at 151 and 153.

230 U.S. Const. art. I, § 10, cl. 3 (recognizing that in time of war states may keep "Troops" and "Ships of War" outside of its usual militia forces).

231 *Id*. § 10, cl. 1.

232 *Supra* notes 36, 37, 41 and accompanying text.

233 *Supra* notes 55 and accompanying text.

its constitution, suspend the writ of habeas corpus and, of course, may ask Congress to do so as well.[234]

Typically, invaders are not in allegiance to the state before the invasion. Rather, they are alien enemies or persons the state lawfully can treat as such. This renders them subject to rules different from those applied to insurrectionists.[235] Generally speaking, the state must treat captured combatants as honorable prisoners of war, unless found guilty of war crimes or qualifying as "enemies of the human race."[236]

In some cases, state policy makers may determine that international criminal organizations qualifying as *hostes humani generis* comprise all or part of an invasion. In cases of insurrection, a sovereign treats captives as people in allegiance who have abused their trust. In cases of invasion by alien enemies, a sovereign treats them as prisoners of war. But as for "enemies of the human race," a sovereign may handle them either way.[237]

C. May Treaties or Federal Law Impair State War Powers?

There are clear limits on the power of states to wage defensive war, even when faced with insurrection or invasion. Federal statutes or treaties may override state efforts to restrict immigration or the free flow of goods.[238] The Fourteenth Amendment prohibits dispensing with due process or equal protection of the laws, although both concepts are malleable enough to take wartime exigencies into consideration.[239]

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234 *Supra* notes 112 and accompanying text.

235 *Supra* notes 172 & 173, and accompanying text.

A decision by federal officials to waive or not enforce applicable federal law may give rise to the claim that the intruder has been "invited" and therefore is not an alien enemy and cannot be treated as such by states. Such a claim might be warranted if that decision is pursuant to state or federal pardon powers; we do not believe such a claim is warranted simply because the executive fails to enforce federal law.

As a practical matter, states and the federal government usually will classify the same people as either alien friends or enemies. However, outside the naturalization and bankruptcy contexts, U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have power… to establish an uniform Rule of naturalization, and uniform laws on the subject of Bankruptcies throughout the United States"), we are aware of no principle requiring uniform classification in all circumstances—particularly if the federal agent has acted contrary to federal law. If uniformity were compelled in the immigration context, no state could deviate from a President's opinion as to whether the state is invaded—even though the Self-Defense Clause does not involve the President.

236 1 William Blackstone, Commentaries *411 (war "gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons . . . .").

237 *Supra* notes 65 & 66 and accompanying text.

238 *Supra* notes 95-100 and accompanying text. But *cf*. note 260 *infra*.

239 U.S. Const. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). *See generally* Andrew Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S.U.L. Rev. 79 (2014) (asserting that a greater role was envisioned for Congress beyond enforcement legislation). *See also* note 219 *supra* (discussing original meaning of due process of law).

Congressional approval is necessary for mutual agreements with other states, military or otherwise,[240] although such approval can be implied.[241]

More difficult is the question of the extent to which federal execution of incidental powers, such as statutes enacted under the Necessary and Proper Clause,[242] may impair further the ability of states to wage defensive war.

There are several relevant Supreme Court cases. *Missouri v. Holland*[243] held that when Congress legislates pursuant to a treaty, Congress is not otherwise restricted to its specifically-enumerated powers, apparently because the Necessary and Proper Clause grants Congress authority to enact laws "necessary and proper" for treaty execution.[244] In *Reid v. Covert,*[245]the plurality opinion clarified *Missouri v. Holland* by stating that, although Congress may exercise otherwise-unenumerated powers when legislating pursuant to treaties, it may not adopt laws in violation of "any specific provision of the Constitution,"[246] such as the limitations in the first eight amendments of the Bill of Rights. Presumably, this would include the reservation in the Self-Defense Clause of state powers to wage defensive war.

Bond v. United States[247] qualified the rule of *Missouri v. Holland* further: Congressional legislation adopted pursuant to treaties should be construed when possible to avoid intruding on areas of traditional state concern.

Finally, *Prinz v. United States*[248] held that a law adopted for a purpose outside Congress's specifically-enumerated powers cannot be upheld under the Necessary and Proper Clause if it intrudes on state sovereignty to such an extent that the law is not "proper."[249] The state interest overridden in *Missouri v. Holland* was control over human interactions with migratory birds. The state interest protected in *Prinz* was freedom from federal "commandeering"—federal imposition of an administrative function on state officials. However, the power to wage defensive

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240 U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). The absence of a semicolon after the word "Power" suggests that a permissible construction is that "unless actually invaded, or in such imminent Danger as will not admit of delay" modifies the restriction on agreements and compacts as well as the restriction on waging war. This is probably not, in our view, the best reading, but its credibility is raised by this consideration: a state defending itself from invasion should be able seek aid if the federal government fails to honor its obligations under the Protection From Invasion Clause. States cannot join any "treaty, alliance, or confederation" even with consent of Congress. *See* U.S. Const. art. I, § 10, cl. 1. But a pact that allows the state to exit without penalty, quickly and at any time and for any reason is not necessarily a "treaty." *See* Andrew Hyman, *The Unconstititonality of Long-Term Nuclear Pacts that are Rejected by Over One-Third of the Senate*, 23 Denv. J. Int'l Law & Pol. 313 (1995).

241 United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

242 U.S. Const. art. I, § 8, cl. 18.

243 Missouri v. Holland, 252 U.S. 416 (1920).

244 *Id.*. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.").

245 Reid v. Covert, 354 U.S. 1 (1957).

246 *Id*. at 18.

247 Bond v. United States, 572 U.S. 844 (2014).

248 Prinz v. United States, 521 U.S. 898 (1997).

249 *Id*. at 924.

war is even more central to state sovereignty than the interest defended in *Printz*. It may be necessary to territorial integrity and, potentially, to survival. Presumably the *Printz* doctrine protects it against federal exercise of incidental authority.

D. Some Thoughts on Justiciability

Several Supreme Court cases have determined that the "republican Form" mandate in Article IV, Section 4 is committed to the political branches of the federal government, and, therefore, "republican Form" cases are not justiciable.[250] Without much analysis, some lower courts have extended this rule to the Protection From Invasion Clause[251] and to other aspects of reserved state territorial integrity.[252]

Detailed examination of modern justiciability issues is beyond the scope of this article. Several observations may, however, assist in framing future discussion.

First: the Supreme Court's reasons for rendering "republican Form" cases non-justiciable are based on considerations unique to that portion of Article IV, Section 4. These considerations involve matters of definition ("When is a government republican?") and matters of practicality ("What is the retroactive and prospective legal effect of declaring a government "non-republican?").[253] Those considerations are of limited relevance to invasion cases, because the definitional doubt is smaller, and the meaning of "invasion" can be determined by a state government having authority to do so.

Second: the courts' opinions holding "invasion" cases to be non-justiciable also displayed the belief that the constitutional term "invasion" refers only to a military attack from a foreign government.[254] Because such an attack was not a feature of those cases, it was easier to dismiss them as non-justiciable. As demonstrated above, however,[255] that belief is clearly erroneous.

Third: The consequences from failing to enforce the insurrection and invasion mandates may be far more severe than those arising from failing to enforce the "republican Form" mandate. If Texas or Montana decided to enthrone a king, the Union could continue with all 50 states intact. Failure to protect a state against insurrection or invasion could sever or topple the Union itself.[256]

Fourth: Judicial failure to enforce the federal duty to protect states from insurrection or invasion would convert a clear constitutional requirement into a mere suggestion that federal politicians could ignore at will. This, in turn, would

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250 Luther v. Borden, 48 U.S. 1 (1849); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); Baker v. Carr, 369 U.S. 186 (1962); Rucho v. Common Cause, 588 U.S. ___, 139 S. Ct. 2484, 2506 (2019) (dicta).

251 California v. United States, 104 F.3d 1086 (9th Cir. 1997); Padavan v. United States, 83 F.3d 23 (2d Cir. 1996) (both holding the Protection From Invasion Clause to be non-justiciable).

252 New Jersey v. United States, 91 F.3d 463 (3d Cir. 1996).

253 Luther v. Borden, 48 U.S. 1 (1849) (discussing such factors). *Cf.* Colgrove v. Green, 328 U.S. 549, 553 (1946) (a court decision hypothetically declaring a state government non-republican followed by the state's failure to erect a complying government would create a vacuum, such that, "The last stage may be worse than the first").

254 *See* cases cited *supra* note 253.

255 *Supra* Part III (E).

256 One is reminded of the neglect of the administration of President James Buchanan in the face of secession.

undercut a central reason the Constitution was adopted: to "provide for the common Defence."[257]

Treating insurrection and invasion as non-justiciable has implications beyond the scope of the federal duty to protect. It also has implications for the extent of state war powers. After all, "Insurrection" and "invasion" not only trigger the federal government's duty under the Protection From Invasion Clause, but also trigger exercise of state war powers. If the terms are too vague for courts to define for federal purposes, then they also are too vague for courts to define for state purposes. If Protection From Invasion Clause cases are held to be non-justiciable because the Constitution commits the decision of whether and how to protect states against invasion to the political branches of the federal government, then the Constitution even more clearly commits (as demonstrated by the Self-Defense Clause) the determination of whether a state has been "Invaded" or in "imminent Danger" to the state government. If redressibility issues impede justiciability in Protection From Invasion Clause cases, then they could also impede justiciability when a state has gone onto a war footing and raised an army.

To be clear: If federal officials are proceeding in good faith to crush an insurrection or repel an invasion, the courts should not second-guess their tactics.[258] But judicial intervention is appropriate when federal officials utterly neglect their duty or adopt measures so plainly insufficient as to demonstrate a lack of good faith effort.

Like the issue of justiciability, the choice of remedies against recalcitrant officials is best left to another day. We might suggest, however, that where mandamus, declaratory judgments, or injunctions are not practical, monetary damages might well be. Damages could, for example, fund or reimburse state expenses incurred in addressing the problem without federal assistance.

VI. Conclusion

Before ratification of the Constitution, the fourteen North American states were the ultimate repository of the power to wage war, although all but Vermont had entered a treaty (the Articles of Confederation) pooling some of their war powers. While the Articles lasted, most war-making authority—including exclusive authority to wage offensive war—was lodged in the Confederation Congress. The states were required to maintain militias, enjoyed wide flexibility to wage defensive land war, and retained more limited flexibility to wage defensive naval war.

Under the Articles, the states also reserved the prerogative, with congressional approval, of entering treaties, and they could levy exactions on imports not inconsistent with congressional treaties. They reserved almost untrammeled authority in certain areas related to war, such as immigration and the writ of habeas corpus.

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257 U.S. Const., *Preamble* ("provide for the common defence"). On the paramount need for a central authority to protect the Union, see the extended discussions in The Federalist Nos. 4 & 5 (John Jay), Nos. 7 & 8 (Alexander Hamilton), No. 45 (James Madison).

258 *Cf.* United States v. Texas, 599 U.S. 670 (2023) (holding that Texas had no standing in a case seeking to have the government make more arrests under an immigration statute).

The Constitution re-arranged this scheme. The new central government received exclusive power to wage offensive war, symbolized by the grant of an enumerated power to Congress to declare war. The federal government also received the exclusive right to enter treaties and alliances and issue letters of marque and reprisal. The states retained their militias, although subject to federalization for limited and enumerated purposes. States were freed of some of the Articles' restrictions on their flexibility in waging defensive war.

The federal government also obtained the prerogative of suspending habeas corpus in certain circumstances. States retained that prerogative as well. States kept the power to restrict immigration and regulate foreign trade, but their laws on these matters were largely subject to congressional preemption.[259]

The Constitution imposed certain war-related obligations on the federal government. The federal government was charged with defending the states against invasion and, upon state request, with suppressing insurrection.

The states reserved the sovereign's prerogative of engaging in defensive military action. That authority is triggered by insurrection, by actual or imminent invasion, or by attacks from "enemies of the human race"—that is, by transnational criminal gangs. The Founders envisioned insurrectionaries being treated as criminals who have betrayed their legal obligation of allegiance to the state, "invaders" as alien enemies, and international criminals being treated either way, at the option of the state.

The constitutional term "invasion" denotes an unauthorized and uninvited intrusion of any size across a border, where the intrusion causes, or threatens to cause, detriment beyond the fact of the intrusion itself. It includes illegal immigration of a kind, magnitude, or degree of organization that may inflict harm.

State warmaking authority is at its apex in the case of invasion, against which the states have reserved full defensive land war powers. Of course, a state may opt not to exercise the full scope of its war powers, and any actions it undertakes are subject to the law of war.

Finally, the Constitution's reservation of defensive war power to the states encompasses all procedures customary during the Founding era for fighting defensive war except those, such as letters of marque and reprisal, specifically interdicted by the Constitution. These procedures are constrained only by necessity, the law of war, and specific constitutional provisions (such as the ban on state letters of marque and reprisal). They include, when necessary, preemptive and even cross-border attacks.

State resort to their war powers does not depend on federal assistance or federal permission, and federal measures adopted as incidents to enumerated powers—

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[259] In Arizona v. United States, 567 U.S. 387 (2012), the court said that the federal government's authority over immigration "rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization' . . . and its inherent power as sovereign to control and conduct relations with foreign nations . . . ." *Id*. at 394-95. But that case did not involve naturalization, and the proper basis for decision was the Define and Punish Clause. *See Natelson, Define and Punish, supra* note 3. The Court also relied on the (mythical) doctrine of inherent sovereign authority, another error. *See* Natelson*, supra* note 72. It is outside the scope of this article to analyze whether those errors resulted in erroneous outcomes, but because the case did not involve naturalization, there was no *constitutional* requirement of nationwide uniformity.

including legislation adopted to enforce treaties—may not destroy or unreasonably burden the ability of a state to defend itself.[260]

[260] We leave unresolved the question of the extent to which federal actions within core federal powers (such as the power to regulate Commerce), U.S. CONST. art. I, § 8, cl. 3) rather than incidental powers (*cf. id*., art. I, § 8, cl. 18) (such as the regulation of manufacturing as an incident to commerce) may override the state authority reserved by the Self-Defense Clause.

Natelson believes that incidental powers trump reserved ones, because only powers not granted are reserved, and the Constitution grants incidental powers; Hyman believes that the Self-Defense Clause is a concurrent power, and is an express right similar to those enumerated in the Bill of Rights, not just a residual effect of granting limited power to the federal government. They agree that, where possible, federal statutes should be interpreted to avoid intruding into traditional areas of state authority, including self-defense.

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What Court (if any) Decided *Ex parte Merryman*?—A Correction for Justice Sotomayor (and others)

Seth Barrett Tillman*

In her 2022 Katzmann Lecture, Justice Sotomayor stated:

> [O]nly twice in our history have presidents ignored Supreme Court rulings—imagine that—in two hundred years of history. First, Andrew Jackson permitted states to displace Indians from their sovereign lands and gave them federal support to do so in direct contravention of the Supreme Court's ruling in *Worcester v. Georgia*, holding that Indian nations were sovereigns and states could not pass laws controlling Indian lands. Second, after Chief Justice Taney ruled [in *Ex parte Merryman*] (in a case he heard alone, not with the full Court, and that was filed with the United States District Court) that President Abraham Lincoln's unilateral suspension of the writ of habeas corpus was unconstitutional, President Lincoln maintained the suspension and did not release the detainee in question.[1]

* Seth Barrett Tillman, Associate Professor. Maynooth University School of Law and Criminology, Ireland. Scoil an Dlí agus na Coireolaíochta Ollscoil Mhá Nuad. I thank Professor Jonathan W. White and Brian McGinty for their past and recent willingness to entertain my many questions, and I thank Professors Paul D. Halliday and G. Edward White for their willingness to entertain my obscure theories.

1 Hon. Sonia Sotomayor, Katzmann Lecture, *Reflections about Judicial Independence*, 97 N.Y.U. L. Rev. 875, 881 (2022) (footnote omitted). Since 2016, I have explained—again and again and again—that it makes little sense to say that Lincoln defied or even "ignored" Taney's ruling in *Ex parte Merryman*. Taney never issued any order directing the President, the Executive Branch, the United States Army, or the named defendant—General Cadwalader—to release the habeas corpus applicant: John Merryman. *See* Seth Barrett Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, 224 Mil. L. Rev. 481 (2016), http://ssrn.com/abstract=2646888, https://tinyurl.com/yck97jev. *See generally* Seth Barrett Tillman, *Canonical Cases and Other Quodlibets: A Response to Professor Fallon*, 97 Tex. L. Rev. Online 13 (2018), https://ssrn.com/abstract=3246598, https://tinyurl.com/289yycc8; Seth Barrett Tillman, Merryman *Redux: A Response to Professor John Yoo*, 22 Chap. L. Rev. 1 (2019), https://ssrn.com/abstract=3213353, https://tinyurl.com/4kfxbfk9. Likewise, commentators have made a similar argument in regard to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See, e.g.*, Gerard N. Magliocca, *The* Gold Clause Cases *and Constitutional Necessity*, 64 Fla. L. Rev. 1243, 1258 n.88 (2012) ("Many people believe that Andrew Jackson defied Chief Justice Marshall's ruling in *Worcester v. Georgia*, but that is not true because the Court never issued the mandate in that case."); Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 Seattle J. for Soc. Just. 541, 552 n.64 (2003) ("[T]he Court had not entered a final order and the President was under no legal obligation. The private party petitioners did not pursue the litigation."); *see also* Richard K. Neumann Jr., *The Revival of Impeachment as a Partisan Political Weapon*, 34 Hastings Const. L.Q. 161, 208 (2007) ("In any event, it was the State of Georgia, *not Jackson*, who would have to comply with the Supreme Court's judgment [in *Worcester v. Georgia*], and Georgia did ignore it, which is the point of the supposed Jackson quote." (emphasis added)).

Here, Justice Sotomayor made three claims. First, she asserted that *Ex parte Merryman*[2] was decided by Chief Justice Taney acting alone—Sotomayor was correct about that. Second, Sotomayor asserted that *Merryman* was "filed with the United States District Court"—she was not correct about that. And finally, Sotomayor characterized *Merryman* as a Supreme Court case—she was not correct about that either. We all make mistakes—but characterizing a case as a Supreme Court case, when it is plainly not such a case, is odd. One might think Sotomayor, a Supreme Court Justice, would know what cases her own Court had decided. Still, Sotomayor is not alone[3]—other judges have also asserted that *Merryman* was a

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2 *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.), https://tinyurl.com/ms6x7fnd.

3 Not only is Justice Sotomayor not alone, any number of judges and other commentators have individually voiced inconsistent views on this issue—albeit at different times and in different publications. *Compare infra* note 5 (reporting position of Chief Judge Posner—taking the Supreme Court view), *with infra* note 11 (reporting alternative position of Chief Judge Posner—taking circuit court view); *compare infra* note 6 (reporting position of Judge Napolitano—taking the Supreme Court view), *with infra* note 38 (reporting alternative position of Judge Napolitano—taking the view *Merryman* was issued by a "federal court in Baltimore"); *compare infra* note 11 (reporting position of Chief Justice Frank J. Williams—taking circuit court view), *with infra* note 51 (reporting alternative position of Chief Justice Frank J. Williams—taking the chambers opinion view); *compare infra* note 7 (reporting position of Andrew C. McCarthy—taking the Supreme Court view), *with infra* note 11 (reporting alternative position of Andrew C. McCarthy—taking circuit court view); *compare infra* note 7 (reporting position of Mark E. Neely, Jr.—taking the Supreme Court view), *with infra* note 20 (reporting alternative position of Mark E. Neely, Jr.—taking the district judge view), *with infra* note 34 (reporting alternative position of Mark E. Neely, Jr.—taking the Chief Justice view), *with infra* note 36 (reporting a further alternative position of Mark E. Neely, Jr.—taking a complex view regarding the issue of what court issued *Merryman*); *compare* 1 Steven Gow Calabresi, The History and Growth of Judicial Review 130 n.65 (2021) (citing *Merryman* as "17 F. Cas. 144 (C.C.D. Md. 1861)"), *with* Steven G. Calabresi & Justin Braga, *Judge Robert H. Bork and Professor Bruce Ackerman: An Essay on The Tempting of America*, 13 Ave Maria L. Rev. 47, 52 (2015) (reviewing Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990), and Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 Yale L.J. 1419 (1990)) ("President Lincoln refused to enforce [the] Chief Justice's district court ruling . . . ."); *compare* Brian R. Dirck, The Executive Branch of Federal Government: People, Process, and Politics 99 (2007) (asserting that Taney issued *Merryman* "in his capacity as a federal district court judge"), *with* Brian R. Dirck, Waging War on Trial: A Handbook with Cases, Laws, and Documents 88 (2003) (asserting that *Ex parte Merryman* was "issued by the Supreme Court"), *with* Brian R. Dirck, Lincoln and the Constitution 78–79 (2012) (noting the "ambiguities" in regard to "[u]nder what authority . . . Taney hear[d]" *Merryman*); *compare* Richard H. Fallon Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1204 (7th ed. 2015) (citing *Merryman* as "17 F.Cas. 144 (C.C.D.Md.1861) (No. 9487), by Chief Justice Taney, sitting as a Circuit Judge"), *and* Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 Utah L. Rev. 1, 3 ("Ruling in his capacity as circuit *judge*, Chief Justice Roger Taney concluded in *Merryman* . . . ." (emphasis added)), *with* Richard H. Fallon, Jr., *Political Questions and the Ultra Vires Conundrum*, 87 U. Chi. L. Rev. 1481, 1546 (2020) ("Chief Justice Taney issued his ruling in *Merryman* in his capacity as a circuit *justice*, not on behalf of the Supreme Court as an institution." (emphasis added)), *with*

Supreme Court decision, including Judge Katherine B. Forrest, in a district court opinion,[4] as well as both Chief Judge Posner,[5] a federal appellate judge, and Judge Napolitano,[6] a state trial court judge, writing extrajudicially. Any number of other judges, academics, and authors have also asserted that *Merryman* was a Supreme Court decision.[7] The position taken by these commentators (including Justice

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Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Calif. L. Rev. 1, 17 n.63 (2003) (citing *Merryman* as: "17 F. Cas. 144 (1861)" absent listing *any* specific court); *compare* Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay 357 n.1 (2017) (citing *Merryman* as a decision of "(C.C.D. Md. 1861)"), *and* Amanda L. Tyler, *Judicial Review in Times of Emergency*, 109 Va. L. Rev. 489, 501 n.69 (2023) ("Taney [acted in *Merryman*] in his capacity as a circuit judge."), *with* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 Yale L.J. 600, 638 n.131 & 687 n.412 (2009) (citing *Merryman* as a decision by "(Taney, Circuit Justice, C.C.D. Md. 1861)"), *and* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 Nw. U. L. Rev. 1389, 1457 n.337 (2005) (citing *Merryman* as an "(opinion of Chief Justice Taney as circuit justice)"), *with* Amanda L. Tyler, *Is Suspension a Political Question*, 59 Stan. L. Rev. 333, 343 n.45 (2006) (explaining that "[t]here is a debate over whether the petition in *Merryman* was directed to Taney in his capacity as a Circuit Justice or as Chief Justice"), *with* Amanda L. Tyler, *Courts and the Executive in Wartime*, 107 Calif. L. Rev. 789, 842 (2019) ("[James C.] Purcell [who drafted Endo's brief in *Ex parte Endo*] relied upon important earlier *Supreme Court* habeas decisions in *Ex parte Bollman*, *Ex parte Merryman*, and *Ex parte Milligan* . . . ." (emphasis added)). What court (if any) do these distinguished judges and commentators believe decided *Merryman*?

4 *See* Hedges v. Obama, 890 F. Supp. 2d 424, 458 (S.D.N.Y. 2012) (Forrest, J.) ("In *Ex parte Merryman* . . . the Supreme Court made clear . . . .").

5 *See* Richard A. Posner, Law, Pragmatism, and Democracy 272 (2003) (asserting that *Merryman* is "one of the few cases in which a Supreme Court decision . . . has been openly defied by one of the other branches").

6 *See* Andrew P. Napolitano, *A Legal History of National Security Law and Individual Rights in the United States*, 8 N.Y.U. J.L. & Liberty 396, 406 (2014) (characterizing *Merryman* as a Supreme Court case).

7 *See, e.g.*, Daniel R. Coquilette & Bruce A. Kimball, On the Battlefield of Merit: Harvard Law School, The First Century 268 (2015) (describing *Merryman* as a Supreme Court case); Tom Head & David Wolcott, Crime and Punishment in America 88 (2010) ("When a complaint was filed before the Supreme Court on [John Merryman's] behalf, *they* ruled in *Ex Parte Merryman* . . . ." (emphasis added)); Mark R. Levin, Men in Black: How the Supreme Court is Destroying America 128 (2005) ("In *Ex parte Merryman*, Taney, writing for the Court . . . ."); James S. Pula, The Civil War from Its Origins to Reconstruction (2019) (describing *Merryman* as a ruling of the "U.S. Supreme Court"); András Sajó & Renáta Uitz, The Constitution of Freedom: An Introduction to Legal Constitutionalism 423 (2017) (characterizing *Merryman* as a "Supreme Court rul[ing]"); Samuel Walker, Civil Liberties in America 155 (2004) (explaining that the "Supreme Court overrule[d] President Lincoln in *Ex Parte Merryman*"); Steven J. Bucklin, *To Preserve these Rights: The Constitution and National Emergencies*, 47 S.D. L. Rev. 85, 87 n.17 (2002) (characterizing *Merryman* as a "famous United States Supreme Court opinion"); Ken Gormley, *Conclusion: An Evolving American Presidency*, *in* The Presidents and the Constitution: A Living History 623, 651 (Ken Gormley ed., 2016) (characterizing *Merryman* as a Supreme Court ruling); Drew Noble Lanier, *The Political and Legal Status of Persons in the War on Terrorism*, *in* Striking First: The Preventive War Doctrine and the Reshaping of U.S. Foreign Policy 119 (Betty Glad & Chris J. Dolan eds., 2004) (characterizing *Merryman* as a Supreme Court case); Mark E. Neely, Jr., *The Constitution and Civil*

Sotomayor, Chief Judge Posner, Judge Forrest, and Judge Napolitano) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* was authored by the Chief Justice of the United States, and it was assumed that his opinion spoke for the Supreme Court as an institution.

Liberties Under Lincoln, *in* Our Lincoln: New Perspectives on Lincoln and his World 37, 37 (Eric Foner ed., 2008) (characterizing *Merryman* as an "opinion from the United States Supreme Court"); *id.* at 39 ("*Ex parte Merryman* . . . stands as one of the most poorly understood of decisions to come from the Supreme Court."); James D. Hardy, *Judging Lincoln*, 5(2) Civil War Book Review 1, 2 (reviewing [Chief Justice] Frank J. Williams, Judging Lincoln (2002)) ("The [Supreme] Court sustained Lincoln in the *Prize Cases* (1863) and reversed him in *Ex Parte Merryman* (1861) . . . ." (first emphasis added)); *see also, e.g.*, Nicolas Gachon, Abraham Lincoln and the U.S. Constitution, 1861–1865 / The Presidential War 53 (2022) (discussing *Merryman* in a chapter titled: *The Supreme Court to the rescue of civil liberty*), https://tinyurl.com/yc62md2s; Luis Kutner, World Habeas Corpus 86 (1962) ("Merryman petitioned the Supreme Court for a Writ . . . ."); Michael Stokes Paulsen & Luke Paulsen, The Constitution: An Introduction 177 (2015) ("Lincoln understood the Constitution *not* necessarily to mean whatever the Supreme Court said it meant concerning slavery and national authority (*Dred Scott*) or concerning presidential power in wartime (*Ex parte Merryman*)."); *id.* at 171 & 309 (same); Allen C. Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 How. L.J. 397, 410 (2007) ("Lincoln had already defied one attempt at Supreme Court meddling in 1861 in *Ex parte Merryman* . . . ."); Tiffany Middleton, *How to Read a U.S. Supreme Court Opinion,* 77 Soc. Educ. 32, 34 (Jan./Feb. 2013) (discussing *Ex parte Merryman* in a post on U.S. Supreme Court opinions); John Yoo, *Lincoln and Habeas: of* Merryman *and* Milligan *and* McCardle, 12 Chap. L. Rev. 505, 505 (2009) ("Three cases define the *Supreme Court*'s encounter with the [American] Civil War: *Ex parte Merryman*, *Ex parte Milligan*, and *Ex parte McCardle*." (first emphasis added)); Andrew C. McCarthy, *The President Needs to Invoke the Constitution's Wartime Provisions*, USA Today, July 2010, at 22, 24 (characterizing *Merryman* as a Supreme Court decision); Susan Navarro Smelcer, The Evolution of Dissent in the United States Supreme Court 96 (Emory University, Political Science, PhD dissertation, 2015) (characterizing *Merryman* as the Supreme "Court's challenge to Lincoln's suspension"); *id.* ("The conflict in *Ex parte Merryman* was not the last between the [Supreme] Court and the other branches during the War or in the period immediately following."); Brian Duignan, *Select Decisions of the United States Supreme Court*, Britannica (last accessed Dec. 26, 2022), https://tinyurl.com/2v4xuffd (listing *Merryman* among other U.S. Supreme Court cases); Robert Longley, *Why Bush and Lincoln Both Suspended Habeas Corpus*, ThoughtCo. (Nov. 2, 2022), https://tinyurl.com/3usk5fmn ("Taney . . . issued a writ of habeas corpus demanding that the U.S. Military bring Merryman before the Supreme Court."); *How to Read a U.S. Supreme Court Opinion*, American Bar Association (May 4, 2022), https://tinyurl.com/832zekyk, https://tinyurl.com/enmy3ms8 (discussing *Ex parte Merryman* in a publication on U.S. Supreme Court opinions); *cf., e.g.*, Noah Feldman, The Broken Constitution / Lincoln, Slavery, and the Refounding of America 191 (2021) (suggesting that Merryman's counsel "may even have hoped that the Supreme Court itself would act on [Merryman's] petition"); Jerome Barron, *Decision without Power—The Dilemma of the Supreme Court*, 40 N.D. L. Rev. 57, 61 n.6 (1964) (citing *Merryman* as a decision of "(Sup. Ct. 1861)"); Frank W. Dunham, Jr., *Where* Moussaoui *Meets* Hamdi, 183 Mil. L. Rev. 151, 156 (2005) (affirming, absent documentary support, that "[r]ather than adher[ing] to [Taney's] ruling, Lincoln appealed [*Merryman*] to the full Supreme Court").

Others have asserted that *Merryman* was a decision of the United States Circuit Court for the District of Maryland—the local intermediate federal appellate court. Chief Justice Rehnquist,[8] Judge Diane Wood,[9] a federal appellate judge, and two federal district court judges[10] took this position, as well as any number of other domestic judges, foreign judges, academics, and authors.[11] (It is possible that

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8 *See* [Chief Justice] William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 44 (1998) (noting that, in *Merryman*, Taney "was speaking only as a member of a circuit court").

9 [Judge] Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. Chi. L. Rev. 455, 460 n.30 (2003) ("Chief Justice Roger Taney, sitting on the Circuit Court for Maryland, in *Ex parte Merryman* . . . questioned the President's authority . . . .").

10 *See* Hon. Roy K. Altman, *Foreword*, 76 U. Miami L. Rev. 929, 932 n.15 (2022) (suggesting the possibility, and counterfactually, that John Merryman "petitioned the circuit court, which then *assigned the case to Taney*" (emphasis added)); [Judge] Sherrill Halbert, *The Suspension of the Writ of Habeas Corpus by President Lincoln*, 2 Am. J. Legal Hist. 95, 99 (1958) ("Taney took jurisdiction in this case as a Circuit Judge . . . .").

11 *See, e.g.*, In the Matter of the Petition for Habeas Corpus of Benigno S. Aquino, Jr. v. Hon. Juan Ponce Enrile, Secretary of National Defense, G.R. No. L-35546 (Supreme Court Philippines Sept. 17, 1974) (Castro, J.) (characterizing *Merryman* as a "Circuit Court" decision), https://lawphil.net/judjuris/juri1974/sep1974/gr_l_35546_1974.html; William S. Church, A Treatise of the Writ of Habeas Corpus 39 (San Francisco, Bancroft-Whitney Co. 1886) (explaining that *Merryman* was heard in "the United States circuit court of [Maryland]"); Laura F. Edwards, A Legal History of the Civil War and Reconstruction 22 (2015) (asserting that Taney heard *Merryman* as a "federal circuit court judge"); Fallon et al., *supra* note 3, at 1204 (citing *Merryman* as "17 F.Cas. 144 (C.C.D.Md.1861) (No. 9487), by Chief Justice Taney, sitting as a Circuit Judge"); Benjamin Ginsberg, Presidential Government 34, 287 (2016) (stating that Taney, in *Merryman*, sat as a "federal circuit court judge"); H. Leon Greene, Northern Duty, Southern Heart/George Proctor Kane's Civil War 128 (2023) (indicating that Taney, in *Merryman*, sat as a "federal circuit court judge"); Mark C. Miller, The View of the Courts from the Hill: Interactions between Congress and the Federal Judiciary 57 (2000) ("[John] Merryman filed for a writ of habeas corpus with the U.S. Court of Appeals in Maryland . . . ."); James P. Pfiffner, Power Play: The Bush Presidency and the Constitution 95 (2008) (noting that in *Merryman*, "Chief Justice Roger Taney . . . was sitting as a circuit judge"); [Chief Judge] Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts 188 n.50 (2001) (citing *Merryman* as "(Cir. Ct. D. Md. 1861)"); Christian G. Samito, Changes in Law and Society during the Civil War and Reconstruction 59 & 63 (2009) (asserting that, in *Merryman*, Taney sat as a "judge of the U.S. Circuit Court for the District of Maryland"); James F. Simon, Lincoln and Chief Justice Taney: Slavery, Secession, and the President's War Powers 190 (2006) ("[I]n fact, [Taney in *Merryman*] was acting in his capacity as a circuit court judge."); Jonathan W. White, Abraham Lincoln and Treason in the Civil War: The Trials of John Merryman 42 (2011) (concluding that "records confirm that the [*Merryman*] case was a circuit court decision"); [Chief Justice] Frank J. Williams, Judging Lincoln 63 (2002) ("Taney . . . took jurisdiction as a circuit judge."); Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 Harv. J.L. & Pub. Pol'y 63, 80 (2015) (asserting that, in *Merryman*, "Chief Justice Taney, [was] sitting by designation as a circuit court judge"); Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 Brook. L. Rev. 1085, 1129 n.285 (2019) (characterizing *Merryman* as a "Circuit Court of Maryland" decision); David Farnham, *"A High and Delicate Trust": How Ignorance*

and Indignation Combined to Expand President Lincoln's Claimed Power to Suspend Habeas Corpus in the Case of John Merryman, 24 J. of S. Legal Hist. 109, 110 n.8 (2016) (affirming that Taney "had issued the writ as a Circuit Judge and not as a Supreme Court justice"); Paul Finkelman, *"Hooted Down the Page of History": Reconsidering The Greatness of Chief Justice Taney*, 19(1) J. Sup. Ct. Hist. 83, 98 (1994) (explaining that in "*Ex parte Merryman* Taney [ruled] in his capacity as circuit court judge"); David B. Kopel, *Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer*, 47 Loy. U. Chi. L.J. 1117, 1145 (2016) (explaining that "in *Ex parte Merryman*, in which Taney was circuit-riding and sitting as a Circuit *Court* Judge . . . ." (second emphasis added)); David Landau et al., *Federalism for the Worst Case*, 105 Iowa L. Rev. 1187, 1238 (2020) (characterizing *Merryman* as a "circuit court" decision); James Landman, *You Should Have the Body: Understanding Habeas Corpus*, 72 Soc. Educ. 99, 101 (Mar. 2008) (explaining that "Taney [was] sitting as a circuit court judge"), https://tinyurl.com/2p96arrn; Michael Les Benedict, *"The Perpetuation of Our Political Institutions": Lincoln, the Powers of the Commander in Chief, and the Constitution*, 29 Cardozo L. Rev. 927, 950 (2008) (characterizing *Merryman* as a "circuit court case"); Wayne McCormack, *Threats to Judicial Independence: Traditional Transitions Challenged*, *in* Challenged Justice: in Pursuit of Judicial Independence 37, 42 (Shimon Shetreet et al., eds., 2021) (noting that "Taney [was] sitting not as a Supreme Court Justice but as a United States Circuit Court Judge"); Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. Rev. 1, 25 (2014) (characterizing *Merryman* as a decision of the "Circuit Court for the District of Maryland"); Jason H. Silverman, *The Odd Couple of American Legal History*, 10 Green Bag 2d 511, 517 (2007) (characterizing *Merryman* as "a federal circuit court case"); Tyler, *Judicial Review in Times of Emergency*, *supra* note 3, at 501 n.69 ("Taney [acted in *Merryman*] in his capacity as a circuit judge."); Jonathan W. White, *The Strangely Insignificant Role of the U.S. Supreme Court in the Civil War*, 3 J. Civil War Era 211, 218 (2013) ("Taney was sitting as a circuit justice in the U.S. Circuit Court for the District of Maryland, but he made his opinion appear to be that of a Supreme Court justice 'at chambers.'"); [Chief Justice] Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then & Now—The Southern Rebellion and September 11*, 60 N.Y.U. Ann. Survey of Am. L. 463, 474 (2004) ("This time, [in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864)] unlike *Merryman*, the *circuit court* agreed with the suspension." (third emphasis added)); Kenneth Holland & Matthew Woessner, *Taney, Roger B.*, *in* Encyclopedia of the Supreme Court 742, 744 (David Schultz ed., 2d ed. 2021) (explaining that "Taney in *Ex parte Merryman*, Circuit Court, District of Maryland (1861), issued the writ"); Zac Frank, *Elizabeth Cheney, Bush Legal Counsel*, Slate (Jan. 29, 2009, 1:00 PM), https://tinyurl.com/4peksdma ("Correction, Jan. 30, 2009: This article originally referred to *Ex Parte Merryman* as a Supreme Court case. It was a circuit court order written by Roger Taney, the [C]hief [J]ustice of the Supreme Court, who was sitting on the circuit court at the time."); Allen Guelzo, *Ex parte Merryman (1861)*, Constituting America (last accessed Dec. 29, 2022), https://tinyurl.com/4rwe6t9h ("Taney issued [*Merryman*] in his co-capacity as a federal circuit judge, but prefaced it as being issued from his U.S. Supreme Court chambers as though it were the product of a full hearing before the Supreme Court."); *infra* note 26 (collecting authority asserting that *Merryman* was a decision of the "Fourth Circuit"); *see also, e.g.*, 2 James Bradley Thayer, Cases on Constitutional Law 2361 (Cambridge, George H. Kent 1895) (reporting: "Ex parte John Merryman. Circuit Court of the United States for Maryland."); Fallon, *Executive Power and the Political Constitution*, *supra* note 3, at 3 ("Ruling in his capacity as circuit judge, Chief Justice Roger Taney concluded in *Merryman* that . . . ."); Deborah Pearlstein, *Contemporary Lessons from the Age-Old*

this is also the position of Justice Alito and others on today's Supreme Court.[12])

Prize Cases*: A Comment on the Civil War in U.S. Foreign Relations Law*, 53 S. Louis U. L.J. 73, 83 n.52 (2008) ("*Merryman* was decided by Chief Justice Taney while sitting with the Circuit Court of the District of Maryland."); James F. Simon, *Lincoln and Chief Justice Taney*, 35(3) J. Sup. Ct. Hist. 225, 236 (2010) (explaining that Taney issued the *ex parte* writ "in his capacity as a circuit court judge"); *cf., e.g.*, Albert Bushnell Hart, Salmon Portland Chase 326 (Boston, Houghton, Mifflin and Company 1899) (indicating that Taney, in *Merryman*, was "sitting alone on the Circuit bench"); Harold M. Hyman, The Reconstruction Justice of Salmon P. Chase 124 (1997) (characterizing *Merryman* as a "circuit opinion"); Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic*, 84 Notre Dame L. Rev. 1975, 1990 (2009) ("John Merryman, *filed* a habeas writ to the appropriate Circuit Court, where Chief Justice Taney sat." (emphasis added)); Geoffrey R. Stone, *Civil Liberties in Wartime*, 28(3) J. Sup. Ct. Hist. 215, 220 (2003) ("The judge *assigned* to hear [John] Merryman's petition was Chief Justice Roger B. Taney." (emphasis added)); John Harrison, *Would All the Laws But One be Close Enough for Government Work*, 2 Green Bag 2d 333, 334 (1999) (reviewing [Chief Justice] William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime (1998)) ("Chief Justice Taney, *apparently* sitting on the Circuit Court, ordered Merryman released . . . ."); Andrew C. McCarthy, *How the sausage was made*, 41(6) The New Criterion 55, 58 (2023) (reviewing Brad Snyder, Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment (2022)) ("Taney, acting as a circuit judge, ruled . . . ."); *Judicial Review of Executive Orders*, Federal Judicial Center (last accessed Dec. 18, 2022), https://tinyurl.com/3hbj4266 ("In *Ex parte Merryman* (1861), Chief Justice Roger Taney, sitting on the U.S. circuit court in Maryland, held that the power to suspend the writ rested exclusively with Congress."); *Ex Parte Merryman / United States law case [1861]*, Britannica (last accessed Dec. 26, 2022), https://tinyurl.com/4r36tcmp (explaining that "Supreme Court Chief Justice Roger B. Taney, sitting as a federal circuit court judge [in *Merryman*]"). *See generally* An Act to amend the Judicial System of the United States, ch. 31, § 4, 2 Stat. 156, 157 (1802) (providing that the "districts of Maryland and Delaware shall constitute the fourth circuit"), https://tinyurl.com/4aj7dma3. This 1802 statute was famous for repealing the 1801 Midnight Judges Act. *See infra* note 47 (citing Midnight Judges Act). The statutory circuits controlled circuit riding duties by the Justices and also when term would be held. Nevertheless, from this time until the Evarts Act (1891), a *different* circuit court of appeals met in each state.

12 *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1978 (2020) (Alito, J.) (citing *Merryman* as a decision of "(CCD Md. 1861)"); *see also* Parisi v. Davidson, 405 U.S. 34, 47 (1972) (Douglas, J., concurring) (citing *Merryman* as a decision of "(CC Md. 1861)"); *cf.* Beras v. Johnson, 978 F.3d 246, 258 (5th Cir. 2020) (Oldham, J., concurring) (citing *Merryman* as a decision of "(C.C.D. Md. 1861)"); Zweibon v. Mitchell, 516 F.2d 594, 627 (D.C. Cir. 1975) (Skelly Wright, J.) (citing *Merryman* as a decision of "(C.C.Md.1861)"); U. S. *ex rel*. Martinez-Angosto v. Mason, 344 F.2d 673, 685 (2d Cir. 1965) (Marshall, J.) (citing *Merryman* as a decision of "(C.C.Maryland 1861)"). If these Justices and judges meant that *Merryman* was a decision of the federal Circuit Court for the District of Maryland, then they erred. Why? Because, as the *Bluebook* explains, a parenthetical's referring to a court identifies the "deciding court," and *Merryman* was not decided by the federal circuit court. The Bluebook: A Uniform System of Citation 55 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). Nevertheless, this ambiguous language within these citations is arguably helpful. Why? Because *Merryman*, in fact, was adjudicated within the confines of the territory

The position of these commentators (including Chief Justice Rehnquist and several other federal judges) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* is usually cited as a circuit court decision,[13] presumably because Taney chose to leave his final written opinion of the case with the clerk for the United States Circuit Court for the District of Maryland with directions that his opinion be filed with the circuit court's records and transmitted to President Lincoln. As a result, Taney's opinion has been reported, on many, if not most, occasions (e.g., in the *Federal Cases* reporter) as a circuit court case.[14]

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of the federal Circuit Court for the District of Maryland—even if not a decision of the federal circuit court. *See generally* An Act to amend the Judicial System of the United States (1802), *supra* note 11 (providing that the "districts of Maryland and Delaware shall constitute the fourth circuit"); *Ex parte* Merryman, 17 F. Cas. 144, 145 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (reproducing litigation-related affidavits, including two certified by "John Hanan, U.S. Commissioner" who was "appointed by the circuit court of the United States, in and for the Fourth circuit and district of Maryland, to take affidavits").

13 *Merryman* is usually cited along the lines of: "*Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.)." *See also* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 578 n.2 (2008) ("Taney's oral opinion denying that a president could suspend the writ without congressional authorization was subsequently *published* as a federal circuit court opinion." (emphasis added)); *cf.* Katherine L. Vaughns, *Of Civil Wrongs and Rights:* Kiyemba v. Obama *and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years after 9/11*, 20 Asian Am. L.J. 7, 20 n.92 (2013) ("*Ex Parte Merryman* was technically *issued* as an opinion of the Circuit Court for the District of Maryland." (second emphasis added)). *But see* Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding* Ex Parte Merryman, 34 U. Balt. L. Rev. 11, 17 n.41 (2004) ("However, it is not at all clear that this characterization of Taney acting as a circuit court judge is correct.").

14 *See Merryman*, 17 F. Cas. at 144 (providing in the caption of the case's report: "Circuit Court, D. Maryland."); *see also id.* at 153 ("I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland, and direct the clerk to transmit a copy, under seal, to the [P]resident of the United States."); Brian McGinty, The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus 176 (2011) (affirming that part of the cause of the (subsequent) confusion surrounding *Merryman*'s status as a federal circuit court case sprung from Taney's using the clerk of the circuit court during and at the close of the proceedings); White, *supra* note 11, at 42 (suggesting that the circuit court's clerk having taken control of the final written opinion, having transmitted it to Lincoln, and having filed it with the circuit court's records—all "confirm that the case was a circuit court decision"). Volume 17 of *Federal Cases*, the traditional reporter currently and long used for citing to *Merryman*, was published by West Publishing Company in 1895. *See* 17 The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States 144, 144 (St. Paul, West Publishing Co. 1895) (providing in the caption of *Merryman*'s report: "Circuit Court, D. Maryland."), https://tinyurl.com/mvu5z92w; McGinty, *supra*, at 176 & 224 n.12 (affirming that part of the cause of the (subsequent) confusion surrounding *Merryman*'s status as a federal circuit court case sprung from *Merryman*'s later appearing in the *Federal Cases* reporter). The report of *Merryman* in *Federal Cases* relied upon an earlier report of the case which had appeared in "Taney, 246"—also known as *Campbell's Reports*. *See* James Mason Campbell, Reports of Cases at Law and Equity and in the Admiralty Determined in the Circuit Court of the United

Still, there are (other) good reasons contemporaries might have been confused on this point. Why? First, during the initial public *Merryman* hearing, on May 27, 1861, both Chief Justice Taney, the circuit justice for Maryland, and William F. Giles, the single federal district court judge for Maryland, appeared on the bench.[15] Having two judges on the bench might have led the public to believe they were hearing a federal circuit court case. However, on May 28, 1861, the date of the final *Merryman* hearing, Judge Giles did not appear on the bench with Taney, nor did Judge Giles participate in deciding *Merryman*.[16] Second, both public *Merryman* hearings, on May 27 and May 28, 1861, were held in the room where federal circuit court hearings had been and were regularly held.[17] This too was likely to have led

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States for the District of Maryland by Roger Brooke Taney / April Term 1836 to April Term 1861, at 246 (Philadelphia, Kay & Brother 1871) (providing in the caption of *Merryman*'s report: "Circuit Court, April Term, 1861"), https://tinyurl.com/9ehd8vrf. Professor Hartnett points to two 1861 reports of *Merryman* which captioned the case as a circuit court decision. *See* Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev. 251, 280 n.126 (2005) ("Two contemporary reports denominate the case as decided in chambers, not in the April 1861 term of the Circuit Court for the District of Maryland, although they also denominate it as decided in the Circuit Court. *See Ex parte* Merryman, Am. L. Reg. & U. Pa. L. Rev., 1861, at 524 (providing caption 'In the United States Circuit Court, Chambers, Baltimore, Maryland. Before Taney, Chief Justice'); 3 W. L. Monthly 461, 461 (1861) (providing caption 'U.S. Circuit Court—At Chambers. Baltimore, Md. . . . . Before Hon. Roger B. Taney, Chief Justice of the United States.')."). As to Taney's original *Merryman* decision, a PDF is available on the website of the Maryland state archives. *See 1 June 1861, Order that opinion be filed and recorded in the Circuit Court of the United States for the District of Maryland, directing the Clerk transmit a copy under seal to the President of the United States*, Archives of Maryland (Biographical Series): John Merryman (1824–1881), https://tinyurl.com/2cdpd8w5, https://perma.cc/SQ7V-2EFU.

15 *See The Habeas Corpus Case*, The South (Baltimore, Md.), May 28, 1861, at 2 (reporting that Taney explained that Judge Giles "was present at yesterday morning's hearing at [Taney's] special request, to afford [Taney] the aid of [Giles'] counsel, but as the writ of attachment had been issued by himself [Taney], in his capacity as Chief Justice of the United States, Judge Giles did not conceive it to be requisite that he should be present this morning [on May 28, 1861], unless at [Taney's] request…."), https://tinyurl.com/4a59xjfu; *see also* McGinty, *supra* note 14, at 28 (same); *id*. at 74–75 (explaining that Taney regularly "presided [over federal circuit court cases in Baltimore] in conjunction with the U.S. district judge for the District of Maryland, William F. Giles").

16 Giles' name nowhere appears in the report of *Merryman* in *Federal Cases*. *See Merryman*, 17 F. Cas. *passim*; *see also* McGinty, *supra* note 14, at 176 (explaining that Judge "Giles did not participate in the [*Merryman*] decision"); *supra* note 15.

17 *See Merryman*, 17 F. Cas. at 146 (noting that Taney's order stated that the writ was "returnable . . . at the circuit court room, in the Masonic Hall, in the city of Baltimore"); *id*. (noting that the clerk issued the writ, which stated that the defendant was to appear with John Merryman in the "United States court-room, in the Masonic Hall, in the city of Baltimore"); *City Intelligence: The Habeas Corpus Case*, The [Baltimore] Daily Exchange, May 29, 1861, at 1 (reporting that "[a]t an early hour of the day, the United States Circuit Court building was besieged by an immense crowd"); *see also* McGinty, *supra* note 14, at 176 ("Taney heard *Merryman* "in the courtroom of the [federal] circuit court in Baltimore."); *cf*. Charles Grove Haines & Foster H. Sherwood, The Role of the Supreme Court in American Government and Politics, 1835–1864, at 457 (1957) (noting that Taney's writ directed Cadwalader to produce John Merryman "in the Baltimore circuit court"—an ambiguous statement which might refer to a federal or state

the public to believe they were hearing a federal circuit court case. One also notes that some of those who have adopted the *Merryman*-was-a-circuit-court-decision position, including one federal district court judge writing extrajudicially, have also indicated that *Merryman* was heard as an appeal of a lower court decision,[18] but the basis for such a view remains obscure.[19]

Others have asserted that *Merryman* was a district court decision—in effect, a decision of the United State District Court for the District of Maryland.[20]

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court, a building, or both); 3 Charles Warren, The Supreme Court in United States History, 1856–1918, at 90 (1922) (noting that in *Merryman*, "Taney [was] sitting in the United States Circuit Court"—which might refer to the building, or the court, or both); Robert Eugene Cushman, *History of the Supreme Court in Resume*, 7 Minn. L. Rev. 275, 289 (1922) (noting that in *Merryman*, "Taney [was] sitting in the circuit court"—which might refer to the building, or the court, or both).

[18] *See, e.g.*, Joshua E. Kastenberg, A Confederate in Congress: The Civil War Treason Trial of Benjamin Gwinn Harris 44 (2022) (asserting that Merryman first took his case to Judge Giles, the Maryland federal district court judge, and then Merryman "appealed directly to Chief Justice Taney"); Thomas C. Mackey, Opposing Lincoln: Clement L. Vallandigham, presidential power, and the legal battle over dissent in wartime 59 (2020) (characterizing Taney's *Merryman* decision as a decision of the "federal circuit court" on appeal from a prior federal district court decision); [Judge] Stephen M. Orlofsky, *Judicial Independence in the Age of Trump*, New Jersey Lawyer 24, 25 (June 2018) ("A district court judge in Maryland issued a writ for the benefit of John Merryman nonetheless. When it was not respected, Merryman appealed to Taney as the circuit judge for Maryland."), https://tinyurl.com/5ar3ywh7; Peter David Finn, Emergency and Modernity: Contextualizing the Contemporary Debate 80–81 (National University of Singapore, Department of Political Science, PhD dissertation, 2017) (describing *Merryman* as first having been heard by Judge Giles, who issued the writ, which was ignored by the commander of Fort McHenry, and then the case "made its way to the United States Supreme Court where Chief Justice Roger B. Taney wrote the majority opinion"); *see also* Harry A. Ezratty, Baltimore in the Civil War: the Pratt Street riot and a city occupied, ch. 18 (2010) (asserting that Taney heard *Merryman* after prior federal district court proceedings).

[19] *See* Jonathan W. White, Book Review, 11 J. Civil War Era 579, 581 (2021) (reviewing Thomas C. Mackey, Opposing Lincoln: Clement L. Vallandigham, presidential power, and the legal battle over dissent in wartime (2020)) ("*Merryman* was not an appeal from a federal district court."); *see also infra* notes 20–24 (showing that *Merryman* was heard by Taney as a trial judge).

[20] *See, e.g.*, Dorothy Denneen & James M. Volo, Daily Life in Civil War America 370 (2d ed. 2009) (characterizing *Merryman* as a "federal district court" decision); George Kateb, Lincoln's Political Thought 148 (2015) ("*Ex parte Merryman* . . . [was issued] pursuant to Taney's role as a district court judge . . . ."); Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 10 (1991) (explaining that Taney issued *Merryman* while "on circuit as a district judge"); Jack Stark, Prohibited Government Acts: A Reference Guide to the United States Constitution 22 (2002) (asserting that Taney in *Merryman* "presid[ed] over" "a federal district court"); John W. Bagby et al., *Medical Martial Law: Towards a More Effective Pandemic Policy*, 47 S. Ill. U. L.J. 1, 33 (2022) (characterizing *Merryman* as a decision of the "Maryland Federal District Court"); P. Banerjee, *A Comparative Analysis Of The Use Of Emergency Powers In The United States Of America ("U.S.") And India*, 6 Indian Pol. & L. Rev. J. 286, 289 (2021) (characterizing *Merryman* as a decision of the "Federal District Court of Maryland"), https://tinyurl.com/yab78e4r; Dale Carpenter, *Dishonorable Disobedience*, The Volokh Conspiracy—Reason (Sept. 3, 2015, 10:49 PM), https://tinyurl.com/4nfnuhn5 (discussing Lincoln's "failure to follow a district

Indeed, Justice Sotomayor hinted at this possibility,[21] as has Judge Salmon, a judge on the Maryland Court of Special Appeals[22] and other

court order in *Ex Parte Merryman*"); Noah Feldman, *Hold Your Tongue: This Isn't a 'Constitutional Crisis,'* Bloomberg: Opinion (May 12, 2017, 18:14 IST), https://tinyurl.com/4hbuphwa (explaining that Taney, in *Merryman*, was "sitting as a district judge"); *Emergency Powers*, Legal Information Institute (Nov. 2022), https://tinyurl.com/bde9vvfm (characterizing *Merryman* as a decision of the "Federal District Court of Maryland"); *see also The Impeachment Trial of President Abraham Lincoln*, 40 Ariz. L. Rev. 351, 367 (1998) (reporting Mark E. Neely, Jr. stating, in mock cross examination, "Taney, sitting in the Baltimore District Court, held that the president had no power to suspend the Writ . . . ."); *cf.* Louis Fisher, Cong. Research Serv., RL32458, Military Tribunals: Historical Patterns and Lessons 22 n.145 (2004) (discussing *Merryman*, and citing "(D.C. Md. 1861)"), https://tinyurl.com/4563jzkw; Captain Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, and Proposal for* Hamdan v. Rumsfeld, 186 Mil. L. Rev. 1, 37 n.235 (2005) (discussing *Merryman*, and citing "(D.C. Md. 1861)"); Frances M. Clarke & Rebecca Jo Plant, *No Minor Matter: Underage Soldiers, Parents, and the Nationalization of Habeas Corpus in Civil War America*, 35(4) Law & Hist. Rev. 881, 891 n.21 (2017) ("Merryman's case never came to trial. As a capital offense, it had to be tried by the United States District Court in Baltimore, over which Taney presided.").

21 *See* Sotomayor, *supra* note 1, at 881 (asserting that *Merryman* was "filed with the United States District Court"). I see no good basis for Sotomayor's assertion that *Merryman* was "filed" with district court for Maryland. Taney's written opinion and other historical records establish that *Merryman* was not initially filed with *any* court—instead, John Merryman's Maryland counsel, George M. Gill and George H. Williams, presented (or, at least, sent) Merryman's habeas corpus petition to Chief Justice Taney at Taney's Washington home. *See* McGinty, *supra* note 14, at 76 (explaining that the "petition and supporting affidavits arrived at Taney's Washington home"); Arthur T. Downey, *The Conflict between the Chief Justice and the Chief Executive:* Ex parte Merryman, 31(3) J. Sup. Ct. Hist. 262, 262 (2006) (explaining that Merryman's petition was presented to "Taney at his home in Washington"). When the case ended, Taney expressly directed that his "opinion [was to be] filed and recorded in the [C]ircuit [C]ourt of the United States for the [D]istrict of Maryland . . . ." *Ex parte* Merryman, 17 F. Cas. 144, 153 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.). At some later stage, the case file was transferred to (or, perhaps, inherited by) the United States District Court for the District of Maryland. And the case file, including Taney's opinion, was subsequently borrowed by the Maryland state archives. *See* Archives of Maryland (Biographical Series): John Merryman (1824–1881), https://tinyurl.com/bdfeze5x, https://tinyurl.com/2cdpd8w5 (noting that "*Ex Parte Merryman*, orig[i]nal [sic] case papers [were] borrowed from the Federal District Court"). *Compare* White, *supra* note 11, at 42 (explaining, in 2011, that "the [case] records are still with the clerk's office at the U.S. District Court for the District of Maryland"), *with* E-mail from the Maryland State Archives to Seth Barrett Tillman (Jan. 4, 2022) (explaining, in 2022, that "the originals are housed here at the Maryland State Archives for preservation, but still are under the ownership of the U.S. District Court"). To be clear, *Merryman* was not "filed" with the district court by Merryman's lawyers, nor by the presiding judge. At some stage, perhaps long after the case became a final judgment and appeared in the reporters, the stale records of the case were put in the possession of the district court, and that court put those records in its files.

22 *See* Hayfields, Inc. v. Valleys Planning Council, Inc., 716 A.2d 311, 315 n.5 (Md. App. 1998) (Salmon, J.) (citing *Merryman* as a decision of "D. Md."). "D. Md." is the standard modern form of citation for the United States District Court for the District of Maryland. If Judge Salmon meant that *Merryman* was a decision of the federal district court for the District of Maryland, then he erred. Why? Because, as the *Bluebook* explains, a

authors.[23] The position of these commentators (including Justice Sotomayor and Judge Salmon) is *not* correct. Apparently, the basis for these authors' mistaken inference was that *Merryman* was decided by a court of first instance or trial court,[24] and in the modern federal judicial system, it is the district courts which customarily function as the court of first instance or trial court.

So, which was it?[25] Was *Ex parte Merryman* a decision of:

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parenthetical's referring to a court identifies the "deciding court," and *Merryman* was not decided by the federal district court. The Bluebook, *supra* note 12, at 55. Nevertheless, this ambiguous language within this citation is arguably helpful. Why? Because *Merryman*, in fact, was adjudicated within the confines of the territory of the federal district court for the District of Maryland—even if not a decision of the federal district court. Judge Salmon sat on the Maryland Court of Special Appeals. In 2022, in consequence of a constitutional amendment, that court was renamed the Appellate Court of Maryland. *See Supreme Court of Maryland*, Maryland Courts (last accessed Dec. 21, 2022), https://www.courts.state.md.us/coappeals.

[23] *See, e.g.*, Susan N. Herman, Advanced Introduction to US Civil Liberties 26 n.6 (2023) (discussing *Merryman*, and citing "(D. Md. 1861)"); Eric Berger, *Of Law and Legacies*, 65 Drake L. Rev. 949, 954 n.12 (2017) (discussing *Merryman*, and citing "(D. Md. 1861)"); James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 Rev. of Litig. 1, 64 n.297 (2006) (discussing *Merryman*, and citing "(D. Md. 1861)"); Eugene V. Rostow, *The Japanese-American Cases–A Disaster*, 54 Yale L.J. 489, 511 n.58 (1945) (citing *Merryman* as a decision of "(D. Md. 1861)"); George Rutherglen, *Structural Uncertainty over Habeas Corpus & the Jurisdiction of Military Tribunals*, 5 Green Bag 2d 397, 398 n.4 (2002) (citing *Merryman* as a decision of "(D. Md. 1861)"); Robert L. Tsai, *Manufactured Emergencies*, 129 Yale L.J. Forum 590, 596 n.22 (Feb. 15, 2020) (citing *Merryman* as a decision of "(D. Md. 1861)"); Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 Nw. U. L. Rev. 1567, 1611 n.256 (2004) (citing *Merryman* as a decision of "(D. Md. 1861)"); Adrienne Lee Benson, Note, *Routine Emergencies*, 90 N.Y.U. L. Rev. 1662, 1675 n.55 (2015) (citing *Merryman* as a decision of "(D. Md. 1861)"); Scott J. Shackelford, *Habeas Corpus Writ of Liberty, Boumediene and Beyond*, 57 Clev. St. L. Rev. 671, 678 n.54 (2009) (reviewing Robert Searles Walker, Habeas Corpus Writ of Liberty (2006)) (citing *Merryman* as a decision of "(D. Md. 1861)").

[24] *See also* 1 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 6.13(b)(i) n.12 (5th ed. 2022) ("The [*Merryman*] case did not reach the Supreme Court, but the trial judge was Chief Justice Taney."); James A. Dueholm, *Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29(2) J. of the Abraham Lincoln Ass'n 47, 48 (2008) (explaining that "Merryman's lawyer promptly petitioned Chief Justice Roger Brooke Taney, sitting as a *trial* judge . . . ." (emphasis added)); Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 Harv. L. & Pol'y Rev. 67, 76 (2018) (affirming that "[i]n his opinion as a trial judge in the matter, then-Judge Taney ruled"); *supra* notes 20–23 (collecting authority).

[25] *But cf*. Stephen I. Vladeck, *The* Field *Theory: Martial Law, the Suspension Power, and the Insurrection Act*, 80 Temple L. Rev. 391, 392 n.2 (2007) (characterizing the question posed in the instant Article (and elsewhere) as a "seemingly pedantic historical footnote"); Steve Vladeck, *SCOTUS Trivia: Circuit Justice or Chief Justice, In Chambers?*, One First (Feb. 20, 2023), https://tinyurl.com/59rx6mhz ("Speaking of the Supreme Court and the [American] Civil War, in the battle for nerdiest debate among [f]ederal [c]ourts scholars, the dispute over the specific capacity in which Chief Justice Taney decided *Ex parte Merryman* has to be up there."). Professor Vladeck repeats

(a) the Supreme Court of the United States;
(b) the United States Circuit Court for the District of Maryland;
(c) the United States Court of Appeals for the Fourth Circuit;[26]

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all too many of the usual historical myths: e.g., "Merryman was a former Maryland legislator [?] and Confederate sympathizer [?] accused [?] of being part of an organized plot to prevent Union troops from being sent through Baltimore to reinforce Washington in late April 1861 [?]" and "[w]hen Merryman was arrested by federal troops and sent to Fort McHenry for detention, his father [?] (who just happened to have been Taney's college roommate [*?* and *!*]) promptly asked the Chief Justice, no friend of Lincoln's, for a writ of habeas corpus." *Id*. *But see Merryman*, 17 F. Cas. at 146 (reporting Cadwalader's written return, i.e., his response, to Taney's habeas writ as stating that Merryman was "charged with various acts of treason" absent any specific mention of events during April 1861 or events in Baltimore); 'Merryman, John, of Hayfields,' *in* 1 The Biographical Cyclopedia of Representative Men of Maryland and District of Columbia 312, 313 (Baltimore, National Biographical Publishing Company 1879) (noting that Merryman was a member of the Maryland legislature in 1874—absent any indication of prior membership), https://tinyurl.com/mtf43mbk; *id*. at 312 (explaining that shortly before Merryman's seizure by the U.S. Army, Merryman "was introduced to [U.S.] Major Belger, and offered to render him or the [Union] troops any service required; and if necessary would slaughter his [Merryman's] cattle to supply the[] [Union troops] with food"); White, *supra* note 11 *passim* (reporting Merryman's post-American Civil War service in the state legislature, and not reporting any 1861 or pre-1861 service); 'John Merryman' *in* Francis B. Culver, *Merryman Family*, 10(3) Md. Hist. Mag. 286, 296–297 (Sept. 1915) (noting that Merryman was a member of the state legislature in 1874—absent any indication of prior membership), https://tinyurl.com/4es42enp; Vladeck, *The* Field *Theory*, *supra*, at 408 (noting that Merryman "was *elected* to the Maryland House of Delegates in 1874" (emphasis added)); *but see also* McGinty, *supra* note 14, at 59–60 (describing Merryman's *failed* 1855 campaign for a state legislative seat). *But see generally* Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 485 n.11, 486 n.12, 487–88 (contesting *Ex parte Merryman*'s many myths—including several of those raised by Vladeck and others). For what it is worth, Merryman was elected to the Maryland lower house in 1873, for a term which, apparently, began in 1874. *See General Assembly of Maryland*, The Maryland Union, Nov. 13, 1873, at 2 (reporting Merryman's election to the House of Delegates as a Democratic-Conservative for Baltimore County); *General Assembly of Maryland*, Montgomery County Sentinel, Nov. 14, 1873, at 3 (same). Finally, Vladeck's claim that Merryman's father and Chief Justice Taney were "college roommate[s]" is novel. I suppose Vladeck's claim is built on Paulsen's claim and Yoo's claim that Merryman's father and Taney attended Dickinson's College "together". Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81, 90 n.27 (1993) (citing Swisher, *infra*); Yoo, *supra* note 7, at 513 & n.81 (citing Swisher, *infra*). Both Paulsen and Yoo relied on Swisher. But Swisher does not report that the two attended "together;" rather, Swisher only reports that the two "attended Dickinson College during the *same period*." 5 Carl B. Swisher, The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States: The Taney Period 1836–64, at 845 (1974) (emphasis added). And Swisher's modest historical claim's basis, documentary or otherwise, remains obscure. Indeed, modern research suggests that Swisher was in error. *See* White, *supra* note 11, at 130 n.1 (explaining that "Dickinson College has no record of Merryman's father, Nicholas Rogers Merryman, attending"). *See generally* D.M. Lucas & J.G. Wigmore, *The Broken Telephone Effect*, 22(2) Canadian Soc'y of Forensic Sci. J. 225 (1989), https://tinyurl.com/2rh6vezt.

[26] Some have reported *Merryman* as a Fourth Circuit decision. *See, e.g.*, Robert Searles

(d) the United States District Court for the District of Maryland; or,
(e) the Supreme Court of Maryland?[27]

Of course, the correct answer is: (f) none of the above.[28]

Walker, Habeas Corpus Writ of Liberty 116 (rev. ed. 2006) (asserting that, in *Merryman*, Taney sat "as the presiding judge of the Fourth Circuit Court of Appeals"); Downey, *supra* note 21, at 269 (asserting that in *Merryman*, Taney was "[w]riting for the Fourth Circuit"); *see also* United Nations International Human Rights Instruments: United States 40 (Jan. 16, 2006) (noting that, in *Merryman*, "Chief Justice Taney [was] sitting as a Circuit Judge for the 4th Circuit"), https://tinyurl.com/r2rx87yd; Richard J. Ellis, The Development of the American Presidency 413 & 560 n.35 (2012) (characterizing Taney as "hearing [*Merryman*], in his capacity as chief judge of the fourth circuit"); McGinty, *supra* note 14, at 229 (indicating that Merryman was filed in "May 1861 in [the] United States Circuit Court for the Fourth Circuit"); *id*. at 230 (same). But the earliest decisions reported on Westlaw for the United States Court of Appeals for the Fourth Circuit are from 1892. *See, e.g.*, *The Steam Tug Luckenbach v. The Georgia*, 50 F. 129 (4th Cir. Apr. 12, 1892). *See generally* An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes (the Evarts Act), ch. 517, 26 Stat. 826 (1891), https://tinyurl.com/5e5c2h49; *supra* note 11 (discussing pre-*Merryman* federal circuits and judicial circuit riding duties).

27 *See* Perlman v. Lieutenant-Colonel Piché, 41 Dominion Law Reports 147 [34] (Cour Supérieure du Québec 1918) (Bruneau J) (asserting that *Merryman* was a decision of "la Cour suprême du Maryland"), *also reported in* 54 Les Rapports Judiciaires de Québec 170, 183 (Jean-Joseph Beauchamp rédacteur en chef, 1918). During the American Civil War, the highest state court in Maryland was the Court of Appeals of Maryland. In 2022, in consequence of a constitutional amendment, that court was renamed the Supreme Court of Maryland. *See Supreme Court of Maryland*, Maryland Courts (last accessed Dec. 21, 2022), https://www.courts.state.md.us/coappeals.

28 *See generally* Bruce A. Ragsdale, Ex parte Merryman and Debates on Civil Liberties During the Civil War 10–11 (Federal Judicial History Office 2007) (discussing alternative theories of Taney's jurisdiction in *Merryman*), https://tinyurl.com/djd582yb; *id.* at 11 ("Taney realized that his jurisdictional authority in *Ex parte Merryman* was irrelevant, since he was exercising no judicial power apart from the orders to file the records of the proceedings and to send a copy to President Lincoln."). Still, Ragsdale does not consider that Taney's efforts to cite Cadwalader for contempt required a sound basis for federal jurisdiction. Justice Scalia, possibly in an effort to square-the-*Merryman*-circle, cited *Merryman* as a decision of "(C.D.Md. 1861)". Hamdi v. Rumsfeld, 542 U.S. 507, 562 (2009) (Scalia, J., dissenting); *see also* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 14 (D.D.C. 2006) (Robertson, J.) (citing *Merryman* as a decision of "(CD Md. 1861)"); Eric A. Posner, *Political Trials in Domestic and International Law*, 55 Duke L.J. 75, 79 n.5 (2005) (citing *Merryman* as a decision of "(C.D. Md. 1861)"). Scalia et al.'s form of citation is not pellucidly clear. For yet another less than entirely clear form of citation, see Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. Chi. L. Rev. 865, 892 n.67 (2007) (citing *Merryman* as a decision of "(Cir Ct Md 1861)" as appearing in the *Federal Cases* reporter). However, "Cir Ct Md" might also refer to the Maryland state trial court of general jurisdiction. *See, e.g.*, *Circuit Courts*, Maryland Courts (last accessed Mar. 28, 2023), https://www.courts.state.md.us/circuit; *see also* Arthur John Keeffe, *Practicing Lawyer's Guide to the Current Law Magazines*, 48 A.B.A. J. 491, 491 (1962) (noting that during the American Civil War, federal authorities arrested Judge James L. Bartol of the Maryland Court of Appeals and Judge Richard Bennett Carmichael of the Maryland Circuit Court, and the "latter was arrested while conducting court").

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So what did happen? Taney decided *Merryman* under special authority granted by the Judiciary Act of 1789 to all Article III judges and Justices. Section 14 of the act stated: "And that either of the *justices of the supreme court*, as well as *judges of the district courts*, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment."[29] This position is confirmed by Chief Justice Taney's own words in *Merryman*. Taney wrote: "The application in this case for a writ of habeas corpus is made *to me* under the 14th section of the judiciary Act of 1789 [1 Stat. 81], which renders effectual for the citizen the constitutional privilege of the writ of habeas corpus."[30] This understanding of the actual procedural posture of *Merryman* has been recognized by some (but not all) Justices[31] and commentators,[32] along with some of the earliest reports of the case.[33]

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29 An Act to establish the Judicial Courts of the United States, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (emphases added), https://tinyurl.com/24796edk; Clinton Rossiter, The Supreme Court and the Commander in Chief 20 (expanded ed. 1976) (explaining that in *Merryman*, the Chief Justice was "pure and simple, acting under section 14 of the Judiciary Act of 1789"); *see also Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80 (1807) (Marshall, C.J.) (discussing Section 14 and stating: "the first sentence [of Section 14] vests this power [to grant habeas corpus] in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States"). Under the 1789 Act, judges were not appointed by the President to circuit courts. Rather, each circuit court was composed of the local federal district court judge and whichever Justice of the Supreme Court "rode" circuit for that circuit.

30 *Merryman*, 17 F. Cas. at 147 (emphasis added) (bracketed language in the original).

31 [Justice] Samuel Freeman Miller, Lectures on the Constitution of the United States 349 n.1 (New York, Banks and Brothers Law Publishers 1891) (noting that Taney was "sitting at chambers"), https://tinyurl.com/38hxpjz3.

32 *See* Haines & Sherwood, *supra* note 17, at 458 (explaining that *Merryman* was issued "at Chambers" and that Taney spoke "in the first person"); *id*. (explaining that the power to issue the writ of habeas corpus under the Judiciary Act of 1789 extended to "[t]he courts of the United States and each justice of the Supreme Court, as well as every district judge"); Hartnett, *supra* note 14, at 279–81 (explaining that *Merryman* was a chambers decision, and not a Supreme Court decision); *see also* McGinty, *supra* note 14, at 80–81 (arguing that Taney acted in an "individual capacit[y]"); Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 638 n.142 (1949) ("In *Ex parte Merryman*, . . . Taney acted alone as Justice of the Supreme Court—not as a judge holding the circuit court"); *cf.* Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 6 J. L. 19, 20 (2016) ("For much of the nineteenth century, the Great Writ could be granted by the Supreme Court, the Circuit Court, the District Court, *or* by a Justice or Judge of any of them acting individually." (emphasis in the original)). Professor Randall wrote: "The *Merryman* decision was not that of the Supreme Court; but it was an opinion of one member of the Court, Taney, in a case which he heard while on circuit. Furthermore, it was in chambers, not in open court, that the decision was rendered." James G. Randall, Constitutional Problems Under Lincoln 131 (1926) (emphasis added), https://tinyurl.com/phjfech2. It is true that the initial May 26, 1861 hearing was "not in open court"—it was *ex parte* (and so the *Merryman* case was named). But the two subsequent hearings—on May 27 and May 28, 1861—were in open court.

33 *See, e.g*., George William Brown, Baltimore and The Nineteenth of April, 1861 / A Study of the War, App'x III, at 139 (Baltimore, Johns Hopkins University 1887)

In other words, Taney was acting as a Justice on or riding circuit,[34] but he was not acting as a Justice or judge for the local federal circuit court or any other duly constituted court.[35] Indeed, as Professor Jonathan White explains, Chief Justice Taney, in developing his draft *Merryman* opinion, "crossed out 'the court' and inserted 'a judicial tribunal' in pen. Taney then crossed out 'a judicial tribunal' and 'I' and [instead] inserted in pencil 'a justice of the Sup. Court' and 'he' . . . ."[36]

(reproducing *Campbell*'s report and captioning the case as: "Before the Chief Justice of the Supreme Court of the United States, at Chambers"), https://tinyurl.com/2tjjukff, https://tinyurl.com/32px89nb; Campbell, *supra* note 14, at 246 (reporting, in a 1871 publication, in *Merryman*'s syllabus that Taney's *ex parte* order "was issued by the Chief Justice of the United States, sitting at chambers"); *The Habeas Corpus Case / Opinion of the Chief Justice of the United States*, The World (N.Y.), June 4, 1861, at 3 (captioning the case as "Before the Chief Justice of the Supreme Court of the United States, at Chambers"); *The Habeas Corpus Case / Opinion of the Chief Justice of the United States*, Weekly National Intelligencer (Washington, D.C.), June 8, 1861, at 4 (captioning the case as "Before the Chief Justice of the Supreme Court of the United States, at Chambers"); *The Merryman Case*, The Crisis (Columbus, Ohio), June 13, 1861, at 2 (explaining that the case was "*Before the Chief-Justice of the Supreme Court of the United States, at Chambers*" and "filed by Chief-Justice Taney . . . in 'the Circuit Court of the United States'"). The latter Ohio newspaper article perfectly captures *Merryman*'s procedural posture.

34 *See* Halliday & White, *supra* note 13, at 578 n.2 ("Taney himself treated his *Merryman* opinion as one issued by the Chief Justice of the United States as a Supreme Court Justice, not in his capacity as a federal circuit court judge."); *see also The Impeachment Trial of President Abraham Lincoln*, *supra* note 20, at 367 (reporting Mark E. Neely, Jr. stating, in mock cross examination, that "we can consider [*Merryman*] a precedent from the Chief Justice of the Supreme Court").

35 An expansive meaning for "court" might include *ex parte* and in chambers proceedings, even where the adjudicator is not acting as part of any ongoing, institutionalized, permanent judicial body. In other words, Article III's "court" language extends even to "courts" which meet on an *ad hoc* basis and have no permanent location at which to keep records, including pleading, briefs, orders, opinions, dockets, etc. Here, I am using "duly constituted court" to refer to a narrower meaning for "court". In other words, a "duly constituted court" is a named judicial body, with a continuous existence, meeting in a fixed place (or set of places), maintaining records at those places, and available to do business on an announced calendar of dates or sessions. Albeit, these specific characteristics are not permanently "fixed"—they may be modified by the legal system. *See, e.g., supra* notes 22 & 27 (explaining how two courts' names were changed by a constitutional amendment). Given that occasionally issued chambers opinions had no assigned place to be maintained, it made good sense for Taney to leave instructions for his *Merryman* decision to be filed with the federal Circuit Court—the nearest court of record. *Cf*. Philip Hamburger, Is Administrative Law Unlawful 296–97 (2014) (opining on the meaning of "court of record").

36 White, *supra* note 11, at 41. The conclusions Professor White draws from these changes to Taney's draft opinion are entirely different from mine. *See id*. at 41–42 ("Taney made these changes so that he could appear as a Supreme Court justice in chambers rather than as a justice riding circuit, but the initial drafts reveal Taney's awareness that he was presiding over a session of a circuit court."); White, *supra* note 11, at 218 (asserting that "Taney . . . made his opinion appear to be that of a Supreme Court justice 'at chambers'"); *see also* McGinty, *supra* note 14, at 176 (explaining that the "later confusion about the capacity in which [Taney] acted resulted at least in part from his muddying of the record. . . . [Taney] is at least partly responsible for the resulting confusion"); Mark E. Neely Jr., Lincoln and the Triumph of the Nation: Constitutional Conflict in the

Taney issued his oral opinion in *Merryman* from the bench while he was on or riding circuit,[37] that is, away from his home chambers which was in the nation's capital, but not in his capacity as a circuit *court* judge or as a judge of the circuit *court*. Because Taney's power to decide *Merryman* was a special statutory authority committed to him as an individual Supreme Court Justice, that is, because he was *not* acting for any duly constituted court,[38] his decision is properly characterized

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American Civil War 96 (2011) ("Taney might have fallen victim to his own attempt to describe the [*Merryman*] decision as one from the Supreme Court (in chambers)."); Guelzo, *supra* note 11 ("Taney issued [*Merryman*] in his co-capacity as a federal circuit judge, but prefaced it as being issued from his U.S. Supreme Court chambers as though it were the product of a full hearing before the Supreme Court." (including Professor Jonathan White's *Abraham Lincoln and Treason in the Civil War* in the bibliography to Professor Guelzo's weblog post)); *cf*. William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1856 (2008) (taking the position that Taney's jurisdiction in *Merryman* was "not entirely clear"). *See generally* Cynthia Nicoletti, *Placing Merryman at the Center of* Merryman, 34(2) J. of the Abraham Lincoln Ass'n 71, 74 (2013) (reviewing Brian McGinty, The Body of John Merryman (2011), and Jonathan W. White, Abraham Lincoln and Treason in the Civil War (2011)) (concluding that White's position is "less than persuasive" but agreeing that "Taney *exploited* the fuzziness of the law on the issue of federal judges' authority to hear habeas corpus petitions" (emphasis added)). Instead of her using charged language such as "exploited," Nicoletti might have been on stronger ground had she entertained the possibility that Taney was as uncertain then, as we are today, as to the scope of his lawful jurisdiction and authority. *See* Locks v. Commanding Gen., Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("Article I, s 9, of the Constitution provides that [the] 'privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.' It may be that in time that provision will justify the issuance of a writ of habeas corpus by an individual Justice. *The point, however, has never been decided* . . . ." (emphasis added)); Ragsdale, *supra* note 28, at 10–11 (discussing alternative theories of Taney's jurisdiction in *Merryman*).

[37] *See, e.g.*, J.G. Randall & David Donald, The Civil War and Reconstruction 302 n.2 (2d ed. 1961) ("The mistake is sometimes made of attributing the *Merryman* decision to the Supreme Court of the United States; but it was the opinion of one member of the court while on circuit *duty*." (emphases added) (citation omitted)); *supra* note 32 (collecting other authority from Randall). To be sure, *Merryman* was decided over the course of May 27 and 28, 1861, while Taney was in Baltimore, Maryland. However, on May 26, 1861, Taney had already held an *ex parte* hearing, in the presence of Merryman's attorneys, in his (i.e., Taney's) home in the capital. That *ex parte* hearing concluded with the Chief Justice's granting an order directing General Cadwalader, the named defendant and commander of Fort McHenry, to produce John Merryman for a hearing, to be held the next day in Baltimore. *See infra* notes 45–48 and accompanying text (recounting facts and procedural posture of *Merryman*). Although Taney announced his decision in public at the conclusion of the May 28, 1861 proceedings, his full written opinion was not finalized and filed with the Clerk of the Circuit Court until June 1, 1861. *See* Archives of Maryland (Biographical Series): John Merryman (1824–1881), https://tinyurl.com/2cdpd8w5 (dating Taney's final order and opinion "1 June 1861"); McGinty, *supra* note 14, at 86 (same). By June 1, 1861, it would appear that Taney had already left Baltimore and returned home. *Query*: Should *Merryman* be dated when it was decided in open court: May 1861? Or should *Merryman* be dated when Taney's full opinion was finalized and filed with the clerk: June 1861?

[38] *But see* Andrew P. Napolitano, Suicide Pact 44 (2014) ("[John] Merryman's attorney sought a writ of habeas corpus from the federal *court* in Baltimore." (emphasis added)); White, *supra* note 11, at 42 (concluding that *Merryman* is properly characterized as a

as "at chambers". The characterization of *Merryman* as "in chambers" or "at chambers" or a "chambers" decision is the correct one. Indeed, it is how Taney characterized his *Merryman* decision.[39] Nevertheless, this characterization has led to confusion for several reasons.[40]

"lower federal *court* decision" (emphasis added)); William R. Casto, *Robert Jackson's Critique of* Trump v. Hawaii, 94 St. John's L. Rev. 335, 348 n.99 (2020) (explaining that in *Merryman* "Taney was sitting on a lower *court*, as many sitting Supreme Court Justices did at the time" (emphasis added)); Hon. Justice Michelle Gordon AC, *The Integrity of Courts: Political Culture and a Culture of Politics*, 44 Melb. U. L. Rev. 863, 872 (2021) ("[Taney] therefore issued the writ and demanded that Merryman be brought before the [*c*]*ourt* in Baltimore the following day." (emphasis added)); Halbert, *supra* note 10, at 99–100 (characterizing *Merryman* as an opinion "of a Federal Court"); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 Geo. J.L. & Pub. Pol'y 463, 484 n.119 (2019) (reviewing Gary Lawson & Guy Seidman, "A Great Power of Attorney": Understanding the Fiduciary Constitution (2017)) (characterizing *Merryman* as a "lower *court* opinion" (emphasis added)); *but see also* George, *supra* note 23, at 64 (Lincoln's actions were "rebuked in *Ex parte Merryman* where Chief Justice Taney (in a lower *court* while riding circuit) ruled . . . ." (second emphasis added)); Henry T. Greely, *COVID-19 immunity certificates: science, ethics, policy, and law*, 7(1) J. of L. & Biosciences 1, 22 n.68 (2020) (characterizing *Merryman* as an "opinion in a lower federal *court*" (emphasis added)); Aneil Kovvali, *A Modest Proposal for Justice Scalia's Seat*, 102 Va. L. Rev. Online 1, 4 (2016) ("For much of the Supreme Court's history, the Justices rode circuit, traveling about the country and deciding cases in the capacity of lower *court* judges. For example, the famous case of *Ex parte Merryman* . . . ." (emphasis added)).

39 The handwritten original of Taney's *Merryman* opinion plainly captions the case as: "Ex parte John Merryman / Before the [C]hief Justice of the Supreme Court of the United States. At Chambers." *1 June 1861, Opinion of Justice Taney*, Archives of Maryland (Biographical Series): John Merryman (1824–1881) (last visited Dec. 25, 2022), http://tinyurl.com/hjeg3k4; *see* Swisher, *supra* note 25, at 848 & n.25 (same); *see also id*. at 846–47 (explaining that Taney, while on the bench during *Merryman* proceedings, explained that "this was not a session of the Circuit Court but was a session at chambers by the Chief Justice of the Supreme Court"). *But compare* Feldman, *supra* note 7, at 191 (stating, absent any citation to primary documents or other authority, that: Taney "was leaving some room for ambiguity about the capacity in which he himself was sitting. . . . The ambiguity would remain throughout the case, and has never been satisfactorily resolved."), *and supra* note 36 (collecting authority), *with* Anthony Gregory, The Power of Habeas Corpus in America 94 n.8 (2013) ("Taney seems deliberately to have described himself solely by his Supreme Court position in documents concerning [*Merryman*] . . . ."), Matetsky, *supra* note 32, at 20 n.5 ("[I]t appears that [in *Merryman*,] Chief Justice Taney felt quite strongly that he was sitting as a Supreme Court Justice rather than exercising his Circuit Court responsibilities . . . ."), *and supra* notes 32–34 (collecting authority from Professor Fairman and others supporting the "at chambers" position). It appears that Attorney General Edward Bates took the position that Taney's *Merryman* decision was in chambers. *See* Edward Bates, Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 86–87 (1861) ("I think it will hardly be seriously affirmed, that a judge, at chambers, can entertain an appeal, in any form, from a decision of the President of the United States—and especially in a case purely political.").

40 Those who read only appellate case law sometimes fail to appreciate that fast-paced trial court proceedings often show that the parties are confused about the facts and that the record they produce is equally confusing. In *Merryman*, for example, General

First, some object to characterizing *Merryman* as a chambers decision because they believe *Merryman* was a decision of the Circuit Court for the District of Maryland. Admittedly, *Merryman* looks like a circuit decision for a variety of reasons. First, its two public hearings—on May 27 and May 28, 1861—were held in the federal circuit court's courtroom.[41] However, a courtroom is just that—a room can be used for many purposes and even by other courts. Second, during the first public hearing, on May 27, 1861, two federal judges appeared on the bench: Chief Justice Taney and Judge Giles, the Maryland federal district court judge. But, Giles did not appear on the bench with Taney on the second day, nor is there any indication that Giles joined or dissented from Taney's opinion as part of a two-judge panel.[42] Third, the *Merryman* decision appeared in the *Federal Cases* reporter, which *primarily* reported circuit court (and district court) decisions.[43] *Primarily*, but not *exclusively*. And finally, Taney co-opted the circuit court's clerk during *Merryman*'s proceedings, including issuing an express instruction to put his written opinion on file with the records of the circuit court.[44] Of course, this latter instruction is something Taney need not have ordered had *Merryman* been a run-of-the-mill circuit court decision.

Second, Taney's Supreme Court chambers was in Washington, District of Columbia. *But no* Merryman *proceedings were actually heard there—in Taney's chambers in the capital district*. Instead, on May 26, 1861, Taney received Merryman's lawyers' submission in his home, and not in his chambers. After reviewing that submission, and while still in his home, Taney issued a writ of habeas corpus: an *ex parte* order directing the defendant, General Cadwalader, to produce (but not release[45]) John Merryman for the May 27, 1861 hearing, which was to be held in the Baltimore circuit court courtroom. Furthermore, *Merryman* was decided and announced from the bench, on May 28, 1861, while Taney was physically in

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Cadwalader, who was also a lawyer, was summoned to appear and to respond to Taney's writ on less than one day's notice. *See* Swisher, *supra* note 25, at 845. Some of the papers Cadwalader received were signed or witnessed by Thomas Spicer, the clerk of the circuit court. *See* Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 497 n.45, 499 n.47, 519 n.91, 523. But Cadwalader's written response to the writ indicates that he believed Spicer was clerk of the Supreme Court of the United States. *Id*. at 497–98 n.45. At that time, the clerk of the Supreme Court was William T. Carroll, not Spicer. *See* Terence Walz, *If Walls Could Talk: The Supreme Court and DACOR Bacon House Two Centuries of Connections*, 47(1) J. Sup. Ct. Hist. 20, 22 (2022) (identifying Carroll as clerk of the Supreme Court from 1828 to 1863). Of course, the careful reader should be particularly alert for such historical discrepancies when a case is adjudicated during the pressures and fog of war. *See* Tillman, *Canonical Cases and Other Quodlibets: A Response to Professor Fallon*, *supra* note 1, at 21 (responding to Professor Fallon's suggestion that the timing of the Supreme Court's announcements in *Ex parte Quirin* was a "breach of ordinary protocol" with: "Is it really so surprising that at the start of the United States' entrance into a world war there might be a break in 'ordinary' [Supreme Court] protocol applying to mundane civil disputes during peacetime conditions?").

41 *See supra* note 17 (collecting authority).

42 *See supra* notes 15 & 16 (collecting authority).

43 *See supra* note 14 (collecting authority).

44 *Id*. (collecting authority); *see supra* notes 37 & 40.

45 Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 495–500; *see also supra* note 1 (collecting authority).

Maryland,[46] and not in his District of Columbia chambers. All this has led some to doubt the propriety of characterizing *Merryman* as a "chambers" decision.

Third, *Merryman* included three separate hearings. As explained, the first hearing was an *ex parte* May 26, 1861 hearing in Taney's home in the capital. The second hearing, on May 27, 1861,[47] was in Baltimore. This hearing was not *ex parte*—both parties had notice and both parties were represented—at least in some fashion.[48] Furthermore, the May 27, 1861 hearing was open to the public, as was the third and final hearing, which was held in the same Baltimore courtroom on May 28, 1861. Traditionally, an "in chambers" proceeding is one conducted "a. in the privacy of a judge's chambers[; or,] b. in a court not open to the public."[49] But neither of these definitions squarely applied to the *ex parte Merryman* hearing held on May 26, 1861 in Taney's home, nor to the public *Merryman* hearings held on May 27 and 28, 1861 in the circuit court courtroom in Baltimore. These circumstances have led some to doubt the propriety of characterizing *Merryman* as a "chambers" decision.

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46 *See* Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 483–94.

47 The May 27, 1861 date of the first *Merryman* hearing in Maryland does not appear consistent with the announced term or session dates for the Circuit Court for the District of Maryland. *See* An Act to provide for the more convenient organization of the Courts of the United States (a/k/a The Midnight Judges Act), ch. 4, § 7, 2 Stat. 89, 91 (1801) ("The circuit court of the fourth circuit, at Baltimore, in and for the district of Maryland, on the twentieth day of March and fifth day of November . . . ."), https://tinyurl.com/4v4fehrf, *amended by* An Act to Amend the Judicial System of the United States, ch. 34, § 2, 5 Stat. 176, 177 (1837) (mandating that the circuit court should meet "in the district of Maryland, at Baltimore, on the first Monday of April and the first Monday of October, annually"), *amended by* An Act to change the time of holding the United States Circuit Court in the District of East Tennessee and the District of Maryland, ch. 193, § 1, 5 Stat. 308 (1838) (mandating that "the Circuit Courts of the United States for the District of Maryland shall be held at Baltimore on the first Monday of November annually"). *But see* Phillip W. Magness, *Between Evidence, Rumor, and Perception: Marshal Lamon and the "Plot" to Arrest Chief Justice Taney*, 42 J. Sup. Ct. Hist. 133, 134 (2017) ("The elderly Chief Justice . . . was fulfilling his *circuit court* duties in Baltimore when Merryman's petition arrived on his bench." (emphasis added)). It would appear that, other than *Merryman*, the only other reported federal cases decided in Maryland in 1861 were: United States v. The F.W. Johnston, 25 F. Cas. 1232 (D. Md. Sept. Term, 1861) (Giles, J.), and United States v. The Arcola, 24 F. Cas. 849 (D. Md. Oct. Term, 1861) (Giles, J.). There is no indication among the published decisions (other than, perhaps, *Merryman* itself) that the Circuit Court for the District of Maryland met for any April 1861 term. Nor have I discovered any newspaper articles from April 1861 suggesting that the federal circuit court met in April 1861 in Baltimore. *See* Genealogy Bank (last accessed Jan. 28, 2023), https://www.genealogybank.com/. *But cf.* David M. Silver, Lincoln's Supreme Court 32 (reissue 1998) (1956) ("Taney continued to hold circuit court in Baltimore after he had disposed of the Merryman case . . . .").

48 Merryman was represented by counsel. By contrast, Cadwalader sent his aide-de-camp: Colonel R.M. Lee. *See, e.g.*, *Ex parte* Merryman, 17 F. Cas. 144, 146 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); McGinty, *supra* note 14, at 11. *But see Affairs in Baltimore*, N.Y. Times, May 29, 1861, at 1 (reporting that "Major Belger" attended the hearing on May 27, 1861 for Cadwalader, and also reporting that Major Belger read Cadwalader's response to the court), https://tinyurl.com/23yj274u.

49 Collins English Dictionary, https://tinyurl.com/b94ecv36 (definition of "in chambers").

Finally, in modern times, "chambers" opinions by Justices of the Supreme Court are primarily "dispos[itions] 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"[50] as part of a wider, prior, imminent, and/or ongoing appeal to the Supreme Court. In such circumstances, the individual Justice is acting on behalf of the Court as a whole, and as such, a decision of a single Justice *is* a decision of the Supreme Court of the United States.[51] *Merryman*, by contrast, was not such a decision. Not only was *Merryman* not a decision in the process of being appealed to the Supreme Court, it was not even possible, for either of the parties,[52] to appeal Taney's final order in *Merryman* to the Supreme Court![53] In other words,

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[50] *In-Chambers Opinions*, Supreme Court of the United States, https://www.supremecourt.gov/opinions/in-chambers.aspx; *see also, e.g.*, Locks v. Commanding Gen., Sixth Army, 89 S. Ct. 31, 32 (1968) (Douglas, J., in chambers) ("But apart from granting stays arranging bail, and providing for other ancillary relief, an individual Justice of this Court has *no power to dispose of cases on the merits*." (emphasis added)).

[51] Although a decision of a single Justice on an application for interim relief is a Supreme Court decision, it carries different persuasive force and precedential effect in contrast to a merits decision of the full Court. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 1010 n.167 (2005) ("Actions by single Justices are generally not considered to have precedential value . . . ."); *see also* [Chief Justice] Frank J. Williams & Nicole J. Benjamin, *Military Trials of Terrorists: From the Lincoln Conspirators to the Guantanamo Inmates*, 39 N. Ky. L. Rev. 609, 615 (2012) ("Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion."). A confederate state court has also addressed this issue. *See Ex parte* Walton, 60 N.C. 350, 1864 WL 4848, at *6 (1864) (Pearson, C.J.) ("The question is, does that decision settle the law or should it be overruled? I am aware that, in the opinion of the Secretary of War [for the Confederacy] and of his Excellency, Gov. Vance, the decision of a single Judge on *habeas corpus* questions is only binding in the *particular case* . . . ." (emphasis in the original)); *id*. at *9 (suggesting that "a 'judgment of discharge [by a single judge],' on *habeas corpus*, will, as heretofore, be treated as binding only in the particular case").

[52] Taney issued no final order *against* General Cadwalader: the named defendant. Thus, as the prevailing party, neither Cadwalader, nor the government in Cadwalader's name, could take any appeal. *See* Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 506–08 (expounding on the aggrieved party rule); *infra* note 53 (explaining why Merryman could not take any appeal).

[53] *See* Tillman, *Ex parte* Merryman*: Myth, History, and Scholarship*, *supra* note 1, at 506–08 (arguing that, in 1861, no statute provided any appeal to the Supreme Court from a chambers habeas decision); *see also In re* Metzger, 46 U.S. (5 How.) 176, 191 (1847) (McLean, J.) ("This Court can exercise no power in an appellate form over decisions made at his chambers by a *Justice of this Court* or a judge of the district court." (emphasis added)); McGinty, *supra* note 14, at 176 (explaining that in *Merryman* no appeal was possible because "[d]ecisions of individual justices in chambers [were] not appealable to the full court"); Rehnquist, *supra* note 8, at 44 (noting "significant procedural obstacles to such an appeal [in *Ex parte Merryman*] as the law then stood"). Professor Vladeck takes the view that "nothing at all turns on this debate (except the correct *Bluebook* citation form for Taney's published opinion in *Ex parte Merryman*)." Steve Vladeck, *SCOTUS Trivia: Circuit Justice or Chief Justice, In Chambers?*, One First (Feb. 20, 2023), https://tinyurl.com/59rx6mhz. Not true. For example, both a circuit court and a district court are courts of record. If *Merryman* had been issued by either such court, the decision would have had precedential effect—even if not binding precedent. On the other hand, if *Merryman*, was merely issued in chambers, then its precedential effect is

it is not now widely appreciated that the prevailing modern understanding of what a "chambers" decision is, has changed substantially from what a "chambers" decision was in the mid-nineteenth century. This too has led some to doubt the propriety of characterizing *Merryman* as a "chambers" decision.

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less than clear. *See supra* note 51. Moreover, many have criticized the parties for failing to appeal Taney's *Merryman* decision to the Supreme Court. *See* [Justice] Stephen Breyer, The Court and the World: American Law and the New Global Realities 16 (2015) ("[Lincoln] did not release John Merryman. Neither did he appeal the ruling, *as he might have done*." (emphasis added)); Harold H. Bruff, Untrodden Ground: How Presidents Interpret the Constitution 135 (2015) ("Lincoln should either have let Merryman go or appealed the order to release him."); Thomas J. DiLorenzo, Lincoln Unmasked: What You're not Supposed to Know About Dishonest Abe 93 (2006) ("The Lincoln administration could have appealed the chief justice's ruling, but it chose to simply ignore it . . . ."); Paulsen & Paulsen, *supra* note 7, at 171 ("Lincoln defied Taney's unilateral order . . . declining even to appeal Taney's order to the full Supreme Court."); Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 Utah L. Rev. 1, 22 ("[T]ake the best-known example . . . Lincoln defied the court in *Merryman* without bothering to appeal . . . ." (footnote omitted)); Paul Finkelman, *Limiting Rights in Times of Crisis: Our Civil War Experience—A History Lesson for a Post 9-11 America*, 2 Cardozo Pub. L. Pol'y & Ethics J. 25, 39 (2003) (noting that "Merryman did not appeal his incarceration to the full Supreme Court"); Michael Stokes Paulsen, *Lincoln and Judicial Authority*, 83 Notre Dame L. Rev. 1227, 1285 (2008) ("[Lincoln] did not obey Taney's order, nor did his administration seek any sort of appeal to the full Supreme Court."); Paulsen, *The* Merryman *Power*, *supra* note 25, at 92 (posing the question whether Lincoln was "required [in *Merryman*] either to comply or to seek review and reversal by the full Supreme Court"); *see also* White, *supra* note 11, at 218 ("An appeal to the [full] Supreme Court, in other words, would have been imprudent."). *cf. supra* note 19 (collecting authority affirming, incorrectly, that Taney's *Merryman* decision was heard as an appeal from a district court decision); Dunham, *supra* note 7, at 156 (suggesting, absent documentary support, Lincoln appealed Taney's decision to the full Supreme Court). However, an appeal of Taney's *Merryman* decision to the full Supreme Court was only possible if it was a federal circuit court decision—a forum from which such an appeal was provided for by federal statute. On the other hand, if *Merryman* was a chambers decision, then the better view is that no such appeal was provided for by federal statute at that time, and it follows that any criticism directed to the parties for failing to appeal was then and remains now an intellectual nonstarter. *See* The Federalist No. 63, at 338 (James Madison) (J.R. Pole ed., 2005) ("Responsibility in order to be reasonable must be limited to objects within the power of the responsible party . . . ."); C.H. McIlwain, Constitutionalism and the Changing World 282 (1939) ("[T]here can be no responsibility without power and there should be no power without responsibility."); Enoch Powell, M.P. (for South Down, N.I.), *Christianity and the Curse of Cain*, *in* Wrestling with the Angel 13 (1977) ("No one can be responsible for what he does not control."); J. Enoch Powell, M.P. (for Wolverhampton, South-West, Eng.), Shadow Secretary of State for Defence, *Speech at Wolverhampton* (Dec. 12, 1966), *in* Freedom and Reality 197, 199, 260 (John Wood ed., 1969) ("'[R]esponsibility' depends upon the prior question of power . . . .").

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For all the reasons above, I suggest that, to avoid future confusion, citations to *Merryman* should eschew referencing the Circuit Court for the District of Maryland and the customary reporter: *Federal Cases*.[54] The traditional form of citation has only led to substantial confusion. Instead, I suggest *Merryman* should be cited by referencing the modern reporter for in chambers decisions by Justices of the Supreme Court: Cynthia Rapp and Ross E. Davies' *A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States*.[55]

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[54] *See, e.g.*, *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.); *supra* notes 3 & 13 (collecting authority); *infra* note 55 (collecting authority). Westlaw reports over 500 domestic and foreign cases, trial and appellate court documents, and secondary sources citing *Merryman* in the *Federal Cases* reporter at "17 F. Cas. 144". *See* The Federal Cases Comprising Cases Argued and Determined in the Circuit and District Courts of the United States, *supra* note 14, at 144.

[55] *See Ex parte* Merryman (1861) (Taney, C.J.), *in* 4 (pt. 1) A Collection of In Chambers Opinions by the Justices of the Supreme Court of the United States 1400–12 (Cynthia Rapp & Ross E. Davies, compilers, 2004), http://tinyurl.com/judtw8q. *See generally supra* note 1 (collecting authority). No doubt, one could craft other helpful forms of citation. *See, e.g.*, Bissonette v. Haig, 776 F.2d 1384, 1391 (8th Cir. 1985) (Arnold, J.) (citing *Merryman* as "17 Fed. Cas. 144 (No. 9487) (Taney, C.J., in chambers) (1861)"). Quite correctly, Judge Arnold eschews citing *Merryman* as a circuit court decision. Like Judge Arnold, a few sources cite to *Merryman* absent listing *any* specific court. *See, e.g.*, Paul Brest et al., Processes of Constitutional Decisionmaking / Cases and Materials 223 (4th ed. 2000) (citing *Merryman* as: "17 F. Cas. 144 (1861)"); Fallon, Marbury *and the Constitutional Mind*, *supra* note 3, at 17 n.63 (citing *Merryman* as: "17 F. Cas. 144 (1861)"); Dennis J. Hutchinson, *Lincoln the "Dictator,"* 55 S.D. L. Rev. 284, 290 n.25 (2010) (citing *Merryman* as: "17 F. Cas. 144 (1861)"). In a certain sense, these latter citations, although somewhat unhelpful or incomplete, are technically correct—no duly constituted court decided *Ex parte Merryman*.

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Magical Thinking and Appearance-based Recusal

Zygmont Pines*

ABSTRACT

This article is a critical analysis of a fundamental judicial ethic, the appearance of impartiality, an increasingly important public issue that is poorly understood and woefully underexamined in jurisprudence and academic literature. The ethic is pivotal to the determination of judicial disqualification, a/k/a recusal, and the public's fragile trust in the rule of law.

The article explains how a mysterious metaphorical device, the "reasonable observer" (a descendant of the common law's "reasonable man") has been subjectively applied in a confusing and inconsistent manner in judicial disqualification cases. The unexamined approach has unwittingly undermined the plain text and the mandatory ethical obligation of recusal (i.e., a judge must disqualify when his or her impartiality might reasonably be questioned).

The discussion: (a) analyzes the theoretical underpinnings of the reasonable person-observer analytical tool ("heuristic"); (b) explains how American jurisprudence has glibly transmogrified the appearance-recusal precept; (c) provides a unique and starkly contrasting analytical perspective demonstrating how select common law-based jurisdictions (Australia, Canada, Singapore, South Africa, United Kingdom) have painstakingly examined and applied the widely-recognized norm of appearance-based impartiality; and (d) synthesizes the preceding theoretical and jurisprudential information to support a proposal for a recalibrated metric and a pragmatic, clarifying heuristic. The article concludes with a model provision, in the form of a guiding "commentary," that summarizes the essential aspects of the appearance of bias precept. The article provides an interpretative approach that attempts to be faithful to the letter and spirit of the foundational judicial ethic.

KEYWORDS

recusal, judicial disqualification, judicial ethics, appearance of impartiality, reasonable person, reasonable observer, common law

CONTENTS

* former State Court Administrator of Pennsylvania; former Chief Legal Counsel, Administrative Office of Pennsylvania Courts; email: zap2308@gmail.com

Introduction

In a world of uncertainty, humanity has demonstrated an insatiable desire and quest for boundless knowledge to anticipate and resolve the problems of reality. Early in Goethe's *Faust*,[1] there is a dialogue between the devil (Mephisto, momentarily disguised as Dr. Heinrich Faust) and a bewildered student seeking direction in his life and studies. In the following passage, Mephisto provides cynical advice that many judges and lawyers would likely (and disapprovingly) appreciate.[2]

> **Mephisto**: As a general rule, put your trust in *words*,
> They'll guide you safely past doubt and dubiety
> Into the Temple of Absolute Certainty.
> **Student**: But shouldn't words convey ideas, a meaning?
> **Mephisto**. Of course they should! But why overdo it?
> It's exactly when ideas are wanting,
> Words come in so handy as a substitute.
> With words we argue pro and con,
> With words invent a whole system.
> Believe in words! Have faith in them!
> No jot or tittle shall pass from them.[3]

Goethe portrays Dr. Faust as a despondent scholar on the point of suicide stemming from his overwhelming sense of intellectual emptiness and futility. In his despair Faust turns to magic and conjures a world of spirits, eventually bartering his soul with Mephisto in return for the prospect of unlimited knowledge and sensual pleasure. Goethe's story begins with Faust at his desk when Mephisto suddenly appears.[4] In the tragedy, Mephisto, who personifies both supreme intelligence and cynical wit, serves as Goethe's literary device, providing a supernatural element into Faust's dark scholarly world.

Reason and rationality often appear to represent a line of demarcation between the worlds of reality and make-believe. Our legal profession basks in the comfortable conceit that law embodies eminent reason and rationality, far removed from fantasy or fiction. As Owen Fiss once observed in his reflections about the presence of passion in the law, "[T]he judicial decision may be seen as the paragon of all rational decisions, especially public ones." [5] Magical devices, however, are

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1 Johann Wolfgang Von Goethe, Faust (2014) [hereinafter Faust]

2 Charles Geyh, in the context of discussing procedural reforms for recusal, once remarked that "able lawyers (and judges) can conjure plausible reasons for varying outcomes in every case that is not so frivolous as to warrant sanctions." *See* Charles Gardner Geyh, *Why Disqualification Matters*, *Again,* 30 Rev. of Litigation 671, 715 (2011).

3 Faust, *supra* note 1, at 69 (emphasis in original). Goethe's Faust was a work in progress for over 60 years. The work has been an inspiration to many artists and creators over the years. A variation of the tale, for example, was the subject of a parody in the animated series, *The Simpsons* (*"The Devil and Homer Simpson"*) in which Homer Simpson barters his soul for a donut. *See* "Treehouse of Horror" episode qt http://www.the simpsons.com/#/recaps/season-5_episode-5 at www.The Simpsons.com.

4 Mephisto initially appears to Faust as a black poodle.

5 *See* Owen M. Fiss, *Reason in All Its Splendor*, 56 Brook. L. Rev. 789, 790 (1990). Fiss notes that Justice Brennan commented on Justice Cardozo's doubt about judges as vessels of pure reason. *Id.* at 796.

not limited to the world of fiction. Commenting on "imagination's rationality," American philosopher Robert Nozick remarked that imagination plays an important role in the rationality of belief.[6]

Faust's story serves as a reminder that rationality is not impervious to the forces of imaginative reasoning. H. L. A. Hart said that Justice Oliver Wendell Holmes represented a "heroic figure in jurisprudence" for Englishmen because of Holmes' imaginative power and clarity.[7] Language is law's vehicle for imaginatively expressing and manifesting rationality.[8] To be frank, judges are pre-eminent alchemists of language – semantic sorcerers who will, at times, engage in a divination-like process and resort to a fictional literary device akin to "magical realism." [9] It is through this magical process that fiction paradoxically provides the jurist a portal to wisdom. In their deep-seated desire and obligation to do justice, judges naturally seek to overcome the frustrating limitations of knowledge, uncertainty, and cognitive capacity.[10] Like Faust, judicial decision-makers will sometimes resort to the metaphysical and find themselves in a magical or mystical kingdom, one that is inhabited by a spectral presence we affectionately call "the reasonable person."[11] This reasonable person has lived with us for many years.[12] Judges (and juries) have engaged in séance-like encounters with this faceless and voiceless apparition to intuit guidance and direction in problem-solving. In trying to discern reality and provide justice, the decision-maker engages in a creative, imaginative reasoning process, asking: What does this reasonable person see, think, advise?

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6 *See* Robert Nozick, The Nature of Rationality 172 (1993) (rationality is not simply applying mechanical rules).

7 *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 593 (1958).

8 *See* Nozick, *supra* note 6, at 179.

9 *See, e.g.*, Thomas Halper, *Logic in Judicial Reasoning,* 44 Ind. L. J. 33, 38 (1968), noting, in reference to the element of "judicial hunch" in legal reasoning, that "The judge, then, emerges as a magician, and the law turns out to be a box of tricks." Magical realism is a literary genre that has roots in the worlds of both reality and fantasy. Generally, magical realism relies on supernatural devices, such as apparitions, to reveal and explain reality. A prime example is Gabriel Garcia Marquez, One Hundred Years of Solitude (1967). An extended examination of the literary device can be found in Magical Realism: Theory, History, Community (Lois Parkins Zamora & Wendy B. Faris, eds., 1995) [hereinafter Zamora].

10 *See, e.g.*, Adrian Vermeule, Judging Under Uncertainty 157-62 (2006). Vermeule discusses the "institutionalist dilemma" regarding interpretive choices and the constraint of "bounded rationality." *See also* Halper, *supra* note 9, at 47 (acknowledging the "corona of uncertainty" in the law).

11 The objective reasonable person has originally been referred to, in common law (in the context of torts and contracts), as the "reasonable man." *See* Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective,* 14 Lewis & Clark L. Rev.1233 (2010) (exploring the many facets of "common law's most enduring fiction" in private and public law); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S. C. L. Rev. 293-94 (1997); John Gardner, *The Many Faces of the Reasonable Person* (2015), https://johngardnerathome.info/pdfs/reasonableperson2013.pdf ; and Prosser and Keeton on Torts, § 32-33 (5th ed. 1984) [hereinafter Prosser & Keeton].

12 *See* DiMatteo, *id.* at 305-07 (identifying the religious, philosophical, and psychological roots of the reasonable person).

Lois Parkinson Zamora provided a perspective as to the significance of such metaphoric devices: "Ghosts embody the fundamental magical realist sense that reality always exceeds our capacities to describe or understand or prove…Magical realist [devices] ask us to look beyond the limits of the knowable and ghosts are often our guides." [13] The pronouncements of this fictitious reasonable person have been integral to the law's decision-making.[14] Like the symbol of Mephisto, the ghost-like reasonable person has served as law's muse, a wisdom whisperer, a metaphorical[15] fabrication of the understanding (that we lack) and an adaptive heuristic (that we need)[16] to help us respond to perplexing circumstances and uncertainty.[17] The paradox is that out of a need for objectivity and rationality in decision-making, the law has had to imagine and rely on its own form of magical realism—*magical legalism.*[18] The conjured reasonable person in law is more than an imaginative and magical hypothetical construct. The hypothetical understandings of the artificially constructed reasonable person become a touchstone of legal rationality and interpretation.[19]

Impartiality, in substance and appearance, is a foundational principle of fair judicial decision-making. Appearance-based recusal has become an increasingly controversial and inadequately understood concept.[20] In today's legal world,

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13 *See* Zamora, *supra* note 9, at 498.

14 *Consider,* Ida Petretta, *The Question of Comparisons,* 68 Am. J. of Comp. L. 893, 898-99 (2020) (rhetoric has always been integral to judicial disputes and analogical legal decision-making).

15 On the many uses and meanings of metaphor in everyday life, *see* the essays in On Metaphor (Sheldon Sacks, ed. 1978).

16 *See* Richard Re, *Clarity Doctrines*, 86 U. Chi. L. Rev. 1497, 1513-14 (2019).

17 *See* Nozick, *supra* note 6, at 93 (organisms need adaptive mechanisms to respond to local circumstances).

18 Others have appropriated the term "magical legalism". *See* Jeffrey Miller, *Magical Legalism of Marcel Ayme: Charming Rogues and the Suspension of Physical, Natural, and Positive Law,* 53 Cahiers De Droit 649 (2012); and Javier Trevino-Rangel, *Magical Legalism: Human Rights Practitioners and Undocumented Migrants in Mexico*, 23 The Int'l J. of Human Rights 843 (2019).

19 William Baude & Stephen Sachs, *The Law of Interpretation*, 130 Harv. L. Rev. 1079, 1117 (2017) (advocating an approach, a law of interpretation, that would identify and apply interpretive rules governing a particular text or written instrument). *Cf.* Re, *supra* note 16 at 1507 (linguistic ambiguity could be resolved by way of an interpretive canon, yielding legal clarity).

20 *Consider*, for example, Jane Mayer, *Legal Scholars Are Shocked by Ginni Thomas's "Stop the Steal" Texts,* The New Yorker (Mar. 25, 2022), https://www.newyorker.com/news-desk/legal-scholars-are-shocked-by-ginni-thomass-stop-the-steal-texts; Kara Voght & Tim Dickinson, *SCOTUS Justices '"Prayed With" Her—Then Cited Her Bosses to End Roe,* Rolling Stone (July 6, 2022) (quoting constitutional law and ethical experts regarding the problem of the appearance of judicial impartiality, the reasonable observer, and the lack of an objective mechanism to resolve judicial ethical concerns), https://www.rollingstone.com/politics/politics-features/roe-supreme-court-justices-1378046/; Michael J. Solender, *Must Justice Clarence Thomas Recuse Himself,* Wall St. J (Apr. 1, 2022) (noting that Ginni Thomas's texts create, at minimum, the appearance of impropriety for Justice Thomas), https://www.wsj.com/articles/justice-clarence-thomas-supreme-court-recuse-ginni-texts-11648828232; and *infra* note 168 (Supreme Court's public approval ratings). In the international common law context, *see* Matthew Chuks Okpaluba & Tumo Charles Maloka, *The Fundamental Principles of Recusal of a Judge at*

as evidenced by the thousands of state and federal cases addressing judicial disqualification, there are incalculable ways for a judge to simply express, often through a detailed narrative of facts, "I refuse to recuse." or, less often, " I recuse."[21] Whether a judge is ethically qualified to adjudicate a case is governed by specific standards for disqualification, more commonly referred to as "recusal."[22] A judge's decision-making must be impartial in both substance and appearance. The over-arching recusal standard or rule,[23] applicable to state and federal jurists in the United States,[24] is an exemplar of lexical simplicity. The ethical mandate to recuse is expressed in just five little words—a jurist must recuse when his or her *"impartiality might reasonably be questioned."*[25] The ethical mandate for judges is built on a metaphor. Viewed as the "reasonable observer" standard of impartiality, the ethical precept incorporates and is a variant of its venerable common law ancestor the "reasonable person."[26] The precept's focus is not on the reasonableness of the jurist's conduct but how that conduct *appears* to the fictional *reasonable observer.* Like other applications of "reasonableness," [27] the reasonable observer is not a static concept. Context becomes all-important. The reasonable observer's ethical mandate attempts to address the appearance—not actuality—of impartiality and bias in light of particular facts and circumstances. Moreover, the ethical standard imposes an extraordinary challenge upon a jurist who is the subject of a recusal challenge -- it requires the jurist to become, in

Common Law: Recent Developments, 43(2) Obiter 88, 90 (2022) (noting that "[d]espite the already-existing avalanche of case law on this important subject [recusal], there is no slow-down in the frequency with which cases raising the issue of bias, apprehended bias or the requirement of judicial impartiality are canvassed in common-law courts."); and Anne Richardson Oakes & Haydn Davies, *Process, Outcomes, and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality,* 51 Santa Clara L. Rev. 573, 581-86 (2011) (noting the increased sensitivity to and acceptance of the appearance concept in the European Court of Human Rights). [hereinafter Oakes & Davies].

21 Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (3rd ed. 2017), is a valuable treatise regarding judicial disqualification. The resource provides comprehensive exposition, with commentary, of relevant U.S. caselaw. *See id*. § 1.5 n. 5, ¶15 (statistically, refusals to recuse predominate).

22 The terms *recusal* and *disqualification* are often used interchangeably. *See, e.g.*, In re School Asbestos Litigation, 977 F.2d 764, 769 (3d Cir. 1992); and Model Code of Judicial Conduct (Am. Bar. Ass'n 1990) Canon 2, r. 2.11, cmt. [1] [hereinafter Model Code].

23 Some academics have noted a distinction in terminology regarding *rules* vs. *standards*. *Standards* are viewed as promoting abstract ideals and are less determinative than rules. *Rules* are more conduct-specific and easier to enforce. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perception of Lawyer Codes of Conduct, by U.S. and Foreign Lawyers,* 32 Vand. J. Trans. L. 1117, 1123 (1999); Joseph R. Grodin, *Are Rules Really Better than Standards,* 45 Hastings L. J. 569 (1994).

24 *See* Louis J. Virelli, Disqualifying the High Court: Supreme Court Recusal and the Constitution 165-210 (2016) (discussing recusal at the state and federal court levels).

25 Model Code, Canon, 2, r. 2.11(A), *supra* note 22.

26 *See* Prosser & Keeton, *supra* note 11.

27 *See* text in *infra* § I(A) and accompanying notes.

effect, a clairvoyant in perceiving and interpreting the imaginary perceptions of an imaginary person. Magical Legalism indeed.

The deceptive simplicity of the five-word ethical mandate of recusal reminds one of what a philosopher once warned about the challenges of interpretation: "Language is a labyrinth of paths. You approach from one side and know your way about; you approach the same place from another side and no longer know your way about." [28] Like the approach in common law countries, the appearance-based recusal standard in the United States embodies the elusive notion of *reasonableness*—reasonableness of the *observer* and reasonableness of the *perception*. Integral and critical to the ethical standard's notion of reasonableness is the modal expression,[29] "*might*," which acts as the vital verbal fulcrum for the standard's implementation. As this article will explain, the meaning of "reasonableness" (of both the reasonable observer and the reasonable observation) and the spectrum of belief (exemplified by the verb "might") in the over-arching ethical mandate pose formidable epistemic challenges regarding interpretation. How do we assess appearance-based recusal? Who is the reasonable observer? What is "reasonable"? What is (or should be) our analytical yardstick or metric? Regrettably, there is little clarity or guidance in American caselaw.

Clarity of language is essential for interpretation and rational decision-making. Clarity's goal is to approximate a modicum of certainty or, at least, predictability in decision-making.[30] Sometimes the wisdom and experience of others can provide guidance. As Justice Stephen Breyer and other legal commentators have noted, a key component of legal reasoning is comparison.[31] When it comes to the rule of law, the best way to identify and preserve American values may well be to take account of what happens elsewhere. Justice Breyer explained:

> In the last several decades, more and more nations throughout the world have adopted documents that increasingly resemble our own Constitution and protect democracy and human rights. More and more, they look to independent judges to apply those documents. So if I have a legal problem

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28 *See* Petretta, *supra* note 14, at 909 (citing Ludwig Wittgenstein, Philosophical Investigations (1998)). *See also*, Aviam Soifer, *Reviewing Legal Fictions*, 20 Ga. L. Rev. 871, 915 (1986) stating "Words help us understand and escape the tyrannies of the past…Used eloquently, however, words may help us to seek change rather than continuity and to struggle for our aspirations rather than to accept that whatever seems to be is good enough."

29 *See infra* §. IV(B)(1).

30 *See* Re, *supra* note 16, at 1513-14 (discussing "clarity thresholds" and "accuracy promoting heuristics" to avoid or minimize risks of judicial error and harmful effects).

31 *See* Stephen Breyer, *American Courts Can't Ignore the World*, The Atlantic (Oct. 2018), https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/. Justice Breyer has been a forceful proponent of learning from foreign jurisdictions. Even the late Justice Scalia was known to be receptive to examining and considering comparative law, except in constitutional matters. *See* Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue*, 12 Tulsa J. Comp. & Int'l L. 149 (2004) (discussing an emerging "transnational judicial dialogue" and interest among Supreme Court justices in foreign law); *see also* Olympic Airways v Husain, 540 U.S. 644, 658 (2004) (Scalia J., dissenting) (urging courts to take foreign judicial decisions more seriously in the context of treaty interpretation).

> similar to a problem that a person like me with a job like mine has already faced and decided, why shouldn't I read what he said? I don't have to agree. It does not bind me. I don't have to follow it. [32]

The comparative approach makes eminent sense especially when we consider universal fundamental values such as judicial impartiality and the appearance of justice. A legal commentator has observed that there are no pure identities or traditions -- we live in legal families that represent hybrids, constantly bleeding into one another and in constant contact with one another.[33] Despite the understandable exceptional pride of Americans in their legal system, our jurisprudential roots are in the Magna Carta and English common law.[34] From the beginning of our Republic, we have relied on common law, which is the most widespread legal system in the world.[35] In recognition of these legal realities, scholars have urged that there should be a transnational judicial dialogue and "intellectual cross-fertilization of ideas," [36] a "dialogue of recognition"[37] so to speak, with others who see things differently than we do.

This article regarding appearance-based recusal will expand the traditional analytical aperture. We will examine the wisdom and experience of our legal relatives from various common law-based countries (Australia, Canada, Singapore, South Africa, United Kingdom). It is important to note that these countries have tackled the difficult issue of appearance-based recusal in a manner that has been thought-provoking and enlightening. An examination of caselaw and legal commentaries from those countries will reveal a remarkable similarity of fundamental ethical values, as well as related jurisprudential challenges. Regardless of our geographical separation or cultural differences, the common problem has *not* been with similar ethical principles but with their interpretation and implementation. As we shall see, however, Anglo-American recusal jurisprudence exposes differences that are stark and perplexing. Whereas the selected common law countries have painstakingly

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[32] Breyer *id. See also* Stephen Breyer, The Court and the World 241 (2015) (noting a well-established American legal tradition of learning from foreign sources, consisting predominantly but not entirely of common law materials). *Consider also* Lawrence v Texas, 539 U.S. 558, 576 (2003) (foreign legislation considered, including European Commission of Human Rights).

[33] Petretta, *supra* note 14, at 914. *See also* Damiane Canale, *Comparative Reasoning in Legal Adjudication,* 28 Canadian J. of L. & Juris. 5 (2015) (while foreign law is not authoritative, it can provide content-independent reasons for adjudication).

[34] *Id.* at 894-96. *See also* Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries,* 19 Columbia—VLA J. L. & Arts 229 (1994) (noting that the U.S. common law has a rich independent legal history, but many of its principles in contract and tort and other relevant law are not dissimilar to the principles found and applied in common law countries); and H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 Colum. L. Rev. 1 (1917).

[35] *See* Sweet & Maxwell, English Common Law is the Most Widespread Legal System in the World (2008), https://sweetandmaxwell.co.uk./about-us/press-releases/061108.pdf*;* and Cyrus Das, *Recusal of Judges: A Commonwealth Survey of the Applicable Tests,* 280 in Cyrus Das, The Culture of Judicial Independence (2014) ("English law, in some form or another, is applied in about 55 countries around the world which house about one-third of the world's population") *id.* at 280.

[36] *See* Waters, *supra* note 31, at 150.

[37] *See* Petretta *supra* note 14, at 913.

analyzed the concept of appearance-based recusal, U.S. caselaw is, to put it mildly, analytically opaque, embodying an approach that can undermine the animating values of recusal. Such an approach effectively tips the decisional scales in the challenged jurist's favor. The selected common law countries demonstrate an analytical approach in their caselaw that is arguably more supportive and value-enhancing of the appearance standard and its underlying values, promoting greater analytical clarity, jurisprudential understanding, and public confidence-inducing accountability. It appears that, in our respective individual encounters with the mystical reasonable observer, our common law relatives imagine and perceive in substantially different ways.

If, as Nozick contends, principles symbolize and express our rational nature, we need to be alert to how we reason and interpret, ever-alert to our cognitive weaknesses as we engage in the process of creating ethical beliefs and action from a mysterious alchemy of words.[38] As Nozick emphasizes, a belief is rational if it is arrived at through a process that reliably and predictably achieves certain goals.[39] In the recusal context, the goal is both symbolic and practical—to protect the appearance of impartiality, which is essential to the public's trust and confidence in our legal system and the rule of law; and, through interpretation, to attain a serviceable—not perfect or precise—theoretical framework (heuristic) that aids judges in serving justice through fair recusal decision-making.[40] Contrary to Mephisto's advice, the Temple of Absolute Certainty[41] is a delusion. This article will assess appearance-based recusal from multiple perspectives in the hope of identifying essential analytical considerations and principles. The recommended approach attempts to reveal and fill the jurisprudential void by providing greater conceptual clarity. It is an approach that strives to be faithful to both the letter and spirit of the appearance principle of judicial impartiality.

The article will proceed in the following manner. *Part I* is theoretically foundational to the article's concluding formulation of a recommended understanding and approach to appearance-based recusal. It discusses the relevance of heuristics in the decision-making process. The focus is on the "reasonable observer" heuristic, a descendant of the common law's "reasonable man," a metaphorical, fictionalized construct that was also adapted to apply in U.S. constitutional Establishment Clause cases. Relevant to the analysis of recusal and the task of interpretation is a brief discussion of fundamental jurisprudential and philosophical concepts such as: reasonableness and the reasonable man, the tension between the statistical and normative approaches to reasonableness, the paradox of objectivity in decision-making, and the influence of factors, including morality and context, in the quest for jurisprudential clarity. Particular attention is given to Justice Sandra Day O'Connor's seminal and imaginative adaptation of the common law's reasonable man standard, the "reasonable observer" heuristic, in Establishment Clause caselaw, an approach that focused on whether governmental

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38 *See* Nozick, *supra* note 6, at 40, 71-74.

39 *Id.* at 67.

40 *Id.* at 68.

41 *See* Faust *supra* note 1 at line 3. Consistent with Mephisto's cynicism, Mephisto also says "…law is no delight. / What's jurisprudence? – a stupid rite/ That's handed down, a kind of contagion, / From generation to generation,/ From people to people,/ region to region." *Id.* at 68.

action conveys a public message of religious endorsement. Justice O'Connor's approach (as well as scholarly and judicial criticisms of the heuristic) will provide a relevant reference point in later identifying the reasonable observer's attributes and the importance of clear interpretive criteria. O'Connor's reasonable observer's status was always perilous and its ultimate (but not unexpected) demise in 2022 in Establishment caselaw will serve as a cautionary lesson regarding clarity and context in the creation and application of the metaphorical heuristic in the ethic of judicially-mandated recusal.

Part II analyzes the recusal standard and the appearance of impartiality concept in U.S. caselaw. This section explains how U.S. courts have used the metaphorical reasonable observer heuristic to interpret, amplify, and eventually transform the clear and simple ethical mandate in a way that undermines its values and plain text. This transmogrification is exemplified through the semantical glibness in which the critically important modal verbs "might" and "would" (signifying *possibility* vs *probability*) are applied. It is not clear whether this subtle modal verb shift in caselaw reflects an intentional or subconscious mind-set (groupthink) or simply lexical insouciance. In any event, judicial reformulation of the general appearance standard, fortified by the common law's protective presumption of judicial impartiality, demonstrates that recusal interpretation in U.S. jurisprudence has employed a more stringent metric that can effectively tip the scales of recusal decision-making in the challenged jurist's favor.

Part III provides a stark contrast to the U.S. approach to appearance-based recusal by focusing on how various common law-based jurisdictions (Australia, Canada, Singapore, South Africa, and the United Kingdom) have struggled to achieve a common understanding and approach (theoretical and practical) in the interpretation of appearance-based disqualification. This section attempts to engage in an international discussion about Anglo-American ethical principles regarding recusal. It is a comparative approach that has been advocated by Justice Breyer. Particularly striking is the fact that the common law countries, in contrast to their American counterpart, have engaged in extensive analyses about the appearance of judicial impartiality. Their remarkable, and sometimes head-spinning, epistemic jurisprudential struggles can provide guidance. This comparative common law experience serves as an important backdrop to the next section.

Part IV culminates in a synthesis of the preceding sections regarding the reasonable observer heuristic in appearance-based recusal. The section identifies jurisprudential guideposts, especially the outcome-determinative/standard-of-scrutiny metric, that can assist judges in applying the inherently enigmatic metaphor in a more principled way. It is an analytical approach that attempts to be more faithful to the plain language, the spirit, and values of the American ethical mandate. The article concludes with an exhortation that the current jurisprudential and analytical void in appearance-based recusal needs to be acknowledged. The current U.S. approach regarding such an important and increasingly controversial public issue about judicial ethics [42] should then be re-considered and refined to promote analytical clarity and rationality. The article concludes with a specific pragmatic proposal, in the form of a model commentary, to accompany the over-

[42] *See*, *e.g.*, *supra* note 20, regarding press coverage of recusal controversies involving the Supreme Court.

arching, foundational precept of appearance-based impartiality. While the proposal cannot provide "absolute certainty" in a Faustian sense, it can assist the judiciary in the quest for conceptual clarity and, ultimately, fairness and ethical accountability.

I. The Reasonable Person and the Reasonable Observer: Heuristics in Deontic Reasoning

Decision-making is a complex process. Humans are equipped with logic in their search for truth.[43] Judges, of course, are human;[44] they operate through the process of reasoning and various mechanisms (concepts, tests, principles, standards), to facilitate and channel "rational" judgment.[45] The reasoning process operates on two levels: the intuitional (referred to as "System 1") and deliberative ("System 2").[46] Contrary to the "beautiful fiction" of "unbounded rationality,"[47] logical thinking is not central to human reasoning.[48] The brain is efficient but cognitively limited.[49]

Although the ideal of attaining perfect rationality may be an enticing illusion, humans have developed ways to compensate for the perils of fallibility inherent in the complex process of decision-making. Heuristics operate as aids or efficient mental shortcuts for decision-making.[50] Gerd Gigenrenzer offers the example of an outfielder catching a fly ball and simultaneously trying to solve a series of differential equations. The outfielder's task is formidable. In employing a "gaze heuristic," the catcher assesses the speed, height, distance, and trajectory of the fly ball to achieve a simple objective.[51] Gigerenzer explains that humans have an arsenal of similar cognitive aides in their "adaptive tool kit" of heuristics. For example, taking the best option, following the majority, selecting on the basis of representative familiarity (e.g., similar circumstances or name/cultural/ political affiliations) are heuristics that promote "fast and frugal" decision-making.[52] Some heuristics are psychologically innate or intuitive, like using oneself as a frame of reference ("anchoring") or even trying (and often failing to achieve) a course-correction ("adjusting") to the egocentric bias anchor.[53]

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43 *See* Gerd Gigerenzer, *Bounded and Rational* in Contemporary Debates in Cognitive Science 117 (R. J. Stainton ed. 2006).

44 *See* Jerome Frank, *Are Judges Human?* 80 U. PA. L. Rev. 17 (1931); and Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations of Judges,* 61 So. Cal. L. Rev. 1877, 1905 and 1910 (1988).

45 *See* Elizabeth Thornburg, *(Un)Conscious Judging,* 76 Wm. & Mary L. Rev. 1567, 1608 (2019).

46 *Id.* at 1608-09.

47 *See* Gigerenzer, *supra* note 43, at 128.

48 *Id.* at 123.

49 *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?* 76 Or. L. Rev. 61, 93 (2000).

50 Amos Tversky and Daniel Kahneman have been pioneers in the study of heuristics and biases. *See, e.g.,* Amos Twersky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974), https://www.science.org/doi/10.1126/science.185.4157.1124 [hereinafter Twersky & Kahneman].

51 *See* Gigerenzer, *supra* note 43, at 119-20.

52 *Id.* at 119-127.

53 *See* Thornburg, *supra* note 45, at 1612-13; Twersky & Kahneman, *supra* note 50, at 20-21; Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors*

Heuristics can serve as quick and efficient short-cuts for judges to streamline and channel their decision-making in the face of uncertainty and other pressures (such as time, efficiency, limited resources, and political conditions). Although judges may believe that they are not susceptible to systematic errors of judgment, studies show judges are subject to a range of cognitive illusions.[54] While helpful and necessary, heuristics can lead to systematically erroneous judgments inasmuch as judges tend to favor intuitive (System 1) rather than deliberative (System 2) faculties.[55] Bias and error, for example, can be the consequence of ignoring important information, relying on stereotypes, using one's beliefs and values as a metric, and resorting to quick "common sense" rationales or impressionistic reasoning.[56] In the difficult search for predictive accuracy, it is laziness or ignorance, a failure in System 2's deliberative function, that may lead to faulty and overconfident judgments.[57]

Heuristic devices support decision-making. The legal world depends on them. For judges, who are viewed as relying on logic and reasoning, the concept of "reasonableness" plays a critical role. The reasonable man (or reasonable person)[58] standard is an example of a heuristic reasoning device, based on an idealized and abstract construct, ubiquitous in the world of torts and contracts.[59] A related heuristic, "the reasonable observer," [60] has come into play, for example, in two instances: when a determination must be made whether a judge's "impartiality might reasonably be questioned," requiring disqualification/recusal; or when a court must constitutionally interpret the public's perception of a religious symbol that is

in Judgments of Belief and Values, in Heuristics and Biases: The Psychology of Intuitive Thought 120-38 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds. 2002); Daniel Kahneman, Thinking Fast and Slow 119-28 (2011).

54 *See* Rachlinski, *supra* note 47 at 100-101; Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability,* 60 Clev. St. L. Rev. 913 (2013); Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions,* 49 Court Rev. 114 (2013); Adebola Olaborede & Lirieka Meintjes-vander Walt, *Cognitive Bias Affecting Decision-Making in the Legal Process,* Obiter 806 (2020) (identifying seven common cognitive biases); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?,* 45 DePaul L. Rev. 605 (1996); *cf*. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic,* 98 Iowa L. Rev. 293 (2012) (analyzing the reasonableness of an officer's snap judgment to shoot a suspect).

55 *See* Thornburg, *supra* note 51, at 1608-09, 1615-20; Kahneman, *supra* note 51, at 99-114.

56 *See* Rachlinski, *supra* note 49, at 74-81 and 90-93 (illustrating the "representative heuristic" in criticizing the "badly flawed" doctrine of *res ipsa loquitor*, which ignores the base rate of negligence; also analyzing the adequacy of the "prudent investor" standard, which implicates bias in assessing a trustee's liability).

57 *See* Kahneman, *supra* note 53, at 106, 114, and 152-53.

58 The concept was originally masculine, implying male attributes, but was eventually de-gendered to become a "person." *See* Alan D. Miller & Rosen Perry, *The Reasonable Person,* 87 N.Y.U. L. Rev. 323, 361-62 (2012). The authors also discuss the impact of the feminist backlash to the male-based nomenclature and standards. *Id.* at 362-66.

59 *See* DiMatteo, *supra* note 11.

60 *See, e.g.,* Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 Mich. L. Rev. 491, 517-18 (2005) (discussing Justice O'Connor's heuristic of the reasonable observer in religious endorsement cases); and Haydn Davies & Anne Richardson Oakes, *Problems of Perception in the European Court of Human Rights,* 3 St. John's J. Int'l & Comp. L. 120, 121, 131 (2013) (the observer is a fiction, a generically conceived representation) [hereinafter Davies & Oakes].

associated, directly or indirectly, with the government. Such an open-ended and ambiguous fictional construct presents significant questions: Who is this reasonable observer? What does the reasonable observer see? How does the reasonable observer think? And, most importantly, what do we mean by "reasonable?" The following considerations provide some foundational elements and concepts that will be relevant to the development of a heuristic to guide the recusal process.

A. Reasonableness

"Reasonable" is a quality that permeates the domain of law, including the judicial ethic of recusal. The appearance-based recusal standard of reasonableness is both adjectival and adverbial: operating implicitly (*viz*., the observer must be a reasonable person) and explicitly (*viz*., the questioning of a jurist's impartiality must be grounded in reason). But what do we mean by "reasonable"?

A dictionary definition of "reasonable" provides limited guidance. If one analogizes "reasonable" to a navigational device, it is more akin to a compass than a GPS.[61] It can provide direction in a general sense, but it cannot identify the precise location. For example, reasonable is definitionally identified in varying terms: right-thinking judgment, not absurd or ridiculous, within bounds of reason, sensible.[62] Justice O'Connor approached the term from another Wittgenstein-like[63] angle when she described the meaning of "unreasonable." She said: "[T]he term 'unreasonable' is no doubt difficult to define but it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." [64] One can, therefore, appreciate a law professor's lament when he acknowledged in an article that he pities the municipal lawyer who must explain to others the meaning of "reasonable" in an ordinance.[65] Scottish law professor, Neil MacCormick, said he found reasonableness to be a puzzling and fascinating, a context-driven concept.[66]

In analyzing the kaleidoscopic-like concept of "reasonable," scholars have generally noted its complexity and ubiquity in philosophy, economics, and in many areas of Anglo-American law (torts, contracts, criminal, administrative, constitutional, trusts).[67] On the positive side, commentators have expressed

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61 Global Positioning System. *See* www.gps.gov.

62 "Reasonableness" has been defined as: right thinking, right judgment, not absurd or ridiculous, not extreme, within bounds of reason, and rational. *See* Webster's Third International Dictionary 1892 (1981).

63 *See* text accompanying *supra* note 28.

64 *See* Williams v Taylor, 529 U.S. 362, 410 (2000).

65 *See* Brandon Garrett, *Constitutional Reasonableness*, 102 Minn. L. Rev. 61, 124-25 (2017); *see also* Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 Ala. L. Rev. 887, 887 (2021) (no consensus on the definition of reasonableness). *See also infra* note 120 regarding Professor Hill's similar lament.

66 *See* Neil MacCormick, *Reasonableness and Objectivity*, 74 Notre Dame L. Rev. 1575, 1576 -77 (1998).

67 *See, e.g.*, Benjamin Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. Pa. L. Rev. 2131, 2132-33 (2015); Kevin P. Tobia, *How People Judge What is Reasonable*, 70 Ala. L. Rev. 293, 298 (reasonableness sits at the core of various legal standards) (2018); and David Zaring, *Rule by Reasonableness,* 63 Admin. L. Rev. 525, 527 (reasonableness works all over the legal system). *See also* Silvia Zorzetto, *Reasonableness*, 1 Italian L. J. 107 (2015) (explaining the porous concept of reasonableness from multiple perspectives and contexts).

reasonableness as "law's conscience," one that embraces two seemingly inconsistent ideals (justice/equity and conformity);[68] a higher order value;[69] a normative term that should embody the ethic of care and concern for others;[70] in tort law, reasonable signifies prudence, care, a community ideal, combining both subjective and objective ingredients; [71] and, in contract law, it is a "metaphorical solvent" that promotes the goal of "objectivity" in decision-making.[72] .

Nevertheless, there are negative assessments to explain why there is considerable frustration and confusion about the multivalent legal standard of reasonableness. Benjamin Zipursky noted that reasonable and its cognates are often used as a vague Goldilocks' "just right" qualifier in law.[73] To use another analogy, reasonableness is like another societal icon, *Jell-O* —hard to grasp and easily modifiable in shape and content, depending on one's preferences.[74] Others have described reasonableness as a vague paradigmatic legal standard that suffers from multiple ambiguity and lack of clarity;[75] an object for "intellectual jousting;" [76] a legal fiction that fosters pseudo-certainty;[77] a magnet for legal theory;[78] and, fundamentally, a self-referential term that acts as a disguise for the lack of objective criteria.[79] Thus, it is not surprising to appreciate the claim that the vast domain of "reasonable" represents a "deregulated zone" in the law.[80]

Consequently, various commentaries lead one to the conclusion that there is no practical or principled consensus about the meaning of reasonable. Notwithstanding the term's enigmatic nature, while it embodies a broad zone of discretionary freedom, it may also function as a laudable gravitational force to constrain decision-making, albeit in vague indecipherable ways, somewhat like a canine invisible fence.[81]

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68 *See* Alan Calman, *The Nature of Reasonableness,* 105 Cornell L. Rev. Online 81 (2020) (the concept dominates Anglo-American law).

69 *See* MacCormick, *supra* note 65 (providing an extended exposition of reasonableness).

70 *See* Joanna Grace Tinus, *The Reasonable Person in Criminal Law* 48 (2017) (Canadian thesis advocating that courts should embrace a more normative approach to reasonableness), https://qspace.library.queensu.ca/bitstream/handle/1974/15374/Tinus_Joanna_G_201702_MA.pdf.

71 *See* Prosser & Keeton, *supra* note 11, at § 32.

72 *See* DiMatteo, *supra* note 11, at 297; *see also* Garrett, *supra* note 64, at 69-84 (exploring three dimensions of constitutional reasonableness).

73 *See* Zipursky, *supra* note 66, at 2139 (noting also, at 2137-38 the adjectival and adverbial aspects of reasonable).

74 *See* Susan Grove Hall, *The Protean Character of Jello, Icon of Food and Identity*, 31 Stud. in Popular Culture 69, 76 (2008) (noting that *Jell-o* has become a metaphorical icon that defies categorization). *Cf.* Silvia Zorzetto, *Rational, Reasonable and Nudged Man,* 73, 80 (2019) (judicial uses of reasonableness continues to be so broad and undetermined as to be impossible to grasp) [Univ. of Milan thesis *available at* www.academia.edu].

75 *See* Zipursky, *supra* note 66, at 2133.

76 *See* Calman, *supra* note 68, at 16. The comment is peculiar given the article's heavily analytical neuro-scientific approach.

77 *See* Soifer, *supra* note 28, at 882.

78 *See* Zipursky, *supra* note 66, at 2132.

79 *See* Garrett, *supra* note 64, at 107.

80 *See* John Gardner, *The Many Faces of the Reasonable Person* 1, 17 (2015), https://johngardnerathome.info/pdfs/reasonableperson2013.pdf.

81 *Consider* Zaring, *supra* note 67, at 552-554 (viewing the term as a potentially positive force in administrative law).

B. The Reasonable Man (a/k/a The Reasonable Person)

Within the deregulated zone of reasonableness one can find perhaps the most visible fictional icon of the law, "the reasonable man" (a/k/a the reasonable person) called upon as an all-purpose construct when a legal problem must be solved objectively.[82] Caution, however, is necessary. As noted by Alan Miller and Ronen Perry: "Any judge or juror who claims to understand the nature of the reasonable person from his or her familiarity with society is mistaken. Such a task is not merely difficult or impractical—it is impossible." [83] Generalities often become a substitute for analysis.

As with the reasonableness concept, the reasonable man has appeared in many areas of the law, predominantly in torts and contracts.[84] The personification of the reasonable man in torts concerns the reasonableness of one's conduct, whereas the focus in contracts is on intent in the formation and interpretation of a contract. The reasonable man fiction[85] has been the subject of considerable commentary and criticism. Many cases often treat the reasonable man and reasonableness synonymously given their shared history.[86] Today's popular conception of the reasonable man associates him with English common law, described often in common law countries as "The Man on the Clapham Omnibus." [87]

Given the ubiquity of this metaphorical creation in the law, modern courts and commentators have struggled to understand him. In a treatise on torts, the reasonable man was described as an "excellent but odious character," a fictitious person "who never has existed on land or sea." [88] Others have portrayed the reasonable man in varying, somewhat demeaning terms such as America's "sacred

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82 *See* Gardner, *supra* note 80, at 27.

83 *See* Miller & Perry, *supra* note 58, at 328.

84 *See* Gardner, *supra* note 80, at 2-3; and Moran, *supra* note 11. The reasonable man/person metaphor has proven to be elastic. *See, e.g*., *Brief of The Onion* as *Amicus Curiae in Support of Petitioner*, Novak v. City of Parma (Petition for Writ of Certiorari, Supreme Court of the United States, No.22-293) (advocating the importance of constitutionally protected parody and the "reasonable reader's" perspective) *available at* www.supremecourt.gov.

85 Regarding the role of fictions in the law, *see* Peter J. Smith, *New Legal Fictions,* 95 Geo. L. J. 1435 (2007); and Soifer, *supra* note 28.

86 *See* Tobia, *supra* note 67, at 333, 335.

87 *See* Zorzetto, *supra* note 74, at 82; and Gardner, *supra* note 80, at 18; Tobia, *supra* note 67, at 333-39. Clapham is a suburb of London. As these articles indicate, the reasonable man's origins were statistical via a Belgian statistician, Adolpe Quetelet, who used the term *l'homme moyen* to analyze the physical characteristics of the average man. As explained by Lord Reed, the reasonable Clapham Omnibus Man exemplified a passenger belonging to an intelligent tradition of defining a legal standard by reference to a hypothetical person, stretching back to the creation by Roman jurists of the figure *bonus pater familias*. *See* Healthcare Services at Home, Ltd v Common Servs. Agency [2014] UKSC 49, ¶ 1-3, 4 All ER 210 (appeal taken from Scotland). It is not clear whether the first jurisprudential appearance of the reasonable man in England was in Vaughn v. Menlove [1837] 132 Eng. Rep. 490, 3 Bing (N.C.) 468, or R. v Jones [1703] 87 Eng. Rep. 863. *See* Tinus, *supra* note 70, at 6-10. *See also* DiMatteo, *supra* note 11, at 294-297 and 303 (reasonable man concept in contracts rooted in the need for objectivity and impartial interpretation, similar to the objective theory of contracts).

88 *See* Prosser & Keeton, *supra* note 11, at § 32, ¶ 174.

cow" and a privileged White Anglo-Saxon Protestant ("WASP") male who suffers from a thought disorder, obsessed with imposing order and control to the injury of justice;[89] a preconceived bundle of beliefs and rationales; [90] a legal fiction to foster pseudo-certainty;[91] and, more charitably, an "average Joe" or an all-purpose vanilla-like personification.[92] Not surprisingly, the reasonable man concept has been the object of critical feminist commentary[93] perhaps explaining why the "reasonable man" is often referred to as the "reasonable person" (a moniker that will be adopted hereinafter).

Beyond the mixed metaphors and the benign (or slanderous) labels, "[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[94] Christopher Jackson has observed that the reasonable person is so commonplace that it has not received sufficient attention or analysis.[95] Aside from oft-repeated generalizations and platitudes about the reasonable person's attributes (e.g., basic intelligence, common sense, prudence, informed, not perfect, not individualized but representing a community ideal, not hyper-sensitive or possessing extremist views etc.) [96] and being the embodiment of community values and the collective consciousness, [97] the reasonable person concept has generated understandable concerns, many of which will be relevant to the discussion herein and to a consideration of an appropriate recusal heuristic. Specifically, one may plausibly ask: Does the reasonable person embody a majoritarian view that is insensitive

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89 *See* Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder,* 54 Wake Forest L. Rev. 1049, 1051, 1060, and 1073-85 (1989). The author views the reasonable man as an anthropomorphic metaphor for legal reasoning and reason itself, one who has contributed to a disregard for the rights, experiences, and dreams of people who do not fit his paradigm.

90 *See* DiMatteo, *supra* note 11, at 315-16.

91 *See* Soifer, *supra* note 28, at 882.

92 *See* Gardner, *supra* note 80, at 18, 27.

93 *See* Miller & Perry, *supra* note 58 at 361-64; Tinus, *supra* note 70, at 15-22; Mayo Moran, *Rethinking the Reasonable Person: Custom, Equality and the Objective Standard,* (1999) (treatment of various groups under the objective standard viewed as raising profound concerns about equality and ultimately about the rule of law; author focuses primarily on feminist efforts to reform the reasonableness standard) (unpublished thesis, Univ. of Toronto, *available at* www.tspace.library.utoronto.ca); and Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspectives,* 14 Lewis & Clark L. Rev. 1233, 1234 (2010) (noting that, as law's most enduring, complex, ubiquitous, and controversial legal fiction, the reasonable person may be a vehicle that allows discretion to import prejudice into the law). The feminist critique bears similarities to the majoritarian critique of the reasonable observer heuristic. See § IV(A) infra.

94 *See* Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting); and Moran, *supra* note 93, at 205-10 (noting, from a feminist perspective, that the reasonable person has been so generalized to the point of ambiguity).

95 *See* Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 San Diego L. Rev. 651, 651-52 (2013) (echoing Mayo Moran).

96 Attributes, however, may be heightened for one who possesses particular skills or a higher level of knowledge. *See* Prosser & Keeton, *supra* note 11 at §32, ¶¶ 182-93; *cf.* DiMatteo, *supra* note 11 at 318-19 (reasonable person personification in contracts in comparison to the torts context).

97 *See* DiMatteo, *id*. at 317 and 343; Zorzetto, *supra* note 74, at 80.

and non-responsive to the viewpoints of a non-majoritarian culture?[98] Whom does the reasonable person realistically represent? Is it a clever subterfuge for hiding a decision-maker's controlling preferences and biases? Have we saddled the metaphorical reasonable person with unrealistic expectations in terms of knowledge and information? In addition to the absence of conceptual clarity in the reasonable person standard, these questions have assumed increasing relevance when one considers the "Reasonable Observer," who has appeared on the modern constitutional stage as a doppelganger descendant of the common law's illusory reasonable person.

C. The Reasonable Observer

Adam Soifer has observed that "Our great judges are those who most effectively use the fabric of fiction to camouflage their creativity." [99] From the fertile imagination of Justice Sandra Day O'Connor, who assessed whether government-related actions or symbols represented an unconstitutional endorsement of religion, the fiction of the Reasonable Observer developed. The reasonable observer heuristic developed as an off-shoot of the so-called tripartite "*Lemon* test," an analytical construct that sought to assess religious establishment claims of unconstitutionality in terms of purpose, effects, and potential governmental entanglement with religion.[100] Justice O'Connor's metaphorical reasonable observer heuristic arguably served as a convenient analytical tool, like the common law reasonable person, to enable a jurist to *appear* to be impartial and objective in the interpretation of the views or perceptions of a fictionalized common person who might perceive and interpret governmental action as an unconstitutional "endorsement" of religion under the Establishment Clause. [101] Nevertheless, as with the common law concept, the reasonable observer heuristic invited speculation and confusion because it did not clarify how one goes about deciphering the imaginary being's imaginary perceptions. Subsequent caselaw has attempted to elucidate the jurisprudential inquiry.

In a case pertaining to the display of a cross on government property, Justice O'Connor expressed the contours of her vision of the reasonable observer analytic by stating: "The endorsement inquiry is not about the perceptions of particular

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98 *Cf. and consider* the relevance of the feminist controversy, *supra* note 56. *See also* Tinus, *supra* note 68, at 15-22 (discussing the feminist critique); Prosser & Keeton, *supra* note 11, at § 32 n.5. Moran, *supra* note 11, notes the challenging relationship of the amorphous reasonable person metaphor with egalitarian values and the paradoxical danger of prejudicial discretion.

99 *See* Soifer, *supra* note 28, at 885.

100 Lemon v. Kurtzman, 403 U.S. 604, 612-13 (1971).

101 U.S. Const. amend. I, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…". Application of the endorsement test under the Establishment Clause often involved challenges to religious displays on government property. The endorsement aspect of the Establishment Clause question is whether such a government-related display represents a constitutionally impermissible government endorsement of religion. Justice Ginsburg noted that the endorsement inquiry has been described as the "reasonable observer standard." American Legion v. American Humanist Assn., American Legion v. American Humanist Assn., 139 S. Ct. 2067, 2106 n. 4 (2019) (Ginsburg, J., dissenting).

individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe." [102] She then noted:

> I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge…In my view, however, the endorsement test creates a more collective standard to gauge the 'objective' meaning of the [government's] statement in the community…In this respect, the applicable observer is similar to the "reasonable person" in tort law, who "is not to be identified with any ordinary individual…but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment"…[The endorsement inquiry] simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.[103]

At a pivotal point, Justice O'Connor stated: "…[T]he reasonable observer must be deemed aware of the history and context of the community and forum in which the religious display appears…This approach does not require us to assume the 'ultrareasonable observer' who understands the vagaries of this Court's First Amendment jurisprudence…."[104] In O'Connor's legal universe, the views of the reasonable observer ultimately presented an abstract question of law.[105] On reflection, one had to question how precisely the message from this mystical observer could be discerned in the challenging constitutional balancing process. Does a jurist rely on gut instinct about the collective community's hypothetical perception of the government's intent? Does the jurist rely on a vague reasoning process that travels through a legally unregulated zone, a process that a common law lawyer has described as impressionistic?[106]

Justice O'Connor's formulation provoked criticism from her colleagues. Justice Scalia's lead opinion took issue with how one identifies the hypothetical beholder (*i.e.*, the observer). Justice Scalia asked: is it any beholder (no matter how unknowledgeable), or the average beholder, or Stevens' "ultrareasonable"

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102 Capital Square Rev. & Adv. Bd. v. Pinette, 515 U.S. 753, 779 (1995).

103 *Id*. at 779-80 (internal citations omitted, italics in original) (O'Connor, J., concurring in part and concurring in the judgment). *See also* Justice O'Connor's earlier views regarding her endorsement interpretive approach in Lynch v Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring) and Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring in the judgment).

104 *Capital Square*, 515 U.S. at 780-781.

105 *See Lynch*, 465 U.S. at 694 (stating that the analytical question of the reasonable observer's observations is largely a question to be answered based on judicial interpretation of social facts). *See also* Jessie Hill, *Anatomy of the Reasonable Observer*, 79 Brook. L. Rev.1407, 1440 (2014).

106 *See* Simon Atrill, *Who Is the Fair-Minded and Informed Observer? Bias after Magill,* 62 Cambridge L.J.279, 283 (2003). Professor Hill states that the interpretive methodology is not an empirical or statistical one. *Id.* at 1440. *See also* William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 Cal. L. Rev. 495 (1986). Regarding the issue of empirical evidence, *see infra* notes 231 and 370.

beholder? [107] Justice Stevens also chimed in. Critical of O'Connor's formulation and favoring a strong presumption against religious displays on public property, Justice Stevens viewed Justice O'Connor's fictional construct as coming "off as a well-schooled jurist, a being finer than the tort law model," noting further that "it strips constitutional protection from every reasonable person whose knowledge happens to fall below some ideal standard." [108] In Justice Paul Stevens' vision, he would have extended protection to the universe of reasonable persons to ask whether some viewers of the religious display would perceive government endorsement. Addressing Justice O'Connor's concerns about hyper-sensitive individual views, he noted that her ideal observer test ignores the requirement that the apprehension be objectively reasonable.[109]

There has been considerable scholarly and judicial criticism of the reasonable observer heuristic that was grafted onto religious endorsement cases. In her critical assessment of the reasonable observer approach, Jessie Hill viewed it as a heuristic mechanism to reconstruct intent, based on an evaluation of the context of the perceived message and all relevant information, the objective being an interpretation of the social meaning and effect of a religious message associated with the government's message.[110] Hill proffered that the heuristic should be re-interpreted and strengthened by procedural mechanisms (such as evidential flexibility, burden-shifting rules, presumptions, as well as a recognition that there are other reasonable non-majoritarian perspectives). [111] She questioned how one can decipher consensus or whether it is even achievable.[112] Echoing similar concerns, Jessie Choper contended that the O'Connor heuristic was too nebulous and subjective, allowing too much legislative-like discretion, thus facilitating the imposition of a judge's values at the expense of a needed sensitivity to reasonable non-majoritarian points of view.[113] Richard Fallon, for example, urged a wide-angle re-appraisal of Establishment Clause doctrine, which he said was "notoriously confused and disarrayed—a farrago of unstable rules, tests, standards, principles, and exceptions."[114] Particularly, for our analytical purposes, Fallon claimed that

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107 *See Capital Square*, 515 U.S. at 769.

108 *Id.* at 800 n. 5.

109 *Id.* Stevens notes therein that a person who views an exotic cow as a symbol of the government's approval of the Hindu religion could not survive O'Connor's test, which is predicated on the view that there is always someone who will feel excluded by a government's particular action.

110 *See* Hill, *supra* note 60, at 503-07; and Hill, *supra* note 105, at 1409-10. Hill's criticism is that Justice O'Connor's heuristic is over-idealized, fails to capture reality, is unconstrained and unguided, risking the danger that the over-idealized observer becomes a stand-in for the judge who may embody a majoritarian point of view.

111 *See* Hill, *supra* note 105, at 1449-52.

112 *See* Hill, *supra* note 60, at 517-22.

113 *See* Jessie Choper, *The Endorsement Test: Its Status and* Desirability, 18 J. L. & Pol. 499, 512, 516-20 (2002). *See also* Benjamin I. Sachs, *Whose Reasonableness Counts*, 107 Yale L.J. 1523 (1998) (critically analyzing the approaches of Justices O'Connor and Souter); and Mark Strassen, *The Endorsement Test is Alive and Well: A Cause for Celebration and Sorrow,* 39 Pepp. L. Rev. 1273 (2013).

114 *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause,* 166 U. Pa. L. Rev. 60, 119, 223 (2017), citing Paul Horwitz, The Agnostic Age 223 (2011). *See also* B. Jessie Hill, *supra* note 60, at 492 (describing the unpredictability of Establishment Clause challenges).

Establishment Clause cases failed to employ an "analytically sequenced tiered framework for judicial review" that is necessary for clarity and rationality. [115]

Such criticisms had placed the Establishment Clause's reasonable observer heuristic on life support. Scholars like Professor Hill speculated that the Supreme Court might eventually pull the plug.[116] The critics ultimately proved to be correct when, in 2022, a Supreme Court majority in Kennedy v Bremerton School District definitively jettisoned *Lemon* and its implementing reasonable observer standard in favor of a "history-and-tradition" test.[117] Justice Gorsuch criticized *Lemon* and the endorsement test as an attempt to create a "grand unified theory" for assessing Establishment Clause claims, which inevitably invited chaos that led to differing results.[118]

In retrospect, the repeated criticisms from members of the Court about *Lemon* and the endorsement test presaged the reasonable observer's demise.[119] One might say that Professor Hill's note of concern in 2014 ("Pity the reasonable observer")[120] became a prescient lamentation in 2022. Notwithstanding the demise of the reasonable observer heuristic in Establishment caselaw, O'Connor's heuristic and its subsequent doctrinal challenges provide a useful backdrop to the later discussion of a similar heuristic in appearance-based recusal—one with a significant contextual difference. Whereas the reasonable observer heuristic represented a judicial invention in Establishment Clause jurisprudence, the reasonable observer heuristic in judicial ethics is explicitly incorporated in a precept that focuses on the important secular virtue of judicial impartiality and the public's viewpoint. The saga of the

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115 *See* Fallon, *id.* at 60-62.

116 *See* Hill, *supra* note 105, at 1408-10.

117 *See* Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022). The case involved a high school football coach's post-game prayers on the football field. The Court viewed the prayers as private and non-coercive. Justice Sotomayor stated that the Court had overruled *Lemon* "entirely and in all respects." *Id*. at 2449 (Sotomayor, J., dissenting opinion in which Breyer and Kagan, JJ., joined). J. Sotomayor's dissent questioned whether the new history-and-tradition test provided any guidance to school administrators and wondered how such a test would be implemented. *Id. at* 27-30. It is interesting to note that Professor Hill opined in 2014, *supra* note 105, at 1408-09, that the reasonable observer test might survive the death of endorsement if social meaning remained a relevant factor, for example, when it is necessary to determine if government speech is coercive or proselytizing.

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

119 *See American Legion*, 139 S. Ct. 2067, a case involving the erection of a 30-foot World War I memorial (a Christian cross) in 1925. The plurality opinion generated seven opinions and noted that the Court had many times expressly declined to apply or ignored application of *Lemon*. *See id*. at 2080. The plurality opinion by Justice Alito cited lower federal court cases demonstrating that the *Lemon* test resulted in chaotic jurisprudence, produced unpredictable results, and was difficult to apply. 139 S. Ct. at 2080-81. Growing judicial frustration or confusion about the governing jurisprudential standard is exemplified by *Kennedy*, 142 S. Ct. 2407, in which 11 judges of the 11th Circuit had dissented from that court's denial of a petition for reconsideration, 4 F.4th 910, 911, noting *Lemon's* "ahistorical, atextual" approach in Establishment Clause cases. *Id.* at 911, and n.3. In both *American Legion* and *Kennedy*, the Court found the government's actions did not violate the Establishment Clause.

120 *See* Hill, *supra* note 105, at 1407. *See also* Davies & Oakes, *supra* note 60, at 131 (acknowledging the inherent difficulty in describing the fictional public observer).

reasonable observer heuristic in Establishment jurisprudence, however, provides a cautionary message about the perils of interpretation and the need for some basic analytical clarity.

D. Other Considerations

Relevant to the assessment and development of an analytical framework for appearance-based recusal decision-making are additional considerations that should not be over-looked. While these observations will not provide specific content to a proposed recusal heuristic, they are philosophically directional and will guide the process.

1. Philosophical Polarity – the "average" vs. the "ideal"

There have been two competing philosophical perspectives relevant to the legal idea(l) of reasonableness. One approach advocates a standard that is normative, one generally influenced by ethical values. The normative approach, which is predominant in the legal world, recognizes that the standard cannot be proven empirically or logically. This approach looks to reasonableness as reflecting a community's ideals and values, one that expresses the collective conscience of a community.[121]

The competing view (labeled as positivist, empirical, or statistical) posits that the reasonable person is an ordinary "vanilla-type" creature, an all-purpose being reflecting the average citizen ("the average Joe") and embodying an aggregation of beliefs and behaviors of the individuals in a community.[122] Such a composite approach is historically associated with its origins in statistics. As others have cautiously observed, the "average" approach, strictly applied, can implicate uncomfortable consequences.[123]

Straddling the fence between these two camps is a legal philosophy that portrays the reasonable person as a hybrid in theory and practice.[124] In the prior discussion about the contrasting views of Justices O'Connor and Stevens in *Capital Square* regarding the identity of the reasonable observer,[125] there is a lurking issue whether the approach should be an idealized normative one, based on aspirational

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121 *See* Tobia, *supra* note 67, at 302; Miller & Perry, *supra* note 568 at 370-71 and 380 n.285; and DiMatteo, *supra* note 11, at 307 (noting the religious and philosophical foundations). Prudence, for example, is a qualitative attribute of the reasonable person in torts. *See* Prosser & Keeton, *supra* note 68, § 32, at ¶¶ 174-175.

122 *See* Gardner, *supra* note 80, at 18 and 27.

123 *See* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. Ill. L. Rev. 1255, 1269 (2018); and Tobia, *supra* note 67, at 300-301 (reasoning that there is no such thing as an "average accident" or "average racism.") There is a related philosophical paradox. If the reasonable person represents the community average, does the concept acknowledge the possibility that the reasonable person can also act unreasonably? *See* Matt King, *Against Personifying the Reasonable Person?* 11 Crim. L. & Philos. 725, 728-29 (2017). Dean Prosser points out that, in the world of tort law, the reasonable person is not to be identified as an ordinary individual who might do unreasonable things. *See* Prosser & Keeton, *supra* note 11, § 32 at 175.

124 *See generally* Tobia, *supra* note 67; and Jaeger, *supra* note 65.

125 *See supra* § 1(C).

principles, or one that is more receptive to incorporating, at least in part, the empirical realities of a given community.[126] The normative-statistical dilemma will take on added significance with respect to reconceptualizing and customizing, to a degree, the reasonable observer heuristic in judicial ethics.[127]

Such philosophical musings, sometimes abstruse, may be intellectually interesting. But they provide questionable practical guidance to the judicial decision-maker who must resolve disputes with clarity, practicality, and efficiency [128] Nevertheless, these competing philosophical perspectives are worthy of consideration because they may assist the decision-maker in identifying the appropriate values, points of view, sources of knowledge, and jurisprudential objectives in constructing and construing a context-and-fact dependent heuristic.

2. The Paradox of Objectivity

Objectivity in the law can be an overly romanticized aspirational concept. There are frequent references in caselaw that judicial reasoning is "objective." Such a viewpoint is both idealistic and practical because it comforts the litigants and the public about the importance of judicial impartiality and the fair administration of justice, namely, that a jurist's personal preferences, values, or biases will/should not dictate the reasoning process. The reasonable person or reasonable observer becomes a valuable filtering mechanism for providing the *appearance* of objectivity and impartiality. At the same time, it provides an important reminder (to a jurist and the public) that personal values or views should not control the adjudicatory process.

But the concept of judicial objectivity requires a more nuanced assessment, as jurists and scholars acknowledge. Alan Calman has observed that what is missing from discussions of reasonableness is a basic understanding of human nature.[129] Prosser's analysis of the reasonable man concept admits that it implicates both the subjective and the objective.[130] Christopher Jaeger's analysis of the "empirical reasonable person" posits that the reasonable person's roots are empirical; but reasonableness is also intuitive and aspirational[131] In a legal zone that provides

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126 *See* Jackson, *supra* note 95, at 658-63 (advocating that the relevant circumstances of a litigant's situation should be incorporated into the reasonable person test). *See* Tobia, *supra* note 67, at 311-12 and 340-41 (observing that recent experimental research demonstrates that what is considered "normal" judgment and reasonableness is a hybrid blend of the statistical and prescriptive). *Cf.* Miller & Perry, *supra* note 56 (concluding that reasonableness, considered in normative terms, is the only logical way to view the reasonable person).

127 *See* text accompanying *infra* notes 365-70 regarding various considerations relevant to the external assessment approach; *consider also supra* § I(D)(1) regarding the philosophical polarity between the average and the ideal.

128 A word of caution is appropriate. Philosophical concerns can implicate significant practical consequences. *Consider* Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness,* 100 B. U. L. Rev. 951, 963-65 (2020) (regarding the "split second syndrome" and the issue of adopting an average approach in the constitutional assessment of an officer's split-second decision to shoot a suspect).

129 *See* Calman, *supra* note 68, at 3.

130 *See* Prosser & Keeton, *supra* note 11, at § 32, ¶ 175 n.14.

131 *See* Jaeger, *supra* note 65, at 901-03, 947.

considerable unguided discretion, it is understandable that others have concluded that the use of reasonableness can disguise the lack of objective criteria and can operate as a disguise or a tool for judicial control that *appears* to defer to community standards.[132] The judicial task is especially challenging as Judge Kozinski noted in *In re Bernard*.[133] He has described the judge's philosophical dilemma as "this objective-subjective conundrum" wherein the jurist becomes both the interpreter and the object of interpretation.[134] As noted in *In re United States*, asking a judge to step outside himself and take the view of an objective outsider is a task that is "difficult even for a saint to do."[135]

Regardless of the context in which the reasonable person/observer standard is applied—torts, contracts, constitutional endorsement, or judicial disqualification—there remains an underlying concern about the ever-present danger of a judge's beliefs, values, predispositions, or bias imperceptibly compromising the apparent objectivity of decision-making, especially in circumstances when discretion is legally unguided.[136]

3. Morality

The relationship between law and morality is a topic that has fascinated philosophical and legal scholars. H. L. A. Hart's classic exposition of the separation of law and morals explained that historically there has been a recognition that "the development of legal systems had been powerfully influenced by moral opinion, and, conversely, that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles," an historical causal connection that is not easy to trace.[137]

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132 *See* Garrett, *supra* note 64, at 107, 110, 125; Mayo Moran, *supra* note 93, at 1233, 1234 (suggesting that the reasonable person may inject prejudice into the law).

133 In re Bernard, 31 F. 3d 842, 844 (9th Cir. 1994).

134 *Id*. *See also* Resnick, *supra* note 44, at 1905, 1910 (noting the "inevitability of perspective" in that there is no one objective stance or neutrality given that judges are human who are embedded in society; there is a series of perspectives). The troublesome dilemma of objectivity in recusal self-assessments can be alleviated somewhat by asking a neutral jurist to assess and decide the recusal challenge lodged against another jurist. Such a process is eminently preferable to the self-serving and subjective self-assessment of impartiality. *See* Zygmont A. Pines, *Mirror, Mirror, On the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform,* 125 Dick. L. Rev. 69 (2020) (discussing the problem of "biased impartiality" while proposing fair and procedurally specific procedures that require an independent assessment of a recusal challenge by another jurist).

135 In re United States, 441 F.3d 44, 67 (1st Cir. 2006). In an international context, the South African Constitutional Court observed that "absolute neutrality is a chimera." *See* South African Commercial Workers Union v Irvin & Johnson Ltd. [2000] 3 S.A. 705 (CC) at ¶ 13.

136 *See* DiMatteo, *supra* note 11, at 314-17 (psychological aspects of the reasonable person and the judicial mind), noting that the reasonable person is the "inevitable prisoner of the subjective judicial mind," *id.* at 344; and Hill, *supra* note 105, at 1449 (danger of judicial predisposition and alignment); and Warren A. Seavy, *Negligence – Subjective or Objective*, 41 Harv.L. Rev. 1, 27 (1927); and see Pines, *supra* note 127, at 116-20 (identifying various forms of bias).

137 *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 598 (1958). Regarding the practical decision-making aspects of the law-morality

The limited scope of this article precludes any extended philosophical discussion regarding the role of morality in the development of the law.[138] Suffice it to say that with respect to the reasonable person concept, others have observed a connection. In the realm of contracts, for example, Larry DiMatteo noted that the reasonable person's roots are in moral philosophy (Thomas Aquinas and Aristotle) and in a belief in virtues and right reason representing, in effect, a secularization of religious principles.[139] Given that the reasonable person is viewed as embodying the conscience of the community and is a personification of a community's ideal, it is natural that the reasonable person would assume a normative mantle.[140] The essential point is that the reasonable person/observer is plausibly imbued with normative, moral attributes. More importantly for our purposes, and regardless of the more general philosophical issues of law and morality, the reasonable observer in recusal matters should be recognized as a distinct construct that implicates moral/ethical considerations and aspirations. It is worth acknowledging that the essence of the reasonable observer metaphor in recusal is indeed virtue, in a secular sense, specifically, the civic morality of justice, judicial impartiality, and fairness.

4. Context

The issue of law's relation to morality raises the related and important factor of context. In his analysis of reasonableness and objectivity, professor Neil MacCormick stressed that the task of interpreting "reasonableness" is contextual, involving the identification of values, interests and the like that are relevant to the particular focus of attention, which depends on the type of situation, the relationship at issue, and the governing principles and rationales for the branch of law at issue. Reasonableness is necessarily a context-driven concept.[141] Justice O'Connor in *Capital Square* explained that the application of her reasonable observer-endorsement test depended on a sensitivity to the unique circumstances and context of the particular challenge.[142] Other commentators caution that one must be careful in applying the reasonable person concept beyond traditional legal realms.[143] One thus needs to acknowledge the special context of appearance-based

dilemma, *see* J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*," 29 Cardozo L. Rev. 669 (2007).

138 *Consider Commonwealth v. Howard*, 257 A.3d 1217, 1233-39 (Pa. 2021) (Wecht, J., concurring) wherein Justice Wecht critiques the "common sense of the community" standard and the application of common law-based notions of morality in a prosecution (endangering the welfare of a child), questioning what evidence is necessary in identifying the relevant community and proving the charge.

139 *See* DiMatteo, *supra* note 11, at 305-07.

140 *See* Lee, *supra* note. 123, at 1267-69 (difficult to escape a normative assessment of the reasonable person; author asks whether jurors should reflect their individual values or values of the community); and Zorzetto, *supra* note 74, at 80 (noting "Whether the Anglo-American Clapham Omnibus [the reasonable person] represents a certain moral ideal that belongs to common sense, rather than a composite of society at large, is in fact unclear.")

141 *See* MacCormick, *supra* note 66, at 1577, 1593-94.

142 *See Capital Square*, 515 U.S. at 782.

143 *See* Tobia, *supra* note 67, at 350-351; *but see* Jackson, *supra* note 95, at 653, 705 (disagreeing with the assumption that the reasonable person heuristic varies and depends on the field of law and the normative considerations that animate a given field of law).

recusal, particularly with respect to the underlying values and concerns that would be relevant to the judicial interpretation of the reasonable observer. Context—the public's perception of judicial impartiality in the administration of justice vis à vis the particular facts and circumstances of a case—is all-important. The fact, for example, that the Supreme Court has recently abandoned the reasonable observer approach in Establishment Clause cases (in favor of a history-and-tradition test)[144] does not dictate a similar result in appearance-based recusal jurisprudence given the fact we are faced with the unavoidable task of carefully explaining and applying a paramount ethical standard that textually incorporates the metaphorical reasonable observer.

II. Appearance-Based Recusal in U.S. Jurisprudence

A. The Appearance Standard of Recusal

Justice and impartiality are abstract concepts. Yet there is an inevitable human impulse to imaginatively envision such concepts through literary devices – metaphors, symbols, aphorisms. The "Man on the Clapham Bus," the classic metaphorical symbol for the reasonable person in Anglo jurisprudence,[145] stirs the legal imagination more than the cold concept of objective reasonableness. Bryan Oberle examined the many archetypal characters and symbols of justice in world mythology and identified 68 symbols of justice and 27 words associated with justice (including fairness, impartiality, prudence, reason, and truth).[146] The "appearance of justice" concept has become, like the reasonable person, an imaginative envisioning of a vague aspect of our justice system, particularly relevant in the context of judicial recusal and disqualification. But beyond metaphor and symbolism, how does one interpret the "appearance" of justice? There is little practical guidance.

Impartiality[147] constitutes the core of "appearance of justice," the foundation of U.S. and, as will be discussed, international jurisprudence. The Supreme Court, on more than one occasion, has emphasized that "justice must satisfy the appearance of justice."[148] In *Liljeberg v Health Services Acquisition Corp*., the Court noted that, even if a jurist is pure of heart and incorruptible, a judge's actual knowledge or intent is not a relevant consideration to the appearance of justice in the analysis of the recusal ethic.[149] The Court explained:

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144 *See Kennedy*, 142 S. Ct. 2407, *supra* note 117.

145 *See supra* note 87.

146 *See* Bryan Oberle, *Comparing the Archetypal Characters and Symbols of Justice in World Mythology*, 1 Ilios 60, 62-63 (Apr. 2011). *See also* Dennis Curtis & Judith Resnick, *Images of Justice*, 96 Yale L.J. 1727 (1987); and Judith Resnick & Dennis Curtis, Representing Justice (2011).

147 Model Code, *supra* note 22. The terminology section of the Code defines "impartial," "impartiality," and "impartially" as the "…absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."

148 *See* Offutt v. United States, 348 U.S. 11, 13 (1954); Aetna Life Ins. Co. v. Lavoie, 474 U.S. 813, 825 (1986); and *In re* Murchison, 349 U.S. 133, 136 (1955).

149 *Liljeberg*, 486 U.S. 847 (1988).

> The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicion and doubts concerning the integrity of the judges. The very purpose of sec. 455(a) [the federal recusal statute] is to provide confidence in the judiciary by even avoiding the appearance of impropriety whenever possible. [150]

A modern example of the manifestation of this aspirational appearance principle (perhaps viewed as excessive by some) involved a Virginia trial judge who decided, pursuant to a motion by the local public defender, that the portraits of jurists (overwhelmingly white), peering down (as the judge noted) on African American defendants, should be removed from the courtroom. The judge decided that such a gesture was important to emphasize in his courtroom the appearance of justice and fairness. [151]

The appearance of justice principle was incorporated in the American Bar Association's first model judicial code in 1924.[152] The phrase "justice must satisfy the appearance of justice," came from the pen of an English jurist, Lord Gordon Hewart. Described as "the worst chief justice ever," Lord Hewart stated that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[153] There is a certain cross-Atlantic irony in the provenance of the foundational concept of the appearance of justice. The U.S. version of the ethical appearance standard is tied to another controversial figure, Judge Landis who, while still a jurist, was chosen to clean up the sport of baseball after the so-called Chicago Black Sox baseball scandal in the 1920's. The controversy over Judge Landis's dual compensation eventually prompted the ABA to promulgate an ethical code that addressed the appearance of impropriety.[154]

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150 *Id.* at 864-65. *See also* Liteky v. United States, 510 U.S. 540, 553 n.2 (1994) (noting "… the judge does not have to be subjectively biased or prejudiced, so long as he appears to be so.").

151 *See* Commonwealth v. Shipp, Case No. FE-2020-8 (Va. Cir. Ct., Dec. 20, 2020). The local court system had previously adopted a "Plan of Action" to address racism within the justice system, including public displays and symbols. *See also* Hans Bader, *You Can't Make This Stuff Up*, Fairfax Courts Edition (Dec.29, 2020) (criticizing the court's action), https://www.baconsrebellion.com/wp/you-cant-make-this-stuff-up-fairfax-courts-edition/.

152 *See* Pines, *supra* note 134, at 81-89 (discussing the history and development of the appearance precept). For further background information, *see* Melinda Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors,* 7 St. Mary's J. Legal Malp. & Ethics 238, 257- 72 (2017).

153 *See* R. v. Sussex Justices, *ex parte* McCarthy [1924] 1 K.B. 256, 259, discussed in Raymond J. McKoski, *The Overarching Legal Fiction: "Justice Must Satisfy the Appearance of Justice,"* 4 Savannah L. Rev. 51, 51-52 nn. 1,2,3, and 7 (2017). The case involved the ethical dilemma of a court clerk who had an association with the law firm in the civil suit. The magistrates in the case declared that they had not, in fact, consulted with the clerk, giving rise to Lord Hewart's memorable phrase. *See also* Anne Richardson Oakes & Haydn Davies, *Justice Must Be Seen To Be Done: A Contextual Appraisal*, 37 Adelaide L. Rev. 461 (2016) (discussing the genesis and modern application of Lord Hewart's appearance concept).

154 Although Judge Landis was successful in rescuing and restoring the reputation of American baseball, he was eventually censured by the American Bar Association for

Thus, notwithstanding the associational taints, the appearance concept may have been a serendipitous Anglo-American cross-pollination of ideas.[155]

Over the years the "appearance of justice" has become a fundamental, overarching ethical principle in statutes and codes of judicial conduct, far-removed from the common law Blackstonian view that presumed judicial integrity and restricted judicial disqualification to financial interests.[156] The appearance concept is essential to promoting and preserving the public's trust and confidence in the judicial system and the rule of law,[157] in recognition of the reality that the public's perception of bias can be as damaging as actual bias.[158]

The roots of the appearance concept can also be traced to antiquity—in Roman law, for example, suspicion (of partiality) provided a basis for judicial disqualification.[159] Since 1924, through the persistent efforts of the American Bar Association (ABA) in drafting various versions of the Model Code of Judicial Conduct, the appearance standard has been integral to American law, developing from an aspirational concept to a mandatory ethical responsibility. In tandem with the ABA, Congress enacted various statutes to govern judicial recusal based on the ABA model. In 1972, Congress adopted the Model Code's appearance standard.[160] The ABA drafter's notes to the revised standards, however, never explained the appearance standard[161] except to say:

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having received a monetary commission while also serving as a federal judge. Landis left the federal bench and served for many years as baseball commissioner until his death. *See* Pines, *supra* note 134, at 75-77 regarding the Judge Landis controversy.

155 *See* text accompanying *supra* notes 30-36 regarding the importance of an international legal dialogue.

156 *See,* for example, Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1610) (Coke, L.C.J.).

157 Model Code, Canon 1, r. 1.2 cmt. [1], *supra* note 22, which states, "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety…" Cmt. [3], *id.,* states that "Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary…".

158 *See* David v. City & County of Denver, 837 F. Supp. 1094, 1095 (U.S.D.C. Colo. 1993); Frank, *supra* note 44, at 34-35 (1931); and Raymond McKoski, *Living with Judicial Elections*, 39 U. Ark. Little Rock L. Rev. 491, 516 (2017) (noting that partiality destroys the foundation of the judicial process and can have enormous destructive impact on the public's trust and confidence in the judicial system); and Pines, *supra* note 134, at 113-16.

159 *See* Geyh, *supra* note 2, at 667-68; and Marbes, *supra* note 152, at 257-58 (citing the 530 A.D. Codex of Justinian).

160 *See* 28 U.S.C. §. 47, 144, and 455(a) (2018). Section 144, which provides for the automatic disqualification of a jurist by an affidavit process, has been viewed as a failed experiment. *See* Geyh, *supra* note 2 at 685. Section 455(a) incorporates the ABA's appearance standard. When section 455 was amended, it ended the so-called "duty to sit," which was often used by jurists to support the refusal to recuse. Today, the duty to sit is subordinate to the ethical precept of recusal. *See* Marbes, *supra* note 152, at 86 nn. 66, 93; and Pines, *supra* note 134, at 86 n66.

161 Regarding the theoretical and practical differences between a "rule" and "standard," *see supra* note 23. The ABA reporter's notes, *see infra* note 155, at 43, 45, and 47, refer to the provisions as enforceable standards of conduct. The "appearance" mandate or precept is considered herein as a standard rather than a rule, although such nomenclature is largely irrelevant to this article's analyses.

> The general standard is followed by a series of four specific [*per se*][162] disqualification standards [bias or prejudice, prior connection with proceeding, financial interests, familial relationships regarding party, lawyer, economic impact on a relative and witness] that the Committee determined to be of sufficient importance to be set forth in detail. Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. [163]

As noted by the Supreme Court, most states subscribe to the general over-arching appearance of impartiality standard,[164] which has not escaped criticism.[165] In a prominent case involving a West Virginia state supreme court justice's receipt of substantial campaign contributions, Justice Benjamin fiercely fought attempts for his disqualification in the state proceeding. Selectively quoting Roscoe Pound and Justice Stephen Breyer (luminaries in American law), Benjamin defensively stated: "The very notion of appearance driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of the law, is antithetical to due process." [166] The Supreme Court later concluded that Benjamin's failure to

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[162] The Code identifies categorical (per se) conditions that require automatic disqualification: personal bias or prejudice; judge's (or other designated persons') relationship or financial interest regarding a party, lawyer, or witness in the proceeding; economic interest (of the judge or other designated persons) in the subject matter: campaign contributions; public (unofficial) statements of the judge (or as a judicial candidate) in the nature of an actual or apparent commitment relevant to the proceeding; and judge's professional or personal involvement with respect to the matter in controversy. *See* Model Code, r. 2.1(b), *supra* note 22. *See also* Leslie Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably Be Questioned*, 14 Geo. J. L. Ethics 55, 76-102 (2000) (providing examples of potential appearance of impropriety scenarios, including: judicial remarks, prior involvement in a matter, presiding in a case of a former client or client's opponent, professional relationships, claims filed by or against a judge, a judge's personal connection to the proceeding, family relationships, social or business relationships, and campaign contributions).

[163] *See* E. Wayne Thode, Reporter's Notes to Code of Judicial Conduct 60 (1973). *See also* United States v. Pepper & Potter, Inc. 677 F. Supp. 123, 125 (E.D.N.Y. 1988); and United States v. Herrera-Valdez, 826 F.2d 912, 918 (7th Cir. 2016) (section 455(a) is generally understood to encompass the *per se* disqualification categories but also encompasses a broader range of situations where appearance is compromised). The current version of the appearance standard can now be found as a mandatory black-letter rule in rule 2.11 of the Model Code, *supra* note 21.

[164] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 888 (2009) ("Almost every State… has adopted the ABA's objective [appearance of impropriety] standard.").

[165] *See* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard,* 56 Ariz. L. Rev. 411 (2014) (critique by a former state jurist); *but cf.* M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard,* 7 J. App. Prac. & Process 45 (2005) (a strong defense and explanation of the appearance standard by a federal judge).

[166] *See* Caperton v. A.T. Massey Coal Co., 223 W.Va. 624, 694 (2008).

recuse was a violation of due process.[167] It should be noted, however, that the general appearance standard of recusal in federal and state laws (statutes and codes) represents a more stringent ethical precept than the infrequently applied constitutional (due process) probability-of-bias standard.[168]

It is also important to realize that the focus of the ethical standard is on the appearance, not the actuality, of a judge's bias or intent.[169] Citing the reporter Thode's notes[170] about the model code, one judge stressed: "Judicial ethics reinforced by statute exact more than virtuous behavior, they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct."[171] The objective appearance assessment is undertaken, not from the challenged or reviewing jurist's perspective or values, but through the external lens of an imaginary third person, the reasonable observer. Thus, the reasonable observer in judicial disqualification is metaphorically similar to the reasonable observer that was applied in religious endorsement caselaw—a fictitious, jurisprudential creation, employed in an abductive reasoning process to interpret (objectively) external evidence regarding the public's perception (subjective) of the government's words or conduct.[172] As Thode's notes make clear: "Any conduct that would lead a reasonable

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167 *Caperton*, 556 U.S. 868.

168 *See* Melinda Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence,* 49 Val. U. L. Rev. 807, 824 (2015) (constitutionally based recusal is of lesser practical importance); and *Caperton*, 556 U.S. at 887-888 (due process demarks only the outer boundaries of judicial disqualification; states are free to employ more rigorous standards). In *Caperton*, *supra* note 164, the Court applied a probability of actual bias standard. The application of mandatory ethical standards to the Supreme Court has provoked much controversy, debate, and uncertainty. *See, e.g.*, Marbes, *supra* note 152, at 288 n.228; and Virelli, *supra* note 24, at 16 ("…federal recusal law has adopted a Bractonian view of recusal as a bulwark against suspicious judging, rather than the common law approach of deference to judicial integrity and professional judgment. But the Supreme Court has not embraced this view of recusal with regard to its own members. The justices have a long history of involvement in controversial situations implicating recusal-related issues."). In response to significant media coverage regarding alleged ethical lapses concerning Justices Thomas and Alito, as well as the Court's prolonged and unexplained failure to adopt a binding code of conduct for the Court, the Senate Judiciary Committee voted (along party lines) for a stautory code of conduct that would govern the ethical conduct of the Court's justices. *See* Carle Hulse, *Senate Panel Approves Supreme Court Ethics Bill With Dim Prospects* N.Y. Times (July 20, 2023) https://www.nytimes.com/2023/07/20/us/politics/senate-supreme-court-ethics-rules.html; *see also supra* note 20; and Devin Dwyer, *Supreme Court pivots to abortion, guns, and death penalty as public approval slides,* ABC News (Oct. 3, 2021) (noting 40% approval rating in Sept. 2021, down precipitously from a ten-year high of 58% in 2020), https://abcnews.go.com/Politics/supreme-court-pivots-abortion-guns-death-penalty-public/story?id=80156687; and Donald Ayer, *The Supreme Court has gone off the rails,* N. Y. Times, Oct. 4, 2021, https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html.

169 Justice Markman, for example, noted the confusion regarding the distinct actual bias and appearance standards. *See* People v. Aceval, 782 N.W. 2d 204, 205-206, 486 Mich. 955, (2010) (Markman, J., concurring). Justice Markman asserted that the appearance of impropriety standard was vague and formless. *See also infra* notes 205 and 206.

170 *See* Thode, *supra* note 163.

171 *See* Hall v. Small Business Adm'n, 695 F.2d 175, 176 (5th Cir. 1983).

172 *Cf.* Hill, *supra* note 105, at 1410. Hill's reasonable observer heuristic provides that the judge does not put herself in the hypothetical reasonable person's shoes. The judge

man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."[173] Often overlooked or under-appreciated in recusal cases[174] is the fact that the objective appearance test is not, nor should be, interpreted as a reflection of a jurist's actual integrity, intent, or competency. Appearance-based recusal is not a personalized assessment. For example, in appellate proceedings, when recusal review results in the reassignment of a matter to a different judge, there is commonly a concluding comment of assurance that the decision is not meant to be viewed as impugning the integrity or competency of the challenged jurist.[175]

B. The Appearance Standard of Recusal in Practice

A leading treatise's survey of judicial disqualification in the United States concludes that disqualification jurisprudence is replete with inconsistencies.[176] Foreign commentators have expressed similar concerns about the difficulties encountered in consistently applying their apparent bias standard, particularly in analytically close or marginal cases.[177] The U.S. appearance recusal standard, however, is distinct from its Anglo counterparts in two particular respects. First, there is an analytical opaqueness of U.S. appearance-based recusal decisions. A random examination of many opinions from federal and state courts[178] reveals a remarkable jurisprudential similarity—an analytically vanilla-like, *pro forma* incantation of stock terms and phrases often preceding a detailed factual narrative and a generalized conclusion. In examining the structure and content of these disqualification decisions, one is reminded of the sociologist Emil Durkheim's observation about a "collective consciousness" that is manifested by elite problem-solving groups.[179] The shared feelings, beliefs, and attitudes of such societies reflect shared cognitive patterns. This groupthink phenomenon facilitates the transmission of knowledge, principles, and norms of the collective group.[180] One should be mindful that the shared (perhaps

considers as much information as possible to reconstruct intent or purpose, namely, the social meaning of the government's message. Hill's reasonable observer is interpreted as a "reader of social meaning." The distinction is a subtle one.

173 *See* Thode, *supra* note 163, at 60.

174 This perspective contrasts with the reasonable man test, for example, in negligence cases, where the focus is on the reasonableness of the actor's conduct.

175 *See, e.g.*, *In re Bernard*, 31 F.3d 842; *In re* School Asbestos Litigation, 977 F. 2d 764, 782 (3d Cir. 1992); Hall, *supra* note 163, at 180. *See also* Pines, *supra* note 134, at 120-24 (stressing the public, not personal, aspect of the standard).

176 *See* Flamm, *supra* note 21, at § 1.5, ¶ 16 (inconsistencies suggest the absence of a sound theoretical base and raise troubling questions for a litigant).

177 *See* Julia Hughes & Dean Phillips Bryden, *Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification,* 36 Dalhouise L.J. 171, 173 (2013) (a Canadian perspective).

178 Flamm, *supra* note 21, a treatise that provides a panoramic topical exposition of U.S. recusal caselaw.

179 *See* Emile Durkheim, The Division of Labor in Society 41-43 and 397 (1947).

180 *See* Emile Durkheim, On Morality and Society (Robert H. Bellak ed. 1973), quoting Durkheim on concepts: "Concepts…are always common to a plurality of men. They are constituted by means of words, and neither the vocabulary nor the grammar of language is the work or product of one particular person. They are the result of a collective elaboration, and they express the anonymous collectivity that employs them." *Id.* at 15.

unreflectively habitual) jurisprudential cognitive patterns may serve to promote an institutional solidarity, defensively (unintentionally) maintaining a collective value system and influencing others about what is good for the system. Naturally, this sociological viewpoint is speculative, but it deserves some consideration when evaluating the American recusal process, especially given the reality that, as has been noted, recusal can be perceived (wrongly) as an attack on judicial integrity and ethics (institutional and individual), which may prompt a self-defensive survival reflex.[181]

Relevant to the analytical opaqueness aspect is the existence of what one commentator has identified as an obsession with factual recitation, that is, an "allure of factiness." In U.S. judicial decisions, this approach serves a strategy of appearing judicially neutral and modest through a reliance on heavily-steeped factual narrations that reach a seemingly logical normative conclusion.[182] Another commentator posits that using facts may be a risk-averse smokescreen to reject recusal requests.[183] As noted, many recusal opinions, after a recitation of the standard stock recusal principles, engage in an extensive recitation of facts to analyze the hypothesized perceptions of an ill-defined metaphorical reasonable observer, thus providing some plausibility to the "facty" theory.[184] This approach is comparable to the quondam reasonable observer-endorsement test in religious establishment-endorsement cases, which was also highly fact-specific.[185] In such circumstances, factual details and the recitation of stock legal principles often fail to provide analytical clarity. It is as if one cannot see the forest from the trees. Additionally, the excessive focus on facts can be viewed as implicating a cognitive bias -- the conjunctive fallacy -- in which a decision-maker's deliberative System 2 process[186] uses abundant details of an event or circumstance to provide support for a higher probability assessment (for example, the denial of a recusal motion).[187] While disqualification cases are factually unique and understandably require careful factual elucidation, the allure of excessive fact-finding should not divert attention from the fundamental concerns of analytical clarity and transparent reasoning.

The more significant concern about the application of the U.S. appearance standard of recusal is the transmogrification of the pivotal verbal metric ("might"), undermining both the letter and spirit of the recusal standard. There appears to be a lexical insouciance about the subtle semantic shifting in appearance-based

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181 *See* text accompanying *supra* notes 174 and 175 (ethical appearance standard is not personal and is not meant to connote actual bias).

182 *See* Allison Orr Larsen, *Judging Under Fire and the Retreat to Facts*, 61 Wm. & Mary L. Rev. 1083, 1089-92, and 1105-06 (2020).

183 *See* Hughes & Bryden, *supra* note 177, at 179.

184 *Consider, e.g.,* United States v. Salemme, 164 F. Supp. 2d 49, 84-85 (D. Ct. Mass. 1998) (lengthy recitation of facts in support of judge's decision not to recuse even though the opinion indicates that the government informed the judge that it believed a reasonable person would, in the circumstances, question the judge's impartiality; judge admits that it may be debatable that a reasonable person would question his impartiality); People v. Grieppe, 17-CV—3706 (CBA0(JO) (E.D.N.Y. Jan. 8, 2018) (extensive recitation of facts regarding conflicting accounts of a settlement conference).

185 *See,* e.g., Elewski v. City of Scranton, 123 F.3d 51 (2d Cir. 1997), discussed in Sachs, *supra* note 113.

186 *See* Thornburg, *supra* note 45.

187 *Consider* Peer & Gamliel, *supra* note 54, at 115-16 (discussing decisional biases).

disqualification caselaw that is hard to explain.[188] For the present purposes, it is sufficient to note that a leading commentator on judicial recusal identified an important semantic quandary when he asked whether the standard ("impartiality might reasonably be questioned") embodies *possibility* or *probability*.[189] That distinction, focusing on the modal verbs "*might*" and "*would*," is a critical one. It presents a jurisprudential dilemma about semantics that has been addressed in greater analytical detail by various common law countries. Their epistemological discussions will provide guidance in the reconceptualization of the recusal heuristic.[190]

To understand how U.S. appearance-based disqualification manifests in practice, it is helpful to identify preliminarily the major aspects, procedural and substantive, involved in disqualification adjudications.

1. Procedural Preliminaries: Allocation of Benefit and Burden

Inasmuch as impartiality is a foundational value in our justice system, a disqualification challenge represents a weighty and an emotionally precarious challenge to the judicial system and the judge. Given the gravity of the matter, strict guardrails have been established to prevent frivolous claims or tactical manipulation of the judicial process. These procedures impose a burden (on the petitioner) and a benefit (on the jurist).

A petitioner who claims actual or apparent bias must present a claim with factual specificity. Vague, conclusory, unverified, or unsupported allegations or feelings are insufficient to satisfy the petitioner's evidentiary hurdle. Thus, general allegations of animus, as well as speculation or innuendo, cannot satisfy the evidentiary burden. Courts will reject recusal challenges when they are based on "mere" conjecture or suspicion. [191] As one court has noted: "…disqualification should not be allowed on the bases of rumors, innuendos, unsupported allegations, or claims that like blind moths, flutter aimlessly to oblivion when placed under the harsh light of full facts."[192]

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188 *See infra* §§ II(B)(3) and IV(B)(1).

189 *See* Flamm, *supra* note 21, at §§ 11.4 and 11.5.

190 *See infra* § IV(B).

191 *See, e.g.*, Com. *ex rel*. Armor v. Armor, 398 A.2d 173, 174 (Pa. Super. 1978) (bias allegation, without supporting evidence, will inevitably result in an unsuccessful recusal challenge); Tracey v. Tracey, 903 A. 2d 679 (Conn. 2006) (vague, unverified assertions of opinion, conjecture or speculation insufficient). When rejecting mere conjecture or suspicion, courts are fond of using another metaphorical expression, "Caesar's wife." Such a comment can be a simplistic response in avoiding a more penetrating analysis of a bias claim, which requires proof of a reasonable basis. There is a distinction between a claim that is based on "mere" suspicion as opposed to "reasonable" suspicion. *See, e.g.,* United States v. Nixon, 267 F. Supp. 3d 140 (D.D.C. 2017); *In re* United States, 666 F. 2d 690 (1st Cir. 1981); and *In re* Allied Signal, 891 F.2d 967 (1st Cir. 1989). The Caesar metaphor, however, can act as a thoughtful (albeit sexist) reminder that the judicial system must be kept, like Caesar's wife, above reproach.

192 Murray v. Internal Revenue Serv., 923 F. Supp. 1289, 1293 (D. Idaho 1996). The evidential burden is similar in religious endorsement caselaw. *See* Elewski v. City of Syracuse, 123 F. 3d 51 (2d Cir. 1997) (regarding the display of a creche, the court notes that Establishment cases required factual specificity in relation to the particular context).

The petitioner faces another burden. A challenge to a jurist's actual or apparent impartiality must meet the obstacle of a presumption that strongly benefits the challenged jurist.[193] The presumption is long-standing, recognized in the eighteenth century as vital to the common law system, which adopted a restrictive approach to disqualification.[194] Disqualification caselaw in the United States routinely asserts that a jurist is presumed to be competent and to possess integrity.[195] The burden to disqualify a judge and overcome the presumption is viewed as a heavy one.[196] Looking at the presumption from an angle other than competency and integrity, one court started its disqualification analysis with a "presumption against disqualification," which arguably reflects the presumption's true impact.[197] Similarly, another jurist has observed that great deference must be given to a trial judge facing a recusal challenge, a sentiment that permeates disqualification jurisprudence.[198] The presumption is a significant hurdle for the litigant.

Aside from the issue of providing a challenged jurist with a procedural advantage in a recusal challenge, the presumption generates other concerns. Judge Easterbrook noted:

> Yet, drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under sec. 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.[199]

This jurisprudential concern leads to another important issue. What is the actual effect of the presumption? Does it tilt the scales of justice in the jurist's favor? For example, is it applied at the initial stages of litigation or throughout the litigation, thus providing a tactical advantage for the judge and a procedural burden on the petitioner? There is no clarity in recusal caselaw. One suspects that the presumption operates to benefit the jurist throughout the disqualification litigation. Presumptions can be conclusive or rebuttable. Presumptions are created for reasons

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193 *See* Flamm, *supra* note 21, at § 4.5 regarding the application of the presumption in disqualification cases; and Raymond J. McKoski, *supra* note 165, at 423 (referring to the "almost impenetrable presumption of impartiality").

194 *See* Marbes, *supra* note 152, at 259, 266-72 (noting a divergence in opinion regarding the strength of the presumption, with formalists favoring a strong one, and realists favoring a weaker one). *See also* Pines, *supra* note 134, at 106-09 (critical assessment of the presumption, particularly in the context of "objective" self-assessments of impartiality).

195 *See In re* Estate of Hayes, 185 Wash. App. 567, 342 P.3d 1161, 1182 (Wash. App. 2015).

196 *See* State v. Kofoed, 817 N.W.2d 225 (Neb. 2012).

197 *See Nixon*, 267 F. Supp. 3d at 147.

198 *See*, *e.g.,* Commonwealth v. White, 589 Pa. 642, 677 (2006) (Cappy, J., dissenting). *See* Flamm, *supra* note 21, at § 13.4 (strong deference to the judge's view).

199 Matter of Mason, 916 F.2d 384, 386 (7th Cir. 1990). *See also* Pines, *supra* note 134, at 106-09 (criticizing the unreflective application of the presumption in view of the inadequacy of procedural safeguards and inherent unfairness of recusal processes; recalibration and procedural reform advocated). *See also* Marbes, *supra* note 152 (recommending a contextual recalibration of the presumption).

of convenience, fairness, or policy.[200] One view is that, if evidence is produced to rebut the presumption, the presumption is utterly destroyed and disappears (the so-called "bursting bubble" theory)[201] even if the decisionmaker disbelieves the countervailing evidence.[202] The weight of authority is that the presumption, however, does not have any effect on the persuasion burden; it merely shifts the production burden; litigants challenging a jurist's qualification must still prove their case.[203] In the reasonable observer context, commentators have been critical of the application of the presumption, suggesting that the presumption be re-considered and re-calibrated.[204]

2. The Reasonable Observer --The Enigmatic Wisdom Whisperer

To understand what and how the reasonable observer perceives, it is necessary to ascertain who the reasonable observer represents. A transcribed administrative conference discussion between two justices of the Michigan Supreme Court, regarding Michigan's then recently amended rules of disqualification,[205] highlights a conceptual consternation:

> Justice Hathaway: If there is an appearance of impropriety, then you cannot sit on the case.
> Justice Young: And from what perspective is the appearance of impropriety? Is it a subjective standard? Is it an objective standard?
> Justice Hathaway: I haven't thought through all of that to be honest with you, to answer you here.[206]

The justices' perplexity is understandable because, in assessing the appearance of impropriety, a jurist is placed in an awkward, perhaps cognitively untenable, position. As one jurist observed: "An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system."[207] In quoting from another case, Judge Kozinski remarked: "Because the judge must apply the disqualification standard [of section 455(a)] both as its interpreter

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200 *See* Fleming James, Jr., *Burdens of Proof,* 47 U. Va. L. Rev. 51, 65 (1961). *See also* C. Okpaluba & L. Juma, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa*, 14 Potchefstroomse Electronic L.J. 13, 23-24 (2011) (identifying the rationales for the presumption).

201 *See* Charles M. Yablon, *A Theory of Presumptions*, 2 Law, Probability and Risk 227, 229 n.7 (2003).

202 *See* James, *supra* note 200, at 67.

203 *Id.* at 68 and 70 (noting also that once a presumption comes into play, the tendency is to send the matter to the jury and invite it to weigh it in some vague manner).

204 *See* Marbes, *supra* note 152, at 298-302; and Hill, *supra* note 105, at 1449-52.

205 *See* MCR 2.003. The amendment incorporated the new appearance standard.

206 *See* Pellegrino v. Ampco Systems Parking, 485 Mich. 1134, 1155 (2010). The exchange was contained in a prior formal statement by Justice Young ("Response to Justice Kelly and Justice Hathaway"), notwithstanding the fact that Justice Young stated that he was not participating in the underlying case. Justice Young's position was that the amendment to the MCR 2.003, *id*., was unconstitutional.

207 *Mason*, 916 F.2d at 386.

and object, the general standard is even more difficult to define. [There is a] philosophical dilemma created by this objective-subjective conundrum." [208]

From the theoretical perspective at the legal baseline, however, courts have recognized that the reasonable observer should not be the judge—the reasonable observer must be a lay person.[209] One court expanded the traditional perspective by stating that "the question of reasonableness ought to be approached from the viewpoint of the party to the action, not of that famous fictitious character, the reasonable man."[210] Since the observer's perspective is theoretically an objective one, it should not embody the personal values, philosophy, or viewpoint of the jurist tasked with applying the standard, especially if the jurist is the object of the ethical inquiry. This approach is consistent with Anglo jurisprudence.[211] The difficulty, however, is that the reasonable observer remains an abstraction and inevitably leads to a deeper dilemma, *i.e.,* what are the attributes of the imaginary reasonable observer? Analytical clarity is problematic.[212]

In the negligence field where the reasonable person came to maturity, Dean Prosser remarked that the level of knowledge, including minimal requirements, ascribed to the reasonable person is one of the most difficult issues to assess.[213] In disqualification cases, the commonplace expressions are that the reasonable observer is one who is "informed" of all the surrounding facts and circumstances; a thoughtful person, but not hypersensitive or unduly suspicious; one who is knowledgeable and objective.[214] The reasonable observer is viewed as "the average person on the street." [215]

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[208] *Bernard*, 31 F.3d at 844, quoting SCA Servs., Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977).

[209] *See* Taylor-Boren v. Issac, 143 N. H. 261, 268, 723 A.2d 577 (1998); United States v. Voccola, 99 F.3d 37, 42-43 (1st Cir. 1996).

[210] *See* Roberts v. Ace Hardware, Inc. 515 F. Supp. 29, 31 (N.D. Oh. 1981). *See also* Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1984) ("It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling."). *Cf.* Matter of Demjanuk, 584 F. Supp. 1321, 1329 (N.D. Oh. 1984) (disagreeing with the approach in *Roberts*, *id,* and urging that a strict construction approach to recusal is essential to prevent abuse and to assure the orderly functioning of the judicial system); and Eastside Baptist Church v. Vicinanza, 269 Ga. App. 239, 241, 603 S.E. 2d 681 (Ga. App. 2004) (reasonable perception is not based upon the perception of either the interested parties or their lawyer-advocates seeking to judge-shop and obtain a trial advantage); and Davies & Oakes, *infra* note 351 (suggesting a more nuanced broader perspective to include the subjects of the judicial process).

[211] *See infra* section III regarding the "double reasonableness" heuristic in the common law countries identified herein.

[212] *See* Choper, *supra* note 113, at 510-11 (criticizing the subjectivity and lack of analytical clarity in Justice O'Connor's then-prevailing endorsement test and highlighting the lack of definitional clarity of the reasonable observer heuristic that results in *ad hoc*, inconsistent, fact-laden rulings).

[213] *See* Prosser & Keeton, *supra* note 11 at §32, ¶¶ 182-85.

[214] *See, e.g.,* Mathis v. Huff & Puff Trucking, Inc. 787 F.2d 1297, 1310 (10th Cir. 2015) (reasonable person as a well-informed, thoughtful, objective observer, rather than hypersensitive, cynical, and suspicious). Caselaw reveals gradations of the "informed" attribute: *Mason*, 916 F.2d at 386 (informed and thoughtful); Atkins v United States, 2018 U.S. Dist. LEXIS 63728 (Ill. D. Ct. 2018) (well-informed); and *In re* United States, 441 F.3d 44, 57 (1st Cir. 2006) (fully informed). *See also* FLAMM, *supra* note 21, §§ 15.1 to 15.3 and 18.1-18.6 and cases cited therein.

[215] *See, e.g.*, Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1111 (5th Cir. 1980); Tyler v. Purkett, 413 F.2d 696, 704 (8th Cir. 2005).

Difficulties arise when the "knowledge" and "fully informed" aspects of the reasonable observer are examined more closely. The definitional quandary brings to mind the differing views between Justices O'Connor and Stevens in *Capital Square* about how much knowledge (of the history and context of the community) should be imputed to the reasonable observer.[216] Notwithstanding the moniker of the reasonable observer as an "average Joe," the observer has been identified in disqualification cases as someone who is outside the judicial system or even unfamiliar with it, one less inclined than the judiciary itself to credit a judge's impartiality.[217] These characterizations may reflect an attempt to emphasize a more visible, confidence-inspiring, wall of separation between the observer and the jurist/judicial system. Clearly, black-letter law repeatedly states that the reasonable observer is informed, not uninformed, knowledgeable of and understands the facts and circumstances of the matter.[218] But what do these attributes mean? Some cases have imposed a responsibility on the hypothesized observer to examine the facts, the record, even the law and judicial practices,[219] going so far as to impose a quasi-legalistic perspective onto the reasonable observer.[220]

Other issues about the knowledge and point of view of the "fully informed and objective" observer arise. Often, such facts may be hidden from public view and are not readily ascertainable—for example, the association of a judge's law clerk with one of the parties or counsel, the potential economic interest or civic activities of a judge's spouse, an *ex parte* conversation, a financial gift or contribution, or a troubling past social media post. Such "private" facts may indeed be relevant to an appearance-based challenge. Although caselaw states that the recusal inquiry is tied to knowledge of facts in the public domain,[221] appearance-based recusal

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216 *See Capital Square*, 515 U.S. 753, and *generally* §1(C) *supra*.

217 *See Mathis*, 787 F.3d at 1310, citing United States v. DeTemple, 162 F.3d 279, 287 (3rd Cir. 1998); and *Herrera-Valdez*, 826 F.2d at 918-919.

218 *Hayes*, 185 Wash. App. at 607 (reasonable person is assumed to know and understand all the relevant facts).

219 *See In re* Sherwin-Williams, 607 F. 3d 474, 478 (7th Cir. 2010); Klayman v. Judicial Watch, 278 F. Supp.3d 252, 255 (D.D.C. 2017); *Nixon*, 267 F. Supp. 3d at 147-148.

220 *See In re* Drexel Burnham Lambert, 861 F.2d 1307, 1313 (2d Cir. 1989) (stating "We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety under sec. 455(a) requires us to judge the situation from the viewpoint of the reasonable person and not from a purely legalistic perspective. Like all legal issues, judges determine appearance of impropriety—not by considering a straw poll of the only partly informed man-on-the-street would show – but by examining the record facts and the law, and then decides whether a reasonable person knowing and understanding all the relevant facts would recuse the judge…") It is not clear whether this case's legal context (a writ of mandamus) heightened the reasonable person standard. *Cf. In re School Asbestos,* 977 F.2d 764 (writ of mandamus context without any apparent heightened standard). The ethical challenge in *Drexel-Burnham* focused on the potential financial interest of the judge's spouse; the benefit of the doubt was accorded to the challenged jurist. The dissent gave a detailed recitation of the facts and concluded that, coupled with the heightened public awareness, the financial interest of the spouse was not remote.

221 *See In re* Fifty-One Gambling Devices, 298 S.W.3d 768 (Tex. 2009); and Smulls v. State, 71 S.W. 3d 138 (Mo. 2002) (a reasonable person is one who knows all that has been said in the presence of a judge; recusal assessed with respect to multiple allegations of newspaper articles and trial judge's interaction with another judge; dissent found a sufficient basis for the appearance of impropriety).

may require the examination of not readily ascertainable facts. These private facts eventually become public when they are made part of the official record.[222] A legitimate concern arises, however, when such private facts represent insider information and are used to boot-strap a refusal-to-recuse decision. [223]

Lastly, against this tableau of analytically diverse perceptions of the reasonable observer, one returns to the fundamental issue of what the reasonable observer heuristic is (or is not) capturing. Philosophically, there has always been a tension in how the reasonable person heuristic is applied. As noted previously,[224] should it simply embody the "average" of a society? Or is there a normative or idealized component to the construct? The answer may be both.[225]

Justice O'Connor's vision of the reasonable observer (in religious endorsement cases) had always been a challenging one. In *Capital Square*, Justice O'Connor disavowed any focus on "actualities," preferring to base her heuristic on a "collective standard," similar, she said, to the reasonable person in the law of torts.[226] Justice O'Connor acknowledged that the fictional metaphor in tort represents a "community ideal of reasonable behavior." [227] Prosser also described the reasonable person as the "personification of a community ideal."[228] The personification, however, goes further. From Justice O'Connor's perspective, the reasonable observer was viewed as aware of the history and context of the community and the forum in which the religious display appears.[229] In disavowing consideration of "any person" or "some people," [230] Justice O'Connor applied a metaphor that relies on both an average and an idealized-normative personification of the community. The construct is

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222 *See Hall*, 695 F.2d 175 (law clerk's participation in a conference); State v. Bard, 181 A.3d 187 (Me. 2018) (judge's *ex parte* communications); *see also Liljeberg*, 486 U.S. 847 (judge's lack of actual knowledge regarding a conflict).

223 *Consider, e.g.*, Leland Stanford Junior University v. Superior Court, 173 Cal. App. 3d 403 (1985) (judge's character and reputation for impartiality are among facts that the average person on the street would consider). Such a "fact" may be used to fortify the presumption of impartiality and integrity. *Consider also Nixon*, 267 F. Supp. 3d at 148 n.7 (judge need not accept facts from petitioner and can contradict them with facts drawn from his own personal knowledge).

224 *See supra §* I(D)(1) regarding philosophical polarities.

225 *See* Miller & Perry, *supra* note 58 (advocating a normative approach); Jaeger, *supra* note 65, at 934-938 (stating that lay people view the reasonable person in partially empirical terms); Zorzetto, *supra* note 74, at 144-45 (stating that legal norms are normative-centered, not empirical); Tobia, *supra* note 67 (recommending that "reasonable" be viewed as a hybrid concept).

226 *Capital Square*, 515 U.S. at 779.

227 *Id*. at 780.

228 Prosser & Keeton, *supra* note 11, at § 32, ¶ 175.

229 *Capital Square*, 515 U.S. 753. In a school prayer case, Justice O'Connor saddled the objective observer with an acquaintance of "the text, the legislative history, and implementation of the statute." *See* Jaffree, 472 U.S. at 76.

230 *Capital Square*, 515 U.S. at 779-80. As noted, see *supra* notes 117-18 and accompanying text, the Supreme Court in *Kennedy*, 142 S.Ct. 2407, recently abandoned the reasonable observer approach in favor of a history-and-tradition test, an approach that is potentially less subjective and more factually oriented, as well as perhaps more philosophically compatible with the Court's conservative majority.

fundamentally theoretical and abstract, intuitively (i.e., subjectively) based, with no apparent connection to an empirical thread.[231] The reasonable observer is, in effect, an abstract portrait painted with a broad brush.[232]

The application of Justice O'Connor's formulation of the metaphorical reasonable person/observer in Establishment jurisprudence revealed some underlying infirmities of the heuristic. Notwithstanding the demise of Justice O'Connor's heuristic, the critical questions asked by commentators remain relevant for our purposes: Whose perception controls? [233] If the reasonable person represents an "average," what is it an average of? [234] With respect to such concerns, the application of the heuristic in religious endorsement cases had been criticized as being both under-inclusive and over-inclusive. [235] Echoing Justice Stevens' assessment in *Capital Square*,[236] such commentators opined that the reasonable

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231 *See* Hill, *supra* note 105, at 1440 ("the reasonable observer's judgments are not statistical, empirical or otherwise derived from what a majority of people might do…"). The reasonable person fundamentally presents a question of law. *Id. Consider*, *Howard*, 257 A. 3d 1217, 1233-39 (Pa. 2021) (Wecht, J., concurring) (deploring the amorphous moralizing "common sense of the community" standard in the context of a conviction of endangering the welfare of a child, and pragmatically asking what evidence is required to demonstrate a community's norms or even how to define the relevant community). *See also* Davies & Oakes, *supra* note 60, at 121-23, 142-43 (noting the difficult issue regarding empirical evidence to assess the intuitive perceptions of the public regarding the legitimacy of the judicial process). *Consider also* Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 Or. L. Rev. 463 (1991) (noting that courts have been increasingly receptive to the use of survey evidence and have sought guidance on issues regarding public policy and community standards; litigants have proferred survey results when the public's belief or perception is at issue, *id.* at 472-473, *citing* Zippo Manufacturing Co. v. Rogers Imports, Inc. 216 F. Supp. 670, 683 (S.D.N.Y. 1963)); Jeffrey Bellen and Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 Nw. U. L. Rev. 1137 (2014) (addressing the rapidly emerging judicial phenomenon of courts using judicial notice rules to bring Internet data into the courtroom; authors propose a framework and process); and Flamm, *supra* note 21, § 18.4 (polls and surveys generally disfavored in judicial disqualification cases).

232 *Consider* Thornburg, *supra* note 45, at 1616 (judges tend to favor intuitive rather than deliberative faculties); and Cass R. Sunstein, *Some Effects of Moral Indignation in Law*, 33 Vt. L. Rev. 405, 410 (2009) (discussing theories of cognition, author observes that sometimes intuition replaces effort and analytical reasoning and may be influenced by automatic biases); and Atrill, *supra* note 103, at 283 (from a common law perspective, author criticizes the judicial application of the hypothetical observer perspective as "impressionistic" with respect to the imputation of knowledge and the failure to consider competing policy interests).

233 *See* Baude & Sachs, *supra* note 19, at 1091 (noting that sometimes a fundamental issue in interpretation is whether the author's or the readers' perspective controls).

234 *See* Jaeger, *supra* note 65, at 900 (asking the fundamental question regarding the identification of the empirical reasonable person).

235 In the context of religious endorsement cases, *see* Choper, *supra* note 113, at 533-35; and Hill, *supra* note 60, at 517-22 (regarding the identification of consensus and the dangers of generalizing).

236 *See* text accompanying *supra* notes 108 and 109. *See also infra* notes 351 and 352, which identify commentaries that recommend a more nuanced and flexible heuristic. Regarding the issue of a majoritarian perspective, vis-à-vis the reasonable observer heuristic, one is reminded of the Supreme Court's (plurality) opinion acknowledging the

observer heuristic often favored a majoritarian point of view; it could be insensitive to non-majoritarian or minority perspectives (cultural and individual). Another commentator, Paula Abrams, had said that the reasonable observer is a formalist characterization, devoid of real human reactions, an empty suit that lacks humanity, a standard that undermines the value of inclusion.[237] It is in this respect that the reasonable observer heuristic presents a significant qualitative difference regarding its application in Establishment and disqualification cases. Establishment-endorsement cases inevitably involve the application of the heuristic in relation to particular constitutional values.[238] Constitutional terrain is simply different – due process and religious liberty, for example, involve concerns and values distinct from the subject matter of litigation in which recusal is raised.[239] Thus, it is important to consider the context of the recusal challenge when applying the heuristic's requirement of reasonableness.[240] In disqualification cases, for example, the factual context of the recusal challenge is unrestricted and can be wide-ranging. Impartiality challenges can be linked to many factual variables: religion, gender, race, sex, ethnicity, and political issues. Despite the contextual differences, as in endorsement cases, there is always the danger of an anti-majoritarian bias or insensitivity seeping into disqualification assessments. In a multi-cultural society, the reasonable observer in disqualification cases should not be considered in majoritarian or statistical terms, even if such an endeavor were possible. Disqualification cases are qualitatively distinct in context because the precept of judicial impartiality, and the appearance thereof, are values that are foundational to the rule of law and the decisionmaker's (and judicial system's) integrity and credibility. In short, the interpretation and application of "the reasonable observer" heuristic, integral to the text of the ethical disqualification mandate, require a cautious, customized, and contextually sensitive approach.

Metaphors (like the reasonable person or observer) are meant to assist us in thinking and reasoning.[241] They expand our perceptual horizons. In law,

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need to protect "discrete and insular minorities." *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); and David Strauss, *Is Carolene Products Obsolete?*, 2010 U. Ill. L. Rev. 1251 (2010).

237 *See* Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 Lewis & Clark L. Rev. 1537, 1538-39, 1547 (2010). Interestingly, the Court's recent history-and-tradition approach, *see supra* note 117, may make constitutional analysis in Establishment cases more abstract or impersonal. The unanswered question is whether contemporary observations and sensibilities will play any theoretical or evidential significance in the implementation of the new test. If so, how? Will the new history-and-tradition paradigm in Establishment cases minimize or disregard the reasonable beliefs, interests, and sensitivities of reasonable observers in a multi-cultural society? Will such views even be considered?

238 *See* Choper, *supra* note 113, at 519-20 (different constitutional issues may raise distinct doctrinal problems).

239 *Id.* at 523 n. 120. *See also* Zorzetto, *supra* note 67 (analyzing the importance of context).

240 *See supra* § I(D)(4), regarding context. *See also* Hill, *supra* note 105, at 1412 n.19 and 1418-21 (noting that the reasonable observer standard may have application outside the Establishment Clause context).

241 Paul H. Thibadeau & Lea Boraditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, 6(2) PLoSONE 2011, *available at* https://doi.org/10.1371/journal.pone.0016782 (published Feb. 23, 2011). Authors note that metaphors are incredibly pervasive and fundamental to everyday discourse; it is estimated that English speakers

metaphorical devices should serve to promote rationality, analytical predictability, and the appearance of adjudicatory fairness. In the analysis and application of the reasonable observer metaphor in recusal caselaw, however, the lack of the heuristic's clarity exposes a troubling uncertainty about the "wisdom whisperer".

3. Semantics and the Spectrum of Belief

As Mephisto advised in *Faust*: "Put your trust in *words/* They'll guide you safely past doubt and dubiety." [242] Similarly, one finds another literary character, Alice in Wonderland, created years after *Faust*, raising a fundamental linguistic dilemma with Humpty Dumpty. In response to Humpty Dumpty's assertion that "When I use a word it means just what I choose it to mean – neither more nor less," a puzzled Alice says: "The question is whether you can make words mean so many different things."[243] An examination of disqualification jurisprudence in the United States reveals the wisdom of that observation. [244]

The over-arching disqualification[245] standard in the United States is that a jurist must disqualify when the jurist's "impartiality might reasonably be questioned." It is a specific standard, reified in federal and state statutes and judicial codes, similar in principle to, but distinct in form from, its counterpart in common law countries (which rely on general principles of apparent impartiality and the appearance of bias). In the U.S. standard, the verb "might" acts as the fulcrum of implementation. The operative word is arguably one of lexical simplicity. In common parlance, the modal verb "might" occupies a position within a spectrum of predictability and certainty; it is an expression that connotes *possibility*.[246] For example, if the weather forecaster states that "it might rain," rather than "it would rain" tomorrow, one would interpret the former forecast as more hospitable to the planning of an outdoor event. [247] While philosophical or lexical interpretations may engender complexity, confusion or ambiguity,[248] the common understanding of the two modal verbs (*might* and *would*) reflects a substantial epistemological difference --- from possibility to probability.[249] Unlike weather forecasting that relies on objective

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produce one unique metaphor for every 25 words they utter. *Id*.

242 *See* Faust, *supra* notes 1 and 3, lines 1-2.

243 *See* Lewis Carroll, *Through the Looking Glass and What Alice Found There*, at 213, in The Annotated Alice (2000).

244 Humpty Dumpty replied: "The question is which is to be master—that's all." *Id.*

245 *See supra* notes 156-63 and accompanying text regarding the scope of the precept.

246 *See* Merrick Winiharti, *The Difference Between Modal Verbs in Deontic and Epistemic Modality*, 3 Humaniora 532-39 (2012) (epistemic modality expressed in degrees of strength regarding probability and possibility).

247 *See, e.g.,* State v Marcotte, 392 Wis. 2d 183, 195-96, 943 N.W.2d 911, 917-18 (2020) where the court noted the linguistic distinction between "could" and "would" in terms of a judge's comments which objectively reflected a prejudgment and suggested a greater certainty of sentencing.

248 *See, e.g.,* Stephen Yablo, *Is Conceivability a Guide to Possibility?*, 53 Philos. & Phenomenological Res.1-42 (1993) (concluding that conceivability is no proof of or guide to logical possibility; conceivability involves the appearance of possibility). *Cf.* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 Yale L. J. 788 (2018) (a probing analysis that advocates a linguistic approach in the interpretation of the deceptively simple legal concept of "ordinary meaning").

249 *See infra* § IV(B)(2)(a) regarding common English usage, and text accompanying

atmospheric criteria and mathematical calculations, however, recusal assessments present greater difficulty and risk of error because they depend on the subjective-objective[250] analysis of the dauntingly imprecise ingredient of "reasonableness."

The crux of this Article's section is that U.S. recusal jurisprudence presents a perplexing example of the lack of analytical clarity regarding the meaning of the appearance recusal heuristic and the applicable evidential threshold for disqualification. Specifically, there is a disturbing divergence in disqualification jurisprudence between the specific terminology of the ethical mandate (disqualification is required when a judge's "impartiality might reasonably be questioned") and its application in concrete cases -- a divergence that ultimately undermines the fundamental value that justice must satisfy the appearance of justice. Remarkably, except for the occasional perceptive observation by others of the conceptual ambiguities, [251] there has been a lack of analytical attention regarding the critical issue of the evidential threshold of belief in appearance-based disqualification. What is the judicial lens? As Richard Flamm pointedly asks: Does the disqualification standard embody a notion of *conceivability* or *certainty*? Flamm identifies the linguistic and conceptual conundrum in terms of "definitely would question" or "might conceivably do so." [252] A general exposition of the caselaw leads Flamm to conclude that there is a split of opinion. As he notes, courts have rarely squarely trained their attention on this issue.[253] The *ad hoc* and non-analytical approach to judicial disqualification, in the absence of any authoritative guiding principles, has contributed to a perception of inconsistency and ambiguity. Nevertheless, it is beneficial to determine if there are discernable patterns emanating from the collective judicial conscience.[254]

From a wide-angle perspective, U.S. caselaw seems to slip and slide from the lower modal standard ("might") to a higher conclusory "would" – the latter, in Faustian parlance, safely guiding the decision-maker from doubt and dubiety.[255] To say that a reasonable observer "might" reasonably question a jurist's impartiality is significantly different from concluding that a reasonable observer "would" (but, more often in reported cases "would not") question the jurist's impartiality – again, predicated on a subjective (or magical) assessment of the *hypothetical* perception of the *hypothetical* reasonable observer.

U.S. caselaw reveals an analytical approach that is less solicitous to appearance-based recusal, one that is in tension with the ordinary and clear text of the standard.

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note 189, *supra* regarding the possibility-probability conundrum; and *consider* Lee & Mouritsen, *id*. at 854-56 (demonstrating the use of "might" as a distinct qualifier).

250 *See, e.g.,* Prosser's view of the reasonable man as both objective and subjective, *supra* note 130.

251 *See* Flamm, *supra* note 21, at §§ 11.4 and 11.5; and Newhouse, *infra* note 397.

252 *Id.* § 11.4, at 230. *Consider also* Professor Fallon's advocating an "analytically sequenced tiered framework for judicial review" in Establishment Clause cases, *supra* notes 114-115.

253 *Id.*

254 *See supra* notes 179 and 180 regarding Durkheim's conception of the collective conscience. *Consider also*, Sunstein, *supra* note 232, at 428 ("For law, the basic lesson is that judgments made one at a time are likely to produce incoherent patterns, and hence it would be useful to systematize outcomes by seeing them as part of larger comparison sets.").

255 *See* Faust, *supra* note 1, line 2. Similarly, rather than focusing on the appearance of impartiality, judges are prone to slip and fall into a no-actual-prejudice analysis.

Often the modals "might" and "would" are blithely used interchangeably in opinions (and even in a single opinion). For example, in rejecting countervailing considerations of administrative inconvenience and expense of a re-trial in a convoluted multi-party diversity action (that required 33 days of trial), one court adopted a hard line approach toward the trial judge's failure to disqualify, stressing the importance of protecting the judiciary from any hint of the appearance of bias.[256] Nevertheless, the court's use of words is noteworthy, when it said: "The judge should consider how his participation in a given case looks to the average person on the street. Use of the word 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were s/he to know all the circumstances, *would* harbor doubts about the judge's impartiality... [then noting that] [A] reasonable person *might very well* question the judge's impartiality." [257] It's a head-spinning analysis. Although such interchangeable use of "might" and "would" within opinions is common, [258] occasionally one does see in other cases an analysis and result that are faithful to the precept's modal "might." [259]

In addition, courts will frequently couple the outcome-determinative modal verb with qualifiers that make the advocate's burden more onerous. In the application of the relatively simple five-word recusal standard (i.e., the judge's "impartiality might reasonably be questioned"), courts exercise considerable interpretative latitude and creativity in the assessment of the risk of perceived partiality. Courts have imposed various conditions onto the "might" appearance standard, including: "significant doubt;" [260] "serious doubt;"[261] "significant risk;"[262] "substantial doubt;"[263] or "substantially out of the ordinary."[264] Some cases will

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256 *See Potashnik*, 609 F.2d 1101, at 1111-12.

257 *Id.* at 1111 (emphases supplied). The trial judge had business dealings with the plaintiff's attorney and the judge's father was a senior partner in the plaintiff's law firm.

258 *See, e.g.,* Hadler v. Union Bank & Trust Co., 765 F. Supp. 976 (S.D. Ind. 1991); State v. Martin, 825 A. 2d 835 (Conn. 2003). Among the many cases examined, the American opinions (state and federal) revealed a predominant and perplexing semantical sliding between "might" and "would" terminology, with decision-making often predicated on a conclusory "would." Such decisions often reject requests for recusals.

259 *See In re School Asbestos*, 977 F.2d at 782 (noting that a "reasonable person might perceive bias to exist, and this cannot be permitted"); and *Potashnick*, 609 F.2d at 1111-12 (eventually stressing the "might" aspect of the standard); and *Eastside Baptist Church*, 269 Ga. App. at 239 and 241 (applying a "might" standard in requiring recusal and reassignment).

260 *See, e.g., Salemme,* 164 F. Supp. 2d at 52; United States v Kelly, 888 F.2d 732, 744-45 (11th Cir. 1989); *Murray*, 923 F. Supp. at 1293 (reasonable or significant doubt required); *Grieppe*, 17-CV-3706 at *10; *Herrera-Valdez*, 826 F.2d at 917; State v Smith, 203 Ariz. 75, 80 n.4 (2002) (court nevertheless admits that better practice, especially in a capital case, would have been to assign a judge from another county; court denies recusal challenge but reserves future recusal review regarding sentencing); and *Taylor-Boren*, 143 N.H. at 268.

261 *See In re* Lucci, 863 N.E.2d 626 (Oh. 2006); *In re* Disqualification of Lewis, 826 N.E.2d 299 (Oh. 2004).

262 *See* United States v. Holland, 519 F.3d 909, 913, 914 (9th Cir. 2008).

263 *See* White, 910 A.2d 648; Commonwealth v. Dip, 221 A.3d 201, 206-07 (Pa. Super. 2017).

264 *See* Hook v McDade, 89 F.3d 350, 354 (7th Cir. 1996) (stating that the question is whether a reasonable person would be *convinced* that judge was biased; recusal requires

also identify a more burdensome evidential standard. In *United States v. Nixon*, the court, beginning with the protective presumption of impartiality, noted that the moving party must demonstrate by "clear and convincing evidence" that a judge has conducted himself in a manner supporting disqualification.[265] Although courts may sometimes frame the standard of review in terms of reasonable doubt,[266] one court had to specifically disavow a "beyond a reasonable doubt standard," calling such strict language in prior caselaw a "minor oversight."[267]

Lastly, there are instances when a disqualification challenge has been rejected despite an acknowledgment that there may indeed be merit to a reasonable person's questioning the jurist's impartiality.[268] In *Parker v. Connors Steel*,[269] a complicated labor dispute case involving allegations about the conflicting participation of the judge's law clerk in the decisional process, the court seems to have turned the appearance-based recusal standard on its head when it rejected a disqualification challenge and found harmless error, saying:

> To the extent that public confidence has already been undermined, we do not believe that granting relief in this case will change the public's perception in any appreciable way. Such harm cannot be remedied by vacating the district court's decision and reassigning this case to a different judge. In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees' claims. Judicial decisions based on such *technical* arguments not relevant to the merits contribute to the public's distrust in our system of justice.[270]

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compelling evidence) (emphasis supplied).

265 *See Nixon*, 267 F.Supp.3d at 147. *See also* State v. Marcotte, 392 Wis.2d 183, 943 N.W.2d 911, 915-16 (burden of proof is on party asserting judicial bias to show by a preponderance of the evidence that a judge is biased or prejudiced); and United States v. DeTemple, 162 F.3d 279, 287 (4th Cir. 1998) ("…to constitute grounds for disqualification, the *probability* that a judge will decide a case on a basis other than the merits must be more than trivial) (*emphasis supplied*). *And see In re* Bulger, 710 F.3d 42, 47 (1st Cir. 2013) (recusal standard must be more demanding to prevent parties from manipulating system; in mandamus context, Souter, J. grants petition for disqualification). As to the importance of the procedural context, *Bulger, id.* at 45, notes that mandamus places a more exacting burden. *See also supra* notes 67, 220, and 239, regarding the importance of legal context.

266 *See Voccola*, 99 F.3d at 42-43; *In re Fifty-one Gambling Devices*, 298 S.W.3d at 775; *cf. In re* Hill, 152 Vt. 548, 573 n.12, 568 A.2d 361, ___ n.12 (1989) (disqualification required whenever "a doubt of impartiality would exist in the mind of a reasonable disinterested observer").

267 *See* Dodson v. Singing River Hosp. Sys., 839 So.2d 530, 533-34 (Miss. 2003).

268 *See Salemme*, 164 F. Supp.2d at 85 (emphasis supplied); and *In re* Commitment of Winkle, 434 S.W.3d 300 (Tex. App. 2014) (decision denying recusal fell within "the zone of reasonable disagreement;" court acknowledges that the trial judge's community might infer bias from judge's campaign signs and slogans, and facts "may raise serious questions about his fairness as a judicial officer," *id.* at 312-13).

269 Parker v. Connors Steel, 855 F. 2d 1510 (11th Cir. 1988).

270 *Id.* at 1527 (emphasis supplied). Regarding the challenge of recusal decision-making in the context of a culture of suspicion, *see Liljeberg,* 486 U.S. 847, *supra* n. 150; *Mason*, 916 F.2d 384, *supra* n. 199; and Oakes & Davies, *infra* n. 451.

It is impossible to identify the impetus (psychological or jurisprudential) for the imposition of a higher standard in these appearance-recusal cases. Perhaps an aversion to the challenging and vague appearance-based standard; or an unconscious preference for (or comfort in) an actual prejudice standard;[271] or, from a speculative sociological perspective,[272] the unexamined semantical habits or shared understandings in the judicial community's zeitgeist—these may explain the more restrictive (i.e., the higher evidential "would") approach in appearance-based recusal cases.

In any event, such varying adjectival adhesions, increasing the procedural and evidential burdens imposed on a petitioner, effectively transmogrify the appearance-based recusal standard, create analytical confusion, and increase the risk of erroneous and unfair decision-making. The ultimate risk is that the public's perception of justice and its trust and confidence in the judicial system are jeopardized.

III. Appearance-Based Recusal: The Common Law Approach

Adjudicating a claim of apparent bias asserted by a solicitor against a disciplinary tribunal who convicted him of professional misconduct described as heinous, Commissioner (later Chief Justice of Singapore) Sundaresh Menon of the High Court of Singapore prefaced his comprehensive analysis and synthesis of common law recusal principles governing apparent bias with the following:

> The applicant reaches out to that hallowed principle: justice must not only be done but it must manifestly be seen to be done. He contends that this principle has been violated in his case. What do these words really mean? Are they simply a nice-sounding tagline expressing a pious aspiration? Or do these words in fact express an uncompromising standard which serves to guarantee that those having business before judicial and quasi-judicial bodies in this country will not go away harboring any reasonably held apprehensions that they have not been fairly dealt with? [273]

In his examination of international recusal standards, Rex Perschbacher noted his fascination with countries that, despite their diversity, have independently adopted similar recusal standards.[274] Among the common law-based countries (primarily

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[271] *See, e.g.*, *Salemme*, 164 F. Supp.2d at 52, citing Justice Kennedy's comments in *Liteky,* 510 U.S. at 557-558, regarding the requirement of a high threshold to satisfy the appearance standard (stating: "…a judge should be disqualified only when it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute"); and Rex R. Perschbacher, *Caperton on the International Scale*, 18 Legis. & Pub. Pol'y 699, 705 (2015) (noting the tendency to resist recusal based on appearances or perceptions and opining that judges appear to be more comfortable with actual, demonstrable, and obvious bias situations).

[272] *See* Durkheim, *supra* notes 179-80 and accompanying text.

[273] *See Re* Shankar Alan s/o Anant Kulkarni [2006} SGHC 194 (Sing.) ¶ 1 [hereinafter *Shankar*]

[274] *See* Perschbacher, *supra* note 271, at 699-700 and 705; *see also* Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough*, 68

Australia, Canada, Singapore, South Africa, and the United Kingdom) that are the focus of this article, there is a remarkable similarity of foundational principles and values in their recusal analyses, including individual and institutional judicial independence, impartial decision-making, fair judicial processes, the appearance of justice, and the importance of public trust and confidence in the judicial system and the rule of law.[275] In South Africa, for example, judicial recusal is considered a "constitutional matter."[276] In recognition of the universality of fundamental jurisprudential values, the principle of judicial impartiality is enshrined in the jurisprudence of the European Court of Human Rights.[277] The Anglo-American consanguinity (in principles, not implementation) is sometimes manifested by specific references to American jurisprudence.[278]

Cambridge L.J. 388, 391 (2009); and DAS, *supra* note 34, at 281 (remarking on "a remarkable unity or consistency" in the common law courts regarding the tests for recusal).

275 *See, e.g.,* Johnson v. Johnson (2000) 201 C.L.R. 488, at ¶¶11, 12 (public confidence in the judiciary and societal interests in the appearance of justice) (Australia); Canada (Ministry of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391, at §§ 67, 69, and 110 (appearance of justice and judicial independence, and impartiality) (Canada); R v. Sussex JJ *ex parte* McCarthy 1 K.B. 256, 259 (appearance of bias sufficient to overturn a judicial decision) (United Kingdom) ["Sussex Justices"]; *Shankar* [2006] SGHC 194, at ¶¶ 1, 43, 55, and 90 (appearance of justice and impartiality) (Singapore); and Findlay v. United Kingdom [1997] 24 E.H.R.R. 221 (judicial independence and objective impartiality) (European Court of Human Rights). *And see* Okpaluba & Maloka, *supra* note 20 (updated 2022 survey of recusal law in common law countries); Abimbola A. Olowofoyeku, *Sub-Regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice*, 20 Afr. J. Int'l & Comp. L. 365, 366 n. 5 (2012) (citing international conventions and charters affirming the common law's appearance of justice principle; article critically examines the emerging recusal jurisprudence in the East Africa region). Other common law-based countries, beyond the scope of this article, have engaged in recusal analysis and reform. *See* Mudalige Chamika Gajanayaka, *Judicial Recusal in New Zealand: Looking to Procedure as the Principled Way Forward* (2014) (thesis Victoria University of Wellington) (a comprehensive procedurally detailed proposal for recusal reform) *available at* https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4610/thesis.pdf?sequence=2.

276 *See* President of the Republic of South Africa v. South Africa Rugby Football Union 1999 4 SA 147 (CC), at ¶ 30 (S. Afr.) [hereinafter *SARFU2*] involving "an unprecedented application for recusal" of the entire Constitutional Court," *id.* at ¶ 7.

277 *See* Olowofoyeku, *supra* note 274, at 391; Porter v Magill, 2002 2 A.C. 357, at ¶¶ 102-103 (referring to Strasbourg jurisprudence); Lawal v. Northern Spirit Ltd. 2003 I.R.L..R. 538, at ¶ 2 (HL); and *Findlay*, 24 E.H.R.R. 221. *See* Article 47 of the Charter of Fundamental Rights of the European Union (2012), Title VI (Justice), https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#:~:text=Everyone%20is%20entitled%20to%20a,being%20advised%2C%20defended%20and%20, which states: "Everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal previously established by law…" The United States Supreme Court discussed at length both the European Court of Human Rights' decisions and foreign legislation regarding intimate homosexual conduct in Lawrence v Texas, 539 U.S. 558 (2003). *See also* Davies & Oakes, *supra* n. 60, analyzing the doctrine of appearances in the European Court of Human Rights jurisprudence.

278 *See, e.g., SARFU2*, 4 SA 147, at ¶ 42 (citing Benjamin Cardozo); *Johnson,* 200 C.L.R. 488, at ¶ 43 (citing 28 U.S.C. § 455 and the ABA's Model Code of Judicial Conduct). *See also* Olowofoyeku, *supra* note 275, at 365 (in his examination of East African recusal

Although generalities can be admittedly dangerous, a comparative review of Anglo-American recusal caselaw reflects, in one respect, a stark dissimilarity. In contrast to the American approach, which can often be factually ponderous, impressionistic and conclusory, common law countries have exhibited a deeper analytical bent, which arguably provides the parties and public with a better understanding and appreciation of how and why a decision was reached.[279] It is this public jurisprudential dialogue in their opinions, expressed at times to the point of semantic complexity, that have promoted (or provoked) commentary and criticism. For example, one who is familiar with the various criticisms that have been leveled at Justice O'Connor's reasonable observer test in religious endorsement cases[280] would recognize the parallel paths travelled in Anglo jurisprudence regarding general concerns about the application of jurisprudential norms governing recusal. These concerns include: the danger of ignoring public perception and thereby effectively reverting to a misplaced actual prejudice standard;[281] the unrealistic expectations imposed on the metaphorical informed observer;[282] the disregard or devaluation of important policy interests;[283] the failure to demarcate the burden of proof required to prove adjudicative impartiality;[284] the difficulty in applying the appearance standard;[285] implementing the appearance standard in an impressionistic manner, including the failure to adequately explain how the appearance of bias test is applied or how the relevant factors are balanced;[286] the failure of courts to give sufficient weight to the appearance standard;[287] the heavy emphasis on lengthy factual narratives that can serve as a smokescreen;[288] the potentially negative impact

jurisprudence, author begins his article with a quotation from American (Texas) caselaw about the importance of the appearance standard, citing Sun Exploration and Production Co. v. Jackson, 783 S.W.2d 202, 206 (Tex. 1989).

279 The common law cases cited herein exemplify this more analytical approach. Common law cases, however, can also be heavily factually detailed. *See* Okpaluba & Juma, *supra* note 200, at 261-62 notes 90, 91. *Consider, e.g.,* Porter, 2 AC 357. A helpful list of leading recusal cases and their citations from common law countries including Australia and New Zealand, Canada, South Africa and neighboring countries, and the United Kingdom, can be found at the end of Okpaluba's article, *id.*

280 *See supra* § I(C).

281 *See* Perschbacher, *supra* note 271, at 704; and Debra Lynn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 Fordham Int'l L.J. 137, 158-59 (2013).

282 *See* Bassett & Perschbacher, *id.* at 187; Hughes & Bryden, *supra* note 177, at 181-82; and Atrill, *supra* note 106 at 280-83.

283 *See* Atrill, id. at 282-83.

284 *See* Okpaluba & Juma, *supra* note 200 (addressing the divergent approaches of courts in constructing the meaning of actual and apparent bias in South African law).

285 *See* Olowofoyeku, *supra* note 274, at 389, stating: "It is not right for any decision of the nation's apex court (or, indeed, any court) to be predicated, not on some point of principle (which can be unpacked), but entirely on whatever judges may imagine that some fictional characters would think. There must be another way…"

286 *See* Hughes & Bryden, *supra* note 177, at 178; Atrill, *supra* note 106, at 283; and Okpaluba & Juma, *supra* note 200, at 29 n. 72 and 30-31.

287 *See* Bassett & Perschbacher, *supra* note 281, at 158; and Perschbacher, *supra* note 271, at 702-03.

288 *See* Hughes & Bryden, *supra* note 177, at 179.

of inconsistent or incoherent standards especially in marginal or close cases;[289] and the impairment of the credibility of the judicial process.[290]

Common law countries assess the appearance of bias through a double factor formula, often referred to as the "double reasonableness" test.[291] Similar to the reasonable observer standard in the United States, common law countries require that the perception of bias must be objectively reasonable in two respects: (1) the *perception* itself must be reasonable; and (2) the *person* perceiving bias must be a reasonable person, one who is knowledgeable ("informed") of the relevant facts and circumstances.[292] As in U.S. jurisprudence, in applying the apparent bias standard, the common law court preliminarily requires that the allegations of apparent bias must be based on objectively ascertainable grounds, not on the idiosyncrasies, superstitions, or sensitivities of the litigants.[293] Additionally, the reviewing court will preliminarily apply an "interpretative restraint" —the presumption of impartiality.[294] The presumption has been described in Canada as a heavy one requiring convincing evidence to rebut.[295] This fictional legal premise,[296] a classic procedural device applied in the service of institutional credibility, has been occasionally criticized in the recusal context.[297] In *Bernert*, the South African court explained the application of the presumption, noting:

> [T]his presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.[298]

Aside from such procedural hurdles, the difficulty of the double reasonableness test lies in its implementation: how does one identify the reasonable observer and

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289 *See id*., at 173, 176.

290 *See id.*, at 174-75.

291 *See* Okpaluba & Juma, *supra* note 200 and text accompanying nn. 61 and 62; and Okpaluba & Maloka, *supra* note 20, at 96.

292 *See, e.g.,* R v S (RD), [1997] 3 S.C.R. 484 (Can.); Bernert v. ABSA Bank Ltd 2011 3 SA 92, at ¶¶ 31 and 34 (CC); Wewaykum Indian Bank v Canada [2003] 231 D.L.R.(4th) 1, at ¶¶ 60, 67, and 73 (Can.); and *SARFU2*, 4 SA 147, at ¶ 45.

293 *See* BTR Industries South Africa (Pty) Ltd v. Metal and Allied Workers Union 1992 3 SA 673, 695C-E [hereinafter *BTR*] (S. Afr.); *Wewaykum*, *id.* at ¶ 77; *Bernert*, *id.* at ¶ 34.

294 *See* Okpaluba & Juma, *supra* note 200, text accompanying nn. 54-60 and cases cited therein; *SARFU2*, 4 SA 147, at ¶¶ 40-41.

295 *See Wewaykum,* 231 D.L.R. (4th) 1, at ¶ 59 and 76; and *R v. S*., 3 S.C.R. 484, at ¶ 32. *See also* Okpaluba & Maloka, *supra* note 20, at 107-11 (surveying Canadian recusal).

296 *Consider* Peter J. Smith, *New Legal Fictions* 95 Geo. L.J. 1435 (2007) (noting the various classic and new legal fictions and the purposes they serve and why judges rely on them).

297 *See* Perschbacher, *supra* note 271, at 704 (stating that the presumption operates to dilute the appearance standard).

298 *See Bernert,* 3 SA 92, at ¶¶ 31-33.

the reasonable perception? The devil is in the details. As the Australian court in *Johnson* noted: "As is usually the case when a fiction has been adopted, the law endeavors to avoid precision."[299]

A. The Reasonable Observer

In *Application by Purcell*, presenting a challenge to the impartiality of a disciplinary panel, Northern Ireland jurist, Frederick Girvan, remarked:

> The reasonable man (or woman) on the Clapham omnibus has been joined on the journey by another paragon of rationality, the fair minded and informed observer. These anthropomorphic creations of the common law lend a humanizing and homely touch to the law, personalising what are, in effect, objective tests of fairness and rationality. The metaphors should not distract from a proper understanding of the objective nature of the question to be addressed in individual cases.[300]

As another jurist noted: "What matters, in the final analysis, is a practical approach that takes into account not only the possible meanings of the word and phrases in question but also the context in which they appear."[301] As in the American recusal context, two practical questions confront the common law jurist in understanding and speaking for the reasonable observer: Whose perception controls? And what level of knowledge and information should we impute to the reasonable observer?

In the seminal case of *Regina v Gough*, Lord Goff of Chiveley made clear the perspective he was applying when he said:

> Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, *because the court in cases such as these personifies the reasonable man*; and, in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.[302]

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299 *See Johnson*, 200 C.L.R. 488, at ¶ 52.

300 *See* In the Matter of an Application for Judicial Review by Trevor Purcell [2008] NICA 11, at ¶ 26 (Girvan, LJ) (N. Ir.) *See also Johnson, id.* at ¶ 48 (cautioning that the "metaphorical fiction should not be taken too far").

301 *See* Tang Kin Hwa v. Traditional Chinese Medicine Practitioners Board [2005] 4 SLR (R.) 604 H.C. (Sing.) ("Tang Kin Hwa") critically assessed in ¶¶ 45-46, 57, 61, and 74 of *Shankar*, [2006] SGHC 194; and Okpaluba & Maloka, *supra* note 20, at 96-100 (discussing the characteristics of the reasonable observer).

302 *See* Regina v. Gough [1993] A.C. 646, 670, 2 All ER 724 [hereinafter *Gough*] (emphasis supplied). Similar sentiments appear on the other side of the Atlantic. *See, e.g.*, Hill, *supra* note 105, at 1410 and 1439 (the reasonable observer in religious endorsement cases is an idealized interpreter and a stand-in for the judge); *see also In re Bernard*, 31 F.3d at 644 (commenting on the "objective-subjective conundrum," Judge Kozinski notes that the judge applies the standard both as its interpreter and its object).

On further reflection, nine years later, in a case involving a high-profile political scandal, Lord Bingham announced a need for a "modest adjustment" to the reasonable observer test —the perspective would henceforth be that of a fair-minded and informed *lay* observer, which was acknowledged as a standard that was applied in other Commonwealth countries.[303] Similarly, the Supreme Court of Appeal of South Africa believed that "there is a real distinction between assessing appearance of bias through the eyes of a trained and experienced judicial officer and assessing it through the eyes of a reasonable person… . They [judges] may more readily, therefore, in a given case regard a danger of bias as not real where the reasonable impression of bias would reasonably lodge in the mind of a reasonable person suitably informed." [304] The South African court also noted that viewing the reasonable observer through the eyes of a jurist creates the danger of an actual rather than apparent bias approach.[305]

With respect to who comprises the class of lay persons, the term encompasses the general public.[306] The High Court of Australia stated that, in considering the formulation of the fictitious bystander regarding the impression which facts might reasonably have upon the parties and the public, the public includes groups of people who are sensitive to the possibility of judicial bias.[307] Occasionally the perception of bias held by the parties, which clearly plays a pivotal role in the instigation of a recusal claim, has been acknowledged as an important factor to consider.[308]

The level of knowledge imputed to the fictional reasonable observer is often glossed over, a strange oversight given that the metaphorical reasonable observer is an integral component of how a court must view and adjudicate the reasonableness of the perception of partiality. Australian courts have been more explanatory and seem to take the view that a high level of knowledge or information should not be a necessary attribute of the hypothetical observer, who is viewed simply as a fair-minded person.[309] On the other hand, Canadian courts seem to have imposed

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303 *See* Porter v. Magill [2001] UKHL 67, [2002] 2 W.L.R. 37, at ¶¶ 103-104 [hereinafter *Porter*]. *Porter* significantly modified the prior objective test regarding the reasonable apprehension of bias, thus supplanting the other seminal case of *Gough*, *id.*

304 *See* S. v. Roberts 1999 4 SA 915 (SCA), at ¶ 36 (S. Afr.) (noting judges' perceptions might be more subjective because of their training and experience).

305 *Id.* at ¶ 36.

306 *See, e.g.*, *Shankar* [2006] SGHC 194, at ¶ 74-75 and *Porter*, [2001] UKHL 67, at ¶¶ 103-104.

307 *See Johnson*, 200 C.L.R. 488, at ¶ 52. *See also* nn. 351 and 352 *infra.*

308 *See Johnson, id.* at ¶¶ 12, 49, and 52 (recognizing the need to consider the complaint not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and the public). *Consider also Perschbacher*, *supra* note 271, at 703, citing Webb v. The Queen (1994) 181 C.L.R. 41, wherein the author notes that Australian courts are not sufficiently receptive to the perception of the parties, stating that "It should be obvious that the parties, focused on their own cases and measuring bias from their own perspectives, are more likely to believe that bias exists, in contrast to the perspective of a so-called reasonable person seen through the eyes of the judiciary."

309 *See Webb*, 181 C.L.R. 41, at ¶¶ 3 and 11 (noting "…in considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case); and ¶ 49, *id*. (special knowledge should not be attributed to the reasonable bystander). The court identified, *inter alia*, the following attributes of the fictitious bystander: not

somewhat higher cognitive expectations on its metaphorical figure, describing the reasonable observer as an informed, reasonable, "right-minded person," "one who views a matter realistically and practically," and one who has "thought through" the matter.[310]

B. The Reasonable Perception

The most challenging aspect in understanding the common law countries' interpretation and application of the double reasonableness heuristic in recusal cases is the perception component: what precisely is the standard by which one defines and scrutinizes the reasonableness of the observer's perception of bias? Traveling through the cosmos of the selected common law countries, one enters a veritable twilight zone of semantics. Common law jurisdictions have engaged in an alchemy of words to express and measure apparent bias – such as, the reasonable likelihood of bias, real danger of bias, real suspicion of bias, reasonable apprehension of bias, and real possibility of bias. Clarity becomes complicated by head-spinning semantical instability. One realizes that terms are not what they appear to mean. These Humpty Dumpty-like[311] verbal gymnastics have led others to criticize the various approaches to apparent bias as: gratuitous semantic confusion,[312] jumbled,[313] bewildering,[314] and semantically muddled.[315] Nevertheless, in the struggle for

a lawyer but not wholly uninformed regarding the most basic considerations relevant to the case; reasonable and fair-minded; knowledgeable about common place things; knowledgeable about the strong professional pressures on adjudicators, including traditions of integrity and impartiality; and neither complacent or unduly sensitive or suspicious. *Id.* at ¶ 53. *See also* Atrill, *supra* note 106, at 280-81 (noting that Australia often omits the "informed" attribute).

310 *See, e.g., Wewaykum,* 231 D.L.R. (4th) 1. at ¶¶ 60, 63, and 74; *R v S (RD)*, 3 S.C.R. 484, at 507-09 (a racially charged case in which the Canadian court noted that a reasonable observer should be informed of the traditions of integrity and impartiality that form a part of the background as well as the social reality of a particular case, including the prevalence of racism and gender bias in a particular community); Perschbacher, *supra* note 271, at 703 (noting that Canada employs an elaborate standard of the reasonable observer who possesses a complex and contextualized understanding of the issues of the case); and Hughes & Bryden, *supra* note 177 (critical of the level of knowledge and information Canadian courts impute to the reasonable observer). *See also SARFU2*, 4 SA 147, at §§ 45 and 47 (noting that South Africa employs the same reasonable observer standard as Canada, *i.e.,* one who views the matter realistically and practically). *See also* Okpaluba & Maloka, *supra* note 20, at 107-11 (citing and considering Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General) [2015] 2 SCR 282.

311 *See* text accompanying notes 242-44.

312 *See Shankar*, [2006] SGHC 194, at ¶ 45, quoting *Tang Kin Hwa*, 4 S.L.R. (R.) 604.

313 *See* Okpaluba & Juma, *supra* note 200, at n.72.

314 See *Gough*, [1993] AC 646 2 All ER 724, at ¶ 21.

315 *See* Okpaluba & Juma, *supra* note 200, at 28-29 (noting "Unfortunately, however, in reading recent judgments of the Supreme Court of Appeal of South Africa, one discerns a jumbled approach…," citing cases at n. 72, *id*.). *See also* Morne Olivier, *Anyone but You, M'Lord: The Test for Recusal of a Judicial Office*r, Obiter 606, 608 (2006) (with respect to the controversy and uncertainty regarding the formulation of the applicable test, author posits that the incorrect and improper use of terminology as the contributing factor). *Cf.* Lionel Leo & Siyuan Chen, *Reasonable Suspicion or Real Likelihood: A*

conceptual clarity, a consensus seems to have appeared as to the essential concerns that should animate and guide appearance-based recusal.

The semantical labyrinth begins with the United Kingdom's seminal case of *R. v Gough*[316] wherein Lord Goff in 1993 rejected "mere suspicion" or "reasonable suspicion" as the controlling test of apparent bias in favor of a "real danger (or likelihood) of bias" standard, which was then viewed from the perspective of the court. Lord Goff grappled with the confusion emanating from caselaw that viewed apparent bias inconsistently *viz.*, real likelihood vs. reasonable suspicion. In rejecting the suspicion route, Lord Goff decided to refine the nomenclature, saying: "Finally, for the avoidance of doubt, I prefer to state the test in terms of *real danger* rather than *real likelihood*, to ensure that the court is thinking in terms of *possibility* rather than *probability* of bias." [317]

The courts of Australia and South Africa decided to adopt a different approach. The High Court of Australia in 1994, in assessing apparent bias, decided that, of the various tests used to determine an allegation of bias, "the 'reasonable *apprehension* of bias' is by far the most appropriate for protecting the appearance of impartiality," noting that the "reasonable likelihood" or "real danger of bias" tends to wrongly emphasize the court's view of facts.[318] Later, in 2000, the Australian High Court acknowledged that Australia's approach embraced possibilities ("might") rather than high probability.[319]

South African courts have also expressed the relevant apparent bias test differently. In *BTR Industries*, the Supreme Court of South Africa abandoned the "real likelihood of bias test" in favor of the "reasonable suspicion of bias" test, stating:

> To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice…I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided, the *suspicion* of partiality is one which might reasonably be entertained by a lay litigant…If *suspicion* is reasonably apprehended, then that is an end to the matter." [320]

Question of Semantics? Re Shankar Alan s/o Anant Kulkani, 2 Singapore J. Legal Studies 446 (2008) (concluding, contrary to the views expressed in *Shankar*, that the competing tests are essentially equivalent in application; authors favor the "reasonable suspicion of bias" terminology in terms of denoting possibility).

316 *See Gough*, [1993] AC 646, 2 All ER 724.

317 *Id.* at 670 (emphases supplied). *And see* Olivier, *supra* note 315, at 609 (stating that the "real likelihood of bias" test had its origins in English law, citing, *inter alia*, R (Donohue) v. County Cork Justices [1910] 2 Ir. R. 271, and R. v. Camborne Justices: *Ex Parte* Pearce [1954] 2 All E. R. 850 (QB). With respect to Lord Goff's clarifying comment in *Gough* and the dilemma of definitional elasticity, *consider* the Supreme Court of Africa's observation, *i.e.*, the essential connotation of the word likelihood is that of probability. *See BTR Industries*, 3 SA 673, at ¶¶ 39-40.

318 *See Webb,* 181 C.L.R. 41, at ¶ 9 (emphasis supplied).

319 *See Johnson*, 200 C.L.R. 488, at ¶¶ 31 and 49.

320 *BTR,* 3 SA 673, at ¶¶ 52 and 53 (emphasis supplied).

Regarding the reasonable suspicion standard, the court also noted: "I consider that those very objects which the 'reasonable suspicion test' are calculated to achieve are frustrated by grafting onto it the further requirement that the *probability* of impartiality must be foreseen." [321]

Seven years later, the Supreme Court of Appeal of South Africa provided more specific guidance as to its reasonable suspicion of bias test by identifying the requirements: (1) there must be a suspicion that the judicial officer might -- not would -- be biased; (2) the suspicion must be that of a reasonable person in the position of the accused or litigant; and (3) the suspicion must be based on reasonable grounds. [322] As a capstone to South Africa's recusal jurisprudence, the Constitutional Court of South Africa later re-assessed its semantics and decided that the term "suspicion" presented "inappropriate connotations," and re-formulated the test as the "apprehension of bias," [323] subsequently re-labeled as the "reasonable apprehension of bias" test.[324]

The evolutionary development of the reasonableness test for apparent bias in other judicial systems (*e.g.*, the Strasbourg court and the High Court of Australia), prompted the United Kingdom eventually to make a "modest adjustment" to *Gough* in two respects: the identity of the reasonable observer and the applicable standard of review. First, adopting the reasonable perspective of the lay person, not the court, Lord Hope then stated that "the real possibility of bias" (rather than *Gough's* real danger/likelihood of bias) was henceforth the appropriate test to assess apparent bias.[325] Thus, the controlling standard would be the *real possibility* of bias.

In comparison, Canadian courts have applied its reasonable apprehension of bias test in a manner that has provoked concern about credibility and legitimacy of the judicial process.[326] In *R v S (RD)*, the Supreme Court of Canada applied its double reasonableness test from a seemingly more rigorous reasonable observer perspective, one based on a "real likelihood or probability of bias" assessment.[327]

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321 *Id.* at ¶ 50 (emphasis supplied).

322 *See Roberts*, 4 SA 915, at ¶ 32. The court also added a fourth element, *viz.*, the suspicion is one which the reasonable person referred to would, not might, have. *Id.* at ¶ 34. The fourth element can be confusing but sensible; it does not dimmish the degree of the belief (suspicion) required but serves to emphasize that the existence of the suspicion itself must be based on probability not possibility. Thus, the fourth element is extraneous to this article's doctrinal objective and is omitted in the text of the article to avoid any unnecessary semantic or jurisprudential confusion.

323 *See SARFU2*, 4 SA 147, at ¶ 38.

324 *See* SACCAWU v Irvin and Johnson Ltd. 2000 3 SA 705, at ¶ 14 (CC) [hereinafter *SACCAWU*] (S. Afr.). *See also* Sager v Smith 2001 3 SA 1004 (SCA) (noting the difference between the "reasonable suspicion of bias" and the "reasonable apprehension of bias" tests is one of semantics, not substance).

325 *See Porter* [2001] UKHL 67, at ¶¶ 103-04.

326 *See* Hughes & Bryden, *supra* note 177, at 173-76 (noting particular concern about the application of the standard in "marginal cases" and the consequential need to balance considerations).

327 *See R v S (RD)*, 3 S.C.R. 484, at 487 (in applying its reasonable apprehension of bias test," the court stated: "The jurisprudence indicates that a real likelihood of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence." *See also* Committee for Justice and Liberty v National Energy Board, [1978] 1 S.C.R. 369, 394-395 (applying the "more likely than not" standard) (Can.). In 2003, the Supreme Court

Coupled with the requirement of convincing evidence to rebut the strong presumption of impartiality, Canada's "more likely than not" standard theoretically imposes a heavier burden on one who asserts apparent bias.

C. The Singapore Synthesis

A discussion of the double reasonableness heuristic—the reasonable observer and the reasonable observation—in the selected common law jurisdictions would not be complete without reference to the panoramic and complex analysis provided by the High Court of Singapore in 2006. The opinion in *Shankar*[328] represents a valiant attempt to provide some analytical clarity to the semantically complex subject of appearance-based recusal from a comparative common law perspective. *Shankar* employed a comparative approach in identifying the perspective of the reasonable observer, which serves as the lynchpin in determining the appropriate level of scrutiny and the reasonableness of the observer's perception of bias. Addressing the confusing semantic controversies, Menon, J.C., noted:

> Even with the rider that "likelihood" is to be equated with "possibility" there is a significant difference between the court inquiring whether on the one hand it thinks there is a sufficient (real) possibility that the tribunal was biased on the one hand, and on the other, whether a lay person might reasonably entertain such an apprehension, even it the court was satisfied that there was in fact no such danger.[329]

The court further explained at length the inter-relationship of the observer-observation components of the apparent bias heuristic:

> I would therefore, with some reluctance, differ from the view taken by Phang JC in *Tang Kin Hwa*[330] that there is no practical difference between the two tests. In my judgment, there are indeed some important differences between them the most important of which are the reference point of the inquiry or the perspective or view point from which it is undertaken, namely whether it is from the view point of the court or that of a reasonable member of the public; and the substance of the inquiry, namely, whether it is concerned with the degree of possibility that there was bias even if it was unconscious, or whether it is concerned with how it appears to the relevant observer and whether that observer could reasonably entertain a

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of Canada, noting the considerable weight and strong presumption of impartiality, also applied the apprehension test in terms of "more likely than not." *See also Wewaykum,* 231 D.L.R. (4th) 1, at ¶ 59, 74, and 76. The text herein uses the qualifier "seemingly" because semantical interpretation, especially with respect to a foreign jurisdiction, can be tricky. For example, in American caselaw, "probable cause" is a term that is not synonymous with the common understanding of "probably." *See, e.g., infra* nn. 413-16. Likewise, one can never know how a jurist subjectively calibrates a standard or metric; but clear standards and explication of one's reasoning can provide enlightenment (and accountability).

328 *Shankar* [2006] SGHC 194.

329 *Id.* at ¶ 69.

330 *See Tang Kin Hwa*, 4 S.L.R. (R.) 604.

> suspicion or apprehension of bias even if the court was satisfied that there was no possibility of bias in fact. These two aspects are closely related and go towards addressing different concerns.[331]

Menon, J.C., then concluded:

> The "reasonable suspicion" test however is met if the court is satisfied that a reasonable number of the public could harbor a reasonable suspicion of bias even though the court itself thought there was no real danger of this on the facts. The driver behind this test is the strong public interest in ensuring public confidence in the administration of justice.[332]

Rejecting the *Gough* standard of perception ("real likelihood"), the court in *Shankar* provided analytical clarity with the following remark:

> [T]here is an inherent difficulty with the real likelihood test in that it is utterly imprecise. The court is not looking for proof of bias on a balance of probabilities. What then is the court looking for? A sufficient degree of possibility of bias is how Lord Goff put it in *Gough.* But that becomes inherently, indeed impossibly, subjective. The 'reasonable suspicion' test in my view avoids this because it directs the mind not towards the degree of possibility of bias which the court thinks there may be, but towards the suspicions or apprehensions the court thinks a fair-minded member of the public could reasonably entertain on the facts presented.[333]

Supporting the court's careful jurisprudential analysis was its prior commentary regarding the "imaginary scales of justice" and the applicable levels of scrutiny -- beginning with doubt (which suggests a state of uncertainty), then "suspicion" (suggesting that something might be possible without yet being able to prove it, thereby requiring the adjective "reasonable" to require articulation of reasons, based on evidence presented, rather than fanciful beliefs), proceeding to "likelihood" ("which points towards a state of being likely or probable or, for that matter, possible), and finally "proof on a balance of probabilities" (suggesting a "more likely than not," or its converse).[334]

In concluding that the reasonable suspicion test is the law in Singapore,[335] *Shankar* looked to the High Court of Scotland and Lord Hope's following observations in *Millar v. Dickson*:

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331 *See Shankar* [2006] SGHC 194, at ¶ 74.

332 *Id.* at ¶ 75. JC Menon viewed the Australian case of *Webb*, 181 C.L.R. 41, as the key to his understanding of the different tests and the comparison of perspectives (the public and the court). *See Shankar, id*. at ¶ 65.

333 *Id.* at ¶ 84. Regarding the element of suspicion, *see supra* note 150 *supra* and *infra* note 451.

334 *Id*. at ¶¶48-51. *See also* text accompanying *infra* notes 407-11, regarding the levels of scrutiny.

335 *Id*. at ¶¶76 and 81.

> The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice…It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. *The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further action in the case. No further investigation is necessary, and any decisions he may have made cannot stand.*[336]

D. Coda

St. Augustine reportedly stated that he knew what time it was until anyone asked him to explain it.[337] The United States and its common law relatives share the fundamental value that justice must satisfy "the appearance" of justice.[338] Explaining, however, what the appearance of justice means has been a formidable epistemic challenge with respect to judicial impartiality and disqualification. What distinguishes the approach of the common law jurisdictions herein (Australia, Canada, Singapore, South Africa, and United Kingdom) is the analytical depth of their struggle to understand and explain the practical import of the appearance concept. *Shankar's* exposition of the contending theories provides a useful backdrop for some generalizations about the jurisprudential guideposts that could be relevant in assessing apparent bias.

With respect to the reasonable observer, common law countries confirm that the hypothetical observer's perspective is interpreted through the eyes of a hypothetical lay person, not the court, thus imbuing the jurisprudential construct with a modicum (or appearance) of objectivity. They have viewed the lay observer as fair-minded, impartial, reasonable, one not possessing a high level of knowledge or insider information. Although such attributes are abstractions, they sufficiently serve to guide and constrain, at least in a theoretical and aspirational sense, judicial discretion.

As to the reasonable perception component of the appearance heuristic, which has provoked considerable analytical consternation among common law countries, there appears to be a consensus that the governing metric should be possibility, not probability.[339] The perception, whether denominated as an apprehension or suspicion (of bias), however, must be a reasonable or "real" one, in the sense that there must be objectively demonstrable articulated facts rather than "mere" suspicion, conjecture, hypersensitivity, or tactical efforts designed to manipulate the judicial process.

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336 *Id.* at ¶ 90 (emphasis in the original), citing Millar v. Dickson [2002] 1 L.R.C. 457 (PC), [2002] S.L.T. 988 (Scot.).

337 *See* Peter Heath, The Philosopher's Alice, at 69 n.7 (1974).

338 *See* In re Murchison, 349 U.S. 133, 136 (1954).

339 As with the "informed" attribute that has been attached to the reasonable observer, Canada seems to have adopted a more elevated metric of belief. *See supra* notes 326-37.

IV. Reconceptualizing and Clarifying the Reasonable Observer Heuristic

In their on-going struggles to define and understand the concepts of apparent bias and the reasonable observer heuristic, the preceding common law jurisdictions adopted an analytical approach that stands in sharp contrast to the lack of analysis in U.S. recusal jurisprudence. The American heuristic, conceptually at least, resembles the "double reasonableness" analytical framework of the common law countries – the focus is on both the *observer* and the *observation*, assessed through the opaque veil of *reasonableness*. The Anglo-American appearance of bias standard shares fundamental values – judicial impartiality, the appearance of justice, public trust and confidence in an unimpeachable judicial system. What differentiates the U.S. approach is the fact that the ethical standard of apparent bias is governed by specific textual language, found in codes or statutes—namely, disqualification is required whenever a judge's "impartiality might reasonably be questioned."

In the execution and interpretation of the appearance of impartiality ethic (notwithstanding the different Anglo-American analytical approaches), it is interesting to read the various concerns expressed by common law commentators regarding their application of the apparent bias heuristic.[340] These commentaries are a reminder of our common dilemma in attempting to craft clear language to effectuate basic values and ideals. Anglo-American recusal jurisprudence demonstrates that language, through the process of interpretation, can serve—or subvert—the underlying values of a text or jurisprudential principle. As Mephistopheles observed in *Faust*, meaning is deciphered through the interpretation of words. Interpretation reflects—or should reflect—values and rationality. Rationality requires both reasons and reasoning.[341] Rational decision-making, however, becomes exceedingly complicated when it depends on inherently subjective and ambiguous concepts, such as reasonableness, the essence of the ethical mandate.[342] Such subjectivity enhances the potential for semantic inconsistency, ambiguity, and confusion, especially since logical thinking is not central to human reasoning.[343] Judges are human and tend to favor intuitive, impressionistic, rather than deliberative thinking.[344] Like all humans, judges are susceptible to egocentric biases that confirm their pre-existing beliefs; they may use themselves and their beliefs or values as an "anchor" in judging.[345] Given such cognitive limitations, coupled with

340 *See* text accompanying *supra* notes 281-90.

341 *See* Nozick, *supra* note 6, at 71, 107, and 176.

342 *See supra* § I(A).

343 *See* Gigerenzer, *supra* note 43, at 123. *See also* Halper, *supra* note 9, at 46 (referring to "amoeboid flexibility which allows the judge to admit or exclude particular cases with almost no consideration for overall conceptual rationality.")

344 *See* Thornburg, *supra* note 45, at 1614 (noting, however, that legal rules can overcome heuristic biases, *id.* at 1635). *See also* Atrill, *supra* note 106, at 282-83 (noting judicial propensity for "impressionistic" decision-making). *Cf. Johnson, 200 C.L.R. 488,* at ¶ 46(5) where the High Court of Australia noted the "desirable development" of a trend away from viewing judges as ones with "unique perceptiveness" and now relying on "the logic of circumstances" and contemporary documents rather than mere impressions."

345 Tversky & Kahneman, *supra* note 50, at 20-21; Kahneman, *supra* note 53, at 119-28; and Thornburg, *supra* note 45, at 1612-13; and Fairley v Andrews, 423 F. Supp. 2d 800, 820 (N.D. Ill. 2006) (judges come to the bench with backgrounds of experiences, beliefs, viewpoints, and associations).

the constraints of limited information and uncertainty, there is a recognizable need to provide analytical guardrails and signposts to support (and constrain) judges in their difficult (and inherently subjective) ethical decision-making process.[346]

Thus, a reconceptualized reasonable observer heuristic would be beneficial in helping judges to understand the "objective" appearance ethic, while helping them avoid the siren call of an actual prejudice analysis.[347] In the absence of a reformulation (unlikely) or abandonment (ill-advised and perilous) of the appearance of bias standard, specifically with respect to the precept's verbal fulcrum,[348] the reasonable observer heuristic can be reconceptualized to promote greater analytical clarity and principled interpretation. Against the backdrop of the preceding sections, the following adjustments to the reasonable observer heuristic are offered.

A. The Reasonable Observer Should Be Conceptualized Realistically and Flexibly

Regardless of whether the reasonable observer standard is applied in the religious endorsement or recusal context, common questions predominate: Who does the reasonable observer represent? Whose voice is the judge channeling? What does the reasonable observer know and see?

1. The Reasonable Observer: Identity

Commentators, including Supreme Court justices,[349] have advocated for a more realistic, sensitive, and nuanced conception of the reasonable observer.[350] As others have suggested, the reasonable person/observer is a heuristic that should reflect social (public) meaning; the heuristic should acknowledge and incorporate the real possibility of multiple personae.[351] Relevant to a broader, more flexible

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346 *See* Sunstein, *supra* note 232, at 432-33 (identifying the need to produce institutional safeguards to over-ride error-prone intuitions).

347 See *Shankar,* [2006] SGHC 194, at ¶ 62, quoting R v Inner West London Coroner, *ex parte* Dallagio [1994] 4 All 139, at 152; Bassett & Perschbacher, *supra* note 281, at 159; and Shaman, *supra* note 54, at 629. Actual prejudice assessments invariably benefit the challenged jurist, especially when applied in connection with the presumption of judicial impartiality.

348 *See infra* §§ II(B)(3) and IV(B).

349 *See* Justice Stevens' critique of the prior endorsement test in *Capital Square*, 515 U.S. 753, in *supra* § II(B)(2).

350 *See* Atrill, *supra* note 106, at 288; Tinus, *supra* note 70; Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 Lewis & Clark L. Rev. 1285, 1310-11 (2020); and Moran, *supra* note 93 (feminist concerns regarding equality and the reasonable man standard).

351 *See* Hill, *supra* note 60, at 509-10, 517-18; Hill, *supra* note 105, at 1452 n.211, citing Michael C. Dorf, *Same Sex Marriage, Second-Class Citizenship, and Law's Social Meaning,* 97 Va. L. Rev. 1267, 1336 (2011) (favoring a multiple reasonable observer approach, noting that there is no single perspective that warrants privileging); Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 Fla. L. Rev. 739, 775 (2018) (noting that no single perspective can be attributed to the reasonable observer); and Davies & Oakes, *supra* note 60, at 121-23, 132-34, and *infra* notes 372 and 373 (given the increased public sensitivity to the fair administration of justice, authors suggest a more nuanced and perhaps empirically-based approach regarding the observer

heuristic is the recognition of the futility and undesirability of trying to achieve an idealized, unattainable consensus.[352] The flexibility of this approach makes philosophical and jurisprudential sense if one considers the fundamental nature of the reasonable observer. In response to the persistent philosophical debate whether the reasonable person, as the designated representative of a global community ("the average Joe," so to speak) is more statistical (i.e., average) or normative (i.e., the embodiment of an ideal or community values), commentators have favored the latter. A purely statistical approach is viewed as empirically impossible inasmuch as we lack objective means to reduce human beings or their beliefs to a single number, metric, or trait.[353] The statistical approach, in its attempt to generalize reality, presents the danger of being over- or under-inclusive;[354] in a sense, conceiving of reasonableness as an average or composite of multiple characteristics results in an unrealistic leveling of reality – it captures too much or too little, and thus can be viewed as exclusionary, a particularly troublesome analytic when placed in the context of ethics and justice.[355] Additionally, supportive of a more flexible and recusal-sensitive approach to the reasonable observer heuristic is the fact that the heuristic is applied to the ethical domain of judicial impartiality, a secular value that ultimately reflects the ethic of caring for the interests of others,[356] a viewpoint that is compatible with the classical notion of the reasonable person.[357]

The recognition of the interests of others, when relevant, should guide the formulation of the reasonable observer heuristic. The high court of Australia addressed the importance of considering the impressions of the public and parties in applying the reasonable observer (a/k/a fictitious bystander) heuristic:

> It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias. It must be remembered that in contemporary Australia, the fictitious bystander is not necessarily of European ethnicity or other majority traits." [358]

fiction, extending it to include actual subjects of the judicial process).

352 *See* Perschbacher, *supra* note 271, at 705 n.29, quoting Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification – and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoilation, and Perceptual Realities*, 30 Rev. Litig. 733, 739 (2011); and Mayo Moran, *supra* note 94, at 205-10 (author urges a standard more responsive to the realities of a multi-racial and multi-cultural world); Mayo Moran, *supra* note 93, at 1283 (emphasizing the importance of context, author suggests that "rhetorical unity" about the reasonable person may be dangerous).

353 *See* Miller & Perry, *supra* note 58, at 371 and 377.

354 *See* Tinus, *supra* note 70, at 42.

355 *Consider, e.g.*, the exclusionary nature of the "reasonable man" in relation to a feminist perspective. *See* Moran, *supra* note 93; Miller & Perry, *supra* note 58, at 361-62; and Tinus, *supra* note 70, at 15-22.

356 *See* Tinus, *id.* at 48 (distinguishing the "reasonable person" from the "rational person," the former being concerned with the interests of others; author endorses a reasonable person concept that is imbued with the normative of care).

357 *See* Tobia, *supra* note 67, at 302-05; c*onsider also* DiMatteo, *supra* note 11, at 305-08 (discussing the reasonable person in tort and contract law as the secularization of religious precepts and rooted in moral philosophy).

358 *See Johnson,* 200 C.L.R. 488, at ¶ 41.

Similarly, in identifying and applying the objective test for apparent bias, the High Court of South Africa acknowledged: "In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them."[359] In a racially-charged case, involving a white police officer's arrest of a Black 15-year old who had allegedly interfered with the arrest of another youth, the Supreme Court of Canada applied its reasonable apprehension of bias test with the following caution: "Judges must be particularly sensitive to the need not only to be fair but also appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin."[360]

The preceding commentary is relevant to the symbolic and practical issue of whose voice does the judge channel when conjuring the metaphorical reasonable observer. Joanna Grace Tinus, advocating a fine-tuning of the heuristic, has remarked that "…the objective nature of the [reasonable person] standard has been undermined by relying on a standard of reasonableness that tends to reflect social norms and particular prevailing ideas of particular classes of individuals."[361] Others have focused their criticism on the fact that the reasonable observer heuristic suffers from an inherent majoritarian point of view, sometimes characterized as the "individuation problem."[362] Associating the reasonable person with a majoritarian point of view, for example, had been recognized as a serious defect of the heuristic (as previously applied in America's religious endorsement cases) given the potential impact on minority populations.[363] Jesse Choper, for example, had recommended that religious minority interests should be part of the calibration.[364]

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359 *See SARFU2,* 4 SA 147, at ¶ 43.

360 *See R v. S (RD),* 3 S.C.R. 484, at ¶. 2.

361 *See Tinus, supra* note 70, at 45; Resnick, *supra* note 44, at 1909-10 (no judge stands outside a social context; adjudication is socially embedded); and Robertson, *supra* note 351, at 749, 762 (noting the unconscious framing of issues that seem to support one's social identity).

362 *See* Tobia, *supra* note 67, at 347-50 (recommending a hybrid approach regarding the reasonable person construct); *consider also* Garrett, *supra* note 64, at 77 (noting, in a constitutional context, that if the main goal is to protect individual rights, then the perspective of an individual would be more important than the aggregate in determining reasonableness); and Davies & Oakes, *supra* note 351, at 154-55 (suggesting the consideration of a litigant's perspective, which the authors note may be conceptually paradoxical in the application of a self-described "objective" reasonable observer test).

363 *See* Hill, *supra* note 105, at 1410-11; and Choper, *supra* note 113, at 518-19, 525 (noting that Justice O'Connor's prior endorsement heuristic, *see* note 117 *supra,* suffered from being nebulous, unconstrained, legislative-like, and insufficiently sensitive to the reasonable minority observer).

364 *See* Choper, *id.*, at 519 n.107, and 525 (regarding the then-prevailing endorsement analysis, author noted that the calibration should be empirically influenced by the perceptions of the "average" member of the minority religious faith, if they are discernible). *See also* Justice Stevens' views, text accompanying *supra* notes 108-109. As others have noted, caution must be exercised—the hyper-sensitive and those with extremist views or "distressed sensibilities" should be excluded from consideration. *See* Choper, *id.* at 521-524; and Hill, *supra* note 60, at 517-18 and n. 153. Unconventional views, however, should not be categorically excluded. *See* Miller & Perry, *supra* note 58, at 378. In 2022, the Supreme Court, as noted herein, has abandoned the endorsement heuristic in religious endorsement cases in favor of a history-and-tradition approach. *See Kennedy*, 142 S. Ct. 2407.

The recognition and incorporation of multiple perceptions, when appropriate and feasible, would promote greater jurisprudential sensitivity and clarity. Decision-making could be enhanced, for example, by taking a debiasing "external assessment approach." As Richard Re notes:

> Thus, a court could attempt to assess and take account of the views of other actors, even when the court itself is "internally" certain that the other actor's reasonable view is incorrect. Scholars have labeled this basic approach an external assessment of ambiguity, by which one interpreter attempts to predict or imagine how other interpreters would resolve a particular issue.[365]

This external assessment of ambiguity approach, in which the identity of the perspective plays a key role, is believed to enhance analytical clarity and predictability. Such a mode of interpretation may be more appropriate when there is limited information and the governing perspective is that of an actor other than the deciding court,[366] conditions that apply in the recusal context. Ward Farnsworth explains that the external assessment approach focuses on how ordinary readers would view an ambiguous issue.[367] Noting that internal assessments about ambiguity are dangerous because they are easily biased by strong (sometimes unconscious) policy preferences, Farnsworth observes that the "external estimates of ambiguity, while sometimes inaccurate, are nevertheless *more* accurate than internal judgments when measured by the amount of agreement readers are able to reach about a statute [or text]." [368] In reference to the task of interpreting an ambiguous statute, he states:

> The external perspective…can serve as a useful heuristic in such cases where the clarity of a text is open to question, especially in areas of law where parties – or "ordinary readers" of the legal text in question – have a strong interest in notice. The external standard is a valuable corrective to the serious risks of bias that attend the more usual task of simply asking whether a statute seems clear to oneself.[369]

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365 *See* Re, *supra* note 16, at 1517.

366 *Id*. at 1522.

367 *See* Ward Farnsworth, *Ambiguity about Ambiguity—An Empirical Inquiry into Legal Interpretation*, 2 J. Legal Analysis 257, 290-91 (2010). It is worth noting, however, that the appearance-of-impartiality ethical mandate does *not,* in this author's view, implicate textual ambiguity; the words are simple and clear. It is the execution of the mandate that poses difficulties. *Cf*. Lee & Mouritsen, *supra* note 248.

368 *Id.* at 290 (italics in original).

369 *Id.* at 291. Farnsworth's examination of the external and internal modes of interpretation was based on an empirical study (a survey administered to a thousand law students). Farnsworth's study recognized a hard reality: external judgments are hard to make accurately. *Id. at* 259-60. Obviously, judges are ill-equipped to rely on surveys for decision-making, assuming evidential propriety. But, as Farnsworth concludes, his study found "support for the idea that in at least some circumstances, judgments of ambiguity are best made by estimating how a clear statutory text would be to an ordinary reader [similar to the reasonable observer?] of English." *Id.* at 260. *Consider also* Davies & Oakes, *supra* note 60, at 157 (in addressing the issue of empirical evidence to assess the intuitive perceptions of the judicial process in relation to the doctrine of appearances

The external approach in interpretation is a sensible one given that, as Christopher Brett Jaeger has noted, there is a distinction between legal reasonableness and lay reasonableness. Academic or theoretical discussions of the reasonable person, whose roots are empirical, are often divorced from the reality of how lay decision-makers encounter, understand, and apply the standard; it is an issue, he says, that deserves more attention. Jaeger posits that law should, as a normative matter, track the lay conception of justice and should mirror popular intuition." [370]

This analytical backdrop leads to the fundamental practical question as to the identity of the voice(s) of the reasonable observer. As emphasized by the high courts of the United Kingdom, Australia, and South Africa,[371] the fair-minded reasonable person is a lay person, not the judge—notwithstanding the reality that some subjectivity will inevitably seep in because a human (the judge) is the medium for interpretation. Likewise, the perceptions of the public and parties, while not determinative or controlling, are worthy of consideration in the formulation of the heuristic since the confidence of the litigants and the parties in the judicial system is fundamental.[372] Finally, while more difficult to assess, the reasonable sensitivities and perceptions of apparent bias, shared by identifiable segments of the population, should be considered if their "voices" have relevance to the issues in the proceeding given the over-arching policy objective of impartial decision-making.[373]

The identity of the reasonable observer is difficult, yet fundamental, to the integrity of the decision-making process. The issue of the hypothetical reasonable observer raises philosophical, jurisprudential, and pragmatic concerns. Since the reasonable person/observer question must be rooted in the realities (albeit speculative) of the lay observer, an empirical assessment would be a rational way to proceed. But how? While recognizing that the reasonable observer question is

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in the European Court of Human Rights, the authors suggest that empirical research into the root causes of public attitudes to justice and the application of those findings in judgments should not be ignored); and *infra* note 448 regarding two empirical surveys on judicial disqualification.

370 *See* Jaeger, *supra* note 65, at 904, 934-35, 938; Zorzetto, *supra* note 225; and *supra* note 231 (empirical evidence issue).

371 *See Shankar* [2006] SGHC 194, at ¶¶ 65 and 69 (Singapore); *Webb,* 181 C.L.R. 41, at ¶ 11 (Australia); and *Roberts,* 4 SA 915, at ¶ 36 (Australia).

372 As the High Court of Australia noted in *Johnson*, 200 C.L.R. 488, at ¶ 52, the "public" includes groups of people who are sensitive to the possibility of bias; *see also Shankar*, *id.*, at ¶ 74 ("reasonable number of the public [who] could harbor a reasonable suspicion of bias"); *Roberts, id.*, at ¶ 31 (question of the reasonable person should be approached from the viewpoint of the party to the action not of that famous fictional character); and *BTR,* 3 SA 673, at 659C-E; and Davies & Oakes, *supra* note 60, at 134-35 (perception of the litigants).

373 *See* Choper, *supra* notes 363 and 364; notes 351 and 352 *supra* regarding multiple viewpoints. *See also* text accompanying notes 108 and 109 regarding Justice Stevens' discussion of non-majoritarian viewpoints. *Cf.* Commonwealth v. Druce, 796 A.2d 321 (Pa. Super. 2002 (applying a "significant minority" of the lay community standard regarding disqualification). Pennsylvania's lay minority standard was subsequently disavowed. *See* PA Code of Judicial Conduct r. 1.2 cmt. [5] (2014) noting that the current "reasonable minds" standard for the appearance of impropriety "differs from the formerly applied common law test of whether 'a significant minority of the lay community could reasonably question the court's impartiality.'"

ultimately one of law,[374] and is not determined by a simple calculation of votes, Jessie Hill concludes that an empirical consensus is difficult (albeit inappropriate) to attain and, ironically, runs the risk of supporting a discriminatory majoritarian point of view.[375] Nevertheless, she posits that the reasonable observer's task (i.e., the determination of public or social meaning) can be approached by evaluating all relevant information,[376] similar to the suggestion made by the Canadian Supreme Court, which stated:

> Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony by expert witnesses, from academic studies properly placed before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. *This process of enlargement is a precondition of impartiality*. *A reasonable person would see it as an important aid to judicial impartiality*.[377]

If information is available, and if the task is reasonably feasible and evidentially relevant, the process of enlargement should be considered. Doing so would make the reasonable observer heuristic in appearance-based judicial ethics more principled, jurisprudentially sound, and responsive to the changing realities of contemporary society's pluralism.

2. The Reasonable Observer: Imputation of Knowledge

Anglo-American jurisprudence identifies the metaphorical reasonable observer in generalities: fair-minded, reasonable, thoughtful, aware of the relevant facts and circumstances, and informed. As the prior discussion has indicated, the "informed" attribute has generated a considerable variety of opinion about the reasonable observer's level of knowledge and information.[378] How "informed," "well-informed," "fully informed," or "knowledgeable" must the reasonable observer be? Discussion among judges and academics about the cognitive capacity and imputation of knowledge has occurred in two different legal contexts: constitutional religious endorsement and disqualification. Justice Stevens was particularly troubled by Justice O'Connor's more sophisticated formulation of the reasonable person heuristic as previously applied in the religious endorsement context. For Stevens, the legal construct of the reasonable observer unrealistically represented

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374 *See* Hill, *supra* note 105, at 1440.

375 *See* Hill, *supra* note 60, at 517-22. *Consider also supra* notes 231 and 369 (regarding empirical evidence, judicial notice, surveys, polls).

376 *See* Hill, *supra* note 105, at 1410. The context of Hill's discussion was the former reasonable observer heuristic in religious endorsement cases.

377 *See R v S (RD),* 3 S.C.R. at 488-89 (LaForest, L'Heureux-Dube, Gonthier and McLachlin, JJ) (*emphasis supplied*).

378 *See* discussion of cases in *supra* notes 207-20 and accompanying text, regarding the "informed" attribute.

a well-schooled jurist and a personification of a community ideal who possessed a high level of legal and historical knowledge.[379]

Despite the different contexts (i.e., constitutional religious endorsement and rule-based judicial ethics), the basic jurisprudential challenges about the "informed" reasonable observer are similar. American commentators concluded that the heuristic (as it had been applied in the constitutional religious endorsement context) presented a highly problematic, over-idealized, unrealistic caricature regarding the imputed level of knowledge.[380] Common law commentators have also expressed their concerns about the "informed" attribute regarding their recusal jurisprudence. As noted, some common law countries have imposed a more elaborate or rigorous standard of the informed attribute.[381] That approach has been criticized. [382] Although expressing his displeasure with the "artificial" and "unworkable" reasonable lay observer heuristic, and favoring a return to a judge-centric approach, Professor Olowofoyeku, noted a trend that common law courts were imbuing the informed observer with increased knowledge and understanding so courts can reach a "right outcome," which he says is inconsistent with the rationales for interposing a hypothetical lay person to judge the appearance of bias. As such, he notes, "this impartial observer might as well be a judge." [383] Similarly, critical of imbuing the reasonable person with insider information and the workings of the judicial system, two commentators have viewed the application of a higher standard as a way for courts to justify their refusal to recuse.[384] In their view, this interpretation of the informed observer augments the significance of the judge's sensibilities, hence subjectivity, and plays an important role in compromising judicial integrity and the apparent bias test.[385] Simon Atrill, a proponent of a more nuanced observer test that emphasizes a balance of policy interests, likewise, viewed the imputation of a higher-level of knowledge as effectively facilitating a return to the *Gough* standard in which reasonableness is seen and judged through the eyes of the jurist.[386] As the High Court in Singapore observed: "It is also why it would be a mistake for a court to simply impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself.' [387]

The Australian judicial system has stressed the importance of adopting realistic criteria for the variously described fictitious bystander. As the High Court of Australia explained: "Obviously, all that is involved in these formulae

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379 *See* notes 108 and 109 *supra* and accompanying text regarding *Capital Square,* 515 U.S. 753 and *Kennedy*, 142 S. Ct. 2407 regarding the Court's 2022 rejection of the observer heuristic in favor of a history-and-tradition analysis.

380 *See* Hill, *supra* note 105, at 1409-10; and Choper, *supra* note 113, at 511-14.

381 *See supra* notes 309 and 310 and accompanying text.

382 *See* Hughes & Bryden, *supra* note 177, at 181-82; and Perschbacher, *supra* note 262, at 699, 703.

383 *See* Olowofoyeku, *supra* note 274, at 404.

384 *See* Hughes & Bryden, *supra* note 177, at 180-83.

385 *Id.*

386 *See* Atrill, *supra* note 106, at 280-82; Bassett & Pershcbacher, *supra* note 281, at 158 (stating that there is a serious risk that the judiciary is subjectivizing the objective standard, *i.e.*, the reasonable person is effectively a reasonable *judge*) (emphasis in original).

387 *See Shankar* [2006] SGHC 194, at ¶ 63. Regarding the troublesome self-referential perspective of judicial recusal, *see* Pines, *supra* note 134.

is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public."[388] To that end, Australia often omits the "informed" attribute in applying the reasonable bystander heuristic.[389] For example, as noted in *Johnson*, the bystander is described as fair-minded and reasonable, neither wholly uninformed or uninstructed about the law in general or issues to be decided, knowledgeable about commonplace things, and possessing basic common sense regarding the process of adjudication and the judicial-legal profession, one who is neither unduly sensitive or suspicious.[390]

The High Court of England and Wales noted that the fair-minded observer cannot be ascribed all the knowledge and, indeed, assumptions of a trained judge, adding "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny." [391]

How one describes—or embellishes—the attributes of the reasonable observer can be, knowingly or unwittingly, outcome-determinative. For conceptual and interpretive clarity, the reasonable observer should not be imbued with unrealistic or unnecessary qualities that threaten to convert the reasonable observer heuristic into a subjectivized judge-centric standard that muddies the focus of the standard (the objective and fair-minded lay member of the community) or undermines the standard's fundamental values (appearance of impartiality, public trust and confidence). If an "informed" attribute is deemed necessary, then it should be a simple one, connected to the relevant facts and circumstances of the case – an attribute that supports the desired qualities of being thoughtful, fair-minded, and reasonable. Simply put, how "informed" must one be to make a commonsense, reasonable assessment of a jurist's apparent impartiality? [392]

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388 *See Johnson*, 200 C.L.R. 488, at ¶ 52.

389 *See* Atrill, *supra* note 106, at 280-82.

390 *See Johnson*, 200 C.L.R. 488, at ¶ 53. This narrative regarding attributes is a paraphrase and condensation of the relevant paragraph in *Johnson*. The opinion further noted that excessive "sophistication and knowledge about the law and its ways," atypical of the general community, should be avoided. *Id*. at ¶ 54.

391 *See* M&P Enterprises Ltd v. Norfolk Square Ltd [2018] E.W.H.C. 2665, at ¶ 27, *quoting* Lord Hope in Gilles v. Secretary of State for Work and Pensions [2006] 1 All E.R. 731, at ¶ 17.

392 The question is not intended to minimize the important fact that, as caselaw repeatedly emphasizes, disqualification analysis is fact-specific. The question posed herein is cautionary. Anglo-American disqualification analysis can run the risk of being overly "facty" or unnecessarily complicated, obfuscating the appearance standard and potentially converting it into an actual prejudice standard. *See* Shaman, *supra* note 54, at 628-32. Regarding the notion of "facty" *see, e.g., SARFU2*, 4 SA 147 (involving a fact-heavy analysis of an "unprecedented" recusal challenge that focused on all judges of the Constitutional Court).

B. The Reasonable Observer's Perception Should Be Analyzed in Terms of Possibility Not Probability

1. The Judicial Transmogrification of a Clear Mandate

Identifying the voice and attributes of the reasonable observer is, as the high courts of Singapore and Australia recognized, the portal to understanding and applying a critical element of the apparent bias heuristic, *viz*., the level of scrutiny applicable to the assessment of the reasonableness of a lay observer's perception of bias.[393] As the preceding sections demonstrated,[394] the common law countries have engaged in semantic struggles to identify the appropriate level of proof for assessing apparent bias: from "real danger," to possibility, to likelihood, to probability -- all considered in relation to the metaphorical observer's enigmatic manifestations (such as "apprehension" or "suspicion"). The labyrinth of language employed in the search for understanding and consensus has been Faustian.[395]

Commentators and jurists in the United States, on the other hand, have avoided (intentionally or unreflectively) such semantical quicksand. The approach has been devoid of meaningful analysis in the interpretation and application of the reasonable observer heuristic's "might reasonably be questioned." The modal verb "might" is the outcome-determinative fulcrum of the standard.[396] "Might" and "would" are distinct terms.[397] Yet, because of the lack of interpretive guidance, there has been confusion regarding the level of probability required: does it connote, as one commentator has observed, a higher level of certainty ("would") or lower a lower level of conceivability ("might")? [398] In terms of American recusal principles

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393 *See Shankar*, [2006] SGHC 194, at 65, citing *Webb v. The Queen*, 181 C.L.R. 41, at 50-51.

394 *See supra* § III(B) and (C).

395 *See* text accompanying *supra* note 28.

396 *See* Winiharti, *supra* note at 246 ("would" is a modal that can be an expression of prediction; it is important to consider the context in which a modal is used). *See also* notes 248 and 249 *supra*.

397 *See, e.g., Webb,* 181 C.L.R. 41, at ¶¶ 33-34 (noting the distinction in terminology regarding whether a reasonable person *might* or *would* have a reasonable apprehension or suspicion). *See also* Okpaluba & Juma, *supra* note 200, n. 167 (noting, in reference to McGovern v. Ku-Ring-Gai Council [2008] 251 ALR 558, 42 NSWLR 504, that the Court of Appeal for New South Wales, dealing with the apprehension of bias, found the trial judge to have improperly applied the applicable test by asking the incorrect question, namely, whether the decision-maker *would*, rather than *might*, not be impartial) (emphasis supplied). *McGovern* is the leading case on apprehended bias in New South Wales. *See also* Martin J. Newhouse, *Mandating Recusal in the Absence of Bias: In re Bulger, 710 F.3d 42 (1st Cir. 2013)*, 59 Boston Bar (Jan. 7, 2015), (emphasizing the standard's specification of "might" in contradistinction to the stricter standard of "would;" author suggests the words may be used interchangeably but that the standard tilts in favor of recusal, especially in sensitive cases, to protect the public's perception of judicial impartiality), https://bostonbar.org/journal/mandating-recusal-in-the-absence-of-bias-in-re-bulger-710-f-3d-42-1st-cir-2013/

398 *See* Flamm, § 11.4, *supra* note 21. Why the Model Code's drafters chose the modal "might" instead of "would" is not explained in Thode's notes. *See supra* note 163. One can surmise, however, that the drafters were careful with terminology regarding such a pivotal concept. The verbal choice makes eminent sense given the precept's underlying value, *viz.* protecting the appearance of justice and the public's trust and confidence in

and practice, the question raises an important jurisprudential issue. Within a fluid spectrum of uncertainty, what is/should be the appropriate level of belief and evidential proof ? [399] The dilemma of how to allocate the burden is exacerbated when information and human cognitive abilities are limited.[400]

Notwithstanding such constraints, the law has attempted to calibrate certitude, although, as one commentator has noted, remarkably no one has ever formulated an adequate model for applying the standards of proof.[401] Kevin Clermont notes: "The epistemological aim of evidence law is that the factfinder should construct a belief that corresponds to the outside world's truth. Probability thus reflects a measure of the chance of that correspondence existing between finding and reality."[402] The traditional method of legal reasoning is through imprecise probabilities. Civil law, for example, assigns evidential burdens through various perspectives such as preponderance of the evidence or clear and convincing evidence.[403] Criminal law has adopted additional calibrations, such as reasonable suspicion, probable cause, and beyond a reasonable doubt.[404] The Singapore High Court, for example, placed the "imaginary scales of justice" in distinctly impressionistic terms: doubt, suspicion, likelihood, and more-likely-than-not.[405]

Academics have not been able to resist the allure of positing alternative theories and methods to identify degrees of probability and certitude.[406] Evidential

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the judicial system and the critical need for the jurist to exercise caution.

399 *Consider* Fleming James & Roger P. Perry, *Legal Cause*, 60 Yale L.J.761, 771 (1951) (noting, in the context of the chameleon quality of "proximate cause," the problem of establishing sufficient causal evidence where an opinion is expressed in terms of possibility rather than certainty or probability or where there is an equipoise of possibilities).

400 *See* Vermeule, *supra* note 10, at 169-71.

401 *See* Kevin M. Clermont, *Trial by Traditional Probability, Relative Plausibility, or Belief Function*, 66 Case W. Res. L. Rev. 353, 361 n.33 (2015) (noting that psychologists have contributed almost nothing as to how humans apply standards of proof). *Consider*, for example, Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 Wash. & Lee L. Rev. 1443, 1461-62 (2019) (noting that a survey of federal judges placed reasonable doubt at "90% or higher" level, but jurors equate that highest burden with a much lower level of guilt).

402 *See* Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. Rev. 469, 481 (2009).

403 *See* Ronald J. Allen & Michael S. Pardo, *Relative Plausibility*, 23 The Int'l J. Ev. & Proof 1 (2019) (a critique of conventional probability theory; notes that probabilistic standards in civil cases are vague and poorly understood, citing Addington v Texas, 441 U.S. 418, 425 (1979); authors favor relative plausibility theory as the best tool to assess juridical proof, but notes that critics question whether the two theories are meaningfully different, *id.* at 20-29); and *cf.* Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 Am. J. Comp. L. 243 (2002) (noting a striking divergence between common law and civilian standards of proof in civil cases in England and the United States).

404 *See* Kevin M. Clermont, *supra* note 402 (standards of proof); Flemming, *supra* note 200 (burdens of proof and persuasion).

405 *See Shankar,* [2006] SGHC 194, at ¶¶ 48-51.

406 *Consider* Allen & Pardo, *supra* note 403 (relative plausibility); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation* (2007), *available at* https://ssrn.com/abstrct=1003421; Paul Tidman, Conceivability as a Test for Possibility, 31 Am. J. Phil. Q. 297 (1994) (considers the conceivability thesis regarding the relationship between conceivability and possibility, which he notes plays a crucial role

calibrations are inherently imprecise and unquestionably implicate a high degree of intuition and subjectivity in the decisionmaker. Attempts have been made to identify a hierarchy of standards of proof within the realm of traditional probability. Kevin Clermont, for example, disfavors quantification and has offered the following scale ("categories of uncertainty") regarding decision-making:[407]

1. Slightest Possibility
2. Reasonable Possibility
3. Substantial Possibility
4. EQUIPOISE
5. Probability
6. High Probability
7. Almost Certainty.

Clermont notes that a higher standard is a way to inform the factfinder that the burdened party must provide a stronger showing of probability; a better way to envisage the whole scale of likelihood, he says, is as a set of fuzzy categories, or coarse gradations, of likelihood.[408]

Nevertheless, there is a gravitational pull to seek greater clarity and certainty through the assignment of more specific metrics, although judges reportedly eschew numerical or percentile interpretations.[409] Ronald Bacigal, for example, has reformulated the levels of certainty into five categories by assigning the following statistical benchmarks:[410]

1. Slight Possibility (1% to 10%)
2. Reasonable Suspicion (20% to 40%)

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in philosophical and everyday thinking); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 Vand. L. Rev. 407 (2019) (addressing the legal system's deference to police officers' intuitions); and Clermont, *supra* note 402 (author suggests a multi-valent "degrees of belief" approach as a better way to accommodate vagueness and imprecise probability).

407 *See* Clermont, *supra* note 402, at 482-83 n.31.

408 *Id.* at 485.

409 *See* Re, *supra* note 16, at 1503. *See also* United States v. Fautico, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (regarding a survey of how judges associated probability to the various evidential burdens); Clermont, *id*. at 482 and 484 (easier for judges to apply a deliberate and probabilistic approach to the standard of proof; noting also that judges have difficulty in conveying any standard of probability to a jury and juries have difficulty in quantifying the standards of proof); Bobby Greene, *Reasonable Doubt: Is It Defined by Whatever is at the Top of the Google Page?*, 50 J. Marshall L. Rev. 933 (2017) (noting inability of judges to quantify the reasonable doubt standard); and Gretchen B. Chapman & Eric Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Values* (2000) in Heuristics and Biases: the Psychology of Intuitive Thought 4-5 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds. 2002) (noting, in reference to numerical anchors that are uninformative but salient, that even judges agree that numbers are irrelevant but have an impact).

410 *See* Ronald Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 Miss. L.J. 279, 333-34 (2004). Bacigal's calibrations are within the context of a discussion about interpreting probable cause in a flexible way, citing Judge Posner's focus on zones rather than specific points in a spectrum.

3. Fair Probability (40% to 49%)
4. More Likely Than Not (51%)
5. High Probability (80% to 100%)

Irrespective of the challenge of identifying and assigning probabilistic numbers to the standards of proof, Clermont, for example, acknowledges that the law allows recovery upon much less than a 50% showing of probability.[411]

The discussion of heuristic calibration takes one closer to an understanding of what should be a potentially more principled and rational understanding of the disqualification standard's "might." To do so, there is a need to expand the horizons by considering two related, but distinct, standards of proof that are applied in the criminal law context: probable cause and reasonable suspicion.[412]

In the context of Fourth Amendment law,[413] "probable cause" is not what it appears to be. Probable cause is not synonymous with "probably." Probable cause signifies more than *bare* suspicion; nor does it require resolution of evidence according to a preponderance of the evidence or the more-likely-than-not standard.[414] Probable cause is understood as requiring a *reasonable ground* for belief.[415] Recognizing that probable cause is a fluid concept not easily reducible to a neat set of legal rules, Kiel Brennan-Marquez notes that the Supreme Court's reasoning in probable cause tracks the plausibility model of suspicion.[416]

This discussion takes us to the U.S. concept of reasonable suspicion, which has its roots in *Terry v Ohio*.[417] Craig Lerner noted that, in quantitative terms, and in comparison to probable cause on the spectrum of probability, reasonable suspicion

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411 *See* Clermont, *supra* note 401, at 356. *Consider, e.g.,* Lageman v. Zepp, 266 A. 3d 572, 597-99 (Pa. 2021) (Saylor, J., dissenting) (discussing the application of *res ipsa loquitur* when the evidence has not established negligence, citing Norris v. Phila. Elec. Co., 5 A.2d 114, 115 (Pa. 1939)).

412 The caveat here is that application of the standards of proof and relevant tests may be comparatively helpful, but one must always be sensitive to whether the use is appropriate to the context. *See* § I(D)(4), *supra*, regarding the factor of context. Of course, one never knows if or how a metric or value judgment is being interpreted and applied.

413 U.S. Const., amend. IV, provides: "The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

414 *See* Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical and Concrete Harms,* 73 Law & Contemp. Probs. 69, 72 (citing cases); and Lerner, *supra* note 406, at 460.

415 *See* Colb, *id.* at 72, noting also that the Supreme Court has not considered what numerical odds are sufficient to establish probable cause, *id.* at 75.

416 *See* Kiel Brennan-Marquez, *"Plausible Cause:" Explanatory Standards in the Age of Powerful Machines*, 70 Vand. L. Rev. 1249, 1265 (2019).

417 Terry v. Ohio, 392 U.S. 1 (1968) (probable cause not required to conduct a limited protective search for weapons when police, based on specific reasonable inferences, believe that criminal activity may be afoot and that the person with whom he is dealing may be armed and dangerous). *Terry* has since become immortalized as embodying the "reasonable suspicion" standard, although the Supreme Court's majority opinion did not use that term.

amounts to far less than 50%.[418] With its origins in English law and as explained in the Canadian case of *R v Kang Brown*, "A 'reasonable' suspicion means more than a mere suspicion, and something less than a belief based on reasonable and probable grounds." [419]

For our purposes, aside from its relatively lower-level quantitative aspect, the notion of suspicion is a fluid concept that reflects practical considerations of everyday life.[420] Regarding both standards (reasonable suspicion and probable cause), the requirement of a narrative, factual explanation based on the totality of circumstances presented is important. The standards are concepts designed to explain, *not* predict. Brennan-Marquez notes that the Supreme Court has long understood probable cause and reasonable suspicion in explanatory terms, *i.e.*, requiring articulation of data and information supporting one's inference or conclusion.[421] Essentially, identifying the governing standard of scrutiny with clarity, in conjunction with the requirement of factual articulation, would help to constrain discretion and subjectivity.

2. Reasons That Support a Clear and Strong Disqualification Standard

There is a need to re-interpret the appearance-based disqualification standard in a manner that re-balances the equation away from popular notions of probability or certainty. In doing so, we need to acknowledge the current unreflective jurisprudential approach and the importance of principled, analytical clarity. The operative disqualification standard—when a judge's impartiality might reasonably be questioned—should be interpreted more carefully and less restrictively than it has been. The critical issue is how one interprets and applies the modal "might," as modified by "reasonably." In consideration of the preceding discussion about levels of belief, the appropriate level of scrutiny should be *reasonable suspicion*— not likelihood or probability. The following reasons justify such an approach.

a. Textual and semantic fidelity, ordinary usage: The glaring aspect of the appearance standard is that "might" is not synonymous with, and does not have the same semantical meaning of, "would." The modal "would" is utilized frequently, without explanation or elaboration, in U.S. disqualification caselaw. To be clear, there is no semantic ambiguity in the disqualification standard's specification of "might." Whether "would" was considered by the drafters as an option, we do not know; in any event, the drafters specified "might." Although it is impossible to discern the actual intent or state of mind regarding how one uses or interprets language, we can presume that words are used in a way that is consistent with

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418 *See* Lerner, *supra* note 406, at 460.

419 *See* R. v. Kang Brown, [2008] 1 S.C.R. 456, at ¶ 75, cited in Terry Skolnick, *The Suspicious Distinction Between Reasonable Suspicion and Reasonable Grounds to Believe,* 47 Ottawa L. Rev. 223, 235 (2015-16).

420 *See* Brennan-Marquez, *supra* note 416, at 1265-66, citing Brinegar v. United States, 338 U.S. 160, 175 (1949) and Maryland v. Pringle, 540 U.S. 366, 371 (2003). The author, in discussing probable cause and suspicion, notes that numerical benchmarks may be unstable and imprecise. *Id.* at 1266 n.51.

421 Brennan-Marquez, *id.* at 1255. Author also notes that historically "probable" was more akin to "provable." *Id.* at 1253-54 nn. 9 and 10.

their plain meaning—similar to how we approach and differentiate *actual* from *apparent* bias.[422] In the application of the disqualification standard, there should be congruency between the language of the text and the ordinary meaning of the words chosen to implement the text. In modern American usage, "might" is a word that occupies a place on the continuum of *possibility*.[423] The proper interpretative approach is one that analyzes the disqualification standard from the perspective of possibility, not probability. Reasonable suspicion is a metric that is congruent with the plain and interpretive meaning of the ethical mandate's "might."

Adrian Vermeule provides prudent advice about interpretation in decision-making -- judges should stick close to the surface level or literal meaning of clear and specific texts, resolutely refusing to adjust those texts by reference to a judge's conception of textual purpose, drafters' understanding, public values and norms.[424] In addition, consistent with Vermeule's advice, judicial implementation of the semantically clear disqualification standard should avoid unnecessary and potentially distorting adjectival amplifications of the evidential standard. The standard for the perception of judicial impartiality should not be qualified or amplified by terms like "substantial," "significant," or "serious," which are often applied in an *ad hoc fashion* to the reasonable person's perception.[425] Similarly, application of the appearance standard should not be weakened or compromised by self-serving, balance-shifting procedural devices, such as presumptions.[426] If sufficient evidence is produced to undermine the presumption, the presumption should dissipate.[427]

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422 *Consider*, however, Silvia Zorzetto, *The Language of Legal Rules: Some Notes About Plain Meaning in Law* 10-12 (2013) (noting the relevance of context and citing instances when interpretation contradicts plain meaning), https://www.academia.edu/32601671/THE_LANGUAGE_OF_LEGAL_RULES_SOME_NOTES_ABOUT_PLAIN_MEANING_IN_LAW. *See also supra* notes 248 and 249.

423 *See* Bryan A. Garner, Garner's Modern American Usage 529 (3d ed. 2009). *See also* Theodore M. Berstein, The Careful Writer: A Modern Guide to English Usage 271 (1965) (in comparing "may" and "might," author notes that the latter "adds a greater degree of uncertainty to the possibility"). *See also supra* notes 248 and 249.

424 *See* Vermeule, *supra* note 10, at 168-81. *Consider also* Barrett v Commonwealth, 430 S.W.3d 337. 342 (Ky. 2015) (court adopts a plain language approach and concludes that "reason to believe," not probable cause, is the appropriate interpretation of the standard in Payton v New York, 445 U.S. 573 (1980)).

425 *See* cases cited in *supra* section II(B)(3). *Consider also* R v. Lifchus, [1997] 3 S.C.R. 320, at ¶ 26 (Can.) (with respect to the reasonable doubt standard, court says that explaining "doubt" through qualitative terminology such as "serious" or "substantial" should be avoided in order not to lead a juror to set an unacceptably high standard of certainty).

426 *See* Hill, *supra* note 105, at 1449-52 (in the context of religious endorsement cases, author noted the benefit of adopting procedural mechanisms to strengthen the reasonable observer heuristic, stating that presumptions can serve as tie breakers in close cases; however, they can be easily manipulated).

427 *See* Murl A. Larkin, *Article III: Presumptions*, 30 Houston L. Rev. 241, 241 (1993-1994) (presumption disappears upon rebuttal); Pines, *supra* note 134, at 106-09 (critical examination of the presumption of impartiality in the context of a jurist's problematic self-assessment of impartiality, which paradoxically represents a "biased impartiality" endeavor); and Marbes, *supra* note 144, at 298-302 (proposing a flexible re-balancing of the presumption of impartiality, including a weaker presumption for self-disqualification decisions); see Flamm, *supra* note 21, at § 4.5; and Yablon, *supra* note 201, at 227, 229 n. 7 (noting the "bursting bubble" theory of presumptions, *i.e.* once the party against

b. *Contextual adjustment of the metric:* Judicial impartiality is recognized as a value of the highest order, integral to the concept of a fair trial, a fair tribunal, and the public's confidence in our system of justice.[428] Accordingly, when such interests are implicated, the level of scrutiny should be adjusted to accommodate and protect those fundamental interests.[429] Fleming James suggests that in difficult cases, and to avoid a harsh or "unlovely" spectacle, courts may relax the requirements of proof.[430] In the specific context of apparent bias, the *Shankar* court stated:

> The point simply is this: there is a vital public interest in subjecting the decisions of those engaged in any aspect of judicial or quasi-judicial work to the most exacting scrutiny in order to ensure that their decisions are not only beyond reproach in fact and indeed from the perspective of a lawyer or a judge but also beyond reproach from the perspective of a reasonable member of the public. The inquiry should be directed from the perspective at whether the events complained of provide a reasonable basis for such a person apprehending that the tribunal might have been biased.[431]

Adjusting the level of scrutiny in accordance with the reasonable suspicion standard provides a sufficient baseline, as well as procedural flexibility, to protect the appearance of judicial impartiality in the difficult context of uncertainty, limited information, and the public's trust and confidence in the judicial system's integrity.

c. Minimizing the costs and risks of error: The recalibrated level of scrutiny (reasonable suspicion) provides protection from the harmful consequences of erroneous decision-making in disqualification cases. A recalibrated standard, faithful to the precept's text and values, would promote greater judicial caution in recusal matters and engender greater public confidence. Allocating the burden of uncertainty (especially when decision-making is dependent on the "objective" application of a vague metaphorical construct like the "reasonable" observer) is a challenging task. Vermeule has suggested various strategies, such as the *maximin criterion* and *satisficing*. In the former, some choices dominate others in the absence of probability information because the dominant choice produces better outcomes

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whom the presumption is raised meets a burden of production, the presumption "bursts" and falls out of the case; author notes major evidence treatises seem generally to endorse this view).

428 *See* Pines, *supra* note 134, at 103-09, and cases cited therein. As the cases from the common law countries herein demonstrate, the values are international.

429 *See* Yossi Nehustan, *The Unreasonable Perception of Reasonableness in UK & Australian Public Law*, III Indian J. Const. & Admin. L. 83, 108 (2019) (in the context of British and Australian law, author advocates that the level of scrutiny should be adjusted in relation to the interests at stake, *e.g.*, strict scrutiny when human rights are at stake); *see also* Bacigal, *supra* note 410, at 320-21 (in calibrating probable cause, it is important to identify the appropriate level of scrutiny by considering the importance of the interests).

430 *See* James & Perry, *supra* note 399, at 780-81.

431 *See Shankar* [2006] SGHC 194, at ¶ 64. *See also* Hill, *supra* note 105, at 1452 n. 211 (in her analysis of the reasonable observer in endorsement cases, Hill cites Professor Dorf's suggestion that there should be heightened scrutiny when an identifiable group of people take offense at the government's message of perceived inferiority).

than the outcome of the alternative, and never produces a worse outcome. [432] In the latter, rather than adopting a maximizing strategy to pick the "best" option, one decides, in the face of constraints, to pick an option that is simply "good enough," which can, as Vermeule notes, be a surprisingly good option for making accurate decisions.[433] The interesting aspect of these options is that the reasonable suspicion standard is an approach that serves a fundamental risk-averse principle that is often stated (but not sufficiently implemented) in disqualification cases – *i.e.*, when in doubt, the jurist should err on the side of caution and disqualify.[434]

d. *The "reasonable" safety valve*: In disqualification matters, judges seem to exhibit scorn for a claim that exemplifies "suspicion," often cavalierly linking it with the adjective "mere."[435] Sometimes, one senses that the real concern (misplaced) is with actual bias, often demonstrated by a defensive, good faith protestation of the jurist's unimpeachable impartiality. Australia decided to use different nomenclature and adopted a "reasonable apprehension" standard.[436] Whether one uses the terminology of apprehension or suspicion, the fundamental standard remains the same. *Reasonable* suspicion (or apprehension) is *not* mere suspicion -- it requires explanation and a careful articulation of the relevant facts and circumstances to support appearance-based recusal. Free-floating suspicion or unsupported belief will not, and should not, justify disqualification. Notwithstanding its semantically and psychologically slippery aspect,[437] "reasonable" is the indispensable anchor for principled decision-making in appearance-based disqualification.

e. *Comparative jurisprudence*: The discussion about the jurisprudence from the selected common law jurisdictions reflects a studious (and, at times, admittedly complicated) attempt to eventually reach a jurisprudential consensus in the quest for a prudent, principled, and practical standard governing apparent bias. In its application of the lay observer heuristic, common law countries have demonstrated a determination to protect cherished public values and promote public confidence. Whether the reasonable observer standard is considered in relation to "suspicion" or "apprehension," the common law jurisdictions have gravitated toward a calibration that reflects a lower level of probability (*viz.*, possibility).[438]

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[432] *See* Vermeule, *supra* note 10, at 175-76.

[433] *Id.* at 177-79. *See also* Re, *supra* note 16, at 1513-14 (suggesting an analytical framework for a clarity threshold, rooted in uncertainty, that would reduce a particular risk of judicial error and its consequences or maximize the odds of judicial accuracy; noting also that unpredictable rulings can be disruptive, yielding institutional and societal costs, *id.* at 1516).

[434] *See, e.g.*, Potashnick, 609 F.2d, at 1112; New York City Hous. Dev. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (doubts should be resolved in favor of recusal).The risk-averse rationale might arguably provide an underlying factor when an appellate court orders disqualification and reassignment after prior or repeated reversals. *Consider* U.S. v. Martin, 455 F.3d 1227 (11th Cir. 2006) and U.S. v. Torkington, 874 F.2d 1441 (11th Cir. 1989).

[435] *See, e.g., In re United States*, 666 F.2d, at 695 (properly noting the distinction); *In re Allied Signal*, 891 F.2d at 970 (disavowing mere suspicion of Caesar's wife as a standard); *Salemme,* 164 F.Supp.2d at 52 (rejecting the Caesar's wife analogy).

[436] *See Webb*, 181 C.L.R. 41, at ¶¶ 4, 10, and 11.

[437] *See supra* §1.

[438] The caveat, however, is that Canada seems to have formally adopted a higher ("more likely than not") approach. *See supra* notes 326-27; and Okpaluba & Maloka, *supra* note 20. It is worth noting that American caselaw will occasionally express the reasonable

f. Symbolic utility: Commentators have recognized the importance of the expressive aspect of a government's statements or actions.[439] Robert Nozick explains that the symbolic aspect of an action may sometimes be more important than a causal one and should be recognized as an important and independent factor in normative decision-making.[440] Ethics reflects the values we cherish and protect. Recusal decisions can attract public attention, especially if a case or jurist is high-profile. Just one instance of a controversial refusal to recuse can result in significant reputational (institutional and individual) harm. The loss of public trust and confidence is very difficult to repair or restore. Erring on the side of caution, based on clear ethical and jurisprudential principles, is the prudent course of action to maintain the public's trust and confidence in the rule of law.

C. Implementing the Reasonable Observer Heuristic – Channeling Discretion through Guidance

Judges have been placed in the difficult epistemic position of interpreting and applying a generalized, value-based, ethical standard with virtually no meaningful guidance. The approach in disqualification caselaw has been *ad hoc*, based on specific idiosyncratic facts, analyzed in the context of skeletal principles. U.S. caselaw and academic literature have not provided sufficient guidance. Naturally, whether specific guidelines would make an actual difference in decisional outcomes can never be definitively ascertained since it is impossible to discern actual intent or the mental processes of the judges involved in recusal decision-making. But such psychological impenetrability is no excuse for a lack of supportive clarifying information against which the rationality of judicial actions could be influenced and evaluated.[441]

To address the various allegations of short-comings (*viz.,* vague, unprincipled, too discretionary, exclusionary, and impressionistic) of the reasonable observer heuristic,[442] whether in the religious endorsement or recusal contexts, commentators have suggested procedural mechanisms, for example, adjusting the burden of proof and presumption of impartiality, evidential flexibility, a better balancing of policy interests, and refining the relevant tests, as well as training and education.[443] These suggestions have merit.

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observer's perception in terms of "suspicion." *See, e.g., Hadler,* 765 F. Supp. at 979 (disqualification standard protects against actual and reasonable suspicion of judicial partiality); David v. City and County of Denver, 837 F. Supp. 1094, 1096 (D. Colo. 1993) (court has duty to determine every semblance of reasonable doubt or suspicion).

439 *See Hill, supra* note 60 (discussing speech act theory and expressivism regarding social meaning and application of the reasonable observer heuristic in religious endorsement cases); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. Rev. 2021 (1995).

440 *See* Nozick, *supra* note 6, at 26-35.

441 *See supra* notes 161-63 (regarding, rules, standards, and categorical or *per se* rules).

442 *See, e.g.,* Choper, *supra* note 113, at 510-21 (regarding the religious endorsement test); and Moran, *supra* note 11 at 1234-37 (noting that the reasonable person concept may serve as a vehicle for importing discriminatory views into the heart of the legal standard).

443 *See, e.g.*, Hill, *supra* note 105, at 1449-52; Atrill, *supra* note 106, at 282-84; Hughes & Bryden, *supra* note 169, at 176 and 187; Thornburg, *supra* note 45, at 1641-45; and Robertson, *supra* note 351 (favoring bright line rules and procedural safeguards).

Categorical (or *per se*) rules are designed to provide more direction and limited latitude, as compared to generalized standards, often expressed in elusive terms like "reasonableness." [444] The issue of legislative-like elasticity attending the reasonable observer heuristic[445] could be more effectively addressed through the constraining role of explanatory commentary, which might ultimately promote greater sensitivity to and the internalization of ethical norms.[446]

Heuristics are designed to support decision-making. Accordingly, the following model commentary may provide a useful synthesis of essential principles regarding the reasonable observer heuristic in appearance-based recusal. The model commentary would guide recusal decision-making and discretion. The proposed commentary seeks to compensate for the regrettable and surprising lack of analytical clarity in appearance-based recusal jurisprudence.

Model Commentary

Impartiality of judgment is a bedrock principle of the justice system—it is a manifestation of judicial morality. A corollary principle is that justice must satisfy the appearance of justice. Aetna Life Ins. Co. v Lavoie, 475 U.S. 813, 825 (1986). When a judge's impartiality might reasonably be questioned, a judge has an ethical duty to disqualify (often referred to as recusal). This over-arching ethical mandate, separate from the other specific instances mandating disqualification, is referred to as the "appearance of impartiality" or the "apparent bias" standard. It is entirely distinct from disqualification based on actual bias, which is often hidden or unconscious (implicit bias).

The ethical focus is on appearances and the public's perception of judicial impartiality. The appearance of impartiality standard is said to be an objective one—implemented through the perspective of an imaginary "reasonable observer." The reasonable observer is a metaphorical construct, a heuristic (an analytical tool), that serves as the judge's guide in the neutral and fair assessment of the appearance of impartiality.

The reasonable observer is described as a lay member of the public (not a judge), one who is fair-minded and informed, one who is knowledgeable of the facts and circumstances relevant to the ethical inquiry. The reasonable observer should not be imbued with any specialized knowledge, expertise, or insider information; nor should the reasonable observer embody hypersensitivity or extremist views. While the reasonable observer is a useful fiction symbolizing a representative of the public— an average citizen of aggregate traits—it should not be inflexibly viewed as a monolithic representation or a sterile abstraction.

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444 *See* Daly, *supra* note 23; *cf.* Grodin, *supra* note 23 (considering the notion of "unreasonableness" when the decision-maker fails to provide intelligible reasons to justify a decision).

445 *See* Choper, *supra* note 113, at 520 (in endorsement cases, judges exercise substantial authority of a legislative-like nature).

446 *See* Brennan-Marquez, *supra* note 407, at 1256-57 (noting that explanatory standards vindicate goals that enable judges to navigate value-pluralism); Sunstein, *supra* note 439, at 2024-25 (discussing the potential of legal expressions to influence or even change social norms).

The metaphorical reasonable observer may, in appropriate cases, encompass more than one perspective. The legal and factual context of the case is relevant to the conception and application of the reasonable observer. In appropriate circumstances, when evidentially feasible, the reasonable observer heuristic should consider the reasonable perceptions of the parties and others, namely, those who might be reasonably suspicious or apprehensive as to the risk or possibility of judicial bias in a particular matter. Applying the heuristic is not an easy task. Oftentimes, reliance on the generalized, composite traits of the metaphorical "average" reasonable observer may be sensible and necessary.

The ethical appearance standard embodies possibility, not probability—specifically, whether a reasonable observer "might" reasonably question a judge's impartiality. The ethical standard reflects a level of belief or apprehension that is akin to "reasonable suspicion." It is not "mere" suspicion. The belief, perception, or apprehension must be reasonable, a critically important qualifier. A recusal challenge is a serious matter. Although the judge has an independent obligation to assess the appearance of impartiality, the burden is on the person who seeks disqualification. One who asserts the appearance of partiality must articulate specific facts that reasonably support a question of the jurist's impartiality. Generalized allegations, unsupported conjecture, or mere belief will not satisfy the appearance recusal standard.

Recusal decision-making, in response to a challenge, should be supported by a written or on-the-record summary by the jurist of essential facts and legal rationale(s). When there is an absence or insufficiency of facts to support disqualification, the motion to disqualify should be denied. When the facts and circumstances present a close question about the reasonableness of the recusal challenge, the jurist should exercise caution and recuse, even if the jurist maintains a good faith belief in his or her actual impartiality. It is important to recognize that appearance-based disqualification is concerned with perception and does not signify incompetence or lack of integrity of the jurist. Rather, recusal represents the fulfillment of a paramount ethical mandate, a foundational responsibility designed to safeguard the public's fragile trust and confidence in the judiciary and the rule of law.

One might question whether the proposed commentary would (or might) provide jurisprudential value. It is important to acknowledge that much of the American caselaw reviewed in connection with this article demonstrated reasonable and jurisprudentially justifiable outcomes, even when the analyses therein may have been conceptually vague or garbled (for example, minimizing or ignoring the centrality of appearances, or improperly collapsing an appearance analysis into one of actual prejudice, or inconsistently using and referring to a verbal metric that favors the challenged and presumptively favored jurist). Nevertheless, there are cases, which have been cited herein, in which a clarifying analytical framework, faithful to the text of the recusal mandate and its underlying policy, could have produced a different, more recusal-sensitive result.[447] These examples portend

[447] *Consider*, *e.g.*, *Parker,* 855 F.2d 1510 (complicated labor dispute involving the close relationship of the judge and his law clerk with defense counsel; judicial admission therein that a lay observer might believe in the favorable treatment of defendants); *Drexel-Burnam*, 861 F.2d 1307 (in a case involving allegations of financial interest and

the likelihood of other similar recusal dilemmas. As other commentators have suggested, it is often in the area of marginal or close cases— when reasonable persons disagree— that a better calibrated and clarifying heuristic can educate others and make a practical difference.[448]

Given the reported existence of bias in the judicial system,[449] including the challenging reality of implicit or unconscious bias,[450] a more analytically clear and

heightened public awareness, the concurring and dissenting jurist favored a less legalistic analysis that supported recusal); *Salemme*, 164 F. Supp.2d 49 (extensive factual, and self-defensive, narrative in which the court acknowledges a close question regarding the appearance of impartiality); *Smith*, 203 Ariz. 75 (involving judge's professional relationship with son and daughter-in-law of the murder victim, assessed in the context of "significant doubt"); *Lewis*, 826 N.E.2d 299 (involving a judge's prior tense and acrimonious relationship with defense counsel, assessed in the context of "serious doubts" that gravitated toward an actual prejudice assessment); *Smulls*, 71 S.W. 3d 138 (in a capital murder prosecution that generated multiple appeals involving recusal issues, case involved racially-tinged comments as well as questionable interactions with a judicial colleague; the concurrence/dissent, at 163, noted that the case demonstrated the wisdom of teachings of prior cases in which doubts as to judicial impartiality should be resolved in favor of recusal); and *Winkle*, 434 S.W.3d 300 (in a civil commitment case of an alleged sexually violent predator, involving the judge's questionable campaign comments and slogan about sexual predators and homosexuals, the analysis gravitated toward actual prejudice).

448 *See* Philip Bryden & Jula Hughes, *The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification*, 48 Alberta L. Rev. 569 (2011). Authors conducted an empirical study of the practices and attitudes of Canadian judges regarding judicial disqualification, noting that conceptual tools addressing judicial impartiality failed in "analytically marginal" cases; the survey included common scenarios, such as professional and personal relationships, prior judicial knowledge, prior trials and proceedings. Authors concluded that jurisprudence did not offer much guidance and that judicial sensibilities played a significant role. They suggested the need for the development of an improved analytical framework, along with rules and judicial education. *Consider also* Dana Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 Nw. U. L. Rev. 1277 (2023) (empirical, randomized blind field experiment regarding recusal in a limited context, *viz.*, political contributions; study revealed trial judges' failure to disclose financial interests or recuse in cases, many of which involved rulings in favor of the conflicted parties).

449 *See*, e.g., Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 Clev. St. L. Rev. 137 (2013); Resnick, *supra* note 44, at 1903 (noting widespread institutional discrimination regarding sex and race); Frank M. McClellan, *Judicial Impartiality and Recusal: Reflections on the Vexing Issue of Racial Bias,* 78 Temple L. Rev. 351 (2005); Craig Nickerson, *Gender Bias in a Florida Court: "Mr. Mom" v "The Poster Girl for Working Mothers,"* 35 Cal. W. L. Rev. 185 (2001) (concluding that gender bias permeates the family court system); Shaman, *supra* note 54, at 626-28 (regarding judicial racial, ethnic, gender, and religious bias); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts,* 44 J.L. & Econ. 285 (2001); Robinson, *supra* note 351 (noting the growing skepticism about the judiciary and its neutrality concerning politically sensitive topics); J. J. Harman *et al., Parents behaving badly: Gender Biases in the perception of parental alienating behaviors,* 30 J. of Fam. Psychol. 866 (2016).

450 *See,* e.g., Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?,* 84 Notre Dame L. Rev. 1195 (2009); John F. Irwin & David L. Real, *Unconscious Influences in Judicial Decision Making: The Illusion of Objectivity,* 42 McGeorge L. Rev. 1 (2010); Robinson, *id.* at 749, 762 (noting unconscious cognitive framing of issues

ethically solicitous and sensitive recusal framework can provide value.[451] Instead of unreflective reliance on a vague metaphorical muse, a more nuanced and realistic reasonable observer heuristic (one that recognizes the interests and concerns of our pluralistic and polarized society in appropriate situations), coupled with a recusal-sensitive evidentiary standard (one that rejects probability or certainty),[452] could provide greater conceptual clarity and utility in cases that, for example, implicate potentially volatile or controversial matters such as race, gender, religion, sexual orientation, or politics.[453] Of course, such a sanguine viewpoint is necessarily

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that support one's social identity). *Consider*, *e.g.,* Belton v. State, No. 8-2022 (Md., May 31, 2023) (respected appellate jurist's use of racially-tinged literary analogy created reasonable basis to suggest implicit bias requiring reversal).

451 As Professor Resnick notes, however, there is an inevitable inherent tension between contextual particularity and the urge for universals. *See* Resnick, *supra* note 44, at 1910 (in the context of feminist considerations of the judicial role). *See also supra* note 448 regarding empirical surveys which expose a hard reality about judicial impartiality. Another cautionary observation is relevant, that is, whether the vigorous pursuit of the appearance ethic and an unimpeachable judicial system may, paradoxically, contribute to what others have called "a culture of suspicion" producing an adverse impact on the public's trust and confidence in the integrity and legitimacy of the judicial system. *See* Anne Richardson Oakes & Hayden Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality,* 51 Santa Clara L. Rev. 573, 576-77 (2011) (analyzing the concept with respect to the judicial use of technical advisors in Europe; quoting the U.S. Conference of Chief Justices, the authors note that the uneasy relationship between appearance and reality is "arguably the defining problem of the modern age," *id.* at 620, n. 234). Concerns about exacerbating a culture of suspicion should be assessed in the context of a judicial system that demonstrates a commitment to vigilantly pursuing the fundamental ethic of judicial impartiality, in substance and appearance. Ethical transparency and accountability are enduring values that ultimately provide incalculable benefit for the rule of law, in both appearance and substance. *See also Liteky, supra* note 150.

452 *See supra* notes 351 and 352.

453 *Consider* Bryden & Hughes, *supra* note 448, at 600-01 (noting that context is important; sensitive or high profile cases may require a heightened level of scrutiny). One could contend that the application of a better delineated and calibrated ethical appearance precept might have supported pro-recusal determinations in the following cases, which involved high profile or sensitive contexts (such as transgender rights, ethnicity, race, religious beliefs, and politics and law enforcement):

See Jackson v. Valdez, 2019 WL 6250779 (N.D. Tex, 2019) involving a transgender plaintiff alleging violations of her constitutional rights by Texas correctional officials in connection with an invasive body search during pre-trial custody. Plaintiff sought recusal based on the trial judge's history of multiple statements and advocacy, including legislative testimony, made when he served as deputy attorney general. The trial judge summarily denied the recusal motion concluding that a well-informed, thoughtful, and objective observer would not have questioned the judge's impartiality. The appellate court affirmed, noting that prior involvement and advocacy in high profile cases, without more, involving a group of people with which the plaintiff identifies, is an insufficient basis for recusal. (One could reasonably say that, given the multiple instances of prior advocacy, the appearance-recusal issue should not have been minimized as one simply involving prior employment. *See* Flamm *supra* note 21, at § 10.6 regarding the potential impact of multiple, "sum of zeros," allegations.) However, in another transgender case, the refusal to recuse was arguably supportable. *See* Soule v Conn. Ass'n of Schools, litigation which challenged Connecticut's transgender athletic policy.

The trial judge admonished counsel (associated with a reputedly anti-LGBT firm) about using terminology that was needlessly provocative and disrespectful of gender identity. The case was eventually dismissed as non-justiciable and moot. *See* Case No. 3: 20-cv-00201 RNC (D. Conn. Apr. 25, 2021). *And cf.* Kristie Higgs v Farmer School and the Archbishops Council of the Church of England, [2022] EAT 101 (July 5, 2022), a case involving the dismissal of a teacher regarding statements that reflected her religious beliefs (critical of LGBT issues). The Employment Appeal Tribunal, applying the fair-minded reasonable observer test, recused Edward Lord, a trans rights activist, because of public statements he had made on Twitter, which in the Board's view presented the real possibility of unconscious bias (¶¶ 51-52), notwithstanding the jurist's protestations of his actual impartiality.

In Jitendra J.T. Shah v. Tex. Dept. of Criminal Justice, Civ. Action H-12-2126 (S.D. Tex., Sept. 16, 2013), a Hindu plaintiff sought the trial judge's recusal because of his pre-trial remarks that mentioned Hitler and racial identity. The plaintiff's litigation alleged racial and national origin discrimination. While the judge's questionable refusal to recuse seems to have been predicated on an actual prejudice rationale, the ultimate outcome (judgment for defendant) appears ultimately supportable given plaintiff's failure of proof.

Idaho v. Freeman was a very publicized case raising the politically sensitive issue of the constitutional validity of Idaho's ratification of the Equal Rights Amendment, which the Mormon Church strenuously and officially opposed. Recusal was sought because the trial judge had occupied a high leadership position as a regional representative in the Mormon Church, a position of responsibility considered akin to a cardinal in the Catholic Church. The trial judge asserted his actual impartiality and denied the recusal request. *See* 478 F. Supp. 33 (D. Idaho, 1979) and 507 F. Supp. 706 (D. Idaho 1981). Regarding this case and the topic of religion and recusal, *see* Richard B. Sapphire, *Religion and Recusal*, 81 Marq. L. Rev. 351 (1998); Gwenda M. Burkhardt, *Idaho v. Freeman – Judicial Disqualification: The Effect of Religious Leadership on Judicial Impartiality*, 15 J. Marshall L. Rev. 243 (1980) (noting that the trial judge's recusal decision undermined public confidence and was widely criticized). *Consider also* John Garvey & Amy Comey, *Catholic Judges in Capital Cases,* 81 Marq. L. Rev. 303 (1998).

Politicized matters can generate considerable public scrutiny of the judiciary's impartiality when a recusal challenge is presented. In discussing the growing skepticism of the judiciary's neutrality on politically sensitive topics, Cassandra Burke Robertson offers two cases, one from New York and the other from Ohio. In the New York litigation, involving the legality of New York City's controversial stop-and-frisk policy, the appellate court stayed the trial judge's ruling and disqualified her from the case because of the trial judge's prior statements and actions that might have led a reasonable observer to question the judge's impartiality. *See* Ligon v. City of New York, 736 F.3d 118, 124 (2d Cir. 2013). As Robertson notes, *supra* note 351, at 742, the forced disqualification was heavily criticized. And in the Ohio matter, involving a constitutional challenge to Ohio's regulations pertaining to abortion clinics, Ohio Supreme Court Justice Kennedy rejected calls from pro-choice groups for her recusal. The recusal challenge focused on the justice's speech before a right-to-life organization and a questionnaire she completed for a right-to-life organization, in which she affirmed her agreement with the positions advocated by the pro-life organization. *See* Robertson, *id.* at 742-43, referring to Capital Care Network of Toledo v. State of Ohio Dep't of Health, 58 N.E. 3d 1207 (Ohio Ct. App. 2016). Although no formal recusal motion was filed, grievances were filed. See Robertson, *id.*

For helpful and extensive commentary regarding recusal principles and caselaw relevant to these broad areas, *see* Flamm, *supra* note 21, at §§ 35.1 to 37.6 (background and experience), §§ 28.1 to 30.8 (business and professional relationships), §§ 31.1 to

tempered by the reality that it is difficult, if not impossible, to expose (yet alone prove) the hidden presence of actual bias or to assess whether the decision-maker has, in fact, properly reached a value judgment in accordance with the appropriate and elusive ethical standard. Nevertheless, as to the suggested model commentary, it is worthwhile to remember that the perfect can indeed be the enemy of the good. One can only aspire, not guarantee.

Conclusion

Judicial impartiality and its corollary, the appearance of impartiality, are fundamental to the rule of law and the public's fragile trust and confidence in the judicial system. Justice must be impartial in both substance and appearance. It is remarkable that, unlike the approach and head-spinning epistemic struggles of our common law relatives discussed herein (Australia, Canada, Singapore, South Africa, and the United Kingdom, which share our ethical and jurisprudential values), little judicial or academic analysis has been devoted in the United States to understanding or explaining the appearance-based ethical standard that mandates judicial disqualification (recusal) when a judge's "impartiality might reasonably be questioned." There is a pressing need for greater analytical clarity.

The over-arching and semantically simple appearance mandate (also referred to herein as a standard or precept) is implemented in judicial disqualification cases through the heuristic device of the metaphorical "reasonable observer," a descendant of the common law's venerable Reasonable Man. As a result of the perplexing analytical void in recusal caselaw, the application of the heuristic has facilitated considerable judicial latitude that paradoxically subjectivizes the so-called objective ethical standard governing recusal. The regrettable result has been inconsistent, conclusory, and jurisprudentially confusing decision-making. With little or no guideposts, other than the enigmatic fictional abstraction of the "reasonable observer," judges must somehow find their way through a mysterious process that imaginatively interprets the mysterious wisdom whisperer. The challenging process impacts both the jurist's ethical responsibilities and the due process rights of the litigants. Through the make-believe perspective of the vague, fair-minded, and informed observer, judges have had to adopt an *ad hoc* approach to appearance-based disqualification decision-making. It is a decisional process that might be compared to magical realism – more fittingly, "magical legalism" – one that mixes fact with fiction to interpret a reality.

Significantly (perhaps through interpretive habit, a collective consciousness, or inattention), judges have subtly reengineered the plain text of the ethical mandate, particularly its critical verbal fulcrum (the modal "might"). There has been a semantically interpretive plasticity that has resulted in the transmogrification of the ethical standard – jurists have adopted, perhaps unwittingly, a higher level of belief ("would"). Fortified by a presumption of judicial impartiality, the reengineering essentially becomes a probabilistic approach that ultimately re-balances the recusal judgment scale to the benefit of the "objective" decision-maker, the one who is the adjudicator and subject of the recusal challenge.

34.4 (social relationships), and §§ 5.1 to 5.4 (class bias).

There should be greater recognition and understanding of what has occurred. Specifically, there should be a clear re-orientation in our jurisprudence that rationally reflects and implements the plain textual meaning of the ethical mandate and its underlying value—*i.e.*, preserving and protecting the public's fragile trust and confidence in our justice system. *First,* the metaphorical reasonable observer heuristic should be better identified and explained. *Second*, the precept's specific governing metric ("might"), regarding the perception or apprehension of apparent judicial bias, should be properly understood to denote *reasonable possibility* (not probability or certitude or "mere" suspicion).

After discussing and synthesizing the relevant jurisprudential-philosophical foundations and principles, as well as relevant recusal caselaw (American and common law), this article attempts to provide greater analytical clarity regarding the foundational principle of judicial impartiality. It culminates in a pragmatic proposal, in the form of a succinct model commentary, to accompany the governing ethical mandate. This model commentary, clearly recusal-sensitive, could provide much needed guidance to judges in more fully understanding, interpreting, and honoring their bed-rock ethical mandate of the appearance of impartiality. At a time in which the integrity of judicial decision-making and the rule of law are assuming increasing importance and scrutiny in our society, the public's trust and confidence must be of paramount importance.

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From Crown Privilege to State Secrets[1]

William G. Weaver III
Louis Fisher[2]

ABSTRACT

The state secrets privilege is the most formidable evidentiary privilege available to the United States government. Available only to the executive branch, it is used to protect national security information from disclosure during litigation, and is habitually acquiesced to by courts. Once invoked, the privilege prevents covered material from being put into evidence that touches sensitive matters of national security. It is apparent that this privilege is subject to abuse by the executive branch to shield activities and personnel from judicial scrutiny and legal inquiries for reasons other than to protect national security. The privilege derives from British and Scottish doctrines of Crown Privilege that allow government to withhold evidence from legal proceedings to protect the public interest. The derivation of the state secrets privilege from the tradition of Crown Privilege has never been thoroughly explored. This article traces the influence of Crown Privilege in the development and evolution of the state secrets doctrine in the United States.

KEYWORDS

Secrecy, State Secrets, Crown Privilege

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[1] This article is dedicated to the wonderful and important work of Steven Aftergood for the Federation of American Scientists and his Project on Government Secrecy, from 1991-2021 (https://fas.org/issues/government-secrecy/).

[2] William G. Weaver is Director and co-founder of the Patti and Paul Yetter Center for Law at the University of Texas at El Paso. Professor Weaver's research focuses on executive branch secrecy policy, governmental abuse, and law and bureaucracy. He attended the Defense Language Institute for training in Russian language, Cryptologic Warfare School, and the University of Virginia for his J.D. and Ph.D. He worked at intelligence collection and analysis sites in Augsburg, Germany (1977-1980), and West Berlin (1980-1984). In Berlin, he created a novel (for the time) mass data analysis project designed to glean useful intelligence concerning Soviet armed forces from quotidian bits of intercepted data. His articles have appeared in *American Political Science Review*, *Political Science Quarterly*, *Virginia Law Review*, *Presidential Studies Quarterly*, *Journal of Business Ethics*, *Organization* and other journals. He has co-authored several books on law and political theory, including *Presidential Secrecy and the Law* (with Robert Pallitto) (Johns Hopkins U.P., 2007).
Louis Fisher is Visiting Scholar at College of William and Mary School of Law. He worked for four decades at the Library of Congress as Senior Specialist in Separation of Powers (Congressional Research Service, from 1970 to 2006) and Specialist in Constitutional Law (the Law Library, from 2006 to 2010). During his service with CRS he was research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. Fisher's specialties include constitutional law, war powers, budget policy, executive-legislative relations, and judicial-congressional relations. Among his many published works are: *Constitutional Conflicts Between Congress and the Pres*ident (6th ed. 2014), *American Constitutional Law* (with Katy J. Harriger, 12th ed. 2019), *Presidential War Power* (3RD ED. 2014), *Political Dynamics of Constitutional Law* (with Neal Devins, 6th ed. 2019), *The Constitution and 9/11: Recurring Threats to America's Freedoms* (2008), *The Supreme Court and Congress: Rival Interpretations* (2009), *On Appreciating Congress: The People's Branch* (2010), *Defending Congress and the Constitution* (2011), *On the Supreme Court: Without Illusion and Idolatry* (2013), and *The Law of the Executive Branch: Presidential Power* (2014).

CONTENTS

> "That the king's little-finger should be heavier to them than the loins of the law."[3]
>
> — Thomas Wentworth, 1st Earl of Strafford

> "Shall every subordinate in the department have access to the secret, and not the presiding officer of justice?"
>
> — John H. Wigmore[4]

I. Introduction

In a 1998 hearing, Senator John Kerry asked Deputy Attorney General Randolph Moss if a President signed a specific, classified, illegal finding authorizing the assassination of a foreign head of state, would an Executive branch employee be authorized to report the act to law enforcement or members of Congress. Moss's astonishing reply was that federal employees would not be authorized to report the crime, implying that anyone who did so would be subject to removal or criminal prosecution.[5] It is a truism that in democracies the people's effectiveness in managing their elected officials is contingent on the availability of accurate knowledge of what they are doing in their official duties. Yet the United States is a country besieged by secrecy: warrantless electronic surveillance,[6] U.S. kidnapping of foreign nationals and rendition to torture,[7] U.S. held detainees kept in secret and out of court reach,[8] unparalleled levels of classified information,[9] retreat from the

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3 Quoted in 3 *Howell's State Trials*, "The Trial of Thomas, Earl of Strafford, Lord Lieutenant of Ireland, for High Treason" 1381, at 1421.

4 8 John Henry Wigmore, Evidence in Trials at Common Law § 2379 (3d ed. 1940).

5 *Disclosure of Classified Information to Congress*: Select Committee on Intelligence. Hearing 105-729. 105th Cong., 2d Sess. (1998)

6 Title VII, Section 702 of the Foreign Intelligence Surveillance Act (FISA), *Procedures for Targeting Certain Persons Outside the United States Other Than United States Persons* (50 U.S.C. sec. 1881a) §702 (Reauthorized 2019) provides for surveillance of foreign nationals for intelligence purposes.

7 "Extraordinary rendition" is a euphemism. It is not rendition at all, since there is no legal process used or implicated. It is kidnapping and transfer of people deemed terrorists to third parties, who then torture those kidnapped to obtain information concerning terrorist operations, personnel, methods, and activities. *Zubaydah v. United States* (595 U.S. __ (2022)) is the most recent case to come to broad national attention. The U.S. Carried out renditions to torture during the early 2000s, and there is no evidence of recent use of "extraordinary rendition."

8 *See* report of the Senate Select Committee on Intelligence: *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (S. Rep. No. 113-288, (2014) and *Zubaydah v. U.S.* 20-827 (2022)

9 *See, e.g.*, *Statement of J. William Leonard, Former Director, Information Security Oversight Office*. He noted: "[I]n the years since 9/11, we have seen successive administrations lay claim to new and novel authorities and to often wrap these claims in classification. This can amount to unchecked executive power…" Committee on Oversight and Government Reform (House) 114th Cong. 2d. Sess. December 7 (2016) (No. 114-174) (https://www.govinfo.gov/content/pkg/CHRG-114hhrg26177/html/CHRG-114hhrg26177.htm)

Freedom of Information Act,[10] retaliation to silence whistleblowers for attempting to report embarrassing information or illegal activities,[11] the use of secret evidence against criminal defendants,[12] refusal to release information concerning extra-judicial killings by the U.S. that target U.S. citizens,[13] and the refusal to release even unclassified information.[14] Various statutes, legal tools, and administrative procedures promise to make large expanses of governmental activity open to inspection. Yet these may all be swept away through the incantation of classification power that withdraws information from public access at the application of a label. And that label is talismanic. It assures that material will not be subjected to judicial inspection or production to triers of fact, regardless of court, litigant, or public need for that material or the severity of the matters addressed. There is also an element of "magical thinking," as in the infamous reassertion of classification of the Pentagon Papers even after they had been published in The New York Times.[15] Such occurrences are concrete examples of Max Weber's well-known observation that the "concept of the official secret is the specific invention of bureaucracy, and nothing is so fanatically defended by the bureaucracy."[16]

Recently, in a culminating decision to a seventy-year journey of judicial self-abnegation, the U.S. Supreme Court found that publicly available information vetted by governments, attested to by participants in torture, and reported by the most respected news organizations in the world, is inadmissible in the face of government assertion of the state secrets privilege.[17] Information available at the corner bodega news stand, and undeniable as a matter of fact, is unavailable to a trier of fact in suit where the plaintiff truthfully and accurately claims illegal torture at the hands of the United States government.[18] The Court held that the state secrets privilege may exclude evidence at trial "even if [the information is] already made public through

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[10] For a recent lament, *see Undermining the FOIA: Less Information, Less Oversight* Editor & Publisher, Oct. 31, 2022. (https://www.editorandpublisher.com/stories/undermining-the-foia-less-information-less-oversight,240237)

[11] For example, see Department of Homeland Security reporting on whistleblower investigations: https://www.oig.dhs.gov/reports/whistleblower-retaliation-reports-of-investigation.

[12] The 1996 Antiterrorism and Effective Death Penalty Act established a special court to hear confidential evidence in deportation cases. The Classified Information Procedures Act preserves defendants' rights while protecting classified information in criminal trials.

[13] Abdulrahman al-Awlaki, sixteen at the time of his death, was killed by a U.S. drone strike in Lebanon in 2014. Awlaki's father was similarly killed two weeks earlier in Yemen. The younger al-Awlaki is not known to be a terrorist, and government officials claimed he was not the target of the strike. His eight-year-old half-sister died in a raid ordered by President Trump in 2017 in Yemen.

[14] See Department of Defense Instruction 5200.48 Controlled Unclassified Information (CUI) (March 6, 2020).

[15] New York Times v. United States, 403 U.S. 713 (1971).

[16] From Max Weber: Essays in Sociology 233 (H.H. Gerth & C. Wright Mills, trans., eds. & Introduction, Oxford U.P., 1946.

[17] *Zubaydah v. U.S.* 595 U.S. ___ (2022).

[18] Confirmatory sources include a Senate Select Committee report, testimony of former employees for the U.S. Government, and findings by the European Court of Human Rights. *See*, slip opinion, *U.S. v. Zubaydah,* No. 20–827 at p.3.

unofficial sources."[19] This decision calls to mind doctrines of "official truth" in systems of government that are far from the spirit of our Constitution and founding principles of the United States. This is an extraordinary result in a democracy that constitutionally affirms that the truth cannot be confiscated from the public by government edict.

In addition to a remarkable demeaning of judicial responsibility and authority, the decision is a dangerous surrender of law to executive power. At the use of a classification stamp by the humblest executive branch employee or member of the military, information is withdrawn from judicial availability and justice is defeated. As Justice Robert Jackson noted in another case involving executive power, "the principle lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[20]

The terrorist attacks of September 11th sped up the shift toward greater executive branch secrecy that had its origins decades ago. Richard Nixon, of course, is infamous for his secret, and illegal activities: the Huston Plan,[21] Watergate, "enemies of the state" list,[22] and the warrantless surveillance of people on that list. No account would be complete without at least mentioning Richard Nixon's infamous dictum said to interviewer David Frost, "When the President does it, that means that it is not illegal."[23] David Cole noted that this dictum met an update with George W. Bush and became "when the Commander-in-Chief does it, it is not illegal."[24] Presidents and the executive branch historically engage in warrantless surveillance and wiretap of citizens.[25] Nixon was in the transition era between a personal presidential agenda executed by a few trusted advisers and an institutionalized network of executive secrecy fueled by vast resources.

Post-Nixonian efforts to reign in presidential actions and subject them to greater oversight resulted in the establishment of the intelligence oversight committees in Congress[26], the enactment of the Foreign Intelligence Surveillance Act,[27] and aggressive congressional investigations that revealed embarrassing executive branch

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19 *U.S. v. Zubaydah,* No. 20–827 slip opinion at p.3.

20 Korematsu v. United States 323 U.S. 214, at 246 (Jackson, J. dissenting).

21 "The Huston Plan," named for its author Tom Huston, outlined "domestic security" actions authorized by President Richard Nixon that included "surreptitious entry – breaking and entering in effect – on specified categories of targets" (*Conservative Architect of Security Plan: Tom Charles Huston*, N. Y. Times, May 24 1973, p. 34). Notably, Huston said the National Security Agency backed the plan (*NSA Backed 'Huston Plan' for Illegal Intelligence Activities*, Wash. Post, March 3, 1975, front page).

22 A list of 120 people classed as "Political Opponents" singled out for plans of harassment and retribution for perceived harms done to Nixon (*See* Enemies list.info "The Complete, Annotated Nixon's Enemies List") https://www.enemieslist.info/list1.php.

23 Interview by David Frost, May 19, 1977.

24 David Cole, 13 Wash. & Lee J.C.R. & Soc. Just. 1, pages 1-2 (2006)

25 For nearly a century Presidents and their executive branch agencies have wiretapped subjects without warrant. *See* Elizabeth B. Bazan & Jennifer K. Elsea, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* (Congressional Research Service, Jan. 5, 2006).

26 Senate Select Committee on Intelligence Responsibilities and Activities grew out of the "Church Committee" in 1975, and H.R. 658 created the House Permanent Select Committee on Intelligence in 1977.

27 50 U.S.C. ch. 36.

activity.[28] Yet the adversary was no longer a cabal of errant presidential associates, but an extensive bureaucratic enterprise allied by an interest in maintenance of secrecy. Presidents had powerful means at their disposal to shield themselves from what was frequently characterized as an encroachment on constitutionally allocated presidential powers.[29] Since the 1970s the entire intelligence and investigative apparatus of the United States has been shifting in alliance with presidential power.

Louis Fisher once commented that the separation of powers between Congress and the President was probably less than that between the President and the bureaucracy. But in matters of national security the bureaucracy and the presidency found their friendship. Over time, as the opaque areas of government expand, administrators and bureaucrats find themselves utilizing presidential privileges and cover in proliferating ways to prevent oversight functions by Congress and the courts. The attacks of September 11, 2001 provided a great deal of legitimate reason to reconfigure responsibility and changes to U.S. security committed to the executive branch.

In areas where secrecy is the ordination of power, bureaucrats are better served by cosseting themselves to theories of secrecy that revolve around presidential authority to withhold information. In the last several decades both the bureaucracy and the institution of the presidency have coinciding powerful interests in the maintenance of secrecy.[30] The executive branch has many means for preventing the disclosure of information to courts, Congress and the public. But in the arsenal of tools available to presidents to keep secrets, the state secrets privilege stands above all else. This privilege, the most powerful available to the President, descends from British monarchical prerogative. It is crown power imported into United States law in response to cold war era needs to shield military and intelligence information.

Presidents initially resorted to the privilege sparingly yet "every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."[31] The "repetitions" were few until the late 1970s, but since that time use of the privilege expanded.[32] A common law evidentiary doctrine, it appears at first to be a rather unremarkable device. This is deceptive, for it is the firewall that allows the President and administrative agencies to engage in secret activities with confidence that what they do will remain secret.

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28 For example, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (The Church Committee) in 1975. The full text of the report is available at: https://archive.org/stream/finalreportofsel01unit/finalreportofsel01unit_djvu.txt

29 See, Office of Legal Counsel memoranda: *Common Legislative Encroachments on Executive Branch Authority* (July 27, 1989); *The Constitutional Separation of Powers between the President and Congress* (May 7, 1996).

30 The now discontinued blog, "Secrecy News," for The Federation of American Scientists, carried out comprehensive coverage of government secrecy activity and policy, as well as engaging in incisive analysis of the government penchant to make as little information as possible available to the public. Steven Aftergood was single-handedly responsible for this blog. It was, and still is, a wonderful resource. The entries and associated files remain available online at fas.org.

31 *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J. dissenting).

32 *See, e.g.*, *Restoring the Rule of Law,* Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, One Hundred Tenth Congress, Second Session, Sept. 16, 2008.

The privilege rarely fails or meets with substantial judicial scrutiny, and it developed into a serious threat to traditional constitutional understandings and balance of powers between the branches of government.[33] It is also the envy of nongovernmental defendants who sometimes try to invoke the privilege absent executive branch authorization. AT&T, for example, sought to invoke the privilege before the Vermont Public Service Board. The company acknowledged the privilege is for the executive branch to assert, but argued that notification to the Board "that the information [sought] has a security classification should mandate the same end."[34]

Other than the scarce exception, the privilege is invariably fatal to efforts to gain access to covered documents. It is hardly surprising that such an effective tool would tempt Presidents to use it with increasing frequency and in a variety of circumstances. Concerning the few times assertion failed, two cases were an obvious misuse of the privilege to protect unclassified Department of Commerce information under the administration of Ronald Reagan.[35] In a third case, *Yang v. Reno,*[36] the court found that the privilege had been incorrectly asserted but indicated that it would be upheld on remedy of the pro forma mistakes.[37] In *Halpern v. United States,*[38] a court of appeals found that an action under the Invention Secrecy Act of 1951[39] could conceivably go forward at an in camera trial and noted that "we are not convinced that [such a trial is] undesirable or unfeasible."[40] But the *Halpern* court

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33 In canvassing the reported cases on use of the privilege, it has only ultimately failed on four occasions. Two cases concerned an obvious misuse of the privilege to protect unclassified Department of Commerce information under the administration of Ronald Reagan (*Republic Steel v. United States*, 3 C.I.T. 117 (1982); *U.S. Steel v. United States*, 6 C.I.T. 182 (1982)). In a third case, *Yang v. Reno,* 157 F.R.D. 625 (M.D. Penn. 1993), the court found that the privilege had been incorrectly asserted (Id., at 633), but indicated that the privilege would be upheld on remedy of the pro forma mistakes. (Id., at 635). In *Halpern v. United States* a court of appeals found that an action under the Invention Secrecy Act of 1951 (35 U.S.C. 181 et seq.) could conceivably go forward at an *in camera* trial and noted that "we are not convinced that [such a trial is] undesirable or unfeasible" (Id., at 43). But the Halpern court reached further: "The assertion by the United States of its privilege with respect to state secrets is . . . governed by similar considerations [as discussed concerning a secret trial under the Invention Secrecy Act]. Congress has created rights which it has authorized federal district courts to try. Inevitably, by their very nature, the trial of cases involving patent applications placed under a secrecy order will always involve matters within the scope of this privilege. Unless Congress has created rights which are completely illusory, existing only at the mercy of government officials, the act must be viewed as waiving the privilege. Of course, any such waiver is dependent upon the availability and adequacy of other methods of protecting the overriding interest of national security during the course of a trial." (Id., at 43). But this precedent has never been utilized in any other case concerning the privilege.

34 2006 Vt. PUC LEXIS 155 Vermont Public Service Board September 18, 2006, Order Entered Docket No. 7193

35 *Republic Steel v. United States*, 3 C.I.T. 117 (1982); U.S. Steel v. United States, 6 C.I.T. 182 (1982).

36 *Supra*, note 33.

37 *Id*. at 635.

38 258 F.2d 36 (2d Cir. 1958).

39 35 U.S.C. 181 et seq.

40 *Halpern*, *supra* note 38, at 43.

reached further, ordering a secret trial on patent rights.[41] The *Halpern* precedent is orphaned, and no other court has ordered a similar remedy.

Unlike executive privilege and the deliberative process privilege or other powers to withhold information from courts, Congress and the public, the state secrets privilege is absolute, and is not balanced against demonstrated need by litigants for the requested information.[42] The only provision for secrecy found in the Constitution allows Congress to withhold information from the published record of its activities (Art. I, §5), and with respect to the Executive branch the Constitution is completely silent about secrecy. Yet Presidents, beginning with Washington, have asserted a privilege to withhold information from Congress and the public, and have been consistently vague about the grounds for exercising this secrecy.[43]

Unlike executive privilege and the deliberative process privilege or other powers to withhold information from courts, Congress, and the public, courts treat the state secrets privilege as absolute: it is not balanced against demonstrated need by litigants for requested information.[44] It is frequently characterized as an ancient privilege[45] with roots deep in Anglo-American law, but the formal legal recognition

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41 *Id*.

42 For example: *Trulock v. Wen Ho Lee*, 66 Fed. Appx. 472, 475-76 (4th Cir. 2003) ("The privilege is absolute, 'rendering the information unavailable'"). *In re* Under Seal, 945 F.2d 1285, 1287 n.2 (4th Cir. 1991))("the privilege renders the information unavailable regardless of the other party's need in furtherance of the action"); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) ("The privilege is absolute, and 'no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege'."); *Landry v. FDIC*, 340 U.S. App. D.C. 237, 248 (D.C. Cir. 2000) ("We note that decisions involving the more sensitive and absolute privilege for state and military secrets. . ."); *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003) ("The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity.").

43 Thomas Jefferson's account of a discussion in a cabinet meeting called by President Washington concerning a House committee's request for information relating to General St. Claire's campaign against Native Americans noted the following:

> [The President] ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion.

Jefferson also observed that the request is improperly made by Congress directly to the "Head of a Department." The request should be made addressed to the President. (1 The Writings of Thomas Jefferson 303 (Lipscomb ed., 1905).

44 For example: *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003) ("The privilege is absolute, and 'no competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege'."); *Landry v. FDIC*, 340 U.S. App. D.C. 237, 248 (D.C. Cir. 2000) ("We note that decisions involving the more sensitive and absolute privilege for state and military secrets. . ."); *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003) ("The state secrets privilege is an absolute privilege and cannot be overcome by a showing of necessity."); *see* cases cited in note 41.

45 Wright and Graham note that "this supposed antiquity is itself a justification for the state secrets privilege," but also say that statements proclaiming the privilege as ancient and "'universally recognized'. . . [are] hyperbole [that] inspires skepticism, particularly

of the privilege in the United States is little more than seventy years old.[46] It has never been authorized or modified by statute,[47] and relies only on the common law for its support.[48] In recent decades the privilege has risen in importance and frequency of use[49] and is resorted to by presidents and administrators to not only protect national security information but to also prevent disclosure of embarrassing material or evidence of government criminal activity.[50] For example, President George W. Bush used the privilege to stymie legal action against the government concerning National Security Agency warrantless surveillance of United States citizens,[51] to stop Title VII discrimination suits against intelligence agencies,[52] to prevent information escaping about the kidnapping and rendition of foreign nationals to torture,[53] and a host of other matters.

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when . . . that historically the privilege has been seldom invoked." Federal Practice and Procedure, § 5663 *Policy of the Privileges*.

46 The privilege was adopted and a procedure for its assertion prescribed by the U.S. Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953).

47 A congressional effort to bring the rule under statutory control in 1973 failed. *See* Wright and Graham, *supra* note 44, *Rejected Rule 509 of the Federal Rules of Evidence*.

48 *See, e.g*., *Trulock v. Wen Ho Lee*, *supra* note 41, at 475, ("Under the common law state secrets privilege, the government may prevent disclosure of information in a lawsuit. . ."); *Kasza v. Browner*, 133 F.3d 1159, 1167 (9th Cir. 2003) (". . . the state secrets privilege is an evidentiary privilege rooted in federal common law"); *In re U.S.*, 277 U.S. App. D.C. 37, 39 ("The state secrets privilege is a common law evidentiary rule").

49 *See* L. Fisher, In the Name of National Security: Unchecked Presidential Power and the Reynolds Case 245 (2006); A. Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931 (March 2007); M. Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 Admin. L. Rev. 131 (2006) 133-36; W. Weaver & R. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101-02 (2005). Compare these claims with R. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 Geo. W. L.R. 1249 (2007), at 1299-1301.

50 *See, e.g.*, *Barlow v. United States*, Cong. Reference no. 98-887X (Court of Federal Claims 2000); *Halkin v. Helms*, 598 F. 2d 1 (D.C. Cir. 1979); *Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590 (Dist. Maryland 1991); *Molerio v. Federal Bureau of Investigation*, 749 F.2d 815 (D.C. Cir. 1984); *Patterson v. FBI*, 893 F.2d 595 (3d Cir. 1990); *Tilden v. Tenet*, 140 F. Supp 2d 623 (E.D. Virginia 2000).

51 Hepting v. AT&T Corp., 671 F.3d 881 (2011). The government enlisted the private telecommunications companies to surveil U.S. citizens without warrant for national security purposes. The sole issue before the court was the constitutionality of § 802 of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1885a, which allows for immunity for telecommunication companies in carrying out authorized surveillance. The court found the activities constitutional.

52 Sterling v. Tenet, 416 F.3d 338 (4th Cir. 2005), cert. denied *sub nom.* Sterling v. Goss, 126 S. Ct. 1052 (2006).

53 *See Arar v. Ashcroft* 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006), Memorandum in Support of the United States' Assertion of State Secrets Privilege, C.A. No. 04-CV-249-DGT-VVP (E.D. N.Y.) January 18, 2005; *El Masri v. Tenet* (E.D. Va. 2006) 1:05-cv-01417-TSE-TRJ, Statement of Interest, Assertion of A Formal Claim of State Secrets Privilege by United States Of America, March 8, 2006 (Document 17); *Mohammed v. Jeppeson Dataplan Inc*. 614 F.3d 1070 (2010), where suit under the Alien Tort Statute for kidnapping and rendition to torture of suspected terrorists is dismissed after assertion of the state secrets privilege. Bob Overby, the director of Jeppesen's "Trip Planning Service" openly and publicly referred to rendition transportation as "torture flights" at

President Barack Obama was no more timid in asserting the privilege. In a case of mistaken identity, Khalid el Masri, a German car salesman, was arrested at the Serbian-Macedonian border, delivered to the CIA, which beat, drugged, and delivered him to Afghanistan. There he was sodomized, further beaten, and subjected to other demeaning and inhumane treatment. After U.S. personnel realized their mistake, el Masri was released on a bucolic hilltop in Albania.[54] His case against the United States was dismissed on assertion of the state secrets privilege. In contrast, a unanimous ruling by the European Court of Human Rights found that el Masri's rights had been violated and confirmed his account of his kidnapping and torture.[55] The el Masri case is but one example of numerous extrajudicial acts of government officials during the Obama years.[56]

More recently, the 9th circuit considered if the Foreign Intelligence Surveillance act displaced the state secrets privilege with respect to electronic surveillance.[57] The 9th Circuit found that "Congress intended FISA to displace the state secrets privilege and its dismissal remedy with respect to electronic surveillance."[58] The U.S. Supreme Court reversed this decision, holding that FISA did not alter or displace the availability of the state secrets privilege.[59]

In practical terms, the state secrets privilege never fails; in no case has a court ordered the disclosure of classified material in a public proceeding, even if the reasons for classifying the material are quite dubious.[60] The privilege is coextensive with at least all material classified "secret" or above[61] and since the

"Breakfast Club" meetings for new employees. And an instructor informed employee trainees that "We do spook flights." (Declaration of Sean Belcher (https://www.aclunc.org/docs/Government_Surveillance/Rendition/Declaration_of_Sean_Belcher.pdf)).

54 Case of *El-Masri v. The Former Yugoslav Republic of Macedonia* (Dec.13, 2012) (Application 39730/09).

55 The Munich, Germany, prosecutor's office investigated the El-Masri abduction and filed arrest warrants against 13 CIA agents. *See Abuse of State Secrecy and National Security: Obstacles to Parliamentary and Judicial Scrutiny of Human Rights Violations*," Committee on Legal Affairs and Human Rights Council of Europe (2010), at p. 7.

56 See, e.g., *Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush*, https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush.

57 *Fazaga v. FBI* (https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/20/12-56867.pdf#page=47).

58 *Id*. at 74.

59 20-828 FBI v. Fazaga (03/04/2022)

60 Assertion of the privilege has failed on several occasions, but courts did not order the production of material that the executive branch claimed to be properly classified national security information. Failure of the privilege happens in three circumstances: 1) The information sought is not truly classified (see, *supra* note 3,); 2) The privilege is not correctly asserted (*e.g. Yang v. Reno* 157 F.R.D. 625 (M.D. Penn 1993); *Int'l Action Ctr. v. United States*, 2002 U.S. Dist. LEXIS 16874 (D.D.C. 2002)); 3) A trial may still proceed without the requested information and without endangering national security. This last circumstance is a "failure" of the privilege only in the sense that the executive branch's stated intention on assertion of the privilege is to stop litigation of the case altogether. *See, e.g., Hepting*, *supra* note 50, at 4.

61 The three categories of classification, "confidential," "secret", and "top secret" are promulgated in executive orders (*See, e.g.* Executive Order 12958). On occasion courts have been skeptical of the claim that information classified as "confidential" is so sensitive as not to be producible in court (*see*, *supra*, note 3). Virtually all classification decisions

common belief is that the President has plenary power to control the classification of national security information, qualification of material for the privilege is in the exclusive control of the President and the executive branch.[62] But classification of information is not a prerequisite to assertion of the privilege. Indeed, the privilege is successfully invoked to prevent the disclosure of unclassified information, even when that information is in the hands of nongovernmental third parties, including private citizens.[63] The privilege is employed mainly to shut down litigation, not merely to withdraw sensitive information from the trial process; few cases survive after invocation of the privilege.[64]

There is a maturing body of literature concerning use of the privilege, but there is little describing origins and development of the privilege. When judges feel compelled or inspired to reach for historical justifications and antecedents for the privilege, they often refer to the treason case of Aaron Burr.[65] Until recently, judges also relied on the 1874 case of *Totten v. United States*, but in 2005 the U.S. Supreme Court put that idea to rest in a unanimous decision, holding that *Totten* did not implicate the state secrets privilege.[66] Other than allegedly in *Burr*, there is no case that squarely takes up the privilege in the United States before the 1953 decision in *United States v. Reynolds*.[67] As explained below, it is incorrect to view

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are made in accordance with executive orders (less than two percent of classification decisions are made pursuant to statute), and "national security information" is a term of art referring to information specifically classified according to executive order. Information classified according to statute is generally scientific in nature. For example, "Restricted Data" is information classified in accordance with the *Atomic Energy Act of 1954* (42 U.S.C. § 2011 et seq.), and patent application information may be classified under the *Invention Secrecy Act* (35 U.S.C. § 181).

62 The state secrets privilege has never been claimed by any governmental entity outside of the executive branch. While theoretically it may be possible for Congress or the courts to assert the privilege in litigation, it seems very unlikely to ever occur in practice.

63 *See, e.g.*, *Burnett v. Al Baraka*, 323 F. Supp. 2d 82 (D.D.C. 2004); *Maxwell v. First Nat. Bank*, 143 F.R.D. 590 (D. Md. 1991; *See also* section IV(c) *infra*.)

64 In nearly every case, assertion of the privilege puts an end to litigation. But in *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir 1983) and the cases of *Hepting* (note 50, *supra*) and *ACLU v. National Security Agency*, 06-CV-10204 (E.D. Mich. 2006) plaintiffs have been allowed to continue their actions despite assertions of the privilege. In those cases, the plaintiffs were allowed to continue their actions because of public disclosures by the government concerning the complained of surveillance programs. The government deprived itself of the advantage of the privilege by publicly admitting the activity that formed the basis of the suits.

65 *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 644 (1972) (Justice Douglas Dissenting); *United States v. Reynolds*, 345 U.S. 1, 8 (1953); *In re Sealed Case*, 326 U.S. App. D.C. 276, 285-86, 298, 301 (1997).

66 *Totten v. United States*, 92 U.S. 105 (1875); *Tenet v. Doe*, 544 U.S. 1, 10 (2005) ("There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* bar has been reduced to an example of the state secrets privilege."); See discussion of *Totten* below.

67 345 U.S. 1 (1953). In *Firth v. Bethlehem Steel*, 199 F. 353 (E.D. Penn. 1912) a federal district court allowed the United States to intervene in a private suit to assert the "military" privilege to have testimony stricken from the record and to prevent its reintroduction by other means. In *D.C. v. Bakersmith*, 18 App. D.C. 574 (D.C. Cir. 1901), the government asserted that "it is laid down by the authorities as a well-established principle of law that official transactions between the heads of the departments of the government and their

Burr as a precursor of the privilege.

Other than scant comments by U.S. judges and commentators and unsubstantiated assertions over the centuries, there has been little attention paid to the beginnings of state secrets doctrine; beginnings found in English and Scottish Law.[68] The descent of the privilege is not found in the U.S. Constitution or early decisions of the U.S. judiciary, but in the *Prerogativa Regis* of England. Indeed, the privilege sprang upon the United States fully mature in the *Reynolds* case, which relied on English precedent to provide a historical dimension and justification for the privilege. If the proximity of the privilege to unaccountable divine right of monarchs caused any discomfort for the Supreme Court in *Reynolds*, it is not noticeable. And up to the present, the federal judiciary has shown a regard for this extraordinary privilege that defies simple explanation.

II. Arcana Imperii

> *[A]rcana imperii* [mysteries of state]. . . like the mysteries of the *bona dea*, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober enquiry.
>
> — William Blackstone[69]

A. Origins in Crown Prerogative

It is simply assumed or asserted by U.S. commentators, with little or no discussion, that the privilege had its origins in crown prerogatives in England, which certainly appears to be correct.[70] But the mode of origin is instructive and provides a different color to the background of the privilege than one might expect. Seventeenth century

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subordinate officers are in general treated as secrets of State," but the court did not reach this objection. And in *King v. U.S.*, 112 F. 988 (5th Cir. 1902), a criminal defendant sought to examine federal agents as to their efforts to suborn perjury and manufacture evidence. The U.S. attorney objected, asserting the state secrets privilege, to which the Fifth Circuit Court of Appeals responded: "[W]e are clear that the conversations of government detectives and other agents with witnesses, with the purpose and effect of inducing and influencing the evidence of such witnesses, do not rise to the dignity of state secrets" (at 996).

68 Though McShane notes: "[T]here is a general paucity of comment, both judicially and academically, on the relationship between crown privilege and the prerogative." F. McShane, *Crown Privilege in Scotland: The Demerits of Disharmony Part I*, 1992 Jud. Rev. No. 3, 256, 265.

69 William Blackstone, 1 Commentaries on the laws of England, 237-38 (London: A. Strahan & W. Woodfall, 12th ed. 1793).

70 *See, e.g.,* C. S. Emden, Documents Privileged in the Public Interest, 39 L.Q. R. 476, 476-77 (1023) (Crown privilege "can, no doubt, be traced to the prerogative right to prevent the disclosure of state secrets") (1923); *Conway v. Rimmer* [1967] 2 All. E.R. 1260, 1263 ("Crown privilege is one of the prerogatives of the Crown."); But see *Rogers v. Sec'y of State for the Home Dept.* [1973] A.C. 388, 407 ("The right to demand that admissible evidence be withheld from, or inadmissible evidence adduced to, the courts is not one of the prerogatives of the Crown.")

public discussions of the privilege centered on crown prerogative to detain citizens in custody without showing cause. In the turbulent regime of Charles I we see the beginning of a theoretical foundation for crown privilege. Prior to Charles I there is little evidence of discussion of crown power to prevent disclosure of secrets of state. Such a power certainly was not open to serious question, and it is only with Charles' claims that prisoners could be held at prerogative for unexplained reasons that crown power to withhold information became controversial.

Prerogatives were claimed by the crown to be beyond the reach of law, and the crown, as the "fountain of justice," was said by a fiction to always act in the public interest.[71] William Blackstone defined the term "prerogative" as that which is "out of the ordinary course of the common law" and refers to "those [powers] which [the crown] enjoys alone . . . and not to those which [it] enjoys in common with any of [its] subjects."[72] Of course, when prerogative-based acts infringed on citizen liberty or property rights, Parliament and judges often clashed with the crown. But the power to withhold information was at the core of crown prerogatives. It was a power not available to other actors, served to protect the most important functions of the state, and was claimed to be necessary to secure the public interest.

The theoretical basis for judicial refusal to order the disclosure of requested information always was, and continues to be, preservation of the public interest. As Matthew Bacon noted in a standard text on law in the seventeenth century, "it hath been established as a rule, that all prerogatives must be for the advantages and good of the people, otherwise they ought not be allowed by the law."[73] No prerogative relies on this maxim more than crown privilege, for the basis of its assertion is that it is necessary for the efficient functioning of the government or even the continued existence of the state. Despite its importance and its centrality to proper functioning of government, the prerogative of crown privilege was not generally discussed or recognized in early works and compilations concerning royal prerogatives. For example, nothing in the Prerogativa Regis[74] relates to a privilege to protect information or secrets of state, and none of the standard law texts of the seventeenth or eighteenth centuries cite to a prerogative against disclosure of information or the protection of state secrets. Nevertheless, Sir Edward Coke notes in *The Institutes* that the third clause of oath for Privy Councilors states that:

> [H]e shall keep secret the king's counsell, and all that shall be commoned by way of counsell in the same, without that he shall common it, publish it, or discover it by word, writing, or in any otherwise to any person out of the same Councell, or to any of the same Councell, if it touch him, or if he be party thereof.[75]

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71 For example: "[W]hen a statute is made pro bono publico, and the King (as the head of the commonwealth, and the fountain of justice and mercy,) is by the whole realm trusted with it." January 1, 1616 (77 E.R. 465, 7 Co. Rep. 36 King's Bench Div. Penal Statutes)

72 Blackstone, 1 Commentaries, *supra* note 69, at 232.

73 Matthew Bacon, A New Abridgement of the Law 149 (London: E. & R. Nutt, & R. Gosling, 1736).

74 17 Edw. II, Stat. 1 (1324).

75 Edward Coke, The Fourth Part of the Institutes of the Laws of England – Concerning the Jurisdiction of Courts 54 (London (M. Flesher for W. Lee & D. Pakeman: 1644).

The lack of commentary concerning crown power to withhold information may be indicative of the inability to imagine that such a prerogative would ever give rise to contention, and the apparent infrequency of its need to be exercised.

Comments with respect to the plenary power of the Crown to control official information indicate that it had a wide range, if not completely acceded to. Nathaniel Bacon noted in one case that "It may be the great Lords thought the Mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity."[76] And in 1571, Queen Elizabeth I warned members of Parliament that "they should do well to meddle with no matters of State, but such as should be propounded unto them, and to occupy themselves in other matters, concerning the Common-Wealth."[77] Likewise, James I in 1620 told Parliament: "We discharge you to meddle with Matters of Government or Mysteries of State"[78] and lectured Parliament and public in a proclamation:

> . . . forasmuch as it comes to Our eares, by common report, That there is at this time a more licentious passage of lavish discourse, and bold Censure in matters of State, then hath been heretofore, or is fit to be suffered, Wee have thought it necessary, by the advice of Our Privie Councell, to give forewarning unto Our loving Subjects, of this excesse and presumption; And straitly to command them and evry of them, from the highest to the lowest, to take heede, how they intermeddle by Penne, or Speech, with causes of State, and secrets of Empire, either at home, or abroad, but containe themselves within that modest and reverent regard, of matters above their reach and calling, that to good and dutifull Subjects appertaineth.[79]

Matters came to a head in 1628 when Charles imprisoned subjects who refused to lend money to the Crown to prosecute war.

B. The Affairs of 1628

The earliest contentious discussions of crown privilege grew out of parliamentary and legal contretemps concerning the crown's power to detain citizens without showing legal cause for such detention. Although it is difficult to determine the extent, since cases were sporadic, at least some judges in the time of Charles I, and of course the King himself, believed courts could only acquire jurisdiction to bail prisoners or rule in habeas corpus through the state production of a legal cause for

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[76] Nathaniel Bacon, An Historical and Political Discourse of the Laws and Government of England, From the First Times to the End of the Reign of Queen Elizabeth 176 (London: 1739).

[77] *Journal of the House of Lords*, April 4, 1571, in *The Journals of all the Parliaments During the Reign of Queen Elizabeth* 136-145 (1682), http://www.british-history.ac.uk/report.aspx?compid=43682, accessed: Jan. 12, 2023.

[78] 2 *Proceedings and Debates of the House of Commons in 1620 and 1621*, 326. (Oxford: Clarendon Press, 1766).

[79] 1 Stuart Royal Proclamations 495-96, (James F. Larkin & Paul F. Hughes, eds., 1973).

the detention of the prisoner in question. If the crown refused to show cause for a prisoner's detention it was argued by the crown, and seemingly accepted in law, that courts had no jurisdiction with which to act in the matter.

For example, Coke reports in the *Case of the Lords Presidents of Wales and York* that the court stated "the defendants, by law, may in all courts plead to the jurisdiction of the court, but how can they do so when no man can possibly know what jurisdiction they have: concerning matters of state, which are *arcana imperii*, it is meet they should be kept *sub sigillo concilii* [under seal; in strict confidence] and in secret."[80] And in *Ruswell's Case*, King's Bench held "that a return that one is committed per *Mandatum Privati Concilii Domini Regis* [by order of King's Council] was good enough, without returning any Cause; for it is not fit that Arcana Imperii should be disclosed."[81] But Coke had divided opinions on this matter,[82] noting:

> God forbid they should not be known to them, who are to be judged by them: but the keeping them in such secrecy bewrayeth, that the Council are afraid that they would not be justified if they were known; and it was concluded again, misera servitus ubi jus aut vagum aut incertum. [It is miserable slavery where the law is vague or uncertain].[83]

And over eighty years prior to the disputes of 1628, *Binck's Case* took up detention for felony and for matters of state.[84] The court concluded that since the felony charge was first listed, all that followed must be of lesser seriousness, and therefore the defendant, if bailable on the felony, must also be bailable under charges concerning matters of state. The *Binck's* court seemed to take the strict line that a failure to return cause for detention allowed judges sole discretion to determine bail. This principle was reaffirmed in *Codd v. Turback*[85] a mere twelve years before the great debate began around crown-ordered detentions in *Darnel's Case*.[86] There, the court found that "By the law of God, none ought to be imprisoned, but with the cause expressed in the return of his imprisonment, as appeareth in the Acts of the Apostles."[87]

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80 12 Co. Rep. 50, 53 (Circa 1607). Coke provides no date for the case, but Cuthbert Pepper referred to in the case as Attorney in Court of Wards, was appointed to that position by James I on July 9, 1607 (*Calendar of State Papers Domestic Series*: James I, 1603-1610, Vol. 28: July-December, 1607, entry for July 9. (M. Green, ed., 1857)). Pepper was dead by August 11, 1608 (Id., Vol. 35, July-August 1608, entry for August 11).

81 3 *Journal of the House of Lords* 753, 1620-1628, April 19, 1628.

82 See note 54 *infra* and associated text.

83 *The Case of the Lord Presidents of Wales and York* 12 Co. Rep. 50, at 53 (Circa 1607).

84 35 H. 8, Rot. 33 (1544).

85 81 Eng. Rep. 94 (L.B. 1616).

86 3 How. St. Tr. 1 (1627).

87 81 Eng. Rep. 94 (K.B. 1616). The biblical reference seems to be to Acts 25:16-27. When Paul is arrested, Festus explains that "it is not the custom of the Romans to give up any man, before that the accused have the accusers face to face, and have had opportunity to make his defense concerning the matter laid against him. . . [I]t seemeth to me unreasonable, in sending a prisoner, not withal to signify the charges against him."

In addition, *Magna Carta* and subsequent petitions by Parliament showed crown acquiescence to the claim that no subject could be detained without showing cause in law. Paragraph 39 of the Great Charter states: "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." And in 1363 the crown tacitly admitted that it had no legal authority to order detentions by special directive. Parliament in that year petitioned Edward III "that the great Charter, and the Charter of the Forest, and other Statutes made in his time, and the time of his Progenitors, for the profit of him, and his Commonalty, be well and firmly kept; and put in due execution, without putting disturbance, or making arrest contrary to them by special command, or in other manner."[88] The King did not object to the petition; his silence interpreted as assent.[89]

But Charles I put this matter into hot debate after he ordered the detention of subjects who refused to loan the crown money to prosecute war. In *Darnel's Case*, detainees of the crown sought relief in habeas corpus cum causa.[90] The detainees claimed that courts could acquire jurisdiction over cases where subjects are detained "*per speciale mandatum Domini Regis* [by special order of the King]," and that imprisonment under such an order without further, particular cause shown "was too general, and uncertain; for that it was not manifest, what kind of command that was."[91] They further claimed that "Nothing passes from the Crown without matter of record," and one could not be imprisoned or continued in prison on the mere verbal command of the King; action in trespass would lie against those executing such command.[92] In response to these challenges the Attorney General particularly seized on the duty and prerogative of the crown to prevent the disclosure of state secrets:

> The King often commits, and shews no cause: if he does express the cause, indeed to be either for suspicion of felony, coining, or the like, the court might deliver the prisoner, though it was per *speciale mandatum Domini Regis*, because there is no secret in these cases; for with the warrant, he sends the cause of the commitment: but if there was no cause expressed, that court always remanded them. It was intended, there was matter of state, and that it was not ripe, or time for it to appear. . . there were *Arcana Imperii*, which subjects were not to pry into. If the King committed a subject, and expressed no cause, it was not to be inferred from thence, there was no cause for his commitment: the course has always been, to say there was no cause expressed, and therefore the matter was not yet ripe; and thereupon the courts of justice have always rested satisfied, and would not search into it. In this case, the King was to be trusted: it was not to be presumed, he would do anything that was not for the good of the kingdom.[93]

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88 36 Edw. III Rot. Parliament No. 9.
89 *Id*.
90 3 How. St. Tr. 59 (1628).
91 T. Salmon, *A Critical Review of the State Trials*, 79 (London: 1735).
92 *Id*. at 81.
93 *Id*. at 83 (emphasis added).

The Attorney General further showed that Lord Coke, who now argued against the King, was of a different mind when he was a judge on King's Bench. There, he and his colleagues held that "it had been resolved, that the cause need not be disclosed, being *per mandatum concilii* as *Arcana Regni* [mysteries of the crown]."[94] Expanding on this point, the Attorney General ventured that "Explanations would hazard an encroachment on [royal] prerogative,"[95] and "That if a man was committed by the commandment of the King, he was not to be delivered by a habeas corpus in that court, for they knew not the cause of his imprisonment."[96] The specific hypothetical cited in support of these contentions concerned protection of state secrets:

> If a King employ an ambassador to a Foreign Country or State, with instructions for his Negotiation, and he pursue not his instructions, whereby dishonour and damage may ensue to the Kingdom, is not this committable? And yet the particular of his instruction, and the manner of his miscarrying, is not fit to be declared to his Keeper, or by him to be certified to the Judges, where it is to be opened and debated in the presence of a great audience. I therefore conclude, for offences against the State in case of State Government, the King and his Council have lawful power to punish by imprisonment, without shewing particular cause, where it may tend to the disclosing of the secrets of State Government.[97]

Yet Ashley demonstrated a keen grasp of the dilemma presented by a state secrets privilege, and captured this problem in his advice to the Lords in Parliament:

> I conceive it to be a question too high to be determined by any legal decision; for it must needs be a hard case of contention when the conqueror must sit down with irreparable loss; as in this case [*Darnel's case*], if the subject prevail, liberty but loses the benefit of that state government, without which a monarchy may too soon become an anarchy; or, if the state prevail, it gains absolute sovereignty, but loses the subjects not their subjection, for obedience we must yield, though nothing be left us but prayers and tears; but it loses the best part of them, which is their affections, whereby sovereignty is established, and the crown firmly fixt on his royal head. Between two such extremes, there is no way to moderate, but to find a medium for accommodation of the difference, which is not for me to prescribe, but humbly to move your lordships, to whom I submit it.[98]

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94 *Id*. at 86.
95 *Id*. at 94.
96 *Id*. at 84.
97 3 *Journal of House of Lords*, April 19, 1628, 759 (1802). The events of 1628 invite comparison with the actions of the Bush administration post 9/11, but a general discussion of this matter is beyond the scope of this article. As with the actions by Charles I it is also true that the Bush administration knowingly held innocent people in custody without access to counsel or legal process.
98 *Id*.

Crown abuse of the doctrine of reasons of state to detain subjects was recognized early on, with Sir Benjamin Rudyard reportedly declaiming in 1628 that "As for Intrinsecal Power and Reason of State, they were matters in the clouds, where he [Rudyard] desired to leave them: only as to reason of state he would say, that in the latitude it had been used, it had eaten out, not only the laws, but all the religion of Christendom."[99] And some 50 years after the events of 1628, Sir Harbottle Grimstone noted: "For matters of State, it is convenient that the person committed should be restrained; but if so, he is not to be buried alive, to have no man come at him. How then can he get his Habeas Corpus, or prepare for his defence?"[100]

The crass reasons for detention in *Darnel's Case* were incompatible with the grand claim that matters of state justified the King's power to detain subjects without return of cause to the courts in response to habeas claims. It was apparent to all that Darnel and others were being held for the purpose to extort money out of the wealthy to finance unpopular wars and to serve as an example to others who might contemplate refusal to give over funds.

C. Development of the Privilege Post-1628

In the *Petition of Right of 1628*, Charles grudgingly accepted the claim that arrests and detentions without showing legal cause were beyond the crown's power. But once the problem of disclosure of matters of state was separated from warrantless detention, the English courts generally adopted a position of virtually unfettered deference to crown claims – frequently noticing the continuation of prerogative power in matters concerning refusal to disclose information regarding matters of state.

In the 1688 *Trial of the Seven Bishops*, the court refused to require a witness to testify as to the events of a Privy Council meeting.[101] And in *Layer's Case*, counsel for a defendant charged with high treason insisted on having minutes of a Privy Council meeting read into the record in open court. Lord Chief Justice Pratt noted that "I . . . asked Mr. Attorney General, whether he thought fit to consent to it; and without his consent we are of opinion, that they cannot be read . . . You cannot read the minutes taken against the king, because these matters are not ripe yet, nor to be discovered to the world."[102] In *R. v. Watson* a public official was asked to testify as to the accuracy of a plan of the Tower of London, which had been purchased from a public vendor. Lord Ellenborough thought "It might be attended with public mischief to examine an officer of the tower as to the accuracy of such a plan."[103]

In *Bishop Atterbury's Case*, the defendant attempted to examine crown employees who had opened and deciphered inculpatory encrypted communications. But the crown resisted, and the Lords found that such testimony would be "inconsistent with the public safety."[104] The path was not always so clear for the assertion of privilege, and in some cases witnesses were made to answer, and

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99 Note 51*, supra*, at 91.
100 4 *Grey's Debates of the House of Commons* 273 (1769).
101 12 *How. St. Tr.* 183, 309-11 (1688).
102 16 *How. St. Tr.* 94, 223-24 (1722).
103 32 *How. St. Tr.* 1, 389 (1817).
104 16 *How. St. Tr.* 323, 495 (1723).

documents were ordered produced. For example, in The *Earl of Strafford's Trial* in the House of Lords, accounts of statements Strafford made in Privy Council were allowed into evidence, prompting Lord Clarendon to opine:

> The ruin that this last act [of producing this testimony] brought to the King was irreparable; for . . . it was [a] matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more engaged to servile applications. It banished forever all future freedom from that board and those persons from whom his Majesty was to expect advice in his greatest streights; all men satisfying themselves "that they were no more obliged to deliver their opinions there freely, when they might be impeached in another place for so doing."[105]

In *The Trial of Maha Rajah Nundocomar*, the court called in a secretary to Governor General Warren Hastings in India to produce books of the Council to the East India Company. Hastings instructed the secretary to refuse delivery of the books to the court, asserting that they contained "secrets of the utmost importance to the interest, and even to the safety of the state."[106] Unimpressed, the court said that it would be improper to subject the books to "curious and impertinent eyes; but, at the same time . . . [h]umanity requires [evidence in the hands of the state] should be produced, when in favour of a criminal, justice when against him."[107] The court ended by lecturing Hastings, saying that "where justice shall require copies of the records and proceedings, from the highest court of judicature, down to the court of Pie-Powder" magistrates have the power to compel disclosure.[108]

In *Moodaly v Moreton and East India Co*., the East India Company refused to give over documents, with the court noting that "The defendant demurred [that they] were sovereigns of the territory; that they could not be sued; that it might be attended with bad consequences, in a political view, to discover their secrets."[109] This case was not a suit at law, but an action for discovery to determine just which entity should be sued for breach of contract. The East India Company argued not only that they were sovereign, but employees were sworn to secrecy and could not be compelled to divulge secrets of the Crown. Master of the Rolls Sir Lloyd Kenyon agreed that the East India Company exercised sovereign power, but he decided to:

> [P]ut the East India Company and the defendant Moodaly upon the same footing. In ordinary cases, it is usual for this Court to grant discovery, auxiliary to a Court of law, and to grant commissions to examine witnesses. It hath been said, that the East India Company

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[105] 3 *How. St. Tr.* 1351, 1442-43 (1640). Of course, the mischief identified by Lord Clarendon is more in line with theories of modern executive privilege than with the fear surrounding publication of state secrets.

[106] 20 *How. St. Tr.* 923, 1057 (1775).

[107] *Id*.

[108] *Id*.

[109] 21 E.R. 425 (1785).

> have a sovereign power: Be it so; but they may contract in a civil capacity: It cannot be denied but in a civil capacity they may be sued: in the case now before the Court, they entered into a private contract; if they break their contract, they are liable to answer for it.[110]

Yet discounting the odd exception, English courts uniformly accepted assertions of crown privilege with little inclination to investigate the grounds of those assertions. The claims of privilege were not differentiated as to their compelling natures or underlying facts, and the English courts adopted an extremely deferential response to those claims – most often treating the claims as conclusive on the courts.[111] Judges approached matters of state secrets the same as matters concerning confidentiality of informer identities, or allegedly defamatory reports generated by government officials, or any other reason cited by the crown in support of withholding. The standard that developed, which was not much of a standard at all, was whether the disclosure of the requested documents would damage the "public interest."[112]

The apogee of reasoning concerning crown privilege came in three cases, only one of them a case concerning state secrets proper. In *Home v. Bentinck* a military officer sued a member of a commission of inquiry in defamation. The plaintiff requested production of the commission report. Defendant's attorney traced the privilege to prerogative rights of the crown, noting:

> By the common law, the king has, by his prerogative, the command of the army . . . and [if] proceedings appear necessary for the due discipline of the army, the king has a right to direct what he thinks proper. This is no more than the exercise of other prerogatives in the affairs of state, in all matters relating to affairs abroad and at home. . . The king, then, though restrained in a certain degree

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110 *Id*. at 427.

111 *Ankin v. London and North Eastern Rwy.*, 1 K.B. 527 [1930] (1929) (ministerial objection to production of a class of documents based in public interest is conclusive upon courts.); *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co.*, Ltd., 1 K.B. [1916] 822 (1916) (Foundation of the rule of privilege is that production is contrary to the public interest, not that the documents are of an official or confidential nature.); *Attorney-General v. New Castle-Upon-Tyne Corp.*, 66 N.S. 593 (1897) (The crown is not bound to give discovery.); *Beatson v. Skene*, 5 H. & H. 838, 853 (1860) (Question of whether or not production would damage public interest is not for the judiciary to decide, but for the head of the department in possession of the document); *In re La Scociété Les Affréteurs Réunis and the Shipping Controller*, 3 K.B. 1921 1 (Crown may not be ordered to make an affidavit of documents for which it claims privilege.). *See also* the ill-fated Crown Proceedings Act of 1927, where cl. 20(7) would have made objection to production of a document by a minister "final and conclusive" on the courts. The 1947 *Crown Proceedings Act* failed to provide a statutory ground for crown privilege, stating only that any common law rule for withholding documents survives the Act (Ch. 44, §28 (1)(b)). This failure mirrors the failure of the United States to bring the state secrets privilege under statutory control (See *Wright and Graham*, Rejected Rule 509 of the Federal Rules of Evidence).

112 This standard is recounted in numerous cases and treatises, though at least one respected commentator on evidence in English law believed the privilege too broad and unrestrained as applied by English judges. J.P. Taylor, 1 *A Treatise on the Law of Evidence as Administered in England and Ireland* 612-14, 9th ed. (1895).

> from exercising that full control, which a despotic commander would have in a foreign country . . . has the direction of issuing such orders as he pleases . . . provided they be not contrary to the Mutiny Act or the common law.[113]

Chief Justice Dallas, writing for the Court of Exchequer, did not directly touch on the issue of prerogative, but did say that "upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited" that the privilege should apply.[114]

Some judges concluded that the judiciary had an affirmative duty to assert privilege for the crown even when there was no ministerial objection made to the production of documents.[115] In *Anderson v. Hamilton*, for example, Lord Ellenborough declined to allow "secrets of state to be taken out of the hands of her majesty's confidential servants."[116] Other judges in the Kingdom, though, chafed against such a gift of power to the ministerial branches of government. In *Gugy v. Maguire* government asserted the privilege after a Provincial Secretary's refusal to produce a report of a superintendent of police. Judge Mondelet strongly objected to the assertion of the privilege and specifically the line of reasoning in *Bentinck*:

> I cannot, I ought not, for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine – a doctrine which prostrates to the ground that liberty, that protection to life, honour, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! A doctrine which reduces the judge on the Bench to an automaton, who, like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit, it may be his misfortune to be tainted with, or of any unprincipled member of society . . . who is desirous of, or has interest in being screened, or of screening others, from the responsibility his misdeeds have subjected them to. If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure. I cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous.[117]

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113 2 B. & B. 130, 150-151 (1820).

114 *Id*. at 164.

115 *See Hennessy v. Wright*, 31 Q.B. 509, 518-19 (1888) (Judge must prevent disclosure of messages between governor of a colony and the Secretary of State in absence of objection by responsible crown minister) (Also holding that "official letters are not receivable in evidence," at 520); *Little v. Smith*, 9 D. 737, 740 (1847) ("I think the Crown is not entitled to give up the [precognition] without an express judgment of the Court, even if the Crown sees no objection."); *Stace v. Griffith*, Law Rep. 2 P.C. 420, 425 (1869) (Lord Chelmsford found he was required to determine, before contents of a letter was admitted into evidence, "that it was not an official communication").

116 2 B. & B. 156 (1816 case from Middlesex sittings after Hilary term, reported as a note in *Home v. Bentinck*, note 112 *supra*.)

117 *Gugy v. Maguire*, 13 Low. Can. 33, 38 (1863), quoted in 5 J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 197 (§2379) (1923).

The most expansive explanations concerning crown privilege after *Bentinck* came in *Beatson v. Skene* and *Duncan v. Cammel, Laird*.[118] In *Beatson*, Chief Baron Pollock, in a speech for a unanimous panel of Law Lords, found: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice."[119] Then Pollock took up the crucial question of who is to have the final say on what constitutes the "public interest." He concluded that:

> The judge would be unable to determine [the question of public interest] without ascertaining what the document was, and why the publication of it would be injurious to the public service – an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the documents would be injurious to the public service, must be determined, not by the Judge but by the head of the department having the custody of the paper; and if he is in attendance and states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it.[120]

The opinion in *Beatson* was the controlling decision concerning crown privilege until the Law Lords took the matter up again in *Duncan v. Cammel, Laird*, a decision made during the darkest days of World War II.[121] There, relatives of sailors killed in the sinking of the submarine *Thetis*, sued the submarine's manufacturer and requested production of design documents and other papers. Quoting *Attorney General v. New-Castle-Upon-Tyne*, the court noted "The law is that the Crown is entitled to full discovery, and that the subject as against the Crown is not… That is a prerogative of the Crown, part of the law of England, and we must administer it as we find it."[122] In reaffirming the bright lines announced by Pollock in *Beatson*, the court found that "The reasons given by Pollock C.B., by Lord Dunedin and by Lord Kinnear cannot be gainsaid."[123] The decision went on to approvingly quote

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[118] *Duncan v. Cammel Laird* ([1942] A.C. 624; *Beatson v. Skene* (157 Eng. Rep. 1415 Exch. Div. 1860).

[119] 5 H. & N. 838, 853 (1860). *Beatson* has been cited a single time by U.S. Federal courts (*Kaiser Aluminum and Chemical Corp. v. U.S.* (141 Ct. Cl. 38 (1958)), where the court refused to order production of contract negotiation documents when the government asserted executive privilege (at 49)).

[120] *Id*. (emphasis added). The concerns cited by Pollock mirror the way the state secrets privilege is treated by U.S. courts. Judges show great deference to the privilege and rarely order evidence produced for in camera inspection by the court. In a rare decision the Ninth Circuit reversed a decision in a case, saying the district court should have ordered in camera review of litigant-requested material (*Federal Bureau of Investigation v. Fazaga* 916 F.3rd 1202 (9th Circ. 2019)). The Supreme Court reversed this decision (Slip opinion 20-828 *FBI v. Fazaga*)

[121] *Supra*, note 117.

[122] [1897] 2 Q.B. 384, 395.

[123] *Supra*, note 117, at 641. Reliance on Lord Dunedin is misplaced. *See* discussion at __ *infra*.

Lord Parker's observation in *The Zamora*, that "Those who are responsible for the national security must be the sole judges of what the national security requires."[124]

The *Duncan* court noted that "the argument before us proceeded on the assumption that there was no recorded decision of this House on the subject. . . . This, however, is not so."[125] The law lords then leaned heavily on the case of *Earl v. Vass* for the proposition that ministers may not be compelled to produce documents when claiming a public interest exception.[126] As related below, the decision in *Vass* was wrong. Thus, in an apparent effort to grasp support for their position the lords in *Duncan* misunderstood *Vass*, and in the process simply gained an incorrect understanding of Scottish law on the matter of crown privilege. While not precisely causing ruinous effects for either Scottish law or American law, the decision in *Duncan* did have some influence on the Court in *Reynolds*, if for no other reason than the mistaken representation that Scottish law and English law were in agreement on the subject of ministerial power to withhold documents. The spirit of *Duncan* broadly informed the Court's decision in *Reynolds*, but it is a spirit founded on a mistake – and that mistake is still with us.

D. Divergence Between Scottish and English Law

Scottish law developed in quite a different manner to that in England concerning crown privilege.[127] The law of the two countries diverged substantially on the issue of ministerial power to withhold papers, and that divergence, through an unfortunate set of mistakes, was overlooked by the law lords in *Duncan*. Two cases beguiled English courts into a thorough misunderstanding of Scottish law with respect to crown privilege. First is *Earl v. Vass*, discussed above. *Vass* is hardly a stout decision to rest on for the proposition that ministerial decisions are conclusive on courts. Lord Eldon, L.C., sat alone in the case, and counsel for Vass put in no argument, so the matter was heard *ex parte*. Lord Eldon consulted with Lord Chief Justice Charles Abbott concerning the matter, even though Abbott had no expertise in the law of Scotland. Eldon also once expressed the extreme position that "the Crown cannot waive the right to withhold documents."[128] Finally, he made reference to English cases such as *Home v. Bentinck*, so it is unsurprising that his decision was at variance with Scots law.

Despite the clear direction of the opinion, a close read of *Vass* reveals no holding that compelled production of documents under a public interest objection

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124 *Id*., quoting *The Zamora*, [1916] 2 A.C. 77, 107.

125 *Supra*, note 120, at 627

126 1 *Shaw's App.* (1822) 229.

127 For one thing, it is still a *crown privilege* in Scotland and has not evolved into a form similar to English law's "public interest exception," which is broader in its application. Although the term "public interest exception" is used interchangeably with crown privilege in Scotland, neither term has applied to any entity beyond the national government or the Lord Advocate. *See e.g. W.P. v. Tayside Regional Council*, 1989 S.L.T. 345, 347 (1989); *Whitehall v. Whitehall*, 1 Div. 98, 99 (1956) (To accept the broad claims associated with the public interest exception "would be to go far along the road towards subordinating the Courts of Justice to the policy of the Executive, and to regulating the extent to which justice could be done by the limits within which that policy would permit it to be done. This has never been the law of Scotland").

128 *Henderson v. Robertson*, (15 D. 292) (1853).

is beyond court power. Indeed, Eldon is careful to stay within the facts of the case and does not venture to make large statements about the finality of ministerial objections to production of papers. Eldon did discuss the "principle laid down" in *Bentinck*, stating that "because it is against public policy that you should be compelled to produce instruments and papers . . . it must shut out the possibility of the public receiving any information as to a person's fitness to be appointed to an office."[129] Yet on the edge of declaring ministerial objections as conclusive on the courts, Eldon does not quite make that claim. Perhaps he felt some uneasiness with making such a declaration with respect to the law of Scotland, and that uneasiness would be well founded. In Scotland, the rule has always been that judges are the final authority in determination of crown privilege claims, and Scottish courts have shown little patience with transparent efforts to shield the government from embarrassment, liability, or investigation.[130] Indeed, Viscount Symonds wrote in *Glasgow v. Central Land Board* that "it is in fact a repugnant task for those who are charged with the administration of justice to determine the rights of parties with something less than the full knowledge of all the material facts and documents. . . But that such may be [the judge's] task is beyond all question."[131]

Second, English judges relied on the decision in *Admiralty v. Aberdeen Steam Trawling and Fishing Co.*[132] Courts incorrectly used *Aberdeen* to support the proposition that English and Scottish courts were in alignment on the finality of ministerial certificates in asserting crown privilege. Lord Dunedin did write in *Aberdeen* that,

> It seems to me that if a public department comes forward and says that the production of a document is detrimental to the public service, it is a very strong step indeed for the court to overrule that statement by the department. The Lord Ordinary has thought that it is better that he should determine the question.[133]

Yet, Lord Dunedin went on to say in language that is remarkably like modern U.S. judicial deference to claims of national security:

> I do not there agree with him, because the question of whether the publication of a document is or is not detrimental to the public service depends so much upon the various points of view from which it may be regarded, and I do not think that the court is in possession of these various points of view. In other words, I think that, sitting as judges without other assistance, we might think that

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129 Note 125, *supra*, at 237.

130 *See, e.g., Glasgow v. Central Land Board*, 1956 S.C. (H. L.) 1, 11 ("[T]here always has been and is now in the law of Scotland an inherent power of the Court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so"); *Higgins v. Burton*, 1968 S.L.T. (Notes) 52 ("[A]s is well known, courts in Scotland have always refused to be bound by a Minister's Certificate, and its effect depends on the discretion of the Court").

131 *Glasgow* (note 129) at p. 9.

132 1909 S.C. 335.

133 *Id*. at 337.

> something was innocuous, which the better informed officials of the public department might think was noxious. Hence, I think the question is really one for the department, and not for your Lordships.[134]

Citing to Lord Dunedin, the *Duncan* court found that in *Aberdeen* "the Inner House of the Court of Session, overruling Lord Johnston, insisted that the view of the government department was final."[135] But Lord President Dunedin also backed the idea that "The crown in Scotland is . . . in the same position as a subject with regard to diligence for the recovery of documents: with this distinction, that as public policy is always a ground for the court refusing to order production of documents, that ground is available to the crown more readily than to a private citizen."[136]

It could hardly be the case that Dunedin held both the position claimed in Duncan and the position that the crown's advantage in claiming privilege was merely an easier resort to the public policy exception. Dunedin plainly stated the law of Scotland in *Dowgray v. Gilmour*, where he wrote "the Court has, no doubt, the right to order the Lord Advocate or anyone else, to produce documents."[137] The Duncan court came to the wrong conclusion about the decision in *Aberdeen*. Perhaps because they already believed the legal systems of Scotland and England were aligned on this issue, they simply saw what they expected to see. Contrary to *Duncan*, the law of Scotland has never been in alignment with England in respect to crown privilege.

Beginning early in the 18th century, Scottish courts granted compulsion of production against ministerial objections. In the 1727 case of *Stevens v. Dundas* the court allowed a diligence against the crown requiring the production of an information in spite of the Lord Advocate's unwillingness to release the document.[138] And in *Leven v. Board of Excise* the court granted a diligence for records in the face of objections that the "documents called for had come into their hands in their public capacity, they were bound to decline undergoing any examination on the subject."[139] The court in *Leven v. Young*, in an unequivocal statement, observed in 1818 that "It is not to be understood that the court have any doubt of their power to compel any haver to produce evidence. [It is for the court to] decide if a document is to be produced."[140]

One scholar observed that by the middle of the nineteenth century "the 'ends of justice' were explicitly recognized as being a relevant consideration in determining

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134 *Id*. at 340.

135 *Duncan*, note 79 *supra*, at 639.

136 *Encyclopedia of the Laws of Scotland*, 340 (1928). A "diligence" in Scottish law is a mechanism of enforcement in civil litigation.

137 14 S.L.T. 906, 909 (1907).

138 19 W.M. Morison, Decisions of the Court of Sessions 7905 (1804). There is little information available concerning this case, but it is interesting that the Lord Advocate, Sir Robert Dundas, is referred to in the case as the "King's Advocate," thereby more clearly tying the decision to one against the crown ("A party, upon a signed information, as guilty of forgery, being committed to prison by the King's Advocate . . . thereupon, he insisted against the King's Advocate to exhibit the information, which the Lords found the Advocate obliged to do").

139 17 Faculty Decisions (1812-1814), No. 165 (First Division 1814).

140 1 Murray 350, 370 (1818).

whether a public interest objection to production should be overruled."[141] Scottish courts adopted a balancing approach to determine rulings concerning the assertion of crown privilege, an approach expressly rejected by the weight of English authority on the matter. As discussed above, in England the power of conclusory objection to production of papers to preserve the public interest lodged in the minister raising the objection. This is substantially both a transfer of judicial power to ministers, and an abdication of the courts in a broad area of evidentiary discovery. Balancing is also contrary to the state secrets privilege as adopted by the United States, where it is an "absolute" privilege that applies without fail when properly asserted.[142]

Under Scottish law, the need of the requesting party was weighed against the claim of public interest; though it should be noted that this was usually not treated as a level playing field. In various expressions of the necessity needed to overcome a claim of privilege, Scottish courts required "great and overwhelming necessity,"[143] "an exceptional case,"[144] "an appropriate exceptional case,"[145] or something much less.[146] The meanings of those phrases are left unexamined, and judges proceeded on a case-by-case basis in determining the deference to give to assertions of crown privilege. From this record it is a reasonable conclusion that courts in Scotland retained final authority on the assertion of a crown privilege or public interest objection.

Duncan was an incorrect pronouncement of foreign law in an English appeal by a judge who admittedly sought advice from another English judge (and not even a Scottish law expert) in a case concerning a failed weapons system during the height of war. Perhaps under the circumstances a strict and careful review of the law gave way to perceived exigencies of the moment. It was bad law that eventually

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141 F. McShane, note 67 *supra*, at 265. McShane made this observation in part based on the holding of Lord Hope, the Lord Justice-Clerk, who pondered compelling production of a precognition in an action for wrongful imprisonment ("I am not prepared to say, that there is no case in which the Court would not, when it was necessary for the ends of justice [to] order production of a precognition." *Donald v. Hart*, 6 D. 1255, 1255-1256 (1844)).

142 Note 4, *supra*.

143 *Donald v. Hart*, note 139, *supra*. The Crown admitted in this case that at least in Scotland that courts may compel production of documents "where some great and overwhelming necessity was made out." (F. McShane, note 67, *supra*, at 265). See also *Arthur v. Lindsay*, 22 R. 417, 420 (1895), opinion of Lord President Robertson (considering what "great and overwhelming necessity" means and concluding that ministerial certificates of withholding are almost always controlling). But see *Wotherspoon v. H.M. Advocate*, 1999 S.L.T. 664, 665 H.C.J., finding that "It was in the public interest that . . . investigations and precognitions should be confidential and that evidence should not be led of their contents save in the case of some great and overwhelming necessity. The sheriff refused the defence motion because he took the view, as he put it, that there were no unusual or strong circumstances or great and overwhelming necessity which would permit the court to waive the highly confidential rule which attaches to Crown precognitions." Yet the court went on to note that "We think it right to record that we are not persuaded that the sheriff's reasoning was sound." The sheriff acceded to the contention that withholding of documents is subject to approval by the court.

144 *Henderson v. M'Gown*, 1916 S.C. 821, 825.

145 *Rogers v. Orr*, 1939 S.L.T. 403, 406 (Opinion of Lord President Normand).

146 *See* note 92, *infra*.

suffered the fate it deserved. *Glasgow* and *Conway v. Rimmer*[147] dismantled Duncan both as a matter of Scottish law and English law. *Glasgow* is the most complete treatment of the law of crown privilege in Scotland, and it put to rest any notion that the law of Scotland and England agreed on the matter of public interest privilege.

In *Glasgow*, "[T]he debate upon this appeal has largely been whether the law of Scotland in respect of an objection to recovery of documents on the ground of public interest was determined by the decision of this House in Duncan's case."[148] As a preliminary matter, the lords noted that"[I]t would be clearly improper for this House to treat the law of Scotland as finally determined by a decision upon an English appeal unless the case arose upon the interpretation of a statute common to both countries."[149] In other words, Scottish common law matters and statutes not replicated in English law are to be left to Scottish courts. In a capitulating statement by the Law Lords, at least so far as the vanities of *Duncan* are concerned, the Lords noted: "It may be that the existence of an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England. If so, this House sitting as the final Court of Appeal from the Courts of Scotland will be jealous to preserve it."[150]

Viscount Simonds, in a speech that could hardly be more clear on this matter, said "we have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the Court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so."[151] Lord Norman likewise said it is "a firmly established rule that in Scotland the court has power to override objection of a Minister or head of a government department that the production of a document would be contrary to public interest." Lord Norman added this "is not a phantom power" and that "in the last resort it is a real, though imperfect, safeguard of justice."[152]

Lord Keith closed by referring to opinions by the eminent Lord Kinnear and Lord Dunedin. These two lords "had in mind at the same time the existence of an overriding power in the Court [i.e. a power to ignore ministerial objections]."[153] He noted that "it is a very strong step indeed for the Court to overrule that statement by the Department," yet "[w]e must either say that it is a good ground of objection, or we must overrule it altogether."[154]

In short, there may have been differences over time as to the need required to overcome a claim of crown privilege, but the settled law of Scotland is that determination of applicability of the privilege is left to the discretion of the court and not the minister claiming the privilege. This judicial independence on matters of state secrets is completely ignored by the Supreme Court in *Reynolds*.

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147 [1968] A.C. 910 (H.L.).
148 *Glasgow v. Central Land Board*, 1956 S.C. (H. L.) 1, 8-9.
149 *Id*. at 9-10.
150 *Id*. at 11.
151 *Id*. at 11.
152 *Id*. at 16.
153 *Id*. at 24
154 *Id*.

III. Transition to United States Law

> "If you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression."
>
> -- Mr. Botts to Chief Justice John Marshall in the trial of Aaron Burr.[155]

What is clear from the history concerning the handling of matters of state secrets by English courts is that the thread of prerogative is present in a nearly unbroken sequence over four centuries of court decisions. The crown's power to withhold information regarding matters of state is based on unreviewable prerogative rights, a trust reposed in the king and queen, and deference to ministerial power to determine what is in the public interest. As one attorney noted to the U.S. Supreme Court in 1836, "the prerogative of the king has been cherished by [English] judicial authority."[156] There is no concept in the United States Constitution for a power outside of law or for executive action that is immune to judicial examination of its lawfulness by right of an inherent, constitutionally undefined power.

English courts acted chiefly as arms of the executive branch, especially in matters concerning ministerial duties of the government, until the power of the crown gradually began to be supplanted. The Act of Settlement of 1701 envisioned a more defined separation of powers and sought to free both Parliament and judges from crown influence.[157] Judges were to hold their offices during good behavior and were not removable at crown discretion. But the judiciary in England now fell prey to the centralized power of Parliament rather than that of the crown, and by the nineteenth century Parliament "exercised the ultimate authority over the whole judicial system."[158] The judges "moved from being lions under the throne to being lions under the mace."[159] As barrister Robert Stevens noted:

> The judges in the common law courts were political appointees; the Chief Justices of these courts were expected to support the government and were often given peerages for that very purpose. They also sometimes sat in the Cabinet. The chief judge in the equity courts was the Lord Chancellor, who presided in the House of Lords in its legislative sittings and again sat in the Cabinet. It was not an arrangement likely to develop a system which saw the courts as an independent arm of government.[160]

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155 *Aaron Burr's Trial*, *Robertson's Reports* II at 517 (1807).

156 *Brent v. President and Directors of the Bank of Washington*, 35 U.S. 596, 609 (1836).

157 12 & 13 Will. 3 C. 2. Clause 3 of the Act in part states: ". . . judges commissions be made *quamdiu se bene gesserint* [so long as they perform their duties properly], and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

158 F.J.C. Hearnshaw, *Review of Principles of British Constitutional Law by Cecil S. Emden*, 7 J. Comp. Legislation & Intern'l L., 3d Ser., No. 4, 265, 266 (1925).

159 R. Stevens, *Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner and Brave New World*, 24 Leg. Studies 2004, 1, 4.

160 *Id*. at 2-3.

In the United States, courts are not lions under the throne or the mace but are an independent and coequal branch of government. The opinions in *Beatson* and *Duncan* were predictable results of settled principles in a law and constitution that is not ours, but their importation into United States law by the U.S. Supreme Court in *Reynolds* jars with our Constitution and our history of an independent judiciary. It creates a power in the executive that derives from the prerogatives of kingship. This is accomplished with a seeming lack of understanding of the origins of crown privilege and how those origins conflict with the founding spirit and our Constitution. The *Reynolds* decision exhibits a lack of thorough consideration of the effects of the decision that is unbefitting the gravity of the principles involved and the attendant consequences. In argument before the Massachusetts Supreme Court, a Mr. Parsons captured the difference between the two constitutions in noting that:

> In England, prerogative is the cause of one against the whole. Here, it is the cause of all against one. In the first case, the feelings and vices, as well as the virtues, are enlisted against it; in the last in favour of it. And, therefore, here, it is of more importance that the judicial courts should take care that the claim of prerogative should be more strictly watched.[161]

An important feature of the development of crown privilege is that little precedent in the area concerns true state secrets: information that would compromise national security if exposed. To be sure, justification for the privilege often referred to the necessity to protect the state, but there are few instances where such a justification was directly relevant to the cause at hand. In all of English history up to the time of Reynolds there amounts to only two cases where one can say without embarrassment that a true state secret was involved. Those cases are *Duncan*[162] and *Watson.*[163] And in *Duncan*, as noted, the law lords simply were mistaken about the application of crown privilege in Scottish law.

In the law of England there was no more a formed doctrine concerning a state secrets privilege than there was in the United States, yet the *Reynolds* court acted as if it were otherwise. The Supreme Court confused the broad expanse of the prerogative tradition and public interest immunity as a basis for the narrow evidentiary exception for true state secrets that it sought in the *Reynolds* opinion. We have no tradition or legal bases in support of prerogative rights, and to the extent English deference to Divine Right has influenced our decisions at law we have gone off course. The United States, up until recently, has shown little sustained inclination toward broad public interest immunity such as that found in England.[164]

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161 *Martin v. Commonwealth*, 1 Mass. 347, 356 (1805).

162 *Supra* note 79.

163 *Supra* note 63.

164 It is a plausible claim that the federal government now has what amounts to a public interest immunity privilege. The proliferation of rubrics such as "sensitive but unclassified," secret hearings and dockets, general opacity of government agencies since 9/11, and judicial willingness to limit access arguably lead to the functional equivalent of a broad public interest immunity.

There is nothing in the way of state secrets jurisprudence in the United States prior to the *Reynolds* decisions, despite persistent claims to the contrary.[165] Just as the *Reynolds* Court looked to English crown privilege and saw a coherent doctrine importable into United States law without controversy and little need of discussion, judges also see nonexistent precedent for the holding in *Reynolds* in U.S. law. The very lack of precedent seems to impel judges to insist on inventing what is not there. Perhaps with Littleton's Rule concerning the preeminence of precedence in English law that "what never was, never ought to be," or something similar in mind, judges simply needed to invent a historical jurisprudence of state secrets.[166]

Unlike England, the United States had no crown privilege or public interest immunity, so that when *Reynolds* arose there was virtually no American law to draw on for not only state secrets but for a ministerial privilege of refusal of production. Even the informer's privilege, perhaps the privilege in this area with the fullest support in law, yielded relatively few cases in United States law during the nineteenth and early twentieth centuries.[167]

Federal courts decisions, Department of Justice briefs, scholarly articles, and amicus briefs often point to the 1807 trial of Aaron Burr[168] and the Supreme Court case of *Totten v. United States,*[169] as precedent for the state secrets privilege. A district court in 1977, for example, claimed that the privilege "can be traced as far back as Aaron Burr's trial in 1807."[170] In 1989, the D.C. Circuit said that although "the exact origins" of the state secrets privilege "are not certain," the privilege in the United States "has it initial roots in Aaron Burr's trial for treason."[171] The

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165 Indeed, the privilege seems to be essentially a capitulation to executive power at the dawn of the nuclear era and in the midst of fears over nuclear war.

166 *See Attorney-General v. Vernon*, 23 E. R. 528, 534, 1 Vern. 369, 385 (1685) ("There is no precedent of any such suit ever brought into this court, and it is Littleton's rule *what never was, never ought to be*" (emphasis in original)); *Prodgers v. Phrazier*, 23 E. R. 268, 269, 1 Vern 9, 12 (1681) ("But the *Lord Chancellor* relied much upon it, that there never was any precedent of the custody of an idiot granted to a man, his executors, administrators, and assigns, as this case was: and he said what never was never ought to be; and he said that was a good reason given by Littleton on the Stat' of Marlebridge" (emphasis in original)).

167 *Gray v. Pentland*, 1815 W.L. 1282, 2 Serge. & Rawle 23 (Pa. S.C. 1815) (In a case in defamation the Pennsylvania state governor refused to give the plaintiff a complaint drafted by the defendant. Justice Brackenridge noted, "As to the Governor . . . being compellable to give the deposition or writing transmitted to him . . . it cannot be done. It must be a matter within his discretion, to furnish or to refuse it; and this, on ground of *public policy*" [emphasis in original]), at *4; *Shinglemeyer v. Wright*, 124 Mich. 230, 239, 82. N.W. 887, 890 (1900) (Letters to law enforcement claiming criminal acts on the part of others are privileged); *State v. Soper*, 16 Me. 293, 1839 WL 755 (Me.), 33 Am. Dec. 665, 4 Shep. 293 (1839) (A witness manager of a private concern may refuse to disclose names of employees who make claims that lead to a criminal investigation); *United States v. Moses* (1828); *Worthington v. Scribner*, 109 Mass. 487, 489 (1872) (In an action for malicious and false representation to the U.S. Treasury Department defendants may not be made to answer interrogatories: "The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications").

168 25 Fed. Cas. 30 (1807); 25 Fed. Cas. 187 (1807).

169 92 U.S. 105 (1876).

170 *Jabara v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).

171 *In re United States*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

uncertainty referred to is perhaps gentle recognition of the stark reality that there is little in the way of law to buttress a provenance for the privilege in United States. In the *Reynolds* case, the Justice Department's brief to the Supreme Court also cited Burr's trial as an apt precedent.[172]

Despite discussion of state secrets, the Burr trial is not a state secrets case, and the court was not called upon to rule on any claim concerning disclosure of secrets. Although the trial threatened to involve questions concerning state secrets, the Jefferson administration ultimately not only did not withhold documents but Jefferson himself took a personal and active interest in making sure that all pertinent documents would be made available to the court.[173] And other matters in the case potentially concerning state secrets were likewise resolved without legal decision. Justice John Marshall, writing in his capacity as circuit judge, noted that on the matter of withholding for state secrets "it need only be said that the question does not occur at this time."[174]

As for *Totten*, the Supreme Court in *Reynolds* cited to the case for the claim that "the privilege against revealing military secrets . . . is well established in the law of evidence."[175] The idea may have been well established but the law of the matter most certainly was not settled nor even subject to any significant level of discussion. To be charitable, the court's labored claims have little to back them up. Other federal court decisions, Justice Department briefs, scholarly articles, and amicus briefs also cite *Totten* as a legitimate precedent for the state secrets privilege.[176] *Totten* is a problematic basis for the state secrets privilege. The case concerned nothing beyond a discrete category of unenforceable contracts. Little may be extracted from the law of this narrowly defined case to justify the application of its principles to the entire field of military secrets, national security, and foreign affairs. If *Totten* had such a broad reach, then it would have all but replaced the state secrets privilege. *Totten* is a jurisdictional bar; when it applies it demands dismissal of the case on the pleadings. Yet commentators still refer to it as a case in the line of state secrets jurisprudence.[177]

These historical examples are misleading for two reasons. First, they instill the false sense that the law of the privilege is ancient and therefore compelling for that reason if nothing else. But there is no law of the privilege in this country

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172 Brief for the United States, *United States v. Reynolds*, No. 21, U.S. Supreme Court, October Term, 1952, at 10-11. *See also Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004); *Ellsberg v. Mitchell*, 709 F.2d 51, 56 n.21 (D.C. Cir. 1983); Brief of Amicus Curiae Professor Robert M. Chesney in Support of Reversal, *Hepting v. AT&T Corp.*, Nos. 06-17132 and 06-17137 (9th Cir. March 16, 2007), at 5-6.

173 11 The Writings of Thomas Jefferson 241 (Thomas Jefferson Memorial Association of the United States, 1904).

174 *United States v. Burr*, 25 Fed. Cas. 30, 37 (D.C.D. Va. 1807). *See also* Louis Fisher, In the Name of National Security: Unchecked Presidential Power and the Reynolds Case 212-20 (2006).

175 *Supra* note 28, at 6-7.

176 *See e.g. Edmonds v. U.S. Dept. of Justice*, 323 F. Supp. 2d 65, 71; Petition for a Writ of Certiorari, *Tenet v. Doe*, No. 03-1395, U.S. Supreme Court, April 6, 2004, at 17-18; Chesney Brief, *supra* note 169, at 6-7.

177 See the excellent analysis of Jeremy Teleman in *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, American University National Security Law Brief, Vol. 3, Issue 1, Article 2.

prior to *Reynolds*. The privilege was unilluminated by United States law. Second, reliance on an historical ground diverts attention from the truly important question concerning the privilege. No one doubts there is a privilege against disclosure of state secrets that would imperil U.S. interests, intelligence information, or sources and methods of intelligence collection. The doubt is in by whom and by what means the privilege should apply. A privilege left solely to the judgment of the executive branch is liable to abuse, and history bears this out. It does no good for the executive branch and its sympathizers to point to common law history for support of great judicial deference on this score, for what evidence there is in the common law points to a judicially rigorous approach to claims of privilege. The executive branch should be put to the test and the nation deserves a judiciary that does not shrink from a duty to check misuse of a privilege that invites overreach and the capacity to hide the business of government from the people.

A. Burr v. United States

A detailed investigation of *Burr* is unnecessary, for that has been ably accomplished by other commentators in recent years.[178] Burr was charged with treason for making war against the United States and inciting insurrection, and at trial he demanded letters in the possession of President Thomas Jefferson. Chief Justice John Marshall heard the case in his circuit judge capacity and had to wrestle with the question of whether he had the power to issue a subpoena for documents against President Jefferson. On the one hand, Marshall apparently feared expressing disrespect toward the office of the presidency, which probably really means a fear of being ignored if a subpoena were to issue. On the other hand, failure to issue the subpoena for documents pertinent to Burr's defense would seem as if Marshall had capitulated to executive power. In one exchange, attorney Wickham said "it is not our object to criminate the Government, but to obtain the truth. We hope that General Wilkinson will not say that his conduct has been approved by the Government, Is this a State secret?" Justice Marshall responded that "he should be sorry to require an answer which would state the opinions of the Government."[179] To the relief of Marshall, President Jefferson communicated his willingness to make the letters available, though he reserved "the necessary right of the president of the United States to decide, independently of all other authority, what papers coming to him as President the public interest permits to be communicated, and to whom."[180] The "independent of all other authority" language appears to be the first clear expression by a President of an ultra-constitutional privilege of state secrets lodged in executive power. Later in the trial, Attorney Wickham, counsel for Burr, said he had asked for the U.S. convention with the Spanish commandant, but was told it was a state secret.[181] Justice Marshall said he would not compel production of the convention "unless its bearing on the case can be shown."[182]

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178 B. Melton, Aaron Burr: Conspiracy to Treason (2002); *See* L. Fisher, *supra* note 9, Chapter 7.

179 Congress of the United States, *American State Papers*, Class X, Miscellaneous Vol. 1, p. 547

180 Letter read in court June 16, 1807, by George Hay. Emphasis added. Reproduced at <http://www.law.umkc.edu/faculty/projects/ftrials/burr/burrjeffproclamation.html>.

181 Congress of the United States, American State Papers, Class X, Miscellaneous Vol. 1, p. 547

182 *Id*.

Much has been written about Marshall's musings concerning this matter. Louis Fisher notes that Marshall and counsel at bar repeatedly referred to a privilege not to make confidential matters public, but there was no assertion that the confidential material would not be made available to the court.[183] Liberty at trial was taken by both sides in casting the issue of whether papers could be withheld under a privilege of state secrets. Defense counsel John Wickham incorrectly claimed that "In England, nothing is more common than for the most secret transactions to be disclosed in a court of justice."[184] Here he somewhat disingenuously seemed to be referring to cases concerning papers of private concerns and not papers held by the government. Attorney General Hay countered Wickham's ill-conceived statement by claiming that "We are not at liberty to dive into the secrets of the Executive Department to know what orders they give to their agents, and to proclaim those orders to the world – orders which were given for the public good."[185] Hay concluded that "There can be no doubt but that the public good does require that various orders of the Government should forever remain a secret."[186]

These statements run at the level of principle, but details often have a way of making a principle look cheap and self-serving, and so it is with Burr's trial. In an exchange bringing out facts reminiscent of events of our era, testimony revealed that General Wilkinson had a habit of taking letters deposited for post and opening them without warrant.[187] When defense counsel wanted to examine Wilkinson on this practice, Attorney General Hay intervened, claiming that the matter was between two citizens and irrelevant to the case at hand.[188] Insisting upon this line of questioning, Burr's defense claimed that the illegal acts by Wilkinson would undermine his credibility as a witness.[189] At the same time implying that Wilkinson acted outside of government instruction, Hay brought him back under the protection of government by making perhaps the first argument for a national security exception to the Constitution to appear in a reported case:

> It has been the constant effort of the counsel on the other side to identify General Wilkinson with the Government. We have heard of the plundering of the post offices, violating oaths, and prostrating

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183 Marshall realized that if he issued a subpoena to Jefferson, it might be interpreted as a sign of disrespect for the office of the presidency. Yet Marshall was more concerned that his own branch would lose respect if it failed to give an accused access to information needed his defense. *United States v. Burr* 25 Fed. Cas. 30, 37(C.C.D. Va. 1807 (Case No. 14,692d).

184 *Burr's Conspiracy–Trial at Richmond*, Virginia, Miscellaneous No, 230, 10th Cong., 1st Sess., Transmitted to Congress by President Thomas Jefferson, November 23, 1807, at 545.

185 Congress of the United States, American State Papers, Class X, Miscellaneous Vol. 1, p. 545.

186 *Id*.

187 *Id*. at 546.

188 *Id*. at 546-47.

189 These were the least of Wilkinson's moral shortcomings and legal infractions. As one historian put it "There is no particular reason. . . for supposing he was less ready to deceive his Spanish paymasters than to betray the interests of his own government." *Some Reflections on the Career of general James Wilkinson* (21 (4) Miss. Valley Hist. Rev. 471 (1935).

> private rights. Now it is asked if the Government approved of these acts. Is it decorous, is it proper, to pursue this course? They may ask questions to implicate General Wilkinson, but is it proper to endeavor to cast an imputation upon the Government? I feel no solicitude on the subject; for when all the circumstances are considered, and the real situation of that country understood, though I will not say that the measures were strictly lawful, yet I will say the exigencies of the times called for them; and that the person who held the high and responsible situation of General Wilkinson was bound to pursue the course which he did.[190]

In rejoinder, Wickham said:

> It is not our object to criminate the Government, but to obtain the truth. We hope that General Wilkinson will not say that his conduct has been approved by the Government. Is this a State secret?[191]

The possibility of embarrassment so frequently an apparent motivating factor in the modern assertion of a right to withhold documents is also present in *Burr's Case*.[192]

In a matter directly implicating a claim of state secrets, it transpired that Wickham had asked for the convention with the Spanish Commandant, but was told by persons unidentified that the document "was a state secret."[193] Wickham claimed that "no State secrets should prevent the production of every paper necessary for [Burr's] defence,"[194] whereupon Marshall refused to compel production of the document "*unless its bearings on the case be shown*."[195] Apparently, Marshall stood ready to compel production of a document claimed to be a state secret if it was necessary to the case for the defense.

In reflecting upon the question of how to treat a certificate from the President claiming privilege for information contained in government communications, Marshall decided that "After such a certificate from the President of the United States as has been received, I cannot direct the production of those parts of the letter, *without sufficient evidence of their being relevant to the present prosecution*."[196]

While there is plenty of legal smoke in *Burr's Case*, there is no jurisprudential fire. Matters were speculated upon concerning state secrets, but nothing was ever put at issue since all potential problems in this respect were resolved without the need for decisions by Marshall. It seems Marshall thought courts had the power to order production of even secret material in the hands of the executive branch if

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190 *Supra* note 184.
191 *Id.* at 547.
192 A fear of embarrassment is also at work in *Reynolds*, where it is now known that no state secrets were implicated in the documents requested by the plaintiffs. Documents simply showed the aircraft was negligently maintained and the Air force may have known it was not airworthy. *See* Fisher, *supra* note 9, Chapter 6.
193 *Id*. at note 188.
194 *Id*.
195 *Id*. (emphasis supplied).
196 *Id*. at 553 (emphasis supplied).

duty and justice required that. *Burr* did not establish a privilege for state secrets. Perhaps this is the reason not a single reported opinion between 1807 and the 1951 circuit court decision in *Reynolds* refers to *Burr* as support for a military or state secrets privilege. Most recently, the concurrence in *Zubaydah v. United States* by Justices Thomas and Kavanaugh improvidently cites *Burr* as a case directly in the line of state secrets jurisprudence.[197] But Justice Gorsuch seems to have the correct perspective on the case when he writes in his dissent that "[s]ince *Burr*, this Court has held that the Executive must do more than assert a harm to national security 'might' follow from producing evidence."[198]

In the end, *Burr* offers little of substance to the debate concerning state secrets other than what everyone already knew: that such a privilege must exist in some form. Marshall was not called upon to decide how a privilege against state secrets would be applied in practice. *Burr* confirms only that there may be times when the security of the nation requires that government held information not come into evidence at trial.

B. Totten v. United States[199]

The Totten decision makes no reference to *Burr*. Considering that courts refer to these two cases as waypoints[200] in an admittedly sparse history of state secrets jurisprudence, it is odd that the second post in that line would make no reference to the first. It seems unreasonable to attribute to the Court a studied or even vaguely realized jurisprudence of state secrets.

The question in *Totten* was straightforward and the U.S. Supreme Court answered that question in a mere four paragraphs. One William Lloyd made a contract with President Abraham Lincoln for espionage services during the Civil War, but the government breached the terms of payment under the contract. Lloyd's estate sued and the Court concluded that contracts for espionage made during time of war could not be sued upon. A narrow reading of *Totten* yields the conclusion that suits for breach of payment for espionage services are a discrete category of unenforceable contracts.

Significantly, no secret information was withheld based on a claim of privilege, and the pertinent facts to litigate the claimed breach had already been publicly aired.[201] Mr. Justice Field wrote the headnote to the case, and identified the narrow holding as "An action cannot be maintained against the Government, in the Court of Claims, upon a contract for secret services during the war, made between the President and the claimant."[202] The function of *Totten* is not to protect secret information from disclosure, but to protect the government from being dragged

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197 *Zubaydah*, at 142 S.Ct. 959, at 979 (2022).

198 595 U.S. at __ (slip opinion page 23).

199 92 U.S. 105 (1875).

200 *See e.g., Mohammed v. Jeppesen Dataplan Inc*. 563 F.3d 992 (section III B); *El Masri v. United States* 479 F.3d 296 (Section II); *Terkel v. AT&T* 441 F. Supp. 2d 899 (section C, parts 2 and 3).

201 New York Times, Notes from the Capital, March 16, 1876.

202 In modern times, that is how the Court still characterizes the case. *See, e.g.*, *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 167 L. Ed. 2d 15, 25 (2007), where *Totten* is described as, "prohibiting suits against the Government based on covert espionage agreements."

into a public airing of what, for the time, were sordid affairs. Contemporaneous reporting on the oral argument to the Supreme Court in the case by *The New York Times*, mentions nothing of secrecy. Only two arguments on behalf of the United States were noted. First, the government claimed that the action was time barred, "inasmuch as the means which were open to the spy to send information were also open to him through which to collect his pay, and he did not avail himself of the opportunities as they presented themselves."[203] Second, the government agreed with the reasoning of the Court of Claims "that there was no power" to remedy the breach "without the appropriation" of funds made specifically for the contracted purpose, and that "such a contract made no case for a suit in that Court."[204] It appears that the issue of secrecy concerning either documents or testimony was not briefed or argued in the case.

In its opinion, the Court apparently introduced the question of secrecy *sua sponte*, noting that "Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter."[205] And that "The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery."[206] These are odd things to say if the case truly concerned state secrets.

First, as noted, much about the case had already been made public and there appeared to be little concern with secrecy either on the part of the Court of Claims or on the part of counsel for the government. Second, it is wrong to say that both the government and Lloyd "must have understood that the lips of the other were to be forever sealed." There was no law at the time that would have prevented Lloyd from publicizing an account of his espionage activities during the Civil War. Indeed, others had done exactly that.[207] It might also be a fair resort to recouping money not paid by the government on contract by selling lurid stories to the press. Lloyd's lips were only sealed because by the time of the appeal to the Supreme Court he was dead. Finally, it makes little sense to say that suing on a contract for espionage services is itself a breach of the contract when the Court concludes that the contract itself may not be sued upon for breach.

There is no language in *Totten* that indicates a broader scope for executive secrecy powers beyond application to espionage contracts. It is unlikely that the *Totten* Court meant to announce a general power of the President to withhold documents from courts in such a short, unbriefed opinion. But that is now apparently the position of some presidential administrations.[208] *Totten* did note that "[i]t may

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203 *See supra* note 137.

204 *Id*. The Court of Claims did not publish an opinion stating its reasons for dismissal of the action. It only reports: "For services under contract with the President of the United States as secret agent of the United States in the States in rebellion, from July 13, 1861, to June 5, 1865. Dismissed." 9 Ct. Cl. 506 (1873).

205 *Supra* note 134, at 106.

206 *Id*. at 107. Emphasis added.

207 *See, e.g.,* B. Boyd, Belle Boyd in Camp and Prison (1865); T. Conrad, A Confederate Spy: A Story of the Civil War (1892); S. Edmonds, Memoirs of a Soldier, Nurse, and Spy: A Woman's Adventures in the Union Army (1865); R. Greenhow, My Imprisonment and the First Year of Abolition Rule at Washington (1863).

208 *Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss*, *Hepting v. AT&T*, C-06-0672-VRW, No. 124-1, at 8, 15.

be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated."[209] But the reference here is to confidentiality and not secrecy or a constitutional power of the President to withhold information from disclosure. This is made clear by the sentence immediately following the above quote, which provides examples of the types of confidentiality the Court had in mind: "On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose."[210] And in veering the decision back to the issue of secret contracts, the Court concludes in the closing sentence of the opinion that "much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed."[211] *Totten* is not a state secrets case.

Despite these apparent limits of the ruling, some administrations have claimed that the Totten Bar requires dismissal of various actions against the United States. The administration of George W. Bush argued *Totten* should bar actions relative to warrantless electronic surveillance of U.S. citizens under the theory that *Totten* extends to all cases where any kind of secret agreement is implicated.[212] In *Hepting v. AT&T*, a case concerning AT&T's cooperation in a "terrorist surveillance program," the district court considered, and rejected, the government's reliance on Totten.[213] This rejection was not surprising considering that the plaintiff was not in contractual privity with the government, the whole world seemingly believed there was an intelligence relationship between AT&T and government, and publicly available evidence pointed to such a relationship. The government even admitted to such a relationship, and AT&T freely acknowledged that when asked by the government to cooperate in intelligence operations it does so.[214] In *Hepting*, to bar the case by aggrieved third parties under *Totten* based on a "secret" contractual relationship between the government and private corporations is to defeat the Fourth Amendment through a formalism one would suspect had long been dead in the law. Similarly, the Ninth Circuit rejected a *Totten* claim in *Mohammed v. Jeppeson Data Plan* since not all of the plaintiffs' averments required reference to

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209 92 U.S. 105, at 106.

210 *Id*. at 107.

211 *Id*.

212 *See In re* NSA Tel. Rec., 444 F. Supp. 2d 1332 (J.P.M.L. 2006) for a list of dozens of actions against the United States alleging unconstitutional and illegal electronic surveillance of U.S. citizens. This case considered and approved consolidation of these cases in the Northern District of California. In many of these cases, the United States asserted that *Totten* barred suit. The government also seems to want the *Totten* "doctrine" to do a good deal more, arguing that whenever a matter is claimed to be clothed in national security the case should be dismissed on the pleadings. *See Hepting*, note 147 *supra*. Although courts have not quite made this leap, it is a logical step in the reinvention of the *prerogative regis* American style.

213 439 F. Supp. 2d 974, 993 (N.D. Cal. 2006).

214 "AT&T Helped U.S. Spy on Internet on a Vast Scale" https://www.nytimes.com/2015/08/16/us/politics/att-helped-nsa-spy-on-an-array-of-internet-traffic.html

secret contracts.[215] In that case, foreign nationals alleged kidnap and torture by the U.S. government. The court found that since the kidnapped victims were outside the contractual agreement, *Totten* did not bar the action.[216] In the first sentence of the opinion the court writes:

> This case requires us to address the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security. Although as judges we strive to honor all of these principles, there are times when exceptional circumstances create an irreconcilable conflict between them.[217]

With due respect to the court, it might be observed that there is no balancing, and that the times where there is an "irreconcilable conflict" is not in "exceptional circumstances" but whenever the privilege is raised.

In analyzing state secrets litigation for instances of *Totten*-based dismissals of cases there is only one instance of a dismissal where the plaintiff was not in contractual privity with the government.[218] In that case the Second Circuit Court of Appeals upheld dismissal of the action but reversed on the grounds for dismissal. The court held that although the action should be dismissed, the case "need not be resolved on whether judicial proceedings would necessarily divulge classified information to the public."[219] Other than this orphaned district court decision there is no case law to indicate that the *Totten* Bar is applicable against a plaintiff not in privity with the government for secret contractual services.

C. United States v. Reynolds[220]

In 1948, a B-29 airplane crashed at Waycross, Georgia, and widows of three civilian victims sued the federal government under the Federal Tort Claims Act (FTCA).[221] The plaintiffs sought production of the official accident investigation report, whereupon the government moved to quash the motion for production claiming that disclosure of the document was protected under Air Force regulations.[222] The district court denied the government's motion, finding that the FTCA had waived the claim of privilege in such cases.[223] When ordered by the court to produce the documents for inspection to determine if they contained privileged information the Air Force refused to comply.[224] The district court insisted that the government submit the accident report to the court for review,

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215 *Mohamed v. Jeppesen Dataplan, Inc.*, 563 F.3d 992
216 Id.
217 614 F.3d 1070, at 1073.
218 *Hudson River Sloop Clearwater, Inc. v. Navy*, 1989 U.S. Dist. LEXIS 19034 (E.D.N.Y. 1989).
219 *Id.*
220 345 U.S. 1 (1953).
221 *Id.* at 2.
222 *Id*. at 3.
223 *Id*.
224 *Id*. at 4.

with the understanding the court would not share the document with widows of the deceased or their attorneys.[225]

The purpose of the review would have been to ensure that the privilege was invoked to protect state secrets, and not to avoid liability or embarrassment. We now know the report contained no secrets of state, but it did say the plane was not airworthy. Had the district court judge seen the accident report, he would have realized it contained no sensitive information and that the government had deceived him. The birth of the state secrets privilege emerges from executive branch officials making false claims to a federal district court. It would be difficult to produce an abuse that should result in more caution in court acceptance of assertion of the privilege than the facts of the case that gave it birth. In the face of government refusal to produce requested documents to the district judge to be read in his chambers, he resolved the disputed facts in favor of the three widows and moved to determination of damages.[226]

At the trial level the Air Force did not assert the state secrets privilege by name, but claimed that the aircraft in question was on a confidential mission.[227] The Government contended on appeal "that it is within the sole province of the Secretary of the Air Force to determine whether any privileged material is contained in the documents and that his determination of this question must be accepted by the district court without any independent consideration of the matter by it."[228] Although the Third Circuit found that "State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding," *in camera* inspection by the trial judge would be sufficient to protect such secrets from disclosure while allowing the judge to determine that the privilege is correctly asserted.[229] It is unclear the grounds the Third Circuit had for making such a statement. One suspects at this moment, the government felt a keen urge to prevent the embarrassment that would occur if the accident report were to be produced for in camera inspection.

In an anemic opinion, only twelve pages long, the U.S. Supreme Court adopted the executive stance and announced a decision derived from the spirit and language of *Duncan v. Cammel*, *Laird*. The government would not be compelled to produce the documents for *in camera* inspection. The opinion contains astonishingly little justification considering it institutes what is in practice a doctrine of legal unreviewability for matters involving anything that might be brought under the rubric of national security. Not even the oral arguments were preserved by the Court, nor do any of the Justices' private papers contain much useful information about the case.[230]

A fair assessment of the majority opinion is that the *Reynolds* decision is a shallow analysis. Even the three dissenting Justices (Black, Frankfurter, and Jackson) provided no evidence or reasoning whatsoever to support their position. Perhaps it is notable that these three dissenters disproportionately represent the sum

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225 *Id*. at 5

226 *Id*.

227 *Id*.

228 *Reynolds v. United States*, 192 F.2d 987, 995-996 (1951).

229 *Id*. at 996.

230 Findings by Louis Fisher concerning research for his In the Name of National Security (Kansas U.P. 2006), Feb. 2007.

of juridical talent on the Court at the time. Yet they merely dissented "substantially for the reasons set forth" by the Third Circuit. No additional analysis or explanation is given. This thread-bare decision critically facilitated the redistribution of political and constitutional power toward the executive branch in the post WWII era. It is a redistribution of power that significantly altered the character of government. Just as modernity and the era of nuclear weapons dramatically shifted national defense power to the presidency, the Court facilitated this shift by providing the executive branch with a readymade tool to escape answering to inconvenient congressional inquiries and legal review of executive branch activities.

In perhaps an unsurprising result, the government report in the *Reynolds* case contains no secrets. It was withheld to avoid embarrassment and liability, since it related that the plane was so defective and poorly maintained that it should never have been allowed to fly.[231] Had the district judge and the Third Circuit seen the report, they would have decided in favor of the three widows. The district court and the Third Circuit understood the weakness of the administration's position in refusing to allow the district judge to view the accident report in camera. Moreover, by the time the widows decided to return to the Supreme Court, the Justices understood the accident report (now public) contained no state secrets. The Court nevertheless ignored executive branch deceit and settled on an approach that emulates the results of *Duncan*. After the *Reynolds* report became public, the Court refused to revisit the case.

The Court in theory retains the power to compel production, but all parties surely now understand this to be a judicial face-saving device. If there were any doubt to this matter, the decision in *Zubaydah* put that to rest.[232] There the Court found publicly available information may be excluded at trial at invocation of the state secrets privilege. In the words of Justice Gorsuch:

> The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the Court acquiesces in that request. . . [W]e should not pretend it will safeguard any secret.[233]

It is difficult to imagine anything other at work here beyond judicial embarrassment and fear of establishing a robust judicial presence in national security matters. This is at the heart of the matter. The unwillingness of the Court to signal that misuse of the label of national security for reasons outside of necessity and law will be remedied by courts has left no viable avenue to check abuse in the name of national security.

A single saving element to *Reynolds* is that while it acquiesced to a "state secrets privilege," it specifically refused the Justice Department's demand for a public interest exception privilege to withhold information from courts.[234] The Court sectioned off national security from "public interest" and perhaps thought that would contain the range of the privilege. This redeeming quality is erased when

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231 *See* accident report pages 26a-30a.
232 *Supra* note 196.
233 *Id*. at 985.
234 *Reynolds*, *supra* note 219, at 6.

the rubric of national security is expanded to cover a broad range of government activity. We do have a public interest exception, and it is termed "national security": it turns out that "national security" in the modern world is multifarious and legally agile.[235]

Since classificatory power is solely in the hands of the executive branch, the impulse to classify out of habit rather than necessity is common.[236] Judges in the United States have a responsibility in determining the nature of the privileged material that English and Scottish judges did not bear. Indeed, since there were no national security interests revealed in the information requested by the plaintiffs in *Reynolds*, the motivating factor for cover-up by the Air Force was a fear of embarrassment and liability for gross negligence in maintenance of the aircraft that crashed.[237] This fact, when publicly revealed, should have given the Court caution in blindly acquiescing to assertions of the privilege. No such caution developed; quite the opposite, as demonstrated in *Zubaydah.* To the present, the U.S. government asserts that characterizing *Reynolds* as anything other than a valid and sincere use of the state secrets privilege is false. In a 2014 brief the government wrote: "[A]ny suggestion that the state secrets privilege assertion in [*Reynolds*] was shown to be improper after documents relevant to that assertion were later declassified. . . is incorrect. In fact, over fifty years after the assertion in *Reynolds*, federal courts reaffirmed the validity of the *Reynolds* assertion."[238] The fact that courts still adhere to *Reynolds* does not mean that *Reynolds* was not a fraud on the court. It only means that the Supreme Court finds it judicially inconvenient to challenge the executive branch in the realm of national security.

Any person of any rank or position with a classification stamp may remove documentation, writings, artifacts and anything else from evidence through classification. Add to this that in the initial classification decision the costs of under-classification may be high, but there is no obvious cost to overclassification. Justices Gorsuch and Sotomayor chastised their colleagues in the lead sentence of their dissent in *Zubaydah*, writing: "There comes a point where we should not be ignorant as judges of what we know to be true as citizens. This case takes us well past that point. . . we should not pretend it will safeguard any secret."[239] They state the obvious: use of the privilege is now formalistic, and courts are to take its invocation as a presidentially-determined demarcation of the limits of justiciability.

In English law, the privilege was a principle of government. As Viscount Simon wrote in *Duncan*, the case represented a "question . . . of high constitutional importance"[240] and noted that "[w]hen the Crown . . . is a party to a suit, it

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235 On June 8, 2011. The National Security Agency "heralded" the declassification of a two-century old study on cryptography translated from German. Steven Aftergood, of *Secrecy News*, noted at the time that the 1809 report was widely available on the internet.

236 Noted from personal experience and observation of one of the authors.

237 After the crash results became public, family members of the deceased filed a suit in action of fraud upon the court. The action has a very high bar. Plaintiff must show "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." Perjury by government officials would be required to meet this bar, and the Third Circuit found the plaintiffs had not met their burden. (*Herring v. United States*, 424 F.3d 384)

238 *Mohamed v. Holder* (Case No. 1:11-CV-0050) (Defendant's Response to Court Order).

239 142 S. Ct. 959, at 985 (2022).

240 *Duncan*, *supra* note 119, at 629.

cannot be required to give discovery of documents at all. . . No special ground of objection is needed."[241] Understanding of the state secrets privilege developed in *Reynolds*, by contrast, does not embrace a constitutional principle. Rather, it is a pragmatic device that works to both protect national security information and to provide courts with a way to avoid confrontation with executive branch power over claimed national security matters.[242] These distinctions limit the operation of the privilege, emplace the courts as the final authority as to when the privilege is correctly asserted, and transform the constitutional, principle-based privilege of English law into the pragmatic, fact-driven privilege of American law. Yet as the *Zubaydah* decision made clear, we find ourselves in a pre-Conway world of crown privilege with a presidency transformed into monarchical status through the lenses of national security and the remnants of crown privilege in the common law.

The ghost of *Duncan v. Cammel*, *Laird* haunts American jurisprudence, and after *Zubaydah* we have what amounts to the "class exception" as that of the pre-*Conway* British jurisprudence. We also find ourselves in a world where anything may be classified and put beyond the reach of law without fear of penalty. Overclassification is endemic in the federal government, and once an item is classified at "secret" level or higher, it is effectively unavailable to the judicial process without executive branch acquiescence. Over 30 years ago, former Dean of the Harvard Law School and U.S. Solicitor General Erwin Griswold wrote an op-ed for the Washington Post titled "Secrets Not Worth Keeping."[243] He said what others only think: "there is very rarely any real risk to current national security from the publication of [classified] facts relating to transactions in the past, even the fairly recent past" and that classification power is greatly misused at a cost to courts and justice.

Other than the *Zubaydah* decision, it would be difficult to capture a more telling instance of this conclusion than the executive branch classification and removal of a 2014 court decision of a federal judge that had been available to the public on government servers for months.[244] This is a direct encroachment on judicial authority, and forces federal courts to yield to secrecy formality rather than maintain the dignity and constitutional importance of judicial independence.

Government counsel also argue before courts that it would be incorrect to put limiting principles on the privilege, including refusal to apply the privilege when invoked to protect the introduction of unclassified information. As one government attorney put it: "The privilege protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information."[245] To accept this is to accept presidential control over justiciability whenever the executive branch wishes to assert the privilege. This ignores that the privilege is meant to be an evidentiary privilege, not an incantation to dispel legal actions. The government essentially claims that the privilege amounts to a jurisdictional bar where it is asserted. This is not what the privilege contemplates, even if that is what it has become as a matter of practice.

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241 *Id*., at 632.

242 *Reynolds*, *supra* note 219, at 10.

243 Wash. Post, Feb. 16, 1989 (https://www.washingtonpost.com/archive/opinions/1989/02/15/secrets-not-worth-keeping/a115a154-4c6f-41fd-816a-112dd9908115/)

244 Restis v. Am. Coalition Against Nuclear Iran, Inc. 2015 U.S. Dist. LEXIS 36085

245 "Court Views State Secrets Too Narrowly" Jan. 29, 2015 Secrecy News, Federation of American Scientists (https://fas.org/blogs/secrecy/2015/01/ssp-narrow/)

A telling example of the mire courts have slid into is that Attorneys General now make straight-faced arguments that the privilege is not limited to classified material. In *Mohamed v. Eric Holder*[246] Attorney General Holder claimed:

> [T]he state secrets privilege in this case is not limited to certain physical documents that Plaintiff seeks to compel through discovery, but rather covers evidence and information that would be needed to litigate the claims presented in this lawsuit in whatever form it appears, i.e., whether that evidence or information is reflected in the documents at issue in discovery, in other documents, or in any testimony that might be presented to establish claims or defenses. Thus, an assessment of the privilege assertion encompasses not just the information set forth in the four corners of a particular document, but also the broader context of the privileged information which that document reflects.[247]

Notice that in the context of this case it meant that even unclassified and publicly available information is subject to exclusion under a state secrets claim. The Attorney General added: "[t]he privilege also protects information that may appear innocuous on its face, but which in a larger context could reveal sensitive classified information"[248] One might ask where the logical limit is to this kind of privilege. Attorney General Holder also complained of a judicial order that "appears to circumscribe the scope of [the government's] assertion of the state secrets privilege… by focusing on the specific documents" sought by the Plaintiffs in discovery, and then finding those documents insufficiently sensitive to be privileged on state secrets grounds.[249] Government counsel added, "an assessment of the privilege assertion encompasses not just the information set forth in the four corners of a particular document, but also the broader context of the privileged information which that document reflects."[250] This is a rather plain way of asking judges to forgo their Article III responsibilities in adjudicating state secrets claims.

The Attorney General then turned to Judge Trenga's determination that 28 documents reviewed by the court *in camera* did not contain state secrets and would be made available to the plaintiff. Citing the Fourth Circuit opinion *El Masri v. U.S.*, the Attorney General states that:

> [a]lthough the state secrets privilege was developed at common law, it performs a function of constitutional significance because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities. *Reynolds* itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that

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246 *Mohamed v. Holder* (Case No. 1:11-CV-0050) (E.D. Va., Defendant's Response to Court Order.

247 *Id*. Defendant's Response to Court Order 1:11-cv-00050-AJT-TRJ (Document 171)

248 *Supra* note 245, at p. 10.

249 *Id*. at p. 4.

250 *Id*. at p. 3

> might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets.[251]

Even for state secrets jurisprudence, this is a breathtaking position. It is asking the court to find unclassified and publicly available information pertinent to the case to be excluded under a state secrets assertion. Once this threshold is passed there is no limit to the extent of the privilege. If we accept that the grounds for the privilege are based in constitutional protection of the executive branch province, then the privilege is divorced from law and review of courts and there is little outside of its potential compass.

The American state secrets privilege shares an uneven history with the doctrine of crown privilege. But the United States government successfully elided crucial distinctions between the two concepts by claiming a constitutional basis for the privilege; often alluding to, and sometimes simply declaring, that it protects the sphere of Article II powers held by the President.[252] The argument is that the presidency sits in a position with functional similarities to the historical British crown. *Reynolds* at first seems to hold otherwise. As the Court noted: "We have had broad propositions pressed upon us for decision . . . [These] positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision."[253] The Court here clearly alludes to the United States brief that highlights a strong privilege under crown doctrine. By denying the government's demand for a public interest exception and refusing to treat the matter as even implicating constitutional doctrine, the Court appears to recognize the substantial differences between crown privilege and what shape an American privilege for withholding state secrets must take.

The discussion seems to involve political compromise, not legal or constitutional principle. It is about the nuts and bolts of judicial action, not the reach of Article II powers. The Court refers repeatedly to "judicial experience" and the practice and habits of judges in factually idiosyncratic settings of discovery. It speaks of "sound formula of compromise,"[254] weighing a plaintiff's need for the requested material when deciding on *in camera* review, and the pursuit of alternatives to allow the case to go forward in the face of a state secrets privilege claim.

But it is also clear that the court keenly felt the anxiety of the Cold War and was not about to be out of step with the rest of the government on policies concerning national security. Perhaps this led to inadvisable judicial timidity in not only adopting tenets of crown privilege, but also in finding that where national security information is withheld the plaintiff still bears the burden of making out all the elements of a case otherwise required. The combination of these two, quite separable, features virtually guaranteed the expanded use of the privilege and the temptation to use it to protect the executive branch from unwanted scrutiny, embarrassment, and even disclosure of illegal and unconstitutional activity. The motivation for use of the privilege is not to avoid monetary liability but to avoid

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[251] 479 F.3d 296, at 303.

[252] *See*, *e.g. Hepting v. AT&T*, Nos. 06-17132 and 0617137, Brief for the United States (March 9, 2007), at 15 ("The state secrets privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense").

[253] *Reynolds* at 6.

[254] *Id*. at 9.

exposure of national security information and, perhaps just as often, embarrassment over executive branch activities.

The whole matter would have been largely avoided had the *Reynolds* Court concluded, as did the district court and the Third Circuit, that governmental refusal to produce documents results in factual matters put at issue relevant to the documents be taken in favor of the plaintiff. The result is judicial abandonment of constitutional duties to check abuse of executive power.

The Court noted that "While claim of executive power to suppress documents is based more immediately upon [statute], the roots go much deeper. [Statutory privilege] is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power."[255] Having put courts on notice, the opinion buttresses that warning: while "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege," it must "do so without forcing a disclosure of the very thing the privilege is designed to protect."[256] Disclosure to whom, is the important question. Is judicial review of evidence *in camera* a forced "disclosure"? No: it is at the heart of judicial duties and responsibilities. Yet, subsequent court decisions seem to indeed support the idea that "forced disclosure" includes orders of production for *in camera* inspection.[257] If so, courts are to strike themselves blind when the privilege is invoked. This is abdication of constitutional duties at the most consequential level. Further, the Court leaves unaddressed the unconscionable fact it was lied to by the executive branch in the very case that spawned the state secrets privilege.

The district court and the Third Circuit in *Reynolds* did not force public disclosure of the accident report. Instead, they merely insisted that the report be shared with the district judge for his independent analysis. Had that been done, the district judge would have discovered that the report contained no state secrets. While nothing concerning national security is at stake, the report did make clear that the plane was so defective it should never have been allowed to fly.[258] In the concluding section of the report it stated: "The aircraft is not considered to have been safe for flight because of non-compliance with technical orders."[259] In a telling recommendation, the report advises "wherever feasible flight test aircraft be bailed to the commercial concern conducting the test."[260] That recommendation is apparently motivated by an effort to shift liability to the bailee in case of future accidents causing tortious injury. The district court and the Third Circuit understood the need for judicial independence. The Supreme Court did not. There is nothing in the report that remotely implicates national security. The founding of the state secrets privilege in U.S. law was built on what is often a motivating factor in deploying the privilege – the effort to hide embarrassing or inculpatory information.

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255 *Id*. at 6, note 9 (1953).

256 *Id*. at 7.

257 For example, Federal Register Vol. 68, No. 126, Part III, Tuesday, July 1, 2003 states "Nothing in this part shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." (§9.9)

258 "Report of Special Investigation of Aircraft Accident Involving TB-29-100XX NO. 45-21866", filed in court, June 22, 1953.

259 Appendix to Report at 22a.

260 *Id*. at 23a.

In a jagged couplet of asserting judicial power and then undercutting that power, the Supreme Court in *Reynolds* offered this reasoning: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case."[261] Plainly stated, the Court warned that "the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[262]

It is unclear how judicial review of classified evidence jeopardizes security, when judges encounter and handle classified information in contexts other than tort suits against the government.[263] This is especially so in the *Reynolds* case, where the report is apparently classified as part of a coverup to avoid embarrassment and public scrutiny. In a telling state of affairs, the Justice Department provides a litigation security service for cases tried in federal courts involving contract disputes, bid protests, and patent cases that will require the production and review of classified material and evidence by court personnel and judges.[264] It is also unclear how the government's position as defendant in a tort suit undermines confidence and trust in federal judges' capacity to guard against disclosure of national security information, when that same judge may be tasked to handle the same sensitive information to settle a contract dispute.

Finally, in tilting the field heavily to the executive branch, the Court admonished that where "circumstances indicat[e] a reasonable possibility that military secrets [are] involved, there [is] certainly a sufficient showing of privilege to cut off further demand for the documents."[265] This is an extraordinarily low bar and offers no guidance to lower courts. It is inconceivable that the Court did not understand the implications of such language, and those implications were certainly not lost on Presidents, the military, and government agencies.

Despite the references to pragmatism and compromise, the effect of the privilege was to instill great deference and fear in the judiciary concerning requests for material asserted to involve matters of national security. The government's arguments relied heavily on the spirit of crown privilege and were aiming for the same conclusiveness given to ministerial withholding that obtained in English law. While it did not impose this result as clear *de jure,* it has reached that goal *de facto*.

In arguing that the principles of crown privilege should be made applicable to United States law, the government in *Reynolds* offered this position: "Great weight should also be given to the decision in *Duncan v. Cammel, Laird & Co*. . . . in which the House of Lords reached the result urged by the Government here."[266]

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261 *Id*. at 9-10.

262 *Id*. at 10.

263 For example, the Classified Information Procedures Act (18 U.S.C App. iii) directs how criminal cases are pursued where classified information is put into evidence.

264 "The Litigation Security Group of the Department of Justice is a team of security specialists available to be detailed to the Court to serve as Classified Information Security Officers (CISOs) to assist in the handling and protection of classified information. These CISOs serve in a neutral capacity providing advice and assistance to the Court and the parties in the handling of classified information." (https://www.uscfc.uscourts.gov/sites/default/files/Classified-Case-Guidelines-Final-Version.pdf)

265 *Reynolds*, at 11.

266 Brief of the United States, *United States v. Reynolds* (1953), at *38.

The government goes on to pointedly state that "[w]e believe that all controlling governmental and judicial material, here and in England, clearly supports the view that . . . disclosure by the head of an executive department cannot be coerced."[267] And finally, that in England "the sole arbiter of when the public interest so requires [withholding of documents] is the cabinet minister who heads the department to which the documents belong."[268]

At this crucial juncture the government then followed the *Duncan* court in an erroneous reading of Scottish law. The brief argued:

> . . . after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners v. Aberdeen Steam Trawling & Fishing Co.,* . . . – 'A department of Government to which the exigencies of the public service are known as they cannot be known to the Court, must, in my judgment, determine a question of this kind [whether or not to withhold documents] for itself . . .' – the Lord Chancellor states that the executive determination of privilege is conclusive on the court.[269]

But as we have seen, the *Duncan*, *Vass*, and *Aberdeen* courts were simply wrong in their reading of Scottish law: ministerial objections to production of documents are not conclusive on Scottish courts. *Glasgow* corrected this misreading. Such objections are certainly strong statements and not to be lightly impugned, but the decision of production is for the court. Importantly, courts in Scotland may engage in examination of underlying documents in claims of privilege if pretext, rather than national security, is suspected as the motivating reason.

Favorably quoting English law, the brief for the United States finds that "it is embarrassing to a judge that he should be informed of matters which he would much rather not hear and which make it much more difficult for him to do his duty . . . [T]he judge, who, after hearing the statements, has to pronounce sentence, may, quite unconsciously, have his judgment influenced by matters which he has no right to consider."[270] What is embarrassing, and surprising, is that the Court would tolerate such condescension.

And in an unusual argument, the brief claims that crown privilege should have more forceful effect under our law than even in England:

> The constitutional and public policy considerations which underlie the result in *Duncan v. Cammell, Laird & Co.*, have, we submit, even greater significance in the present case than in the English case, because the English constitution does not embody the doctrine of separation of powers and there is no extensive history of executive independence like that we have discussed in the preceding subsection. None of these difficulties would confront an English court seeking to require disclosure. Hence – contrary to the view of the court below – we think that the present case is *a fortiori*.[271]

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267 Brief of the United States, *Reynolds v. United States* (3d Cir. 1951), at 1.
268 *Supra* note 174, at *39.
269 *Id*. at *40.
270 *Id*.
271 *Id*. at *41-42.

It should be enough to note it is a bizarre claim that our Constitution, which grew out of the express rejection of monarchical power, nevertheless incorporates prerogative rights of the English crown. In addition, that incorporation is one that the judiciary should accept without question or qualm.

Finally, in an allusion to what would eventually underlie the mosaic argument,[272] the brief explains that:

> . . . as the House of Lords pointed out in *Duncan*: only the department head knows the exigencies of the public service; only widely separated portions of Air Force policy can come into overt consideration in a given litigation; and the fitting together of the scattered pieces can be accomplished only in the day to day decisions of the agency.[273]

Courts must recognize "that only the executive is in a position to estimate the full effects of . . . disclosure[s]" and that "unless the courts are to interfere in the administration of Government, they must trust in the judgment of the appointed administrator."[274] Nowhere is there a recognition of a judicial role to prevent the legal symptoms of the chronic illness of bureaucracy to engage in secrecy to avoid embarrassment and prevent exposure of incompetence, negligence, malfeasance, and illegality.

While some claim the *Reynolds* Court did not adopt the position of complete deference argued for by the government, it nonetheless arrived at that position as made clear by the *Zubaydah* decision. The Court made an unwise surrender to executive power, but contained within the British and Scottish case law it incorrectly cites are the tools of potential resurrection of oversight. It would be constitutionally impermissible, as well as an embarrassment, for the Court to surrender its power to order production of evidence. Yet so long as it could reach that functional equivalent and avoid placing courts on collision courses with claims of national security it could maintain the illusion of control.

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[272] The mosaic argument is often purveyed by the U.S. government to prevent disclosure of information that is unclassified, by claiming that unclassified bits of information may be assembled into an analysis that would be classifiable under existing classification guidance. The power of this position is that assembly of unclassified or benign information into complex descriptions and understanding of activities and organizations is precisely what U.S. intelligence agencies do themselves with respect to foreign powers and adversaries. This legal argument often has merit and should not be minimized or generally seen as a subterfuge to avoid production of information. One of the authors (Weaver) worked as an intelligence analyst for eight years in Europe. He engaged in intelligence gathering programs that utilized the method of assembling sophisticated understanding of intelligence targets through seemingly insignificant and disparate pieces of information. Nevertheless, the argument advanced is subject to abuse, and has within it a tempting elastic property. Yet, artificial intelligence may buttress the government argument that even unclassified information may represent a significant threat to national security. It is certainly conceivable that analysis of a vast reservoir of publicly available information may produce classified assessments of U.S. military and intelligence capabilities.

[273] *Supra*, note 267 at *47.

[274] *Id*. at *52.

If the Court had understood the nature of Scottish law, and that it was not in congruence with English law, it may have been humbled to adopt a different stance. It is virtually inconceivable that the Court would have adopted a position of less judicial power than that held by Scottish courts, which are at least nominally under the authority of a monarch.

English and Scottish law, *Burr*, *Totten*, and *Reynolds,* are not parts of a coherent whole concerning the origins of a state secrets privilege, and they certainly do not provide a sufficient legal foundation to accord the presidency the unaccountable power it now wields over matters claimed to concern national security. It is difficult to conclude other than that courts have simply abandoned the field of a contentious area of law by reliance on an "ancient" common law doctrine that does not exist.

IV. Conclusion

At substantial cost to constitutional values, the Supreme Court has made its share of judicial errors, in part by relying on British precedents without realizing they are not an appropriate guide for American policy. In a book published in 1936, Chief Justice Charles Evans Hughes analyzed several cases to illustrate the capacity for judicial error and the damage that comes from it. While generally praising the Court he recognized that it has "the inevitable failings of any human institution."[275] He cited three "noticeable instances" where the Court "suffered severely from self-inflicted wounds," including the *Dred Scott* case of 1857. In that decision the Court denied that a Black man could sue in federal court in order to gain freedom.[276] Writing for the majority, Chief Justice Roger Taney relied heavily on British precedents, suggesting that those principles were well established and fixed. He made no mention that England in 1833 had abolished slavery. In one of several dissents, Justice John McLean rejected the Court's reliance on British precedents to justify slavery. Instead, he chose "the lights of Madison, Hamilton, and Jay, as a means of construing the Constitution in all its bearings."[277] He pointed out that upon the adoption of the Constitution, or shortly thereafter, several states took steps to abolish slavery.

In an article published in 1945, Justice Robert Jackson pointed out that judges "often are not thorough or objective historians."[278] Seeking constitutional principles from the nation's founding may have broad appeal but that type of analysis can involve evidence on both sides of an issue, leading Justices to arbitrarily select one side over another. Judge J. Harvie Wilkinson II of the Fourth Circuit noted that federal judges "are neither trained nor equipped to conduct this type of inquiry."[279] Judges "lifted high by the lofty promises of originalism are laid bare to the insidious temptations of personal preference."[280]

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275 Charles Evans Hughes, The Supreme Court of the United States 45 (1936).

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

277 *Id*. at 537.

278 Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 6 (1945).

279 J. Harvie Wilkinson III, Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Government 50 (2012).

280 *Id*. at 57.

In his study of judicial dependence on history, Charles Miller offered this judgment: "[T]he Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth as a criterion for communication in public affairs."[281] When the Court commits errors in judging history, "this is seldom due to a simple misstatement of verifiable fact. Rather, the Court's history is misleading *in* its interpretation."[282]

Writing in 1965, Alfred H. Kelly described the Court's role as constitutional historian as "if not a naked king, no better than a very ragged one. From a professional point of view, most, if not all, of its recent historical essays are very poor indeed."[283] Too often Justices "reach conclusions that are plainly erroneous."[284] Courts are not likely to receive reliable guidance from briefs submitted to them. Attorneys who prepare the briefs "do not attempt to present a court with balanced and impartial statements of truth. . . . The object of this process is not objective truth, historical or otherwise, but advocacy – i.e., the assertion of a client's interest."[285] In a book published in 2011, Justice John Paul Stevens wrote that "judges are merely amateur historians" whose interpretations of past events, "like their interpretations of legislative history, are often debatable and sometimes simply wrong."[286]

A review of judicial decisions on state secrets underscores what is evident from other fields of constitutional law: the capacity of the Supreme Court to not only make errors but being unwilling to correct them. Nevertheless, federal judges, legal scholars, and reporters frequently describe the Supreme Court as the final word on the meaning of the Constitution. Because the Supreme Court is prone to miscalculation and error, it cannot be expected to issue the last word on constitutional issues.[287]

That judgment is underscored by the record of the Supreme Court in *United States v. Reynolds* (1953). To their credit, the district court and the Third Circuit in that litigation refused to accept the position of the executive branch that the accident report could be withheld from judges after the three widows went to court. Instead of taking the word of the administration, the district judge insisted that the report be submitted to him to be read *in camera* in his office. The Third Circuit agreed with his judgment. Both decisions underscored that judges have a need to make an independent judgment about the content of a document.

The Supreme Court did not understand – and as the *Zubaydah* decision makes clear, still does not understand – that fundamental value at all. It accepted the administration's claim that the report contained state secrets. In subsequent years the *Reynolds* crash report was declassified and made public. It contains no state secrets but makes clear that the plane was so defective it should not have been

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281 Charles A. Miller, The Supreme Court and the Uses of History 195 (1969).

282 *Id.*

283 Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 155.

284 *Id*.

285 *Id*. at 155-56.

286 Justice John Paul Stevens, Five Chiefs: A Supreme Court Memoir 225-26 (2011). For further analysis of judicial capacity to analyze historical precedents, see Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss- Wright *to* Zivotofsky, 31 Constitutional Commentary 149 (2016).

287 Louis Fisher, Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution (2019).

allowed to fly. With that fact in mind, the widows and their attorneys repeatedly made efforts to bring the issue to the Supreme Court so that it would have an opportunity to publicly acknowledge that the administration had lied about the contents of the report. That would have been not only in the interests of the three widows but in the interest of the judiciary. The Supreme Court chose to avoid the issue, but its record merely underscored that the executive branch is at full liberty to deceive the judiciary at no cost to itself.

With respect to state secrets, such deception is no longer necessary. In a culminating act of judicial surrender, in *Zubaydah* the Court capitulated to executive power in finding publicly available information excludable under claim of privilege. At last, the Court embraced the full spirit of *Duncan v. Cammel, Laird*, and recognized a class privilege.

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Lear's Daughters? Unenumerated Fundamental Rights and the Constitution

Thomas Halper*

ABSTRACT

How to determine whether fundamental unenumerated constitutional rights exist, and if so, what they are? The questions are of obvious enormous importance—witness the current controversy over abortion—and yet courts have generally been content to address the issues superficially, sometimes, cavalierly. Their treatment of the most common rationale, an historical/traditional consensus, exemplifies this shallow approach. The underdeveloped character of the argumentation on this topic stubbornly remains one of the most glaring shortfalls of modern constitutional law.

KEYWORDS

unenumerated fundamental constitutional rights, tradition, due process, Bill of Rights.

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* Baruch College & CUNY Graduate Center
Thomas.Halper@Baruch.cuny.edu

"Nothing will come of nothing," roars Lear.[1] His daughter, Cordelia, has refused to compete with her sisters in declaiming her love for her father. She has nothing to say, and so she gets nothing from him. It all seems obvious to Lear, seductively so. Only later does he understand that it is the other sisters who offered him nothing, empty praise that disguised their disdain, and that only Cordelia offered him something, genuine love. By then, of course, it is much too late. Nothing/something. The apparent simplicity of the distinction so easily misleads us. Nothing—literally, no thing—cannot be true. Even when Genesis 1:1 describes the Earth as formless and empty, it offers us a statement about something that is itself something.

Nothing/something. Courts begin someplace. Decisions do not arise *ab nihilo*. There are always pre-existing constitutional provisions, statutes, regulations, precedents, practices. There are always pre-existing beliefs and opinions as to what is good/bad, legitimate/illegitimate, practical/impractical. There are always pre-existing narratives that purport to explain the past, foretell the future, and assign appropriate roles, rights, and responsibilities to the players. The result is a ceaseless tension, as courts are pulled here toward stability and there toward change, which itself generates hopes and fears among the burgeoning uncertainties. Now, imagine that the controversy stems from something that is not there, Lear's nothing. The problems are magnified and multiplied. Now, imagine that the controversy also stems from something that is there, the Constitution. The doors are swung open and confusion strides in.

In this context, consider fundamental rights, which obligate the state to respect our liberty, for example, to let us speak or worship or not to speak or worship more or less as we choose. If the state wishes to infringe on these rights, it must scale the high hurdle of strict scrutiny, demonstrating that its goal is compelling and its means are narrowly tailored—all to minimize the intrusion into our fundamental rights. When the fundamental rights are expressed in the Constitution—like the right to speak or worship—there at least is an agreed upon place to begin, the text. But suppose the rights are not enumerated? The question as to how courts determine what qualifies as fundamental rights, then, is not merely an intellectual curiosity, but rather has profound practical consequences. How ought courts to determine whether the Constitution guarantees fundamental rights it does not express—when the Constitution itself contains no term called "fundamental rights" and no instructions as to how it should be interpreted?

Are there unenumerated fundamental rights? The most obvious answer is that the absence of evidence is evidence of absence. In short, if the right is not expressed, it does not exist. Supporting this is the commonsense observation that rights, particularly, fundamental rights, are clearly so important that their absence could hardly be dismissed as irrelevant or unimportant. Were the Framers too busy—perhaps, sharpening their quill pens or powdering their wigs—and so simply forgot to include them? But if some fundamental rights may go unexpressed, what is the point of the Constitution's expressing other rights? To the uninitiated, the whole matter of unenumerated rights seems to confuse nothing with something, asking whether rights can be there, when they are not there. It all conjures up the skills of a magician, who in our enlightened age we call an illusionist. Are the

[1] King Lear, act I, sc. 1, line 99.

courts, defying Lear, conjuring up something out of nothing? Where is the authority that grants them this power?

On the other hand, in ordinary speech there is much that is understood though unexpressed. When I ask you to dinner, it is understood that I will not offer you a bowl of Fruit Loops and a cup of day-old coffee; it is also understood that you will not dress like big Bird and spend the evening yodeling. The understandings may be based on experience with me or with societal conventions, but that meanings may be unexpressed is universally regarded as a fact of life. Which is not to deny that the unexpressed nature may be a source of conflict and confusion. Ever since 1897,[2] the Supreme Court has been reading "liberty" in the Fourteenth Amendment's due process clause to include various provisions of the Bill of Rights that, though targeting the national government,[3] also apply to the states. Thus, as a practical matter, nearly everyone concedes that there are unenumerated fundamental rights in the Constitution. How, then, to determine what they are? Joe Biden, when chair of the Senate Judiciary Committee, thought the problem was more apparent than real. Is there a constitutional right to privacy? Go to a shopping mall and ask the first three or four people you see. "'Of course!'" they would answer. "And when I asked why [they] all said, 'The Constitution.'"[4] QED. Though the method promises quick and decisive answers, for some reason it has not caught on.

I. The Ninth Amendment

An obvious alternative is the "forgotten Ninth Amendment,"[5] which, to counter *expressio unius*, provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[6] Its rationale, as Madison explained in proposing it, was to rebut the objection that the Bill of Rights, "by enumerating particular exceptions to the grant of power ... would disparage those rights which were not placed in that enumeration; and it might follow by implication that those rights which were not singled out were intended to be assigned into the hands of the general government, and were consequently insecure."[7] What are these rights? The key may lie in the relation of the Constitution to the Declaration of Independence. Lincoln proclaimed that the Declaration "has

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2 Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226.

3 Barron v. Baltimore, 7 Pet. 243 (1833).

4 Joe Biden, Promises to Keep: On Life and Politics (2007).

5 Bennett Patterson, The Forgotten Ninth Amendment: A Call for Legislative and Judicial Recognition of Rights under the Social Conditions of Today (1955). Kurt T. Lash, the leading living authority on the Ninth Amendment, has shown that this familiar label is quite inaccurate. *The Lost Jurisprudence of the Ninth Amendment*, 83 Tex. L. Rev. 597 (2005).

6 One argument offered at the constitutional convention against a bill of rights was that the delegates might fail to identify all the rights; the listing of some would imply the exclusion of others.

7 1 Ann. of Cong. 439 (Gales & Seaton eds. 1834). Or as perhaps the preeminent historian of early America put it, the purpose of the Ninth Amendment was to ensure "a universe of rights, possessed by the people, latent rights still to be evoked and enacted into law." Bernard Bailyn, Remarks at the First Millennium Evening at the White House: The Living Past, Commitments for the Future (Feb. 11, 1998).

proved an 'apple of gold' to us," and considered the Constitution and the federal union "the picture of silver subsequently framed around it. ... . The picture was made for the apple—not the apple for the picture."[8]

This connection became the centerpiece of arguments set down by the Ninth Amendment's most prominent legal advocate, the distinguished Yale law professor, Charles L. Black, Jr. For him, the Declaration of Independence, "a juristic act [that] demolish[ed] one legal authority and set up another,"[9] had as much legal standing as the Constitution; indeed, the purpose of the Constitution and the Bill of Rights, in particular, was to implement the principles of the Declaration. A key potential means to achieve this implementation, he believed, was the open-ended Ninth Amendment, "a fountain of law,"[10] which he thought imposed an affirmative duty on both the national government and the states, as the rights are "retained by the people."[11] He acknowledged that identifying the rights will be "a pack of troubles,"[12] but refusing to try conflicts with the command of the Amendment and must be rejected; "[t]he Ninth Amendment seems to be guarding something."[13]

When the Amendment refers to rights, Black reasoned, it must mean the rights recognized around that time,[14] in other words, the rights declared in the Declaration, including the pursuit of happiness. As the meaning of this right has evolved, Black inferred that "The possession of a decent material basis for life is an indispensable condition ... to the pursuit of happiness;"[15] the result is a constitutional guarantee of a moderate standard of living plus a ban on every kind of discrimination, whether race, gender, or sexual orientation.[16] In Black's eyes, then, the Declaration via the Ninth Amendment granted enormous power to the national government to shape society for the better. The need for this, he believed was obvious, as he considered the Bill of Rights, by itself, "very plainly insufficient to found a system broad and comprehensive enough for a really free people."[17]

It is not clear that Black's history is correct. For well over a century, many influential historians have argued that the point of the Constitution was not to make the Declaration's principles real, but instead to frustrate them.[18] If the Constitution

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8 4 Collected Works of Abraham Lincoln 169 (Ray P. Basler ed. 1953).

9 Charles A. Black, Jr., A New Birth of Freedom: Human Rights Named and Unnamed 6, 9 (1997); Charles l. Black, Jr., *One Nation Indivisible: Human Rights in the States*, 65 St. John's L. Rev. 17, 27 (1991).

10 Charles A. Black, Jr., Decision According to Law 44 n.47 (1981).

11 Black, A New Birth of Freedom, *supra* note 9, at 22.

12 *Id.* at 13.

13 *Id.* at 12.

14 Black, One Nation Indivisible*, supra* note 9, at 30.

15 Black, A New Birth of Freedom, *supra* note 9, at 131.

16 *Id.* ch. 5.

17 *Id.* at 2.

18 Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1913); Robert A. McGuire, To Form a More Perfect Union: A New Economic Interpretation of the United States Constitution (2003); Jac C. Heckleman & Keith L. Dougherty, *An Economic Interpretation of the Constitutional Convention of 1787 Revisited*, 67 J. Eco. Hist. 829 (2007). *But cf.,* Robert E. Brown, Charles Beard and the Constitution: A Critical Analysis of an Economic Interpretation of the Constitution (1956); Forrest McDonald, We the People: The Economic Origins of the Constitution (1958); Gordon Wood, The Creation of the American Republic, 1776-1787 626 (1969).

was meant to enshrine the Declaration's rights, how to explain the Framers' "never seriously considering adopting a bill of rights,"[19] twice voting it down at the constitutional convention;[20] and how to explain Madison's proposing the amendments in 1791 not to actualize the principles of the Declaration, but rather to deflate calls for a new constitutional convention made by leaders of the opposition Anti-Federalists?[21] The broad positive social welfare rights that Black found implicit in the Ninth Amendment, moreover, were clearly foreign to the Framers, who took for granted a system of quite limited government. Black also seemed indifferent to the very substantial cost of these rights, a cost that would deprive taxpayers of money that would otherwise enhance their freedom. Nor did he seem interested in the germane distinction between rights and interests.[22] Finally, laying all these criticisms aside, the guidance provided by the Declaration is so vague that it is barely guidance at all.

Accordingly, Justice Scalia examining the text, argued that the Ninth Amendment's "refusal to 'deny or disparage' other rights was far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."[23] As he saw it, the potential of the Ninth Amendment was vastly overblown. Similarly, Russell Caplan, in a careful history, concluded that the Amendment "is not a cornucopia of undefined federal rights," but was merely directed at "the maintenance of rights guaranteed by the laws of the states."[24] No wonder Justice Jackson found its meaning "a mystery to me,"[25] and John Hart Ely derided it as "that old constitutional jester."[26]

Given the extreme disagreements on such basic considerations, it is hardly surprising that the Ninth Amendment has not served to justify a major doctrine. When "in perhaps [its] most famous invocation,"[27] Justice Goldberg mentioned it in a concurrence to *Griswold v. Connecticut*—he was careful to note that he did not "mean to state that the Ninth Amendment constitutes an independent source of rights"[28]—it was greeted as an act of "astonishing resuscitation."[29] This was premature. As even its most ardent living advocate conceded, "though the Supreme

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19 Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 Sup. Ct. Rev. 301, 304.

20 The Records of the Federal Convention of 1787 587-88 (Max Farrand ed. 1966).

21 Irving Brant, The Bill of Rights: Its Origin and Meaning 39 (1965); Kenneth R. Bowling, *"A Tub to the Whale": The Founding Fathers and the Adoption of the Federal Bill of Rights*, 8 J. Early Repub. 223 (1988).

22 Stephen Holmes & Cass R. Sunstein, The Cost of Rights ch. 6 (1999).

23 Troxel v. Granville, 530 U.S. 57, 91 (2000).

24 *The History and Meaning of the Ninth Amendment*, 69 Va. L. Rev. 223, at 227 (1983).

25 Robert Jackson, The Supreme Court in the American System of Government 75 (1955).

26 John Hart Ely, Democracy and Distrust 33 (1980).

27 Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications for State Constitutional Law*, 1990 Wis. L. Rev. 1229, 1230.

28 381 U.S. 479, 492 (1965).

29 Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 150. Justice Black, dissenting in Griswold, chided Goldberg for his "recent discovery" that the Ninth Amendment could be used to protect fundamental rights. *Supra* note 28, at 518. Ely thought "Black's response to the Ninth Amendment was essentially to ignore it." *Supra* note 26, at. 38.

Court has identified and enforced unenumerated rights, it has never done so based on its reading of the Ninth Amendment."[30] Indeed, "the modern Supreme Court has studiously avoided the Ninth Amendment despite being prodded by parties before the Court to rely on it."[31] Perhaps, it is the very open-ended language of the Amendment that Charles Black found encouraging that has intimidated courts.[32] In any case, they have not accepted his challenge.

If the Ninth Amendment has not proved to be a vehicle for unenumerated fundamental rights, what options exist? The current uproar over *Dobbs v. Jackson Women's Health Organization* (2022)[33] and the demise of a woman's fundamental right to choose to have an abortion is merely the latest and most spectacular chapter in a long narrative.

II. Early Incorporation Cases

Incorporation is the process by which the Supreme Court has taken portions of the Bill of Rights, which originally applied only to the national government,[34] and applied them to the states. The mechanism used is the liberty dimension of the Fourteenth Amendment's due process clause.[35] Though the rights are expressed in the Constitution and in this sense are enumerated, their application to the states is not expressed, thus justifying the label "unenumerated." For relying on "liberty" does not solve the problem, but merely changes it to: what rules guide the Court in its determination as to what liberty encompasses?

The first incorporation case was *Chicago, Burlington & Quincy Railroad v. Chicago* (1897), involving the Fifth Amendment's takings clause. In a long, rambling opinion, Justice Harlan cited "a deep and universal sense of ... justice" and "a settled principle of universal law"[36] that would be violated if the state took property for public use and provided no compensation. However, he never addressed the question as to why the Court was justified in announcing a right that did not appear in the Fourteenth Amendment.

Gitlow v. New York (1925) applied the First Amendment's free speech and free press guarantees to the states. In an eighteen page opinion, Justice Sanford devoted exactly one sentence to incorporation, writing simply that "For present purposes, we may and do assume" incorporation.[37] He took no notice of the Framers' overwhelming rejection of a proposal barring states from "infring[ing] the right of ...freedom of speech."[38] Nor did he seem to notice that Gitlow's offense, publishing *The Left-Wing Manifesto*, involved only freedom of the press and not speech. Nor,

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30 Lash, *supra* note 5, at 713.
31 Kurt T. Lash, *Three Myths of the Ninth Amendment*, 56 Drake L. Rev. 875 (2008).
32 Black speculates that the Amendment might have been ignored for years because of its implications for slavery. A New Birth of Freedom, *supra* note 9, at 149.
33 142 S. Ct. 2228.
34 Barron, *supra* note 3.
35 Amend. XIV, sec. 1.
36 *Chicago, Burlington & Quincy*, s*upra* note 2, at 238.
37 268 U.S. 652, 666.
38 Documentary History of the First Federal Congress of the United States of America: Legislative Histories 39 (Charlene Bangs Bedford *et al*. eds. 1986).

finally, did he pause to offer any justification for his ruling.

In *Near v. Minnesota* (1931), which applied the First Amendment's freedom of the press to the states, Chief Justice Hughes spent a paragraph on the topic, citing *Gitlow* and three other cases. "It was impossible to conclude"[39] that the states would not be bound by the First Amendment, he wrote, but in fact that was the rule prior to his decision. Again, no justification was offered.

Hamilton v. Regents of the University of California (1934) applied the First Amendment's free exercise of religion right to the states. In a sixteen-page opinion, Justice Butler devoted a paragraph to the topic, refusing even to entertain the notion that a justification was required.[40]

DeJonge v. Oregon (1937) saw the First Amendment's right to assembly and petition applied to the states. In an eleven-page opinion, Hughes declared that "peaceable assembly for lawful discussion cannot be made a crime"[41] and that "explicit mention [in the First Amendment] does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[42] Thus, the indirect connection to the Constitution was made—assembly is tied to speech (Fourteenth Amendment), which is tied to speech (First Amendment) -- but again there was no effort to demonstrate why courts were authorized to make the connection.

Everson v. Board of Education (1947) applied the First Amendment's religious establishment clause to the states. Justice Black discussed the constitutional question at some length, particularly, in the context of early American history.[43] The incorporation of the establishment clause is defended as a corollary of the free exercise clause, which had previously been incorporated. Again, an indirect connection was considered sufficient.

In re Oliver (1948) applied to the states the suspect's right to be notified of the accusations against him. Justice Black again discussed early American history, announcing that the Fourteenth Amendment "guarantee[d] that ... no man's life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."[44] The indirect connection was considered adequate.

In light of these seven early incorporation cases, what justifications are offered for applying rights to the states? Sometimes, the answer is none (*Gitlow, Hamilton*); sometimes, morality (*Chicago, Burlington & Quincy Railroad, Oliver*); sometimes a previous incorporation (*Near, DeJonge, Everson, Oliver*); sometimes, history (*Everson, Oliver*); sometimes, public policy (*Chicago, Burlington & Quincy Railroad, Everson*). None of the opinions engages with the question as to how the Court justifies rewriting the Bill of Rights. Not even Black, renowned as a textual literalist, addressed the issue or asked why if the framers of the Fourteenth

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39 283 U.S. 697, 707.

40 293 U.S. 245, 262. "There needs be no attempt to enumerate or comprehensively to define what is included in the 'liberty' protected by the due process clause," Butler declared.

41 299 U.S. 353, 365

42 *Id.* at 364.

43 330 U.S. 1, 8-16.

44 333 U.S. 257, 273, 278.

Amendment intended to incorporate the Bill of Rights, they did not make their intentions textually explicit.[45]

Granted that it might be good public policy to apply the Bill of Rights to the states, why should courts be the vehicle to accomplish this purpose?

III. Lochner v. New York

While the Court was addressing incorporation, it was also deciding other cases bearing on unenumerated rights, perhaps, most famously, *Lochner v. New York* (1905), which concerned a law that regulated the hours and working conditions of bakers.[46] In an earlier case, Justice Peckham had referred to the Declaration of Independence's pursuit of happiness,[47] which he construed as the individual's power to pursue "an ordinary calling or trade"[48] or as he expressed it a few pages earlier, "to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned"[49]—in sum, to construct his own life, to map out his own destiny. In pursuing happiness, we soon learn that we can rarely achieve it on our own. Rather, we need to join with others. From this, Peckham infers an inherent right to come together to seek our goals, in a word, to contract.

This is not an unlimited right, but here the burden falls on New York to demonstrate that its abridgement of the right—denying employer and employee the opportunity to determine the conditions of employment—can be justified. Are bakers, unlike other workers, incapable of looking out for themselves?[50] Is their work "especially unhealthy"?[51] Is there some public benefit, perhaps more "clean and wholesome" bread, the law will produce?[52] Answering no to these questions, Peckham found the law contrary to the unenumerated right of liberty of contract

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45 *Id.* at 272, 277. In a high profile dissent, Black researched the legislative history of the Fourteenth Amendment, concluding that the entire Bill of Rights was incorporated under the "liberty" provision of the Fourteenth Amendment's due process clause. Adamson v. Calif., 332 U.S. 46, 71 (1947). His argument was refuted in a much cited article by Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Justice Scalia often condemned the reliance on legislative history as unreliable, easy to manipulate, and, most importantly, not the law. See*, e.g.*, INS v. Cardozo-Fonseca, 480 U.S. 421, 452 (1987), Thompson v. Thompson, 484 U.S. 174, 191 (1988), Blanchard v. Bergeron, 489 U.S. 87, 98 (1989), Conroy v. Aniskoff, 507 U.S. 511, 519 (1993).

46 N.Y. State labor law, sec. 10.

47 Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897), qtg. Bradley, J., Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762 (1884). This was an ironic precursor to Charles Black's Ninth Amendment argument. The two plainly would have agreed on little else.

48 *Id.* at 591

49 *Id.* at 589.

50 198 U.S. 45, 57.

51 *Id.* at 59.

52 *Id.* at 57.

and thus unconstitutional.[53] Throughout, he emphasized that "This is not a question of substituting the judgment of the Court for that of the legislature."[54]

Justice Holmes, in his brief and famous dissent, surely gets the better of the argument. Peckham's logic may be fine, but as Holmes' observed a quarter of a century before, "The life of the law has not been logic; it has been experience."[55] Holmes, of course, is not pleading that law should be illogical. Instead, he is insisting that law arises as a function of human experience, in the sense that it represents political resolutions of social conflicts and not deductions from abstract principles; the Constitution rests on this common sense observation, and as it was made "for people of fundamentally differing views,"[56] it "is not intended to embody a particular economic theory, whether of paternalism ... or of laissez faire" that Peckham evidently cherished.[57]

How, then, can Peckham justify this right, liberty of contract, that is not expressed in the Constitution? Holmes, an exponent of judicial self-restraint, declares that he cannot. The "word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[58] The alternative would be unauthorized judicial legislation justified only by the judges' ideology or policy preferences, neither of which had a basis in the Constitution. Peckham's claim that the Court had not usurped the legislature's policy making function was mere self-delusion. In contrast to his abstract argument, Holmes invoked history/tradition as a test to determine the constitutionality of an unenumerated right. Liberty of contract failed the test.

The magic key that Peckham imagined he had found that unlocked liberty of contract was what Justice Thomas recently dismissed as an "oxymoron that lack[s] any basis in the Constitution,"[59] substantive due process. The Fifth and Fourteenth Amendments provide, *inter alia*, that neither the national nor the state governments may deprive persons of their liberty without due process of law. This means, literally, that they may deprive persons of liberty, provided the procedures be correct; it also means that the substance of a law, regardless of how constitutional its adoption and enforcement, may not arbitrarily abridge liberty.

At least, that is what it means today. An exhaustive study of the original public meaning of due process in the Fifth Amendment, however, suggests a much narrower meaning of the term. Specifically, that "process" simply refers to "a formal document that provides a person notice of legal obligation," for example, "a criminal defendant may not be deprived of life or liberty without first either person service of process or some legally valid alternative." The clause, the authors

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53 *Id.* at 61.
54 *Id.* at 56-57.
55 Oliver Wendell Holmes Jr., The Common Law 1 (1881).
56 Lochner *supra* note 50, at 76.
57 *Id.* at 75.
58 *Id.* at 76.
59 Dobbs, *supra* note 33, at 2301 (2022). John Hart Ely likened substantive due process to "green pastel redness." *Supra* note 26, at 18. Charles Black called it a "non-concept." A New Birth of Freedom, s*upra* note 9, at 100.

believe, does not even "require that procedures be fair."[60] On the other hand, the nineteenth century saw a few cases positing substantive due process under the Fifth Amendment as applicable to the national government, in one, for example, calling due process "a restraint on the legislative as well as the executive and judicial powers of the government."[61] The infamous *Dred Scott* case also held the clause as negating Congress' power to undo a slave owner's property interest in his slave.[62]

In *Lochner*, Peckham conceived the clause's "liberty" to include liberty of contract, found the justifications for New York's infringement to be arbitrary, and thus struck down the law. Holmes countered that conceiving liberty in this fashion was itself arbitrary and unjustified. Though Holmes was no great friend of the working class, his opinion has been widely regarded as providing a powerful constitutional rationale for government legislation workers have supported. Rights, which we normally presume protect the interests of the vulnerable, here protected the interests of the powerful. In his opposition, Holmes denied courts the power to create a right not expressed in the Constitution.

IV. Meyer v. Nebraska

Meyer v. Nebraska (1923) concerned laws passed by Nebraska, Iowa, and Ohio requiring all schools to teach only in the English language.[63] Adopted in a xenophobic anti-German atmosphere accompanying World War I and reflecting a longstanding commitment to "Americanize" immigrants, the laws were defended by the states as reasonable means to inculcate patriotism and a sense of national identity. By 1923, thirty-one states had similar laws.[64] Robert Meyer, a teacher at an Evangelical Lutheran Church school in rural Nebraska, had violated the law by reading a ten year old student portions of Martin Luther's Bible in German during recess. Convicted, Meyer was fined $25.

Justice McReynolds, speaking for a seven-to-two Supreme Court majority, held that the statute exceeded "the limitations upon the power of the state and conflict[ed] with rights assured to [Meyer]."[65] He conceded that the "desire of the legislature to foster a homogeneous people with American ideals ... is easy to appreciate," but thought that the mere "knowledge of the German language cannot reasonably be regarded as harmful."[66] The law could "interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge,

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60 Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 451, 452, 453 (2022). The authors "take no position" as to whether their conclusions apply to the Fourteenth Amendment's due process clause. *Id.* at 528. Ryan C. Williams, however, maintains that though the Fifth Amendment's clause did not embody substantive rights, the Fourteenth Amendment's did.. *The One and Only Substantive Due Process Clause*, 120 Yale L. J. 408, 416 (2010).

61 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1856).

62 Dred Scott v. Sanford, 60 U.S. 393, 450 (1857).

63 Nebr. Laws 1919, c. 249.

64 I.N. Edwards, *The Legal Status of Foreign Languages in the School*, 24 Elementary Sch. J. 270, 273 (1923).

65 262 U.S. 390, at 402.

66 *Id.* at 402, 400.

and with the power of parents to control the education of their own."[67] McReynolds, echoing Peckham in *Allgeyer,* went on in dicta to declare that substantive due process also includes the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[68] Some of these rights were quite irrelevant to the issues at hand.

McReynolds then returned to the controversy before him. "The American people," he wrote, "have always regarded education and the acquisition of knowledge as matters of supreme importance which should be diligently promoted," referencing the Ordinance of 1787.[69] Like Holmes in *Lochner*, McReynolds in a single sentence prescribes a rule for determining the constitutionality of rights not mentioned in the Constitution: an historical/traditional legal consensus.

McReynolds is not usually held in high regard today. Holmes thought him "a savage,"[70] Brandeis called him "an infantile moron,"[71] and Taft said he was "fuller of prejudice than any man I have ever known."[72] Even by the relaxed standards of his time, he was notorious for bigotry. He routinely turned his back on Justice Cardozo because he was Jewish,[73] he turned his back when Black lawyers argued before the Court,[74] and when women lawyers appeared he would remark, "I see the female is here" and leave the courtroom.[75] More to the point, McReynolds was no friend of immigrants.[76] To put it diplomatically, he was the "improbable author" of *Meyer*.[77] Yet his brief, rough formulation of an historical/traditional basis for unenumerated

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67 *Id.* at 401.

68 *Id.* at 399. McReynolds also rooted his decision in property rights: Meyer's right to teach and the parents' right to "engage him so to instruct their children." *Id.* at 400.

69 *Id.*

70 Qtd. In Alexander M. Bickel, the Unpublished Opinions of Mr. Justice Brandeis 204 (1957).

71 Philippa Strum, Louis D. Brandeis: Justice for the People 371 (1988).

72 Alpheus T. Mason, William Howard Taft: Chief Justice 217 (1965).

73 Henry J. Abraham, The Judicial Process 197 (6th ed. 1993).

74 Robert L. Carter, *Freedom of Association*, in Reason and Passion: Justice Brennan's Enduring Influence 73 (Joshua Rosencranz & Bernard Schwartz eds. 1997).

75 James E. Bond, I Dissent: The Legacy of James Clark McReynolds 10 (1994); Calvin P. Jones, *Kentucky's irascible Conservative: Supreme Court Justice James C. McReynolds*, 57 Filson Club Hist. Q. 20, 24 (1983).

76 United States v. Manzi, 276 U.S. 463, 467 (1928); Chang Chan v. Nagle, 268U.S. 346, 353 (1925); United States v. Ginsberg, 243 U.S. 472, 475 (1917).

77 Louise Weinberg, *Fear and Federalism*, 23 Ohio N. U. L. Rev. 1295, 1334 (1997). Elsewhere, Weinberg speculated that McReynolds may have been driven by a policy goal of facilitating child labor. *The McReynolds Mystery Solved*, 89 Denver U. L. Rev. 133, 157-60 (2011). *See also* Steven J. Macias, who saw McReynolds embedded in "a socially static landscape, one in which the state should not artificially save and prolong the unfit children of immigrants and the poor by schooling them with the better-off and teaching them English." *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J. L. Fam. Stud. 87, 150 (2010). On the other hand, William G. Ross concluded that McReynolds' "magisterial prose" established that his motivation was safeguarding the "rights of parents and students." *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. Cin. L. Rev. 125, 186 (1988).

rights has proven influential. *Meyer* has received nearly 3000 precedential citations, including such prominent cases as *Obergefell v. Hodges*,[78] *McDonald v. Chicago*,[79] *Lawrence v. Texas*,[80] *Washington v. Glucksberg*,[81] *Planned Parenthood v. Casey*,[82] *Cruzan v. Director, Missouri Department of Health*,[83] *Roberts v. Jaycees*,[84] and *Roe v. Wade*.[85]

Meyer illustrates a level of analysis conundrum that has often bedeviled the issue of substantive due process. At the literal level, it is obvious that Meyer's instruction does not fit the historical/traditional legal consensus rationale very snugly, for it is certainly doubtful that a consensus existed to the effect that teachers have a right to teach in a foreign language, that pupils have a right to take courses in a foreign language or that parents have a right to have their children educated in a foreign language. On the contrary, there surely were many schools that did not offer courses in German, as there were schools that did not offer courses in many other subjects. Nor, at a broader level of abstraction, is it clear that a consensus favored the interests of teachers and students over the social goal of assimilation. Indeed, as with *Lochner*, which McReynolds cited as precedent,[86] what is striking is the absence of a consensus on the matter, which explains how these pedagogical laws came to be adopted in the first place. Nor is it clear how conflicts arising from the parental right should be resolved. Suppose parents differed, for example, one claiming a right to have her child raised to admire her country and another to view it as a bastion of racism and sexism. Would this require that both points of view be taught, confusing the students and leaving the parents dissatisfied? Would each view require its own class? Suppose a third parent believed the Framers were Martians, and wanted his children to be taught this narrative. If the level of generality is raised sufficiently, say, to the abstractions McReynolds voiced, the historical/traditional contentions might seem more plausible. How to determine which level of generality fits best? McReynolds offered no guidance.

V. Pierce v. Society of Sisters

Two years later, *Pierce v. Society of Sisters* (1925) saw McReynolds, this time speaking for a unanimous Court, address another state law targeting schools. Here, Oregon required all children ages eight to sixteen to attend public schools, in effect banning private and parochial schools.[87] Backed by the populist governor, Walter Pierce, the law was intended to help assimilate immigrants and counter the influence of the Roman Catholic Church.

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78 576 U.S. 644, at 668 (2015)
79 561 U.S. 742, 793 (2010).
80 539 U.S. 558, 593 (2003).
81 521 U.S. 702, 720 (1997).
82 505 U.S. 833, 848 (1992).
83 497 U.S. 261, 342 (1990).
84 468 U.S. 609, 618 (1984).
85 Roe v. Wade, 410 U.S. 113, 152-53 (1973).
86 Meyer, s*upra* note 65, at 399-400.McReynolds cited thirteen other cases, but none related to parental rights. McReynolds, a bachelor, was childless.
87 Oreg. Ls., sec. 5259.

Though McReynolds conceded that the law infringed upon the school's property rights, he again emphasized that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."[88] In support of this, he added, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[89] The only reference to history/tradition was a clause noting that the work of religious schools had been "long regarded as useful and meritorious."[90]

But if the state can standardize so much else in education—curriculum, textbooks, teacher certification, building certificates of occupancy—why draw the line here? For there is a substantial, irreducible element of coercion in education: students are not free to learn only the subjects that appeal to them or even to speak when they feel like it in class. What, also, exactly is meant by "fundamental theory of liberty"? Is it merely a rhetorical flourish? Of *Meyer* and *Pierce,* Justice Brennan wrote, "I think I am safe in saying that no one doubts the wisdom or validity of those decisions."[91] Yet some doubt, at least about the reasoning, remains. Again, history/tradition, mentioned fleetingly in passing, provides a very thin rationale.

VI. Skinner v. Oklahoma *ex rel*. Williamson

Skinner v. Oklahoma ex rel. Williamson (1942) concerned Oklahoma's Habitual Criminal Sterilization Act that required the sterilization of persons convicted two or more times of "felonies involving moral turpitude," except "violations of the prohibitory laws, revenue acts, embezzlement, or political offenses."[92] Jack T. Skinner, convicted twice of armed robbery and once of stealing six chickens, was ordered to undergo a vasectomy.

Justice Douglas' majority opinion for the Supreme Court struck down the law as violating the Fourteenth Amendment's equal protection clause; treating embezzlers and chicken thieves differently constitutes "a clear, pointed, unmistakable discrimination."[93] But Douglas did not stop here. The very first sentence of his opinion highlights "a sensitive and important area of human rights," namely, "the right to have offspring."[94] Later, he speaks of "the basic civil rights of man," marriage and procreation,[95] without pausing to indicate the contours of these rights. If I have a right to marry, can the state charge me for exercising that right by compelling me to purchase a marriage license? Can it force me to take a blood test? Or ban me

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88 Pierce v. Society of Sisters, 268 U.S. 510, at 534-35 (1925). McReynolds comes perilously close to asserting that parents owned their children. *See* Barbara Bennett Woodhouse, *"Who Owns the Child?"* Meyer *and* Pierce *and the Child as Property*, 33 Wm. & Mary L. Rev. 995, at 1041-50 (1992).

89 Pierce, *supra* note 88*,* at 535.

90 *Id.* at 534.

91 Michael H. v. Gerald D., 491 U.S. 110, at 142 (1989).

92 Okla. Stat. Ann. Tit. 57, sec. 171 *et seq*.

93 316 U.S. 535, at 541.

94 *Id.* at 536.

95 *Id.* On this basis, Douglas announces that the statute will be subjected to strict scrutiny, though he never spells out what this entails, perhaps because the concept was so new that it was little more a turn of phrase.

from marrying members of my family? Is it obliged to subsidize my membership in Tinder.com, if I am unable to find a spouse on my own? Is marriage, a legal construct conferring formal benefits and obligations, actually indistinguishable from, say, freedom of speech, which does not require certification by the state? Why, in any event, refer to marriage, inasmuch as Oklahoma is not preventing Skinner from marrying? As to procreation, is this a positive right in the sense that if I have difficulty, the state is obliged to help me, for example, by funding appropriate medical procedures? Does a right to procreate imply a right not to procreate, that is, to state supplied contraception and abortion? Can a man sentenced to life in prison claim a right to impregnate his wife via artificial insemination?[96]

There is something gratuitous about the inclusion of these unenumerated rights, reminiscent of a cook tossing leftover vegetables into a stew.[97] Were they, as McReynolds would have it, based on historical practice or understanding? Douglas saw no need to pursue the question.

VII. Poe v. Ullman

Justice Harlan addressed the question of unenumerated rights in some detail in his "influential"[98] dissenting opinion in *Poe v. Ullman* (1961), a case involving Connecticut's ban on contraceptives that the Court dismissed as nonjusticiable on account of its absence of ripeness. It is his discussion of substantive due process that accounts for the considerable interest it has continued to attract.[99]

Audaciously, Harlan's focus is not on the literal text of the Constitution, "as if we had a tax statute before us," for the due process clause is "not self-explanatory."[100] Instead, he proceeds from the assumption that the Constitution is "the basic charter of our society, setting out in spare but meaningful terms the principles of government."[101] From this perspective, Harlan argues that "Each new claim to constitutional protection must be considered against a background of constitutional purpose, as they have been rationally perceived and historically developed."[102] Hence, the due process clause should be interpreted in light of the Constitution's basic principles and purposes, in this instance, the "postulates of respect for the liberty of the individual"[103] that rule out "all substantial arbitrary impositions and purposeless restraints."[104]

Harlan proposed a two-part test. First, is the liberty abridged fundamental, that is, does it offend "the traditions from which it developed as well as the traditions

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96 Gerber v. Hickman, 264 F. 3d 882 (9th Cir. 2001).

97 On the other hand, Douglas ignored the opportunity to reverse the notorious pro-eugenics *Buck v. Bell* and even implied that had Oklahoma avoided the equal protection defect, the statute might have been upheld. The opinion, in short, was both reckless and timid.

98 Obergefell, *supra* note 78 at 701 (Roberts, C.J., dissenting); Washington *supra* note 81, at 721 n. 17.

99 The case has been cited 665 times in federal courts and 213 times in state courts.

100 367 U.S. 497, at 540.

101 *Id.* at 539-40.

102 *Id.* at 544.

103 *Id. a*t 542.

104 *Id.* at 543.

from which it broke"?[105] If the answer is yes (as it was in this case), Harlan would raise a second question, can the state's act meet the strict scrutiny test? Here, the answer was no: the Connecticut statute was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[106]

Harlan's treatment of history/tradition, like a river with currents running this way and that, is no simple thing. Though he asserts that "history sheds little light" on the meaning of due process,[107] he refers to the traditions from which it developed," and cites fourteen cases, two of which preceded the adoption of the Fourteenth Amendment, in support of the legitimacy of substantive due process, as well as the Framers' views on the right to privacy implicit in the Third and Fourth Amendments.[108] At the same time, he insists that "tradition is a living thing," and instructs us to look to "the traditions from which it broke. A decision of the Court which radically departs from [this living tradition] could not long survive, while a decision which builds on what has survived is likely to be sound."[109] In his eyes, "liberty" is not "a series of isolated points [but] a rational continuum."[110] With this, Harlan cannily refers simultaneously both to the past and the present.

How to answer both questions? Remarkably, Harlan did not try to hide the personal element, but began his dissent with "I"[111] and used the word no fewer than thirty-nine times and "me' six times. Was this to suggest that he be our guide? Or merely that we must rely on justices doing their best (whatever that means)?

His dissent is a powerful counter argument to the textualism often paraded by Justice Black. Yet it has an unfinished quality, for it left practical questions unaddressed. If history sheds little light and tradition is a living thing, how can they be rigid enough to provide sufficient guidance? How to reply to differing subjective judgments?

VIII. Griswold v. Connecticut

Griswold v. Connecticut (1965) saw Justice Douglas address the same Connecticut law that now was ripe, thanks to a prosecution of Estelle Griswold, the executive director of Planned Parenthood in Connecticut, who gave contraceptive information and counseling to married couples, and was convicted of violating the law and fined $100.

Justice Douglas began his consideration of the merits, announcing, "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch ... social conditions."[112] He then argued that the Constitution embodies

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105 *Id.* at 542.
106 *Id.* at 539.
107 *Id.* at 540
108 *Id.* at 551.
109 *Id.* at 542. Similarly, in Griswold Harlan stated that successful uses of substantive due process depended upon "continual insistence upon respect for the teachings of history." *Supra* note 28, at 501.
110 Poe, *supra* note 100, at 543.
111 *Id.* at 522.
112 Griswold, *supra* note 28, at 482.

certain rights not expressly mentioned, illustrating his point with nine precedents. These "peripheral rights,"[113] implied by the expressed rights, "suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance."[114] He closed the case by arguing that the First (the right to associate), Third (the right to be free from being forced to quarter soldiers in one's home during peace time), Fourth (the right to be secure in one's person and to be free from unreasonable searches and seizures), Fifth (the privilege against self-incrimination), and Ninth (the Constitution's enumeration of rights is not necessarily exclusive) Amendments, taken together, create a zone of privacy protected by the Constitution.[115] At this point, Douglas turned to the fact that Griswold had been counseling married couples. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" he asked, following with a paean to marriage as "an association for as noble a purpose as any involved in our prior decisions."[116] Douglas' justification of the unenumerated right is almost entirely abstract. His sole historical reference is a clause stating, "We deal with a right of [marital] privacy older than the Bill of Rights."[117]

The disconnect between Douglas' argument and the facts of the case is hard to ignore. In the first place, none of the amendments or the precedents cited had the slightest relation to contraceptive counseling. Nor is running classes counseling couples obviously a private act. Nor is it clear what the "sacred precincts of marital bedrooms" refers to, for they have never been thought to constitute off limit sanctuaries barring searches for, say, contraband or weapons.[118]

No wonder Justice Black, dissenting, wrote that though he found the Connecticut law "offensive" and liked "my privacy as well as the next one ... I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[119] In foreswearing what Black called the "old fashioned" amending process,[120] Douglas left the right untethered to a constitutional text and denied it a legislative history, both of which might have offered useful guidance to future courts. When Black predicted that Douglas' privacy was "a broad, abstract, and ambiguous concept which can easily be shrunken [or expanded] in meaning,"[121] he foretold its use in abortion and right to die cases as a synonym for autonomy, a rather different notion.[122] Such acts of discontinuity might seem to require unusually comprehensive justification, but for

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113 *Id.* at 483.
114 *Id.* at 484.
115 *Id.*
116 *Id.* at 485, 486. Feldman observes that "Douglas, after all, loved the institution [of marriage] so much he entered into it four times." Noah Feldman, Scorpion: The Battles and Triumphs of FDR's Great Supreme Court Justices 427 (2010).
117 Griswold *supra* note 28, at 486.
118 The Court abandoned the marriage rationale in Eisenstadt v. Baird, 405 U.S. 438 (1972), even extending the right to contraceptives to minors, Carey v. Pop. Servs. Int'l., 431 U.S. 678 (1977).
119 *Griswold* supra note 28, at 510.
120 *Id.* at 522.
121 *Id.* at 509.
122 Thomas Halper, *Privacy and Autonomy: From Warren and Brandeis to* Roe *and* Cruzan, 21 J. Med. & Phil. 121 (1996).

Douglas, the paragraph on penumbras and emanations seemed quite sufficient. He made no effort to rebut contrary views, for example, that the absence of a general privacy right indicates that the Constitution recognizes only the narrow privacy rights expressed in the amendments—that is, that the emanations produced no penumbra.[123]

IX. *In re* Winship

In re Winship (1970) addressed a New York law that provided that minors could be convicted of certain crimes if the preponderance of evidence was against them. Winship, a twelve-year-old boy, was on this basis convicted of stealing $112 and sent to a juvenile training school. In considering the law, Justice Brennan, speaking for a six to three majority, began by observing that "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a nation,"[124] also referring to its place in the common law.[125] The requirement, he added, "is a prime instrument for reducing the risk of convictions resting on factual error."[126] The undoubted presence of an historical/traditional consensus suggested that the standard is required by the Constitution, and Brennan saw no reason why the same logic would not apply both to adults and juveniles, though he provided no historical/traditional rationale for this position[127] Here, at least, one might assume that at last a traditional/historical consensus has been found.

But no, says Justice Black, dissenting, who pointed out that the Court "had never clearly held ... that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution."[128] He went on to say, "The Constitution ... goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders. I realize that it is far easier to substitute individual judges' ideas of 'fairness' for the fairness prescribed by the Constitution, but I shall not at any time surrender my belief that the document itself should be our guide, not our own concept of what is fair, decent and right."[129] For Black, "the only correct meaning of [due process] is that our government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions."[130] The alternative to the law of the land was "the law of the judges," which is counter to the principle of democratic self-government. He does not dispute the value of

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123 As "penumbra" refers to partial shadows, as from an eclipse, it is not clear that even metaphorically it could give anything life. In his chambers, Justice Thomas has a plaque reading, "Please don't emanate in the penumbra." David J. Garrow, *The Tragedy of William O. Douglas*, Nation, March 27, 2003.

124 397 U.S. 358, 361.

125 *Id.* at 362.

126 *Id.* at 363.

127 *Id.* at 365.

128 *Id.* at 377.

129 *Id.*

130 *Id.* at 382.

the standard of proof, but merely denies that a court can enforce its opinion on the country. If there were no consensus on this question, where would it be found?

X. Roe v. Wade

Roe v. Wade (1973) famously saw the right to choose to have an abortion as an unenumerated fundamental right. Norma McCorvey, single, pregnant, and a resident of Texas, wanted an abortion, but Texas permitted abortions only if necessary to save the life of the mother.[131] Justice Blackmun, speaking for the majority, put history at the center of his argument, first, that abortions had been treated leniently under the law, especially before quickening,[132] and second, that "person" as used in the Constitution does not include the unborn.[133] From this, he concluded that the right to choose to have an abortion is a fundamental right that implicates the strict scrutiny test, though he did not always make it clear whether the right is possessed by the woman or her doctor.[134]

Justices Rehnquist and White, dissenting, also focused on history/tradition, pointing to states restricting abortion and to the framers of the Fourteenth Amendment as silent on the issue. In Rehnquist's words, "To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the amendment."[135] Thus, while the conclusion of *Roe* was in dispute, both sides acknowledged the centrality of the historical/traditional rationale and treated it in far more detail than had earlier courts.

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131 Texas Penal Code, arts. 1191-94, 1196.

132 Roe, *supra* note 85, at 132-36.

133 *Id.* at 158.

134 In the second paragraph, Blackmun says that abortion is the subject of vigorous debate among physicians, and then details the history of medical opinion, with special attention paid to the views of the American Medical Association (*Id.* at 141) and the American Public Health Association (*Id.* at 144-45). Sometimes, he writes that the woman will decide after consulting her doctor; sometimes, he writes that the doctor will decide after consulting the woman. Mostly, he seems to favor the doctor because the decision is "inherently and primarily a medical decision" (*Id.* at 166). In a key passage, he writes, "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment" (*Id.* at 165). In transferring authority from the state to the doctor, Blackmun seems oblivious to the dignity issue of having others, usually men, empowered to make potentially transformative and deeply personal decisions for women. Before becoming a judge, Blackmun had served for nine years as general counsel at the elite Mayo Clinic, and later called these the best years of his professional career. He directed that a portion of his cremated ashes be scattered at the clinic upon his death. Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 248 (2005). For a contrary view, see Nan D. Hunter, *Justice Blackmun, Abortion, and the Myth of Medical Independence*, 72 Brook. L. Rev. 147 (2006).

135 Roe, *supra* note 85, at 174.

XI. Troxel v. Granville

Troxel v. Granville (2000) concerned the visitation rights of grandparents. Tommie Granville and Brad Troxel, an unmarried couple, had two children. They separated but the children regularly spent weekends with the grandparents; Troxel died; Granville told his parents that they could visit the children once a month and under Washington law, they were awarded more generous terms; Granville married and her husband adopted the children; they challenged the ruling; and the Washington supreme court found for Granville, asserting a fundamental right of parents to control the raising of their children.

Justice O'Connor, writing for a plurality of the Supreme Court, conceded that grandparents played an increasing role in the upbringing of their grandchildren, but thought "the interest of parents in the care, custody, and control of their children [are] perhaps the oldest of the fundamental liberty interests recognized by this Court."[136] She considered the Washington law "breathtakingly broad," and, as there was no evidence that Granville was an unfit parent, an infringement on this fundamental right.[137] The basis for the right was a series of precedents, including *Meyer* and *Pierce,* among others.

Justices Souter and Thomas, each concurring, agreed that the parental right was well established, like O'Connor, citing a number of precedents.[138]

Justice Scalia, dissenting, resisted "the instinct against overregularizing decisions about personal relations" on the ground of "mere tradition," as "intimate associations are complex."[139] The cases on which the parental right rests, chiefly *Meyer* and *Pierce*, have "small claim to *stare decisis* protection," and he would not extend their theory to cover this case, and thereby alter family law.[140] Though Scalia referred in passing to "tradition," it was given no elucidation.

Justice Kennedy, dissenting, thought the majority ignored evolving family patterns and unwisely rejected "the best interests of the child standard [which] has been recognized for many years as a basic tool of domestic relations law in visitation proceedings."[141] Thus, his opinion seemed simultaneously to look both forward and backward in time.

XII. Dobbs v. Jackson Women's Health Organization

Which brings us to *Dobbs v. Jackson Women's Health Organization* (2022). A Mississippi law banned virtually all abortions after the fifteenth week of pregnancy, except for medical emergencies and severe fetal abnormalities; there were no exceptions for rape or incest. The point was to challenge *Roe v. Wade*'s holding that the right to choose to have an abortion is a fundamental unenumerated right protected by the Constitution.

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136 Troxel, *supra* note 23, at 57, 65,
137 *Id.* at 67.
138 *Id.* at 77, 80.
139 *Id.* at 91.
140 *Id.* at 92.
141 *Id.* at 99.

Justice Alito, speaking for the Court, began with the unexceptional observation that "Constitutional analysis must begin with 'the language of the instrument.'"[142] *Roe* asserted that the right to choose to have an abortion is a fundamental right. How can we test that claim? Fundamental rights, he declared, must either appear in the Constitution or be deeply rooted in the nation's history and essential to the concept of ordered liberty.[143] Noting that the "Constitution makes no reference to abortion"[144]—indeed, *Roe* derived it from the right to privacy, which is also not mentioned—Alito inquires as to whether it was deeply rooted in the nation's history. From the 1200s to 1960, no statute, no English case, no state case, no federal case, no legal treatise, and no law review article spoke of an abortion right, except to prevent maternal death or serious bodily injury.[145] The "most important historical fact," he added, was "how the states regulated abortion when the Fourteenth Amendment was adopted,"[146] for *Roe* had rested on the Amendment's due process clause; "28 out of 37 had enacted statutes making abortion a crime even if it was performed before quickening."[147] Nor is abortion implicit in the concept of ordered liberty; different states may view the matter differently.[148] *Roe* and its revision, *Planned Parenthood* v. *Casey* (1992),[149] both poorly reasoned, failed to acknowledge that the asserted right failed the test, and should be overturned; "egregiously wrong"[150] precedents should not be allowed to stand. As abortion does not involve a fundamental right, states may regulate it, provided only that they meet the standard rational basis test, ordinarily, a low barrier.

Alito rejected the notion that overruling *Roe* and *Casey* put decisions on contraception (*Griswold*), same sex intimacy (*Lawrence*), and same sex marriage (*Obergefell*) in jeopardy.[151] Unlike them, *Dobbs* involved "critical moral questions"[152] of life and death and affected a non-consenting third party.[153]

Chief Justice Roberts, concurring, would have upheld the law, but left the question of rejecting *Roe* "for another day."[154] The right to terminate a pregnancy should extend far enough to ensure a reasonable opportunity to choose—and

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142 Dobbs, *supra* note 33, at 2244. This suggests that the opinion will be originalist, but actually it says almost nothing about the text's original public meaning, instead focusing on history.

143 *Id.* at 2246.

144 *Id.* at 2242. He repeats this finding six other times in his opinion.

145 *Id.* at 2248-57. This is strikingly similar to the Court's argument against a constitutional right to consensual sodomy in *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986), overruled by *Lawrence*, *supr*a note 80.

146 Dobbs, *supra* note 33, at 2267.

147 *Id.,* at 2253. In his concurrence, Kavanaugh also found the states' positions at the time of the adoption of the Fourteenth Amendment "dispositive." On the other hand, that a quarter of the states permitted abortion may indicate that it remained an open question.

148 Dobbs, *supra* note 33, at 2257.

149 Casey, *supra* note 82.

150 Dobbs, *supra* note 33, at 2265.

151 *Id.* at 2243.

152 *Id.* at 2258.

153 If the criteria are history/tradition and ordered liberty, it is hard to understand why precedents in these areas warrant a waiver. Alito's response, which introduces a pair of entirely different criteria, is really no response at all, but instead merely a means to avoid further controversy.

154 *Id.* at 2314.

Mississippi offers this opportunity—but need not extend any further. Thus, he would replace *Roe* and *Casey's* insistence on the right to choose an abortion before fetal viability with a much more pro-life standard, but the precedents would not be entirely abandoned. The right to choose an abortion would continue to be acknowledged and protected, but its application and effect would be considerably narrowed. A defender of judicial minimalism, Roberts generally favors curtailing the occasions for reversing precedents, as deferring to democratically elected lawmakers and as safeguarding the legitimacy of the Court.[155] However, the majority perhaps regarded this as a political compromise that was constitutionally both inadequate and unnecessary.[156]

Justice Kavanaugh, concurring, thought that the Constitution was "neutral" on abortion, and, therefore, that the Court must be "scrupulously neutral," too.[157] He emphasized that the Court had not outlawed abortion, but instead had left the question to the people and their representatives. He also reiterated Alito's point that the ruling does not cast doubt on *Griswold* or *Obergefell*, and he thought it clear that states cannot ban residents from travelling to another state to obtain an abortion.[158]

The concurring opinion of Justice Thomas attracted by far the most attention, apart from Alito's. He thought the due process clause "at most guarantees process,"[159] and urged the Court to "reject substantive due process entirely."[160] He also believed that *Griswold, Lawrence*, and *Obergefell* should be reconsidered.[161] However, Thomas did not fully confront the enormous and far reaching consequences of jettisoning substantive due process, consequences that would impact numerous issues in addition to abortion. Indeed, the revolutionary implications of his opinion recalled the comments of Thomas's friend and colleague, Justice Scalia: Thomas "doesn't believe in stare decisis, period .... If a constitutional line of authority is wrong, he would say, 'let's get it right.' I wouldn't do that."[162] Scalia, who called

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155 Roberts has not always practiced what he preached. For example, he wrote for the Court in Citizens United, a high profile case that overruled precedents and generated substantial criticism from officials, pundits, academics, and others. Citizens United v. FEC, 558 U.S. 310 (2010).

156 A well-respected reporter covering the Court has written that Roberts tried to persuade Kavanaugh and Barrett to decide for Mississippi but uphold Roe. She doubts he would have succeeded, but believes that leaking Alito's opinion made it all but impossible. Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2020).

157 Dobbs, *supra* note 33, at 2305.

158 *Id.* at 2309. Where Alito was angry and caustic in his treatment of *Roe* and *Casey*, Kavanaugh said that he had "deep and unyielding respect for the justices who wrote the Casey plurality opinion."

159 *Id.* at 2301.

160 *Id.* at 2304.

161 Dobbs, *supra* note 33, at 2302. This generated fears that reversals were on the Court's unacknowledged agenda. *See*, *e.g.,* Amy Gajda, *How* Dobbs *Threatens to Torpedo Privacy Rights in the US*., Wired, June 29 2022, 11:09; Olivia Goldhill, *Supreme Court Decision Suggests the Legal Right to Contraception Is Also Under Threat*, Stat, June 14, 2022; Silvia Foster-Frau, *LGBTQ Community Braces for Rollback of Rights After Abortion Ruling*, Wash. Post, June, 24, 2022.

162 Douglas T. Kendall, *The Big Question about Clarence Thomas*, Wash. Post, Oct. 4, 2004 p. A31, qtg. Ken Foskett, Judging Thomas: The Life and Times of Clarence Thomas. (2004). Thomas, who is married to a white woman, did not suggest that Loving

himself a "faint-hearted" originalist,[163] would accept precedents that conflicted with the original public meaning of a constitutional provision or statute in order to avoid disruptions that generated uncertainty and instability; Thomas would not.

Justices Breyer, Kagan, and Sotomayor, in a sixty page dissent, maintained that the Constitution put fundamental rights like abortion "off limits to majority rule."[164] They rejected Kavanaugh's claim of neutrality, charging that the decision was a "no compromise refusal to recognize a woman's right to choose."[165] They also feared that the same logic could be used to threaten the rights to contraception, same sex intimacy, and same sex marriage, and believed that "it undermines the Court's legitimacy."[166]

By insisting that an unenumerated fundamental right must be both deeply rooted in the nation's traditions and essential to a scheme of ordered liberty, Alito hoped to preserve substantive due process from attacks like Thomas', while preventing it from being used to constitutionalize subjective judicial preferences. By requiring both these tests to be met, he placed a heavy burden on rights advocates that mirrored the burden that government faced, when it sought to limit enumerated fundamental rights. He was careful to make it clear that *both* tests must be met; there might be a deeply rooted right to eat hamburgers or watch football games, but these are not essential to a scheme of ordered liberty, a phrase he borrowed from Justice Cardozo's much cited opinion on Bill of Rights incorporation in *Palko v. Connecticut* (1937).[167]

However, Alito's argument was undercut by his failure to analyze the very concept of ordered liberty that he pronounced essential. At one point, he indicated that the way to proceed would be to ask what the Fourteenth Amendment "means by the term."[168] But instead of proceeding, he simply returned to the history that he thought demonstrated that abortion rights were "not deeply rooted."[169] Cardozo had defined rights under the scheme of ordered liberty to mean that "neither liberty nor justice would exist if they were sacrificed,"[170] but Alito did not even bother to quote the words. Thus, the much vaunted "ordered liberty" test, once stated, was ignored.

Another obvious problem with the tests is that while Alito repeatedly emphasized the importance of the constitutional text, his two criteria were entirely judge-created and had no textual foundation. There is nothing odd about this. For example, the notion that fundamental rights implicate strict scrutiny is well accepted, though it also has no textual justification. More broadly, judicial review, which the Court exercised here, and the concept of fundamental rights itself also

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v. Virginia (1967), a precedent banning states from outlawing interracial marriage, ought to be reconsidered.

163 *Originalism: The Lesser Evil,* 57 U. Cin. L. Rev. 849 862 (1989). Later, Scalia repudiated this label, favoring "honest originalist." Jennifer Senior, *In Conversation: Antonin Scalia*, New York Magazine, Oct. 14, 2013.

164 Dobbs *supra* note 33, at 2320.

165 *Id.* at 2328.

166 *Id.* at 2350. Though Justices do not ordinarily venture opinions on issues not raised in the cases before them, in Dobbs Alito, Kavanaugh, Thomas, and Kagan all addressed topics for potential future litigation.

167 302 U.S. 319, 325.

168 Dobbs, *supra* note 33, at 2248.

169 *Id.* at 2253.

170 Palko, *supra* note 167, at 326.

have no explicit textual basis. Alito, despite his celebration of textualism, could not avoid the snares of judicial doctrine any more than the justices he criticized.

Alito clearly believed that he was acting in the tradition of judicial self-restraint. Unelected, democratically unaccountable courts should not make policy, particularly, when the issue is morally controversial.[171] Substantive due process had sometimes been used by justices to write their own policy preferences and ideological beliefs into the Constitution, he thought. Indeed, *Roe,* "exceptionally weak,"[172] imposed on the people a particular theory about when the rights of personhood begin; it "required states to regard a fetus as lacking even the most basic right, the right to live, until an arbitrary point in a pregnancy has passed."[173]

Thus, Alito lined up with fetal protection laws that include fetuses as rights-bearing persons, though obviously unable to exercise such fundamental rights as freedom of speech or of religion.[174] Arguably, fetal personhood would implicate both the due process and equal protection clauses, rendering abortion unconstitutional. Kavanaugh in his concurrence declared that this radical argument was "wrong as a constitutional matter,"[175] but no other justice voiced agreement with this position, perhaps implying that it remains a live option.

"Liberty," Alito wrote, is so "capacious"[176] a term that it invites judges to read their own preferences into it, but the temptation should be resisted. Yet his

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171 Ironically, though the majority boasted that returning abortion to the states was a victory for democracy (*e.g.,* Dobbs, *supra* note 33, at 2237, 2243, 2279, 2284 [Alito, J.]; 2228, 2304, 2305, 2306, 2309 [Kavanaugh, J.]), it had earlier declined to promote democracy within states by addressing partisan gerrymandering. Rucho v. Common Cause, 139 S. Ct. 2484 (2019). Nor had it deferred to Congress in the high profile cases of Shelby County v. Holder, 570 U.S. 529 (2013), concerning the Voting Rights Act, and Janus v. AFSCME, 138 S. Ct. 2448 (2018), concerning right-to-work laws. The Court's opposition to judicial activism appears to be selective.

172 Dobbs*, supra* note 33, at 2243.

173 *Id.* at 2261.

174 On this basis, from 1973-2005 in some 413 cases pregnancy was an essential factor leading to criminal prosecution of women. Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol., Policy & Law 299 (2013). Nearly twenty years before Dobbs, the South Carolina supreme court upheld the conviction of homicide by child abuse of a woman who used cocaine during pregnancy and experienced a still birth. State v. McKnight, 576 S.E. 2d 168 (2003), *cert. denied*, 540 U.S. 819 (2003). A fetus whose parents were injured in an auto accident caused by negligence could sue the offending driver for loss of parental consortium. Angelini v. OMD Corp., 575 N.E. 2d 41, 43-44 (Mass. 1991). The assumption was that the life of the fetus trumped the interests of the pregnant mother, even when the fetus was a product of rape or incest. Michele Goodwin, *If Embryos and Fetuses Have Rights*, 11 J. L. & Ethics Hum. Rts. 188, 197-98 (2017). Fetal protection statutes are found not only at the state level, but also at the federal level in the Unborn Victims of Violence Act, which defines a fetus as a "member of the species homo sapiens, at any stage of development, who is carried in the womb." 18 U.S.C. sec. 1841 (2004).On the other hand, that fetuses should be counted as persons in the decennial census was rejected in the 1870 Census that followed the adoption of the Fourteenth Amendment by less than two years. Michael J. Rosin, *Congress Has Never Considered Fetuses Persons within the Meaning of the Fourteenth Amendment*, Slate, June 9, 2022.

175 Dobbs**,** *supra* note 33, at 2305.

176 *Id.* at 2247.

self-restraint that entailed upholding the Mississippi statute also ironically entailed threatening well established decades old precedents, which could not be defended as embodying rights "deeply rooted" in the nation's history.[177] Supreme Court precedents strictly bind lower courts, but *stare decisis* is only a "soft rule"[178] binding the Supreme Court itself, particularly, in constitutional cases.[179] Accordingly, Alito noted that the rule of precedent is plainly "not an inexorable command."[180] Indeed, on occasion (as in *Brown*), the Court has been widely applauded for reversals. From 1789-2020, the Court reversed its precedents 145 times (about .5% of its total cases); the Roberts Court has actually overturned at a lower rate than the preceding Warren, Burger, and Rehnquist Courts[181] -- notwithstanding the fact that originalism may have disruptive effects.[182]

It is hard to avoid the feeling that Alito was responding not simply to a jurisprudence he believed to be profoundly flawed, but also to the social forces it seemed to embody and promote. From this perspective, the days when marriage and family were taken for granted as central supports to society are inexorably drifting away. Rates of marriage[183] and childbirth[184] continue to decline; rates of adults living alone continue to rise;[185] individualistic rights continue to be celebrated at the expense of community obligations; abortion, a facilitator of these unhealthy developments, is defended in moral terms, but in the end it is all about its liberating impact on selfish lifestyles.

For the dissenters, however, reversing precedents in *Dobbs* collided with substantial reliance interests, for literally millions of people had trusted the precedents as they made extremely important personal decisions over a half century. From this perspective, the rule of precedent serves one of the law's chief goals, stability/predictability,[186] by offering "assurance against untoward surprise."[187] To

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177 *E.g.,* Griswold, Loving, Lawrence, Obergefell, Bostock.

178 Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1713 (2013).

179 But *cf*., Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 Corn. L. Rev. 422, at 431 (1988).

180 Dobbs, *supra* note 33, at 2261.

181 David Schultz, Constitutional Precedent in United States Supreme Court Reasoning (2022). The Library of Congress counted 232 cases, still a tiny percentage. *A Short History of Overturned Supreme Court Landmark Decisions*, Constitution Annotated (2022).

182 Adam Vermeule, Common Good Constitutionalism 113 (2022). He believes that disruption was "baked into originalism from the beginning," as its purpose was "to unsettle the evolving doctrine of the Warren and Burger Courts, which conservatives despised." *Id.* at 93.

183 Marriage rates dropped from 9.8/1000 in 1990 to 5.1 in 2020. Erin Duffin, *Marriage Rates in the United States from 1990 to 2020*, Statistica, Sep. 30, 2022.

184 Birth rates dropped from 15.573/1000 in 1990 to 12.012 in 2021. Macrotrends, *U.S. Birth Rate 1950-2022* (2022).

185 Rates grew from 12.8% (23.2 million) in 1990 to 14.4% (36.2 million) in 2020. U.S. Census, *Historical Living Arrangements of Adults* (Nov. 2021).

186 Bendix Autolite Corp. v. Midweco Enters., 486 U. S. 888, 897-98 (1988); David Lyons, *Formal Justice and Judicial* Precedent, 38 Vand. L. Rev. 495, 496 (1985); Earl M. Maltz, *The Nature of Precedent*, N.C. L. Rev. 367, 368 (1988).

187 Moragne v. States Marine Lines, 398 U.S. 375, at 403 (1970).

the extent that parties feel that their "legitimate expectations"[188] have been misled, overturning precedents cannot escape the impression of unfairness.[189] As Justice Brandeis put it, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[190] If originalism played into Alito's hands, fidelity to precedent decidedly did not.

The implication of the reliance interests was that the goals of stability/predictability may sometimes be so socially valuable that they justify upholding flawed precedents.[191] Is abortion one of these instances? In *Casey*, Kennedy observed that "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail." He saw a "promise of constancy" in the decision's granting the "ability of women to participate equally in the social and economic life of the nation [as] facilitated by their ability to control their reproductive lives;"[192] dissenting, Rehnquist thought constitutional law was much less important as a contributor to women's progress than improved education and increased acceptance by men.[193] In *Dobbs*, Alito minimized the impact of reliance, indicating that it was not comparable to the tangible commercial interests bound up in property or contract rules; he also considered it hard for the Court to assess the impact of abortion rights on women's lives. Reliance is implicated in situations "when advance planning of great precision is most obviously a necessity;"[194] abortions, however, result from unplanned activity.[195] In short, Alito

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188 Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 415 (2010).

189 "Legislatures are constantly creating new legal rules," one analyst observed, "yet no one thinks that this somehow gives those aggrieved by the new rule some vested legal right in the continuation of the prior legal regime." Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?* 86 N.C. L. Rev. 1165, 1178 (2008).

190 Burnet v. Colorado Oil & Gas Co., 285 U.S. 393, 405 (1932). Brandeis could hardly have been referring to a topic as weighty and controversial as abortion.

191 An example would be the Slaughterhouse Cases, almost universally reviled, yet a century and a half later not overturned. 83 U.S. 36 (1873). As Scalia demanded during oral argument, "Why are you asking us to overrule 150, 140 years of prior law, when you can reach your result under substantive due process.?" Transcript of Oral Argument, at 6, McDonald v. Chicago, 561 U.S. 742 (2010). By closing off the privileges and immunities path, this case was critical in the application of substantive due process to the states. Justice Thomas, like Charles Black, would prefer reversing Slaughterhouse and substantive due process in favor of privileges and immunities, one of their few areas of agreement. Thomas, *supra* note 33, at 2302; Black, A New Birth of Freedom, *supra* note 9. On overruling venerable precedents, see Matthew H. Kramer, *Hoary Precedents*, University of Cambridge Legal Studies Research Paper no. 3/2022 (March, 2022).

192 Casey*, supra* note 82, at 856.

193 *Id.* at 956-57.

194 Dobbs, *supra* note 33, at 2276, qtg. *Casey*, at 856.

195 Rehnquist had argued in Casey that women who lacked access to abortions could take care that they did not become pregnant. Casey, *supra* note 80, at 956. Yet whether or not women have planned to become pregnant, the pregnancy may radically interfere with other major life plans. Why should they be banned from changing their mind or correcting what they consider a mistake merely on account of planning?

relied on history to demonstrate an absence of constitutional support for abortion, but dismissed history when it constituted an argument from reliance.[196]

XIII. Dobbs' Precedents

Meanwhile, amidst a barrage of abstract issues, an empirical concern was overlooked: is there a viable basis for Alito's two-pronged test or did he simply conjure it from the ether? Consider the three precedents he cited. *Moore v. East Cleveland* (1977) concerned a zoning ordinance that limits occupancy in a home to family members. Inez Moore lived with her son and her two grandsons, of whom one joined her upon his mother's death. East Cleveland's ordinance featured a narrow definition of "family" that excluded grandsons. Mrs. Moore was convicted of violating the ordinance.

Justice Powell wrote for the plurality. "When a city undertakes such intrusive regulation of the family," he wrote, "the usual deference to the legislature is inappropriate."[197] As "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition,"[198] Powell does not confine the term to "members of the nuclear family,"[199] but concludes that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[200] Nowhere does Powell present empirical evidence beyond *Meyer* and *Pierce* to show that the Constitution protects the family or that "family" should be interpreted rather broadly. There is no investigation as to the original public meaning of the due process clause or its legislative history. As "tradition is a living thing,"[201] Powell seems to be highlighting that the meaning of "family" continues to evolve. As marriage rates are in a steep decline—the 5.1 per 1000 population rate in 2020 was nearly 40% below the 2000 rate[202] and less than a third of the post-World War II rate—does this have constitutional implications? Should unmarried persons living together be included as "family"? Should caretakers unrelated by

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196 A non-representative online panel surveyed before and after Alito's draft opinion was leaked to the press revealed that respondents perceived Americans to be more supportive of abortion following the leak, and that social liberals trusted the Court less. Opinions on abortion were unchanged. Chelsey S. Clark & Elizabeth Levy Paluck, *The Supreme Court Overturned Roe. Will American' Views toward Abortion Change?* Behavioral Scientist (June 28, 2022). See also Pew Research Center, Majority of Public Disapproves of Supreme Court's Decision to Overturn Roe v. Wade (July 8, 2022).

197 413 U.S. 494, 499.

198 *Id.* at 503.

199 *Id.* at 504.

200 *Id.* at 506. Justice Brennan concurred, seeing the ordinance as arbitrary, insensitive, and especially burdensome to Black families. He did not discuss the historic roots of family rights, but instead described how families have evolved. Justice Stevens, concurring, considered the ordinance an unjustifiable intrusion into Moore's right "to use her own property as she sees fit." *Id.* at 513. He also did not refer to historic roots. The dissents by Chief Justice Burger, Justice Stewart, and Justice White also did not refer to historic roots.

201 *Id.* at 501.

202 Nat'l Vital Stat. Sys. (2022).

blood and law? If constitutional rights attach to family membership, should states be permitted to continue their practice of differential family legislation, reflecting their differences in history and tradition? None of these questions is resolved in Powell's casual usage, which naturally weakens the utility of the test. As to Alito's "implicit in the concept of ordered liberty," this goes entirely unmentioned.

Michael H. v. Gerald D. (1989) was the second precedent cited by Alito in *Dobbs*. Carole D. was married to Gerald D., but they separated and she had an affair with Michael H. and gave birth to Victoria. Blood tests established a 98.07% probability that Michael was the father. Carole and Gerald reconciled, and Gerald took on the father's role. California law conclusively presumed that a child born into a family where the husband is neither sterile nor impotent is the husband's child, with no right to a hearing. Michael sued, contending that he had a due process liberty interest as a fundamental right in his parental relationship that California failed to recognize.

Justice Scalia, speaking for a plurality, rejected Michael's claim because he failed to show that his alleged fundamental right was "an interest traditionally protected by our society."[203] Had "persons in the situation of Michael and Victoria ... been treated as a protective family unit under the historical practices of our society"?[204] The answer was no: "our traditions have protected the marital family ... against the sort of claim Michael asserts."[205] The common law as well as statutes back California's practice supporting the integrity of the family, and the presumption of legitimacy is a fundamental principle of the common law.[206] The liberty interest of an "adulterous biological father" to assert parental rights, when the child's mother is married to someone else, has never been recognized.[207] On the contrary, the presumption generally followed is the presumption of legitimacy. Since it is not a fundamental right, Michael's claim does not implicate the due process clause, and there is no reason for the Court to balance the competing claims of Michael and Gerald, who find themselves in a zero-sum situation. Rather, it is left to California to balance the claims through the ordinary political process.[208]

The level of analysis is critical here; Scalia's literal reading focused on the historically traditional rights of an adulterous natural father; had he instead spoken of parenthood, family relationships or emotional attachments, the result might have been different.[209] But Scalia's point was that the most specific tradition would be the most useful, as its applicability would be most obvious and the judicial discretion it permitted would be minimized. Utilizing a higher level of generality would "permit judges to dictate rather than discern society's views."[210] The narrow literalness of Scalia's tradition represented his effort to enhance the utility of the concept. His opposition was not to change, he insisted, but rather to Supreme Court driven change, which he regarded as undemocratic.[211] However, in his heavy focus on

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203 Michael H., *supra* note 91, at 122.
204 *Id.* at 124.
205 *Id.*
206 *Id.* at 124.
207 *Id.* at 125.
208 *Id.* at 130.
209 *Id.* at 127 note 6.
210 *Id.*
211 Burnham v. Superior Court, 495 U.S. 604, at 626 (1990).

history/tradition,[212] nowhere did he speak of concepts essential to ordered liberty, despite Alito's citations.

Justice Brennan, dissenting, thought Michael entitled to a hearing, and presented an extensive attack on Scalia's reliance on history/tradition. He thought the concept "malleable" and elusive, and rejected the notion that it could be located by "poring through dusty volumes on American history."[213] Reasonable people, he wrote, "can disagree about the content of particular traditions [and] even about which traditions are relevant to the definition of 'liberty.'"[214] There was also the question as to when "a tradition becomes firm enough to be relevant to our definition and the moment at which it becomes too obsolete to be relevant any longer."[215] He also charged Scalia with omitting precedents that did not fit into his traditional narrative, and saw a grave level of analysis error: Scalia had asked not "whether parenthood is an interest that historically has received our attention and protection [but] whether the specific variety of parenthood—a natural father's relationship with a child whose mother is married to another—has enjoyed such protection."[216] He pointed to earlier decisions, which protected the rights of fathers to maintain relationships with their children, even when they were born out of wedlock.

Brennan not only found tradition misapplied; he also thought that it was so inherently backward looking that it discounted important changes in society, in particular, echoing Powell, that "family" and "parenthood" have evolved and now contain a "freedom not to conform,"[217] as well as Scalia's "cramped vision."[218] "The plurality ... squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty."[219] Scalia, in Brennan's eyes, "does not recognize that times change, does not see that sometimes a practice or rule outlives its foundations,"[220] Brennan's general hostility to the history/tradition criterion was partially undermined by his own use of history in the form of precedents and practices.

Washington v. Glucksberg (1997), the third precedent heavily relied upon by Alito in *Dobbs*, asked whether mentally competent, terminally ill adult patients possessed a substantive due process fundamental right to commit physician assisted suicide. Harold Glucksberg and three others wished to assist the suicide of terminally ill patients in constant pain, in violation of Washington law.[221] The case produced a unanimous result, oddly splintered by five concurrences.

Chief Justice Rehnquist, speaking for the Court, announced that "Our established method of substantive due process analysis ... protects those fundamental rights and liberties which are, objectively. 'deeply rooted in this nation's history

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212 Scalia explicitly address the issue of historical methodology. Michael H., *supra* note 89, at 132, footnote 6.
213 *Id.* at 110.
214 *Id.* at 137.
215 *Id.* at 138. Barnett and Bernick suggest thirty years. Randy E. Barnett & Evan D. Bernick, The Original Meaning of the Fourteenth Amendment 239 (2021).
216 Michael H., *supra* note 91, at 139.
217 *Id.* at 141.
218 *Id.* at 157.
219 *Id.* at 141.
220 *Id.*
221 Wash. Rev. Code sec. 9A.36.060(10.

and tradition' ... and 'implicit in the concept of ordered liberty.'"[222] As to history and tradition, he presented six pages covering over 700 years of Anglo-American history to show that "opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages."[223] These were followed by three pages listing contemporary state legislation that also condemn the practice.[224] The purpose of the history/tradition requirement was to "rein in the subjective elements that are necessarily present in due process judicial review."[225] As with *Michael H,* the level of analysis was very specific, covering not the broad liberty to choose how and when to die, but instead the right to physician assisted suicide.[226]

Rehnquist conceded that doctors could withdraw life sustaining treatment and let nature take its course, but insisted on a distinction between killing and letting die (or what some philosophers have termed passive or active euthanasia[227]). The ruling "permits the debate to continue, as it should in a democratic society."[228] What Alito failed to mention is that Rehnquist accepted abortion under the history/tradition and ordered liberty standards.[229]

Rehnquist's second criterion, implicit in the concept of ordered liberty, was completely undeveloped[230] (perhaps because the failure of the history criterion rendered it superfluous) and consisted simply of a citation to *Palko*.[231] With the failure to establish assisted suicide as a fundamental right, no balancing test was implicated. Yet Rehnquist noted no fewer than a half dozen interests the state had in opposing the practice, which overwhelmed any interests on the other side. All this may help to explain why the Court in *Obergefell v. Hodges*, the famous same sex marriage case, announced that the *Glucksberg* reliance on history "is inconsistent with the approach this Court has used in discussing other fundamental rights."[232]

In short, none of the three cases cited by Alito as precedents for his two-pronged test in *Dobbs* are supportive. In *Moore* and *Michael H*., history and tradition were rather briefly touched on; in *Glucksberg*, they were discussed in some depth;

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222 Washington, *supra* note 81, at 721.
223 *Id.* at 711.
224 *Id.* at 716-18.
225 *Id.* at 722.
226 *Id.* at 722-23.
227 James Rachels, *Active and Passive Euthanasia*, 292 New Eng. J. Med. 78 (1975). As both types of euthanasia result in the death of the patient, some regard the argument as a distinction without a difference.
228 Washington, *supra* note 81, at 735.
229 *Id.* at 727. Nor did he mention the concurrence of Justice O'Connor, who implicitly differentiated physician assisted suicide from abortion by noting, "Every one of us at some point may be affected by our own or a family member's terminal illness." *Id.* at 737.O'Connor's retirement was hastened by the dementia of her husband. Joan Biskupic, *O'Connor Takes Private Ordeal Public*, USA Today, May 14, 2008.
230 The case's syllabus claims that the "various descriptions of the interest here at stake -- *e.g.*, a right to "determin[e] the time and manner of one's death," the "right to die," a "liberty to choose how to die," a right to "control one's final days,' "the right to choose a humane, dignified death," and "the liberty to shape death"—run counter to that second requirement." *Supra* note 81`, at 703.Without more, it is simply not clear why this should be so.
231 *Id.* at 721.
232 Obergefell, *supra* note 78, at 671.

however, in none of them was the second criterion, ordered liberty, explored. The three precedents, in sum, do not satisfactorily validate Alito's approach in *Dobbs.*

XIV. The Future?

Those considering the future might pay attention to *Tiwari v. Friedlander*, a Kentucky case involving Nepali immigrants seeking official permission in the form of a certificate of need to open a home care agency for Nepali speakers.[233] Tiwari argued that the point of the procedure was to create a barrier to entry with the purpose of protecting pre-existing providers, and that it unconstitutionally deprived him and his colleagues of their Fourteenth Amendment due process liberty right to earn a living.

A federal district court in Kentucky clearly thought the policy indefensible, noting competition driven innovations it would discourage; even if a facility would cut patient costs or improve patient outcomes, it could be barred from opening. Congress had dropped its certificate of need mandate and consultants hired by Kentucky had urged the same, but the system continued. Here, there was an obvious need for a Nepali speaking agency, as Louisville had a sizable Nepali community, who were not well served by the pre-existing agencies. Applying the rational basis standard, the court asked whether the law "makes worse the very interest it purports to serve, as well as any other legitimate interest."[234] As the law increased costs and reduced access and quality, the court found that the law failed the test. Tiwari satisfactorily stated a claim for relief under the due process clause.

Later, however, the district court, now with a new judge, ruled that Kentucky had met the rational basis standard, whereupon Tiwari appealed to the Sixth Circuit Court of Appeals, which ruled that the program "passes, perhaps with a low grade but with a pass all the same."[235] The law may fail to meet its goals, but this is insufficient to require a judicial correction "Our custom instead is to assume that democracy will eventually fix the problem."[236] Whether there is a right to earn a living "is for the U.S. Supreme Court, not our court, to make."[237] The Supreme Court subsequently denied certiorari.[238]

The right to earn a living has decided discredited *Lochner* echoes; on the other hand, it will also find some supporters, particularly among libertarians. What will be in play is whether such an unenumerated right exists. If the answer is yes, the contours of the right would need to be spelled out in future cases. Innumerable statutes and regulations involving licensing, wages, and working conditions might impinge on this right and thus be grounds for litigation. Is the prospect so daunting that courts would simply refuse to concede the right? Or would they nonetheless press ahead?

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233 Ky. Rev. Stat. sec. 216B.061(1) and sec. 216B.020.
234 Civil Action No. 3:19-CV-884-JRW-CHL.
235 Tiwari v. Friedlander, 26 F. 4th 355, 363 (2022).
236 *Id.* at 365.
237 *Id.* at 369.
238 Tiwari v. Friedlandfer, 143 S. Ct. 444 (2022).

XV. Some Conclusions

The Constitution, as an astute observer once observed, "was born of prudent compromise rather than principle, ... derived more from experience than from doctrine, and ... was received with an ambivalence in no small part attributable to its ambiguities."[239] Disagreement thus was guaranteed, not only as to what provisions mean but more basically, how the meaning was to be ascertained. Plainly, the matter cannot simply be left to the good graces of well-meaning judges sitting as Platonic philosopher-kings. It is obvious, then, that courts require some principle to guide their determination of unenumerated fundamental rights. The most frequently applied criterion is a deeply rooted historical/traditional consensus, which is thought to provide a strong, stable, and satisfactory criterion. The fact of consensus naturally minimizes the likelihood of controversy, always a major plus in designating fundamental rights.

Though the justices do not mention it, the criterion itself is deeply rooted in Western intellectual history and tradition. In considering the bases of authority, for example, Max Weber assigned the pride of place to "an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them."[240] Longstanding cultural patterns, likely unwritten, legitimate the exercise of power, generating an emotional respect that is validated by the venerability of the practice itself. Is it unthinking habit or the deliberate adherence to exemplary norms? It hardly matters. The momentum generated by tradition is strong, indeed, sometimes unstoppable.

The Anglo-Irish politician, Edmund Burke, considered history/tradition not only an important source of legitimacy, but also, in general, a social blessing. Thus, he wrote of the British constitution that its "sole authority is that it has existed time out of mind,"[241] as this indicated that multiple generations had found it, overall, useful and appropriate. A nation is not created and ruled by pure reason, he observed, but represents "a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born."[242] The ties of obligation go both backward and forward; the purpose of change is preservation. A constitution, thus, is a product of "many minds in many ages. It is no simple, no superficial thing, nor to be estimated by superficial understandings"[243] [because] a nation ...is an idea of continuity, which extends in time [and] is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time."[244]

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239 Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 Mich. L. Rev. 592 (1986).

240 Max Weber, Economy and Society: An Outline of Interpretive Sociology 215 (Guenther Roth & Claus Wittich eds. 1968).

241 Edmund Burke, 10 The Works of the Right Honourable Edmund Burke 96 (new ed. 1812).

242 Edmund Burke, Reflections on the Revolution in France 194-95 (Conor Cruise O'Brien ed. 1969/1790).

243 Edmund Burke, 3 The Works of Edmund Burke 452 (1839).

244 Edmund Burke, 6 Works 146-147 (Bohn ed. 1886).

Burke was especially impressed by the argument from prudence, which he considered "not only first in rank of the virtues political and moral, but […] the director, the regulator, the standard of them all."[245] He felt "a presumption in favor of any settled scheme of government,"[246] fearing that disregarding history in preference to theoretical rumination may result in unanticipated consequences that bring with them serious harm; abstract disputations may call into question the most profound matters, perhaps opening the door to demagogues or authoritarians. Modest incremental change drawing on history/tradition is the prudent path.

Burke's views point to a certain incoherence in Alito's argument. Like Burke, he is impressed with history/tradition as a legitimator and teacher. Relatedly, he might think it an unrealistic act of hubris to imagine that Hamilton's judiciary, "the least dangerous branch,"[247] can be the chief engine of social progress. Yet unlike Burke, he seems blind to the advantages of incrementalism, as exhibited in his dismissal of Roberts' position. In this, Alito may mirror larger patterns in judicial behavior. It is true that apparently revolutionary rulings in hindsight may be seen as culminating a lengthy incremental process. The famous *Brown* desegregation case,[248] for example, which struck the country as a bolt from the blue,[249] actually followed inevitably and logically from a series of low visibility rulings.[250] But sometimes the Court opts for abrupt change. *Miranda v. Illinois* (1966) reversed police practice dating back to colonial days in requiring that criminal suspects be informed of their rights;[251] *New York Times v. Sullivan* (1964) rewrote a considerable portion of the venerable law of libel.[252] *Roe* changed abortion law overnight, and *Dobbs* changed it back. The case for a history/tradition-based incrementalism has thus not always been accepted by the Court. Alito, supremely confident, swept it away like crumbs on a tablecloth.

Alito made it clear that the practical consequences of the ruling were not properly his charge, retorting that "how our political system or society will respond to [the] decision" is not the Court's concern.[253] The justices must "only do [their] job ... to interpret the law."[254] In this, he seemed to resemble Weber's politician

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245 Burke, *supra* note 240, at 1:498.

246 *Id.* at 7:94.

247 The Federalist 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961/1787). Hamilton also cautioned, "To avoid an arbitrary discretion in the courts [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."

248 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

249 Daniel A. Farber & Suzanna Sherry, Judgment Calls: Principle and Politics in Constitutional Law 106 (2009).

250 *E.g.*, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Bd. of Regents, 332 U.S. 631 (1948); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

251 384 U.S. 436.

252 376 U.S. 254.

253 Dobbs, *supra* note 33, at 2279

254 *Id.* Similarly, a year earlier Justice Gorsuch wrote, "raw consequentialist calculation plays no role in our decision...no amount of policy talk can overcome a plain statutory command." Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021). Alito was dismissive of the talk in Casey about the Court's legitimacy, but an opinion survey revealed that its rating among the public was the lowest in more than three decades. Pew Research Center, Positive Views of Supreme Court Decline Sharply Following Abortion Ruling (Sep. 1, 2022).

adopting an ethic of ultimate ends, who will do what is right and "leave the results to the Lord." Weber contrasts this approach with an ethic of responsibility, which must take "account of the foreseeable results of one's actions."[255] The problem with Alito's ethic of ultimate ends is that as rights are not absolute, determining their limitations inescapably entails considering the practical results of the law. Thus, an empirical analysis of all the cases decided by the Court in the 2020-2021 term "found that Justices who decry consequentialism or pragmatism often ended up making consequentialist arguments themselves."[256] Alito might grant the power of Weber's distinction, but add a pair of points in rebuttal, first, that it applies to politicians, not to judges; and second, that it ignores the difference between a choice that is merely morally disagreeable and one that is morally criminal.[257] For Alito, it is plain that choosing abortion is morally criminal. Thus, his declaration: "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[258]

Does Alito's emphasis on history/tradition impede the updating of the Constitution? The difficulty with the passive voice, of course, is that the actor is omitted. The Constitution does not update itself, but instead, must be updated by unelected and therefore democratically unaccountable judges. When they change the meaning of statutes or regulations, they effectively change the law; in other words, they assume a function the Constitution reserves for the openly political branches. Occasionally, this may be justified to avoid an absurdity. Article II designates the President commander in chief of the army and navy; it would be bizarre to insist on a constitutional amendment to include the air force. Similarly, when the Third Amendment refers to quartering soldiers without the consent of the owner of the house, it is hard to imagine that it does not also apply to sailors. But these absurdities are rare and usually easy to identify. As Justice Thomas put it, "Reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to make difficult empirical judgments."[259]

Yet in the end, the reliance on history/tradition fails to persuade. For one thing, the worship of the past seems an odd preoccupation in a country that has always celebrated The New. Lacking the ancient roots of Britain, America from the earliest days has focused on the future, seeing tomorrow more as opportunity than as snare. Recall Crevecoeur's American man: self-reliant, practical, hopeful.[260] What to traditionalists has seemed good common sense has frequently seemed to many

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255 From Max Weber: Essays in Sociology 120 (H.H. Gerth & C. Wright Mills eds. 1946).

256 Victoria Nourse, The Promise and Paradox of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020-2022 30 (SSRN 4179654 2022). Of the unanimous decisions, 17% engaged in consequentialist arguments; of the non-unanimous decisions, 75% engaged. *Id.* at 36-37.

257 Bernard Williams, *Political and Moral Character*, in Public and Private Morality 55, at 71 (Stuart Hampshire ed. 1977).

258 Dobbs, *supra* note 33, at 2305. Thus, Alito avoids the problem of dirty hands, when immoral means are used in the service of a greater good. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 Phil. & Pub. Affs. 160 (1973).

259 N.Y. State Rifle & Pistol Ass'n. v. Bruen, 142 S. Ct. 2111, 2130 (2022). Thomas does not notice that relying on history itself involves judges making difficult empirical judgments.

260 J. Hector St. John Crevecoeur, Letters from an American Farmer (Albert E. Stone ed. 1981/1782).

Americans a communitarian romanticism blocking individual-driven progress, the work of fuddy-duddies with nothing but vapid nostalgia to offer.

For relying on a historical/traditional consensus is by definition backward looking and subject to the defects of such an approach. It may, for example, entail relying on decisions taken when large segments of society were effectively excluded from the political process, and is thus inherently biased against these people. To answer whether abortion is a right in the context of the Fourteenth Amendment, for instance, is to anchor it to a time dominated by the view that women are properly subordinate to and dependent on men, who alone could satisfactorily represent their interests, a view that denied women the vote and attenuated their political influence. Thus, the views of women on a supremely important issue that affects only them directly is made quite irrelevant. On the other hand, to tie abortion rights to the feminist tradition, which may be connected to the equal protection clause, will yield an emphatically different result.[261] An originalist focusing on the original public meaning of the text of the Fourteenth Amendment might favor the more literal first tradition, but there will be many who believe it has been superseded by the second, which seems to them clearly more robust today. How to choose between competing traditions?

In short, the plea to rely on history/tradition must partly rise or fall on the particular history/tradition selected. When the white South invoked it on behalf of slavery or later on behalf of segregation (or The Southern Way of Life), it was eventually properly rejected. The apparent historical/traditional consensus, at least among the white population, was dismissed as irrelevant. Today's justices naturally do not propose reverting to a brazenly racist past, but taking history/tradition as a legitimating variable will leave them open to embracing a range of problematic arguments. As one careful analyst noted, "Judges working within a traditionalist framework will often narrow or broaden a tradition with the aim either to exclude or include the practice being reviewed."[262] In order to avoid this fate, justices are forced to pick and choose among the various histories/traditions proffered, enshrining an element of subjectivity and discretion that calls into question the entire enterprise.

It is also plain that a Burkean argument for history/tradition-based incrementalism comes perilously close to an argument for the status quo; formalizing the consensus on rights may minimize conflict and confusion, but it will change things so little that it may hardly be worth the trouble. As Justice Brennan put it, "if the only purpose of the due process clause is to confirm the importance of interests already protected," it becomes a "redundancy [that] mocks those who ... wrote the Fourteenth Amendment."[263] With this narrow reading, the due process clause will offer scant protection to nonconformists, protecting mainly those who need no protection. Put differently, Alito would have the Court safeguard rights generally accepted and not endangered, rather than generate new ones.[264]

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[261] Ruth Bader Ginsberg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1200-5 (1992). *Also see* Reva Siegel *et al*., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 Colum. J. of Gender & L. 67 (2023).

[262] Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 Notre Dame L. Rev. 1123, 1162 (2020).

[263] Michael H, *supra* note 91, at 140-41.

[264] Progressive constitutionalists, on the other hand, "view the power and normative authority

Of course, Alito's point is not that he is opposed to change but merely to an unaccountable, undemocratic Supreme Court as the driver of change. If the goal is to be flexible and accommodating, he might ask, why have a constitution, which can only be an obstacle to change? Why not follow the British model and grant all power to the legislature? All of which is to rehearse familiar arguments for a living Constitution able to adapt to change and free society from the dead hand of the past.

There are also technical questions concerning the historical/traditional consensus. Why assume that a consensus supporting a practice is indistinguishable from one viewing it as a judicially enforceable fundamental constitutional right? The consensus may be merely permissive, not mandatory, and the right may not rise to the level of fundamental. There is a consensus supporting driving on the right side of the road, but it is hard to imagine it as a constitutional right. Why assume that if a state has not outlawed a practice, it recognizes it as a right? Perhaps it was simply an oversight. Or a sign of indifference.

There is also the level of analysis problem. A historical/traditional consensus covering the literal facts of the case may seem the most persuasive, but its wider application will necessarily be problematical, undercutting its significance. If *Meyer v. Nebraska* were taken to concern only the right to teach from a German text, we might hardly notice it. On the other hand, a more abstract level may promise wider application, but may also house vague, ambiguous or inconsistent elements that undermine its utility by generating unwanted consequences. Pro-choice advocates, for example, often chant, "My body, my choice." Do they also mean to support an unlimited right to sell one's organs, serve as a surrogate parent or engage in incest? Determining the appropriate level of analysis unavoidably is also an invitation to subjectivity, which in constitutional questions we naturally prefer to minimize.

Too, complications inhere in the historical enterprise itself, which Eliot famously found "mixing memory and desire."[265] Thus, in one of his last opinions, Justice Breyer catalogued a series of practical problems that, together, left the emphasis on historical/traditional consensus in tatters.[266] Judges are not historians, he pointed out, suggesting that their law office history will too often be inadequate, perhaps merely the uncritically accepted work of *amici* advocates aiming at winning, not at truth.[267] The history they read and the history they proffer reflects advocacy, not disinterested scholarship. As the co-editor of a multi-volume collection of historical documents conceded, "we cannot definitively read the minds of the Founders except, usually, to create a choice of severable possible meanings ... Indeed, evidence of different meanings likely can be garnered for almost every

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of some social groups over others as the fruit of illegitimate private hierarchy. And regard the Constitution as one important mechanism for challenging those entrenched private orders." Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641, 644 (1990).

265 T.S. Eliot, The Waste Land 9 (1922).

266 N.Y. Rifle & Pistol Ass'n., Inc., *supra* note 253, at 2177-81 (2022).

267 For example, three medieval historians have charged that Alito's opinion in Dobbs misunderstood some key terms used by English lawyers in the thirteenth century. Karl Shoemaker, Mireille Pardon & Sara McDougall, *"Abortion Was a Crime?"* The Docket: Law & Hist. Rev. (June 14, 2022). Similarly, another study found that Alito erred in his claim that three-quarters of the states banned abortion at the time that the Fourteenth Amendment was adopted. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 Stan. L. Rev.1091 (2023).

disputable proposition."[268] Relying on history is especially problematic with lower courts, which may lack the necessary resources and face a heavy work load, but all courts run the risk of cherry-picking supporting evidence and ignoring the rest. Even if courts avoid these perils, they cannot always rely on experts, who will often disagree among themselves or be unable to provide clear and useful answers. Thus, Alito's history lesson in *Dobbs* seems only partially persuasive; for example, it is true that following the Civil War, abortion was widely criminalized, but prior to that time under the common law abortion was generally permitted before quickening, which at from sixteen to twenty weeks was a very substantial loophole.

Thus far, history and tradition have been literally joined by a slash, for the justices have generally treated them as essentially the same. However, "history" and "tradition" are not synonyms, though the words are obviously related and would seem to overlap. If history, very roughly speaking, refers to what happened, tradition refers to the narrative we have constructed about what we believe happened, often a narrative with a normative point.[269] These narratives may help to shape our opinions, beliefs, and values, as well as our very identities. Thus, while there may be only one objective history, there will always be a plethora of traditions reflecting differences in perspectives, self-interest, memories, and numerous other factors.

Yet Alito and others on the Court persist in ignoring all this messiness, addressing history and tradition, typically the centerpieces of unenumerated rights analysis, in a stunningly casual manner. Sometimes, in fact, "history and tradition" seems like an example of a hendiadys, a figure of speech in which words joined by a conjunction convey a single meaning, like "nice and easy." Omitting or muddying the distinctions between history and tradition and treating them as unidimensional and linear have the practical advantage of simplifying the task of argumentation. But the price is high, for this approach downplays the differences, the multiple dimensions, the zigging and zagging, and to that extent may be seriously unrealistic and misleading. What is absent from the argumentation is precisely what demands emphasis, and these considerations are not peripheral or trivial, but clearly basic. If the Court has not confronted these questions, it is hard to take seriously its repeated reassurances that it will be guided by history/tradition, concepts that it has barely begun to investigate. As Tallulah Bankhead reported in a very different context, "There is less in this than meets the eye."[270]

In sum, though historical/traditional consensus sounds commonsensical, it does not take much effort to reveal its shortcomings. Which raises the question as to its alternatives; the old cliché is that you can't beat something with nothing. The chief alternative seems to be citing cases that are presented as pertinent. There is a circularity here, as the Court justifies a finding in terms of prior findings by the Court, which themselves may have hardly had justifications worth discussing.

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[268] Philip B. Kurland, *The Origins of the Religious Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 841 (1986).

[269] Marc O. DeGirolami believes that "when the Court interprets traditionally, it signals the presumptive influence of political and cultural practices of substantial duration." *Supra* note 256, at 1125. In excluding judicial precedents and doctrines, however, he may be granting the term more precision than its rather sloppy judicial use warrants.

[270] Qtd.in Alexander Woolcott, Shouts and Murmurs (1922).

At other times, the Court, in imitation of the introduction of the Ten Commandments, has simply announced that certain unenumerated rights exist. To those seeking justifications, the Court in its silence appears to echo Ring Lardner's riposte: "Shut up, he explained."[271]

If the bases of unenumerated rights were merely of antiquarian interest, none of these problems would matter much. But, of course, the situation is entirely the reverse. Many of the most high profile, impactful, and controversial cases of the past few decades have pivoted on exactly this concept. Commentators focusing on the product, not the process, have often lost sight of this. But that the notion of unenumerated rights remains so intellectually undeveloped in the light of its obvious importance is one of the most glaring shortfalls in modern constitutional law.

[271] Ring Lardner, Shut Up, He Explained: A Ring Lardner Selection (Babette Rosmond & Henry Morgan eds. 1962/1920).

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Insurrection, Disqualification, and the Presidency

John Vlahoplus*

ABSTRACT

Section 3 of the Fourteenth Amendment provides in part that anyone who takes an oath as an officer of the United States to support its Constitution but engages in insurrection may not hold any civil or military office under it until Congress removes the disability by a two-thirds vote of each House. The insurrection of January 6, 2021, and the coming presidential election raise two pressing constitutional questions. For purposes of Section 3, is the President an officer of the United States, and is the Presidency an office under the United States?

This Article makes the case that the President is an officer of, and holds an office under, the United States for those purposes. It contributes to the debate over the provision's reach by setting out the broad case for Section 3's application to Presidents and the Presidency, utilizing text, purpose, legislative history, canons of construction, ordinary usage, and contemporaneous judicial and executive interpretations.

The Article demonstrates public understandings before and after ratification that Section 3 bars eligibility to the Presidency, both in general and for the most important disqualified rebel—Jefferson Davis. It catalogues descriptions of Presidents as officers of the United States from Washington in 1794 to Jefferson, Jackson, Van Buren, Harrison, Polk, Taylor, Fillmore, Buchanan, Lincoln, Johnson, Grant, and Garfield, many of which occurred in the context of the President's election, constitutional position, and role in preventing domestic violence, preserving the Union, and enforcing the law during Reconstruction. Finally, it ties related Reconstruction statutes, legislative history, and contemporaneous judicial and executive interpretations into the broad case that Section 3 bars faithless Presidents from again taking the oath to "preserve, protect and defend the Constitution of the United States" until Congress permits.

KEYWORDS

U.S. Const. amend. XIV, § 3; Insurrection, Disqualification and the Presidency

CONTENTS

* B.A., Washington & Lee University; J.D., Harvard Law School; D.Phil., Oxford University; Member, New York State Bar. Thanks to Stephen D. Hibbard for helpful comments on an early draft.

Introduction

The Civil War and Reconstruction were the second American Revolution.[1] They ended slavery, preserved the Union, remade the Constitution,[2] and "radically transformed . . . the distribution and exercise of political power in the United States."[3] Section 3 of the Fourteenth Amendment played an important role in that transformation by disqualifying rebels from holding important positions in the post-war state and federal governments.[4] Section 3 provides in part that anyone who takes an oath as an officer of the United States to support its Constitution but engages in rebellion or insurrection against it may not hold any civil or military office under it until Congress removes the disability by a two-thirds vote of each House.

The insurrection of January 6, 2021, and the coming presidential election raise two pressing constitutional questions. For purposes of Section 3, is the President an officer of the United States, and is the Presidency an office under the United States?

This Article makes the case that the President is an officer of, and holds an office under, the United States for purposes of Section 3. It does not canvass counterarguments or counter-authorities but seeks to contribute to the debate over Section 3's reach by setting out a broad case for the provision's application to Presidents and the Presidency.[5] Part I summarizes the background, drafting history, and final text of Section 3. Part II digresses to discuss one interpretation of the relevant terms in the Constitution of 1788. Parts III and IV make the case that the

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1 *See, e.g.*, James M. McPherson, Abraham Lincoln and the Second American Revolution 3–7 (1990), Bruce Levine, *The Second American Revolution*, Jacobin.com (Aug. 17, 2015), https://jacobin.com/2015/08/second-american-revolution-civil-war-charleston-emancipation-lincoln-union.

2 *See, e.g.*, Gregory P. Downs, The Second American Revolution: The Civil War-Era Struggle Over Cuba and the Rebirth of the American Republic 1–4 (2019).

3 *See* Levine, *supra* note 1.

4 *See, e.g.*, Mark A. Graber, *Teaching the Forgotten Fourteenth Amendment and the Constitution of Memory*, 62 St. Louis U. L.J. 639, 642 (2018).

5 The Article responds to a limited number of counterarguments, principally in footnotes to avoid interrupting the main case. For different interpretations of Section 3's applicability to Presidents and the Presidency, *see, e.g.*, Josh Blackman & Seth Barrett Tillman, *Is the President an "Officer of the United States" for Purposes of Section 3 of the Fourteenth Amendment?*, 15 N.Y.U. J. L. & Liberty 1 (2021) (arguing that the President is not an "officer of" the United States and taking no position on whether the Presidency is an "office under" the United States), Andrew C. McCarthy, *One More Thing on Section 3 of the 14th Amendment*, NationalReview.com (Jan. 6, 2022), https://www.nationalreview.com/corner/one-more-thing-on-section-3-of-the-14th-amendment/, Congressional Research Service, *The Insurrection Bar to Office: Section 3 of the Fourteenth Amendment* (Sept. 7, 2022), Gerard N. Magliocca, *Amnesty and Section 3 of the Fourteenth Amendment*, 36 Const. Comment. 87 (2021), Myles S. Lynch, *Disloyalty & Disqualification: Reconstructing Section 3 of the Fourteenth Amendment*, 30 Wm. & Mary Bill Rts. J. 153 (2021), Mark A. Graber, *Their Fourteenth Amendment, Section 3 and Ours*, Just Security (Feb. 16, 2021), https://www.justsecurity.org/74739/their-fourteenth-amendment-section-3-and-ours/, Roger Parloff, *After the Cawthorn Ruling, Can Trump Be Saved From Section 3 of the 14th Amendment?*, Lawfare (June 7, 2022), https://www.lawfareblog.com/after-cawthorn-ruling-can-trump-be-saved-section-3-14th-amendment.

President is an officer of, and holds an office under, the United States for purposes of Section 3. Part V extends the case for those propositions with additional authorities showing the essential harmony of the two terms.

What constitutes engaging in rebellion or insurrection is a separate question. Regarding the Confederate rebellion, however, Attorney General Stanbery opined that "when a person has, by speech or by writing, incited others to engage in rebellion, he must come under the disqualification."[6] President Johnson and his Cabinet approved that interpretation,[7] and Johnson directed officers commanding the Southern military districts to follow it.[8] Newspapers and other publications reported the foregoing broadly.[9]

I. Section 3: Background, Drafting History, and Final Text

Congress sought to break the political power of rebels and their supporters during and after the Civil War using statutes that disenfranchised them and excluded them from positions in the federal and post-war provisional state governments.[10] Statutes could be repealed, however, so congressional Republicans sought more secure protection against resurgent rebel power through the Fourteenth Amendment.[11]

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6 *See* The Reconstruction Acts (June 12, 1867), 12 U.S. Op. Att'y Gen. 182, 205 (1867) ("Second Opinion"). The opinion considered federal statutes enforcing Section 3 prior to its ratification. *See id*. at 182, The Reconstruction Acts (May 24, 1867), 12 U.S. Op. Att'y Gen. 141, 141–42 (1867) ("First Opinion"). *Cf*. Lynch, *supra* note 5, at 172 (authority for the proposition that words of encouragement by a person occupying an influential position may constitute aid or comfort to an enemy).

7 *See* 9 Joint Committee on Printing of the House and Senate, A Compilation of the Messages and Papers of the Presidents 3726, 3728–29 (1897) (In Cabinet, *June 18, 1867*, summary item 16).

8 *See id*. at 3750 (War Department, Adjutant-General's Office, *Washington, June 20, 1867*).

9 *See, e.g., The Attorney General's Opinion*, Tri-Wkly. Constitutionalist (Augusta, Ga.), June 21, 1867, at 2, *From Washington*, *id*. at 3, *Opinion of Attorney General Stanbery as to the Powers of the Military Commanders*, *id*. at 4, *From Washington—Cabinet on Attorney General's Opinion—Votes of the Members*, Dubuque Daily Herald, June 21, 1867, at 1, *Night Dispatches*, Flake's Daily Galveston Bull., June 21, 1867, at 5, *Washington, June 20*, Morning J. (Columbus, Ohio), June 22, 1867, at 1, *Official Opinion of the Attorney General*, Wkly. Intelligencer (Atlanta, Ga.), June 26, 1867, at 4, 7 Am. Ann. Cyclopaedia and Reg. of Important Events of the Year 1867, at 665 (1868), Ex. Doc. No. 20, Reconstruction—Letter from The Secretary of War at 11, Executive Documents of the House of Representatives (1868). Note that some newspaper citations in this article use data like page numbers provided by electronic databases that do not appear in the scans of the actual articles.

10 *See, e.g.*, Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868) (requiring loyalty oath to hold specified positions), Act of Mar. 2, 1867, ch. 153, 14 Stat. 428 (disenfranchisement and limit on holding specified positions), Act of Mar. 23, 1867, ch. 6, 15 Stat. 2 (oath to effectuate Act of Mar. 2, 1867).

11 *See, e.g.*, Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment*, manuscript at 6–7, 23–24 (2014), available at http://ssrn.com/abstract=2483355.

An early version of Section 3 would have disenfranchised through mid-1870 anyone who had given aid and comfort to the rebellion.[12] A later one shifted gears to bar from specified state and federal positions certain officials who had violated their oath to support the Constitution.[13] The exclusion would ensure the election of "loyal men" in what would otherwise be a losing political battle against unreconstructed rebels.[14] President Johnson and "his Southern friends" pushed back with a proposal for Reconstruction without exclusion, which incensed Northerners.[15]

Congressional Republicans prevailed. They limited rebel power over the franchise and government positions through Sections 2 and 3 of the Fourteenth Amendment.[16] Section 3 has the following broad and exclusionary terms:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.[17]

Unpacked, the provision has three principal clauses. The first (the "Officials Clause") defines which officials are potentially subject to disqualification—specified federal and state legislators and officers who took an oath to support the Constitution.[18] The second defines the offenses triggering disqualification—engaging in insurrection or rebellion or giving aid or comfort to enemies of the United States.[19] The third (the "Positions Clause") defines the positions prohibited to faithless officials.[20]

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12 *See* Graber, *supra* note 5.

13 *See id*.

14 *See Democratic Duplicity*, Indianapolis Daily J., July 12, 1866, at 2.

15 *See Rebels and Federal Officers*, Gallipolis J. (Gallipolis, Ohio), Feb. 21, 1867, at 2.

16 Section 2 reduces a state's seats in the House of Representatives for denying certain voting rights. *See* U.S. Const. amend. XIV, § 2.

17 U.S. Const. amend. XIV, § 3.

18 Blackman and Tillman call this the "jurisdictional element" and characterize it by equating *positions* and *persons*. *See* Blackman & Tillman, *supra* note 5, at 2 ("the jurisdictional element, [1], specifies which *positions* are subject to Section 3: a '*person* . . . who, having previously taken an oath . . .") (emphasis added). This perhaps unwittingly suggests the essential harmony of offices and officers discussed later in this Article. *See infra* note 144 and accompanying text.

19 Blackman and Tillman call this the "offense element." *See* Blackman & Tillman, *supra* note 5, at 2.

20 Blackman and Tillman call this the "disqualification element." *See id*. They argue that the terms "officer of the united States" and "office . . . under the United States" are different and therefore "refer to different types of officers and offices" because of the presumption that different language used in the same sentence is not used uniformly. *See id*. at 3, 7. However, "officer of" refers to *persons*, while "office under" refers to *positions*. There is no reason to infer noncongruent usage from text used for these two purposes. After all, a single sentence in Section 3 uses the different terms "a member of

Section 3's text is not limited to the Confederate rebellion.[21] It is broad enough to reach offenses in earlier years, such as any committed in the Mexican-American War.[22] It is also broad enough to reach offenses in later years,[23] such as those committed on January 6.

II. A Digression: The Constitution of 1788

Professors Josh Blackman and Seth Barrett Tillman have closely read the offices and officers language in the Constitution of 1788. They conclude that within that document the term "Officers of the United States" refers "to appointed positions in the Executive and Judicial Branches," and the term "Office . . . under the United States" refers to those positions plus "non-apex appointed positions in the Legislative Branch."[24] Under their reading, the terms exclude elected officials and elective positions.[25] The President is not an officer of, and does not hold an office under, the United States. After all, for example, Article II Section 3 provides that the President "shall commission all the Officers of the United States," but Presidents do not commission themselves.[26]

This Article takes no position on whether Professors Blackman and Tillman correctly interpret the 1788 Constitution. Instead, it addresses the use of those terms after 1788 including proximate to the ratification of the Fourteenth Amendment in 1868, a time of Reconstruction that differed radically from the original Founding. As

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Congress" in the Officials Clause and "a Senator or Representative in Congress" in the Positions Clause without any implication that they are not congruent.

21 Earlier proposals were so limited. *See* Lynch, *supra* note 5, at 168.

22 *See* First Opinion, *supra* note 6, at 160.

23 *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2900 (1866) (Senator Van Winkle: "This is to go into our Constitution and to stand to govern future insurrection as well as the present . . ."), *id*. at 3335–36 (Senator Henderson: "The language of this section is so framed as to disfranchise from office the leaders of the past rebellion as well as the leaders of any rebellion hereafter to come.") (*cited in* Mark A. Graber, *Disqualification From Office: Donald Trump v. the 39th Congress*, Lawfare (Feb. 24, 2023), https://www.lawfareblog.com/disqualification-office-donald-trump-v-39th-congress). Blackman and Tillman write that they "are not aware of any evidence that Section 3 was forward-looking, and was drafted to disqualify future presidents who might participate in future rebellions." *See* Blackman & Tillman, *supra* note 5, at 46–47. The provision's plain text and the Senators' statements strongly support the case that Section 3 is forward-looking. The Congressional Globe is generally considered "an accurate and reliable source" that "achieved almost verbatim accounts of the floor debates" and "was widely available almost immediately after every debate," making debates over the proposed Fourteenth Amendment "neither secret nor difficult for interested outsiders to follow." *See* Gregory E. Maggs, *A Critical Guide to Using the Legislative History of the Fourteenth Amendment to Determine the Amendment's Original Meaning*, 49 Conn. L. Rev. 1069, 1075 (2017).

24 *See* Josh Blackman & Seth Barrett Tillman, *Offices and Officers of the Constitution Part I: An Introduction*, 61 S. Tex. L. Rev. 309, 309 (2021).

25 *See id*.

26 *See* William Baude, *Constitutional Officers: A Very Close Reading*, Constitutional Law: The Journal of Things We Like (Lots) (July 28, 2016) (summarizing Tillman's analysis and giving the example), https://conlaw.jotwell.com/constitutional-officers-a-very-close-reading/.

the Fixed-Meaning Canon provides, "[w]ords must be given the meaning they had when the text was adopted."[27] And what the words of a legal text "convey, *in their context*, is what the text means."[28] This Article makes the case that in the context of the Civil War and Reconstruction, the Section 3 terms include elected officials and elective positions generally, and the President and Presidency specifically.

III. Office Under the United States

The case for including the Presidency as an office under the United States has six parts: specific contemporaneous references to the Presidency in the legislative history of Section 3, in ordinary usage, and in related federal statutes; general references to elective "offices under;" and contemporaneous executive and judicial interpretations.

A. Specific References in the Legislative History of Section 3

Members of Congress referred to both the Presidency and presidential election in debating the proposed Section 3. Representative Stevens, leader of the Radical Republicans in the House,[29] asserted that "as soon as it becomes a law, Congress at the next session will legislate to carry it out both in reference to the presidential and all other elections as we have a right to do."[30]

Senator Johnson suggested that the text did not go far enough because it allowed election to the Presidency and Vice Presidency.[31] He read the named exclusion of Senators and Representatives to imply that Section 3 did not exclude those executive positions.[32] Senator Morrill corrected him by calling his attention to the words "or hold any office, civil or military, under the United States."[33] Senator Johnson acknowledged his mistake, recognized that the named exclusions had "misled" him, and concluded that there was "no doubt" that he had been wrong.[34]

Even before the Fourteenth Amendment, the House Committee on Foreign Affairs had determined in 1834 that the President is subject to the Foreign Emoluments Clause of the Constitution of 1788, which applies to persons "holding any office of Profit or Trust under" the United States.[35] The Committee's view does

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27 *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 78 (2012).

28 *See id.* at 56 (emphasis added).

29 *See* U.S. House of Representatives, *Representative Thaddeus Stevens of Pennsylvania*, https://history.house.gov/Historical-Highlights/1700s/Representative-Thaddeus-Stevens-of-Pennsylvania/.

30 *See* Cong. Globe, *supra* note 23, at 2544, Graber, *supra* note 5.

31 *See* Cong. Globe, *supra* note 23, at 2899.

32 *See id*.

33 *See id*., Magliocca, *supra* note 5, at 93.

34 *See* Cong. Globe, *supra* note 23, at 2899. Andrew C. McCarthy was similarly misled in his interpretation of Section 3. *See* McCarthy, *supra* note 5.

35 *See* H. Rep. No. 302, 23d Cong., 1st Sess. at 2 (1834) (regarding President Jefferson), U.S. Const. art. I, § 9, cl. 8, Michael Stern, *Historical Practice and the Applicability of the Foreign Emoluments Clause to the President*, Point of Order (Nov. 27, 2019), https://www.pointoforder.com/2019/11/27/historical-practice-and-the-applicability-of-

not control the interpretation of the Constitution of 1788, but it does support the case that nineteenth century usage included the Presidency.

B. Specific References in Ordinary Usage

1. Pre-Ratification

American newspapers kept the public aware of the status and implications of Section 3 and of removing its disabilities. Even before ratification, Americans recognized that the proposed amendment would bar holding the Presidency, while President Johnson's watered-down counterproposal would not.

An 1866 article noted that an important feature of the proposed Fourteenth Amendment was "the disqualification of all noted rebels from holding positions of trust and profit under the Government."[36] It explained that Democrats opposed the proposal, blaming the North equally for the war and believing "that a rebel is as worthy of honor as a Union soldier; that Robert E. Lee is as eligible to the Presidency as Lieut. General Grant."[37]

An 1867 article attacked President Johnson's watered-down counterproposal because it

> imposes no disabilities, political or otherwise, upon the leading men of the rebellion, but leaves them, as they were prior to their treason, eligible to any and all offices under the Federal government. Reconstruction upon this basis would render Jefferson Davis eligible to the Presidency of the United States . . . To such reconstruction the loyal North can never assent. There is something revolting in the very thought.[38]

2. Post-Ratification

After ratification, rebels sought amnesties to remove Section 3's disabilities.[39] American newspapers regularly reported that amnesty would restore eligibility to the Presidency, often with outrage and predictions of resurgent rebel power.

An 1871 article asserted that "Were the demands of the amnesty shriekers complied with, Jeff Davis would be elligible [sic] to the Presidency, and would be the most available of all Democratic candidates."[40] Another asked rhetorically whether it was time "to depopulate Arlington of its sixteen thousand buried Union heroes, and make Jeff. Davis and John C. Breckinridge eligible to the Presidency of the United States?"[41] Yet another took the opposite tack, proposing "a universal amnesty, as provided in the fourteenth amendment, such an amnesty as will make

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the-foreign-emoluments-clause-to-the-president/.

36 *See Democratic Duplicity*, *supra* note 14.

37 *Id*.

38 *See Rebels and Federal Officers, supra* note 15.

39 *See, e.g.*, *infra* note 140, Jonathan Truman Dorris, Pardon and Amnesty under Lincoln and Johnson: the Restoration of the Confederates to Their Rights and Privileges, 1861–1898, at 367–69 (1953).

40 *See* Terre Haute Wkly. Express, April 19, 1871, at 4, col.1.

41 *See* B.J.L., *Columbus Letter: An Unexpected Opposition*, Cin. Com., Jan. 9, 1871, at 3.

even Jeff Davis eligible again to the Presidency," predicting that the amnesty would bring "responsible white classes of the South" back into the national fold and undercut the appeal of the Ku Klux Klan.[42]

In 1872 liberal Republicans split from the party, pushed for a universal amnesty, and nominated Horace Greeley for President in their Cincinnati convention. Mainstream Republicans partially relented, agreeing to remove the disabilities for all but the most senior rebels in the Amnesty Act of 1872.[43] The Chicago Tribune crowed that the liberals had forced the party to accept the amnesty, making many rebels "as eligible to the Presidency and to the United States Senate as General Logan or General Butler."[44]

In a later mainstream Republican convention speech reported in the Philadelphia Inquirer, Indiana Senator Morton attacked the liberals for risking the party's election chances over Davis's exclusion:

> One of the main things talked about at Cincinnati was universal amnesty: that the disabilities of Davis and Tombs might be removed that they might get into power.
>
> The Republican party has not granted universal amnesty, but general amnesty. Do you want to overthrow the Republican party because it will not make Jeff Davis eligible to the Presidency of the United States? (Cries of "No!")[45]

In 1876, with Republican power fading, Democrats proposed a universal amnesty.[46] As newspapers reported, the bill was drafted and pushed "so ostentatiously to make Davis eligible to the Presidency" that it was "practically a bill for that purpose."[47] In response, Republican Representative Blaine sought an amendment to impose one exception—for Jefferson Davis.[48]

Blaine's supporters rallied to prevent Davis' eligibility. One paper asserted that "[t]he only justification that Mr. Blaine requires for his amendment is

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42 *See The Administration, Congress and the Southern States—The New Reconstruction Bill*, N.Y. Herald (N.Y., N.Y.), Mar. 29, 1871, at 6, reproduced in *Northern View*, Fairfield Herald (Winnsboro, S.C.), April 12, 1871, at 1. For a discussion of this "carrot" approach, *see* Magliocca, *supra* note 5, at 113.

43 Act of May 22, 1872, ch. 193, 17 Stat. 142.

44 *The Philadelphia Platform*, Chi. Trib., June 8, 1872, at 4. The reference to the Philadelphia platform is to the mainstream Republican platform adopted at the party's nominating convention held in that city. Although the Chicago Tribune was generally a leading proponent of Lincoln and the mainstream Republican party, it supported the liberals during its "lost" postwar years. *See* Harris L. Dante, *The Chicago Tribune's "Lost" Years, 1865–1874*, 58 J. Ill. St. Hist. Soc'y 139, 139–40 (1965).

45 *See Address of Senator Morton*, Phila. Inquirer, June 5, 1872, at 8. The reference to "Tombs" was presumably to Robert Toombs, former Confederate Secretary of State. *See* Pleasant A. Stovall, Robert Toombs, Statesman, Speaker, Soldier, Sage 221 (1892).

46 *See, e.g.*, Dorris, *supra* note 39, at 380–82.

47 *See, e.g., The Amnesty Debate (From the Chicago Tribune—Rep.)*, Evening Post (N.Y., N.Y.), Jan. 14, 1876, *Current Notes*, Portland Daily Press (Portland, Me.), Jan. 17, 1876, at 1 (*citing* Chi. Trib.).

48 For a general discussion of Blaine's motives and the debate over his proposal generally, *see* Dorris, *supra* note 39, at 380–82.

the monstrous anomaly of rendering the Confederate president eligible to the presidency of the United States."[49] Another itched for battle, writing that "[i]f the Confederates cannot restrain themselves from letting loose a hell of Southern fury because somebody objects to making Jeff Davis eligible to the Presidency, it will be best to give them a chance so that all men may know just what sort of fellows they are."[50] Yet another criticized the inconsistency of making Davis "eligible for the Presidency, while [naturalized] patriots like Carl Schurz, who have been true to their adopted country, are debarred by the Constitution."[51]

Democrats reacted with outrage[52] and defeated the entire proposal.[53] As one paper reported, Democrats "stood up and said unless Jeff Davis shall be made eligible to the presidency, we will have no further amnesty."[54] The debate continued in later years,[55] and Congress did not provide a universal amnesty until 1898,[56] nine years after Davis's death. Congress relieved him posthumously in 1978.[57]

C. Specific References in Related Federal Statutes

In July 1862, Congress prescribed the Ironclad Oath to exclude rebels and their supporters from positions in the federal government.[58] The oath applied to everyone holding "any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States." The statute recognized that the President holds an "office under the government of the United States," language virtually identical to Section 3.[59] There is no indication that the difference has any significance. On the contrary, Senator Doolittle considered the terms equivalent and insisted that the oath already prevented holding any civil or military office under the United

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49 *See Current Notes*, Portland Daily Press (Portland, Me.), Jan. 13, 1876, at 2 (*citing* Boston Transcript).

50 *See, e.g., A Hell of Southern Fury*, Leavenworth Daily Com. (Leavenworth, Kan.), Jan. 14, 1876, at 2 (*citing* Chi. Trib.), Oskaloosa Indep. (Oskaloosa, Kan.), Jan. 29, 1876, at 2, col. 3 (*citing* Chi. Times).

51 *See Editorial Notes,* Lyon County Times (Yerington, Nev.), Feb. 6, 1876, at 2.

52 *See, e.g., About Blaine*, Quincy Wkly. Whig (Quincy, Ill.), Jan. 27, 1876, at 1 (*citing* Chi. Times), *Ben. Hill's Speech*, Richmond Daily Dispatch (Richmond, Va.), Jan. 17, 1876, at 6.

53 *See Important Vote on Amnesty*, Ellsworth Amer. (Ellsworth, Me.), Jan. 20, 1876, at 2.

54 *See id*. Professor Gerard N. Magliocca has supposed that "Congress did not intend (nor would the public have understood) that Jefferson Davis could not be a Representative or Senator but could be President." *See* Magliocca, *supra* note 5, at 93–94. *See also* Saikrishna B. Prakash, *Why the Incompatibility Clause Applies to the Office of President*, 4 Duke J. Const. L. & Pub. Pol'y 143, 161 (2009) (it "would be rather strange" to require congressional consent for rebels to be postmaster but not President.), *cited in* Blackman & Tillman, *supra* note 5, at 35 n.89. Public usage supports Magliocca's and Prakash's intuitions.

55 *See, e.g.,* Cin. Com. Gazette, May 2, 1885, at 7, col 2.

56 *See* Act of June 6, 1898, ch. 389, 30 Stat. 432. For a discussion of the statute in the context of the Spanish-American War, *see* Dorris, *supra* note 39, at 389–92 (1953).

57 *See* Act of Oct. 17, 1978, P.L. 95-466, 92 Stat. 1304.

58 Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868).

59 For a discussion of the Ironclad Oath and its exception for the President, *see* Lynch, *supra* note 5, at 163.

States, making the proposed Section 3 unnecessary as to federal offices.[60] The Supreme Court also considered them equivalent in an 1888 decision interpreting a non-Reconstruction statute.[61]

Although the Ironclad Oath was repealed in 1868, Congress substantially restored it in 1884 with similar prefatory language, providing that the oath for persons holding "any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in section seventeen hundred and fifty-seven of the Revised Statutes."[62] That oath, prescribed only two days after the ratification of the Fourteenth Amendment, applied to certain persons "not rendered ineligible to office" by the amendment who hold "any office of honor or trust under the government of the United States."[63]

Section 3 was enacted with the same broad protective purpose as the Ironclad Oath and Section 1757, in the same context of feared rebel power. It uses similar language as those provisions—one of which specifically references the Fourteenth Amendment. Section 3 should be interpreted consistently to treat the Presidency as an office under the United States under the Related-Statutes Canon: "Statutes *in pari materia* are to be interpreted together, as though they were one law."[64] Reconstruction statutes and Section 3 were generally interpreted *in pari materia*.[65]

D. Elective Offices Under Generally

The Positions Clause covers in part "any office, civil or military, under the United States, or under any state." Under the presumption of intra-sentence uniformity and the Presumption of Consistent Usage,[66] "office under" should have the same meaning for both federal and state offices. And after 1788 popular, statutory, and constitutional usage referred to elective offices as offices under the state[67] as well as under "provisional [State] governments,"[68] under the state and federal

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60 *See* Cong. Globe, *supra* note 23, at 2900. For a similar contemporaneous treatment of the two variants as equivalent, *see infra* note 168 and accompanying text.

61 *See* United States v. Mouat, 124 U.S. 303, 305–06 (1888) (reading a statute applicable to persons "holding employment or appointment under the United States" as referring "to persons serving under the Government of the United States.").

62 Act of May 13, 1884, ch. 46, § 2, 23 Stat. 21, 22.

63 Act of Feb. 15, 1871, ch. 53, 16 Stat. 412.

64 *See* Scalia & Garner, *supra* note 27, at 252.

65 *See, e.g.*, First Opinion, *supra* note 6, at 149, *Presidential Usurpation*, Troy Wkly. Times 2 (Troy, N.Y.), Sept. 14, 1867, at 2, *Mr. Dawes and the Reconstruction Acts*, Evening Post (N.Y., N.Y.), Oct. 26, 1874, at 2.

66 *See* Blackman & Tillman, *supra* note 5, at 7 (intra-sentence uniformity), Scalia & Garner, *supra* note 27, at 170 (Presumption of Consistent Usage).

67 *See* Me. Const. art. 9, § 1 (1819) (prescribing oath for "everyone elected, appointed, or commissioned to any judicial, executive, military, or other office under this State."), Gazette of the United States (N.Y., N.Y.), Dec. 26, 1789, at 294 (proposal to forbid the elective Pennsylvania governor to "hold any other office under this State").

68 Act of Mar. 2, 1867, § 6, ch. 153, 14 Stat. 428, 429.

governments,[69] under "the government of the United States,"[70] under the state constitution,[71] and under the authority of the state,[72] with no indication that those textual variations had any legal significance. Senator Van Winkle apparently saw no such significance during debates over the proposed Section 3. He referred to the provision's application to "an office under the national Government or the State governments."[73]

These uses included elective state executive offices.[74] Together with the presumption of intra-sentence uniformity and the Presumption of Consistent Usage, they support Section 3's application to the elective office of President.

E. Contemporaneous Judicial Interpretations

The North Carolina Supreme Court held in 1869 that the Fourteenth Amendment barred a rebel from holding the elective office of state solicitor.[75] The court gave Section 3's "office under" term the same meaning as "office" simpliciter. After describing the party's pre-war position and Confederate military service, the court noted that he "seeks to be admitted into the office of Solicitor for the State" and held "that he is disqualified from holding office under the 14th Amendment."[76]

A Circuit Court in North Carolina reached the same result in 1871 in a case involving the elective office of sheriff. The defendant was indicted for holding the office in violation of a federal statute applicable to "any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of the Constitution

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69 *See, e.g., On Foreigners*, Diary (N.Y., N.Y.), Mar. 28, 1793, at 2 (referring to persons "elected to any office under the government of the state or of the United States."), *Dedicated to the* Rattlesnake, *in Herkemer County*, Otsego Herald (Cooperstown, N.Y.), Jan. 12, 1797, at 2 (describing an elected senator as holding "an important office under the government of this state."). In debating the proper compensation for the Vice President in 1789, James Madison compared him to the lieutenant governor of a state, whom he called an "officer under a State Government." 1 Thomas Hart Benton, Abridgment of the Debates of Congress, From 1789 to 1856, at 121 (debate of July 16, 1789) (1860). All lieutenant or deputy governors were elected at the time. *See* Charter of Conn. (1662); Ma. Const. ch. II, § II, art. I (1780); N.Y. Const. art. XX (1777); Charter of R.I. and Providence Plantations (July 15, 1663); S.C. Const. art. III (1778) (elected by the General Assembly); Va. Const. (1776) (elected by Council of State). The other states lacked a lieutenant governor.

70 Act of July 2, 1862, ch. 128, 12 Stat. 502 (repealed 1868), Act of July 11, 1868, ch. 139, 15 Stat. 85, Act of Feb. 15, 1871, ch. 53, 16 Stat. 412.

71 *See* Gazette of the United States (N.Y., N.Y.), Sept. 22, 1790, at 603.

72 Act of Feb. 20, 1799, Paterson's Laws 376, § 2 (prescribing an oath for "every person who shall be appointed or elected to any office, legislative, executive, or judicial, under the authority of this state.").

73 *See* Cong. Globe, *supra* note 23, at 2898. For Van Winkle's use in describing the Officials Clause, *see infra* note 146 and accompanying text.

74 *See, e.g.,* Act of Feb. 20, 1799, *supra* note 72 (executive offices generally), Me. Const., *supra* note 67 (executive offices generally), Benton, *supra* note 69 (lieutenant governor).

75 *See In re* Tate, 63 N.C. 308 (1869). For a discussion of *Tate*, see Magliocca, *supra* note 5, at 98 n.59.

76 *See Tate*, 63 N.C. at 309.

of the United States."[77] The court directed the jury to find the defendant guilty if they found that, as charged, he had taken an oath to support the Constitution in his pre-war office and had later engaged in rebellion or insurrection.[78]

These courts were not alone in treating Section 3's bar as applying to elective offices and offices simpliciter. An 1866 article asserted that in opposing the Fourteenth Amendment "Democrats practically advocate the election of active rebels to office, and the throwing open the halls of Congress to those who have violated the oaths once taken there."[79] An 1869 article explained that faithless rebels could "only be restored to the right to hold an office of any sort, civil or military, State or national, by a two-thirds vote of each house of Congress."[80]

IV. Officer Of

The Officials Clause of Section 3 applies in part to anyone who has previously taken an oath to support the Constitution "as an officer of the United States . . . or as an executive or judicial officer of any state." The case for including the President as an officer of the United States has five parts: contemporaneous executive and judicial interpretations; references in ordinary usage and in the Thirty-Ninth Congress, which proposed Section 3; a related federal statute; and legislative history of removing Section 3's disabilities.

A. Contemporaneous Executive Interpretation

In 1867 Attorney General Stanbery considered the Officials Clause when rendering two opinions on federal statutes implementing Section 3 pending its ratification.[81] He began by determining who are executive or judicial officers of any state within the meaning of Section 3.[82] He concluded that the qualifier "executive or judicial" excludes militia officers.[83] He then opined that the term clearly includes all executive "officers as are generally known by the proper description of State officers or officers of a State," including governors.[84] Stanbery followed the Ordinary-Meaning Canon: "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense."[85] Stanbery did not recognize any context indicating a technical sense—instead, he opined that the Officials Clause reaches any executive officers "generally known by the proper description of State officers," including governors.

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77 *See* United States v. Powell, 27 Fed. Cas. 605, 606, 606 n.2 (D. N.C. 1871); Act of May 31, 1870, § 15, ch. 114, 16 Stat. 140, 143. For discussions of *Powell*, *see* Lynch, *supra* note 5, at 208, Gerard N. Magliocca, *Oaths and Offices*, Balkinization (Jan. 21, 2021) (link in "Update" postscript), https://balkin.blogspot.com/2021/01/oaths-and-offices.html.

78 *See Powell*, 27 Fed. Cas. at 607.

79 *See Democratic Duplicity*, *supra* note 14.

80 *See A General Pardon. PRESIDENT JOHNSON signalized Christmas Day*, Frank Leslie's Illustrated Newspaper (N.Y., N.Y.), Jan 16, 1869, at 274.

81 *See supra* note 6.

82 *See* First Opinion, *supra* note 6, at 149.

83 *See id*. at 151.

84 *See id*. at 152.

85 *See* Scalia & Garner, *supra* note 27, at 69.

Stanbery equated holding an office with being an "officer of." He opined:

> that to work disqualification two elements must occur—
>
> *First*. Holding the designated office, State or federal, accompanied by an official oath to support the Constitution of the United States; and
>
> *Second*. Engaging in rebellion against the United States, or giving aid or comfort to its enemies.[86]

Stanbery further reasoned that the term "officer of the United States" in the Officials Clause is unqualified, comprehensive, and more general than the "executive or judicial"-limited state version and therefore reaches military as well as civil officers.[87] Stanbery used the General-Terms Canon: "General terms are to be given their general meaning."[88] And as shown in Part IV.C. below, post-1788 usage supports the case that the President was generally known as an officer of the United States in the nineteenth century.

The reason for the comprehensiveness of the federal term is that "the violation of the official oath and the official trust has relation to fealty to the United States," and federal officers stand "in more direct relation and trust to the United States than the officers of a State."[89] Of all federal officials, Presidents stand in the most direct relation and trust to the United States given their constitutionally prescribed oath and their obligations to "faithfully execute the Office" and to "take Care that the Laws be faithfully executed."[90] To allow Presidents but not their appointed subordinates to again take an oath that they have violated would contravene the Presumption Against Ineffectiveness: "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[91]

The President holds an office,[92] takes an oath to support the Constitution,[93] and is therefore within Attorney General Stanbery's definition of an officer of the United States. The President is the federal analog of a state governor, who Stanbery

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86 *See* First Opinion, *supra* note 6, at 158.

87 *See id*.

88 *See* Scalia & Garner, *supra* note 27, at 101.

89 *See* First Opinion, *supra* note 6, at 158.

90 *See* U.S. Const. art. II, § 1, cl. 8, and § 3.

91 Scalia & Garner, *supra* note 27, at 63. *Cf.* Worthy v. Barrett, 63 N.C. 199, 204 (1869), (Reade, J.) ("The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."), *appeal dismissed sub nom.* Worthy v. Comm'rs, 76 U.S. 611 (1869), *cited in* Lynch, *supra* note 5, at 155.

92 *See e.g.,* U.S. Const. art. I, § 3, cl. 5 ("office of President of the United States"), art. II, § 1, cl. 5 ("office of President"), art. II, § 1, cl. 8 ("office of President of the United States"), Graber, *supra* note 23 (reference in Thirty-Ninth Congress to Presidency as a "high office"). *Cf. supra* Part III (making the case that the Presidency is an office under the United States). Because Presidents hold the *office* of President *of* the United States, they should be *officers of* the United States.

93 *See* U.S. Const. art. II, § 1, cl. 8

concluded is clearly an executive officer of a state, and so under the Consistent-Usage Canon the President is an officer of the United States.[94]

B. Contemporaneous Judicial Interpretations

Judicial decisions during Reconstruction relied on ordinary meaning and generality of terms just like the Attorney General's opinion.[95] The Florida Supreme Court interpreted Section 3 as incorporated in the state constitution to apply to anyone who holds a public office. It defined an "office" as "a public charge or employment" and an "officer" as "a person commissioned or authorized to perform any public duty."[96] It opined that "[a]n officer of the State . . . is a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully."[97]

The North Carolina Supreme Court reasoned similarly in 1869 when it held that Section 3 applied to a pre-war elected sheriff.[98] The court took no special notice of the word "of" in "officer of." It interpreted Section 3 to apply to officers simpliciter, asking only "[i]s a Sheriff an officer?"[99]

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94 *Cf.* Graber, *supra* note 23 ("if Blackman and Tillman's thesis is correct, then elected state governors are not officers of their states").

95 Blackman and Tillman cite authorities that apply the term "officer of the United States" to appointed officials. *See* Blackman & Tillman, *supra* note 5, at 26 *et seq*. None, however, interprets Section 3 or any other constitutional or statutory provision that applies to both officers of the United States and officers of the states in the same sentence. Blackman and Tillman further imply that "officer of the United States" has a single meaning at any point that might drift over time but would have to "have drifted back and forth" during the relevant period if it included the President in Section 3 but not in the other authorities. *See id*. at 28. But words or phrases do not have a single legal meaning that is subject to linear change over time. Rather, what the words of any given legal text "convey, *in their context*, is what the text means." *See* Scalia & Garner, *supra* note 27, at 56 (emphasis added). Three of the authorities that Blackman and Tillman cite recognize that Congress can use the same term with different meanings in different contexts. *See* United States v. Mouat, 124 U.S. 303, 308 (1888) ("Undoubtedly Congress may have used the word 'officer' in some other connections in a more popular sense, . . . in which case it will be the duty of the court in construing such an act of Congress to ascertain its true meaning and be governed accordingly."), United States v. Hartwell, 73 U.S. 385, 395–96 (1867), Employee's Compensation Act—Assistant United States Attorney, 31 U.S. Op. Att'y Gen. 201, 202 (1918). The fourth specifically refers only to the Constitution of 1788. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010). In the context of the Civil War and Reconstruction, and Section 3's application to officers of both the United States and the states, Section 3's use of the term can properly include elected Presidents just like elected governors, regardless of how other texts from the same period use the term.

96 In the Matter of the Executive Communication of the 14th October, 1868, 12 Fla. 651, 651–52 (1868).

97 *Id*.

98 *See* Worthy v. Barrett, 63 N.C. 199 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs, 76 U.S. 611 (1869). For other discussions of *Worthy see* Magliocca, *supra* note 5, at 98 n.59, Magliocca, *supra* note 78, Lynch, *supra* note 5, at 155, 164.

99 *See Worthy*, 63 N.C. at 202.

The court equated holding an office with being an officer for purposes of disqualification under Section 3. It listed "the *officers* in North Carolina who are required to take an oath to support the Constitution," including the governor, and opined that anyone "who held any of these *offices* before the rebellion, and then engaged in the rebellion, is prohibited from holding office until relieved by Congress."[100] The court defined a public office as a right to exercise public employment with its attendant compensation, duties, and obligation to take the oath,[101] which included the elective office of sheriff.[102]

A Circuit Court in North Carolina reasoned the same in a case involving a person appointed and then elected constable before the war.[103] The court found that the party was an "officer in the state" holding "an executive office" before the war and thus within Section 3's Officials Clause.[104]

Usage in these cases is consistent with uses of "officer of" involving judicial power over governors and Presidents. An 1867 Supreme Court challenge to military Reconstruction asserted that "[i]f the chief executive officer of a State is liable to be controlled by the courts of the State in the discharge of ministerial duties, for much stronger reasons is the chief executive officer of the United States liable to be controlled by this court under the provisions of the Federal Constitution."[105] A legal journal explained in 1881 that "[th]e writ of *mandamus* has at various times been prayed for, against every officer of government, both State and national, except the President of the United States, and even he has not escaped wholly . . ."[106] The Georgia Supreme Court opined in 1850 "that for *political* reasons alone, the remedy by *mandamus* ought not to be enforced against the chief executive officer of the State."[107] And the Arkansas Supreme Court similarly concluded in 1839 that "[a]ll the officers of the government, except the President of the United States, and the Executives of the States, are liable to have their acts examined in a court of justice."[108]

C. References in Ordinary Usage and the Thirty-Ninth Congress

The American President has been generally known here and abroad as an officer of the United States since as early as 1794, when the anonymous author Nestor described President Washington as "the first executive officer of the United States."[109] Other Presidents were routinely called the "chief executive officer of the

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100 *See id*. at 203, emphasis added.

101 *See id*. at 202.

102 *See id*. at 205 (dismissing petition per curiam with costs).

103 *See* United States v. Powell, 27 Fed. Cas. 605 (D. N.C. 1871).

104 *See id*. at 606 (appointed and then elected constable), 607 (holding and description as an "officer in the state" holding an "executive office" before the war).

105 *See The Military Reconstruction Bill*, Charleston Mercury (Charleston, S.C.), Apr. 10, 1867, at 1.

106 *See* 15 W. Jurist 122 (1881).

107 *See* State ex rel. Law v. Towns, 8 Ga. 360 (1850).

108 *See* Hawkins v. The Governor, 1 Ark. 570, 587 (1839).

109 *See* Nestor, Letter To the President of the United States, General Advertiser (Phila., Pa.), Aug. 12, 1794, https://founders.archives.gov/documents/Washington/05-16-02-0365. Similarly, a friend writing to Vice President John Adams called him a "high officer of the United States." *See* To John Adams from John Browne Cutting, 18 October 1796, https://founders.archives.gov/documents/Adams/99-02-02-1795 (Early Access Link).

United States," including Jefferson,[110] Jackson,[111] Van Buren,[112] Harrison,[113] Polk,[114] Taylor,[115] Fillmore,[116] Buchanan,[117] Lincoln,[118] Johnson,[119] Grant,[120] and Garfield.[121]

Britain's Prime Minister described Polk as the "chief executive officer of the United States" during the Oregon boundary negotiations.[122] Johnson used the same term to describe himself during Reconstruction,[123] and an English paper used it to describe him upon his impeachment acquittal.[124] On the eve of the Civil War, Buchanan called himself "the chief executive officer under the Constitution of the United States."[125] And as candidates, General Fremont and Horace Greeley were attacked as "totally devoid of those stern virtues which the chief executive officer

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[110] To Thomas Jefferson from Samuel Latham Mitchill, July 12, 1808, https://founders.archives.gov/documents/Jefferson/99-01-02-8305 (Early Access Link).

[111] *Mr. Jenkins' Remarks*, Annapolis Md. Republican, Feb. 19, 1833, at 2 (praising Jackson for upholding the law and the republican system and defending the Union in the context of Nullification), Alexandria Gazette, Aug. 11, 1837, at 5, col. 3 (in the context of defending the currency).

[112] *See For President, Martin Van Buren, for Vice President, Richard M. Johnson*, Evening Post (N.Y., N.Y.), Oct. 5, 1840, at 2, *Thursday Morning, April 29, 1843*, Wkly. Economist (Buffalo, N.Y.), Apr. 26, 1843, at 1.

[113] *See Hereabouts and Thereabouts*, Wayne County Herald (Honesdale, Pa.), Sept. 4, 1873, at 3.

[114] *See Arrival of the Caledonia*, Huron Reflector (Norwalk, Ohio), Apr. 29, 1845, at 3, *Oregon—Our Relations with Britain*, Brattleboro Vt. Phonix, May 2, 1845, at 2.

[115] *See Ample Reasons for Being a Democrat*, Portage Sentinel (Ravenna, Ohio), Sept. 27, 1848, at 1, *To the Democratic Voters of the Senatorial District, composed of the counties of Henry and Fayette*, Milledgeville Fed. Union (Milledgeville, Ga.), Sept. 18, 1849, at 6.

[116] *See Mr. Fillmore*, Republic (D.C.), Aug. 27, 1851, at 2.

[117] *See The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, N.Y. Herald (N.Y., N.Y.), Dec. 14, 1860, at 5, *Questions and Answers*, Richmond Enquirer (Richmond, Va.), July 4, 1859, at 2.

[118] *See The President's Speech*, Council Bluffs Bugle (Council Bluffs, Iowa), July 23, 1862, at 3.

[119] *See By the President of the United States of America: A Proclamation*, Boston Post, May 30, 1865, at 2 (describing himself), *The Assemblies*, St. Louis Christian Advocate, May 24, 1866, at 7, *A Good Suggestion from an Old Soldier*, Quincy Daily Herald (Quincy, Ill.), Sept. 19, 1866, at 2, *Interesting Letter from Judge Abell on the Louisiana Troubles*, Wilmington J. (Wilmington, N.C.), June 28, 1867, at 3.

[120] *See The New Administration*, Memphis Daily Appeal, Feb. 10, 1869, at 5, *Should Gen. Grant Be Re-elected*, New Albany Ledger Standard (New Albany, Ind.), Sept. 11, 1872, at 2 (asserting that Grant was not satisfied with honor and lifetime pension from service in the war but "said it is not enough; I want more. I want to be the chief executive officer of the United States. I want the power that belongs to the President of the United States.").

[121] *See* Crested Butte Elk Mountain Pilot (Crested Butte, Colo.), Mar. 3, 1881, at 2.

[122] *See Arrival of the Caledonia*, *supra* note 114, *Oregon—Our Relations with Britain*, *id*., *House of Commons*, Sydney Morning Herald (Sydney, Australia), Aug. 12, 1845, at 3.

[123] *See By the President of the United States of America: A Proclamation*, *supra* note 119. Johnson's proclamation was widely reported. *See, e.g., America*, Guardian (London), June 12, 1865, at 3.

[124] *See Mr. Johnson's Acquittal*, Chronicle (Chester, England), May 30, 1868, at 8.

[125] *See The President's Message*, W. Res. Chron. (Warren, Ohio), Jan. 16, 1861, at 2.

of the United States should possess,"[126] and as "just the kind of material of which the Chief Executive officer of the United States is never made."[127]

Crucially, many of these uses occurred in the context of the President's election,[128] constitutional position,[129] and role in preventing domestic and international violence,[130] preserving the Union,[131] and enforcing the law during Reconstruction.[132] For example, an 1850 article declared that

> President Fillmore . . . places himself where the Constitution places him as the Chief Executive officer of the United States, and in that position looks to the interest of the country—of the whole people—as above any consideration connected with a mere party in politics, or any section of the country."[133]

An 1860 article attacked those mulling rebellion and added "that the arch traitor of the gang is the chief executive officer of the United States, by name James Buchanan," who refuses to acknowledge any authority to employ the armed forces against seceding states, thereby "virtually proclaiming that he would protect his brother traitors in their rebellion."[134] And a Southern writer questioned in 1869 whether "Gen. Grant will discharge his duties faithfully as the chief executive officer of the United States, or whether he will act as the President of the Republican party" to perpetuate the oppression of the South.[135]

These and other period uses, including in the Thirty-Ninth Congress,[136]

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126 *See Gen. Fremont*, Terre Haute Wkly. Wabash Express, June 15, 1864, at 1.

127 *See Greeley and Brown*, Tipton Advertiser (Tipton, Iowa), May 9, 1872, at 4.

128 *See Election of President and Vice President*, Const. Whig (Richmond, Va.), Feb. 28, 1826, at 1 ("the important operation of electing the two chief executive officers of the United States is not regulated by *any Constitutional rule whatever*.").

129 *See infra* note 133 and accompanying text.

130 *See, e.g., To the President of the United States*, *supra* note 109 (calling out state militias during the Whiskey Rebellion), *From Canada*, Wash. Nat'l Intelligencer (D.C.), Nov. 12, 1838, at 2 ("The chief Executive officer of the United States, and all officers acting by his authority, under the laws, have a duty to perform" in preventing Americans from fighting with Canadian separatists against British forces), *The President's Message*, *supra* note 125 (Buchanan disclaiming any authority to use military force against secession), *The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, *supra* note 117 (attacking Buchanan for same).

131 *See Mr. Jenkins' Remarks*, *supra* note 111.

132 *See, e.g., A Good Suggestion from an Old Soldier*, *supra* note 119, *Interesting Letter from Judge Abell on the Louisiana Troubles*, *id.*

133 *See From the Cincinnati (Ohio) Gazette*, Daily Republic (D.C.), Dec. 20, 1850, at 1. An 1851 article praised Fillmore for showing more conciliation than any other "chief executive officer of the United States," having discharged his duties "to the satisfaction of all sections" and having "done justice to North and South." *See Mr. Fillmore*, *supra* note 116.

134 *See The Republican Orator and Organs on the Crisis—Duty of Mr. Lincoln*, *supra* note 117.

135 *See The New Administration*, *supra* note 120.

136 Graber provides examples from the Thirty-Ninth Congress describing the President as the "chief executive officer of the United States," elected officials generally as "officers of," and elected governors specifically as "officers of." *See* Graber, *supra* note 23. Magliocca provides examples of uses from 1865 to 1868 including Johnson referring to

make the case under contemporaneous executive and judicial interpretations, the Presumption of Consistent Usage, and the Ordinary-Meaning and General-Terms Canons that the President is an officer of the United States for purposes of Section 3.[137] These uses continued into the twentieth century, supporting the case that nineteenth century usage was not anomalous.[138]

D. Related Federal Statute

An 1868 federal statute provided that when specified rebel states ratified the Fourteenth Amendment "the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay," except that no person disabled under the proposed Section 3 and not relieved "shall be deemed eligible to any office in" the state.[139] The statute recognized that elected officers are "officers of" the state and implicitly equated holding an "office in" the state with being an "officer of" the state.

Under the Related-Statutes Canon, the term "officer of" in Section 3 has the same meaning as in that statute. And under the Presumption of Consistent Usage, the term "officer of the United States" in Section 3 includes the President as the holder of an elective office.

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himself as the "chief civil executive officer of the United States" and others referring to Lincoln or Johnson as "the executive officer of the United States," "the chief executive officer of the United States," and the "chief civil executive officer of the United States." *See* Gerard Magliocca, *Section 3 and the Presidency*, PrawfsBlawg (Dec. 21, 2021), https://prawfsblawg.blogs.com/prawfsblawg/2021/12/section-3-and-the-presidency.html.

137 Blackman and Tillman dismiss other scholarship citing descriptions of the President as an officer of the United States as being too "scattered" to establish the term's meaning in Section 3. *See* Blackman & Tillman, *supra* note 5, at 43, 45. The citations in this Article are hardly scattered, and they are cited in relation to authorities that use the Ordinary-Meaning and General-Terms Canons to interpret Section 3. Moreover, many of the uses occur in the context of the Civil War and Reconstruction, including in the Thirty-Ninth Congress.

138 *See, e.g.*, 39 Cong. Rec. 3474 (1905) (proposed constitutional amendment to make "[a]ll civil officers of the United States other than the President and Vice President" removable by Congress), 40 Cong. Rec. 489 (1905) (referring to a salary "twice as large as that of any civil officer of the United States except the President of the United States."), Lewis Mayers, The Federal Service 91 (1922) ("This provision forbids any officer of the United States (other than the President, who is not included in its terms) . . . "), Department of the Treasury, Office of the General Counsel, Management Review on the Performance of the U.S. Department of the Treasury in Connection with the March 30, 1981 Assassination Attempt on President Ronald Reagan 99 (1981) ("it seems prudent to provide for an officer of the United States other than the president to exercise what is, in effect, a veto autority [sic] over Securities and Exchange Commission action."). Late nineteenth century usage includes similar references to officers of the government with an exclusion for the President. *See, e.g.,* 12 Cong. Rec. 523 (1881) (statement of Senator Sherman: "there is no officer of the Government except the President of the United States who is not bound, when directed to do so, to lay every paper in his Department before either House of Congress . . .").

139 *See* Act of June 25, 1868, § 3, ch. 70, 15 Stat. 73, 74.

E. Petitions for removal of disabilities

Many of those disabled under Section 3 filed petitions for the removal of disabilities.[140] On January 20, 1869, Representative Farnsworth of the Committee on Reconstruction offered a bill to relieve the disabilities of over one hundred petitioners from Alabama, Georgia, Louisiana, Mississippi, North Carolina, and Virginia.[141] Representative Ward resisted granting individual relief and asked whether there was any reason these particular individuals deserved relief.[142] Farnsworth read one petition, from Ira Garrett of Virginia, as representative of the group. The petition, as recorded in the Congressional Globe, read in part:

Remarks.

> The following is an accurate statement of the offices held before the war, the acts committed in support of the rebellion, and the present political status of the above named:
>
> Mr. Ira Garrett is seventy-six years of age—was elected clerk of the county court in 1831, and clerk of circuit court, of Albemarle, in 1852 and has continued to act in each court to the present time.
>
> He gave no support to the rebellion other than sympathy, which was carried out by feeding the hungry soldiers, and attending to the wants of the sick.
>
> He accepts the political situation of the country.
>
> He is *now* a Republican, and indorsed the reconstruction policy of Congress.[143]

Neither Ward nor any other member of the House objected that relief was unnecessary because Garrett had held elective rather than appointed offices before the war. Nor did anyone object that the petition treated having held a state office as demonstrating that the petitioner had been an "officer of" the state. Holding an office, even an elective office, made one an "officer of" the state for purposes of the

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140 *See, e.g.*, Cong. Globe, 40th Cong., 3rd Sess. 480 (1869).

141 *See id*.

142 *See id*. at 481.

143 *See id*. For a scan of Garrett's petition, *see* petition of Ira Garrett (Dec. 16, 1868), https://history.house.gov/Records-and-Research/Listing/pm_025/. Thanks to Professor Magliocca for the reference and link. For the National Archives collection of petitions *see* U.S. House of Representatives, Record Group 233, Select Committee on Reconstruction, Petitions and Other Records Relating to the Removal of Political Disabilities, July 1867–March 1871, https://catalog.archives.gov/id/563356. For petitions of other Virginia pre-war elected officials in that collection, *see, e.g.,* petition of R.J.W. Duke (pre-war attorney for the commonwealth) and petition of [Drury] W. Burnley (pre-war sheriff), B50 E1007, and petition of Charles W. Statham (pre-war justice of the peace), B51 E1116. Those positions were elective under the 1851 Virginia Constitution. *See* Va. Const. art. VI, §§ 27, 30 (1851).

Officials Clause. Under the Presumption of Consistent Usage, holding the office of President of the United States makes one an officer of the United States.

V. Essential Harmony of the Terms

Parts III and IV make the case for the essential harmony of Section 3's two critical terms. Section 3 applies to officers and offices simpliciter, and an officer is simply one who holds an office.[144] This essential harmony appears in other uses that support the case that the President is an officer of, and holds an office under, the United States for purposes of Section 3.

A. Substituted Usage in Legislative History of Section 3

In debates over the proposed Section 3 both Senator Van Winkle and Senator Johnson described having held an "office under" as the predicate for disqualification—substituting having held an "office under" for having been an "officer of" in the Officials Clause.[145] Senator Van Winkle questioned whether Section 3 should apply to anyone who had ever previously taken the oath or only those who had violated the oath during the term of the position for which they had sworn it. "If it is the intention to exclude from these privileges any one who has ever held an office under the national Government or the State governments, then the language of the section is correct as it is . . ."[146] Senator Johnson doubted that any Southern state would ratify the amendment if Section 3 indeed applied to "all who have at any time held any office under the United States" or "under any State."[147]

For these two Senators, holding an "office under" made one an "officer of" for purposes of the Officials Clause. If the Presidency is an "office under" the United States for purposes of Section 3, the President is an "officer of" the United States for the same purposes.[148] Indeed, in Blackman and Tillman's own 1788 taxonomy everyone who holds an executive office under the United States is an officer of the United States.[149]

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144 Blackman and Tillman perhaps unwittingly approach this type of analysis when they write that "the jurisdictional element, [1], specifies which *positions* are subject to Section 3: a '*person* . . . who, having previously taken an oath . . ." *See supra* note 18, and Blackman & Tillman, *supra* note 5, at 2 (emphasis added).

145 Lynch has suggested that although "under-explored, it facially appears that people who hold 'offices *under*' are 'officers *of*.'" *See* Lynch, *supra* note 5, at 158–59, 158 n.28, and 159 n.29. The Senators' statements support his suggestion. *See also* Graber, *supra* note 23 (holders of "offices under" are "officers of").

146 *See* Cong. Globe, *supra* note 23, at 2898.

147 *See id*.

148 Blackman and Tillman acknowledge that "in everyday parlance, the President is an officer of the United States." *See* Blackman & Tillman, *supra* note 5, at 45. If the Attorney General's opinion, judicial decisions, legislative history, canons of construction, and congressional disability relief practice cited above control, the contemporaneous everyday parlance cited in Part IV.C. above would make the President an officer of the United States for purposes of Section 3.

149 *See supra* note 24 and accompanying text.

B. Combined Usage

Several authorities consider both the Officials Clause and the Positions Clause together. In *United States v. Powell*, for example, the court found that an appointed then elected constable was within the Officials Clause, and the elective position of sheriff was within the Positions Clause by simply concluding that the former was an "officer" and the latter an "office."[150] Interpreting federal statutes enforcing Section 3 before its ratification, Attorney General Stanbery opined that an elected governor was an "officer of" a state and that his position was an "office under" the state's provisional government.[151]

This combined usage appears even before Reconstruction. The 1790 Pennsylvania constitution provided that "[t]he Governor, and all other civil officers, under this commonwealth, shall be liable to impeachment for any misdemeanor in office . . ."[152] The elected governor was an officer under the commonwealth, merging "officer" and "office under" into the singular "officer under." James Madison noted the provision in 1821,[153] and a guide for families and schools cited it as well.[154]

That constitution also cautions against reading constitutional text too technically. It describes the governor as an officer,[155] establishes the elective office of governor,[156] and provides that the governor "shall appoint all officers, whose offices are established by this Constitution."[157] Read closely, the constitution is incoherent—it requires elected governors to appoint themselves.[158] However, common sense and purposive readings should trump technical readings, particularly for constitutions.

C. One Contemporaneous Understanding of the Constitution of 1788 and the Act of August 31, 1852

In 1866 a select committee of the House of Representatives interpreted the officers and offices provisions of the Constitution of 1788 and rejected both the textual analysis that Professors Blackman and Tillman rely on and the conclusions that they draw. The committee dismissed their type of textual analysis as "mere verbal criticism" and asserted that "[n]o method of attaining the Constitution is more

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150 *See supra* notes 77–78 and 103–104 and accompanying text.

151 *See* Second Opinion, *supra* note 6, at 189–91.

152 *See* Pa. Const. art. IV, § 3 (1790).

153 *See* Letter From James Madison to Tench Coxe, January 17, 1821 (Madison responding that he read enclosed piece by Phocian, which quoted the constitution, and stating that "It indicates intelligence and acuteness in the writer, and no inconsiderable fairness, in facing, at every point, the subject he discusses."), https://founders.archives.gov/documents/Madison/04-02-02-0182.

154 *See* William B. Wedgwood, A.M., The Revised Statutes of the State of Pennsylvania and Additional Laws to 1844, Reduced to Questions and Answers, for the Use of Schools and Families 15 (1843).

155 *See* Pa. Const., art. IV, § 3 (1790).

156 *See id.*, art. II, § § 1 (establishing position), 2 (providing for election), 3 (governor holds office).

157 *See id.*, art. II, § 8.

158 *Cf.* Baude, *supra* note 26.

unsafe than this one of 'sticking' in sharp verbal criticism."[159] The committee applied a common sense purposive method of interpretation instead.

The committee concluded that members of Congress hold offices under the United States and "that no argument can be based on the different sense of the words 'of' and 'under,' as used in" the relevant clauses of the Constitution.[160] It reached those conclusions in part by considering the Foreign Emoluments Clause, which bars those who hold offices under the United States from accepting emoluments, titles, and the like from foreign sovereigns.[161] The committee reasoned that members of Congress must hold offices under the United States. Otherwise that clause would not apply to them, and foreign sovereigns could purchase Congress—a result that is "repugnant to all just or safe principles of government."[162]

The select committee's conclusion is consistent with the Foreign Affairs Committee's earlier view that the President is subject to the Foreign Emoluments Clause.[163] It is also consistent with Professor Zephyr Teachout's use of an anti-corruption principle to interpret the Constitution generally and to reach the same conclusion as to elected federal officials.[164]

The select committee's conclusions are particularly noteworthy given their context. Representative Blaine had read a letter on the House floor charging Representative Conkling with corruption for, among other things, having received his House pay while also receiving compensation for prosecuting a court martial as an acting federal judge advocate.[165] The House empaneled the committee to review the charges. The committee considered potentially applicable laws including an 1852 statute (the "Act") that in part forbade anyone holding an "office under the government of the United States" bearing annual compensation of at least two thousand five hundred dollars to "receive compensation for discharging the duty of

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159 *See* Cong. Globe, *supra* note 23, at 3939. Blackman and Tillman provide a "systematic" and "comprehensive" analysis of the text of all provisions in the Constitution of 1788 that use any terms relevant to Section 3, including the Foreign Emoluments Clause, along with changes made during the drafting process. *See* Blackman & Tillman, *supra* note 24, at 309, 314–15, Blackman & Tillman, *supra* note 5, at 6–21. The select committee noted almost all of those provisions, including the Foreign Emoluments Clause, in its report. *See* Cong. Globe, *supra* note 23, at 3939. Blackman and Tillman also provide non-textual defenses of their interpretation. *See, e.g.,* Blackman & Tillman, *supra* note 24, at 315.

160 *See* Cong. Globe, *supra* note 23, at 3939, *cited in* Lynch, *supra* note 5 at 159 n.29, and Graber, *supra* note 23.

161 *See* U.S. Const. art. I, § 9, cl. 8.

162 *See* Cong. Globe, *supra* note 23, at 3939–40. A contemporaneous Supreme Court opinion reasoned similarly in construing "officer" in a criminal statute broadly to include subordinates because otherwise no penalty would apply to them, and they could "commit any of the crimes specified with impunity." *See* United States v. Hartwell, 73 U.S. 385, 395 (1867).

163 *See supra* note 35 and accompanying text.

164 *See* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U. L. Rev. 30, 47–48, 51 (2012).

165 *See, e.g.*, 3 Asher C. Hinds, LL.D., Hinds' Precedents of the House of Representatives of the United States 1133–34 (1907), Cong. Globe, *supra* note 23, at 2298. The committee considered the two alternative cases of a member and a member-elect (given that members-elect receive House pay before being sworn in). *See* Cong. Globe, *supra* note 23, at 3939. This Article only considers the committee's views on the former case.

any other office," whether they held that other office or not.[166]

Conkling argued that the Act could not apply to him because members of Congress do not hold offices under the government of the United States.[167] The committee first considered his defense by reference to the officers and offices terms in the Constitution of 1788. The committee rejected the defense for the reasons stated above, reading the terms "officer of" and "officer under" interchangeably, and the terms "officer 'of' the United States" and officer "'under' the Government of the United States" interchangeably.[168] The committee viewed the anti-corruption principle as so strong that it put members of Congress at risk under the Act.

As a fallback, the committee concluded that even if members of Congress do not technically hold an office under the government of the United States for purposes of the Constitution of 1788, they nevertheless do for purposes of the Act given its underlying purpose—"the absolutely vital importance of" keeping members "as far as possible from the bad influences of corruption and avarice."[169] The anti-corruption principle controlled the independent statutory interpretation.[170]

Finally, the committee had to determine whether a temporary judge advocate discharges "the duty of any other office." The committee defined "office" much as Attorney General Stanbery and state courts later would when interpreting Section 3—as "a particular duty, charge, or trust, conferred by public authority, and for a public purpose, with a right usually attached to receive a fixed compensation for

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166 *See* Act of Aug. 31, 1852, ch. 108, § 18, 10 Stat. 76, 100, Cong. Globe, *supra* note 23, at 3940 (determining whether position was an office itself or discharged the duties of any other office).

167 *See* Cong. Globe, *supra* note 23, at 3939. This Article's description of Conkling's actions comes from the committee's report. Conkling's account differs. For example, Conkling asserted that he was merely engaged as counsel, not as an acting judge advocate. *See id.* at 2296. The differences are not relevant to how the committee interpreted the law under its characterization of the facts.

168 *See id.* at 3939. The committee considered contrary authorities including the leading case of the impeachment of William Blount. *See id*. at 3940. The committee read that case to hold that a former Senator is not subject to impeachment after expulsion, not that members of Congress are not officers of the government "in the enlarged and general sense of the Constitution." *See id*. For some of Tillman's discussions of the Blount case, *see, e.g.*, Seth Barrett Tillman, *Motion for Leave to File Brief of Scholar Seth Barrett Tillman as* Amicus Curiae *in Support of the Defendant*, Citizens for Responsibility and Ethics in Washington v. Trump, No. 17 Civ. 458 (RA) 23–25 (S.D. N.Y. 2017), Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U. L. Rev. 180, 192–95 (2013).

169 *See* Cong. Globe, *supra* note 23, at 3940.

170 The *Hartwell* Court echoed this approach, insisting that even when construing a penal statute strictly "the wider popular" meaning of a term should prevail over "the more narrow technical one" where the purpose of the statute applies to all within the former. *See* United States v. Hartwell, 73 U.S. 385, 396 (1867). "The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature." *Id*. (citing the Court's own precedent dating back to 1820 and treatises). The select committee report and *Hartwell* strongly support requiring purposive interpretation of the Reconstruction amendments under original methods originalism. *Cf*. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 752 (2009) (original meaning depends "on the applicable interpretive rules of the time.").

such service."[171] The committee examined the position and concluded that it was not itself an office and that performing its functions did not discharge the duties of any other office.[172] The committee resolved to exonerate Conkling.[173]

The committee's report was unanimous and read in its entirety to the House one month after Congress sent the Fourteenth Amendment to the states for ratification.[174] The committee's report does not control the interpretation of the Constitution of 1788, of course. But it does vitiate any claim that the narrow definitions that Professors Blackman and Tillman propose were fixed, generally accepted, or presumptively correct for any purpose at the adoption of the Fourteenth Amendment.[175] And it supports the case for applying a common sense, purposive, ordinary meaning method of interpretation to Section 3.[176]

Conclusion

The United States adopted the Reconstruction amendments in a radically different context than it did the Constitution of 1788. Congressional Republicans rightly feared the resurgence of rebel power at the state and federal levels. They tried to prevent that through franchise and exclusion rules, first by statute and then in Sections 2 and 3 of the Fourteenth Amendment.

Section 3 applies to faithless state and federal officers. It bars holding state and federal offices until Congress permits. Its text uses ordinary terms, and the legislative, executive, judicial, interpretive, and popular materials cited above make the case for ascribing ordinary meanings to them. Those materials, along with canons of construction like the Presumption of Consistent Usage, support the provision's application to Presidents and the Presidency just as much as to governors and governorships.

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171 *See* Cong. Globe, *supra* note 23, at 3940.

172 *See id*.

173 *See id*. at 3935.

174 *See id*. (committee appointed April 30, 1866; report read before House on July 19, 1866), National Archives, *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, Archives.gov (retrieved Mar. 4, 2023) (amendment submitted to states on June 16, 1866), https://www.archives.gov/milestone-documents/14th-amendment.

175 Blackman and Tillman rely on the proposition that when "'a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" *See* Blackman & Tillman, *supra* note 5, at 23, *citing* United States v. Castleman, 572 U.S. 157, 176–77 (2014) (Scalia, J., concurring), *quoting* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)) (actual quotation from 572 U.S. at 176, and emphasis omitted). It is not obvious that Section 3 transplanted "officer of" or "office under" from the Constitution of 1788. Quite the opposite. And if Section 3 left "office under" from that constitution behind, then it also left behind any soil that might support a narrow meaning of the related term "officer of." Blackman and Tillman also write "[h]ere, Section 3's jurisdictional element was 'quite obviously modeled' on the Oath or Affirmation Clause," citing Justice Scalia's concurring opinion in *Castleman*. *See* Blackman & Tillman, *supra* note 5, at 23–24. Justice Scalia was interpreting a modern criminal statute, however. *See Castleman*, 572 U.S. at 177. So that reference provides no support for a narrow reading of "officer of" in Section 3.

176 The *Hartwell* decision provides similar support. *See supra* note 170.

As North Carolina Supreme Court Justice Reade explained in 1869, Section 3's purpose is to ensure "that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress."[177] This Article makes the case that Section 3's text reaches Presidents and the Presidency and reminds interpreters that "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[178] One who takes the oath of the office of President of the United States then engages in insurrection or rebellion against it, or gives aid or comfort to its enemies, should not be eligible to take that oath again without permission from Congress.

[177] *See* Worthy v. Barrett, 63 N.C. 199, 204 (1869), *appeal dismissed sub nom.* Worthy v. Comm'rs, 76 U.S. 611 (1869). For similar descriptions of Section 3's purpose by members of the Thirty-Ninth Congress, *see* Graber, *supra* note 23 (statements of Senators Hendricks and Sherman).

[178] *See* Scalia & Garner, *supra* note 27, at 63.

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