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Marshall's Voice

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ABSTRACT

Most judicial opinions, for a variety of reasons, do not speak with the voice of identifiable judges, but an analysis of several of John Marshall's best known opinions reveals a distinctive voice, with its characteristic language and style of argumentation. The power of this voice helps to account for the influence of his views.

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In most of what we read, the individuality of the writer has been scrubbed off, as if by cosmic steel wool, and we are left with paragraphs seemingly without parents. Who writes Medicare instructions or announcements of academic meetings or credit card commercials? We never know nor are we ever interested in knowing. Much of judicial writing, it must be acknowledged, also seems to have been written by no one in particular. Perhaps, this is because it was produced by clerks steeped in anonymity. Perhaps, this is because the opinion was a committee product, in which the original draft was pelted with so many additions and deletions that the entire document had to be cloaked in featureless prose in order to hide its mixed parentage. Or perhaps the judge deliberately sought to write an opinion from nowhere.

This is not what we find with John Marshall. As surely as with Charles Dickens, David Foster Wallace, or Elmore Leonard, Marshall's prose speaks to us with an identifiable voice. Whether it reflects the Virginia frontier of his childhood, literary and historical classics he mastered on his own, or his distinct persona and whether it was deliberately concocted or emerged naturally, the Marshall voice is unmistakable. This essay represents an attempt to understand and explore the nature of that voice.

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I. The Context

Why have judicial opinions? One obvious answer is to help legitimize the Court and its work by providing rational justifications for its decisions. Courts, as Hamilton reminds us,[1] lack the powers of the purse or the sword, instead possessing "merely judgment"; if this judgment is to be made visible, it must be publicly expressed, as in opinions. A second is to facilitate the use of precedent, which is thought to make for consistency, efficiency and fairness. An opinion in one case will make it very much easier to decide if the case is applicable in another. But not every opinion will further these goals. If it is unclear, ambiguous or indecisive, if it appears biased, poorly reasoned or indifferent to pressing circumstances, if it radically confounds expectations, ignores history and practice or ends in unworkable instructions – if these defects blight the opinion, it can hardly be successful. Marshall, preeminently a practical man, needed no reminder of this. But how would his opinions read? If opinions represent the law and the law is impersonal, would his opinions be impersonal, too, produced as if written by a platonic archetypical judge? Or, on the theory that "there are no voiceless words,"[2] would his opinions sound with the voice of Marshall?

But what is voice? Literally, it refers to the sound, rhythm, timbre, and intonation of a speaker, and it is sufficiently identifiable on an individual basis to accommodate voice recognition software. But when used metaphorically, voice seems to recall Augustine's famous riposte on time.[3] At its heart, though, it means at least this: voice reflects the personal presence of the writer, and it is a social act in that it presumes an audience. A writer with a distinctive voice may be said to be *there*, in the room with the reader.

To begin, it is *Marshall's* voice that we are discussing. The clerks who today research and virtually ghost write many judicial opinions were unknown in his day. What we read is what Marshall wrote. At the same time, however, if it was his voice, it was not entirely under his sole control but was forced to follow certain long accepted conventions. He well understood, for example, that opinions are exercises in justification and persuasion. The author does not relate how he came to decide as he did – were childhood experiences determinative or perhaps his daughter passed on an anecdote that focused his mind? Instead, venerable established unspoken rules compel the judge to defend his conclusion on the basis of evidence and reason, and to do so in the form of an argument. And he must, too, take into account his audience, most proximately, his fellow justices. As Justice Ginsburg observed, "In writing for the Court, one must be sensitive to the sensibilities and mindsets of one's colleagues, which may mean avoiding certain arguments and authorities, even certain words."[4] And the audience also includes the larger legal community,

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1 Alexander Hamilton, James Madison, & John Jay, The Federalist Papers (Clinton Rossiter ed. 1961).

2 Mikhail Bakhtin, *Speech Genres and Other Late Essays* 124 (Caryl Emerson & Michael Holquist eds., Vern McGee trans., 1986).

3 "If no one asks me, I know what it is. If I wish to explain it to him who asks, I do not know." *Confessions* 162 (Albert C. Outler ed. & trans., n.d.).

4 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1194 (1992).

the media, perhaps even the general public. If his persuasion is to succeed even partially, it must be targeted appropriately at these audiences, maybe flattering them with pointed references or adopting their perspective or, at the very least, addressing their concerns. Yet if a justice operates within limits, so do nearly all other writers. When they disdain and reject these limits – like, say, Joyce in *Finnegan's Wake* – they run the risk of losing much of their audience.

Marshall's is also a voice that is time bound to the early nineteenth century. It naturally reflects the values and attitudes of the day and the generally accepted style of judicial writing that prevailed at the time.[5] It also had to make do with a technology that by today's standards is primitive, indeed. There was no Internet or LexisNexis to help with research, for example, nor even a Court library. Nor could Justices draw on copious written briefs from the litigants or scan dozens of law reviews critiquing and interpreting opinions. Moreover, prior to Marshall's appointment, the Court's opinions were usually given orally, with the unofficial reporters, Alexander Dallas and William Cranch, compiling the opinions from the justices' notes, sometimes taking liberty with the language. The cases' utility as precedents, therefore, was always somewhat problematic. Also, obviously, in a new republic, today's vast backlog of precedents that typically constitute the heart of opinions[6] was simply nonexistent.

Perhaps most obviously, Marshall's voice, like all voices, was intertextual,[7] in that it revoices words and phrases and utterances from earlier writers. He did not create his own language, but rather used what others had created, reinforcing this, altering that, and in this way entering into a kind of dialogue with them.[8] Thus was Marshall, in a discretionary and unmechanical way, intertexting with the opinions and arguments of his own day plus the commentaries of Blackstone plus the essays we know as the *Federalist* plus much more – and all this rooted him deeply in his time and place.

Marshall brought considerable credibility to his efforts. Unpretentious and with simple tastes, he first "gained national fame"[9] when, as a diplomat sent to France, he denounced an attempt at bribery. Earlier, he had been a combat veteran during the War for Independence, a leader of the Virginia appellate bar, and a legislator at the state and national level who participated in the ratification of the Constitution. Later, President Adams named him Secretary of State. Perhaps equally important as this impressive resume, Marshall was also immensely likable; apart from Jefferson, even his adversaries thought well of him. Much of the leadership he exercised was accomplished in unassuming ways – for example, discussing cases over a few glasses of Madiera – and so effective was he that Jefferson conceded, "It will be difficult to find a character of firmness enough to preserve his independence on

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5 In contrast, Justice Kagan's voice is "remarkably conversational." Laura Krugman Ray, *Doctrinal Conversation*: *Justice Kagan's Supreme Court Opinions*, 89 Ind. L.J. Supp. 1, 2 (2013).

6 Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 Am. J. Pol. Sci. 1018 (1996).

7 George Kamberelis & Karla Danette Scott, *Other People's Voices: The Coarticulation of Texts and Subjectivities*, 4 Linguistics & Educ. 359 (1992).

8 Mikhail Bakhtin, The Dialogic Imagination: Four Essays (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1992).

9 Timothy S. Huebner, *Lawyer, Litigant, Leader: John Marshall and His Papers*, 48 Am. J. Leg. Hist. 314, 317 (2006).

the same bench with Marshall."[10] His frontier persona may have induced some to underestimate his intelligence, political savvy, and work ethic, but in the end, this operated to his advantage. Aristotle says that the persuasive speaker should possess practical intelligence, a virtuous character, and good will.[11] Marshall did not assert that he possessed these qualities, for that would have been counter productive and hostile to his deepest instincts, but in his conduct he seemed to exemplify them. In his opinions, too, he repeatedly emphasized workability, spoke with a certitude that conveyed trustworthiness, and relied on logical chains of reasoning.

This essay will examine Marshall's voice in the context of four of his most famous opinions, *Marbury v. Madison* (1803),[12] *McCulloch v. Maryland* (1819),[13] *Gibbons v. Ogden* (1824),[14] and *Fletcher v. Peck* (1810).[15]

II. Marshall and *Marbury*

Consider, first, *Marbury v. Madison*, his renowned opinion establishing the right of the Supreme Court to review the constitutionality of acts of Congress. William Marbury, a financier who had "elbowed his way to wealth and power [and] moved easily into the highest circles of the Federalist elite," sought the position of justice of the peace in Washington, D.C., "the most powerful public office in the lives of the common people."[16] Defeated by Jefferson in the 1800 election, the Federalist President Adams appointed Marbury to the position two days before Jefferson took office, and the Federalist Senate confirmed the appointment on the next and final day, but in the rush the commission necessary for Marbury to serve was not delivered. Jefferson instructed his Secretary of State, James Madison, to refuse to deliver the commissions and made his own appointments. Marbury maintained that delivering the commission was only a formality; Madison had no discretion in the matter; he had to provide the commission. But he refused.

What to do? Marbury, relying on section thirteen of the Judiciary Act of 1789 ("the Supreme Court . . . shall have power to issue . . . . writs of mandamus, in cases warranted by the principles and usages of law"),[17] went directly to the Supreme Court, seeking a writ of mandamus to compel Madison to hand over the commission.

Speaking for a unanimous Court, Marshall declared Marbury entitled to his commission, pillorying Madison for not doing his duty. He demonstrates that the power to appoint is distinct from the duty to deliver the commission.[18] He faults the Secretary of State for his failure to "obey the laws"[19] and for violating "a vested

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10 Thomas Jefferson, 9 Papers 104 (Paul L. Ford ed., 1904).
11 Aristotle, Rhetoric, 1378ab ff. (John M. Freese trans., 1926).
12 1 Cranch 137.
13 4 Wheaton 316.
14 9 Wheaton 1.
15 6 Cranch 87.
16 David Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U. L. Rev. 349, 352, 388, 354. (1996).
17 1 Stat. 73.
18 *Supra* note 12, 156-62.
19 *Id*. at 158.

legal right."[20] He conjures up hypotheticals to illustrate the Secretary's obligation,[21] and in a flourish announces that the government "will certainly cease to deserve the high appellation [of a government of laws, and not of men] if the laws furnish no remedy for the violation of a vested legal right."[22] He then goes on for two additional pages to establish the obvious fact that Marbury was injured,[23] and for another three pages to remind us that delivering the commission is a ministerial duty and not discretionary.[24]

Only after nineteen pages does Marshall consider the jurisdictional question, which normally is addressed first. At this point, he announces that the question was not whether Marbury was entitled to his commission, but instead whether he could seek a writ of mandamus from the Supreme Court. Article III, the brief and cryptic portion of the Constitution bearing on courts, reads in part: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."[25] It did not mention writs of mandamus, but the government contended that the brief list was a floor to which Congress could add. Marshall, evidently relying on *expressio unius est exclusio alterius*, reasoned that what was not listed was excluded. Thus, as written, Article III would not permit Marbury to seek the writ from the Court. The nineteen earlier pages supporting Marbury's claim were of no effect.

Though his classic biographer calls the idea "absolutely new," "daring," and "novel,"[26] Marshall was not an original thinker, and his opinion here tracks Hamilton's views in *Federalist 78*.[27] The Constitution must be superior to ordinary laws, he argued, or else deputy would be superior to principal and servant to master; and it must be left to the courts to make the determination. But if Marshall takes Hamilton's argument, he presents it in his own way. As he often did, he implicitly poses seemingly innocuous questions that, once they yield their obvious answers, clang shut, closing the trap. Thus did Jefferson, his old foe, write Marshall's colleague, Joseph Story, "When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. . . . Why, if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'"[28]

Thus, we can imagine Marshall asking a pair of questions. Is this a constitution we are discussing? Yes, of course, we reply. That is what the document is called. Well, then, is a constitution different from a statute? Yes, it must be, for it may be defined as "a superior law, unchangeable by ordinary means." If superior, must it not prevail over a conflicting statute? Yes, for that is what "superior" means. Otherwise, constitutions would be "absurd attempts, on the part of the people, to limit a power in its own nature illimitable."[29]

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20 *Id*. at 162.
21 *Id*. at 160-61.
22 *Id.* at 163.
23 *Id*. at 164-65.
24 *Id*. at166-68.
25 U.S. Const. art. III, §2.
26 Albert J. Beveridge, 3 The Life of John Marshall 128 (1929).
27 *Supra* note 1, at 463.
28 Jean Edward Smith, John Marshall: Definer of a Nation 120 (1996).
29 *Supra* note 12, at 177.

Marshall's second question is: is this a court? Why, yes, that is what it is called. What, then, is the first and irreducible function of courts? To decide disputes, we answer weakly. No, he replies, "It is emphatically the province and duty of the judicial department to say what the law is."[30] Only by saying what the law is can courts proceed either to decide disputes or, as in this case, to decide that they cannot decide. If it is the duty of courts to say what the law is, it must be their duty "if two laws conflict with each other [to] decide on the operation of each."[31] That is, to identify those occasions where Constitution and statute conflict, and to declare the statute invalid. The Constitution is a law, and the Court is duty bound to follow it.[32] The argument is all wrapped up as neatly as a Christmas present. Indeed, it takes on an aura of inevitability that induces us to forget four very pertinent considerations that Marshall overlooked.

First, the facts of the *Marbury* case seem so clear-cut that Marshall feels able to argue that the Court was really not exercising discretion, but merely pointing out what anyone could see. But suppose the conflict is not obvious – and presumably the obvious conflicts are conflicts Congress would be most likely to notice and avoid, and thus be quite rare. What then? In those cases where the law/Constitution conflict is debatable, would the Court be seen to be exercising discretion? If so, it would be harder to argue in these numerous cases that the conflict was between the Constitution and a statute than between the Court and Congress. Should judicial review, then, be confined to rare, clear-cut cases?

It is this point that advocates of judicial self restraint have repeatedly emphasized, and it is central because it is tied to the famous counter-majoritarian difficulty.[33] If a legislature makes what Thayer called a "clear mistake"[34] in adopting a law that is plainly unconstitutional – as in *Marbury* – a court's declaring it invalid may raise few difficulties. If clearly unconstitutional laws survive, why have a Constitution? "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained?"[35] The clarity of the conflict confirms Marshall's assumption that judicial discretion is minimal. But if a court declares a law invalid in the absence of a clear mistake, it is exercising considerable discretion – the verdict by definition is contested – and placing its judgment above the legislature's. Yet as the legislature is elected and the judges are appointed effectively for life, their decision takes on an anti-democratic caste. Marshall avoids the problem by not raising it, but as there will be very few clear mistakes, a robust judicial review will confront this issue repeatedly.

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30 *Id.*

31 *Id.*

32 Similarly, at the Virginia convention called to ratify the proposed Constitution, Marshall asked, "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?" John Marshall, 1 Papers 277 (Charles F. Hobson et al. eds., 1974).

33 Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 16-17 (1962).

34 James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893).

35 *Supra* note 12, at 176.

What gives the omission of problematic cases special force were contemporary experiences with judges. In the colonial times that Marshall knew, judges, who sometimes were also legislators, tended to be members of local power structures, with a wide range of petty responsibilities, and courts tended to be viewed as arms of the executive branch. Appointed by the crown via the governor and relying on the common law, judges were so widely distrusted that they were cited in the Declaration of Independence as a grievance contributing to the revolution, being "dependent on [the king's] will alone." Nor did this suspicion end with the creation of the republic, for judges were then viewed as favoring creditors and persons of property in their relations with the great mass of debtors. Too, federal courts had earned a reputation as eager enforcers of the notorious Sedition Act, and were seen as given to sermonizing on the citizens' duty to obey established authority. Accordingly, the opposition, which captured the presidency and Congress in 1801, viewed federal judges as allies of the executive. A judiciary independent of political influence was by no means well established by 1803, in short, and yet to it Marshall would assign the immense potential power of validating laws.

Even the Supreme Court on which he sat lacked stature. The first chief justice, John Jay, had written President Adams that he "left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential" to its performance,[36] and the prophecy must have seemed sound. Indeed, the Court had heard only fifty-five cases in the dozen years before Marshall joined it; sometimes, entire sessions were cancelled; so low was its profile that the designers of the Capitol forgot to allot it space, forcing it to meet in the basement. At Marshall's appointment, Freund commented, it appeared that the "Court might languish in benign obscurity or it might go down under the lash of active contempt."[37] No wonder Beveridge commented that "for perfectly calculated audacity, [*Marbury*] has few parallels in judicial history."[38]

Second, on judicial review, Marshall finds "no middle ground,"[39] but others have seen it differently. For example, in a well known dissent in a Pennsylvania case, a judge indicated that courts could declare a law void if it had been enacted in an unconstitutional manner, though review targeting the substance of laws he considered unjustified.[40] Taking a different tack, the Supreme Court a century after Marshall's death,[41] suggested that laws that appear to deprive discrete and insular minorities of fundamental rights would be treated differently from other laws for the purpose of judicial review. Where groups are unable to protect their rights through the political process, courts, empowered by their distance from that process, may act to assert those rights. Paradoxically, the Court implied, the counter majoritarian nature of judicial review provides courts with an opportunity to enhance democracy by voiding anti-democratic acts of majorities.

A middle ground option may also involve implementation. Marshall's decision, of course, was self implementing; if the Court cannot decide the case, it

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36 George Pellew, The Life of John Jay, 337, 338 (1890).

37 Paul Freund, *Foreword*, in Foundations of Power: John Marshall, 1801-15, xiii (George l. Haskins & Herbert A. Johnson eds., 1981).

38 *Supra* note 26, at 132.

39 *Supra* note 12, at 177.

40 Eakin v. Raub, 12 Sergeant & Rawle 330 (Penn. 1825) (Gibson, J.).

41 United States v. Carolene Products, 304 U.S. 144, 152-53 note 4 (1938) (Stone, J.).

cannot decide the case, and that is the end of it. Typically, a Supreme Court ruling is either immediately implemented or remanded to a lower court for implementation. One of the few exceptions to this procedure was *Brown v. Board of Education*[42], which produced a second case focusing entirely on implementation.[43] But in some nations, judicial deferral to the political branches is an established procedure. In Canada[44] and South Africa,[45] for instance, rulings upholding same sex marriage were suspended for twelve to twenty-four months, in order that regional and national legislatures have the opportunity to modify the preexisting legislation in the interest of fairness or efficiency, so that disruption caused by the court's rulings would be minimized. In nascent democracies, where courts may be weaker, this approach may reduce the likelihood of confrontations.[46] Judicial review, in short, may not be a matter of either/or.

Third, given the importance of judicial review that Marshall announced, why is there no explicit reference to it in the Constitution? That Article III made no explicit mention of mandamus, after all, is central to his argument;[47] why, then, is Article III's failure to mention judicial review not even worth raising? The Judiciary Act of 1789 had been adopted by the first Congress, and fifty-one of its ninety-two members had been at the Philadelphia convention or a state ratifying convention; section thirteen had been drafted by Oliver Ellsworth, who preceded Marshall as chief justice. Was it possible that all these men, steeped in the Constitution, had failed to notice that issuing writs of mandamus was not possible under original jurisdiction? Had they acted with the knowledge that a court could undo what they had done?[48]

Hamilton in *Federalist 78* believed that judicial review was implicit in the constitutional structure, and his arguments are often quoted. But as he took no part in the constitutional debates on the judiciary, and as *The Federalist* was an effort to persuade New York voters and not a record of the Framers' intentions, Hamilton's argument is not determinative. Madison's notes tell us that the Framers considered creating a council of revision, as found in New York. The council would not exercise exactly what we would consider judicial review: it would be composed of judges and members of the executive branch, it would rule on the merits and not the constitutionality of laws, and it would act before the laws were put into effect.[49] Nevertheless, the council was the nearest approximation to judicial review the Framers considered, and the Framers rejected the idea. Charles Beard famously argued that the Framers favored judicial review as part of a system "primarily to

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42 Brown v. Bd. of Educ. I, 347 U.S. 483 (1954).

43 Brown v. Bd. of Educ II, 349 U.S. 294 (1955).

44 Halpern v. Canada, 95 C.R.R. (2d) (2002); Hendricks v. Quebec, [2002] R.J.Q. 2506 (Can.).

45 Minister of Home Affairs v. Fourie, 1 SA 524 (CC), (S. Afr. 2006).

46 Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, N.Y.U. School of Law Public Law and Legal Theory Research Paper Series Working Paper no. 16-01 (2016).

47 *Supra* note 12, at 176.

48 Ironically, a century after the adoption of the Constitution, the Court upheld another part of section thirteen on the ground that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in the framing of that instrument." Wisconsin v. Pelican Insur. Co., 127 U.S. 265, 297 (1888).

49 Max Farrand, 1 Records of the Federal Convention 21 (1911).

commit the established rights of property to the guardianship of a judiciary removed from direct contact with popular electorates," thinking it a check on the democratic impulses of Congress.[50] Subsequent historians have examined the evidence, some rejecting it[51] and others with some modifications supporting it.[52] And while *Doctor Bonham's Case* in 1610[53] was a well known instance of British judicial review, it had no progeny. The prevailing British position at the time of Marbury was expressed by Lord Chief Justice Holt in *London v. Wood*: "An act of Parliament can do no wrong, though it may do things that look pretty odd."[54] Parliament, said Blackstone, "hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding [all] laws."[55] In an America far more prone to celebrate popular sovereignty, one might imagine that these views would resonate. But in a crowning irony, though Marshall entertains no doubts about the legitimacy of judicial review and in other cases supported his views by noting prevailing practices, his failure to highlight its history suggests that it might not have had one. Probably, the safest conclusion would seem to be that we really cannot say what the Framers intended, if they collectively intended anything at all.

Fourth, Marshall nowhere so much as hints at the identity of the Secretary of State initially responsible for delivering the commission – himself! – nor the person who failed to carry out the commission delivery assignment – his brother! Today, of course, these facts would compel a recusal. But there is no hint of any embarrassment in his opinion concerning the roles he and his brother played in the narrative nor any defensiveness or excuses or explanations offered. At one point, Marshall, speaking of Madison, avers that "It is the duty of the Secretary of State to conform to the law,"[56] ignoring that it was his failure to conform to the law that generated the dispute.

Politically, Marshall's opinion was a marvel. The Jeffersonians had believed that he would be impaled on the horns of a dilemma: the Court could decide in favor of Marbury, compelling Marshall to risk an impeachment that would permit Jefferson to replace him with his favorite, Spencer Roane.[57] Or it could decide in favor of Madison, acknowledging the Court's pitiful weakness. What Marshall did

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50 Charles Beard, The Supreme Court and the Constitution 126 (1911).

51 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).

52 Robert A. McGuire, To Form a More Perfect Union (2003); Terry Bouton, Taming Democracy: "The People," the Founders, and the Troubled Ending of the American Revolution (2007); Jac C. Heckelman & Keith L. Dougherty, *An Economic Interpretation of the Constitution Revisited*, 67 J. Econ. Hist. 829 (2007).

53 8 Co. Rep. 114.

54 12 Mod. Rep. 669, 687 (1702).

55 William Blackstone, 1 Commentaries on the Laws of England 160 (21st ed. 1844). A modest sort of judicial review is now exercised, as a consequence of Britain's joining the European Union in 1973, though presumably it will not survive Brexit.

56 *Supra* note 12 at 158.

57 In 1804 Jeffersonians impeached and removed a Federalist district court judge, John Pickering, and impeached but failed to remove a Supreme Court Justice, Samuel Chase. *See* Lynn W. Turner, *The Impeachment of John Pickering*, 54 Am. Hist. Rev. 485; Adam A. Perlin, *The Impeachment of Samuel Chase*, 62 Rutgers L. Rev. 725 (2010).

was to decide in favor of Madison, thus denying the Jeffersonians an opportunity to complain, while establishing a principle they thought dangerous and unlawful. The Jeffersonians won an utterly trivial battle, denying Marbury his commission, but via Marshall's "masterwork of indirection,"[58] they lost a major war, the legitimacy of judicial review, and with it the grounds for complaint.

Throughout his opinion, Marshall's approach is consistently abstract. When authorities are mentioned, they are always peripheral and ornamental. He utilizes four British references (three to Blackstone and one to Mansfield[59]) and four obscure statutes.[60] Had these not been mentioned, their absence would have affected his argument not at all. Too, he shows no interest in a plethora of available wobbly precedents. The Privy Council had nullified 469 colonial laws under its power of disallowance; perhaps eight instances of judicial review at the state level had occurred under the Articles of Confederation; under the Constitution, state laws had been overturned in *Ware v. Hylton* (1796)[61] and *Calder v. Bull* (1798);[62] and review of congressional laws was raised in a dissent in *Chisolm v. Georgia* (1793)[63] and by a majority that upheld the law in *Hylton v. United States* (1796).[64] All these Marshall ignored.

III. Marshall and *McCulloch*

Consider next *McCulloch v. Maryland*,[65] probably the most important case the Supreme Court has ever decided. Where *Marbury's* great principle grew out of a minor dispute of no tangible interest to any but the parties involved, *McCulloch* involved perhaps the greatest political issue of the day. In 1791, Hamilton, the Secretary of the Treasury and the man President Washington had placed in charge of the economy, called for the creation of a national bank. Washington was unsure whether Congress could create a bank, as the power to do so did not expressly appear in the Constitution, and so he asked Hamilton and Jefferson, his Secretary of State, for their views. Predictably, Hamilton favored the bank and Jefferson opposed it, and, predictably, Washington sided with Hamilton. Congress created the bank, but mindful of the controversy, gave it license to operate for only twenty years. From the start, however, opponents charged it with furthering the interests of northeastern financial interests and giving Britons, who owned two-thirds of its stock, more influence than the subjects of a recent war time enemy should have. State banks also became hungry for the national bank's business. The controversy attracted the leading political figures of the day, including Senators Daniel Webster of New Hampshire and John C. Calhoun of South Carolina. In the end, Congress let the bank's charter expire in 1811.

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58 Robert McCloskey, The American Supreme Court 40 (1960).
59 *Supra* note 15, at 163, 165, 168.
60 *Id*. at 164, 165, 171-72.
61 3 Dallas 199.
62 3 Dallas 386.
63 2 Dallas 419.
64 3 Dallas 171.
65 *Supra* note 13.

The War of 1812, however, produced economic hardship and an unstable currency, and demands began to be made for a second bank. Finally, in 1816 a second bank was established, and like the first, it was chartered for twenty years. Ineptly managed, it exacerbated the nation's economic problems, especially by contributing to the failure of many state banks and worsening what was known as the Panic of 1819, and became even more unpopular than the first bank. "Almost the whole country," as Beveridge observed, "was in grievous turmoil."[66] Several states responded with legislation banning the bank from operating within its borders or singling out its operations for taxes. One of these, Maryland, imposed a two percent tax on its bank notes, which could be waived by an annual payment of fifteen thousand dollars. This was by no means the heaviest tax imposed by states, though it was certainly significant.

On instructions from Washington, James William McCulloh (the case misspells his name), the cashier of the Baltimore branch of the bank, refused to pay the tax and was convicted for his failure to pay. The Supreme Court heard the case on appeal, hearing arguments presented by six lawyers over nine days. "The hall was full almost to suffocation," wrote Justice Story, "and many went away for want of room."[67] Three days later, the Court announced its unanimous decision, featuring, as it so often did, an opinion by Marshall. As his opinion in *Marbury* had drawn heavily on Hamilton's *Federalist 78*, so his opinion in *McCulloch* relies on the arguments of one of the bank's chief litigators, William Pinkney. Solemnly, Marshall begins by referring to "the awful responsibility involved in [the Court's] decision" and the possibility "of hostile legislation, perhaps, of hostility of a still more serious nature."[68] The political importance of the case was manifest.

Marshall announced that the case posed two questions. First, can Congress create a bank? The bank, he notes, "did not steal upon an unsuspecting legislature and pass unobserved,"[69] but was thoroughly discussed as early as Washington's first term. Still, Marshall concedes that the question cannot be answered simply by looking at past practice – Madison alone in Congress raised constitutional objections to the first bank, but as President in 1816, he argued for reinstating it -- and so he turns to the text of the Constitution. Here, the problem is, as Maryland pointed out, that nowhere does it mention banks. But Article I, section eight does list a number of Congress' economic powers: to lay and collect taxes, to regulate foreign and interstate commerce, to coin money, and so on. At the end of the long list, the Constitution grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[70] Marshall seizes the word "necessary," making it central to his argument. He reasons that "necessary . . . admits of all degrees of comparison," which he construes as not unduly burdening the practical workings of government. If Congress believes it is "appropriate"[71] to create a bank in order to carry out its enumerated economic powers, the Court should defer to that decision unless it could be called unreasonable, which in this case it could not. It was significant, he points out, that the word "expressly,"

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66 *Supra* note 26, at 4:169.
67 Joseph Story, 1 Life and Letters 325 (William Wetmore Story ed., 1851).
68 *Supra* note 13, at 400-01.
69 *Id*. at 402.
70 *Supra* note 25, at art. I, sec. 8, cl. 18.
71 *Supra* note 13, at 421.

which appeared in the defunct Articles of Confederation as a limit on the central government, was after considerable discussion at Philadelphia, left out of the Constitution.[72] Thus was confirmed the doctrine of implied powers.

The second question was whether Maryland can tax the bank. Maryland insisted that the issue was one of "confidence." Different governmental units routinely assume that they are confident that, in working with other units, these units will not abuse the trust placed in them. The bank should be confident that Maryland will not misuse its taxing power. To which Marshall replies icily, "All inconsistencies are to be reconciled by the magic of the word CONFIDENCE."[73] The question was not confidence, he says, but rather whether a part should control the whole.[74] When Maryland taxed the bank, it taxed an institution created by the whole nation. And as "the power to tax involves the power to destroy"[75] – here, he repeated the words of Daniel Webster, one of the bank's lawyers -- the power Maryland asserted was impressive, indeed. "The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control" the national government.[76] Were the states' to have grasped that their powers were so seriously limited, said Luther Martin, Maryland's chief lawyer, they might well have refused to adopt the Constitution,[77] but his point was lost.

As with *Marbury*, we can imagine Marshall posing two questions. Again, is this a constitution? Of course, he answers. "We must never forget that this is a Constitution we are expounding . . . a Constitution designed to endure for ages to come."[78] Its very nature, "therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[79] If it is not to become a "splendid bauble,"[80] the Constitution must be interpreted in ways that avoid "the absolute impracticability of maintaining it without rendering the government incompetent to its great objects."[81] This requires that Congress be given broad discretion in determining what is necessary and proper to carry out its powers. Again, is this a court? Of course, and so its job is to say what the law is. And because it is in its nature that a constitution be "the supreme law of the land," any state law contrary to it must give way. With this, he established the principle of national supremacy.

Consider how Marshall massages "necessary," extracting meaning after meaning in no fewer than eighteen pages, while never bothering to consult a dictionary or any other source. Jefferson, in arguing against the first bank, had seen "necessary" as meaning "The One Thing We Must Do or the Sky Will Fall."[82] Yet Marshall begins by speaking of "necessary" as embodying "the most appropriate

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72 *Id*. at 406.
73 *Id*. at 431.
74 *Id*. at 435-36. Pozen bemoans "the persistent underenforcement of good faith norms in large parts of constitutional doctrine." David Pozen, *Constitutional Bad Faith*, 129 Harv. L. Rev. 885, 954 (2016).
75 *Supra* note 13, at 427.
76 *Id.* at 436.
77 *Id*. at 376.
78 *Id*. at 407, 415.
79 *Id*. at 407.
80 *Id*. at 421.
81 *Id*. at 418.
82 Thomas Jefferson, Papers 275 (Julian P. Boyd ed., 1974).

means,"[83] but then moves on to claim that it "has not a fixed character [but] admits of all degrees of comparison"[84]: "A thing may be necessary, very necessary, absolutely or indispensably necessary,"[85] and "frequently imports no more than one thing is convenient, or useful, or essential to another."[86] In reaching this result, he refers to "the common affairs of the world," unnamed "approved authors,"[87] and "the character of human language," as well as a provision of Article I that uses the term "absolutely necessary."[88] "To employ the means necessary to an end is generally understood as employing any means calculated to produce the end," he concludes, "and not as being confined to those single means without which the end would be entirely unattainable."[89] This "must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution."[90] Thus, where in *Marbury*, Marshall insisted on the Court's power to say what the law is, in *McCulloch* he comes perilously close to assigning that power to Congress. The constitutional term "necessary," in this way, is transmuted into "any appropriate means"[91] or "the best means"[92] or "any means adapted to the end," [93] which raises a question he never confronts: If the Framers meant to so empower Congress, why did they choose "necessary"?

All these difficulties are dismissed by announcing that "this is a Constitution we are expounding," which Marshall believes requires flexibility. But if flexibility is the trump card, why even have a constitution? Why not have only ordinary statutes, which may be altered or reversed without recourse to the extraordinarily cumbersome process of amendment? This, in turn, suggests a competing view: suppose the point of a constitution is not to be flexible, but rather to set down fixed principles. This would explain why it cannot easily be changed, and it would also imply that courts should not be so free to rewrite it. For the clause says that Congress can "make all laws that shall be necessary and proper," not all laws that it *considers* necessary and proper. On the other hand, though the Constitution is silent as to who should enforce the necessary and proper standard, the courts would seem to have a better claim than Congress, which would be tasked with policing itself.[94] Also, that the term refers not only to the "foregoing [enumerated] powers," but also to "all other powers," might suggest a broader application, for the language is so sweeping and without boundaries that it appears to invite very broad application. Thus, Hamilton relies on this phrase as well as necessary and proper in his justification of the bank.[95]

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83 *Supra* note 13, at 408.
84 *Id*. at 414.
85 *Id*.
86 *Id*. at 413.
87 *Id*.
88 *Id*. at 414.
89 *Id*. at 413-14.
90 *Id*. at 415.
91 *Id*. at 410.
92 *Id*. at 415.
93 *Id*. at 419.
94 James Wilson, the Framer responsible for the phrase, was a strong proponent of judicial review. Mark David Hall, The Political and Legal Philosophy of James Wilson, 1742-1798 134-38 (1997).
95 Alexander Hamilton, 9 Papers 103 (Harold C. Syrett & Jacob E. Cook eds., 1965).

Marshall assumes that the necessary and proper clause "purports to enlarge" Congress' powers,[96] constituting what we call the elastic clause. One retort might be that, instead, the clause limits Congress to implementing its enumerated powers only by means that are necessary and proper. Marshall finds it relevant that the Constitution contains "no phrase [that] excludes incidental or implied powers,"[97] but there was no phrase that excluded writs of mandamus from the Court's original jurisdiction in *Marbury*, and its absence did not save the law.

The larger problem with the elastic clause assumption is that Marshall in truth has demonstrated something very different, namely, that the power to create a bank could be inferred from the listed economic powers, even without the final clause. For if it is the nature of constitutions that they be interpreted broadly, they would grant legislatures the power to implement powers, even if implementation were unmentioned. Underlining this, it was established at common law that an express power carries with it incidental powers, a fact that Marshall even refers to in passing.[98] If Congress can "establish post offices and post roads,"[99] for instance, as he points out, it can aIso provide that mail shall be carried on these roads and that those who rob the mail shall be punished.[100] That the necessary and proper clause was superfluous was expressed by Hamilton in *Federalist 33* ("it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these [necessary and proper] clauses were entirely obliterated") and Madison in *Federalist 44* ("Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication"). Was Marshall making something out of nothing?

Maryland had contended that the necessary and proper clause merely gave Congress the power to legislate in pursuance of the expressed goals. Marshall thought that reading it as giving a legislature the power to legislate was so obvious that it would add nothing to the Constitution. "Would it have entered into the mind . . . of the convention," he asked, "that an express power to make laws was necessary to enable the legislature to make them? That a legislature endowed with legislative powers, can legislate is a proposition too self-evident to have been questioned."[101] But the same charge of superfluity could be leveled at his argument: If Congress already had incidental powers, why add a necessary and proper clause?

The reach of what constitutes "incidental powers," however, may be contested, partly because they apply to an uncertain future, as Madison noted in *Federalist 44,* but also because the Constitution was not straight forward on the question. For example, as Luther Martin pointed out, the Constitution not only granted Congress the power to declare war, but also to raise an army, even though that would seem

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96 *Supra* note 13, at 418-19.
97 *Id*. at 406.
98 *Id*. at 416.
99 *Supra* note 25, art.I, sec. 8, cl. 7.
100 *Supra* note 13, at 417. This was a potent example. In 1816, sixty-nine percent of national civilian employees were postmasters, and "for the vast majority of Americans the postal system *was* the central government." Richard R. John, Spreading the News 3, 4 (1995).
101 *Supra* note 13, at 413.

to be incidental to the war power.[102] In addition, as Madison indicated, incidental powers needed to be distinguished from "independent and substantive powers,"[103] which Marshall does.[104] Madison thought the power to charter corporations, including creating banks, was an independent and substantive power. Hamilton, who favored the bank, disagreed.[105] The difference between incidental and independent and substantive, Marshall asserts, is that the former refer to means and the latter to ends. In fact, though, all government powers refer to means. Government is not an end in itself, but a means toward some other end, perhaps security or prosperity or justice. Thus, in practice, the distinction may be difficult to maintain. For example, when Congress passed a law banning guns from schools on the theory that gun-free schools would contribute to education and thus to interstate commerce, a divided Supreme Court thought the connection too insubstantial to sustain.[106]

Jefferson, in arguing against the first Bank of the United States had contended that creating a bank was not an incidental power, that the Framers rejected giving Congress the power to create a bank for fear of an "adverse . . . reception [from] the great cities," and that construing "necessary" to mean "convenient" "would swallow up all the delegated powers. As he remarked in 1800 about a bill providing for congressional incorporation of a New Jersey copper mine, "Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This Is the House that Jack Built'?"[107] What limitations on congressional power are left? Marshall acknowledges that "Congress, under the pretext of executing its powers, [might] pass laws for the accomplishment of objects not intrusted to the government,"[108] but in context this seems to him a remote possibility, theoretically conceivable but no more than that, for courts ordinarily do not inquire into the motives of legislatures but only into their intent. Nor does Marshall even concede the constitutional relevance of unintended consequences. When discussing the strict scrutiny doctrine in the context of apparent racial discrimination, for example, modern courts insist that the state have a compelling interest and that the legislation be narrowly tailored, all to make sure that rights are abridged no more than necessary. These concerns do not interest Marshall. His heart clearly belongs to Congress.

Yet it was not the *necessary* clause. It was the *necessary and proper* clause. How to parse the phrase? Should it be construed to hold that "necessary" refers to the end sought by the legislation and "proper" to the means; or, conversely, "proper" to the end and "necessary" to the means? Either way, the statute would have to surmount two hurdles. Thus, in the Affordable Care Act case, Chief Justice Roberts held that the individual mandate might be "necessary" to the statute's purpose, but was "not a 'proper' means for making these reforms effective."[109] An

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102 This, however, ignores that an army may have other rationales, such as helping in cases of natural disasters or other public emergencies.
103 James Madison, 13 Papers 372, 375-79 (Charles F. Hobson ed., 1981).
104 *Supra* note 13, at 411.
105 *Supra* note 103, at 8:100-01.
106 United States v. Lopez, 514 U.S. 549, 561 (1995).
107 Charles Warren, 1 The Supreme Court in United States History 501 (1926).
108 *Supra* note 13, at 423.
109 NFIB v. Sebelius, 132 S. Ct. 2566, 2592 (2012).

extensive historical investigation of the clause agrees that the "separate insertion of the word 'proper' strongly suggests that it had a meaning separate from necessary, and almost certainly a restrictive one."[110]

Marshall, however, touches on "proper" only in a single paragraph, declining even to mention the word[111] and satisfying himself with the assertion that "it would be an extraordinary departure from the usual course of the human mind" to use the word "to qualify that strict and rigorous meaning" of "necessary."[112] This is really not an argument but an effort to dispense with making an argument. One authority contends that Marshall evidently saw necessary and proper as a hendiadys, a figure of speech, in which words joined by a conjunction convey a single meaning, for example, calling a pie "nice and tasty"; "nice" does not duplicate "tasty," but reinforces it in a vague way; is the pie minimally tasty? is it the tastiest pie imaginable? The possible meanings are so capacious, it is impossible to say. Thus did "proper" reinforce "necessary," he claims, leaving a wide range of possible meanings: "Congress has the incidental powers that are proper to each of its enumerated powers precisely because they are needed to carry those enumerated powers into execution."[113] Similarly, a careful examination of the contemporary usage of the phrase concludes that it was not a technical legal term, "but rather a common feature of ordinary English."[114] The implication is that courts should focus on "the fit between an agent's prescribed ends and chosen means."[115] But this would seem to entail considerable judicial discretion, a possibility Marshall does not entertain. The effect on the reader, finally, is to be barraged and ultimately overwhelmed by the rat-tat-tat of arguments. Likely exhausted, we surrender and admit defeat.

That Maryland cannot tax the bank seemed to Marshall a question that required a much briefer response. Of course, Congress was empowered to bar states from taxing the bank, leaving Marshall free to pass the burden of deciding onto the political process. But even in the absence of this legislation, he found the states barred by the Constitution itself. The central government, he said, "represents all, and acts for all [and] must necessarily bind its component parts," a fact made explicit by the supremacy clause that makes "the Constitution, and the laws of the United States, which shall be made in pursuance thereof . . . the supreme law of the land."[116] Although the Constitution does not explicitly prohibit states from taxing or otherwise interfering with operations of the national government, the broad principle of national supremacy rules them out. If Maryland were to prevail, the national government would be left prostrated "at the foot of the states," and the supremacy clause would in effect be rewritten to "transfer the supremacy, in fact, to the states."[117] The point, according to Wechsler, "was the maintenance of national supremacy against nullification or usurpation by the individual states, the national

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110 Gary Lawson et al., The Origins of the Necessary and Proper Clause 93 (2010).
111 *Supra* note 13, at 418-19.
112 *Id*., 419.
113 Samuel L. Bray, *"Necessary AND Proper" and "Cruel AND Unusual": Hendiadys in the Constitution*, 102 Va. L. Rev 687 (2016).
114 John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1115 (2014).
115 *Supra* note 113, at 67.
116 *Supra* note 25, art. VI, sec. 2.
117 *Supra* note 13, at 432.

government having no part in their composition or their councils." [118] But if the national government requires protection against the states, Marshall sees no need for the reverse to apply.

As with *Marbury*, *McCulloch* presented a clear and obvious case. There could be no question that the congressional and Maryland laws were in conflict. But what if the conflict were not beyond dispute? In *Pennsylvania v. Nelson* (1957),[119] for example, the state contended that its purpose was to support, not contravene the congressional statute. The Supreme Court, in striking down the Pennsylvania statute, emphasized that Congress had a dominant interest in the topic and had created a pervasive system of regulation, and that there existed the possibility of conflict in administration. All this suggested to the Court that Congress, which was silent on the subject in the law, had intended to preempt the field, leaving no room for the states.[120] Marshall's task was to establish the fundamental principle of national supremacy. Difficult issues of detail were beyond his purview.

Maryland had contended that the national government was created by the states, as was true under the Articles of Confederation. The members of the convention were elected by state legislatures, and ratification took place on a state-by-state basis. But Marshall replies that, instead, it "proceeds directly from the people,"[121] as the preamble's famous opening phrase, "We the people," announces. He concedes that when the people act, "they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments."[122] To which one is tempted to ask, why not? If the state is the basic decisional unit and not, as he noted, "the American people [in] one common mass,"[123] why persist in claiming the reverse? Marshall, though clearly correct, did not stoop to confront the inconvenient details supporting his opponents.

McCulloch not only established implied powers and national supremacy, but the very act of deciding cemented the principle that the Court shall serve as the umpire deciding disputes between the different levels of government. As a court, whose first task must be to say what the law is, it can determine when an act of Congress conflicts with a state law, and declare it unconstitutional. Years earlier during the ratification process, Anti-Federalists had predicted that the "judicial power will operate to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states"[124] because they believed that national courts would invariably side with the national government against the states. Delineating the boundaries between the two levels, however, has emerged as one of the Court's most important functions, and the national level by no means always wins (e.g., *Chamber of Commerce v. Whiting*[125]). Still, though *McCulloch* may have settled vital constitutional questions, the key remaining political question – is the

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118 Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Col. L. Rev. 543, 544 (1954).

119 350 U.S. 497.

120 Some members of Congress vehemently disagreed. *See,* e.g., 104 *Cong. Rec*. 14139-40.

121 *Supra* note 13, at 403.

122 *Id*.

123 *Id.*

124 Herbert Storing, 2 The Complete Anti-Federalist 420 (1981).

125 563 U.S. 582 (2011).

nation a compact of states permitting secession or a permanent federal system – was not resolved until the Civil War nearly a half century later, which followed generations of controversy (the Virginia and Kentucky Resolutions of 1798 provoked by the Alien and Sedition Act, the Hartford Convention in response to the War of 1812, South Carolina's Statute of Nullification in 1832 reacting against the Tariff of Abominations). Indeed, *McCulloch* helped to "call into action a Southern states' rights movement that dominated politics from the 1820s to the Civil War."[126]

IV. Marshall and *Gibbons*

The third great case decided by Marshall, *Gibbons v. Ogden,*[127] saw a private dispute elevated to national importance. The case involved navigation of the Hudson River, which divided New York from New Jersey. New York, by then the most populous state, had enacted legislation purporting to claim the river as entirely its own, and New Jersey had responded by asserting a right to seize New York steamboats that docked on their shore; in short, commercial warfare of exactly the kind the Constitution was designed to prevent had begun.

In this context, Robert Livingston and Robert Fulton were granted an exclusive right by New York to steamboat navigation within its waters, and they assigned the right to Aaron Ogden and Thomas Gibbons. Their arrangement, however, dissolved, and an angry Gibbons obtained a license from Congress to operate his steamboat between New York and New Jersey on the Hudson River. Ogden won an injunction from a New York court that would restrain Gibbons from navigating New York waters; the order was upheld on appeal. Ogden successfully argued that the Constitution did not explicitly grant Congress exclusive control over commerce; states historically, on the other hand, enjoyed exclusive power to regulate commerce within their borders; commerce, in any event, did not include navigation.[128] Gibbons responded by taking the case to the Supreme Court.

In the larger context, a number of other states were at the time asserting the power to regulate navigation, and the question as to whether Congress could appropriate funds for transportation infrastructure ("internal improvements," in the language of the day) was a topic attracting great public attention. The principle of national supremacy announced five years earlier in *McCulloch* would seem to guarantee that Gibbons would prevail, but this, in turn, required that the congressional license be valid. The entire case pivots on that question, which brings Marshall to an inquiry as to the meaning of the commerce clause: "The Congress shall have the power . . . to regulate commerce . . . among the several states."[129]

The deteriorating commercial state of the nation had been perhaps the key factor in replacing the dysfunctional Articles of Confederation with the Constitution. Commercial dissatisfaction had led to the failed Annapolis Convention in 1786 and then to the Philadelphia convention the year after. Oddly, however, this topic

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126 R. Kent Newmeyer, *A Judge for All Seasons*, 43 Wm. & Mary L. Rev. 1463 (2002).
127 *Supra* note 14.
128 17 Johns. 488 (NY 1820).
129 *Supra* note 25, art. I, sec. 8, cl. 3.

of immense importance received only cryptic treatment in Article I. Marshall in *Gibbons* took it upon himself to add flesh to the bones.

Marshall begins by admitting that New York's position "is supported by great names," whose opinions are entitled to "a just and real respect."[130] But turning to the Constitution, he then asks why it should be construed strictly, in particular, why "commerce" should be limited "to traffic, to buying and selling, or to the interchange of commodities" and exclude navigation.[131] The Constitution itself is silent as to how it should be construed, but historically navigation "has been understood by all to be commercial regulation,"[132] and was so understood by the Framers. In fact, one provision of Article I speaks of "regulation of commerce" and "ports," indicating that "commerce relates to navigation."[133] Alluding to Jefferson's embargo of British ships from 1807-1809, Marshall cites it as an example of commerce as navigation,[134] reminding the reader of his foe's failed and unpopular policy and using it for his own purposes. Commerce, he concludes, encompasses "intercourse,"[135] a term broad enough to cover traffic, buying and selling, navigation, and presumably much more. As with "necessary" in *McCulloch*, Marshall's definitional exegesis proceeds without reference to dictionaries or other formal authorities.

Marshall then considers the meaning of "among the several states," finding that "among" means "intermingled with" and the entire phrase "commerce which concerns more states than one."[136] Commerce "which [is] completely within a particular state [and which does] not affect other states [and] which it is not necessary to interfere for the purpose of executing some of the general powers of the government" would be reserved for the states.[137] Commerce, then, cannot only be regulated by Congress at the imaginary "mathematical line" separating states, but must be within states.[138]

Next Marshall defines "regulate" as "the power . . . to prescribe a rule by which commerce is to be governed." What kind of rule? Any kind, for "the power . . . is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[139] The power of Congress, "though limited to specified objects, is plenary as to those objects."[140] Does this mean that the states have no power to regulate commerce with interstate implications? Daniel Webster had advocated this position in his oral presentation, and the nationalist, Justice William Johnson, supported it in his concurrence. The commerce clause needed to be interpreted in light of the disastrous interstate commercial warfare that it was intended to curb, he argued,[141] and so he would bar New York from asserting navigation rights over the Hudson, even in the absence of a congressional statute.[142]

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130 *Supra* note 14, at 186.
131 *Id*. at 189.
132 *Id*. at 190.
133 *Id*. at 191.
134 *Id*.at 192-93.
135 *Id*.at 189.
136 *Id*. at 194.
137 *Id*. at 195.
138 *Id*. at 196.
139 *Id*.
140 *Id*. at 197.
141 *Id*. at 223-25.
142 *Id*. at 228-29.

Did New York run afoul of the Constitution or merely an act of Congress? Marshall addresses the question with diplomatic ambivalence. "There is great force to this argument,"[143] he conceded, but it is not necessary to rule on the matter here. The Court did not have to decide whether the Constitution barred the state from acting because Congress had adopted a law with that effect.[144] Having established by parsing the commerce clause that Congress may license Gibbons, he concludes that "the acts of New York must yield to the law of Congress."[145]

The opinion is long on historical assertions, but short on historical evidence, and, oddly, repeatedly refers to "express" constitutional powers, when in *McCulloch* he had emphasized how important it was that the Framers after much deliberation had discarded that word, which had so severely limited the central government under the Articles of Confederation.

Again, we can easily imagine Marshall asking, Is this a constitution we are discussing? We must answer, yes, and here he pounces: a "narrow construction . . . would cripple the government and render it unequal to the object for which it is declared to be instituted."[146] The nature of a constitution requires a broad interpretation. What is most startling to the modern reader are the future implications of his reading of the commerce clause. In his day, it might authorize the national government to embark on the infrastructure projects that many political figures believed were essential for the nation's economic development. And yet the America of the first quarter of the nineteenth century was an agricultural nation dominated by local and to a much smaller extent regional markets. The national communications and transportation networks that today tie the enormous country together barely existed, and government itself was not very ambitious. Now, when all this has radically changed, the commerce clause supplies the constitutional rationale for a vast array of statutes and regulations, often with important non-commercial rationales. Marshall's foresight, given this, appears remarkable.

Yet did his prescient interpretation of the commerce clause follow from the meaning the words then carried? The most thorough originalist investigation suggests that the answer is no.[147] Barnett examined every mention of the term "commerce" at the constitutional convention, at the ratification debates, and in the *Federalist*, and found no example of the word given a broad Marshallian meaning; he also looked at every instance in which a representative newspaper, the *Pennsylvania Gazette*, used the term from 1728-1800 to ascertain what ordinary citizens meant.[148] Again, none was unambiguously broad. "Commerce" referred to trade or exchange, including shipping, but never to the vast list of activities contemplated by Marshall's "intercourse." Similarly, "regulate" meant "to make

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143 Id. at 209.

144 Primus speculates that Marshall may have drawn back from the constitutional argument from a fear that it might have undermined the South's ability to regulate slavery. Richard Primus, *Marshall's Enumeration,* University of Michigan Public Law Research Paper no. 496, 43 (2016).

145 *Supra* note 14, at 210.

146 *Id*. at 189.

147 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001).

148 Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003).

regular," not to prohibit. Government may instruct us: if you want to carry on a certain commercial activity, this is how you must proceed, but it may do no more than that. Though Marshall sometimes referred to the Framers, Barnett argues that he was not squeamish about placing his own views above theirs. Similarly, President Madison, the Father of the Constitution, vetoed an internal improvements bill, arguing that the commerce clause did not permit Congress to improve navigation because "Such a view of the Constitution would have the effect of giving to Congress a general power of legislation, instead of the defined and limited one hitherto understood to belong to them."[149] Notwithstanding these originalist considerations, of Marshall's great opinions *Gibbons* was the most popular, the public's applauding "its effect in shattering the great [steamboat] monopoly against which they had been struggling for fifteen years."[150]

V. Marshall and *Fletcher*

Consider, finally, *Fletcher v. Peck*, which involved one of the greatest corruption scandals in early American history, the Yazoo land scandal. In 1795 Georgia sold a vast tract of public land known as the Yazoo lands, nearly as large as the states of Alabama and Mississippi, to land speculators for five hundred thousand dollars, about three cents an acre. Why such a bargain price? Almost the entire Georgia legislature had been bribed by the speculators in what Marshall's biographer called "a saturnalia of corruption."[151] As the speculators resold the land at a handsome profit to buyers who may have been unaware of the bribery, Georgians began to agitate against the initial purchase, a mob at one point even threatening to lynch the legislators.[152] In 1796 a new legislature was elected that asserted a power to decide on behalf of the people whether past laws were valid. Accordingly, in 1796 it passed a law declaring the purchase null and void. The original act, as the product of fraud, had never been valid. After many failed efforts at compromise, Georgia's 1796 rescinding act was tested before the Supreme Court in *Fletcher v. Peck*. John Peck sold Robert Fletcher 15,000 acres of the disputed land; Fletcher challenged Peck's title to the land, given the 1796 law. (Actually, it was a collusive suit, as both parties hoped that the claim would be upheld because both were speculators with land to sell; if the 1796 law were upheld, their land titles would be worthless.)

Marshall deplores the apparent corruption, but then quickly dismisses it as irrelevant, for it would be "indecent in the extreme" for courts to inquire as to the "impure motives" of legislatures. In this, he followed the standard practice of ignoring motivation and focusing on intent. The Georgia constitution did not bar the sale of land to the speculators, and Georgia cannot undo the sale by declaring the operative law never to have been valid because the original 1795 law can be considered a contract, and the Constitution denies states the power to impair the

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149 2 Messages and Papers of the Presidents 569 (James Richardson ed., 1897).

150 *Supra* note 107, at I:75.

151 *Supra* note 28, at III:548.

152 Joel Chandler Harris, Georgia from the Invasion of DeSoto to the Present Day 130 (1896).

obligation of contracts.[153] Moreover, by declaring the law invalid, the legislature was asserting a power that properly belonged to the courts. Peck, therefore, had title to the land, and was free to sell it to Fletcher. The 1796 rescinding act violated the United States Constitution, the first important time a court had ruled a state law unconstitutional. In this regard, Marshall, following *Federalist 82*, [154]concedes that state courts may hear cases on federal law, but insists that the losers in such cases retain the right to appeal to federal courts. This was a principle guided by practicality: there were not enough federal courts to monopolize federal cases, and yet if the final determination were not made by a federal court, the uniformity required of federal law would be impossible.

Again, we can imagine Marshall posing simple questions. What is a contract, he asks? It is a compact that binds the participants to do a particular thing. When Georgia sold the Yazoo lands, it bound buyer and sellers, and thus was a contract, and as such, it came under the authority of the contract clause. Well, then, is this a court? Yes, he replies, and so it is up to us to say what the law is. Legislatures may change their mind and repeal laws, but they cannot declare laws null and void, as if they never had been enacted. This power belongs to the courts. Finally, is this a constitution? It is, and so it represents the entire union, and must prevail over a single state that is merely a member of the union. The Georgia legislature, then, by impairing the obligation of contract, exceeded its authority.

Interestingly, Marshall emphasized the intent of the Framers as to the contract clause. The impairment of contract, he wrote, was common under the Articles of Confederation, contributing to a climate of uncertainty about property rights that helped to bring about the Constitution itself. A robust interpretation of the clause was exactly what the Framers' Constitution called for.[155] If states were free to undo contracts, fundamental property rights – and with them, liberty itself – would be imperiled. "The past cannot be recalled,"[156] he wrote, and efforts to do so could only generate instability. States' political concerns, even when freighted heavily with apparent common sense, cannot trump the law. Inquiry into legislative motivation was therefore out of bounds.

What did Marshall omit? He never addresses the notion that the contract clause might apply only to private parties, though the imperfect legislative history reveals that the Framers spoke of the contract clause only in this sense. The implication of extending its application to states is that their range of future action would be limited by property rights asserted by private parties. Marshall discusses the practical imperative of protecting these rights, but never acknowledges the cost, preventing democratically elected officials from undoing certain kinds of past actions in the name of the public interest. Today, abrogating public contracts is harder than private contracts.[157]

Citing "certain great principles of justice,"[158] Marshall rules that an innocent purchaser should not suffer for the guilt of another. In this sense, his opinion

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153 *Supra* note 25, art. I, sec. 10, cl. 1.
154 *Supra* note 1.
155 He could not draw on Madison's records of the debates to support this contention because they would not be published until 1819.
156 *Supra* note 15, at 135.
157 United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).
158 *Supra* note 15, at 133.

reiterated a well established principle of English law. Switching to practicalities, he continues, if this were permitted, "all titles" would be insecure. That this might incentivize corrupt parties, who would no longer confront buyers uncertain if their title would be honored, is not considered. But this construes the contract clause in absolute terms, ignoring that enforcement may be refused if the agreement was procured through bribery. When Marshall declines to examine the motivations of the parties, he forecloses the possibility of determining whether this ground for unenforceability existed.[159]

Also, though Fletcher and Peck in truth had identical interests, Marshall fails to rule that the case was collusive, and thus did not meet the constitutional requirement of legitimate "case or controversy" and should not have been heard by the Court.[160] In the adversarial system, one party may be relied upon to check the other; collusive cases, on the other hand, are left for courts to determine because by definition both parties are involved in the conduct and will not raise the issue. Here, Marshall is so intent on construing the contract clause that he ignores the collusion. In a concurrence, Justice Johnson notes that he was reluctant "to proceed" since it had the markings of a "feigned case," but did so only because he concluded that "the respectable gentlemen . . . would never consent to impose a feigned case on this court."[161]

VI. Some Conclusions

What can we infer from these four major cases? Marshall, though his formal legal education consisted only of six weeks of lectures at the College of William and Mary, developed a supremely effective voice, confident ("The answer to this question seems an obvious one," "perfectly clear," "a proposition too plain to be contested," "too apparent for controversy"), straight forward ("Has the applicant a right to the commission he demands"? "The plain import of the words", "It is emphatically the province and duty of the judicial department to say what the law is"), and unequivocal ("The doctrine would subvert the very foundation of all written constitutions," "it thus reduces to nothing what we have deemed the greatest improvement on political institutions," "it thus must have been the intention"). He was not above bluster and bullying ("he would be charged with insanity," "an extraordinary departure from the usual course of the human mind," "no reason has been or can be assigned," "If any one proposition could command the universal assent of mankind"). He used strong, active verbs ("requires," "denies," "directed"), disdained qualifiers ("emphatically", "absolutely incapable," "no reason to suppose," "truths which have never been denied"), and often refuted counter arguments by ignoring their existence.

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159 Interestingly, Marshall himself had engaged in land speculation.

160 *Supra* note 25, art. III, sec.2, cl.1.

161 *Supra* note 15, at 147-48. In 1814, Congress compensated the Yazoo property holders at about an eighth of the value the Court had approved. C. Peter McGrath, Yazoo: Law and Politics in the New Republic 99-100 (1966).

Judge Posner counts Marshall as a "notable example "of the impure style,"[162] by which he means discourse that is less formal and more conversational than the standard. His language, according to Story, favored "general principles and comprehensive views, rather than . . . technical or recondite learning."[163] Apart from a few terms ("detinue," "mandamus," "estopped"), it would have been easily understood by any educated layperson of the time. And though he was drawn to prolonged focus on key words, particularly, constitutional words, for example, "constitution," "necessary," and "commerce," his discussions were never obscure. Instead, they turned on what he plainly thought were common sense considerations. In this, he followed the lead of his contemporary, Bentham, who, believing that lawyers and judges used linguistic complexity and arcana for their own purposes, favored plain writing comprehensible to ordinary people.[164] "Impure stylists," according to Posner, "like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is."[165] The effect is frankness and authenticity: we are reading the writer's true thoughts and feelings, and this contributes to its authoritative impact.

At the same time, however, Marshall's voice could be oracular like the voice of God, intimidating and conversational only in the sense of a superior dressing down a subordinate. For the overpowering sense in the reader is inevitability. Marshall presents himself as compelled by logic, history, and common sense, as if an automaton in thrall to these forces. "Certitude," Holmes warns, "is not the test of certainty,"[166] but Marshall is not convinced. The problem he faces – never in his view, the problem he constructs – is reduced to a series of rhetorical questions that guide the narrative to the desired result. Occasionally, he will admit the existence of choice, as whether states retain a role in regulating commerce, but for the most part his opinions concede no alternative path. Solan observes that "The more difficult it is for a judge to state in his opinion what drove him to the decision the more tempting independent noncontroversial argument becomes, such as arguments based on our knowledge of language."[167] He regards this as a kind of "linguistic sleight of hand,"[168] *contra* Bentham, and others perhaps might read it as a sign of egoism. More plausibly, however, it seems to have been for Marshall a practical response to the counter-majoritarian difficulty. Were judges openly to place their views over those of the people's elected representatives, they would reek of illegitimacy. But if they, instead, announce that it is the law, speaking objectively, clearly, and unambiguously, the problem is avoided. And because Marshall was so clearly comfortable with who he was, his voice is unencumbered with disguises

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162 Richard A. Posner, Judges Writing Styles (And Do They Matter?), 62 Univ. Chi. L. Rev. 1421, 1430 (1995).

163 Edward S. Corwin, John Marshall and the Constitution 116 (1919).

164 Jeremy Bentham, 5 Works 22-24 (John Bowring ed., 1839). An analysis of the readability of over six thousand opinions written since 1940 reveals an upwards trajectory in the length of sentences and the use of long, polysyllabic words, suggesting perhaps that Bentham's fears have been realized. Ryan Whalen, *Judicial Gobbleygook: The Readability of Supreme Court Writing*, 125 Yale L. J. Forum 543 (2015).

165 Posner *supra* note 162, at 1430.

166 Oliver Wendell Holmes, Jr., Collected Legal Papers 311 (1920).

167 Lawrence M. Solan, The Language of Judges 276 (1993).

168 *Id*. at 178.

and folderol and strikes us as unmistakably authentic. There is simply nothing false about it. His judicial voice was in harmony with his true self.

A persistent theme is Marshall's use of the rhetorical device known as redescription or reframing, which is employed to change the meaning of key terms or concepts. Plato and Aristotle used this technique to attack the rhetoric of their predecessors, as Marshall doubtlessly knew from his early reading in the classics. In the *Meno*, for example, Plato has Socrates redescribe "fine things" as "good things," perhaps to avoid the upper class implications.[169] Machiavelli also used redescription to redefine the virtues needed to attain and maintain power, moving from platonic Christianity to consequentialist means/ends rationality,[170] and Hobbes used it to redefine virtue and vice.[171] In the same way, Marshall cajoles the reader into accepting the legitimacy of his constitutional reasoning. Consider how he redescribes "original jurisdiction," "necessary," "commerce," "regulate," "contract," even "among." Options are chosen and rejected, meanings are shifted or reweighted, and the illusion of transparency generated by his straight forward prose distracts us, so that we fail to notice our manipulation.

Marshall also makes use of paradiastole, which was also found in ancient and Renaissance rhetoric. An example might be to use "courageous," when others might use "foolhardy." Thus, Marshall repeatedly insists that the national government must be strong in order to do all that it is charged with doing. That his "strength" is Jefferson's "overbearing dominance" is barely mentioned, for the device enables him to beg the question. Which suggests that redescription and paradiastole were employed both by Marshall and his adversaries.

Whereas today, months pass between oral argument and written opinion, in Marshall's time the gap was often astonishingly short. Of sixty-six constitutional cases generating full opinions from 1815-1835, seventeen were handed down within five days.[172] Marshall's famous *McCulloch* opinion appeared after only three days. Thorough informal discussion, perhaps at the boarding house where the justices resided when the Court was in session, seems to have obviated the need to circulate drafts of the opinions formally. There can be little doubt that Marshall's remarkable writing facility enhanced his influence: when he assigned opinions to himself, they were done quickly.

Marshall, then, understood the power of the word. But he also understood its limitations. After *Marbury*, he did not use judicial review to attack the Jeffersonians. Nor in *Gibbons* did he deny the states' power to regulate commerce. He did not, in other words, ignore the kind of prudent calculations that his confident tone would appear to override. This broad streak of prudence perhaps helps to explain his extraordinarily long record of influence. At the beginning, his colleagues on the Court were fellow Federalists and, to be blunt, mostly mediocrities. Justice Johnson, for instance, complained to Jefferson that "Cushing was incompetent," Chase "could not be made to think or write," Patterson was "a slow man," and "the other two judges . . . are commonly estimated as one judge."[173] Marshall's

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169 Plato's Meno, 77b2-78b6 (R.S. Buck trans. 1961).

170 Niccolo Machiavelli, The Prince chs. 16, 17 (Rufus Goodwin trans. 2003).

171 Thomas Hobbes, The Elements of Law, Natural and Politic ch. 7 (J.C.A. Gaskin ed., 2008).

172 G. Edward White, The Marshall Court and Cultural Change 181 (1988).

173 Donald G. Morgan, *Mr. Justice Johnson and the Constitution*, 57 Harv. L. Rev. 328

opportunity to impose his will through the powers of his office (e.g., assigning opinions) and the force of his personality (e.g., the discussions with his colleagues) would be obvious. By 1810, however, the Federalists were no longer a majority on the Court. Yet when Jeffersonians added powerful personalities to the Court, like Johnson and Story, Marshall turned them into allies. Meanwhile, passive justices, like Duvall or Todd (neither of whom produced an average of a single opinion per year) offered little resistance.

During his tenure, Marshall wrote 547 opinions for the Court, nearly half of the 1106 cases it decided, and many of these opinions were of considerable significance. At the same time, he wrote only eight dissents. On the surface, this would seem to point to near dictatorial dominance. But there is less here than meets the eye, for Marshall admitted that rather than dissent, he ordinarily chose to "acquiesce silently in [the Court's] opinion."[174] Indeed, his colleague, Justice Johnson, reported that Marshall sometimes wrote and delivered the opinion for the Court, even when it was "contrary to his own judgment and vote."[175] Opinions in his later years took all of three weeks to produce, perhaps reflecting the need for more consultation with his colleagues. By his last decade on the bench, he had become more a consensus builder. The typical vote, as always, was unanimous, but he frequently was forced to compromise.

All this suggests that Marshall to an unusual degree was able to combine two kinds of leadership, task and social,[176] where the task leader focuses on completing the job effectively and efficiently and the social leader is concerned with creating a congenial environment that conduces to cooperation. Typically, leaders may be placed solidly in one camp or another, like the Intel chief executive officer, Andy Grove, an immensely gifted task leader, but a social leader whose approach, in the words of a colleague, "was to hit you over the head with a two-by-four."[177] As time passed and the composition of the Court evolved, Marshall may have adjusted by emphasizing his always potent social leader skills.

Marshall's prudent, calculating leadership co-exists uneasily with his barreling forcefulness and its hint of uninhibited delight in verbal combat. It contrasts, too, with his universal reputation for amiability, for his judicial language was not at all inoffensive or soft spoken, but instead aggressive and unyielding, at times even pugnacious and partisan, as in his attacks on Jefferson's administration in *Marbury* or on Maryland in *McCulloch*. Yet on the other hand, the style comported perfectly with one of whom a contemporary remarked, "In his whole appearance and demeanor, dress, attitudes, gesture, sitting, standing, or walking [Marshall] is as far removed from the idealized graces of Lord Chesterfield, as any other gentleman on earth."[178] In rejecting highfalutin' display, he naturally also eschewed metaphors and other nonliteral devices, then so fashionable, that can seduce us into seeing with clarity something that is not there.

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174 Bank of the United States v. Dandridge, 12 Wheaton 64 (1827).

175 *Supra* note 173, at 333.

176 Robert F. Bales, *Task Roles and Social Roles in Problem-Solving Groups*, in Readings in Social Psychology 437, 441 (Eleanor E. Maccoby et al. eds., 3d ed. 1958).

177 Jonathan Kandall, *Andrew Grove Dies at 79; Intel Chief Spurred Semiconductor Revolution.* N.Y. Times, Mar.21, 2016.

178 William Wirt, The Writings of a British Spy 110 (1836).

There was, too, a certain ambivalence about Marshall's views of the role of the people in political affairs. He celebrated the Constitution as representing the deliberate voice of the people – and hence, superior to conflicting statutes from Congress or states. And yet, like many other leaders of the time, he distrusted ordinary citizens *en mass,* thinking them "selfish, violent, capricious, vindictive, and dangerous,"[179] and refusing to retire and present the spokesman for the common man, Andrew Jackson, the opportunity to name his successor.

Perhaps because he was unassuming, "a genuinely modest man,"[180] who did not even think to preserve his personal papers for posterity, Marshall's writing was not personal, like Justice Blackmun, with his anguish for an abused plaintiff[181] or his passionate opposition to the death penalty.[182] On the contrary. Marshall's language is formal, even dramatic, and rarely acknowledges that the decision could be different from what it is. His is not the tone of Holmes with his epigrams, Frankfurter with his professorial admonitions or Scalia with his paroxysms of indignation. Instead, the impression left with the reader is irresistible power. It is a lumbering locomotive, and our choice is to climb aboard or get run over, hardly the prose of a genuinely modest man.

Which raises the question of how modest he truly was. Marshall, as Story put it, was not lacking in a sense of self worth. "No one," he said, "ever possessed a more entire sense of his extraordinary talents."[183] Where certain other justices like, say, Frankfurter, habitually explained how complicated cases were, Marshall, like, say, Black, was a simplifier, who "distilled an argument down to its essence."[184] This may have resulted from his distaste for formal legal research and consequently heavy reliance on oral argument. He was a quick study and he knew it. Precedents, apart from his own decisions,[185] did not interest him much. In any event, such a sustained commitment to simplification bespeaks considerable self confidence. He never doubted his ability to strip away nonessentials and get to the nub of the matter, though much of what he discarded would have seemed relevant to many others. Their views evidently did not bother him.

From the outset, Marshall was a result-oriented judge. If America were to fulfill its great promise, he believed, it must have a strong national government, strong property rights, and a strong Supreme Court to defend them. All this came to him not from abstract speculation but from practical experience. In this regard, his days as a soldier in the War for Independence carried considerable weight, for he saw at Valley Forge and elsewhere how the states could not be trusted to meet their obligations and how only a strong national government could protect the fledgling nation from internal divisions and rapacious imperial powers. Courts, he hoped, could impose a rule of law and safeguard the society from self interested politics. "The judges of the Supreme Court," he wrote, "separated from the people . . . are viewed with respect, unmingled with affection, or interest. They possess neither

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179 *Supra* note 26, at I: 253.
180 *Supra* note 126, at 1467.
181 DeShaney v. Winnebago Cty. Dep't. Soc. Services, 489 U.S. 189, 213 (1989).
182 Callins v. Collins, 510 U.S. 1141, 1145 (1994).
183 John M. Dillon, John Marshall, Complete Constitutional Decisions 363 (1903).
184 Leonard Baker, John Marshall, A Life in the Law 709 (1974).
185 *See* Brown v. Maryland, 12 Wheaton 419, 446, 449 (1827), which explicitly relied on *Gibbons* and *McCulloch,* respectively.

power nor patronage."[186] Hence, the contradiction so apparent two centuries later – the figure who made America's independent appellate judiciary a reality was driven by his own deeply held political convictions – entirely escaped his notice. Perhaps this reflected the prevailing fiction that judges did not make law, but merely applied universal principles in particular cases. But the sharply enhanced role he seized for the Court, legal and political, evidently led his colleagues to take an increasing pride in the institution that, in turn, added to its prestige and authority.[187] The results he sought invariably in his eyes coincided with the intentions of the Framers. He was, as Corwin said, "thoroughly persuaded that he knew [their] intentions . . . and equally determined that their intentions should prevail."[188]

As a young man, "Pope was the lad's especial textbook,"[189] and *The Essay of Man*'s preoccupation with universal laws governing humanity is evident in Marshall's opinions, which are strewn with such generalities. But the greatest influence may well have come from Blackstone, who was so widely read in the colonies that Burke thought nearly as many copies of his *Commentaries* were bought there as in England.[190] Marshall's father had bought the *Commentaries*, and he "saw to it that his son read Blackstone as carefully as circumstances permitted."[191] Later, his law notes, which he used to prepare for the bar, reveal Blackstone's continuing influence.[192] Blackstone disdained philosophical speculation, preferring common sense, often expressed in maxims, and Marshall exhibits a weakness for maxims, too: "The power to tax involves the power to destroy," "A legislative act contrary to the Constitution is not law," "it is emphatically the province and duty of the judicial department to say what the law is," "Between a balanced republic and a democracy, the difference is like between order and chaos." As to the guides to common sense, Blackstone favored the common law or what he took to be the general approval of mankind. Natural law, human nature, the laws of England – all of these melted one into another. More generally, "Revolutionary era lawyers unreflectively conflated reason and custom."[193] For Marshall, too, practical concerns (sometimes disguised by sonorous references) carried the day, and maxims or the general approval of mankind clinched the argument. Natural law, by itself, seemed too amorphous and ambiguous to be able to justify the economic rights he considered central.

In this, Marshall's approach, in common with the general practice of the day, was foundational, in the sense of explaining political and legal arrangements in terms of givens. God, human nature, society – these imperishable, unalterable forces governed human affairs, and it would be folly to challenge them. The people, driven by their emotions, might fail to grasp this, but judges, working within a common law tradition, would naturally take the long view. The relentless

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186 Gerald Gunther, John Marshall's Defense of McCulloch v. Maryland 78-79 (1969).

187 Arguably, the pride when applied to *Dred Scott, Scott v. Sandford,* 60 U.S. 393 (1857) became hubris, as a majority imagined that with their ruling they had saved the nation from a terrible civil war.

188 *Supra* note 163, at 122.

189 *Id*. at 27.

190 Edmund Burke, Speeches 87 (1853).

191 *Supra* note 29, at I:56 (1929).

192 William F. Swindler, *John Marshall's Preparation for the Bar – Some Observations on His Law Notes,* 11 Am. J. Leg. Hist. 207 (1967).

193 James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?* 58 U. Chi. L. Rev. 1321, 1323 (1991).

interrogation of conventional wisdom, taken for granted today, was in his day never considered.

Speaking on the hundredth anniversary of Marshall's taking the seat as chief justice, Holmes was characteristically ungenerous. "If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives . . . A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there.*"[194] Marshall was certainly *there*, and much of the credit for the power and stature of the Supreme Court reflects his efforts. On the other hand, John Jay and Oliver Ellsworth, who preceded him as chief, were also *there*, and they left the Court inconsequential. As Chief Justice Hughes observed, "Marshall's preeminence was due to the fact that he was John Marshall."[195] Opportunity knocked, as the cliché goes, but only Marshall had the vision and ability to open the door and speak with his powerfully distinctive voice.

[194] Oliver Wendell Holmes, Speeches (1913).
[195] *Supra* note 26, at 1 (1966).

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Sentencing Disparities

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ABSTRACT

Criminal justice stakeholders are strongly concerned with disparities in penalty outcomes. Disparities are problematic when they represent unfounded differences in sentences, an abuse of discretion, and/or potential discrimination based on sociodemographic characteristics. The Article presents an original empirical study that explores disparities in sentences at two levels: the individual case level and the regional level. More specifically, the study investigates upward departures in the United States' federal sentencing system, which constitutes a guidelines-based structure. Upward departures carry unique consequences to individuals and their effects on the system as they lead to lengthier sentences, symbolically represent a dispute with the guidelines advice, and contribute to mass incarceration. Upward departures are discretionary to district courts and thus may lead to disparities in sentencing in which otherwise seemingly like offenders receive dissimilar sentences, in part because of the tendency of their assigned judges to depart upward (or not).

The study utilizes a multilevel mixed model to test the effects of a host of explanatory factors on the issuance of upward departures at the case level and whether those same factors are significant at the group level-i.e., district courts-to determine the extent of variation across districts. The explanatory variables tested include legal factors (e.g., final offense level, criminal history, offense type), extralegal characteristics (e.g., gender, race/ethnicity, citizenship), and case-processing variables (e.g., trial penalty, custody status). The results indicate that various legal and nonlegal factors are relevant in individual cases (representing individual differences) and signify that significant variations across district courts exist (confirming regional disparities). Implications of the significant findings for the justice system are explored.

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I. Introduction

Policymakers, practitioners, and academics have long brought attention to unjustified variations in criminal justice outcomes.[1] A principal focus is on disparities in sentencing practices because of the perception that inconsistencies in penalties are indicative of disproportionality in penalty outcomes, an abuse of discretion, and potential discrimination.[2] An additional concern today is America's evolution into a state of mass incarceration with too many individuals being sent to prison and for longer periods of time.[3] To investigate the possible existence of disparities, researchers from diverse academic disciplines have undertaken a host of studies.[4]

Nevertheless, there is much still to be learned. Serious gaps exist in the empirical legal studies literature regarding certain sentencing practices. The modal approaches to sentencing research is to focus on the in/out decision (i.e., whether the penalty requires any time of imprisonment) and sentence length.[5] Yet, there are other types of sentencing decisions that deserve more attention as they may also substantively exacerbate disparities in outcomes while contributing to mass incarceration. Then, more sophisticated empirical methodologies are available today that permit researchers to better specify statistical models to improve fit to the data and reduce the potential for biases in the results. Plus, there is perhaps insufficient attention to regional variations in sentencing practices.

This Article contributes to the literature by producing an empirical study focusing on sentences that constitute upward departures from sentencing guidelines. In particular, federal sentencing is a guidelines-based system, with upward departures issued at the discretion of district judges. Decisions to depart upward are uniquely remarkable because they obviously lead to lengthier prison terms, may represent gaps in the guidelines, and may signify disparities—potentially discrimination—in sentencing decisions. The federal system is worthy of analysis as it often acts as a role model for criminal justice practices, it operates the largest prison system in the country in terms of the number of inmates held, and it represents sentencing decisions across the country.

To date, no research appears to have discretely concentrated on upward departure decisions in federal sentencing. The results presented herein are meant to address this void. This study takes advantage of multilevel modeling as the empirical methodology, which constitutes a more sophisticated model of statistical analysis than is used in most criminal justice research.[6] The study also responds to a call

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1 Michael Tonry, Sentencing Matters 4 (1996).

2 Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 Criminology & Pub. Pol'y 535, 537 (2014).

3 Craig Haney, Reforming Punishment: Psychological Limits to the Pains of Imprisonment 61 (2006).

4 *See generally* Leslie Sebba, *Is Sentencing Reform a Lost Cause? A Historical Perspective on Conceptual Problems in Sentencing Research*, 76 Law & Contemp. Prob. 237 (2013).

5 Travis W. Franklin et al., *Extralegal Disparity in the Application of Intermediate Sanctions: An Analysis of U.S. District Courts*, 63 Crime & Delinq. 839, 840 (2017) (forthcoming) [hereinafter Franklin et al., *Intermediate Sanctions*].

6 Most studies rely upon single-level regression models. Jose Pina-Sánchez & Robin Linacre, *Refining the Measurement of Consistency in Sentencing: A Methodological Review*, 44 Int'l J. L. Crime & Just. 68, 78 tbl.1 (2016). For more information on the potential limitations on single-level models, see the methodological Appendix.

for more research on court-level factors in judicial decisionmaking.[7] In the federal system, individual defendants are nested (i.e., clustered) within groups at a higher level, being district courts. It is hypothesized that unique courtroom workgroups within district courts result in sentencing practices that differ across districts. Multilevel modeling, explained further herein, provides the ability to investigate how certain predictor factors are related to upward departures in individual cases while also testing whether the effects of those same factors differ among districts.

The Article proceeds as follows. Section II outlines the federal sentencing guidelines system. It then turns to upward departures specifically to contextualize the many reasons they represent extraordinary decision points worthy of scrutiny. Section III reviews contested issues concerning whether disparities are ever warranted and specifically addresses the challenge of regional disparities. Two theoretical views on disparities are relevant. The focal concerns perspective demonstrates that individual penalties tend to be based on perceptions of the defendant's culpability, the defendant's risk of recidivism, and the practical consequences of the potential punishment. In turn, the courtroom communities' perspective indicates that judges and practitioners in courtroom workgroups develop their own unique traditions and routines, which can explain some variations between courts in sentencing outcomes. Next, a literature review summarizes the results of prior empirical research on federal sentencing practices. The preexisting research was informative to building the statistical models presented herein.

Section IV sets forth an original empirical study of upward departure decisions. The data and variables are explained and the results from the multilevel models on upward departures are provided. In sum, the results demonstrate a statistically significant variance between district courts on upward departure outcomes. In a full model, a host of legal factors (e.g., final offense level, criminal history, offense type), extralegal characteristics (e.g., gender, race/ethnicity, citizenship), and case-processing variables (e.g., custody status) are predictive of upward departure outcomes in individual cases. Yet the influence of most of them varies across district courts, suggesting regional disparities in outcomes. The implications of the findings regarding factors correlated with individual outcomes and regional disparities are discussed in more detail. The results also substantively support the focal concerns and courtroom communities' perspectives. A methodological Appendix attached hereto further demonstrates the empirical benefits of a multilevel regression modeling approach and describes foundational decisions underlying the final results reported in the main text.

II. History and Current Guidelines Practices

This Article reports an original study using a sophisticated empirical modeling strategy to explore decisionmaking in criminal penalties. More specifically, the study is of discretionary upward departure outcomes in the federal sentencing system. A focus on criminal justice research specifically at the federal level is

[7] Rob Tillyer & Richard Hartley, *The Use and Impact of Fast-Track Departures: Exploring Prosecutorial and Judicial Discretion in Federal Immigration Cases*, 62 Crime & Delinq. 1624, 1640 (2016).

meaningful for several key reasons. In contemporary times, federal authorities act as a role model in the administration of justice.

> [The federal government] provides resources, collects and develops best practices, and serves as the communicator and facilitator of these best practices throughout the country. . . . Because state, local, and tribal governments are limited by the need to devote resources to solving problems unique and endemic to their particular jurisdictions, the [f]ederal government plays [an] explicit role[] in advancing public policy to respond to gathering threats.[8]

Congress itself is often perceived as a leader in setting the criminal justice policy agenda for the country.[9] With respect to the federal government influencing sentencing decisions, the Justice Department at times has used funding programs to encourage states to adopt federally-based sentencing practices, such as determinate penalties and sentencing enhancements.[10] In addition, the federal sentencing guideline structure has been a model for the states who have adopted guideline systems.

Still, the federal guidelines are known for their extraordinary complexity[11] and are considered the most detailed[12] and constraining[13] ever developed in the country. The federal guidelines clearly were meant to restrain discretion in sentencing. The complex and detailed nature of the federal Guidelines mean that departures from them may provide particularly significant information about relevant predictors in this type of discretionary decisionmaking.[14] The potential to observe seeming disparities, even possibly implicit discrimination, is therefore informative to those interested in fairness, consistency, and transparency in decisions regarding punishments. Studies on federal sentencing also offer a benefit of representing judicial decisions across the country, thus perhaps making the results more generalizable than would research on a single state or subdivision of a state.

There is another significant way that the federal system has influence on the evolution of criminal justice responses in the country. In part due to what some critics perceive as overcriminalization in Congress' enactment of scores of new

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8 Nat'l Crim. Just. Assoc, The Federal Government's Role in Justice Administration 3 (2005), available at http://www.ncja.org/issues-and-legislation/role-federal-govt-administration-justice/role-federal-govt-administration.

9 Jerold Israel, *Federal Influence in State Cases: Sentencing, Prosecution, and Procedure*, 543 Annals 130, 131 (1996).

10 John F. Pfaff, *Federal Sentencing in the States: Some Thoughts on Federal Grants and State Imprisonment*, 66 Hastings L.J. 1567, 1571 (2015); Lisa L. Miller, *Looking for Post-Modernism in all the Wrong Places*, 41 Brit. J. Criminology 168, 172 (2001).

11 James C. Oleson et al., *The Sentencing Consequences of Federal Pretrial Supervision*, 63 Crime & Delinq. 313, 315 (2017).

12 Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Interjudge Sentencing Disparity*, 90 Criminology 239, 240 (1999) [hereinafter Hofer at al., *Sentencing Guidelines*].

13 Ben Grunwald, *Questioning Blackmun's Thesis: Does Uniformity Sentencing Entail Unfairness*, 49 Law & Soc'y Rev. 499, 500 (2015).

14 Douglas A. Berman, *From Lawlessness to Too Much Law: Exploring the Risk of Disparity from Differences in Defense Counsel under Guidelines Sentencing*, 87 Iowa L. Rev. 435, 445 (2002).

federal criminal laws over the last few decades,[15] the federal government now operates the single largest criminal justice system by inmate count in the United States.[16] Indeed, the federal prison system itself is among the top ten largest by country in the world.[17]

To situate the context of this study on upward departure decisions, a brief summary of the federal guidelines system is offered. Then the discussion outlines the case for why upward departures are noteworthy discretionary decisions that offer a valuable subject for research.

A. Primer on Federal Guidelines

At the turn of the twentieth century, the federal sentencing system represented an indeterminate structure that awarded federal district judges broad discretion to determine criminal penalties in individual cases.[18] By the 1970s, however, critics objected. Complainants alleged that the indeterminate structure led to unappealing results, such as too lenient sentences for certain offenses, disparities in sentences among similarly-situated offenders, and discrimination against minority defendants.[19] In its place, the country's politicians across the country embarked in the 1980s on a mission to enact more determinate policies.[20]

Congress was at the forefront of the country's reform movement in the latter part of the twentieth century by adopting legislation which mandated more regimented sentencing practices. The Sentencing Reform Act of 1984 created a presumptive sentencing system to be engineered under the auspices of a newly formed United States Sentencing Commission (the "Commission" or "Sentencing Commission").[21] A dramatic and holistic reform ordered the Commission develop a determinate system of sentencing guidelines ("Sentencing Guidelines" or "Guidelines") to systematize sentencing outcomes principally by restraining judicial discretion. "Proponents of this package hoped that it would end judge-to-judge and region-to-region disparities, promote candor in sentencing, and provide judges with relative values in sentences."[22]

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15 Rachel E. Barkow, *Federalism and Criminal Law: What the Feds can Learn from the States*, 109 Mich. L. Rev. 519, 524-27 (2011).

16 Nathan James, Cong. Res. Serv., R42937, The Federal Prison Population Buildup: Options for Congress 1 (2016).

17 U.S. Sent'g Comm'n, Quick Facts: Federal Offenders in Prison 1 (2015) (noting 210,567 inmates in federal prison as of February 2015, with 185,644 of them serving a federal sentence). The 185,644 figure just given represents the nine largest in the world following China, Russia, Brazil, India, Thailand, Mexico, Iran, and Turkey. *See* Int'l Centre for Prison Stud., World Prison Brief http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.

18 Ilene H. Nagel, *Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminololgy 883, 893 (1990).

19 Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L. Rev. 223, 227-28 (1993).

20 Michael Tonry, *Sentencing in America, 1975–2025*, *in* 42 Crime and Justice in America, 1975–2025, at 141, 159–60 (Michael Tonry ed., 2013).

21 Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211-300, 98 Stat. 1837, 1987-2040.

22 Frank H. Easterbrook, *Introduction*, 26 Am. Crim. L. Rev. 1813, 1813 (1989).

An unforeseen and significant development recast how the Guidelines were to operate. Despite Congress' intent for a presumptive Guidelines system, the United States Supreme Court rendered the Guidelines advisory in nature. In the seminal case of *United States v. Booker* in 2005, the Court found that the system operated in an unconstitutional manner because judges, rather than juries, were the arbiters of facts that increased sentence length.[23] Bestowing advisory status was the Supreme Court's remedial fix to avoid overturning the entire Guidelines system.[24]

The *Booker* fix did not, however, return to the judiciary the wide discretion that existed pre-Guidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges remain significantly circumscribed by the Commission's Guidelines and policies.[25]

At their heart, the Guidelines provide for a series of calculations in order to determine the defendant's offense severity level and criminal history score. With these two numbers in hand, the district judge consults a single Guidelines grid to obtain the recommended prison sentence.[26] The grid is not the end of the decisionmaking process though. Once the Guidelines-recommended penalty for the individual defendant is determined, the judge considers whether any departure provision contained in the Guidelines may apply.[27] Guidelines-based departures may be downward or upward, meaning either that they would justify a sentence below or above, respectively, from the recommendation. The Guidelines contain a number of provisions which the Commission staff acknowledges are circumstances that may not be adequately covered in the offense severity and criminal history provisions. Two of the downward departures expressly require the affirmative motion of the government to justify them.[28]

The Guidelines expressly provide for several types of upward departures, all of which are discretionary to the judge and do not require the prosecutor's request.[29] An example given for an approved upward departure (and one that is relevant to the results of the study provided herein) addresses the inadequacy of the computed criminal history category to properly reflect the defendant's deviant past.[30] Reasons specified for why the judge may find the official criminal history category inadequate include the existence of prior similar conduct not resulting in a criminal conviction or when a prior sentence was not officially computed in the criminal history calculation (e.g., the prior sentence was too dated and thus was excluded from the official calculation).[31]

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23 The Court ruled that such judicial factfinding violated the Sixth Amendment. 543 U.S. 220, 245 (2005).

24 543 U.S. at 249.

25 Peugh v. United States, 186 L. Ed. 2d 84, 95 (2013).

26 U.S. Sentencing Guideline Manual ch. 5 pt. A, sent'g tbl. (2015).

27 *Id*. at § 1B1.1(b).

28 These are substantial assistance to authorities in investigating another potential offender (§ 5K1.1) and fast-track departures as a docket-clearing option (§ 5K3.1).

29 Technically, there are two types of upwardly varying sentences in the federal system. A "departure" is a term used in the Guidelines which refers to a sentence outside the recommended range from the sentencing grid but permitted by the Guidelines rules. United States v. Jeffers, 2015 U.S. Dist. LEXIS 132055, at *21-22 (N.D. Iowa 2015). A "variance" is a non-Guidelines sentence invoked to achieve statutory sentencing goals. *Id.* The difference between them is not of consequence here and the Article uses "upward departure" generally to signify both of them.

30 U.S. Sentencing Guideline Manual § 4A1.3.

31 *Id*. at § 4A1.3.

Per the statutory framework and Guidelines policy, a judge may also depart for reasons not included in the Guidelines if "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines."[32] Judges may reject the recommendation for other reasons, including, according to the Supreme Court in a case following *Booker*, based on a direct policy dispute with a relevant Guideline or Commission policy.[33] Nevertheless, the Guidelines preclude consideration of the defendant's race, sex, national origin, and socioeconomic status.[34]

In the end, a district judge in the individual case must determine a penalty that is reasonable and parsimonious, one that comprises "a sentence sufficient, but not greater than necessary."[35] The penultimate step, then, is for the judge to reflect upon whether a within-Guidelines or, alternatively, a non-Guidelines penalty is proper.[36] Then she pronounces the sentence.

The existence of greater discretion afforded by *Booker* have led empirical researchers to study how discretion is used and whether differences in sentencing outcomes across judges and districts may be a repercussion.[37] The study of potential disparities herein focuses on upward departure decisions for the reasons that are outlined next.

B. The Significance of Upward Departures

It is curious that there appear to be no other empirical studies comprehensively concentrating on upward departures in the federal system. Departures upward are extraordinary and consequential decisions for many reasons. First, an upward departure obviously is meant to increase the severity of the penalty. Prior studies in federal sentencing confirm such a result, and they demonstrate that the consequences are significant. Regression studies have found that the decision to upwardly depart multiplied the odds of a sentence involving incarceration by as much as 12 times compared to a sentence without an upward departure.[38] Regression results have also

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32 18 U.S.C. § 3553(b) (2000); U.S. Sentencing Guideline Manual § 5K2.0 (2015).

33 Kimbrough v. United States, 552 U.S. 85, 108-11 (2007).

34 U.S. Sentencing Guideline Manual §4H1.10 (2015).

35 18 U.S.C. § 3553(a). The legislation specifies that district judges consider the following factors in determining a reasonable sentence in the individual case: (a) the recommended punishment range set by the sentencing guidelines and the Commission's policy statements; (b) the nature and circumstances of the offense; (c) the history and characteristics of the defendant; (d) the need for the sentence imposed considering the seriousness of the offense, retribution, deterrence, protecting the public, and the offender's rehabilitative needs; and (e) the need to avoid unwarranted sentencing disparities among similarly-situated offenders. *Id*.

36 Gall v. United States, 552 U.S. 38, 50 (2007).

37 William Rhodes et al., Federal Sentencing Disparity: 2005-2012, at *6 (2015).

38 Brian D. Johnson & Sara Betsinger, *Punishing the "Model Minority": Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 Criminology 1045, 1067 tbl. 3 (2009). *See also* Travis W. Franklin, *Sentencing Outcomes in U.S. District Courts: Can Offenders' Educational Attainment Guard against Prevalent Criminal Stereotypes*, 36 Crime & Delinq. 137, 151 tbl. 2 (2017) [hereinafter Franklin, *Educational Attainment*] (finding upward departures increased the odds of incarceration by 11 times and increased sentence length by 83%); Travis W. Franklin, *Sentencing Native Americans*

indicated that an upward departure as much as doubles the length of the resulting prison sentence.[39]

Second, to the extent that upward departures naturally leads to a greater number of defendants being incarcerated and for longer periods, these decisions worsen the federal system's prison overpopulation problem. Since 1980, the federal prison population has grown 750%.[40] As a result, the federal prison system is challenged by the resulting increases in costs of imprisonment and is dangerously overcrowded.[41] An Urban Institute report has tagged longer sentences as contributing to over half of the growth in the federal prison system.[42] Upward departure outcomes—whether considered legitimate or not—exacerbate these tensions.

Third, upward departures uniquely signal that judges may be finding gaps in Guidelines policies and calculations, despite the Commission's now decades of experience with studying sentencing practices and making relevant policy adjustments as needed. When a judge determines whether to depart upward from the Guidelines recommendation, it likely represents a compromise between uniformity and proportionality. Whereas downward departures are often for reasons other than proportionality concerns (for example, the repeated use of fast-track departures and substantial assistance departures are mainly for efficient case-processing purposes), upward departures are more attuned to calibrating the penalty to the defendant's culpability and harm. Upward departures are even more surprising as many judges, practitioners, and researchers already assess the Guidelines as producing excessively harsh sentence recommendations as a general rule.[43] Thus, upward departures appear to be exceptions to the rule about the sufficiency (or tendency toward excessiveness) of Guidelines-based proportionality judgments.

Fourth, because upward departures are relatively rare, it is therefore even more symbolic when one is issued in an individual case.[44] An upward departure constitutes individualized sentencing since it is an ad hoc, discretionary decision. The rare

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in US Federal Courts: An Examination of Disparity, 30 Just. Q. 310, 326 tbl. 2 (2013) (finding upward departures increased the odds of incarceration by a factor of seven).

39 Tillyer & Hartley, *supra* note 7, at 1635 tbl. 2 (obtained by anti-logging the coefficient of .71); Jeffery Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After* Booker *and* Gall*?*, 23 Fed. Sent'g Rep. 333, 336 tbl. 2 (2011); Ben Feldmeyer & Jeffery T. Ulmer, *Racial/Ethnic Threat and Federal Sentencing*, 48 J. Res. Crime & Delinq. 238, 252 tbl. 3 (2011); Celesta A. Albonetti & Robert D. Baller, *Sentencing in Federal Drug Trafficking/Manufacturing Cases: A Multilevel Analysis of Extra-Legal Defendant Characteristics, Guidelines Departures, and Continuity of Culture*, 14 J. Gender Race & Just. 41, 68 tbl. 3 (2010) (studying drug trafficking cases).

40 Samuel A. Taxy, Drivers of Growth in the Federal Prison Population 1 (2015), available at http://www.urban.org/research/publication/drivers-growth-federal-prison-population.

41 *See generally* Nathan James, Cong. Res. Serv., R42937, The Federal Prison Population Buildup: Options for Congress (2016).

42 Kamala Mallik-Kane et al., Examining Growth in the Federal Prison Population, 1998 to 2010, at *10 (2012), available at http://www.urban.org/research/publication/examining-growth-federal-prison-population-1998-2010.

43 Byungbae Kim et al., *The Impact of* United States v. Booker *and* Gall/Kimbrough v. United States *on Sentence Severity: Assessing Social Context and Judicial Discretion*, 62 Crime & Delinq. 1072, 1075 (2016); Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 Criminology & Pub. Pol'y 535, 538 (2014).

44 Upward departures occur in three percent of cases. Data obtained from the Commission's annual sourcebooks.

upward departure may, then, be acutely felt as unforeseeable and unfair, perhaps even arbitrary. These perceptions challenge the integrity of the system. Notably, a judge issuing a sentence that constitutes an upward departure does not do so by mistake or in ignorance. The Commission requires district courts to complete a Statement of Reasons form for each sentence which includes several fields where an upward departure box must be checked (when applicable) and further justified.[45]

An upward departure is also a particularly risky choice. In part because of its rarity and in part because of the substantive due process rights afforded criminal defendants, an upward departure practically invites the defendant to appeal. On review, the upward departure decision may well be overturned, particularly if the appellate court finds that the district judge did not provide sufficient reasons for the higher sentence.[46]

Fifth, upward departures are surprising, too, as they violate the premise underlying the cognitive bias of anchoring.[47] Anchoring effects refer to a person's tendency when making numbers-based judgments to rely on numeric reference points.[48] Anchoring is an example of a psychological heuristic in providing a shortcut to more efficient decisionmaking by tuning the person's thought process toward the given anchor number.[49] The Guidelines are generally considered to be substantive anchors for sentencing decisions.[50] An upward departure, then, requires the particular judge to reject the anchor and thereby lose the value of the cognitive shortcut. A discretionary decision to depart imposes a further resource cost upon the judge issuing it because of the burden to justify it in writing in the Statement of Reasons and in a way that distinguishes the case from the heartland already covered by the Guidelines.[51]

Sixth, it is widely recognized that departure decisions as a general rule (upward and downward) are significant, if not primary, sources of perceived disparities in

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45 *See generally* Jelani Jefferson Exum & Paul J. Hofer, *The Evolution of the Statement of Reasons Form*, 28 Fed. Sent'g Rep. 169 (2016).

46 *See e.g.*, United States v. Howard, 773 F.3d 519 (4th Cir. 2014) (vacating upward departure as district court's judgment about defendant's criminal past insufficient to support it); United States v. Espinoza, 550 Fed. Appx. 690 (11th Cir. 2013) (vacating upward departure as district court did not adequately justify it); United States v. Conroy, 567 F.3d 174 (5th Cir. 2009) (vacating upward departure as district judge erred in analyzing whether the defendant's conduct met the Guidelines-based departure provision); United States v. Dillon, 355 Fed. Appx. 732 (4th Cir. 2009) (remanding sentence a second time as sentencing judge did not adequately explain its justification); United States v. Ofray-Campos, 534 F.3d 1 (1st Cir. 2008) (reversing upward variance where reasons given not compelling enough for an extraordinary variance).

47 Silvio Aldrovandia et al., *Sentencing, Severity, and Social Norms: A Rank-Based Model of Contextual Influence on Judgments of Crimes and Punishments*, 144 Acta Pschyologica 538, 546 (2013).

48 Jeffrey J. Rachlinski et al., *Can Judges Make Reliable Numerical Judgments: Distorted Damages and Skewed Sentences*, 90 Ind. L.J. 695, 695 (2015).

49 Bettina von Helversen & Jörg Rieskamp, *Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment*, 15 J. Experimental Psychol. 375, 379 (2009).

50 *See generally* Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 Cardozo L. Rev. 59 (2016) [hereinafter Hamilton, *Extreme Sentences*] (reviewing literature on anchoring effects, providing an empirical study on anchoring effects of Guidelines recommendations on sentencing outcomes, and concluding anchoring exists in federal sentencing practices).

51 *See* Andrew W. Nutting, *The* Booker *Decision and Discrimination in Federal Criminal Sentences*, 51 Econ. Inquiry 637, 641 (2013).

sentencing.[52] If judges depart from Guidelines recommendations too often or for inappropriate reasons, they may be thwarting the main purpose of the implementation of the Guidelines system of reducing unwarranted disparities.[53] Upward departures, unlike some downward departures, do not require a prosecutorial motion, and thereby provide a mechanism for which judicial discretion unequivocally impacts sentencing severity. Plus, when such discretion is based on extralegal (i.e., not legally or formally permissible) reasons, the resulting judgments may even implicate implicit race, gender, or class discrimination. Importantly, researchers have previously tied extralegal factors to decisions that deviate from the Guidelines.[54]

This suggested relationship between upward departures and discretion is highlighted by the likely impact of the *Booker* decision (granting judges greater discretionary ability) on the rate of upward departures. The year after *Booker*, the rate of upward departures doubled compared to the annual rate of upward departures in the decade preceding the decision.[55] The rate of upward departures is now (i.e., fiscal years 2014-2015) at three times the pre-*Booker* rate.[56] Since the *Booker* decision (through the end of fiscal year 2015), federal judges have upwardly departed from Guidelines' recommendations in over 15,000 cases.[57] As another empirical verification of the role of discretion (possibly even discrimination), a substantial majority of these upward departures after *Booker*, as reported by judges themselves in the Statement of Reasons, are based on grounds other than the upward departure policies explicitly permitted by the Guidelines.[58]

Thus far, it has been argued that upward departures in federal sentencing are worthy of further analysis. The study was also led by relevant normative and theoretical foundations and informed by the results of previous studies.

III. Normative, Theoretical, and Research Consideration

The issue of disparities in sentencing practices is not a simple concept and not all agree on either whether it is necessarily a bad result. Challenges presented by potential disparities in penalties are discussed next. Then the Section reviews two major

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52 Jawjeong Wu & Cassia Spohn, *Interdistrict Disparity in Sentencing in Three U.S. District Courts*, 56 Crime & Delinq. 290, 296-97 (2010); Brian D. Johnson, Jeffery T. Ulmer, & John H. Kramer, *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 Criminology 737, 740 (2008) [hereinafter Johnson et al., *Social Context*]; Hofer at al., *Sentencing Guidelines*, *supra* note 12, at 240.

53 Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 303 (1996).

54 Jeffery T. Ulmer et al., *Racial Disparity in the Wake of the* Booker/Fanfan *Decision: An Alternative Analysis to the USSC's 2010 Report*, 10 Criminology & Pub. Pol'y 1077, 1080 (2011); Johnson et al., *Social Context*, *supra* note 52, at 740.

55 Data analyses done by author using the Commission's data files from fiscal years 1999-2015 and the Commission's annual Sourcebooks for fiscal years 1989-2015.

56 U.S. Sentencing Commission, 2015 Sourcebook tbl. N; 2008 Sourcebook tbl. N; 2006 Sourcebook tbl. N.

57 Results from the author's frequency distribution analysis run of the Commission's datasets.

58 The conclusion is derived from the Commission's annual Sourcebooks from fiscal years 2008-2015.

theoretical viewpoints relevant to the research herein, which are referred to as the focal concerns perspective and the courtroom workgroup perspective. Following that is a concise empirical literature review of relevant studies of federal sentencing practices.

A. Disparity Issues

The Sentencing Commission clearly values national uniformity in case-processing and outcomes.[59] While the tenets of federalism philosophically permit criminal laws to vary by state, federal criminal law is expected to provide a single set of policies regarding the official reaction to offenders who commit crimes that are of national interest.[60] Guidelines are expressly meant to provide a normative function.[61] Indeed, the federal Guidelines have over their thirty year existence become embedded in the legal, political, and organizational cultures of federal court communities.[62]

The Commission is not the only institution that works to normalize federal sentencing practices across judicial districts. The U.S. Department of Justice and the Federal Judicial Center are also centralized authorities providing educational opportunities to socialize judges into the federal government's sentencing policies.[63] Offering frequent training in the form of written primers, face-to-face instructional classes, and web-based videos[64] are necessary because of the complexity of the Guidelines. The 2015 Guidelines Manual is just shy of 600 pages,[65] with hundreds, if not thousands, of rules, depending on how one parses the rule counting scheme. The unavoidable purpose for such complexity is to try to leave as little uncovered as possible and thus to correct for potential lapses. Consistent with such intent, the Commission asserts that the primary goal of the sentencing Guidelines was to "eliminate" (i.e., implying not just reduce) unwarranted sentencing disparities.[66]

Though not all stakeholders would concur, it is not always clear what disparity means and whether it is necessarily a bad thing. According to Black's Law Dictionary, disparity means "inequality" and "a difference in quantity or quality between two or more things."[67] The first meaning (inequality) tends to have a negative connotation, at least in criminal justice circumstances. The second (oriented around differences)

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59 U.S. Sentencing Guideline Manual ch. I, Pt. A, at 1.3 (2015) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."); U.S. Sentencing Commission, 2014 Annual Report A-3 (2014).

60 Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 Stan. L. Rev. 137, 137 (2005).

61 Rhodes et al., *supra* note 37, at 23 n. 19.

62 Ulmer & Light, *supra* note 39, at 340.

63 Jeffery T. Ulmer, *The Localized Uses of Federal Sentencing Guidelines in Four U.S. District Courts: Evidence of Processual Order*, 28 Symbolic Interaction 255, 256-57 (2005) [hereinafter Ulmer, *Localized Uses*].

64 For a glimpse into the various instructional offerings, see the Commission's training website: http://www.ussc.gov/topic/training.

65 *See generally* U.S. Sentencing Guideline Manual (2015).

66 U.S. Sent'g Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of how Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform 79 (2004) [hereinafter Fifteen Years].

67 Black's Law Dictionary (10th ed. 2014).

does not necessarily carry an adverse inference. Such competing alternatives to the implication of using the term disparity similarly complicates the discussion in criminal justice circles.

When observers discuss disparity in sentencing outcomes, it is often based on identifying like individuals who commit like offenses.[68] Disparity in this sense might be viewed as the flipside of uniformity in which the posited individuals received similar punishments. An obvious critique of these philosophical notions is that there is no objective criteria for determining what exactly constitutes *like* individuals or *like* offenses. With the complexity of human nature and conduct, no individual or deed can truly be identical.

In any event, the Guidelines—despite *Booker*—remain the lodestone of federal sentencing practices.[69] Still, many sources are again concerned with perceived disparities in actual sentencing decisions.[70] What do they tend to consider is wrong with disparities in punishment? Rationales are that differences in punishment for like offenses erodes the public confidence in an expectedly legal, objective, and rational system,[71] and that they bring gratuitous uncertainty and unfairness[72] for defendants, victims, the government, and the public.

The posited problems with disparities are particularly acute when judges base sentences on extralegal factors that the Guidelines were intended to more proactively forbid.[73] Some argue that empirical evidence of differential sentencing practices based on demographic factors is obviously indicative of illegal discrimination.[74] Their issue is not just with overtly discriminatory practices. The *Booker* decision increased ambiguity in the exact reasons for district court decisions and thereby multiplied the potential for implicit discrimination, meaning unconscious and unintentional discrimination in individual cases.[75] Thus, implicit discrimination might arguably be present when studies show that females and whites, for instance, routinely receive lesser punishments than males and blacks, respectively, after controlling for relevant legal factors.[76] Variations in sentencing practices may be signs not only of inequality and injustice, they also undermine the deterrence value of predictable and firm sentencing policies.[77]

Nonetheless, it is still reasonable to acknowledge that not all variances from Guidelines recommendations constitute disparities, particularly in the negative sense of the term. Prior statisticians reviewing federal sentencing data rightly observe that a non-Guidelines-compliant sentence is not necessarily illegal considering the discretion that judges now lawfully maintain to deviate per *Booker*.[78] Further, as

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68 Rhodes et al., *supra* note 37, at 7.

69 U.S. Sent'g Comm'n, Federal Sentencing: The Basics 3 (2015).

70 U.S. Sent'g Comm'n, 2012 Report to the Congress: Continuing Impact of United States v. Booker on Federal Sentencing F-9 (2012) (citing sources).

71 Mandeep K. Dhami et al., *Quasirational Models of Sentencing*, 4 J. Applied Res. Memory & Cognition 239, 242 (2015).

72 Fifteen Years, *supra* note 66, at 38.

73 J.C. Oleson, *Blowing out the Candles: A Few Thoughts on the Twenty-Fifth Anniversary of the Sentencing Reform Act of 1984*, 45 Rich. L. Rev. 693, 755 (2011).

74 Pina-Sánchez & Linacre, *supra* note 6, at 72; Hofer at al., *Sentencing Guidelines*, *supra* note 12, at 242.

75 Nutting, *supra* note 51, at 638-39.

76 *Id*. at 645.

77 Bibas, *supra* note 60, at 137.

78 Rhodes et al., *supra* note 37, at 18.

an appellate judge reasonably stated, "while a strictly code-based method of legal problem-solving might work to achieve predictability and some sort of uniformity, it does not always work to achieve justice."[79] The inability or unwillingness of a judge to depart from the Guidelines may inequitably mean there is an inordinate amount of rigidity in sentencing requirements.[80] Hence, a reciprocal danger of unwarranted disparity to notions of justice is unwarranted uniformity.

There may well be something extraordinary in a particular case where a judge's discretionary ability could work to better serve justice for all parties.[81] Some commentators thus point out the desirability of individualizing penalties.[82] Likely, balancing is the key. There is some value in providing judges some discretionary ability in determining penalties to account for exceptional circumstances, even if there is also value in channeling or controlling that discretion to avoid abuses.[83]

In the end, this paper does not take the concrete position that even sophisticated statistical analyses of sentencing outcomes can prove that every upward departure represents disparity, at least to the extent the term holds a negative connotation, much less a discriminatory decision. Nor does the paper assign condemnatory blame to district judges for differences in sentencing for seemingly comparable offenses or offenders. As with any study of human behavior, no dataset can possibly account for all aspects of criminal conduct or of decisionmaking. Thus, different judges may sentence seemingly similar offenders to incomparable punishments for legitimate reasons that are simply not captured in the data.

Further, the source of any unwarranted disparity may arise from other actors anyway, such as based on the (legitimate or illegitimate) practices and decisions of other actors in the criminal justice process chain.[84] Research has shown that prosecutors can finesse facts in their case filings and to manipulate the offense(s) charged and/or the specific offense characteristics on which the Guidelines computation is based.[85] Contributions to differences in sentencing outcomes may also derive from inconsistent policies in policing or in the preparation of presentence reports by probation officers.[86] Disparities in outcomes for otherwise seemingly similar offenders may likewise depend upon the diverse competencies of defense counsel with respect to their grasp of the complex Guidelines system.[87]

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79 Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 Fla. L. Rev. 905, 918 (2007).

80 Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 Minn. L. Rev. 299, 303 (1996).

81 Paul J. Hofer, United States v. Booker *as a Natural Experiment: Using Empirical Research to Inform the Federal Sentencing Policy Debate*, 6 Criminology & Pub. Pol'y 433, 438-39 (2007).

82 Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Penn. L. Rev. 1631, 1648 (2012); W.H. Townsend, *The Punishment of Crime*, 10 J. Am. Inst. Crime & Criminology 533, 535 (1920) ("Individualization is the process of adjusting a penalty to the character of a criminal. The criterion of judgment is threefold, including the crime, social conditions, and the criminal.").

83 Stuart S. Nagel, *Discretion in the Criminal Justice System: Analyzing, Channeling, Reducing and Controlling It*, 31 Emory L.J. 603, 609 (1982).

84 Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 Criminology 514, 517 (2014).

85 Rhodes et al., *supra* note 37, at 7.

86 Fifteen Years, *supra* note 66, at 84.

87 Douglas A. Berman, *From Lawlessness to Too Much Law*, 87 Iowa L. Rev. 435, 445 (2002).

Despite the choice not to assume all differences in outcomes establish unwarranted disparities, the observation that "some *patterns* in those differences are suggestive of disparity"[88] in its more negative sense appears reasonable. What the study herein can do is to parse the patterns of differences in the outcomes of upward departures (versus not) that might imply these disparities.

B. Regional Differences

Another disparity matter needs to be addressed considering the study contained herein will focus on it: regional variations in sentencing outcomes. The issue here is where sentencing outcomes may be uniformly meted out within a region but vary from those in other regions. Regional disparities are viewed by some observers in unfavorable terms. The Sentencing Commission officially asserts that the federal Guidelines were meant to control local variations in sentencing practices, such that consistent practices were intended to be enforced nationwide when prosecuting federal crimes.[89] A few commentators agree that any regional disparities for local concerns are necessarily extralegal in nature and thus indefensible and that, because they are *extra*legal, their sheer existence nullifies a major purpose of the Guidelines.[90]

Before reviewing potential sources of regional differences in federal sentencing outcomes, two limitations in the study's design should be noted here. Federal district courts are comprised of more than one district judge.[91] As each sentencing decision is the product of a single judge, a preferable method would be to study interjudge outcomes. However, the Sentencing Commission deletes judge identifiers from its datasets such that it was not possible to distinguish between individual judges within districts. Nonetheless, as judges within the same district may share more correlated characteristics than with judges from other district courts and as districts are regionally oriented, investigating district level disparities remains important. The datasets likewise do not include identifiers for probation officers or the recommended sentences listed in their authored presentencing reports.

There exist several potential sources of local variations in federal sentencing outcomes. One is that even though federal criminal law provides a single body of statutes covering the country equally,[92] federal district courts still are situated in fixed, single locales. Districts, thus, represent regions. Federal law may have nationwide coverage but the commission of federal crimes is not equally spread out across the country. Nor will victims of federal crimes in different areas necessarily experience their losses the same. A particular region might become a hotspot for gun violence related to drug trafficking while the citizens of another feel more acutely

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88 Rhodes et al., *supra* note 37, at 18 (emphasis in original).

89 Fifteen Years, *supra* note 66, at 90.

90 Paula M. Kautt, *Location, Location, Location: Interdistrict and Intercircuit Variation in Sentencing Outcomes for Federal Drug-Trafficking Offenses*, 19 Just. Q. 633, 635 (2002); Hofer at al., *Sentencing Guidelines*, *supra* note 12, at 243.

91 *See generally* U.S. Courts, Chronological History of Authorized Judgeships in U.S. District Courts (2015), available at http://www.uscourts.gov/judges-judgeships/authorized-judgeships.

92 This reference excludes criminal laws solely focused on the District of Columbia, native American lands, and federal property.

the negative impact of financial fraud. There may be some value in allowing judges to equitably adapt national policy to more localized concerns such as these, albeit in moderation.[93] Local variations may be proper, for instance, to swiftly and harshly respond to the area's particular crime problem, such as a district court increasing the severity of punishment for weapons offenses as a deterrent device to try to counter a rise in local gun violence. Such a strategy would obviously differentiate that court's sentencing statistics for firearm offenses.

Another possibility for regional variations is if there is local hostility to a national policy concerning a particular crime or the Commission's assessment of the severity of a crime. Observers may debate the propriety of a district judge's ability to void a centralized policy. Such a rationale may be viewed reasonably in culturally sensitive terms to accommodate local priorities or, instead, as an inappropriate usurpation of the lawful powers of federal policymakers to make national policy decisions.[94]

Other regional variations amongst federal courts in sentencing may be more or less benign, simply reflecting localized socialization in what are called courtroom workgroups. A cultural consensus unique to a courtroom workgroup may mean consistency in sentencing within that workgroup, but whose outcomes are uncorrelated (i.e., disparate) with outcomes generated by other courtrooms. This idea will be discussed further in the next Section that addresses two main theoretical foundations for between-court differences in criminal justice outcomes: the focal concerns perspective and the consequences of culturalized practices through the development of courtroom communities. For now, it is simply noted that the Sentencing Commission avers that regional variation in sentencing outcomes due to differing political climates or court cultures constitutes unwarranted disparity.[95]

C. Theoretical Foundations of Sentencing Decisions

The focal concerns perspective is now a popular theoretical framework for understanding sentencing outcomes.[96] The theory posits that decisions about penalties center on the authority's situational assessment concerning three focal concerns: (1) the defendant's culpability, (2) the defendant's future dangerousness, and (3) the practical consequences of the decision to the defendant and the community.[97]

The Guidelines certainly address the focal concerns in their formalized rules regarding assessments of blameworthiness (e.g., offense level representing severity, offense type), future dangerousness (e.g., criminal history, acceptance of responsibility), and consequences of the penalty (e.g., substantial assistance reductions to conserve prosecutorial resources, fast-track departures to permit more efficient case processing). Yet, considering human nature cannot always be entirely automated and the potential for highly-educated and experienced federal judges to believe in their own qualities of judgment, the Guidelines likely do not entirely constrain discretion in considering the focal concerns.

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93 Bibas, *supra* note 60, at 138.

94 *Id*. at 140.

95 Fifteen Years, *supra* note 66, at 80.

96 Kutateladze et al., *supra* note 84, at 518.

97 Jeffery T. Ulmer, James Eisenstein, & Brian D. Johnson*, Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 Just. Q. 560, 565-66 (2010).

Upward departures may rely more heavily on discretionary thought in that judges issuing them may be considering ideals or values not explicitly contained in the Guidelines rules. In addition, departure decisions beyond those expressed in the Guidelines presumably represent gaps in their set of rules. Thus, it is expected from the focal concerns perspective that there will be disparities in upward departure outcomes because of differences in judges' situational assessment of the focal concerns in individual cases, the extent of their agreement with the Guidelines-driven proportionality judgment, and their relative concern about the practical consequences of the sentence.

The second theoretical perspective popular in sentencing research regards community courtroom cultures. "Court communities are distinct, localized social worlds with their own relationship networks, organizational culture, political arrangements, and the like. These localized social worlds, with their organizational cultures and political realities, shape formal and informal case processing and sentencing norms."[98] Prior research consistently indicates that the type of sentence issued (e.g., probation versus imprisonment), the length of supervision, and the reasons for the particular penalty depend in part on the jurisdiction in which the defendant is sentenced because of localized differences in cultural, political, and social contexts.[99] Contextual variations in these court communities may result from the "participants' shared workplace and interdependent working relations between key sponsoring agencies (prosecutor's office, bench, defense bar)."[100] The courtroom community workgroup likely shares common experiences, and works together to develop normative practices to reduce uncertainty and serve a communal goal of efficient case processing.[101]

Empirical researchers tend to assume there exists little interdistrict variation in the federal system, specifically, because of the uniform set of laws and policies provided by federal statutes and the sentencing Guidelines.[102] As a result, interdistrict variations in penalties at the federal level are understudied simply because of the presumption of little variance.[103] This assumption is likely invalid as other observers contend that federal courts do not necessarily act with uniformity.

> We view the federal district court system not as a singular national legal structure with hierarchically arranged and geographically dispersed subunits, but rather as a semi-autonomous set of systems governed by the same formal rules, states, and procedural policies, while also embedded in localized legal cultures that are themselves shaped by regionally specific historical contingencies and norms.[104]

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98 Jeffery T. Ulmer & Mindy S. Bradley, *Variations in Trial Penalties among Serious Violent Offense*s, 44 Criminology 631, 641 (2006).

99 Robert R. Weidner et al., *The Impact of Contextual Factors on the Decision to Imprison in Large Urban Jurisdictions: A Multilevel Analysis*, 51 Crime & Delinq. 400, 418 (2005).

100 Ulmer & Bradley, *supra* note 98, at 641.

101 Brian D. Johnson & Stephanie M. Dipietro, *The Power of Diversion: Intermediate Sanctions and Sentencing Disparity Under Presumptive Guidelines*, 50 Criminology 811, 819 (2012); Patricia D. Breen, *The Trial Penalty and Jury Sentencing: A Study of Air Force Courts-Martial*, 8 J. Empirical Legal Stud. 206, 213 (2011).

102 Wu & Spohn, *supra* note 52, at 291-92.

103 Johnson et al., *Social Context*, *supra* note 52, at 740.

104 Mona Lynch & Marisa Omori, *Legal Change and Sentencing Norms in the Wake of* Booker: *The Impact of Time and Place on Drug Trafficking Cases in Federal Court,* 48 Law & Soc'y Rev. 411, 412 (2014).

Even though federal district courts operate at the national level, the practitioners within them are often plucked from their own locales. Idiosyncratic local practices within district court communities can impact federal sentencing as judges and prosecutors are often chosen from within the state in which the district court resides; plus, defense counsel and probation staff tend to have previously resided in or near the districts in which they become employed.[105] The Sentencing Commission does not discount the possibility of localized cultures. The agency has called for more lively research on geographic variations in sentencing practices and outcomes.[106] This Article responds to this call, too. The study herein was informed, as well, by previous empirical studies as to the most likely factors to consider in explaining federal sentencing outcomes.

D. Literature Review of Federal Sentencing Practices

Criminologists have aptly recognized that "offenders are sanctioned partially for what they have done (offense characteristics, criminal history), for who they are (race/ethnicity, age, gender) and also for what they may fail to do during the punishment process (plead guilty or express remorse)."[107] Researchers commonly refer to these considerations as representing legal factors, extralegal factors, and case-processing factors. They are consistent with the focal concerns perspective regarding culpability, risk, and external consequences to the punishment. Prior research on federal sentencing outcomes has tended to corroborate these sentiments. The United States Sentencing Commission undertakes a laudable effort to make available its rich datasets to researchers. This sub-section will summarize results from prior empirical studies on federal penalties which have utilized Commission datasets. The results provided necessary information on which variables this study tested as likely to be significant predictors of sentencing outcomes.

1. Significant Predictors of Sentencing Outcomes

As for legal factors, prior research has confirmed that primary predictors of federal sentencing outcomes are offense seriousness, criminal history,[108] and crime type.[109] As might be expected, multiple counts of conviction[110] and the application of a

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105 Michael Tonry, *Federal Sentencing "Reform" Since 1984: The Awful as Enemy of the Good*, 44 Crime & Just. 99, 124 (2015).

106 Fifteen Years, *supra* note 66, at 112.

107 Ronald S. Everett & Roger A. Wotkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. Quantitative Criminology 189, 208 (2002).

108 *E.g.*, Oleson et al., *supra* note 11, at 323 tbl. 2; Rob Tillyer et al., *Differential Treatment of Female Defendants: Does Criminal History Moderate the Effect of Gender on Sentence Length in Federal Narcotics Cases*, 42 Crim. Just. & Behav. 703, 705 (2015) [hereinafter Tillyer et al., *Gender*] (citing studies); Jeffery T. Ulmer et al., *Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation*, 27 Just. Q. 560, 576 tbl. 2 (2010) [hereinafter Ulmer et al., *Trial Penalties*].

109 *E.g.*, Franklin, *Educational Attainment*, *supra* note 38, at 151 tbl. 2; Kim et al., *supra* note 43, at tbl. 2; Johnson et al., *Social Context supra* note 52, at 761 tbl. 5.

110 *E.g.*, Jill K. Doerner & Stephen Demuth, *Gender and Sentencing in the Federal Courts: Are Women Treated More Leniently*, 25 Crim. Just. Pol'y Rev. 242, 255 tbl. 2 (2014);

mandatory minimum sentence are associated with longer federal sentences.[111] In addition, official credit in the form of a reduction in offense levels for the defendant's acceptance of responsibility reduces sentence length in statistical models.[112]

Much research has found that demographic characteristics, which are generally considered to be extralegal factors for punishment purposes, are still correlated with sentence length. As for race and ethnicity, multiple studies of federal sentencing show that whites receive sentences of shorter length than blacks[113] and Hispanics even when controlling for various factors.[114] Several other projects find that the differences demonstrate unassailable racial disparities in federal sentencing.[115] A commonly applied theoretical explanation for assigning more severe penalties to racial and ethnic minorities relates to the minority threat thesis in which stereotypes of minorities being more likely to recidivate may enter into the focal concern of future dangerousness.[116]

Studies of sentencing rather consistently indicate that males are sentenced to longer periods of incarceration.[117] An explanation for the gender effect regards the

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Kautt, *supra* note 90, at 655 tbl. 4 (studying drug offenses).

111 *E.g.*, Kim et al., *supra* note 43, at 1084 tbl. 2; Lynch & Omori, *supra* note 104, at 432 (studying drug trafficking cases); Kautt, *supra* note 90, at 655 tbl. 4 (studying drug offenses). *See also* Melissa Hamilton, *Some Facts About Life: The Law, Theory, and Practice of Life Sentences*, 20 Lewis & Clark L. Rev. 803, 848 tbl. 4 (2016) [hereinafter Hamilton, *Life Sentences*] (finding application of mandatory minimum predicted a sentence of 470 months or more).

112 Feldmeyer & Ulmer, *supra* note 39, at 252 tbl. 3 (finding any acceptance of responsibility credit reduced sentence length 15%); Ulmer et al., *Trial Penalties, supra* note 108, at 576 tbl. 2 (finding each point reduction given for acceptance of responsibility reduced the sentence length 1% in model 2); Ulmer, *Localized Uses*, *supra* note 63, at 271 (finding acceptance of responsibility on average reduces sentences by a year in three of the districts studied).

113 *E.g.*, Oleson et al., *supra* note 11, at 323 tbl. 2; Doerner & Demuth, *supra* note 110, at 255 tbl. 2; Feldmeyer & Ulmer, *supra* note 39, at 252 tbl. 3; Amy Farrell et al., *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. Gender Race & Just. 85, 115 tbl. 3 (2010).

114 Kim et al., *supra* note 43, at 1084 tbl. 2. *See also* Johnson et al., *Social Context*, *supra* note 52, at 761 tbl. 5 (finding whites more likely to receive downward departures than blacks and Hispanics).

115 *E.g.,* Lynch & Omori, *supra* note 104, at 432 (studying drug offenders); Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 729, 729 (2012); Johnson & Betsinger, *supra* note 38, at 1079; Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 Criminology 757, 781 (2006) (focusing on white-collar offenders). Still, there is at least one study that concluded there are not disparities based on race/ethnicity when the outcome was operationalized as life sentences. Hamilton, *Life Sentences*, *supra* note 111, at 848 tbl. 4 (finding no statistically significant racial/ethnic differences in long sentences (operationalized as at least 470 months) in federal sentencing in a model with multiple controls).

116 Cyndy Caravelis et al., *Static and Dynamic Indicators of Minority Threat in Sentencing Outcomes: A Multi-Level Analysis*, 27 J. Quantitative Criminology 405, 407 (2011).

117 *E.g.*, Tillyer et al., *Gender*, supra note 108, at 713 tbl. 2 (citing studies and reporting on study of drug offenses); Rhodes et al., supra note 37, at 67; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285, 300 (2001).

chivalry thesis in which paternalistic ideologies conceive of women in ways that reduce their blameworthiness, such as perceiving females as more childlike, less responsible for their own behavior, in need of male protection, and whose suffering should be kept to a minimum.[118] In addition, it might be relevant to judges that women consistently show at lower risk of recidivism.[119]

In some studies, noncitizens are at a statistically significant greater likelihood of incarceration[120] and an increase in sentence length compared to citizens.[121] A theory for why noncitizenship might lead to more punitive outcomes is that persons presenting with an attribute that makes them culturally dissimilar to the American-born population might be adjudged more negatively as outsiders and thereby subject to marginalization in a socially stratified society.[122] Still, an opposing theory argues persons not legally resident in the United States are deportable and thus a longer sentence may be unnecessary.[123]

Studies commonly indicate that older offenders are treated more leniently than their younger counterparts.[124] It could be the negative correlation between older age and severity of penalty is not just about age per se, but a combination of age, infirmity, and physical impairment may lead to an empathetic response.[125] The impact of age may also be for the focal concern of future dangerousness as older offenders are less likely to recidivate.[126]

Two case-processing factors are relevant to predicting sentencing decisions. The so-called trial penalty occurs when being found guilty at trial (rather than plead) is correlated with more serious punishments.[127] The trial penalty may be

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118 S. Fernando Rodriguez et al., *Gender Differences in Criminal Sentencing*, 87 Soc. Sci. Q. 318, 320 (2006).

119 *See generally* Tonya L. Nicholls et al., *Female Offenders, in* APA Handbook of Forensic Psychology 79 (Brian L. Cutler & Patricia A. Zapf eds., 2nd ed., 2015) (reviewing studies and rationales for females being less risky).

120 Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992-2009*, 48 Law & Soc'y Rev. 447, 464 tbl. 2 (2014) [hereinafter Light, *Noncitizens*]; Johnson & Betsinger, *supra* note 38, at 1067 tbl. 3.

121 *E.g.*, Kim et al., *supra* note 43, at 1084 tbl. 2; Light, *Noncitizens*, *supra* note 120, at 466; Mustard, *supra* note 117, at 301. Though, at least one other study are to the contrary, showing that lacking citizenship has a suppressing impact on the length of the term of imprisonment. Oleson et al., *supra* note 11, at 323 tbl. 2, 325 tbl. 3 (though the statistic was not statistically significant).

122 Light, *Noncitizens*, *supra* note 120, at 455.

123 Scott E. Wolfe et al., *Unraveling the Effect of Offender Citizenship Status on Federal Sentencing Outcomes*, 40 Soc. Sci. Res. 349, 352 (2011).

124 *E.g.*, Anita N. Blowers & Jill K. Doerner, *Sentencing Outcomes of the Older Prison Population: An Exploration of the Age Leniency Argument*, 38 J. Crime & Just. 1, 3-4 (2013) (citing studies); Johnson et al., *Social Context*, *supra* note 52, at 761 tbl. 5 (finding older age positively correlated with downward departure decisions); John D. Burrow & Barbara A. Koons-Witt, *Elderly Status, Extraordinary Physical Impairments and Intercircuit Variation Under the Federal Sentencing Guidelines*, 11 Elder L.J. 273, 312-13 tbl.3, 4 (2004) (finding that in a few districts defendants age 50 and over were more likely to receive downward departures).

125 Burrow & Koons-Witt, *supra* note 124, at 296.

126 Franklin, *Educational Attainment*, *supra* note 38, at 142.

127 *E.g.*, Kim et al., *supra* note 43, at 1084 tbl. 2; Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the*

about punishing those who have the "temerity to go to trial."[128] It could be viewed instead in terms of rewarding pleas, such as rewarding cooperation and remorse while also preserving court resources.[129]

As for the second case-processing factor, studies at the state and federal levels rather consistently show that pretrial detention is significantly and positively related to incarceration and sentence length.[130] Pretrial detention effects are likely due to the same drivers as the focal concerns perspective posit. Those who are denied release pretrial may be more likely to have committed a more serious crime, bear a significant criminal history, and present with other indicators that elevate their potential recidivism risk.[131]

Studies which include district or circuit variables in their models have generally found geographic disparity in federal sentences.[132] These outcomes lend support to the court communities' perspective of localized practices influencing case decisions and fostering regional differences in federal sentencing.

2. The Outcome of Interest in Prior Studies

A significant majority of the foregoing studies on federal sentencing use the incarceration decision (in/out) and/or sentence length as their outcome of interest. Some researchers affirmatively, though, recognize the importance of investigating departure decisions. Almost all of the studies of federal departure decisions to date which model the dependent variable on departure outcomes address downward departures.[133] Decisions to depart downward are certainly deserving of study because a significant percentage of federal sentences these days are below their Guidelines minimums.[134] None of the previous empirical studies appear to have focused extensively on the effect of upward departures as the outcome of interest.

Abrams Study, 84 Miss. L.J. 1195, 1220 (2015); Breen, *supra* note 101, at 211 (citing studies).

128 Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 Ga. L. Rev. 407, 409 (2008).

129 Ulmer et al., *Trial Penalties, supra* note 108, at 564.

130 *E.g.*, Oleson et al., *supra* note 11, at 316-17 (citing studies); Franklin, *Educational Attainment*, *supra* note 38, at 151 tbl. 2; Wolfe et al., *supra* note 123, at 355 tbl. 2. There is one study to the contrary where being out on bail increased sentence length, which the authors did not expect and do not explain the result. Farrell et al., *supra* note 113, at 115 tbl. 3.

131 Oleson et al., *supra* note 11, at 317. Correspondingly, a judge may perceive a defendant who is released on bail and complies with supervision as presenting with a positive rehabilitation potential. *Id*.

132 *E.g.*, Wu & Spohn, *supra* note 52, at 306 (finding differences in the likelihood of downward departures across three Midwestern districts); Ulmer, *Localized Uses*, *supra* note 63, at 269 (finding from a study of four districts significant variations in the likelihood of granting substantial assistance downward departures).

133 *E.g.*, Tillyer & Hartley, *supra* note 7, at 635 tbl. 2; Kimberly A. Kaiser & Cassia Spohn, *Fundamentally Flawed? Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences*, 13 Criminology & Pub. Pol'y 241 (2014); Melissa A. Logue, *Downward Departures in US Federal Courts: Do Family Ties, Sex, and Race/Ethnicity Matter?*, 34 Ethnic & Racial Stud. 683 (2011); Johnson et al., *Social Context*, *supra* note 52.

134 U.S. Sent'g Comm'n, 2015 Sourcebook tbl. N (2016).

This is curiously true, despite upward departures arguably being more substantial, such as leading to longer sentences in the face of the federal prison overpopulation. Plus, their relative rarity renders upward departures more symbolic in nature, perhaps perceived therefore as arbitrary. Almost all the studies to date which consider the upward departure decision as a variable at all simply add it as a control without further discussion of its significance because their interests concerned other aspects of sentencing.[135]

It appears that only three studies (two of them by the same author) have so far utilized the upward departure decision as an outcome variable. Nevertheless, in these trio of studies the upward departure decision was one of multiple outcomes in single-level regressions and the authors did not spend too much space delving into the upward departure's importance in federal sentencing outcomes.[136] The earliest study utilized pre-*Booker* data and controlled only for sociodemographic characteristics.[137] The researcher's attention in the other two studies concerned *Booker*-based variations in sentencing outcomes more generally and the potential, more specifically, for courtroom disparities before and after *Booker* (finding greater disparity in upward departures post-*Booker*)[138] and racial disparities (finding greater racial disparities in upward departure decisions post-*Booker*).[139] This latter author in one study tested a subset of the Commission's data for the time period of study[140] and reports little in either paper of the effects of explanatory factors tested with respect to upward departures (other than race and the *Booker* time trend) and for some reason excluded many predictor variables found to be relevant to sentencing outcomes.[141]

Due to the paucity of research with a concentration on the upward departure

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135 *E.g.*, Franklin et al., *Intermediate Sanctions*, *supra* note 5, at 870 n.12; Tillyer et al., *Gender*, *supra* note 108, at 713 tbl. 2; Ulmer & Light, *supra* note 39, at 336 tbl. 2; Feldmeyer & Ulmer, *supra* note 39, at 252 tbl. 3.

136 Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. Leg. Stud. 75, 95-98 (2015) [hereinafter Yang, *Discretion*]; Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 N.Y.U. L. Rev. 1268, 1314 (2014) [hereinafter Yang, *Interjudge*]; Mustard, *supra* note 117, at 305-09.

137 Mustard, *supra* note 117, at 310 tbl. 11.

138 Yang, *Interjudge*, *supra* note 132, at 1315.

139 Yang, *Discretion*, *supra* note 136, at 98.

140 Yang, *Interjudge*, *supra* note 132, at 1296.

141 Yang, *Discretion*, *supra* note 136, at 98 (indicating in model for upward departures included only predictor variables regarding race, time frame based on United States Supreme Court rulings such as *Booker*, offense type, offense level, criminal history, district, year, and month); Yang, *Interjudge*, *supra* note 132, at 1314-15 (controls included time variables, offense type, offense level, criminal history, and districts). In the 2015 report, the author's conclusion with a logistic regression analysis was that for fiscal years 1994-2010 blacks were more likely (with statistical significance) to be assigned upward departures than whites. I was generally able to replicate this result using the Commission's full dataset for most of the time period of study (fiscal 1999-2010) following the paper's indication of methodology and control variables except for the *Booker* timing and sentence month. However, by re-specifying the model with additional, statistically significant controls, the coefficient for blacks (compared to whites) became nonsignificant. This means that the difference indicated for racial disparity in the other researcher's model appears to be explained away by the addition of other legal and extra-legal factors (specifically, the variables I added were acceptance of responsibility, custody status, number of counts, gender, citizenship, and age).

decision, the importance of it in the results of sentencing outcomes in terms of severity of sentence, and the symbolic nature of the discretionary decision with respect to potentially reflecting gaps in the Guidelines, the opportunity to fill the void was compelling. Then the recent availability of more aggressive computing resources to permit employing a sophisticated research design known as multilevel modeling would allow this study to also be able to test for possible regional disparities. Hence, the next Section offers such a study.

IV. A Multilevel Study of Upward Departures

The most common type of advanced statistical analysis of sentencing outcomes is a single-level regression model with individual predictors.[142] At its simplest, a regression can test the relationship between an independent (also known as predictor or explanatory) variable and the dependent (also referred to as outcome or response) variable of interest.[143] It is unlikely, though, for any outcome of interest in the complex world of criminal justice to be fully explained by one independent factor.[144] Certainly, the focal concerns and courtroom workgroup perspectives would predict that numerous factors would play a role in individual criminal justice outcomes. Helpfully, sophisticated regression models permit a researcher to test the effects of a host of independent variables on the chosen dependent variable, and most current regression studies appropriately utilize multiple predictors. A value of a multiple regression analysis is that a researcher can investigate the effect of each independent variable on the dependent variable while controlling for (i.e., holding constant) the effect of other explanatory variables.[145] For example, if the researcher is interested in whether race is associated with sentence length, she likely ought to include offense severity and criminal history (at the very least) in the model to control for them as it could be that the association between race and sentence length may be largely explained by such legal factors.

Sentencing research now seems on the precipice to replacing single-level regressions with the more sophisticated technique of multilevel modeling.

A. Multilevel Modeling

The concept of multilevel modeling is a relatively recent development in the field of statistics.[146] The growth of interest in conducting multilevel modeling in the last decade is likely based on several factors. Some researchers have realized the

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142 Cassia Spohn, *The Evolution of Sentencing Research*, 14 Criminology & Pub. Pol'y 1, 2 (2015).

143 Ronet Bachman & Raymond Paternoster, Statistical Methods for Criminology and Criminal Justice 489 (1997).

144 *Id*.

145 Paul Hofer, *The Commission Defends an Ailing Hypothesis: Does Judicial Discretion Increase Demographic Disparity?*, 25 Fed. Sent'g Rep. 311, 311 (2013).

146 Anthony S. Bryk & Stephen W. Raudenbush, Hierarchical Linear Models: Application and Data Analysis Methods 3-4 (1992).

flaws in single-level designs when the units of analysis are nested within groups where group-level factors affect the outcome of interest.[147] As a result of this early research, knowledge about multilevel models is starting to become more readily available in scientific literature.[148] In addition, technological improvements in statistical software and hardware computing ability make the resource-intensive analysis of multilevel data more accessible and workable.[149]

In discussing multilevel models, the terminology typically entails levels, usually in a linear fashion to signify the nesting structure. Level-1 is the most elemental. Level-1 units are clustered at Level-2. Three-level models involve Level-2 clusters that are nested into a higher order. For instance, as visually represented in Figure 1, federal sentencing entails a hierarchical structure in which individual defendants represent Level-1 units, with district courts at Level-2, and circuit courts representing Level-3.

Multilevel methods permit the researcher to specify an explanatory variable as a fixed effect, a random effect, or both. A fixed effect variable specifies a single value in the model and is applicable to each Level-1 unit, regardless of which Level-2 group the unit is situated.[150] The coefficient of a fixed effect variable acts like an explanatory variable in a single-level regression analysis, indicating the variable's effect on the outcome of interest. In the study herein, individual defendants comprise Level-1, such that the fixed effects test for how the unique attributes of the individual defendant impacts whether an upward departure is issued. As an example, the study tests whether the defendant's gender is correlated with an upward departure.

A random effect, on the other hand, allows an explanatory variable to vary between Level-2 units such that each Level-2 group has its own estimate of that variable.[151] It should be noted that a random effect does not signify that it is unsystematic, occurs by chance, or is unexplained. Instead, a variable being specified as random refers to observing whether its effect on the dependent variable fluctuates over Level-2 groupings.[152] For our purposes in this paper, a random effect tests whether, for example, even if gender is found overall to be a significant individual predictor of an upward departure, the same effect is consistently observed (or not) across district courts.

A random effect coefficient for a predictor variable that is statistically significant, for purposes of the study herein, indicates that (a) the magnitude (i.e., strength) of the effect of the variable is weaker in some districts but stronger in other districts, and possibly (b) that the effect of that variable changes direction across districts

147 Brian D. Johnson & Christina D. Stewart, *Measurement Issues in Criminal Case Processing and Court Decision-Making Research, in* The Handbook of Measurement Issues in Criminology and Criminal Justice 303, 314-15 (Beth M. Huebner & Timothy S. Bynum eds., 2016) (citing multilevel modeling research sources in criminal justice).

148 *E.g., see generally* Joop J. Hox, Multilevel Analysis: Techniques and Applications (2nd ed., 2010); Leonardo Grilli & Carla Rampichini, *Specification of Random Effects in Multilevel Models: A Review*, 49 Qualitative & Quantitative 967 (2015).

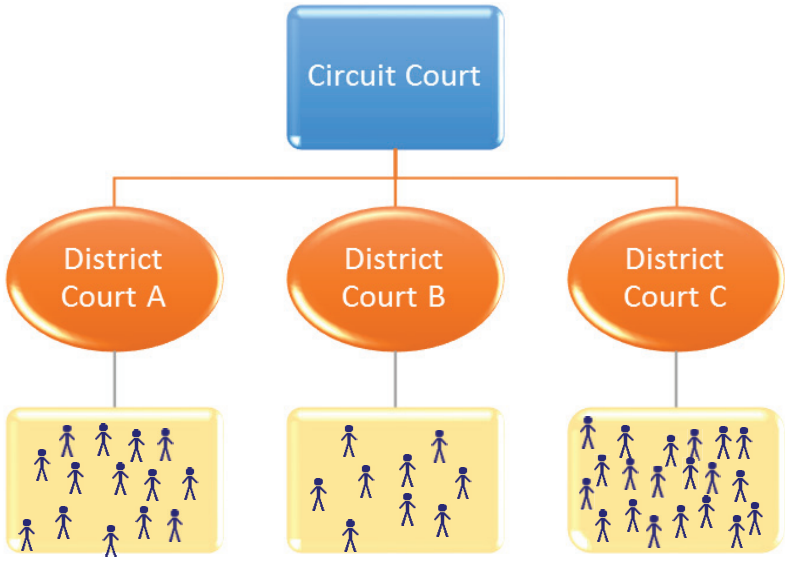
149 Daniel A. Powers, *Multilevel Models for Binary Data*, 154 New Directions Inst. Res. 57, 62 (2012).

150 Andrew F. Hayes, *Multilevel Modeling*, 32 Human Comm. Res. 385, 389 (2006).

151 *Id*.

152 Tom A.B. Snijders, *Fixed and Random Effects, in* Encyclopedia of Statistics in Behavioral Science 664, 664 (Brian S. Everitt & David C. Howell eds., 2005).

Figure 1. Example of a Three-Level Model for Federal Sentencing.



units from positive to negative, or vice versa.[153] As an hypothesized example of (b), it could be that criminal history is a positive predictor in some districts, meaning that the higher criminal history score increases the likelihood of an upward departure; yet, criminal history could be a negative predictor in other districts, such that a higher criminal history score decreases the chance of an upward departure. A random effect that is not statistically significant may still provide meaningful information. A non-statistically significant random effect indicates that the effect of that predictor variable on the outcome fails to differ across districts such that the effect is not group-dependent (here, this means the relationship between the predictor and an upward departure is relatively consistent across districts).

A multilevel study that includes both fixed and random effects is generally referred to as a mixed model. One of the strengths of specifying multilevel modeling is the ability to test whether a particular explanatory variable may have different effects at each level. An explanatory variable may be statistically significant at Level-1 (the fixed effect) and may—or may not—show statistical significance at Level-2 (the random effect), or vice versa.[154]

Overall, multilevel modeling presents an advancement for statistical research in criminal justice. In regards to penalty outcomes, it is particularly important to focus on both (a) individual level predictors because of the focal concerns perspective, and (b) on jurisdictional level variations because there may be relevant contextual

[153] John Wooldredge, *Judges' Unequal Contributions to Extralegal Disparities in Imprisonment*, 48 CRIMINOLOGY 539, 549 (2010).

[154] Multilevel modeling can thereby overcome aggregation bias that exists when an explanatory variable shows different results at different levels. BRYK & RAUDENBUSH, *supra* note 146, at 83.

differences stemming from unique cultural characteristics or peculiarities produced through discrete courtroom community practices.[155] Further information on the theoretical, statistical, and practical values of multilevel modeling can be found in the Appendix to this paper.

Despite the many advantages of multilevel modeling techniques, relatively few multilevel studies have been conducted in federal sentencing. This does not mean that many other researchers have not been cognizant of the potential that geographical and jurisdictional differences may have significant impacts on individual sentencing outcomes. Typically, researchers realizing the potential for regional differences in federal sentencing simply control for these group-level variances in single-level regression models by adding districts[156] or circuit courts[157] as a series of dummy variables. It was certainly proper to account for at least some of the variation that district and circuit courts may introduce to sentencing outcomes. Yet these single-level regression models were unable then to take advantage of the benefits of multilevel modeling, and it is possible that at least some of the results in those studies were therefore biased.

The rather scant number of studies which do apply a better specified model from a methodological perspective by adapting multilevel modeling to federal sentencing data have tended to focus on sentence length as the outcome of interest.[158] Several researchers have studied departure decisions in multilevel designs, though they concentrate on downward departures as the dependent variable.[159] In any event, these studies typically utilized pre-*Booker* data[160] and, therefore, may no longer be generalizable to the current state of affairs. This study supplements the existing literature by addressing upward departures, drawing upon a lengthy period of post-*Booker* sentencing practices, and providing a mixed model with a host of fixed and random effect explanatory variables. The data and methods are next summarized.

B. Data and Methods

This study used Commission datasets for the fiscal years 2008-2015 to represent a long period of sentencing practices and to account for post-*Booker* discretionary decisionmaking. These datasets offer a host of variables parsing individual sentence details. The Commission codes the variables based on a variety of documents: the

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155 Gaylene S. Armstrong & Nancy Rodriguez, *Effects of Individual and Contextual Characteristics on Preadjudication Detention of Juvenile Delinquents*, 22 Just. Q. 521, 525 (2005).

156 *E.g.*, Franklin et al., *Intermediate Sanctions*, *supra* note 5, at 860 tbl. 4; Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 729, 740 (2012); Ulmer & Light, *supra* note 39, at 334; Johnson & Betsinger, *supra* note 38, at 1068 tbl. 3; Mustard, *supra* note 117, at 300.

157 *E.g.,* Blowers & Doerner, *supra* note 124, at 8; Doerner & Demuth, *supra* note 110, at 254; Melissa Hamilton, *Sentencing Policy Adjudication and Empiricism*, 30 Ga. St. U.L. Rev. 375, 454 tbl. 3 (2014).

158 Ulmer et al., *Trial Penalties, supra* note 108, at 575; Lynch & Omori, *supra* note 104, at 423.

159 Tillyer & Hartley, *supra* note 7, at 1631; Johnson, Ulmer, & Kramer, *supra* note 52, at 750.

160 *E.g.*, Feldmeyer & Ulmer, *supra* note 39; Albonetti & Baller, *supra* note 39; Farrell et al., *supra* note 113, at 103; Kautt, *supra* note 90, at 648.

judgment and commitment order, the Statement of Reasons, any plea agreement, the indictment, and the presentence investigation report.[161]

There are three main research questions:

1. Is there significant variation across district courts in the use of upward departures?
2. To what extent do legal, extralegal, and case-processing factors account for upward departures in individual cases?
3. Do district courts vary from each other in the extent to which they weigh each of the legal, extralegal, and case-processing factors when issuing upward departures?

In the multilevel design, the outcome (dependent) variable is whether the judge issued a sentence that was an upward departure from the Guidelines recommendation. This outcome and a list of the multiple predictor variables (comprising legal, extralegal, and case-processing factors) which survived to the final multilevel model and their coding are summarized in Table 1.

In addition to the multilevel models, a statistical analysis was conducted concerning just the upward departure cases. Commission rules direct district judges when departing from the Guidelines to state the reasons for the departure and to specifically record them in the Commission-generated Statement of Reasons form that is submitted with the paperwork for each individual sentencing.[162] These

Table 1. Coding Scheme of Variables.

Variable	Coding Scheme	Description
Dependent Variable		
Upward Departure	1 = yes	Defendant received an upward departure
Predictor Variables		
Legal		
Final Offense Level	Scale	Guidelines scale rating offense severity from 1-43
Criminal History	Ordinal	Guidelines ranking of criminal history from I-VI
Number of Counts	Log (scale)	Natural log of the number of counts of conviction
General Offense Type	Five dummy variables	Five dummy indicators with the reference category of drug offenses
Acceptance of Responsibility	1 = yes	Dummy indicator for having received a reduction in offense levels for accepting responsibility
Extralegal		
Male	1 = male	Dummy indicator for gender
Minority	1 = minority	Dummy indicator for black, Hispanic, or other together coded as 1, with the reference category white
U.S. Citizen	1 = citizen	Dummy indicator for a U.S. citizen
Age Over 50	1 = yes	Dummy indicator for age 50 and above
Case-Processing		
In Custody	1 = yes	Dummy indicator for being in custody at time of sentencing
Trial	1 = yes	Dummy indicator for going to trial (versus a plea)
Level-2	Nominal	94 districts

[161] Christine Kitchens, Federal Sentencing Data and analysis Issues 1 (2010).
[162] U.S. Sentencing Guideline Manual § 5K2.0(3).

are then coded by staff into the Commission's datasets. Thus, a separate analysis (external to the multilevel model) ran frequency distributions of the multiple variables representing the reasons judges provided for the upward departure cases over fiscal years 2008-2015. The results of the multilevel studies and these frequency distributions are provided next.

C. Results

The research questions posed earlier indicated a two-level design with district courts at Level-2. Descriptive statistics regarding the variables that survived to the resulting full model are provided in Table 2.

Separate statistical analyses of Commission datasets (fiscal 2008-2015) indicated that an upward departure is typically of significant consequence to the receiving defendant's sentence: the mean sentence for those defendants receiving an upward departure for the period of study was 84.44 months (about 7 years), with a range from probation to 4,253 months (about 354 years).[163]

Table 2. Descriptive Statistics.

Variable	*Mean (%)*
Dependent Variable	
Upward Departure	(2.0%)
Predictor Variables	
Legal	
Final Offense Level	18.72
Criminal History	2.48
Number of Counts	1.42
General Offense Type	
Drugs	(33.0%)
Violent	(5.9%)
Firearms	(10.6%)
Immigration	(29.9%)
Property	(16.5%)
Other	(14.0%)
Acceptance of Responsibility	(94.8%)
Extralegal	
Female	(12.8%)
Minority	(73.5%)
U.S. Citizen	(58.7%)
Age Over 50	(12.5%)
Case-Processing	
In Custody	(75.3%)
Trial	(3.5%)

[163] The reader may wonder if the 354 year figure is a typographical error or a data error. It is not. This extreme sentence was handed to Corey Deyon Duffey in 2010 for a series of bank robberies. Two of Duffey's co-defendants received similar sentences of 355 and 330 years. Perhaps not surprisingly, the district that sentenced them to these extreme sentences was the Northern District of Texas, the same district that has the highest rate of upward departures in the study period (2008-2015). For more information on the use of extreme sentences such as Duffey's, see generally Hamilton, *Extreme Sentences*, *supra* note 50.

Table 3. Full Multilevel Model of Upward Departures.

Variable	*Fixed Effect*			*Random Effect*	
	b	S.E.	Odds Ratio	s^2	S.E.
Intercept	-5.021	.152	-----***	.064	.051
Legal Factors					
Final Offense Level	-.072	.004	.931***	.001***	.000
Criminal History	.057	.013	1.059***	.009***	.002
Number of Counts (log)	.315	.018	1.370***	.009**	.003
General Offense Type				---	---
Drugs (reference)					
Violent	1.576	.116	4.838***		
Firearms	.694	.094	2.001***		
Immigration	.199	.106	1.221		
Property	.532	.096	1.702***		
Other	.503	.116	1.653***		
Acc. of Responsibility	-.728	.070	.483***	.045*	.018
Extralegal Factors					
Female	-.559	.047	.572***	.018	.014
Minority	.045	.044	1.046	.035***	.010
U.S. Citizen	.509	.066	1.664***	.148***	.031
Age Over 50	.311	.031	1.364***	.010	.006
Case-Processing					
In Custody	1.403	.055	4.066***	.055***	.016
Trial	-.100	.084	.905	.063*	.027
Random intercept				.064	.051
ρ				1.9%	
-2LL = 4149605					
n = 567,294					

**p < .05; **p < .01; ***p < .001*

The final multilevel model included 567,294 cases and is provided in Table 3.[164] All variables were estimated with both fixed and random effects except for one. The general offense type series of five dummy variables was excluded from random effects for statistical resource reasons, as explained in the Appendix. In Table 3, the left column lists the predictor variables. The middle column indicates their coefficients, standard errors, and odds ratios for the fixed effects. The right hand column lists the coefficients and standard errors for the random effects.

The final model includes a substantial portion of the explanations for upward departures. Overall, the model poses a 98% correct classification rate. This section textually delineates the substantive results, with further discussion to follow in the next Section to explore how the theoretical background regarding focal concerns and the community workgroup thesis may help explain these results.

[164] Eleven percent of the potential cases were excluded because of missing data on any one of the final predictor factors. There is no reason to believe the missing cases represent any bias.

1. Individual Disparities

The results for the fixed effects (i.e., individual defendant predictors) will be addressed first. All of the legal factors achieved statistical significance in their individual effects on upward departures. The final offense level was negatively associated with the odds of an upward departure: the odds of an upward departure decreased 7% for every one level increase in the final offense level. The criminal history score had the opposite effect in being positively associated with an upward departure: the odds of an upward departure increased 6% for each one unit increase in criminal history category. The presence of multiple counts of conviction were associated with increased odds of an upward departure. Regarding crime type, compared to drug offenders as the reference category, the other offense types were more likely to receive upward departures. Violent offenders faced almost five times the odds of an upward departure while the odds for firearm offenders doubled. Only immigration offenses did not result in statistical significance. Acceptance of responsibility lowered the odds of an upward departure by a factor of two.[165]

Demographic variables were also modeled as fixed effects. Females were significantly less likely to receive upward departures than males, even after controlling for multiple factors: an upward departure for males was almost two times the odds as for females. U.S. citizens were more likely to be assigned upward departures, with the odds of citizens receiving upward departures being 66% greater as compared to noncitizens. There was also an age effect, with those age 50 and over being more likely to receive an upward departure compared to their younger counterparts.

Minorities were at higher risk of upward departures. The odds of a minority defendant receiving an upward departure increased 5% when controlling for the other legal and nonlegal variables. However, the result at the individual case level (Level-1) for the minority variable was not statistically significant. Still, as will be addressed further below, the minority factor was retained as there was a statistically significant random effect (districts at Level-2) for it, indicating that the lack of significance at the individual case level does not mean there is not a minority effect on increasing the odds of an upward departure in at least some districts.

Both case-processing factors were statistically significant. Custody status exhibited a large effect, increasing the odds of an upward departure by a factor of four for those in custody at sentencing. The trial penalty was not statistically significant at the individual level. However, the trial versus plea factor was retained because, as also addressed below, the random effect coefficient for the trial penalty at the district level indicated statistical significance, signifying that there are trial penalties in at least some districts.

2. District Disparities

The random effects (i.e., variations among districts) of the variables in the far right columns of Table 3 indicate whether the effect of each predictor varied across districts (except offense type which was excluded for statistical reasons per the Appendix). All but two of the predictor factors with random effects (being gender

[165] As the coefficient is less than 1.00, we can interpret the effect on the odds by taking the reciprocal of the odds ratio = 1/.483.

and age over 50) were found to vary across districts to a statistically significant degree.

Further information on the variability of each predictor factor that was modeled with fixed and random effects can be provided. Computations adding and subtracting one and two standard deviations indicated by each predictor variable's random effect from the same variable's fixed effect coefficient show whether the variability between districts concerns the strength of the correlation with the outcome and if the direction of the correction is positive in some districts yet negative in others.[166] In other words, a particular variable may have a stronger effect on the upward departure decision in different districts compared to others. The same variable may also have inconsistent effects in that it is predictive of an upward departure in some districts yet is predictive of no upward departure in others.

For six of the random effects, the size of the effect across two standard deviations varied between districts (i.e., across 95% of the districts), but not the direction. The number of counts of conviction, age over 50, and being in custody at sentencing were each positively correlated with upward departures in at least 95% of districts. The final offense level, acceptance of responsibility, and being female were negative predictors of upward departures in at least 95% of districts.

In contrast, the effect of each of criminal history score, minority status, and trial penalty showed that the strength and the direction of its influence changed across just one standard deviation (i.e., two-thirds of districts). This means that not only the size of the effect of these three variables varied amongst districts but that each held a positive effect in at least some districts while indicating a negative impact in others. U.S. citizenship held a positive association with upward departures in one standard deviation, but across two standard deviations the effect was observed to be negative in at least a few districts.

A supplemental data analysis provides further information about the reasons for upward departure decisions derived from the judges' Statement of Reasons forms filed with sentencing paperwork in individual cases. Table 4 contains the top ten cited reasons for upward departures capture through frequency analyses of the Commission's data, along with their prevalence.

Importantly, considering the title of this Article, unwarranted disparities in upward departures as an external consequence was among the top ten rationales as observed in Table 4. Judges cited disparity issues in one out of twelve upward departure decisions. This result indicates that numerous judges remain cognizant of the potential downsides of the appearance of disparities in sentencing practices. It is also suggestive of gaps in the Guidelines to the extent these judges perceive that the Guidelines calculations in the instant cases failed to achieve proportionality with sentences for similarly-situated defendants. The other reasons judges gave as indicated in Table 4 as justifications for upward departures will be explored further in the context of the general discussion of the results that follows.

D. Discussion

The results just provided can now be more fully addressed concerning the three research questions previously posed. Further, they can be better understood in

[166] *See generally* Joop, *supra* note 148, at 19.

the context of the theoretical perspectives offered implicating the focal concerns perspective and the courtroom workgroup thesis.

Table 4. Specific Reasons Given by Judges for Upward Departures.

Rank	*Reason*	*Percentage of Cases*
1	Criminal history issues	60.0%
2	Nature and circumstances of the offense and history and character of the defendant	53.5%
3	Reflect the seriousness of the offense, promote respect for the law, and provide just punishment	49.9%
4	Deterrence	42.6%
5	Protect the public from further crimes of the defendant	40.9%
6	Rehabilitation	9.3%
7	Avoid unwarranted disparities	8.0%
8	Dismissed and acquitted conduct	8.4%
9	General adequacy issue	5.5%
10	General guideline issue	4.4%

1. Distract Disparities Overall

The first research question queried whether there existed significant variation between district courts in the use of upward departures. The answer is in the affirmative. Bivariate results that were the result of additional statistical analyses indicated a differential of twelve times the rate of upward departures between the lowest rate district and the highest. Significant variation was confirmed in a null multilevel model (see the Appendix) which indicated that 8% of the total variance in upward departure outcomes is explained at the district court level. This rate was statistically significant at the .001 level. In other words, this means that eight percent of the differences in upward departure decisions are accounted for by district court practices. This result of district differences was expected from the courtroom workgroup perspective in that cultures unique to certain districts may influence sentencing outcomes that contrast with outcomes from other cultures/districts.

2. Individual Disparities

The second general research question asked to what extent legal, extralegal, and case-processing factors accounted for upward departures in individual cases. Generally the results support the influence of the focal concerns (concerning the defendant's culpability and future risk and the consequences of the sentence) on individual outcomes with respect to upward departures.

The legal variables supported the focal concerns expectation that perceptions of the defendant's blameworthiness are highly relevant to individual penalties. The results indicated an increased likelihood of an upward departure for a higher criminal history score, multiple counts of conviction, and violent and firearms

offenses (compared to drug offenders). Criminal history and additional counts signify multiple crimes and perhaps perpetrated on multiple occasions, possibly demonstrating greater culpability and harm. The increased odds for violent and firearms offenses reveal culpability concerns in that crimes posing a risk to human life likely are considered more egregious than many nonviolent offences.

The decreased likelihood of an upward departure for acceptance of responsibility is also consistent with a concern for the defendant's blameworthiness as well as with the focal concern of future risk. Accepting responsibility by admitting guilt at an early stage in the proceeding may be perceived to reduce one's culpability while predicting positive rehabilitation potential. The negative correlation of acceptance of responsibility with upward departures was consistent across at least 95% of districts.

Curiously, the final offense level was negatively correlated with the upward departure decision. This result seems to be somewhat contradictory to the focal concern with greater offender culpability predicting more severe sentences. It may instead, then, suggest that in these cases judges find the Guidelines calculations to be more than sufficiently proportional to reasonable sentences as adjudging offense severity. This explanation is likely because stakeholders tend to find Guidelines recommendations are overly punitive as a general rule.[167]

Further discussion of criminal history is warranted as it played a strong role throughout the results. There were multiple indications that judges perceive inadequacies in the criminal history calculations. As previously indicated, a higher Guidelines-calculated criminal history score increased the odds of an upward departure despite multiple controls. This result implies that judges in these cases do not believe the criminal history calculation is sufficiently proportional to prior offending evidence, at least when the defendant already has a substantial criminal history as officially calculated pursuant to Guidelines rules. This observation is buttressed by the reasons judges listed in explaining upward departures. In the list of rationales judges gave for upward departures from the frequency distributions provided in Table 4, the role of criminal background is salient. Criminal history calculation issues were expressly cited in 60% of the cases, earning the top ranked reason overall for upward departures. Relatedly, as a separately coded reason, evidence of dismissed and acquitted conduct was listed as an explanation for upwardly departing in 8% of upward departures. Further, past offending may be part of the second ranked reason, which includes the history and character of the defendant, cited in over half of the upward departures. Because of the broad nature of that particular reason as including the nature and circumstances of the offense, though, it is difficult to parse what portion of the fifty percent was for prior offending specifically. Still, the failure of the formal criminal history calculation to adequately account for prior offending was evident in a significant majority of upward departures.[168]

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[167] *See* resources cited *supra* note 43.

[168] It is of particular note that judges candidly admitted the role of dismissed and acquitted conduct in their decisions to upwardly depart in one out of 12 (8%) cases. This finding might be of concern to critics of the real offense system in which individuals are penalized for conduct that is not the subject of conviction. Critics may be even more offended by increases in punishment for acquitted conduct. Here, it is not possible to tell exactly what percentage of those cases represented acquitted conduct, but it is likely that acquitted conduct played a role in at least some of them. These 8% of upward departure cases

Overall, the salience of criminal history is theoretically important for another reason. The function of the defendant's criminal history in the various results implicates the focal concern regarding the defendant's future risk. The inclusion of criminal history in the Guidelines as a principal factor in the recommended sentence is often viewed as the Commission's proxy to adjudge dangerousness.[169]

Regarding future risk as a focal concern, other reasons in Table 4 more directly address dangerousness. The inclusion of the character of the defendant within the second ranked reason may well include assessments of past antisocial behavior as reflective of future risk. Ranked fifth in the top reasons given, the need to protect the public, clearly a future risk rationale, represented 41% of the upward departures. In sum, the relevance of the focal concern of future risk to severity in sentences is strongly confirmed in the data.

The multilevel results concerning offense type likewise provide interesting information about compliance with Guidelines' proportionality judgments. The dummy series for offense type indicated that all other offense types, except for immigration offenses, were more likely to receive upwards departures than drug cases as the comparator. This implies that district judges as a general rule tend to believe the Guidelines are sufficiently punitive for drug offenses and immigration offenses. As drug and immigration cases combined are the bulk of federal sentencing in percentage terms, this particularly result situate the Guidelines in a positive light in terms of proportionality, at least with respect to generally being sufficiently punitive for a majority of crimes. However, the greater likelihood of upward departures for violent and firearms offenses implies that the judges may perceive the Guidelines as insufficiently punitive in those cases.

Moving onto the impact of extralegal variables, demographic characteristics presented with some expected results, while others were more surprising. There was support for gender leniency as women were far less likely to receive upward departures than men at the individual case level. Plus, gender leniency for women did not vary among districts, even after controlling for a host of other variables. This was the case even though gender is an *extra*legal factor and a prohibited rationale for sentencing outcomes per the Guidelines. Overall, then, the results indicate gender disparities, possibly even gender discrimination in favor of women, in upward departures.

Contrary to many studies, the results here indicate there was no individual-level minority discrimination in upward departure decisions. While the odds for minorities were 5% greater than whites, the result was not statistically significant. Indeed, minority status was the weakest individual predictor overall.[170] A reason that this result is inconsistent with other research finding disparities for minorities may be the greater number of explanatory variables in this model and its ability to

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may also imply there are instances in which judges are countering plea bargaining to the extent that some percentage of these cases may represent increased penalties due to offenses dismissed as part of plea bargain deals. Perhaps this reflects judges acting as a check on prosecutorial authority in cases in which they view the plea bargains as overly lenient.

169 Marjorie A. Meyers, Criminal History: Calculation and Variance 1 (2012), available at http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2012/3_Criminal_History-Calculation_and_Variance.pdf (presentation at U.S. Sent'g Comm'n Annual Training Conference).

170 This result derives from F statistic comparisons.

parse district-level variations. Indeed, the random effect was significant, indicating that minority status matters more in at least some districts. Plus, within one standard deviation, the results indicate there are some districts in which minority status is positively correlated with upward departures, despite numerous controls. Hence, it remains possible that there is explicit or implicit minority discrimination in some regions regarding upward departures, though not throughout the country.

It was surprising that noncitizenship was not a positive predictor of upward departures. Perhaps the explanation for the statistically greater likelihood of United States citizens to receive upward departures is that (according to a supplemental data analysis) two-thirds of the noncitizens in federal sentencing during the period of study (fiscal 2008-2015) were immigration offenders. Noncitizen immigration violators are likely to be subject to deportation. Deportation as an incapacitating gesture may impact an assessment of future risk at least regarding the danger to U.S. residents. Thus, it is possible that for noncitizen immigration offenders, prosecutors typically did not request upward departures in those cases and/or judges may have perceived them as unnecessary because of the deportation option. Still, the random effect of citizenship was statistically significant, indicating that the strength of the effect of citizenship significantly varied between districts. At two standard deviations, the effect of noncitizenship shows that it is actually positive (i.e., noncitizens were at higher odds of upward departures) in at least some districts.

No age leniency was observed at least to the extent it means less punishment for older offenders. Indeed, those age 50 and above were more likely to receive an upward departure and, like gender, the strength of the effect did not vary across districts. This could be evidence of a policy dispute with the Commission's rule that age should typically not be a relevant sentencing factor. An alternative explanation, and one more likely considering the existence of other studies affirming age leniency,[171] relates to the results for criminal history previously discussed. The Guidelines computation of criminal history points contain statute of limitations-types of provisions in which dated offenses are excluded.[172] Simply by virtue of their age, older offenders would be more likely to have offenses far in the past that would be subject to the time bar. In addition, the Guidelines do not count certain types of convictions, such as convictions by military, tribal, and foreign courts and those that resulted in diversion.[173] Older offenders would obviously have a longer opportunity to rack up more convictions by various entities. Altogether, the results strongly indicate that many judges may disagree with such policies for criminal history and thus deviate upward as a result, which would more severely impact older offenders.

In terms of case-processing variables, the failure to find a trial penalty at level-1 is inconsistent with much other research.[174] However, the result here at the individual defendant level is explained by the presence of the acceptance of responsibility variable. Without controlling for the acceptance of responsibility, a previously run multilevel model (with the other predictor variables in Table 3) showed a statistically significant trial penalty factor. Once the acceptance of responsibility variable was input, the significance of the trial penalty vanished.

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171 *See supra* note 124 and accompanying text.

172 U.S. Sentencing Guideline Manual § 4A1.2(d), (3).

173 *Id*. at § 4A1.2(f)-(i).

174 *See supra* text and sources accompanying notes 127-129.

Still, the random effects coefficient was significant, and at one standard deviation, the results indicate a trial penalty in at least some districts, which is in line with prior research.

As the last predictor variable to be discussed, custody status was the strongest factor in elevating the odds of an upward departure among the predictor variables.[175] This result affirms that outcomes at sentencing are not entirely independent of decisions at earlier stages in the prosecution process. A denial of pre-trial bail is likely a proxy that influences stronger focal concerns concerning the defendant's culpability for the current offense and greater potential for future dangerousness. Being held in custody through sentencing as a positive predictor of an upward departure was consistent across at least 95% of districts.

The third focal concern should also be mentioned regarding consequences of the penalty. Several of the top reasons judges indicated on the Statement of Reasons for upward departures (listed in Table 4) implicate external consequences. The third highest ranking justification includes respect for the law, which likely entails respect by the defendant individually and more broadly. The fourth reason cites a general deterrence function as a reason for the upward departure, being triggered in 43% of cases. Both reasons reflect upon the consequences of the penalty in its deterring potential offenders and promoting community safety. Another community consequence present among the top ten reasons relates to the rehabilitation of the offender. The frequency of the rehabilitation motive to justify an upward departure, present in 9% of cases, is curious as federal law specifically dictates that "imprisonment is not an appropriate means of promoting correction or rehabilitation."[176] The data do not provide an explanation for the seeming contradiction. Yet it is still relevant as reflecting thoughts toward returning more conforming defendants to their local communities.

Additional evidence exists that upward departure decisions are quite often about proportionality concerns. Rounding out the top ten reasons listed for upward departures are two categories that expressly indicate judicial perceptions that the Guidelines have gaps. Judges cited general guideline issues or general adequacy issues in up to 10% of upward departure cases.

3. District Disparities on Individual Predictors

The third broad research question queried whether district courts vary from each other in the extent to which they weigh each of the legal, extralegal, and case-processing factors when issuing upward departures. The results found numerous such variations, as has already been partly covered when discussing the second research question. Overall, significant random effects were observed for all but two of the predictor variables (excluding offense type which could not be modeled as random effects). The strengths of the effect of leniency for women and the lack of lenience for older offenders were consistent across districts. In contrast, minority status and the trial penalty, which were not statistically significant in individual cases (after controlling for other variables), achieved significance in their random effects. In general, these random effect results support the courtroom communities' perspective which theoretically accounts for different regional sentencing patterns.

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[175] This result derives from F statistic comparisons.

[176] 18 U.S.C. §3582(a).

To cite two examples, criminal history score and U.S. citizenship were both significant positive predictors of upward departures in individual cases, yet they also held significant random effects, meaning that their relationship to upward departures varied between districts. Moreover, standard deviation computations indicated that criminal history and the citizenship effect were actually negative predictors in some regions.

The discussion shall end on an empirical note. Overall, the results provide strong reinforcement for modeling sentencing decisions with both fixed and random effects in a multilevel model to observe individual- and group-based factors. The statistical significance of multiple explanatory variables in fixed and random effects is itself informative. Then it is also of practical and empirical import that the statistical significance of four variables posed contrasts between their fixed and random effects. In sum, females and age over 50 were statistically significant at their fixed effects, with females and defendants under age 50 far less likely to be issued upward departures (controlling for other explanatory factors). However, there were no significant random effects for those two variables, meaning that the leniency to females and the lack of leniency for those over 50 years-of-age were consistent between districts. The fixed and random effects for two other variables were in the opposite directions. Minority status and going to trial, indicated no significant fixed effects, but their random effects were significant. For minorities and the trial penalty, this means that there are at least a few districts in which minority status is correlated with upward departures and that the trial penalty exists to some extent in at least some districts. The mixed multilevel model employed here was uniquely able to parse those contrasts between individual-level and group-level effects for these four explanatory variables.

V. Conclusions

This Article provided an original empirical study of a discretionary sentencing outcome that leads to more severe sentences. The results show that the focal concerns of culpability, risk, and consequences are significantly relevant to upward departure decisions. Legal and case processing factors regarding these focal concerns are predictive of upward departures and typically in the direction anticipated. The surprising result here was that while higher criminal history score increases the likelihood of an upward departure, the Guidelines offense severity measure produces the opposite effect. A likely explanation is evidence that Guidelines as a general rule offer sufficiently or overly punitive recommendations regarding offense severity. Yet for criminal history, the exclusion of various past crimes in the official Guidelines calculations insufficiently values past antisocial behavior.

It was also of interest that the trial penalty, relevant to culpability and case-processing consequences, is not evident at the individual case level. The explanation is the inclusion of the acceptance of responsibility factor which mediates the trial penalty as a predictor across individual cases. Still, the random effects results also indicate that there exists a trial penalty in at least some districts, even with the acceptance of responsibility variable.

The results confirm that extralegal variables impact non-Guidelines sentences. Leniency for women is strongly supported and systematic, being significant and present across districts. The effect defies the Guidelines policy prohibition consideration of gender. For those who believe gender disparities equal gender discrimination, these results suggest such discriminatory practices. An age effect exists with older age (operationalized as 50 years) being more likely to receive upward departures and, like gender, it was systematically present.

No minority effect is observed at the individual level, though the random effects indicates its presence in at least some districts, even with multiple control variables. Thus, the study finds some racial/ethnic disparities which might constitute implicit or explicit discrimination in some regions. The failure to find that minority status as a consistent predictor of more severe sentences in this study could be due to the multitude of variables measured as fixed and random effects. In turn, citizenship produces an odd result with U.S. citizens more likely to receive upward departures. This result is likely due to the deportation option for non-citizens who commit crimes. On the other hand, this rationale appears to challenge the Guidelines policy that national origin should never be relevant.

Overall, the study suggests reasons for individual disparities in federal sentencing. Likely these embody a mix of warranted and unwarranted disparities, depending upon how one defines and values those terms. The research demonstrates the existence and salience of regional disparities, as well. The multilevel mixed model was able to parse differences between district courts concerning the impact of various legal and extralegal explanatory factors. The results indicate that while gender and age reflect systematic effects, districts vary significantly in their judgment about the relevance of the other predictor factors on upward departure decisions. These variations are consistent with the courtroom workgroup perspective. The results also support the observation that federal courts do not necessarily exhibit a singular culture, share an affinity toward the reasonableness of Guidelines recommendations, or regard national uniformity as the primary goal in sentencing.

This Article contributes to the empirical legal studies literature regarding sentencing practices. It may likewise be helpful more broadly to stakeholders and researchers across criminal justice contexts. The theoretical, policy, and empirical offerings herein may inform about more modernized ways to conceptualize, shape, and study criminal justice outcomes. The study further provides more data in the overall debate about the divergent values of disparity and uniformity.

VI. Methodological Appendix

This Appendix contains additional information about the practical benefits and statistical specifications for multilevel models. It provides the results of several null models (i.e., before explanatory variables were included), further explains some of the independent factors that were transformed in the full model provided in the text of this Article, and discusses why certain other variables were tested yet excluded from the final model.

A. The Limitations of Single-Level Regression Models

Most sophisticated research on sentencing outcomes utilizes single-level regression analysis. While these types of regressions have confirmed values in being able to test the effect of each independent variable in the model while holding constant other variables, there may be an empirical flaw to be recognized in a single-level design as applied to certain datasets. A statistical presumption of a single-level regression model is that the outcomes are independent from one another.[177] Applying this presumption to a study on federal sentencing, like the one presented in this paper, it would mean that a single-level regression model's imperative would be that the impact of, say criminal history score as an example, on the penalty outcome is the same for every defendant, no matter where he or she is sentenced. However, that assumption is likely invalid. Instead, defendants sentenced in the same district court likely share some correlated characteristics. As an illustration, districts at the border of Mexico address a disproportionate percentage of Hispanic defendants committing immigration crimes compared to nonborder districts.[178] The impact of a computed criminal history score on sentences in border districts may vary from other regions simply because border district judges may be aware that official criminal history in foreign countries may not be available in domestic records.[179] Thus, judges facing large numbers of noncitizen defendants may account for the lack of available criminal history information in other ways, thereby skewing the impact of the Guidelines criminal history score on the outcome in those districts as compared to non-border districts.

Defendants within individual districts are more likely to share sociodemographic characteristics than with defendants in other districts because of the tendency in at least some parts of the United States to be more heterogenic in their populations. Traditional regression models unfortunately tend to ignore these kinds of correlations between defendants sentenced in the same jurisdiction.

In addition, the theory of courtroom communities is relevant. Sentences of defendants in the same district may be more correlated because they share the same courtroom cultures and sentencing judges than they are correlated with sentences issued in other districts exhibiting different cultures and judges. These group-based factors, resulting from individuals nested in districts, may also impact sentencing outcomes.

The statistical issue, then, when criminal defendants are nested in a higher level, such as district courts in the federal context, is that assuming that penalty outcomes for the dependent variable are independent from the higher level may be erroneous.[180] In such a case, the single-level regression model's assumption of independence of outcomes may be violated, rendering results that may produce

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177 Peter C. Austin et al., *An Introduction to Multilevel Regression Models*, 92 Canadian J. Pub. Health 50, 50 (2001).

178 U.S. Sent'g Comm'n, Illegal Reentry Cases 8 (2015).

179 Michael T. Light, Michael Massoglia, & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, 79 Am. Soc. Rev. 4 (Online Supp. 2014). Foreign convictions are not formally counted in the official Guidelines criminal history calculation but they may be considered for purposes of upwardly departing because the official calculation underestimates the true criminal background. U.S. Sentencing Guideline Manual § 4A1.2(h).

180 Noelle E. Fearn, *A Multilevel Analysis of Community Effects on Criminal Sentencing*, 22 Just. Q. 452, 457 (2005).

biased estimates and misestimate standard errors.[181] Importantly, there is now available a sophisticated statistical procedure that can address these concerns when data is nested—multilevel modeling. In sum, "the utility of multilevel models lies in their capacity to aggregate cases by group membership and to test simultaneously for individual and group effects on the dependent variable."[182]

B. The Benefits of Multilevel Regression Models

Multilevel analyses, when suitable for the data, are able to provide numerous benefits over single-level regression models. First, multilevel methods can account for the lack of independence when individuals are nested in groups.[183] Multilevel modeling does not assume that the impact of an explanatory variable is the same across groups. Instead, multilevel models can be specified to account for between-group variability in explanatory variables and residuals.[184] Second, the methodology is preferable to simply controlling for the group-level effect as can be done in a single-level regression model. Multilevel modeling can simultaneously test the effects of both individual and group explanatory variables on the outcome of interest.[185] A multilevel model is able to indicate whether the individual-based explanatory factors impact the outcome variable while also indicating how group characteristics affect the relationships between the individual factors and the outcome of interest.[186]

Third, multilevel models are not limited to two levels; they can accommodate additional levels. As an illustration, multilevel regressions are popular in educational research where students are nested in classrooms which are nested in schools. The current challenge of including multiple levels is the substantial increase in computer resource capacity that is necessary to run a model with numerous explanatory factors included. An attractive feature is that there need not be the same number of units at each level. Nor must the levels be strictly hierarchical in nature. They may merely be nested. Thus, a multilevel model can be cross-level, such as defendants nested in years and nested in districts. Such a design would account, then, for both annual and regional variables.

Fourth, multilevel models partition the overall variance in the outcome of interest among the levels of analysis (e.g., at the individual level and then at the group level). The result indicates how much of the variation in the outcome is accounted for by the grouping.

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181 Austin et al., *supra* note 179, at 50. A violation of the assumption of independence can produce Type 1 errors. James L. Peugh, *A Practical Guide to Multilevel Modeling*, 48 J. School Psychol. 85, 86 (2010).

182 Weidner et al., *supra* note 99, at 410.

183 *Id*. (noting in single-level regressions the lack of independence may exaggerate the significance of the parameter estimate).

184 Brian D. Johnson, *Cross-Classified Multilevel Models: An Application to the Criminal Case Processing of Indicted Terrorists*, 28 J. Quant. Criminology 163, 171 (2012).

185 Fearn, *supra* note 182, at 468. In even more technical terms, "multilevel techniques take into account variance at both the individual and group levels, thus allowing intercepts and slope coefficients for selected variables to vary across groups." Stephen R. Porter & Paul D. Umbach, *Analyzing Faculty Workload Data Using Multilevel Modeling*, 42 Res. Higher Educ. 171, 177 (2001).

186 Porter & Umbach, *supra* note 187, at 178.

C. Step One: Running the Null Model

The initial step in a multilevel model project is to run a null model. The null model is also referred to as an unconditional model because it has no explanatory factors included. The purpose is to statistically obtain the intraclass correlation coefficient ("ICC") to determine if multilevel modeling is appropriate for the data. The ICC provides the proportion of the total variance in the outcome that is accounted for by the clustering at the nested group level. In other words, for purposes of this study, the statistic is a measure of how much of the differences in upward departure decisions are attributable to variations in district court practices. If the ICC indicates that intraclass correlation exists with statistical significance, the assumption of independence required by the single-level regression model may be rejected and the data are appropriate for multilevel modeling.[187] Still, even if the ICC shows statistical significance, if it is not practically significant, the researcher can still reasonably decline to model that level. Multilevel analysis with numerous explanatory variables to test requires complex algorithmic processing. An ICC that provides a statistically significant, though practically small, proportional variance may convince the researcher that the ability to include more explanatory variables at the lower levels may outweigh any interest in retaining the practically unimportant variation at that nested level.[188]

D. Three-Level Null Models for the Upward Departure Dataset

Multilevel models, like single-level regression models, are commonly tested on continuous dependent variables. But when the outcome of interest is binary in nature, different modeling must be employed because a binary dependent variable means that the normal assumptions of a normally distributed response variable and homoscedatic errors are violated.[189] In the study presented herein, the outcome of interest is binary, being whether an upward departure was ordered (or not). Statistical techniques can be employed to transform such a binary outcome to achieve normality and reduce heteroscedasticity, typically through the logit function,[190] as was used herein.

A statistical model to fit data with a binary dependent variable is called a generalized linear model with three components: (1) a linear regression equation, (2) a specific error distribution, and (3) a nonlinear link function that transforms the predicted values for the dependent variable to the observed values.[191]

For the study herein, the binary response variable for the *i*th defendant in district *j*, is:

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187 J. Kyle Roberts, *An Introductory Primer on Multilevel and Hierarchical Linear Models*, 2 Learning Disabilities 30, 32 (2004).

188 Tom A.B. Snijders, *Fixed and Random Effects, in* Encylopedia of Statistics in Behavioral Science 664, 665 (Brian S. Everitt & David C. Howell eds., 2005). At times, there is a give-and-take between resource capabilities and theoretical interests.

189 Joop J. Hox & Cora J.M. Maas, *Multilevel Analysis, in* Encyclopedia of Social Measurement 785, 790 (Kimberly Kempf-Leonard ed., vol. 2, 2005).

190 *Id*.

191 *Id*.

$$Y_{ij} \begin{cases} 1 \text{ for upward departure} \\ 0 \text{ for no upward departure} \end{cases}$$

The transformation of the dichotomous dependent variable for an upward departure presented herein utilizes the logit link function.

$$\eta_{ij} = ln\left(\frac{p}{1-p}\right) \qquad \text{Logit Link Function}^{192}$$

In the logit link function, the Greek letter eta (η) represents the transformed linear predictor. Exponentiating the resulting η parameter provides the odds ratio. The p is the probability of the outcome occurring and the denominator $(1 - p)$ is the probability of the outcome not occurring. The equation represents the odds of the outcome.

At the outset of this study, it was considered that a three-level model might be appropriate considering district courts are nested within the higher level circuit courts of appeal and/or within years, with the latter perhaps accounting for changes in sentencing patterns over time and using annual time periods as the temporal division.

A few statistical notes should be briefly mentioned before addressing the models. The software utilized for the study presented herein, including the three-level models that follow, was SPSS version 24. Further, there is no issue of selection bias and therefore no need for the so-called Heckman correction. Selection bias may occur when the researcher obtains data from a non-random sub-sample of the population of interest.[193] The relevant population of interest in this paper is federal defendants sentenced in the federal system during the period of study. The data analyses included herein were not limited to some sub-sample of that population.

In any event, the specification for a three-level null model is as follows:

$$\eta_{ij} = \beta_{0jk} \qquad \text{Level-1}$$
$$\beta_{0jk} = \gamma_{00k} + \mu_{0jk} \qquad \text{Level-2}$$
$$\gamma_{00k} = \gamma_{000} + \mu_{00k} \qquad \text{Level-3}^{194}$$

It was of interest, then, to test for whether the final model ought to account for serious nesting patterns which may introduce bias from the circuit courts of appeal as Level-3. The initial step in creating a multilevel model with three levels is to estimate the null model, which is provided in Table 5.

From Table 5 it is estimated that 7% of the variation in upward departures is between district courts and almost 2% of the variation is between circuit courts of appeal. The ICC was statistically significant for Level-2 district courts, yet was not significant for the Level-3 circuit courts. Practically, it was not surprising that there was not shown to be statistical significance with circuit courts. An earlier scan of bivariate data for the proportion of upward departures in the districts did not reveal consistencies for districts nested in circuits. Instead, the circuits tended

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192 Ronald H. Heck et al., Multilevel Modeling of Categorical Outcomes Using IBM SPSS 151 (2012).

193 Shawn Bushway et al., *Is the Magic Still There? The Use of the Heckman Two-Step Correction for Selection Bias in Criminology*, 23 J. Quantitative Criminology 151, 152 (2007).

194 Heck et al., *supra* note 194, at 183.

Table 5. Null Model for Upward Departures with Districts Nested in Circuits.

Fixed Effects	*b*	S.E.	
Intercept	-3.934	.087***	
Random Effects	s^2	S.E.	ρ
Level-1	3.29		
Level-2	.250	.042***	6.94%
Level-3	.060	.162	1.67%
-2LL=4324243			
n=623,947			

*** $p < .001$

to encompass a mix of low and high use of upward departures within their nested districts. For example, while three of the districts within the Fifth Circuit yielded the highest proportions of upward departures (Northern District of Texas at 6.5%, Western District of Louisiana at 5.7%, and Eastern District of Louisiana at 4.8%), the Fifth Circuit also included one district with a below-average rate of upward departures (Southern District of Texas at 1.5%). Overall, the Fifth Circuit ranked as the fifth highest among the 12 circuits in its total proportion of upward departures. The First Circuit ranked first overall, with a total of 3.3% of sentences with upward departures. But the First Circuit also presented with vastly different practices within its district court outcomes, as well. Most of the upward departures in the First Circuit were issued in the District of Puerto Rico (at 4.4%), yet this circuit also included the District of Rhode Island which issued one of the lowest rates of upward departures (at 0.5%).

While circuit court variation was not statistically significant, it alternatively was likely that there might be variations by time. Thus, a three-level null model was run for district courts nested in fiscal years, which is presented in Table 6.

Table 6. Null Model for Upward Departures for Districts Nested in Years.

Fixed Effects	*b*	S.E.	
Intercept	-3.937	.057***	
Random Effects	s^2	S.E.	ρ
Level-1	3.29		
Level-2	.282	.046***	7.69%
Level-3	.093	.010***	2.54%
-2LL: 4328082			
n=623,947			

*** $p < .001$

This null model with district courts nested in fiscal years demonstrated that 8% of the variation in upward departures is between district courts. It was also found that there is a statistically significant variation with Level-3 being an annual indicator. Yet, for several reasons, the nesting of upward departure outcomes at a level with years was dropped to proceed with a more developed two-level model. The ICC for years was, in practical terms, indicating a low degree of variation by year at

less than 3%. As multiple explanatory variables were expected to be included in the final model with both fixed and random effects, a three-level model including years would present as an extremely complicated model from a computing resource perspective. Indeed, as will be indicated below, even in a two-level design with district courts at the higher grouping, the final model had to be curtailed a bit because of convergence issues when attempting to model all independent variables as both fixed and random effects. An additional concern is that there were only 8 groups involved for years (i.e., eight consecutive fiscal years), an extremely low number for multilevel modeling purposes. In any event, as a primary interest for this study was regional variations in discretionary sentencing decisions, the Level-3 variation with years was dropped. Still, the three-level model indicated in Table 6 was presented herein for informational purposes.

E. The Two-Level Null Model for the Upward Departure Dataset

As the three-level designs just summarized were vetoed, a null model with two levels to account for nesting in districts could be run. The null model for two-level design with a dichotomous dependent is specified with the following equations.

$\eta_{ij} = \beta_{0j}$ Level-1 Null Model
$\beta_{0j} = \gamma_{00} + \mu_{0j}$ Level-2 Null Model

In these null models for this study, the term β_{0j} is the intercept, which is the average log odds of an upward departure in group *j*. At Level-2, the term γ_{00} represents the fixed intercept, being the log odds of an upward departure in a typical district for the average individual. The variance parameter μ_{0j} is the random intercept and signifies the variability of the outcome across Level-2 groups.[195]

In a generalized linear multilevel model using a logit link because of a binary response variable, the Level-1 residuals are assumed to follow the standard logistic distribution, with a mean of 0 and a variance ($\hat{\sigma}^2$) set to $\pi^2/3$, which is equal to 3.29. For a dichotomous outcome, the intraclass correlation coefficient (i.e., a statistic that indicates the proportion of total variability in outcomes which arises at the higher level) is computed in a two-level model as:

$$\frac{\tau_{00}}{\tau_{00} + 3.29}$$ Intraclass Correlation Coefficient (ICC)

The term τ_{00} represents the between-group variance at Level-2.[196]

Table 7 provides for the null model results for upward departures where Level-1 are individual defendants and Level-2 are district courts. Table 7 is the basis for the final model contained in Table 3 in the main body of this Article.

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[195] Heck et al., *supra* note 194, at 151.
[196] *Id*. at 94.

Table 7. Null Model for Upward Departures Nested in Districts.

Fixed Effects	*b*	S.E.	
Intercept	-3.921	.058***	
Random Effects	s^2	S.E.	ρ
Level-1	3.29	---	
Level-2	.301	.047***	8.38%
-2LL=4324129			
n=623,947			

*** $p < .001$

The ICC computed for the two-level null model means that 8% of the variability in upward departures is accounted for by districts.[197] This result is relatively within the bounds of other studies of federal sentencing. The other research that report on the partition of variance results typically find that between 4 and 12% of the variance in sentence length was accounted for at the districts level, with the exactly percentage depending on the period studied, the crimes included, and when reporting full models, the control variables used.[198]

As expected from the courtroom communities' perspective, the Level-2 random effect is significant at the .001 level, which indicates that the probability of an upward departure significantly varies between districts. Indeed, in a separate analysis to compare district means, wide variation in proportions were observed. The proportion of upward departures at the district court level ranges from a low of 0.5% (Northern District of Oklahoma, District of New Mexico, and District of Rhode Island) to a high of 6.5% (Northern District of Texas). Thus, the district with the greatest proportion of upward departures is more than twelve times that of the district with the lowest percentage, indicating a stark district level differential.

The intercept in the two-level null model represents an estimate that can be converted to the overall probability of an upward departure. The random effect represents the degree to which the outcome varies across federal districts. The estimated probability of a defendant receiving an upward departure in the average district is approximately 2%.[199]

Once the researcher chooses the null model with the appropriate higher level(s), the researcher can add explanatory factors. In a very simple model, we can

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197 This leaves 92% of the variability to be accounted for at the individual case level (or other unknown factors).

198 Light, *Noncitizens*, *supra* note 120, at 462 (4% variance in length of sentence and 5% in sentences requiring incarceration); Lynch & Omori, *supra* note 104, at 429 (11% for drug trafficking crimes); Feldmeyer & Ulmer, *supra* note 39, at 250 (7%); Farrell et al., *supra* note 113, at 112 (5% for length of incarceration and 8% of the variance for the odds of incarceration was between districts); Albonetti & Baller, *supra* note 39, at 64 (12% for drug trafficking crimes); Kautt, *supra* note 90, at 653 (7% for drug trafficking crimes).

199 The formula to obtain the overall expected proportion is an inverse of the logit link function: $[(1/(1 + e^{-\eta})) \times 100\%]$. Plugging in the coefficient for the fixed effect coefficient, the formula becomes $[(1/(1 + e^{3.921})) \times 100\%]$, which is equal to 1.94%.

add a Level-1 explanatory variable and a Level-2 predictor, such as the following equation illustrates.

$\eta_{ij} = \beta_{0j} + \beta_{1j}X_{1ij}$ Level-1
$\beta_{0j} = \gamma_{00} + \gamma_{01}W_j + \mu_{0j}$ Level-2
$\beta_{1j} = \gamma_{10} + \mu_{1j}$

Now γ_{00} is the log odds that the outcome = 1 when explanatory variable X = 0 and $\mu = 0$. β_1 is the log odds effect that the outcome is = 1 for every one unit increase in the variable X in group *j*. To get a more interpretable result for the effect of X, we can exponentiate β_1 to obtain the odds ratio to compare the odds for individuals spaced one unit apart on X. Then W*j* represents the random effect of that predictor variable in group *j*.

In this study, the null model with district courts at Level-2 was the choice and the independent variables that survived into the final model are provided in Table 3 in the main body of the text. In Table 3, the ICC statistic indicates that 2% of the overall variance remains with district courts. The intraclass coefficient is no longer statistically significant when accounting for multiple fixed and random effects. Nonetheless, the substantial reduction in the -2 Log-Likelihood statistic between the null model and the full model indicates a significantly better fit of the full model for this dataset. Further discussion on methodological choices along the way to the final model is next.

F. Transforming Variables and Excluding Factors Regarding the Full Model

Some variables were transformed for the final model as explained below. In addition, other factors were tested yet eliminated in the end for the reasons ascribed to them herein.

For purposes of the descriptive statistics in Table 2, the variables for final offense level, criminal history, and number of counts are in their original metrics. For the multilevel model in Table 3, these three variables are each grand mean centered for ease of interpretation as none of them can have zero as a real value. In federal sentencing, defendants must have at least one count of conviction, the lowest criminal history category is I (i.e., 1), and the minimum offense severity level is 1. In a logistic model, the intercept is interpreted to mean the value of the outcome when all predictors are equal to 0. This has no practical meaning for variables that cannot actually have a real world value of 0, which is the case for these three variables. Grand mean centering is the statistical convention for adjusting the metrics to have a more interpretable intercept in such a case.

The number of counts (of conviction) variable was transformed for statistical purposes. In the original data, the number of counts variable was skewed to the right. This variable was first centered at the grand mean. Then to enable a natural log transformation to adjust for the skew and more closely approximate a normal distribution, the value of .1 was added to the mean centered variable because log transformations are not possible on values of 0.

Race/ethnicity was originally coded as dummy variables of black, Hispanic, and other, with white as the reference category. In a full multilevel model with such coding with all fixed effects, the only statistically significant result was for the category of other as compared to whites. This result is practically meaningless

because the grouping of "other" includes a heterogeneous mix of native Alaskan, native American, non-U.S. American Indians, Asian, Pacific Islander, multi-racial, and a smaller subset of other.[200] In addition, SPSS could not properly compute a random effect for this variable with this coding scheme involving three dummy variables. As race/ethnicity is such an important topic of interest in criminal justice, it seemed more worthwhile to recode the variable as a single dichotomous factor in order to incorporate a race-based variable in the formula and to be able to model it with both fixed and random effects.

The full model includes all 94 district courts. This is mentioned because many studies that incorporate district courts in their variables exclude the districts that are in the U.S. territories (Puerto Rico, Virgin Islands, Guam, North Mariana Islands). These researchers argue the territories are viewed as different because states enjoy greater rights than them and, thus, the inclusion of the territories may introduce nonrandom bias.[201] However, other experts challenge the assumption of substantive differences between districts courts within the states and those in the territories.[202] Indeed, researchers in at least one study found far more similarities than differences in sentencing outcomes, except that the districts in the territories tended to be more punitive.[203] These researchers further contend that excluding the territories actually may do more harm by not portraying an accurate picture of the salience of the Guidelines and judicial compliance with them from a national perspective.[204] I determined it was preferable to include the territories for similar reasons.

The general offense type was excluded from the random effects due to the complexity of the algorithm necessary to compute a multilevel model with them included. In other words, the model with the offense type having random effects was overly complicated for computational iterations, resulting in a failure of convergence. Convergence was achieved after excluding offense types at Level-2, while still retaining their Level-1 fixed effects.

It is noted that four additional independent variables were tested but removed before the final model for reasons of parsimony and specific statistical challenges. The applicability of a mandatory minimum statute was not statistically significant (at the .001 level) at Level-1 in any model and thus was removed as there was no theoretical justification to retain it as a factor in a study on *upward* departure outcomes. A variable tied to the Guidelines-recommended sentence was removed because of multicollinearity concerns with the final offense level and criminal history score variables. Notably, all independent variables attempted in any model were tested for multicollinearity. For the independent variables retained and shown in the final model in Table 3, results indicated no significant collinearity problems. All variance inflation factor scores resided within an acceptable level (VIFs < 3). A variable regarding the guideline recommended sentence had previously triggered multicollinearity concerns (with some VIFs greater than 5) and was therefore removed.

A series of dummy variables to distinguish fiscal years of sentencing were also

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200 U.S. Sent'g Comm'n, Variable Codebook for Individual Offenders 31 (2015).

201 *E.g.*, Farrell et al., *supra* note 113, at 103 n. 75; Kautt, *supra* note 90, at 648. *See also* Light, *Noncitizens*, *supra* note 120, at 456 (excluding the territories without stating reason).

202 Gail Iles et al., *U.S. Territorial Exclusion in Federal Sentencing Research: Can it be Justified?*, 3 Int'l J. Criminology & Soc. 113, 113 (2014).

203 *Id.* at 122.

204 *Id.* at 113.

dropped. While the annual rates of upward departures were statistically significant compared to 2008 as the dummy, the overall statistical impact (according to F statistic results) on explaining upward variances for the timing factor was among the weakest among the various explanatory variables. The statistical resources necessary to account for the seven dummy variables for years did not then seem worthwhile.

Another variable was tested and also dropped. No statistically significant effects of education level on upward departures were observed in any tested model. Without any pressing need to focus on educational level as it does not represent the most egregious type of discriminatory category, it was discarded as an explanatory factor.

As a final methodological note, the results here may advise other researchers that it might be preferable to model the main Guidelines proxies for crime severity and criminal background with the two separate factors of final offense level and final criminal history category, respectively, rather than their combination as indicated by the Guidelines' minimum sentence recommendation. As shown herein, the two variables may actually have the opposite effect on the outcome of interest, which would unfortunately be indiscernible when using the minimum sentence combination instead.

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The Harvard Law Review and the Iroquois Influence Thesis

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ABSTRACT

In a recent Developments in the Law chapter on the Indian Civil Rights Act, authors and editors at the Harvard Law Review seemed to take seriously the so-called "Iroquois influence thesis," the idea that basic principles of the American government were derived from American Indian nations, in particular the Iroquois Confederacy. Although the influence thesis has acquired a life of its own, being taught in some of America's elementary and secondary schools, it is nonsense. (One of the sources cited in support of this made-up history is a congressional resolution, as if Congress has some special, historical expertise.) Nothing in American Indian law and policy should depend on the influence thesis, and it is unfortunate that a prominent law review has given it credence. This article explains how the Harvard folks were misguided and why the influence thesis should be interred.

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A recent *Developments in the Law* chapter in the *Harvard Law Review*, "ICRA Reconsidered: New Interpretations of Familiar Rights,"[1] discussed what the Indian Civil Rights Act[2] and its nearly fifty-year history tell us about the relationship between American Indian tribal governments (as varied as they are) and the government of the United States. It's noncontroversial to emphasize, as the chapter did, the tension that has existed throughout American history between those two sets of governments. And ICRA itself is evidence of that discomfort, with Congress seeking to impose American constitutional values, including much of the Bill of Rights, on the American Indian nations—for arguably good reasons, but an intrusion into tribal sovereignty nonetheless.

Recognizing the perhaps inevitable "tension between promoting tribal sovereignty and protecting individual rights"[3]—something has to give—the *Developments* chapter came down on the side of letting tribes, which are sovereigns, after all, make their own decisions on ICRA matters, even in habeas cases. That recommendation isn't self-evidently right, however, when tribal members are claiming that their civil rights were violated by their own tribal governments. Should government officials really have the final say about the legality of their own behavior? In addition, Congress singled out habeas cases for special treatment under ICRA, with review available in "a court of the United States."[4] In an appendix, I've set out a few thoughts on the merits of the *Developments* chapter's substantive arguments.

My purpose in the body of this article is not to challenge the overall argument of the *Developments* chapter, however. It's to emphasize something even more important (important because scholarly failings matter): to demonstrate that some of the authority cited in that chapter is embarrassing. Why in the world did the authors cite, and the *Harvard Law Review* editors permit the citation of, documents that support, or are claimed to support, the "influence thesis"? That's the increasingly pervasive, but silly, idea that the governing principles of the United States, including those in the U.S. Constitution, were influenced—*heavily* influenced—by American Indian nations, particularly the Iroquois Confederacy.[5]

The influence thesis is wishful thinking, nothing more[6]—it's supposed to

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1 129 Harv. L. Rev. 1709 (2016) [hereinafter *Developments*].

2 Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (1968) (codified at 25 U.S.C. §§ 1301–1304).

3 *Developments*, at 1709.

4 *See* 25 U.S.C. § 1303 (providing that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe," but making no other mention of the possibility of federal court review of an alleged tribal violation of ICRA).

5 Some of the fundamental works associated with the spread of this idea in the last 30-40 years are Bruce E. Johansen, Forgotten Founders: How the American Indian Helped Shape Democracy (1982); Jack Weatherford, Indian Givers: How the Indians of the Americas Transformed the World 133 (1988) (chapter entitled "The Indian Founding Fathers"); Donald A. Grinde, Jr. & Bruce E. Johansen, Exemplar of Liberty: Native America and the Evolution of Democracy (1991).

6 The influence thesis has nevertheless been incorporated into the curricula of American school systems and some college programs as well. *See* Bruce E. Johansen, *Reaching the Grassroots: The World-Wide Diffusion of Iroquois Democratic Traditions* (2002) (providing evidence, with approval, of the spread of the influence thesis in schools), available at http://www.ratical.org/many_worlds/6Nations/grassroots.html; *Iroquois Confederacy and the US Constitution* (curricular unit at Portland State University), available at http://www.iroquoisdemocracy.pdx.edu/. *But see* Samuel B. Payne, Jr., *The Iroquois League, the Articles of Confederation, and the Constitution*, 53 Wm. & Mary Q. 605, 606-07 (1996) (critically discussing the spread of the thesis in schools).

make us feel good—and, based as it is on little or no evidence, it should disappear from scholarly discourse. It certainly shouldn't be propped up by citations in the *Harvard Law Review*. As a "scholarly" doctrine, the thesis is generally the product of a few writers citing each other back and forth, and wrenching founding-era (and other) quotations out of context, in support of otherwise unsupportable positions.[7] Members of Congress have done the quotation-wrenching as well,[8] and some tribal officials have wrongheadedly jumped on the influence-thesis bandwagon.[9]

The thesis is dumb, but it also should have been irrelevant to the argument advanced in the *Developments* chapter. (If that argument does depend on such questionable authority, it's grounded in quicksand.) In support of the proposition that tribal governments deserve deference in applying ICRA, the authors argued that the American colonists mindlessly resisted the idea that the American Indian nations had laws and governments worth paying attention to,[10] and we continue to resist today. Fair enough (perhaps), but the influence thesis doesn't support those points. The *Developments* authors seem to have been of two minds—that the American colonists didn't value tribal laws and governments, yet the founders appropriated Indian political ideas to use in the Constitution. Those two propositions can't both be right.

To be sure, the *Developments* authors didn't explicitly say they were endorsing the influence thesis. But, if they weren't, why cite to material that (1) overstates the tribal influence on the founding and (2) is, or should be, irrelevant to the argument being advanced? What's included in footnotes matters, as editors and associates at the *Bluebook*'s home surely know, and these citations seem to have been motivated by political correctness, not scholarly merit.[11]

In the first two parts of the article I examine in some detail a couple of the suspect footnotes. (That sounds excruciatingly boring, I know, but it's no more so than any other law review subject.) In part III, I add further thoughts about why the influence thesis should be summarily rejected. Finally, in the conclusion, I note that the influence thesis has potentially negative effects on the American government's conception of, and policy toward, American Indian nations—another reason the thesis should be interred, not celebrated.

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7 *See, e.g., infra* note 40 (noting academic historian's presentation to congressional committee of misleading quotation from George Washington); *infra* note 49 (noting independent historian's misleading statement of legislative history).

8 *See infra* text accompanying note 35.

9 *See infra* notes 64 & 71 and accompanying text. The officials apparently see a tribal benefit from the thesis, but there's no long-term benefit in supporting an indefensible thesis.

10 *See, e.g., Developments*, at 1711 ("[T]he governments that arrived in North America searched for the particular forms of law and government with which they were familiar and, finding them lacking, sought to impose civilization and order (of their own style) upon tribes.") (footnotes omitted); *id*. at 1710 ("European and American distrust of, or disinterest [*sic*] in, Indian tribal affairs led them to apply their laws and philosophies to the exclusion of Indians' own views in those areas.") (footnote omitted).

11 Or maybe everyone was too busy writing Supreme Court clerkship applications to do routine *Review* work.

I. Footnote 7

Footnote 7 in the *Developments* chapter was dropped from a clause that reads, "Indians had successfully designed and developed advanced governments and laws to protect the rights of their peoples long before the federal government thought to suggest these institutions to tribes."[12] That's true, up to a point, I suppose. I'm not sure how much traditional tribal governments were instituted to protect individual rights against overreaching by those governments, or the extent to which we should treat customs and practices as "advanced laws." But for the sake of argument I'll accept that textual statement.[13]

But footnote 7 went far beyond the idea that the tribes had governments and laws, as of course they did. The authors cited and quoted from two sources that are among the usual suspects in supporting the influence thesis—a 1751 (or perhaps 1750) letter from Benjamin Franklin to James Parker and a 1988 Concurrent Resolution passed by Congress. Neither citation provides support for much of anything worthwhile—the Franklin letter because the quoted language gives a misleading idea of Franklin's meaning and the Concurrent Resolution because it's nonsense on stilts promulgated by a political body, not a group of scholars.

A. The Franklin Letter

In the letter to Parker, according to footnote 7, Franklin "observed . . . that the success of the Iroquois Confederacy, which 'has subsisted ages, and appears indissoluble,' demonstrated the feasibility of union for the colonies."[14] That statement supposedly supported the idea that, "[i]n fact, tribal governments had an impact on the development of the federal government."[15]

Read in isolation, that latter statement is unobjectionable. Obviously the Constitution was affected, in that Indians and Indian tribes are both mentioned in that document.[16] (We don't need a quotation from Benjamin Franklin to find

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12 *Developments*, at 1711 (footnote omitted).

13 Whether the founders would have accepted it is doubtful. *See, e.g.*, Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *reprinted in* 11 The Papers of Thomas Jefferson 48, 49 (Julian P. Boyd ed., 1955) ("I am convinced that these societies (as the Indians) *which live without government* enjoy in their general mass an infinitely greater degree of happiness than those who live under European governments.") (emphasis added). To John Locke, after all, America, as occupied by the indigenous peoples, had been the prime example of the state of nature. *See also* John Adams, A Defence of the Constitutions of Government of the United States of America xv, 118 (1787; Da Capo reprint 1971) (referring to the "rudest tribes of savages in North America" and "the savages of North or South America"). (Full disclosure: Neither Jefferson nor Adams was a delegate to the Constitutional Convention.)

14 *Developments*, at 1710 n.7 (citing and quoting Letter from Benjamin Franklin to James Parker (Mar. 20, 1750/51) [hereinafter Franklin Letter], *reprinted in* 4 The Papers of Benjamin Franklin 117, 120 (Leonard W. Labaree ed., 1961)).

15 *Developments*, at 1710 n.7.

16 *See* U.S. Const. art. I, § 8, cl. 3 (giving Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"); *id*., art. I, § 2,

those constitutional provisions.) Furthermore, the founders, who were students of government, prided themselves on their study of other regimes, so it's not surprising that many were interested in the governance (or, as some thought, the lack of governance) of American Indian nations.[17] (In that respect, ancient Greece and the Roman Empire also had "an impact on the development of the federal government.") And of course the colonists and the tribes had contact, but those meetings (or confrontations) typically didn't involve discussions of political philosophy.[18]

The gulf between general statements about colonist-tribal relationships and the purported influence of the Iroquois Confederacy is enormous. In fact, the contact between colonists and Indians often wasn't friendly, which by itself should call into question the influence thesis. And a closer look at the Franklin letter demonstrates that Franklin didn't mean what footnote 7 said he meant.

The purpose of the letter was to advise Parker, a printer and long-time Franklin friend, who had asked Franklin and others for guidance about publishing a pamphlet apparently prepared by Archibald Kennedy, *The Importance of Gaining and Preserving the Friendship of the Indians to the British Interest Considered,*[19] also cited in footnote 7. Although neither Kennedy nor Franklin was identified in the pamphlet,[20] the pamphlet included what is assumed to be Franklin's response to Parker's inquiry about the merits of the document. The letter is introduced in the pamphlet as follows: "The Author of the foregoing ESSAY, having desired the Printer to communicate the Manuscript to some of the most judicious of his Friends, it produced the following LETTER from one of them: The publishing whereof, we think, needs no other Apology, *viz.*"[21] (Franklin had recommended publishing the pamphlet.[22])

In the first paragraph of the letter, Franklin wrote:

> I have, as you desire, read the Manuscript you sent me; and of Opinion [*sic*], with [Kennedy], that securing the Friendship of the Indians is of the greatest Consequence to these colonies; and that the surest Means of doing it, are, to regulate the Indian Trade, so as to convince them, by

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cl. 3 ("excluding Indians not taxed" from the census count used to apportion representatives and direct taxes).

17 *See supra* note 13 (noting that, for some from the founding generation, the existence of tribal governments and laws wasn't obvious).

18 *See* Erik M. Jensen, *The Imaginary Connection Between the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 Am. Indian L. Rev. 295, 303 (1991) (discussing founders' dealings with Indians that went beyond land speculation) (responding to Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 Am. Indian L. Rev. 323 (1989)).

19 *See* Archibald Kennedy, The Importance of Gaining and Preserving the Friendship of the Indians to the British Interest Considered (1752), available at http://quod.lib.umich.edu/e/evans/N05302.0001.001/1:4?rgn=div1;view=fulltext.

20 *See* Elizabeth Tooker, *The United States Constitution and the Iroquois League*, 35 Ethnohistory 305, 327 (1988) (noting that Franklin wasn't identified as the letter's author for a century, which suggests that we should be skeptical about overstating its influence during the founding period); Editor's Biographical Note, Franklin Letter, *supra* note 14, at 117 (noting attribution of the letter to Franklin by Edward Eggleston in a note to John Bigelow, who was preparing an edition of Franklin's work that was published in 1887-88).

21 Kennedy, *supra* note 19, at 28-29.

22 *See* Franklin Letter, *supra* note 14, at 121.

> Experience, that they may have the best and cheapest Goods, and the fairest Dealing from the English; and to unite the several Governments, so as to form a Strength that the Indians may depend on for Protection, in Case of a Rupture with the French; or apprehend great Danger from, if they should break with us.[23]

As the last clause confirms, Franklin didn't think that the relationship between colonists and Indian nations was necessarily friendly. Friendship wasn't a given; it needed to be "secur[ed]." And the title of the Kennedy pamphlet also suggested that it was necessary to "gain" the friendship of the Indians.[24]

The tension between tribes and colonists didn't disappear during the time between the publication of the Franklin letter and the Constitutional Convention. The sometimes unfriendly relationships continued to make unification of the colonies close to a necessity. Much of the original legislation emanating from Congress, after ratification of the Constitution, was directed at Indian affairs because of the potentially hostile tribes at the frontier, not because of admiration for the native peoples. In short, strengthening the central government would make it possible to deal with the "merciless Indian Savages" Thomas Jefferson had referred to in the Declaration of Independence[25]—or the "savage tribes," Hamilton's term in *The Federalist*.[26] (Would a rational new nation take its governing principles from merciless savages or savage tribes?)

Despite occasional intimations in the literature to the contrary, Franklin's statement about the Iroquois Confederacy included in the Parker letter—that the Confederacy "has subsisted ages, and appears indissoluble"—wasn't made at the 1754 Albany Congress.[27] That congress is often cited as the start of the serious push for confederation, and it was attended by many representatives of Indian nations, particularly from the Iroquois Confederacy.[28] At the Albany Congress, Franklin did

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23 *Id*. at 117.

24 Franklin noted that Indians had fighting skills that could have been invaluable to the colonists in the right circumstances:

> Every Indian is a Hunter; and as their Manner of making War, viz. by Skulking, Surprizing and Killing particular Persons and Families, is just the same as their Manner of Hunting, only changing the Object, Every Indian is a disciplin'd Soldier. Soldiers of this Kind are always wanted in the Colonies in an Indian War; for the European Military Discipline is of little Use in these Woods.

Id. at 120.

25 *See* The Declaration of Independence para. 20 (1776) ("He [the king] has . . . endeavoured to bring on the Inhabitants of the Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions.").

26 *See* The Federalist No. 24, at 61 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

> The savage tribes on our Western frontier ought to be regarded as our natural enemies . . . . Previous to the Revolution, and ever since the peace, there has been a constant necessity for keeping small Garrisons on our Western frontier. No person can doubt that these will continue to be indispensable, if it should only be against the ravages and depredations of the Indians.

27 *See* William N. Fenton, The Great Law and the Longhouse: A Political History of the Iroquois Confederacy 471 (1998).

28 Indian nations, particularly the Iroquois, were represented in Albany, although not in the numbers that might have been expected. *See* Timothy J. Shannon, Indians and Colonists

express support for unification of a sort, as he had in the letter to Parker. But, as the title of the Kennedy pamphlet suggests, it was the "British interest" that was to be protected—unification within the British Empire, not the creation of a new united states.[29] Historian Timothy Shannon has explained, "Identifying Franklin or any other supporter of the Albany Plan as an embryonic American patriot in 1754 is misguided; quite to the contrary, his primary objective was to place the Crown's American subjects on a more equal footing with those of Britain."[30]

Most important, the Franklin quotation in its unedited form—decidedly not the form intimated by footnote 7—doesn't come close to supporting the influence thesis:

> It would be a very strange Thing if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that is has subsisted Ages, and appears indissoluble; and yet that a like Union should be impracticable for ten or a Dozen English colonies.[31]

That's hardly a positive statement about Iroquois principles.[32] Yes, Franklin urged consolidation of the colonies, but his urging was in the nature of "if even the

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at the Crossroads of Empire: The Albany Congress of 1754, at 127-30 (2000); *id*. at 199-200:

> Franklin, on his way downriver [after the congress], wrote to [Cadwallader] Colden complaining of the delay caused by the Indians, when "after all nothing of much Importance was transacted with them." . . . In light of Franklin's dismissive remark about the Indians' role in the congress, the notion of an Iroquois influence on the Albany Plan seems farfetched indeed.

29 *See* Shannon, *supra* note 28, at 63-76. Franklin in the Parker letter had proposed a "voluntary Union entered into by the Colonies themselves," as "preferable to one imposed by Parliament," Franklin Letter, *supra* note 14, at 118, but by the time of the Albany Congress he was hoping that Parliament would act. *See* Editor's Note 1, *id*. at 118.

30 Shannon, *supra* note 28, at 198; *see also* Fenton, *supra* note 27, at 471 (noting that Indian participants at the Congress were more interested in promoting grievances than in providing a model for the new United States).

31 Franklin Letter, *supra* note 14, at 118-19.

32 *See* Shannon, *supra* note 28, at 103 ("When Franklin referred to 'Six Nations of Ignorant Savages,' he was using the Iroquois as a negative example to illustrate the colonists' failure to recognize their own common interests."); *see also* Fenton, *supra* note 27, at 471:

> This bit of satire on Franklin's contemporaries has of late inspired proponents of the idea that the writers of the United States Constitution derived its structure and separation of powers from the Iroquois Confederacy, a doctrine for which supporting evidence has escaped responsible scholars. None of Franklin's contemporaries . . . left an account of the internal workings of the confederacy for James Madison to follow. Not until the middle of the nineteenth century did such appear in Lewis Henry Morgan's classic *League of the Ho-de-no-sau-nee, or Iroquois* (1851). Like much of what else is advanced today as politically correct, this spurious doctrine represents invented tradition . . . .

See also Tooker, *supra* note 20, at 311-12 (noting that it was not until publication of Morgan's 1851 work that information about the Iroquois was widely available). Tooker is doubtful the founders would have found much of the Great Law of Peace acceptable (if they had known about it to begin with). *Id*.

ignorant Iroquois can do it, of course we can." In any event, it's hard to imagine confederation wouldn't soon have been on the table for consideration regardless of what any colonist thought about the Iroquois Confederacy.

B. The Concurrent Resolution

Footnote 7 quoted the Franklin letter in edited form and out of context. That also happened with the congressional committees considering what became House Concurrent Resolution 331, passed by Congress in 1988[33] and also cited and quoted, for some unfathomable reason, in footnote 7. (The resolution was cited as "recognizing the influence of 'the Iroquois Confederacy and other Indian Nations [on] the formation and development of the United States.'"[34]) The House Committee on Interior and Insular Affairs, in reporting on the draft Concurrent Resolution on October 3, 1988, shortly before the resolution was adopted, wrote:

> [T]he incorporation of such concepts as freedom of speech, the separation of powers in government and the balance of power within government so impressed Benjamin Franklin that he challenged the colonists to create a similar united government when he stated: "It would be a strange thing if the Six Nations Iroquois Confederacy * * * should be capable of forming * * * such a union * * * and yet a like union should be impracticable for * * * a dozen English colonies."[35]

But Franklin mentioned none of those concepts (freedom of speech, etc.) in his letter to Parker—that wasn't the reason for the letter—and the strategically placed asterisks turned the language quoted from the letter upside down.[36] I'd like to be able to assume that dishonesty wasn't involved in editing the language for inclusion in the House Report, just a high level of enthusiasm about a fashionable idea. But the resulting misrepresentation was so great that such an assumption is hard to make.

That's one of the reasons the citation to House Concurrent Resolution 331 in footnote 7 was bizarre. In that resolution, as noted, Congress had "recogniz[ed] the influence of 'the Iroquois Confederacy and other Indian Nations [on] the formation and development of the United States.'"[37] The resolution was actually even more specific, stating that "the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself."[38] As if that statement of the influence thesis weren't strong enough on its own, the resolution "acknowledge[d] the contribution of

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33 H.R. Con. Res. 331, 102 Stat. 4932 (1988).

34 *Developments*, at 1710 n.7 (quoting resolution (1) in H.R. Con. Res. 331, *supra* note 33). The resolution uses "to" rather than "on."

35 H.R. Rep. No. 100-1031, at 2 (Comm. Print Oct. 3, 1988).

36 *Cf. supra* text accompanying note 31.

37 *Developments*, at 1710 n.7 (quoting resolution (1) in H.R. Con. Res. 331, *supra* note 33).

38 H.R. Con. Res. 331, *supra* note 33, Preamble.

the Iroquois Confederacy of Nations to the development of the United States Constitution," and noted that "the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy."[39] That's piling on—making basically the same point over and over.

So the drafters of the resolution left no doubt about their overblown point. But I have no idea why anyone, especially the *Harvard Law Review*, would quote language from a congressional resolution as support for a historical proposition. Where's the evidence, for example, about the views of Franklin and Washington?[40] You might cite a resolution to show what members of Congress thought at the time, I guess, but even that's a stretch. Most feel-good congressional resolutions are routinely adopted, without deliberation.

This particular resolution did get limited attention in Congress. A Senate version had been introduced on September 16, 1987,[41] and, on December 2, 1987, the Senate Select Committee on Indian Affairs held a hearing in the morning on the resolution, with the testimony and submitted statements coming almost entirely from proponents of the influence thesis.[42]

The draft language of the resolution, at the time of that hearing, had provided that the confederation of the thirteen colonies "was explicitly modeled upon the Iroquois Confederacy."[43] That's the influence thesis in its most robust, and ridiculous, form—that the U.S. Constitution had its origins in the Iroquois Great Law of Peace.[44]

Somebody must have realized that this was going way too far, however, despite testimony that would have supported such language. The Committee changed the wording before approving the resolution. "[E]xplicitly modeled upon the Iroquois Confederacy" was toned down to "influenced by the political system developed

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39 *Id.*

40 Washington and Franklin were important presences at the Convention—Washington a brooding omnipresence, the aged Franklin, at the end of the Convention, summing up what had happened and supporting the compromises made along the way—but neither played a significant role in the details of the final document. In any event, we know Franklin's views of the Iroquois Confederacy from the unedited version of the Parker letter discussed earlier.

Washington's views about the Iroquois Confederacy were no more positive. At a hearing on the resolution, *see* S. Hrg. 100-610, *Iroquois Confederacy of Nations, Hearing on S. Con. Res. 76 Before the S. Select Comm. on Indian Affairs,* 100th Cong. (Dec. 2, 1987), historian Donald Grinde provided "selected factual data" to support the influence thesis, including a quotation from a September 7, 1783, letter from Washington to James Duane: "I have been more in the way of learning the Sentimts. of the Six Nations than of any other Tribes of Indians." *Reprinted in* George Washington: Writings 535, 537 (John Rhodehamel ed., 1997), and *quoted in* S. Hrg. 100-610, *supra*, at 137. That sounds nice, but Washington wasn't "admir[ing] the concepts of the . . . Iroquois Confederacy," as the resolution put it. He was writing about the possibility of war if attempts were made to displace the Six Nations. He was noting that he knew more about the possibility of their resistance to removal than he knew about how other tribes would react.

41 S. Con. Res. No. 76, introduced at 133 Cong. Rec. 24214, 24223 (Sept. 16, 1987).

42 *See* S. Hrg. 100-610, *supra* note 40.

43 S. Con. Res. No. 76, *supra* note 41.

44 *See, e.g.*, Schaaf, *supra* note 18 (seeing all sorts of similarities between the two documents).

by the Iroquois Confederacy."[45] That was still pretty strong, though, and the report of the Senate Committee on the resolution, dated September 30, 1988, while noting the change and attributing it to the need to conform the language to that in the House version,[46] held nothing back: "More than 200 years ago, the framers of the United States Constitution reviewed the principles of democracy and the democratic institutions of the Six Nations of the Iroquois Confederacy, and then drew from the Iroquois' experiences in constructing the United State's [*sic*] form of government."[47] Evidence? None.

The change to the more temperate, but still over-the-top, language—the one significant change along the way in the legislative process[48]—was apparently made because it was thought the original language wasn't "completely accurate."[49] Indeed. But the amended language, which was also contained in the original House version of the resolution, as introduced on July 11, 1988, by Representative Morris Udall,[50] wasn't "completely accurate" either.

The preposterous resolution nevertheless breezed through Congress, quickly and with almost no resistance. A perfunctory "debate" about the resolution took place on the House floor on October 3, 1988.[51] The resolution passed the House on October 4, 1988, with 408 yea votes and only 8 nays,[52] and the Senate passed it with unanimous consent, on October 21, 1988, the last day of the session.[53]

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45 S. Rep. No. 100-565, at 3 (Comm. Print Sept. 30, 1988).

46 *Id*. at 1 (noting the amendment); *id*. at 3 ("The amendment adopted in Committee to the third clause of the resolution will conform the language of Senate Concurrent Resolution 76 to the language of House Concurrent Resolution 331 [*see infra* text accompanying note 52] which is pending in the House and is otherwise identical to Senate Concurrent Resolution 76.").

47 *Id*. at 3.

48 *See* S. Rep. No. 100-565, *supra* note 45, at 1.

49 *See* Marybeth Farrell, Untitled (Sept. 30, 1988) (State News Service dispatch, dateline Washington), available on LEXIS (quoting Alex Skibine, with name misspelled, deputy counsel for Indian Affairs for House Interior and Insular Affairs Committee). Skibine added that the language ultimately adopted was "general enough that people with different interpretations of history could have enough room for discussion." *Id.* Discussion yes, agreement no.

Some proponents of the influence thesis have written that the Senate voted to adopt the resolution in its original form, with the "explicitly modeled" language, and they've given great weight to that mythical adoption. *See, e.g.*, Gregory Schaaf, *Indian Great Law of Peace (Kaianerekowa)* [hereinafter Schaaf, Encyclopedia], entry in 2 Encyclopedia of American Indian History 410, 412 (Bruce E. Johansen & Barry M. Pritzker eds., 2008) (stating that the Senate voted in favor of the original language and that "[f]or the first time in history, Congress officially recognized that the U.S. government was 'explicitly modeled' after the Iroquois Confederacy"). In support of that made-up position, Schaaf cited to the *Congressional Record* for the day the Senate version of the resolution was introduced (September 16, 1987), not the date the Senate voted, over a year later, after the language had been changed. The Senate website affirms, in response to a frequently asked question, that the Senate didn't take the vote Schaaf claimed it had. *See* http://www.sente.gove/reference/common/faq/Iroquois_Constitution.shtml ("The answer is no" to the question, "Is it true that . . . [t]he Senate passed a resolution on September 16, 1787[,] stating that the U.S. Constitution was explicitly modeled upon the Iroquois Constitution?").

50 *See* 134 Cong. Rec. 17433 (July 11, 1988).

51 *See* 134 Cong. Rec. 27948 (Oct. 3, 1988).

52 *See* 134 Cong. Rec. 28140 (Oct. 4, 1988).

53 *See* 134 Cong. Rec. 32467 (Oct. 21, 1988).

To explain how this happened, a congressional aide was quoted as saying, "I'll be honest with you, a commemorative resolution is not one of the highest priorities of the 100th Congress."[54] (As a news story noted, "Aides to Senate sponsors . . . admitted the resolution may have escaped close scrutiny because of Congress' heavy agenda before adjourning in time for the November elections."[55]) One thing can be said for sure: House Concurrent Resolution 331 wasn't the result of informed deliberation by anyone—members of Congress or trained historians. Historian Peter Axtell complained that most historians were unaware of the existence of the draft resolution until it was too late to resist enactment.[56]

And resistance would have occurred. The late Francis Jennings, director emeritus of the D'Arcy McNickle Center for the History of the American Indian at the Newberry Library in Chicago, was quoted as saying, about the amended (that is, relatively temperate) version of the resolution, "I don't know how [the committees] let it get through. . . . . It destroys my faith in the historical literacy of the Senate."[57] Axtell similarly objected that "[t]he Confederacy has hoodwinked Congress into getting that resolution passed."[58]

On the same day the resolution was approved by the Senate, Congress passed resolutions indicating support for the National Purple Heart Museum[59] and the United States Senate Historical Almanac.[60] With such important business to transact—excuse the sarcasm— one can see why members of Congress weren't focused on the contents of House Concurrent Resolution 331. It's harder to see why members of the *Harvard Law Review* weren't.

II. Footnote 9

Footnote 9 in the *Developments* chapter added more wishful thinking. In support of a textual reference to the "long history of tribal self-government,"[61] that note said, "The Great Law of Peace, the constitution of the Iroquois Confederacy, was drafted [*sic*] perhaps as early as August of 1142."[62] The cited authority for that point was an essay by Barbara Mann in the *Encyclopedia of the Haudenosaunee (Iroquois*

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54 Farrell, *supra* note 49 (quoting congressional aide).

55 *Id.*

56 *Id.*

57 *Quoted in id.*; *see also* Fenton, *supra* note 27, at 471; Payne, *supra* note 6; Philip A. Levy, *Exemplars of Taking Liberties: The Iroquois Influence Thesis and the Problem of Evidence*, 53 Wm. & Mary Q. 588, 603-04 (1996) (characterizing *Exemplar of Liberty*, *supra* note 5, as "a crazy quilt of inaccurate assessments, free-floating speculations, incorrect or disembodied quotations, and thesis-driven conclusions"). *But see* Donald A. Grinde, Jr. & Bruce E. Johansen, *Sauce for the Goose: Demand and Definitions for "Proof" Regarding the Iroquois and Democracy*, 53 Wm. & Mary Q. 621 (1996) (responding to criticism of their work).

58 *Quoted in* Marybeth Farrell, Untitled (Sept. 22, 1988) (State News Service dispatch, dateline Washington), available on LEXIS.

59 *See* H.R. Con. Res. 126, 102 Stat. 4932 (1988).

60 *See* S. Con. Res. 146, 102 Stat. 4933 (1988).

61 *Developments*, at 1710 n.9.

62 *Id.*

Confederacy), a volume that bought into the influence thesis.[63] How do we know that August 1142—what a nice sense of precision!—was "perhaps" a key date? According to the *Encyclopedia*, it's because of oral tradition[64]—you know, passing stories from one generation to the next, with embellishment inevitably occurring along the way[65]—and tying certain events to solar eclipses, particularly one that occurred on August 31, 1142 (more precision!): "The Keepers speak of a Black Sun (total eclipse) that occurred immediately before the league was founded."[66]

To be fair to the *Encyclopedia* folks, that volume didn't say anything about "drafting" the Great Law of Peace. The word "drafting" came from footnote 9. I'm not sure what the *Harvard Law Review* authors and editors thought "drafting" would mean in this context—wampum, perhaps, but translations of wampum weren't available to the American founders. What were the *Harvard Law Review* people thinking in letting this stuff appear in their pages?

Footnote 9 is perversely interesting also because, in demonstrating the "long history of tribal self-government," and after the reference to the year 1142, the authors wrote that "[o]ther tribes, like the Cherokee and Chickasaw, passed constitutions of their own in the early to mid-nineteenth centuries. . . . These constitutions [of the Cherokee, the Chickasaw, and the Choctaw Nations] often were the products of constitutional conventions and extensive thought by the tribes that drafted them."[67] That may be, but it's a big jump from 1142 to the nineteenth century.

If we were to conclude that some connection exists between the U.S. Constitution and tribal governing documents, and those tribal documents were drafted *after* the American founding, what is the chain of causation likely to have been? For that matter, the Great Law of Peace was reduced to writing not in 1142 or any other eclipse year,[68] but in the late nineteenth century.[69] Again, if similarities are found between the written Great Law of Peace and the Constitution—the similarities

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63 Barbara A. Mann, *Haudensee (Iroquois) League, origin date*, entry in Encyclopedia of the Haudenosaunee (Iroquois Confederacy) 152 (Bruce Elliott Johansen & Barbara Alice Mann eds., 2000).

64 For example, the late Mohawk Chief Jake Swamp was quoted as saying, in a 1983 conversation, that "[o]ur Iroquois chiefs and clan mothers have long said that the Great Law of Peace served as a model for the U.S. Constitution. We know that our ancestors met personally with Benjamin Franklin, Thomas Jefferson, James Madison and others involved in drafting the U.S. Constitution." *Quoted in* Schaaf, Encyclopedia, *supra* note 49, at 412. Well, that settles it then. (Would it be impolite to note that Jefferson didn't attend the Constitutional Convention, and Franklin wasn't involved in drafting constitutional language?)

65 Think John Smith and Pocahontas, Washington and the cherry tree, Eliot Ness and the Untouchables.

66 Mann, *supra* note 63, at 152. Mann notes, to her credit, that solar eclipses visible in the relevant part of North America also occurred in 1451, 1550, and 1654. *Id.* Even if the occurrence of an eclipse were really important in dating the Great Law of Peace, 1142 thus isn't the only possibility.

67 *Developments*, at 1710 n.9.

68 *See supra* note 66.

69 *See* Farrell, *supra* note 49 (quoting Ives Goddard, curator of Anthropology at the Smithsonian: "[T]he Great Law Documents . . . don't date to nearly a hundred years after the Constitution. The possibility has to be considered that the influence went the other way."); *supra* note 32 (noting significance of 1851 publication of Lewis Morgan's treatise).

seem to me minimal, but others have more imagination—which "document" would have been the influencer and which the influenced?

III. A Few Additional Thoughts on the Influence Thesis

I've written before about the imaginary connection between the Great Law of Peace and the U.S. Constitution,[70] and I've been criticized by tribal officials for not understanding the concept of "cultural diffusion"—that, "[w]henever two cultures come into contact, an immense amount of information changes hands immediately."[71] The idea, I guess, is that the founders adopted Iroquois principles, with a high level of specificity, without realizing where those principles came from. That's close to a world record for implausibility.

It's also been said that we shouldn't be surprised when little or no documentation can be found to support the influence thesis: the events occurred over 200 years ago, hence the need to rely on oral traditions.[72] But the founding era is well documented. Not every piece of writing is trustworthy, of course, but if the founders were relying on ideas of the Iroquois Confederacy (or of any other American Indian nation), it's hard to imagine we couldn't find mention of that somewhere—in Madison's notes from the Constitutional Convention, in reports of debates in the state ratifying conventions, in the *Federalist Papers*, in newspapers or other contemporaneous tracts—*something somewhere*.

The rebuttal might be that no written record exists because the delegates to the Constitutional Convention wanted to keep the Indian influence secret. Most of them wanted ratification to occur, of course, and the document was doomed if it was understood to have been derived from the Iroquois. But that hypothesis presupposes a conspiracy of silence of breathtaking scope. Besides, if the purported source of constitutional principles would have caused ratification problems, why wouldn't the Anti-Federalists, some of whom were at the Convention, have noted this connection in their voluminous writings? If you're looking for ways to defeat the Constitution, why wouldn't you bring out the big guns—if the big guns exist? Historian Shannon sees the relationship between the founding documents and the Iroquois in a much more convincing way:

> The Articles of Confederation and the United States Constitution . . . were decidedly anti-Iroquois in their ramifications: they assumed for the federal government exclusive powers in Indian affairs that made it impossible to turn back the clock and reinstitute the local diplomacy that had once sustained the council fire in Albany. . . . From the Indian perspective, the true legacy of the Albany Congress was the increasing

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70 *See* Jensen, *supra* note 18.

71 *Introduction*, in Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution 9 (Oren R. Lyons & Jon C. Mohawk eds., 1992).

72 *See, e.g.*, Charles Radlauer, *The League of the Iroquois: From Constitution to Sovereignty*, 13 St. Thomas L. Rev. 341, 352 (2000) (ridiculing "Jensen's insistence upon written documentation two centuries after the fact"). I plead guilty.

> use of federal power to cement their dependency and removal in the new American republic.[73]

I'll make one concession. The influence thesis is indefensible, but it's not only crazies who have supported one version or another of the thesis over the years. For example, the legendary Felix S. Cohen, usually given credit for creating the field of American Indian law in his masterful *Handbook of Federal Indian Law*,[74] could also engage in hyperbole:

> For it is out of a rich Indian democratic tradition that the distinctive political ideals of American life emerged. Universal suffrage for women as well as for men, the pattern of states within a state that we call federalism, the habit of treating chiefs as servants of the people instead of as their masters, the insistence that the community must respect the diversity of men and the diversity of their dreams—all these things were part of the American way of life before Columbus landed.[75]

Cohen went so far as to say that "what is distinctive about America is Indian, through and through,"[76] a striking conception of American exceptionalism.

Cohen was a serious scholar, but he wasn't above romanticizing the past with the goal of improving the future for the American Indian nations. How could he have known most of that pre-1492 history, including the "diversity of their dreams"? More oral traditions, I guess. And, although it isn't politically correct to say so, wars between American Indian tribes weren't unheard of over the centuries.[77] Diversity of men and dreams can go only so far.

IV. Conclusion

The influence thesis shouldn't be taken seriously, in the pages of the *Harvard Law Review* or anywhere else, but that conclusion isn't intended to denigrate American Indian nations. In fact, if one has the interests of those nations in mind, it's risky to act as though a theory that is at best suspect and at worst nonsense is important to their status. American Indian policy doesn't depend on the validity of an ahistorical thesis.

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73 Shannon, *supra* note 28, at 239.

74 Felix S. Cohen, Handbook of Federal Indian Law (1941). Since the time of the founding, doctrine was plentiful—treaties with the tribes, what is now title 25 of the United States Code, and judicial decisions. Cohen created the field by pulling that material together while he was serving in the Office of the Solicitor in the Department of the Interior.

75 Felix S. Cohen, *Americanizing the White Man*, Am. Scholar, Spring 1952, at 171, 178-79, *reprinted in* The Legal Conscience: Selected Papers of Felix S. Cohen, at 315, 317 (Lucy Kramer Cohen ed., 1970).

76 Cohen, *supra* note 75, at 178, *reprinted in* Legal Conscience, *supra* note 75, at 316.

77 The Iroquois were particularly ferocious in war. *See* Jensen, *supra* note 18, at 299.

Almost thirty years ago, ethnographer Elizabeth Tooker noted that the influence thesis—under which white man's law is treated, in its fundamentals, as equivalent to traditional tribal law—actually denies the distinctiveness of American Indians:

> Some recent interpretations of Indian cultures and history have turned this "negative prototype" on its head, asserting that, indeed, Indians did hold white ideals and . . . even that whites got them from the Indian. But as laudable as this might at first glance seem, such a positive stereotype exhibits not only as little fundamental understanding and appreciation of Indian cultures as a negative one, but also little understanding of Western culture. We owe our fellow residents on the continent better.[78]

In seeking to emphasize the importance and distinctiveness of American Indian nations, proponents of the influence thesis may be doing exactly the opposite.

In any event, nothing is gained by endorsing the influence thesis, and what is lost is something we should all care about: the truth.

Appendix: The Incongruity at the Core of the *Developments* Chapter

The body of this article vents about the influence thesis. For anyone interested, I want to make a substantive criticism of the *Developments* chapter from the *Harvard Law Review*—in particular, the recommendation that tribal governments be given primary responsibility for interpreting the Indian Civil Rights Act, even in habeas cases.

It makes sense to defer to tribal governments on many issues, of course, but civil rights isn't necessarily one of them. Civil rights statutes are intended to protect *individuals*, and ICRA was intended to limit the powers of American Indian nations over tribal members.[79] Deferring to a government's interpretation of a statute intended to constrain that government isn't the intuitively right way to proceed. After all, during the civil rights era, when ICRA was enacted, southern officials claimed that state governments were the best judges of how their societies should be structured. But that system wasn't working well—to put it mildly.

I don't mean to liken today's tribal governments to Jim Crow-era state governments. But there's no reason to think tribal governments are inherently noble and unlikely therefore ever to engage in abusive behavior; human nature is human nature. That's why ICRA came into being: to protect tribal

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78 Tooker, *supra* note 20, at 327.

79 The second section of ICRA, codified at 25 U.S.C. § 1302, is titled "Constitutional rights." Subsection (a) provides that "[n]o Indian tribe in exercising powers of self-government shall" engage in any of ten listed behaviors—generally a statutory application of most bill of rights provisions to American Indian tribes. The constitutional limitations would otherwise not be applicable.

members—American citizens, after all—from overreaching by their own tribal governments.[80]

That protection seems to require scrutiny of questionable governmental behavior by someone outside the tribal system. For the most part, however, ICRA has turned out to be a statement of aspirations rather than an enforceable legal document. The Supreme Court's 1978 decision in *Santa Clara Pueblo v. Martinez*[81]— holding that, under ICRA, aggrieved tribal members have no recourse in federal court against their tribal governments, except in habeas cases—reduced the potential impact of ICRA dramatically.[82]

If the only forum available to a tribal member who believes his civil rights have been abridged by a tribal government is tribal court—and that would be the result, even in habeas cases, of the *Developments* recommendations—the protections of ICRA aren't worth much to that member. A tribal court, if it exists at all,[83] isn't necessarily separate from other governmental branches—if other branches exist. (Tribes aren't required to have governments with separation of powers, and a tribal court therefore doesn't necessarily represent an independent judiciary.) The aggrieved tribal member's claim may thus be adjudicated by those, or the friends of those, accused of violating ICRA. The likely result is obvious.

Any discussion of ICRA's merits must be informed by a fundamental principle: neither states' rights nor tribal rights should trump individual rights.

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80 Maybe other reasons were involved as well, but protecting individual rights was the stated motivation.

81 436 U.S. 49 (1978).

82 The Court in *Santa Clara Pueblo* merely held that Congress hadn't made it explicit that federal courts should have jurisdiction over ICRA matters, except for habeas proceedings, where federal judicial review is provided for. *See supra* note 4. Without clear authorization, the Court said it wasn't going to infer federal jurisdiction. It's true that Congress wasn't explicit, but it would have been easy, I think, to infer that Congress intended that result. What otherwise was the point of ICRA? (On the other hand, in the intervening 38 years, Congress hasn't stepped in to reverse the effects of *Santa Clara*.)

83 The *Developments* chapter recognized that not all tribes have courts and suggests how that problem can be addressed for ICRA purposes. *See Developments*, at 1728.

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Liberty, Equality and the Right to Marry under the Fourteenth Amendment

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ABSTRACT

The legitimacy of recent judgments in the Supreme Court, lower federal courts and State courts which have extended the scope of the Due Process and/or Equal Protection clauses of the Fourteenth Amendment has been a fiercely contested controversy in legal and political circles in the USA. The controversy has been especially sharp in relation to the question of same sex marriage, and specifically whether it is within State competence to refuse to allow same sex couples to marry under State law. This paper explores that legitimation controversy through a multi-contextual analysis of the Supreme Court's starkly divided judgment in Obergefell v Hodges (2015), in which a bare majority of the Court concluded that a State ban on same sex marriage was incompatible with the Due Process clause of the Fourteenth Amendment. This paper critiques both the majority and dissenting opinions, and suggests that while one might applaud the substantive conclusion the Court has reached, the reasoning offered by the majority suffers from several obvious weaknesses both in narrow doctrinal terms and from the broader perspective of safeguarding the Court from well-founded criticism that it is overstepping the bounds of its legitimate constitutional role.

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I. Introduction

One need not have been blessed with atypical powers of prediction to appreciate that the U.S. Supreme Court's decision in *United States v. Windsor*[1] would promptly lead the Court to consider the much more significant issue of whether States could refuse to recognize same-sex marriages.[2] That question had last been put squarely before the Court over forty years ago, in *Baker v. Nelson*,[3] when it was summarily dismissed as raising no constitutional issue. In *Windsor*, a 5-4 majority had concluded that s.3 of the Federal Defense of Marriage Act 1996 (DOMA) was inconsistent with the Fifth Amendment. S.3 was a broad interpretation clause, which provided that any reference to 'marriage' in federal legislation should be construed as referring only to marriages between a man and a woman. The effect of s.3 was to deny any benefits accruing to married couples under such legislation to same sex spouses. DOMA had been a pre-emptive strike against the possibility that some States might permit same sex marriages,[4] and seems to have been enacted to give legislative force to majoritarian bigotry against homosexuals.[5] It is a measure of

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1 United States v. Windsor, 133 S. Ct. 2675 (2013).

2 *See* for example Catherine Jean Archibald, *Is Full Marriage Equality for Same-Sex Couples Next - The Immediate and Future Impact of the Supreme Court's Decision in the United States v. Windsor*, 48 Val. U. L. Rev. 695 (2014); William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J. L.& Liberty 150 (2013); Daniel Fuerst, *Means to an Inevitable End: How the United States v. Windsor and the Fall of the Defense of Marriage Act Will Accelerate Marriage Equality Among All the States*, 8 Fed. Cts. L. Rev. 51 (2014).

3 Baker v. Nelson, 409 U.S. 810 (1972). The suit was a remarkably innovative endeavor, brought by two student activists a Mr. Baker and a Mr. McConnell; *see* Marcia Coyle, *The First Case: Forty Years On*, Nat'l L. J. (23 August 2010) http://www.thelegalintelligencer.com/id=1202470971127?slreturn=20170730090023.
Minnesota legalized same-sex marriage in 2013. There is an intriguing p.s. to the claimant's legal failure. *See* Erik Eckholm, *The Same Sex Couple Who Got a Marriage Licence in 1971,* N.Y. Times (May 15, 2015) http://www.nytimes.com/2015/05/17/us/the-same-sex-couple-who-got-a-marriage-license-in-1971.html?_r=0:
The couple, though, did not give up. With some sleight of hand involving a legal change to a gender-neutral name, they obtained a marriage license in another county, and in 1971, in white bell-bottom pantsuits and macramé headbands, they exchanged vows before a Methodist pastor and a dozen guests in a friend's apartment. Their three-tiered wedding cake was topped by two plastic grooms, which a friend supplied by splitting two bride-and-groom figurines. Ever since, they have maintained that theirs was the country's first lawful same-sex wedding. The state and federal governments have yet to grant recognition, but the pastor, Roger W. Lynn, 76, calls theirs "one of my more successful marriages. They are still happily married, and they love each other," Mr. Lynn said.

4 Massachusetts was the first to do so, albeit by judicial construction of the State constitution rather than legislation: *see* Goodridge v. Dep't. of Pub. Health, 798 N. E. 2d 941 (Mass. 2003). For contemporaneous analysis *see* Dwight G. Duncan, *How Brown Is Goodridge - The Appropriation of a Legal Icon,* 14 B.U. Pub. Int. L. J. 27 (2004).

5 *See* the discussion of the Congressional debates in Ian Loveland, *A Right to Engage in Same Sex Marriage in the USA*, Eur. Hum. Rts. L. Rev. 10 at 12-13; Butler, *The Defense of Marriage Act: Congress's Use of Narrative in the Debate Over Same Sex Marriage*, 73 N.Y.U. L. Rev. 841 (1997).

how swiftly the cultural landscape in the United States. has shifted in respect of sexual orientation discrimination that by the time *Windsor* came before the Court in 2103 a dozen States had legalized same sex marriage.

The majority judgment in *Windsor* invalidated s.3 on the basis that it infringed an individual liberty interest arising under the Fifth Amendment. That liberty was not for a person to marry another person of the same sex. DOMA did not purport to 'ban' such marriages, and save in Washington D.C. or the territories, Congress would have no such power in any event. The liberty in issue was an entitlement not to be denigrated, belittled and stigmatized by legislation motivated by moral disapproval of a person's sexual orientation. The majority also accepted that the Due Process clause of the Fifth implicitly contained a proviso equivalent to the Equal Protection clause under the Fourteenth,[6] and seemingly indicated - but did not expressly assert - that sexual orientation discrimination had now become a 'suspect category' for equal protection purposes such that it could only be justified by compelling public policy concerns (which did not and could not include simple moral disapproval).

Even as *Windsor* was decided, a cluster of challenges to the laws in several of the States which prohibited same-sex marriage had been making their respective ways through the State and/or federal court systems. *Obergefell* consolidated four of those cases, which respectively called into question the laws of Michigan, Kentucky, Ohio and Tennessee.

The Tennessee law was contained in an amendment to the State constitution passed in 2006:

> The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman is contrary to the public policy of this state and shall be void and unenforceable in Tennessee….

Constitutional amendment in Tennessee requires that a measure twice be passed in both houses of the legislature in successive sessions (by a bare majority on the first occasion and by a two thirds majority in the second) and then approved by a referendum.[7] Some 81% of voters in the referendum supported the amendment. It could hardly be said therefore that the measure was the result of a transient, bare majoritarian legislative whim. Quite what motives underlay the amendment at the referendum stage is essentially unknowable, given that the overwhelming majority of the 'lawmakers' have not expressed any recorded view to explain why they voted as they did. One might however surmise that many of the good people Tennessee subscribed to - at least in the secluded anonymity of the ballot box – the presumption so prevalent in the late twentieth century United States that homosexuality ought to be designated as a deviant and inferior form of sexual orientation.[8]

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6 Following the Warren Court's lead in *Bolling v. Sharpe*, 357 U.S. 497 (1954) - which contemporaneously with *Brown v. Board of Education*, 347 U.S. 483(1954) – invalidated racial segregation in Washington D.C. schools.

7 Tenn. Const. Art. IX, § 3.

8 The extraordinary vitriol which motivated many anti-gay marriage campaigns in the early 2000s is chronicled in Sean Cahill, *The Anti-Gay Marriage Movement*, in The

The same conclusion presumably applied to Kentucky's 2004 constitutional amendment which affirmed the previously legislative basis of the cross-gender nature of marriage:[9]

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

The Kentucky constitution is not so deeply entrenched as that of Tennessee. Amendment requires the support of three fifths of the members of each of the two legislative houses, and then approval by a bare majority in a referendum.[10] Some 74% of Kentucky voters supported the proposal to prohibit same-sex marriage.[11]

The Michigan State legislature had prohibited same-sex marriages in 1995. The 'people' of the State then amended the State constitution in 2004:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

The terms of Michigan's constitution are not deeply entrenched. Article XII of the State constitution[12] provides for amendment of the constitution by majority support in a referendum approving either a proposal supported by two thirds of the members of the State legislature or a proposal supported in a petition by 10% of the electorate. The 2004 amendment was a petition initiative, which was supported at the referendum stage by a vote of 59% to 41%.[13]

On the same day,[14] voters in Ohio approved a similar amendment to their State's constitution by a 62% - 38% majority:[15]

Politics of Same Sex Marriage 155 (Craig A Rimmerman & Clyde Wilcox, eds. 2007). Much of the impetus came from evangelical protestant sects, although one might note that many avowedly religious Americans were vocal *supporters* of same sex marriage; *see id.* and David C. Campbell & Carin Robinson, *Religious Coalitions for and Against Gay Marriage: The Culture War Rages On*, in Rimmerman & Wilcox (eds.) *id*. at 131.

9 *See* Ellen D.B. Riggle & Sharon S. Rotosky, *The Consequences of Marriage Policy for Same-Sex Couples' Wellbeing*, in Rimmerman & Wilcox (eds.), *supra* note 8, at 75-78.

10 Ky. Rev. Stat. Ann §256; available at http://www.lrc.ky.gov/lrcpubs/ib59.pdf.

11 For a snapshot of the motives of 'Yes' voters see inter, alia, http://usatoday30.usatoday.com/news/politicselections/vote2004/2004-11-02-ky-initiative-gay-marriage_x.htm;

12 http://www.legislature.mi.gov/%28S%28ezcspdnkw5ft3loqteva2gzt%29%29/documents/mcl/pdf/mcl-chap1.pdf;

13 http://edition.cnn.com/ELECTION/2004/pages/results/ballot.measures/.

14 2004 was an especially busy year for anti-gay marriage initiatives; see the discussion and analysis in Katie Lofton & Donald P. Haider-Markel, *The Politics of Same Sex Marriage Versus the Politics of Gay Civil Rights*, *in* Rimmerman & Wilcox (eds.) *supra* note 8.

15 *Id*. Amendment to the Ohio constitution requires (per Art XVI) the support of three fifths of each house of the legislature for a proposed amendment which is then put to the voters in a referendum. A bare majority of votes in favor is required to give legal effect to the proposal; https://www.legislature.ohio.gov/laws/ohio-constitution/section?const=16.01.

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage

The amendment lent further legal force to the sentiments enacted the previous year by the State legislature in a Defense of Marriage Act.

In all four States the issue continued to be contested in the political arena. But *Windsor* provided the trigger for the argument to move into the courts, prompting litigants to begin proceedings in the federal District Courts.[16] While all of the *Obergefell* petitioners succeeded in their respective federal District courts, their cases were consolidated by the Sixth Circuit Court of Appeals in *DeBoer v. Snyder*,[17] in which the court concluded that the States were not under any constitutional obligation to permit same sex marriage. The Eighth Circuit issued a similar judgment in *Citizens for Equal Protection v. Bruning*.[18] In so doing, the Sixth and Eighth Circuits reached a quite different conclusion from that arrived at in other circuits.

One might have thought that the most doctrinally defensible way to invalidate the various State laws would have been to hold that: (a) the laws classified people according to their sexual orientation; (b) the classification had a discriminatory effect as it deprived gay people - and their children - of the various legal and financial (and perhaps cultural/moral/reputational) benefits enjoyed by married (as opposed to cohabiting) couples;[19] (c) that sexual orientation discrimination was a suspect category for equal protection purposes and thus subject to strict or heightened scrutiny; (d) there was no compelling public policy reason to justify such discrimination. On this rationale, marriage per se would be a secondary or derivative issue: the true question would be the acceptable bounds of State sponsored sexual orientation discrimination. Insofar as such a technique would demand judicial innovation, that innovation would be limited to making explicit what was obviously implicit in *Windsor* and arguably implicit in the earlier sexual orientation discrimination judgments in *Romer v. Evans*[20] and *Lawrence v. Texas*.[21]

This was the approach taken by the Court of Appeals Seventh Circuit in *Baskin v. Bogan*[22] in September 2014 when it invalidated the opposite-gender-only marriage laws of Indiana and Wisconsin, albeit that the Court also concluded that the laws could not even pass rational basis scrutiny. The same method was followed

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16 For a helpful summary of the multiplicity of suits see David B. Cruz, *Baker v. Nelson: Flotsam in the Tidal Wave of Windsor's Wake*, 3 Ind. J. L. & Soc. Equality 184 (2015).

17 DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

18 Citizens for Equal Prot. v. Bruning, 455 F. 3d 859, (8th Cir. 2006).

19 On the variegated reasons why same-sex couples in the U.S.A. might wish to marry see especially Goldberg, *Why Marriage?*, in Marriage at the Crossroads: Law, Policy and the Brave New World of Twenty First Century Families (Marsha Garrison & Elizabeth S. Scott, eds., 2012).

20 Romer v. Evans, 517 U.S. 620 (1996).

21 Lawrence v. Texas, 539 U.S. 558 (2003).

22 Baskin v. Bogan, 766 F. 3d 648 (7th Cir. 2014). The sole judgment is authored by Posner, J., It is lucidly and trenchantly dismissive of the States' various attempts to justify their laws: "[S]o full of holes that it cannot be taken seriously" (at 656); "[T]he grounds advanced by Indiana and Wisconsin are not only conjectural; they are totally implausible"; (at 671).

by the majority of the Court of Appeals for the Ninth Circuit in *Latta v. Otter,*[23] a judgment which rested on the court's own judgment earlier in 2014 in *SmithKline Beecham Copt v. Abbott Labs*[24] that *Windsor* demanded that sexual orientation be treated as a suspect category.

In contrast, the Court of Appeal for the Fourth Circuit in *Bostic v. Scahefer*[25] invalidated Virginia's constitutional provision that "only a union between one man and one woman may be a marriage valid in…. this Commonwealth" on the basis that marriage between two consenting adults was a liberty interest under the Fourteenth which could only be abridged by State law satisfying the strict scrutiny test and that Virginia's law did not pass the test. A similar approach was taken by Tenth Circuit Court of Appeals in *Kitchen v. Herbert*[26] in relation to Utah and Oklahoma laws, albeit that the court also indicated that suspect category equal protection analysis would apply.

All of the circuit courts which invalidated the respective State laws had placed significant emphasis on *Windsor* as a guide to the meaning of the Fourteenth Amendment in respect of this issue. The weight of circuit court opinion and the fact that the *Windsor* majority remained in place pointed toward a Supreme Court reversal of the Sixth Circuit in *Obergefell.*

II. The Majority Judgment

As in *Windsor*, the majority judgment in *Obergefell* was authored by Kennedy, and joined - without any separate concurring opinions – by Ginsburg, Breyer, Sotomayer and Kagan. The judgment invalidated the laws of all four of the respondent States. While the majority certainly gave some weight to an equal protection analysis of the issue, the judgment seems to be rooted primarily in the conclusion that the right to marry is a liberty issue which entitles any and all adults to marry whichever other adult he/she might wish, subject only to State regulation which could pass muster under strict scrutiny review.[27]

A. A Liberty Issue……

Part II of the judgment[28] dwells briefly on the centrality of marriage as a social institution in all known societies. Justice Kennedy is keen to portray marriage as an

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23 Latta v. Otter, 771 F. 3d 456 (9th Cir. 2014).

24 SmithKline Beecham Corp. v. Abbott Labs., 740 F. 3d 471 (9th Cir. 2014). Abbot was an ant-trust case involving medicines used in HIV treatment in which one party, Abott, exercised a peremptory right to exclude a juror for no discernible reason other than that he was gay.

25 Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

26 Kitchen v. Herbert, 755 F. 3d 1193 (10th Cir. 2014).

27 Which presumably – at least at present – leaves it open to States to retain restrictions based on age, mental competence, consanguinity and polygamy.

28 Part I very briefly recounts the history of the litigation.

evolving or dynamic social institution, in terms both of the reasons for entering it and its legal effects on the participants:

> For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. *See* Nancy F. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); Stephanie Coontz, Marriage, a History: How Love Conquered Marriage 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. *See* 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and *as society began to understand that women have their own equal dignity, the law of coverture was abandoned*…. These and other developments in the institution of marriage over the past centuries were *not mere superficial changes*. Rather, *they worked deep transformations* in its structure, affecting aspects of marriage long viewed by many as essential…....[29]

The stress on the evolving nature of marriage was presumably laid in anticipation of the argument that the 'liberties' embraced by the Fourteenth Amendment comprised only those issues that could be said to have a clear and longstanding empirical root in the fabric of American life, and since same-sex marriage dated only back to 2003 – and then only in Massachusetts – it could not have that character. The thrust of Justice Kennedy's analysis seems to be to assert that the gender identity of spouses is an 'aspect' - and a 'deep' aspect – of the traditional understanding of marriage, but not an *indispensable* element of it. This proposition might have been argued more fully and more deeply grounded in empirical study. For example, the sub-title of the Coontz book referred to is '*How Love Conquered Marriage'*. The book is a sweeping, cross-cultural historical survey of marriage. Kennedy's reference to it is rather skimpy, and might more helpfully have focused on chapter 15-17, which trace developments in the United States in the post-1945 era, and make a credible case for the proposition that a – if not the – dominant motive for marriage in the near modern era lies in a reciprocal desire for companionship and emotional intimacy rather than child-rearing.[30]

The next section of Part II runs with the notion of changing understandings of 'equal dignity' in relation to the traditionally subordinate status of women vis à vis men and applies it to recent attitudinal changes in modern American society to homosexuality:

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[29] Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015) (Kennedy, J.) emphasis added. Similarly 'deep transformations' perhaps, not mentioned by Justice Kennedy, would be the substantial facilitation of divorce and radical alternations in legal presumptions as to the distribution of financial assets and custody of children when divorce occurs.

[30] Stephanie Coontz, The Way We Really Are: Coming to Terms with America's Changing Families (1997) is perhaps a similarly useful source on the empirically ill-founded notion of the composition of the 'traditional' American family.

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity…. Same-sex intimacy remained a crime in many States….
>
> For much of the 20th century, moreover, homosexuality was treated as an illness….Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable…..[31]

This dynamic is portrayed as manifesting itself in culture and politics and law:

> In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance.[32]As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.
>
> This Court first gave detailed consideration to the legal status of homosexuals in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer* v. *Evans*, 517 U.S. 620 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence* v. *Texas*, 539 U.S. 558, 575.

Part III seeks to identify 'dignity and autonomy' as values synonymous with liberty under the Fourteenth. Justice Kennedy's opinion speeds through bits of the celebrated 1960s contraception cases[33] which in part underpinned the majority judgment in *Roe v. Wade.*[34] Kennedy does not invoke *Roe* here however. This implicit recasting of the organizing principle in the contraception cases as one

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31 Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015).

32 Kennedy, J. did not invoke any social science evidence on the point. Helpful sources are Paul R. Brewer, *The Shifting Foundations of Public Opinion About Gay Rights*, 65 J. Pol. 1208 (2003); Paul R. Brewer, *Values, Political Knowledge and Public Opinion About Gay Rights*, 67 Pub. Opinion. Q. 173 (2003).

33 Poe v. Ullman, 367 U.S. 497 (1961); Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

34 Roe v. Wade, 410 U.S. 113 (1973). Mention of *Roe* was presumably eschewed out of a concern that it would further fan the flames of political controversy that the same-sex marriage question was already generating.

concerned with 'dignity and autonomy' rather than 'privacy' involves something of a linguistic sleight of hand. There are six opinions in *Griswold*. The term 'dignity' appears once – in Justice Douglas's majority opinion. It appears once in *Poe* – in Justice Harlan's dissent. In the latest of the three cases, *Eisenstadt*, it is not used at all.

Justice Kennedy then carries this couplet of dignity and autonomy into a trio of 'marriage cases' in which State prohibitions on marriage were struck down. The first, chronological and in the judgment, is the Warren Court's well known (unanimous) opinion in *Loving v. Virginia:*[35] the second and third are the more obscure decisions in *Zablocki v. Redhail*[36] and *Turner v. Saffley*.[37] In *Loving,* the Warren Court invalidated Virginia's racial discriminatory marriage laws, which forbade marriage between a white and non-white person; *Zablocki* held that Wisconsin's law which prevented fathers who defaulted on child support payments from marrying was unconstitutional ; while *Turner* took the same approach towards a Missouri law which precluded any prison inmate from marrying unless the prison governor considered there were compelling reasons to allow the inmate to do so.

It is difficult to avoid the conclusion that the majority in *Obergefell* is playing rather fast and loose with the respective ratios of the three 'marriage case' judgments in invoking all of them as a support for the notion that the 'fundamental' characteristic of marriage is indifferent to the gender(s) of the participants. Thus, for example, Justice Kennedy asserts "Loving did not ask about a right to inter-racial marriage".[38] Unhappily, perhaps, this contention is manifestly incorrect. Most of the judgment in L*oving* is directed towards equal protection issues. But in respect of the liberty element of the Fourteenth Amendment the Court unequivocally couched its analysis in the language of a right to inter-racial marriage:

> …..The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men….
>
> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State.

Similarly, Justice Kennedy asserts that: "Turner did not ask about a 'right of inmates to marry'."[39] But – very clearly – *Turner* did just that:

> The right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration. Many important attributes of

35 Loving v. Virginia, 388 U.S. 1 (1967).
36 Zablocki v. Redhail, 434 U.S. 374 (1978).
37 Turner v. Saffley, 482 U.S. 78 (1987).
38 Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
39 *Id.*

> marriage remain, however, after taking into account the limitations imposed by prison life. First, *inmate marriages*, like others, are expressions of emotional support and public commitment. These elements … are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; *for some inmates* and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, *most inmates* eventually will be released by parole or commutation, and therefore *most inmate marriages* are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.,* legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.[40]

As to *Zablocki*, this case: "did not ask about a right of fathers with unpaid child support duties to marry".[41] Once again, the assertion is hard to defend, giving that the clinching factor in the majority judgment appeared to be the concern that some 'deadbeat dads' would never be able to marry as their poverty would permanently preclude them from meeting their child support obligations:

> ….Some of those in the affected class, like appellee, will never be able to obtain the necessary court order, because they either lack the financial means to meet their support obligations or cannot prove that their children will not become public charges. These persons are absolutely prevented from getting married. Many others, able in theory to satisfy the statute's requirements, will be sufficiently burdened by having to do so that they will, in effect be coerced into forgoing their right to marry.[42]

All three cases were of course decided in eras when – on the majority's own argument – being homosexual was to be part of a stigmatized and marginalized minority. It is easy to suggest that they therefore offer no support for the substance of Kennedy, J.'s conclusion. But that suggestion misses – or perhaps deliberately ignores the crucial point. The 'marriage cases' are perhaps less concerned with the right to marry per se as with the States' limited capacity to deprive a person of aspects of her/his individuality; that he she is not deserving of the full panoply of individual rights because (per *Loving*) she/he is black or (per *Turner*) she/he is a prisoner or (per *Zablocki*) he/she is an indigent parent. A denial of a fundamental right is a particularistic manifestation of a broader liberty value; to be recognized by law as an individual.

Thus we might conclude that discriminatory anti-gay laws (as to employment, or private sexual conduct, or public displays of affection) laws rested on the legislative premise that their targets were not 'individuals' in the full sense, but a lesser

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40 Turner v. Safley, 482 U.S. 78, 95-96 (1987) (internal citations omitted) (emphasis added).
41 Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).
42 Zablocki v. Redhail, 434 U.S. 374, 87 (1978).

breed of person properly excludable from some of the manifestations of liberty enjoyed by 'normal' people. This is a point developed further below in relation to part of the dissenting judgment offered by Chief Justice Roberts.

It is very noticeable in *Obergefell* that while the majority makes copious references to previous Court decisions, it rarely quotes from any of them at any length. A short passage from *Griswold* is invoked (perhaps to underline the point that even fifty years ago marriage was recognized as having a value beyond child-rearing):

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[43]

As a technique, this is quite curious. One might initially suppose this is because - as alluded to above – any extensive quotation would undermine the majority's liberty argument. But that is certainly not the case. Consider, for example, the following passage in *Zablocki,* which roots the right to marry within the broader right of an individual's entitlement to privacy,[44] a concept which is readily understandable as gender-indifferent:

> Cases subsequent to *Griswold* and *Loving* have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy. *See generally Whalen v. Roe,* 429 U. S. 598-600, and fn. 23-26 (1977). For example, last Term, in *Carey v. Population Services International,* 431 U. S. 678 (1977), we declared:
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> "While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, *Loving v. Virginia,* 388 U. S. 1, 388 U. S. 12 (1967); procreation, *Skinner v. Oklahoma ex rel. Williamson,* 316 U. S. 535, 541-542 (1942); contraception, *Eisenstadt v. Baird,* 405 U.S. at 405 U. S. 453-454; *id.* at 405 U. S. 460, 463-465 (WHITE, J., concurring in result); family relationships, *Prince v. Massachusetts,* 321 U. S. 158, 321 U. S. 166 (1944); and child rearing and education, *Pierce v. Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer v. Nebraska, [262 U.S. 390, 262 U. S. 399 (1923)]."*
>
> *Id.* at 431 U. S. 684-685, quoting *Roe v. Wade,* 410 U. S. 113, 410 U. S. 152-153 (1973). *See also Cleveland Board of Education v. LaFleur,* 414 U. S. 632, 414 U. S. 639-640 (1974) ("This Court has long recognized

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43 Obergefell v. Hodges, 135 S. Ct. 2584, 2599-600 (2015).Obviously, given that *Griswold* concerned the entitlement of a married couple to access the contraceptives that would allow them to have non-procreative sex with each other.

44 In the classic Warren and Brandeis sense as a right to be let alone, not a right to keep things hidden; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1899).

> that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); *Smith v. Organization of Foster Families,* 431 U. S. 816, 431 U. S. 842-844 (1977); *Moore v. East Cleveland,* 431 U. S. 494, 431 U. S. 499 (1977); *Paul v. Davis,* 424 U. S. 693, 424 U. S. 713 (1976).[45]

The final paragraph of this passage might be the most helpful to the majority's argument :

> It is not surprising *that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.*[46]

There is an obvious danger that the copious citation of authority without any extensive, textually rooted consideration of that authority would expose the majority's conclusion to the charge that it is essentially *creating* rather than *discovering* particular 'liberties' , and as such is overstepping the limits of its proper constitutional role. We return to this point below. It is therefore perhaps unfortunate that Justice Kennedy felt the need to engage with liberty issues at all, given that his judgment could have rested on what seems to have been regarded by the majority as a secondary ground – that of equal protection.

B. .....And/Or an Equal Protection Issue

In *Windsor*, the majority had held that the Fifth Amendment contained an implied equal protection proviso and – more broadly – that the two concepts would often be so entangled that a breach on one basis would necessarily entail breach of the other. Justice Kennedy seems to have followed a similar path in *Obergefell*, observing that there is a 'synergy' between the two concepts. The crucial passage on the equal protection point is however rather cursory:

> [T]he marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them….[47]

It might have been helpful if at this juncture the majority has spelled in considerably more detail just what the 'benefits' is issue were, and in what respects same-sex partners were disrespected and subordinated. Justice Kennedy touched briefly

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45 Zablocki v. Redhail, 434 U.S. 374, 384-385 (1978).
46 *Id.* at 385 ((emphasis added).
47 Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

on these points in Part I of the judgment, but they were not drawn out at any length. The only issue raised in relation to Mr. Obergefell – whose partner had died – was that he could not register as the surviving spouse on his partner's death certificate. That is not the weightiest of issues. The point noted under Michigan law was arguably much more substantial; gay couples could adopt children only as individuals, not as (unlike a married man/woman) a couple. Thus if the adopter partner died, the surviving partner would have no legal custodial rights vis à vis the deceased partner's adoptive children. No 'tangible' equal protection issues were highlighted raise at all in respect of Tennessee and Kentucky. Nor did Justice Kennedy make anything significant of the deleterious effects on same sex couples of the 'disapproval' to which he referred. Similarly, the majority made nothing of the point that the State laws also forbade the creation or recognition of any form of civil partnership that would grant same sex couples the tangible benefits bestowed on married couples. For the lawmaking majorities in those States 'separate and unequal' was evidently the proper moral position.

The balance of the majority judgment is certainly shaped to some extent by the way that the various cases joined in *Obergefell* were pleaded and argued in the lower federal courts. Those pleadings and arguments do appear to owe rather more to a liberty than to an equal protection analysis of the issue, but it is unfortunate that the majority did not rest its judgment (much) more firmly on an equal protection basis. Had it done so, it might have reduced the significance of the most problematic part of its decision.

C. On the Separation of Powers

Perhaps the most peculiar self-inflicted wound that the majority deals to the legitimacy of its conclusion is this sentence in Part IV of the judgment:[48]

> Of course, the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.

The notion that 'fundamental rights'[49] and 'democracy' can ever be values that are at odds with each other is extraordinary in the American context, and invites the obvious accusation that the Court is acting in an 'undemocratic' fashion. A better form of words to set the scene in Part IV of the judgment would surely have been:

> Of course, the understanding of democracy enshrined in our Constitution contemplates that majoritarian lawmaking through State or Congressional measures is the appropriate process for change, so long as those measures do not abridge fundamental rights. Our democracy has always envisaged that the courts will protect fundamental rights against legislative interference.

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48 Obergefell v. Hodges, 153 S. Ct. 2584, 2605 (2015).

49 One might assume that the majority includes the notion of equal protection as an element of 'fundamental rights'.

The unhappy nature of the majority's phraseology becomes clearer when Kennedy goes on just a few lines later to invoke the classic modern judicial formulation of the way in which the constitution reconciles understandings of 'democracy' and fundamental rights –Justice Jackson's speech in *West Virginia Board of Education v. Barnette*.[50] This is perhaps where the majority should have more starkly staked out and clearly articulated its ground: that there is more to the notion of 'democracy' than legal deference to electoral politics.

The argument is admittedly difficult to carry on the same sex marriage issue simply because *so many* States wished to forbid it. A recurrent and contentious element of the Court's death penalty jurisprudence in the modern era has been the use of State head counting as an aide to assessing the continued constitutionality of death penalty legislation. The technique was first deployed shortly after *Furman v. Georgia*[51] in *Coker v. Georgia*,[52] when the Court felt able to conclude that imposing the death penalty for the rape of an adult woman was cruel and unusual punishment because only one State did it. Subsequent use of the counting method in death penalty cases has been far more contentious.[53]

This is in part because it can be portrayed as a back door route to constitutional amendment. A rule of constitutional law resting (wholly or in substantial part) on a head count which comprises fewer than the three quarters of States whose assent is required for constitutional amendment has dubious legitimacy in quantitative substantive terms. Procedural concerns also blend in with matters of substance. Voting behavior (whether of electors or legislators) in States may be significantly affected by the normative nature of 'the law' being voted upon. Individuals may be more willing to support (or be less likely to oppose) a new law intended to affect only a particular State, and which could quite easily be changed within the State in future than, a law intended to amend the Constitution.[54]

Relatedly, the practice is obviously problematic insofar as it can be portrayed as shutting down political debate. If the court has declared a particular sentencing policy unconstitutional, then the pro-policy minority cannot increase to a majority; indeed it disappears altogether. Movement from the status quo would require the court to change its collective mind or – a most unlikely proposition - that the requisite majorities suddenly and then sustainably appear in both Congress and the States for the constitutional amendment expressly permitting the policy to be applied.

There is no express mention of head counting jurisprudence in Kennedy's opinion. The technique could presumably have no legitimacy as a source of constitutional law if only a dozen States recognize same-sex marriage, while nearly forty prohibit it. And it is perhaps around this question of numbers that the majority judgment faces its greatest difficulty.

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50 W. Virginia. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

51 Furman v. Georgia, 408 U.S. 238 (1972).

52 Coker v. Georgia, 433 U.S. 584 (1977).

53 *See* for example Ford v. Wainwright, 477 U.S. 399 (1983); Atkins v. Virginia, 536 U.S. 304 (2002).

54 Either because the voter recognizes that the law may turn out to have less desirable effects than she hopes, or that her own views might evolve, in which events she might wish the law to be changed; or that she does not think it proper for voters in States which do not share her view to be obliged to do so.

Even before *Windsor,* same-sex marriage as a purely 'political' as opposed to 'constitutional' issue[55] was being vigorously argued in most of the States. *Windsor* lent those arguments sharper focus. But one could hardly suggest the arguments – as political arguments -were resolved. There is no popular 'majority' favoring same sex marriage. The prohibitory laws of Ohio and Tennessee and Michigan and Kentucky cannot be denied constitutional validity on the basis that they are aberrant departures from a widely accepted norm. The crux of the majority view must be that the norm itself is an aberrant departure from the understanding of democracy that the constitution exists to protect.

That premise is diluted, or perhaps obscured, by an odd passage at the start of part IV of Kennedy's judgment which seems to say that because there has been a great deal of political argument on the question, in all sorts of ways and all sorts of forums, an 'enhanced understanding of the issue'[56] has emerged; which understanding legitimizes the court's intervention – on the side of those possessed of this 'enhanced understanding'. This passage lends itself to the interpretation that the majority is simply turning (a primitive conception of) democracy upside down, and allowing a minority political viewpoint to trump a majoritarian one.

That perception may be reinforced by the very cursory attention the majority gave to the (purported) policy arguments offered by the States to support their respective laws. Justice Kennedy simply dismisses as 'counterintuitive' the assertion that same sex marriage would harm marriage as an institution because it would deter opposite gender couples from marrying. A more fully reasoned rebuttal of that argument and other supportive propositions might have lent greater weight to the majority judgment.

All in all, it is difficult to avoid the conclusion that the majority judgment is less than convincing, and that giving prominence given to the liberty rather than equal protection dimension of the issue was a poor strategic choice. Happily however for the majority of the Court, the reasoning offered up by the dissent has even less to commend it.

III. The Dissenting Judgments

Working perhaps on a the basis that multiple individual dissents carry more weight than a single opinion, Chief Justice Roberts and Justices Scalia, Thomas and Alito all offered their own judgments. The Chief Justice produced a (for the most part) carefully reasoned and expressed dissent, which identified some obvious shortcomings in the majority's opinion, albeit without acknowledging the weaknesses in its own position. The three other dissents, in contrast, are notable primarily for their heady mix of petulance and irrelevance, and could be thought to serve primarily to undermine such cogency as the opinion of the Chief Justice might possess.

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55 Any attempt to sustain a stark dichotomy between 'political' and 'constitutional' issues is fraught with difficulty. It would be silly to assume that some people's views as to what they consider politically desirable is not shaped (and perhaps profoundly) by what they regard as constitutionally permissible.

56 Obergefell v. Hodges, 135 S. Ct. 2584, 2591 (2015).

A. Chief Justice Roberts

> Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.[57]

The crux of the Chief Justice's critique of Kennedy's opinion is presented as lying not – crudely – in a question of substantive morality (i.e. who should be allowed to marry), but in a question of the separation of powers (i.e. which governmental institutions should be empowered to determine which aspects of that substantive moral issue). The analysis proceeds from the premise for several hundred years both Congress[58] and the States have been controlled by lawmaking majorities which have only conceived of marriage as encompassing opposite gender partners; and that the matter to be resolved is how departures from or modifications of that traditional understanding should properly be achieved.

Simply put, any legal 'right' that individuals might have to marry a person of the same gender is a right that can be derived only from State law – whether from the State constitution or legislation or common law. As legal communities, operating within specific geographical boundaries, States may (subject only to narrowly defined Fourteenth Amendment restrictions) allow or prohibit such marriages as they each think fit. And it is open to individuals who dislike the substance of the legal choice made in their home State to move to State with laws more to their liking or to stay put and make efforts to have the unwanted law changed.

The Chief Justice's 'liberty' is a mechanism to safeguard *long accepted* values against newly emergent majoritarian threats. The accepted 'liberty' in issue in *Meyer v. Nebraska* was to teach one's children a foreign language: in *Pierce* it was to educate one's child in a private school. Such choices, even from the *Meyer/Pierce* perspective of the 1920s, were properly seen to stretch back to and beyond the revolutionary era.

Because there is no such traditional basis in respect of marriage between same sex partners, majoritarian denial of such marriages cannot infringe a liberty interest. For the Chief Justice, that spouses be of opposite genders is not simply a deeply rooted element of marriage, but an irremovable core. On this reasoning, same sex marriage could eventually become sufficiently 'traditional' that it would amount to a liberty interest, but that state of affairs lies many years in the future.

Chief Justice Roberts obviously accepts that 'traditional understandings' can be altered by constitutional amendment. Nor does he suggest that *Loving*, or *Zablocki* or *Turne*r mis-stated the restrictive effect of the Fourteenth Amendment on State autonomy on the question of who might get married at all (and to whom). His

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57 *Id*. at 2612.

58 Accepting that defining the elements of marriage is essentially a State enterprise, it should be recalled that in the early years of the U.S.A.'s history Congress exercised 'State-like' powers over the territories and continues to do so in respect of Washington D.C. and inter alia, Puerto Rico, the U.S. Virgin Islands and American Samoa.

position is rather that those cases were decided without any doubt being cast on the correctness of the assumption that marriage could only be a male/female relationship. As such, they provide no authority in the proper legal sense for the conclusion that 'liberty' embraces same-sex marriage.

He is similarly dismissive of the contraception and privacy cases as an authority for such a proposition: in part because (obviously) the State laws in issue there were directed at mixed sex couples; and in part because the laws purported to impose criminal penalties on the targeted individuals. Similarly, *Lawrence* is seen as irrelevant because – notwithstanding it forbids discriminates on the basis of sexual orientation – that protection is limited to a freedom from criminal sanctioning of an essentially private (intimate) act. Proponents of same sex marriage in contrast: "….do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits".[59]

If there is no 'liberty' in issue, it is therefore open to the States to deny same sex partners the right to marry each other as long as such policy can be shown to have a rational basis: "And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational."[60] In short, the gist of the Chief Justice's dissent is that the majority has improperly taken the court into the legislative arena, and thereby resolved an essentially political dispute through legal means.

To that point, the Chief Justice's argument has an obvious credibility. That credibility is eroded somewhat by the simplistic assertion – embraced to some extent as noted above by the majority as well – that the majority decision is necessarily 'anti-democratic'. But where the dissent most loses force is in Roberts' attempts to bolster his more abstract criticism with reference to historical precedent, by equating the majority decision in *Obergefell* with the 'majority' views in two of the Court's most controversial judgments: *Dred Scott v. Sandford*[61] and *Lochner v. New York*.[62]

The reference back to *Dred Scott* is quite extraordinary. In part, this is because of simple error. Chief Justice Roberts asserts for example that 'the Court' in *Dred Scott* held that the Fifth Amendment protected a slaveowner's liberty to take his slaves into the territories and keep them there against Congressional legislation. That assertion is – as Roberts must surely know – just plain wrong. Chief Justice Taney offered up that idea (almost in passing) in his leading judgment, but only two other members of the court clearly concurred with that conclusion[63]. More broadly, Chief Justice Roberts' reference to *Dred Scott* is quite bizarre because what *was accepted* by the majority of the court was that (most) blacks could not be citizens of the United

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59 Obergefell v. Hodges, 135 S. Ct. 2584, 2620 (2015). There is a temptation to see this as akin to an "as long as they don't frighten the horses" approach to gay rights. That may be Chief Justice Roberts personal view. However there is in fact some relatively substantial empirical evidence to suggest that a significant number of voters who favored the opposite gender marriage laws would also have been content to prohibit sexual orientation discrimination in other fields, especially employment; *see* Lofton *supra* note 14; Wilcox et al, *If I Bend This Far I Will Break: Public Opinion About Same Sex Marriage*, in Rimmerman & Wilcox eds., *supra* note 8.

60 Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015).

61 Dred Scott v. Sandford, 60 U.S. 393 (1856).

62 Lochner v. New York, 198 U.S. 45 (1905).

63 *See* Don Fehrenbacher,The Dred Scott Case: Its Significance in American Law and Politics, Ch. 17 (1978).

States because they had for many years (before, during and after the revolution) been regarded as inferior beings by whites.[64] They were not – to return to a point flagged above – 'individuals'. We might perhaps pause to recall Taney's words:

> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.
>
> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect, and that the negro might justly and lawfully be reduced to slavery for his benefit…..
>
> …. [A] perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma of the deepest degradation was fixed upon the whole race.[65]

And then wonder if they could be applied - in a diluted sense of course - with some felicity to majoritarian sentiments towards gay Americans in the recent past. In denying legitimacy – and of course legality - to the continued stigmatization of a minority group by the majority, Justice Kennedy's judgment is in its most important respect entirely antithetic to 'the court's' decision in *Dred Scott.*

The Chief Justice's invocation of the 1905 judgment in *Lochner* perhaps does less – but still some - damage to the cogency of his argument. In *Lochner*, a 5-4 majority invalidated New York legislation which sought to place a ten hour per day maximum on working hours in, inter alia, bakeries. Roberts is manifestly correct in portraying the majority decision in *Lochner* as 'discredited'. However he misses - or perhaps chooses not to mention – the rather obvious difficulty in seeking to equate that majority decision with the majority view in *Obergefell*.

The analogy is patently flawed. The intention of the New York legislature in 1897 was to protect an economically weak minority of employees from exploitation by their economically much more powerful employers. The *Lochner* majority of course portrayed that law as one restricting the liberty of employees to work (if they 'chose') eleven, twelve or more hours per day. Whether through ignorance or mendacity, the *Lochner* majority closed its eyes to the political realities which the law addressed. The State initiatives in issue in *Obergefell* could hardly be portrayed

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64 *See*, *e.g.* Edward S. Corwin, *The Dred Scott Decision in the Light of Contemporary Legal Doctrines,* Am. Hist. Rev. 52 (1911); Edward S. Corwin, *Due Process of Law Before the Civil War (parts 1 and 2),* Harvard L. Rev. 366 & 460 (1910-11); Wallace Mendelson, *Dred Scott's Case Reconsidered,* Minn. L. Rev. 16 (1953); David S. Bogan, *The Maryland Context of Dred Scott,* Am. J. Leg. Hist. 381 (1990-91).

65 Dred Scott v. Sandford, 60 U.S. 393, 408, 409 (1856).

as protecting a weak minority – their purpose is further to disadvantage that minority; and, in States where the relevant law takes the form of a constitutional amendment requiring a super-majority, to entrench that disadvantage beyond the ordinary political process. The majority decision in *Lochner* perpetuated oppressive conduct; the majority decision in *Obergefell* ends oppressive conduct.[66]

B. Justice Scalia

The Chief Justice's dissent is however a model of intellectual rigor and linguistic restraint when set alongside the splenetic tantrum offered up by Justice Scalia who introduces his judgment in apocalyptic terms:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.[67]

Scalia of course muddles the notion of 'the People' with the country's various geographically discrete lawmaking majorities which act through legislation or constitutional amendment under State constitutions. These are not 'the People'. They are 'mini-Peoples – (often) teeny tiny minorities of 'the People'. It remains entirely open to 'the People' to decide that the Court has lent the national constitution an unacceptable meaning, and to alter the constitution accordingly: "No State nor the Congress nor the President nor any federal court nor any federal executive body shall ever permit nor recognize as a marriage any legal relationship between two persons if those persons are of the same gender" might be a form of words that does the trick. And so long as the mini-Peoples of the three quarters of the States can simultaneously coalesce in support of such sentiments, then the 'political' process will have settled the issue until such time as sufficient mini-Peoples coalesce in favor of a new settlement.

Justice Scalia's hysteria is repeated in a passage in which he accuses the majority of being:

> …willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.[68]

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66 Chief Justice Roberts also neglects to mention that a (perhaps the) primary reason for the rejection of Lochner by the new deal court was its acceptance in products that *economic* policies of general application were most unlikely to raise fundamental rights issues. The obvious point of reference is the famous footnote 4 of United States v. Carolene Prod. Co., 304 U.S. 144, 154 (1938).

67 Obergefell v. Hodges, 135 S. Ct. 2584, 2627 (2015).

68 Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015).

This is just the silliest of things to say. It is – and one might note it has always been – a tenet of the constitutional settlement that any person or groups of people are ever at 'liberty' to seek to have the constitution amended; so long as that is done in an orderly, peaceful (and one hesitates to say it 'democratic') fashion. On this reasoning – one wonders how Chief Justice Roberts would treat the point - anyone who suggested *Dred Scott* or *Lochner* was wrongly decided 'stood against the Constitution'. The premise is nonsensical. Justice Scalia may have been a judge of formidable intellect and learning. Opinions such as the one he produced in *Obergefell* do little to buttress any such conclusion. The similar sentiments of Justices Thomas and Alito do not merit separate attention.

III. Conclusion

Chief Justice Roberts, alone among the dissenters, also suggests that he might have formed part of the majority had its conclusion rested on the narrowly formulated (and adequately evidenced) basis that the impugned State laws violated the Equal Protection clause because they denied a range of fiscal or legal benefits to gay couples. It is perhaps unfortunate that the case was not argued and resolved on that basis. A 6-3 majority, carrying George W. Bush's nominee as Chief Justice, would have lent the judgment greater legitimacy than the 5-4 balance we have been given.

The Supreme Court's (unanimous) decisions[69] in *Brown v. Board of Education* were of course met with ferocious resistance in many southern States and with deliberate obstructionism in many other parts of the country.[70] Thus far, there is little indication that the 'defeated' States on the marriage issue will offer either formally or informally any such obstructionism. In that practical sense, the legitimacy of the majority judgment is not seriously in question.

In the immediate aftermath of *Obergefell*, some headlines were made by a woman named Kim Davis, a county registrar in Kentucky:

> MOREHEAD, Ky. — Defying the Supreme Court and saying she was acting "under God's authority," a county clerk in Kentucky denied marriage licenses to gay couples on Tuesday, less than a day after the court rejected her request for a dely.
>
> A raucous scene unfolded shortly after 8 a.m. at the Rowan County Courthouse here as two same-sex couples walked into the county clerk's

[69] There are two. The initial judgment of Brown v. Bd. of Educ., 347 U.S. 483 (1954) held racial segregation in State schools per se breached the Equal Protection clause. The second judgment a year later began the process of planning to give practical effect to the first; Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

[70] *See e.g.* Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 Colum. L. Rev. 193 (1964); John Kaplan, *Comment: The Decade of School Desegregation: Progress and Prospects*, 64 Colum. L. Rev. 223 (1964). For a much more immediate and graphic survey of southern responses see *Another Tragic Era?* U.S. News & World Rep. (Oct. 4, 1957) at 51..

> office, followed by a throng of journalists and chanting protesters on both sides of the issue. One couple, David Ermold and David Moore, tried to engage the county clerk, Kim Davis, in a debate before the cameras, but as she had before, she turned them away, saying repeatedly that she would not issue licenses to any couples, gay or straight.
>
> "Under whose authority?" Mr. Ermold asked.
> "Under God's authority," Ms. Davis replied.[71]

Davis' defiance was in notable contrast to the welcome afforded to the judgment by the current incumbents of senior State executive office in Kentucky, all of whom uniformly pledged to facilitate its effective implementation.[72] Davis was subsequently jailed by a federal court for five days for contempt of court in refusing to issue marriage licenses.[73] A rally celebrating her release was attended by two Republican presidential candidates, Senator Ted Cruz of Florida and former Arkansas Governor, Mike Huckabee.

The issue did not retain much political traction as an issue of contention in the 2016 presidential election, as both Clinton and Trump offered support for the notion of same sex marriage. That has little bearing however on the more empirically significant question of whether some State officials, especially at the lower level, adopt policies and practices intended to obstruct implementation of the law, particularly on the basis that government officials who are opposed on religious grounds to gay marriage should not be compelled to issue marriage licenses to gay couples.[74] As yet, there is little indication that gay couples have met serious obstacles.[75]

It is therefore tempting to conclude that we may well find that in ten years time the notion that a man might marry a man and a woman a woman will have become so normalized in so many parts of the United States that the class of 2027 will look back at *Obergefell* and wonder what all the fuss was about. It will no doubt be a case taught in law schools and discussed in law journals as a vehicle to explore the contesting principles of judicial 'activism' and 'restraint'. As such the judgment(s) will remain important elements of constitutional jurisprudence. But it should perhaps be hoped that those questions of doctrinal theory do not obscure

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71 Alan Blinder & Richard Perez-Pena, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. Times, (Sept. 1, 2015); http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0.

72 *See .e.g.* WKYT News, *Kentucky leaders react to gay marriage ruling,* WKYT News, (June 26, 2015); http://www.wkyt.com/home/headlines/Kentucky-leaders-react-to-gay-marriage-ruling-310082291.html

73 Alan Blinder & Richard Perez-Pena, *Kim Davis, Released From Kentucky Jail, Won't Say If She Will Keep Defying Court*, N.Y. Times (Sept. 8, 2015); http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html.

74 One can certainly anticipate lawsuits brought by such official against their employers on First Amendment grounds should they be dismissed or otherwise sanctioned for refusing to do so.

75 *See* for example Erik Eckholm & Manny Fernandez, *After Same-Sex Marriage Ruling, Southern States Fall in Line*, N.Y. Times (June 29, 2015) https://www.nytimes.com/2015/06/30/us/after-same-sex-marriage-ruling-southern-states-fall-in-line.html?mcubz=0.

the profoundly important impact of the judgment in freeing a long stigmatized and discriminated against minority of 'the people' from the second class legal and cultural status they had been explicitly assigned by their respective States' intolerant legislative majorities. Judge Posner puts the point perfectly in *Baskin v. Bogan*:

> Wisconsin's remaining argument is that the ban on same-sex marriage is the outcome of a democratic process—the enactment of a constitutional ban by popular vote. But homosexuals are only a small part of the state's population—2.8 percent, we said, grouping transgendered and bisexual persons with homosexuals. Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law. [76]

[76] Baskin v. Bogan, 766 F. 3d 648, 671 (7th Cir. 2014).

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Administrative Functions of Implementation and Adjudication Guided by Primacy of Fundamental Rights

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ABSTRACT

This article points out the bottlenecks in the systems of administrative adjudication in Latin America and suggests that the ineffectiveness should not be blamed entirely on the judicial system and judicial procedures. Rather, the Latin-American system of administrative justice should come to terms with its judicial system of general jurisdiction, gradually reducing the jurisdiction of courts over administrative disputes in favor of an administrative reform to ensure administrative functions of implementation and adjudication respecting the primacy of fundamental rights. The author concludes that it is necessary to think about a reform that leads public administrative authorities to act as an instrument for expressing the public interest rather than as end in itself or as an entity to protect self-serving, momentary political and financial interests that are not clearly bound by a duty to protect fundamental rights.

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I. Introduction

This article is derived from a lecture entitled "*The Reform of Administrative Justice In Latin America*" (Реформа административной юстиции в Латинской Америке) given in the international conference *Administrative justice: comparative and Russian contexts* held in Tyumen on September 29-30, 2016 in the framework of the 2nd Siberian Legal Forum devoted to the development of administrative legal proceedings in Russia. It is divided into two parts; the first part covers the original contents of the talk (trends in administrative adjudication), with references in the footnotes. The second part concerns the main issues (specific features and terms adopted) that were discussed at the event, explaining certain concepts and institutions of Latin-American administrative law, particularly in Brazil.[1]

II. Current Trends in Administrative Adjudication

A. Judges Who Are Administrative Law Specialists and Independent

According to Articles 8.1 and 25 of the American Convention on Human Rights, the right to effective judicial protection, a primary focus of the Rule of Law in Latin America, means the right to a competent, independent and impartial tribunal or court, guaranteeing due process of law, for the determination of individual rights, including those of an administrative nature. In the field of the administrative justice, the prerequisites for such protection are judges who are administrative law specialists and independent from the authorities responsible for the challenged

[1] This text was inspired by the article Contemporary Challenges in Latin American Administrative Justice, 3 BRICS L.J. 2, 21-56 (2016).

decisions, as well as the reinforcement of procedural principles that enable weighing private interests against public interests.[2] Pioneering efforts to establish such a self-standing, independent branch of administrative justice include the German administrative tribunal of Baden of 1864[3] and the French Law of Reorganization of the *Conseil d'Etat* of 1872.[4] Although no such division has been adopted in Latin American countries, the independence of the courts is considered to be an indispensable element of the contemporary justice system, as is expressly stated in the national and international laws and conventions in force.[5]

B. The Three Dimensions of the Fair Trial in the Administrative Justice

In keeping with the Inter-American system of human rights, the statutes and case law of many Latin-American countries have identified three dimensions of the right to effective judicial protection in administrative disputes.[6]

First, the judicial protection must be complete.[7] The review of procedural and substantive lawfulness must include, where appropriate, a verification of whether the administrative authority exceeded the limits of its discretionary powers.[8] In principle, government acts are subject to judicial review,[9] but the question is still controversial in certain countries.[10]

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2 Ricardo Perlingeiro, Brazil's Administrative Justice System in a Comparative Context, 1 Revista de Investigações Constitucionais, 3, 37 (2014), *available at* SSRN: https://ssrn.com/abstract=2310109.

3 Eckart Hien, The Role of the Administrative Jurisdiction in Society and in the Development of the European Union, 16 (2005), *available at*: http://bit.ly/2eSnHWi .

4 Loi du 24 mai 1872 sur la réorganisation du Conseil d'État [Law of 24 May 1872 on the Reorganisation of the State Council].

5 Ricardo Perlingeiro*, A Historical Perspective on Administrative Jurisdiction in Latin America: Continental European Tradition Versus U. S. Influence,* Br. J. Am. Leg. Studies 5, 269 (2016).

6 The three dimensions of the right to a fair trial in administrative justice were formulated by Karl-Peter Sommermann and Ricardo Perlingeiro upon conclusion of the *Euro-American Model Code of Administrative Jurisdiction* research project (Ricardo Perlingeiro & Karl-Peter Sommermann, Euro-American Model Code of Administrative Jurisdiction, 2-3 (2014)).

7 Case of Barbani Duarte et al. v. Uruguay, Inter-Am. Ct H. R., ¶ 204 (Oct. 13, 2011), *available at:* http://bit.ly/29rEwZX.

8 Exp: 04-011636-0007-CO, Res. 03669-2006, Constitutional Section of the Supreme Court of Justice of Costa Rica [Sala Constitucional de La Corte Suprema de Justicia de Costa Rica], (Mar. 15, 2006), *available at:* http://bit.ly/2go4q0o. *See* Ernesto Jinesta, Principio general de la justiciabilidad plenaria y universal de la conducta administrativa, 607-34 (2014), *available at:* http://bit.ly/2ggBA67. Incidentally, according to art. 15 of the General Public Administration Act of Costa Rica [Ley General de la Administración Pública] / Law nº 6.227, of 28 April 1978, the judge "shall act as comptroller to ensure the legality of the various aspects of the discretionary administrative decision and observance of the limits thereof." On the subject of substantive review of administrative decisions, see art. 51 of the Mexican Federal Law of Administrative Justice [Ley Federal de Procedimiento Contencioso Administrativo], of 4 October 2005.

9 *See generally* Jinesta, *supra* note 9, and Juan Carlos Cassagne, La judicialización de las cuestiones políticas, *available at:* http://bit.ly/2fxyNUY.

10 Art. 6 (c) of the Ecuadorian Law of Administrative Justice recognizes the category *political acts of government* and exempts them from judicial review; Art. 3 (II) (a) of

Second, the judicial protection must cover every type of conduct of public authorities. Judicial review must cover not only an administrative authority's acts or decisions that restrict the a citizen's rights but also any negligence or culpable omissions on the part of that authority. In other words, procedural law must ensure that citizens are able to resort to the courts not only to challenge administrative decisions or acts that affect them adversely but also the authority's failure to reply to a request or to provide a benefit to which the claimant believes himself to be entitled. The court must have both the authority to rule on the administrative authority's obligations and the necessary powers of enforcement to guarantee that their ruling will actually be put into practice.[11]

The third dimension of effective judicial protection concerns the timeliness of the protection. Judicial protection that comes too late is hardly helpful. Procedural law should therefore enable interim relief to be obtained quickly and easily in urgent cases, through petitions to prevent acts of undue interference by the administrative authority or to obtain declaratory judgments in case of danger in delay. The court should be able to order the administrative authority to perform or to refrain from performing an act. Interim relief should be available whenever interference with the citizen's rights could have irreparable consequences.[12]

C. Two Very Different Approaches to Judicial Organization

Two very different approaches to judicial organization have been taken to create a specialization in administrative adjudication. In general, in *common-law* countries (especially in the United States, United Kingdom and Australia) there are no specialized administrative courts but rather highly specialized quasi-judicial bodies within the

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the Bolivian Law of Administrative Procedure stipulates that "governmental acts based on the power to freely appoint and remove authorities" are not subject to the provisions of that same Law of Administrative Procedure; according to art. 4 (b) of the Law of Administrative Justice of Honduras, administrative courts have no authority to examine issues raised by "actions involving the relationship between Branches of Government or occasioned by international relations, defense of the national territory or military command and organization"; Art. 4 (a) of the Law of Administrative Justice of El Salvador; Art. 21.1 and art. 21.2 of the Law of Administrative Justice of Guatemala; and art. 17.1 of the Law of Administrative Justice of Nicaragua.

11 Case of Barbani Duarte et al. v. Uruguay, Inter-Am. Ct H.R., ¶ 201 (Oct. 13, 2011), *available at:* http://bit.ly/29rEwZX. Along the same lines: Arts. 4 and 5 of the Peruvian Law of Administrative Justice [Ley que regula el Proceso Contencioso Administrativo] / Law nº 27.584, of 22 November 2001; Art. 9 of the Organic Law of Administrative Justice of Venezuela [Ley Orgánica de la Jurisdicción Contencioso Administrativa] / Law nº 39.447, of 16 June 2010; Art.14 of the Law of Administrative Justice of Nicaragua [Ley de Regulación de la Jurisdicción de lo Contencioso Administrativo] / Law nº 350, of 18 May 2000.

12 Art. 230 of the Colombian Law of Administrative Procedure and Administrative Justice [Código de Procedimiento Administrativo y de lo Contencioso Administrativo] / Law nº 1437, of 18 January 2011; Art. 24 of the Mexican Federal Law of Administrative Justice; Art. 18 of the Law of Administrative Justice of Guatemala [Ley de lo Contencioso Administrativo] / Decree nº 119, of 17 December 1996; Arts. 69 and 103-106 of the Organic Law of Administrative Justice of Venezuela.

administrative agency themselves. Given the high degree of expertise of those bodies in the relevant areas of administrative law, the courts generally show deference to their decisions with respect to questions of fact,[13] and merely perform a "closed review" limited to questions of legality and procedure.[14] Such *judicial deference* is made up for by the availability of "intra-administrative" dispute-resolution mechanisms within the agency (administrative tribunals, adjudicators, adjudicative bodies) which are endowed with quasi-judicial powers and sufficient independence to provide citizens with guarantees of due process of law and a fair hearing.

In most Continental European legal systems with *civil law* origins in contrast, the courts have a special division for cases, which tends to have broad powers to review the factual grounds for administrative decisions (an *open judicial review*). Such broad powers of review are intended to counterbalance the traditional absence of internal dispute-resolution mechanisms within the administrative authorities themselves. [15] Thus, regardless of the organizational system, administrative justice is always placed in hands of specialized adjudicators. The difference is that in the "Continental European" approach, administrative disputes are resolved by specialized judges within the Judiciary, whereas in the United States quasi-judicial bodies within the administrative agency play a decisive role, although they remain subject to relatively deferential closed review by the Judiciary.

D. Serious Problems in Latin-American Systems of Administrative Justice

This dichotomy has given rise to serious problems in Latin-American systems of administrative justice.As former Iberian colonies, the countries of Latin America inherited the Continental European legal culture, with its *civil law* tradition. Since the early 19th Century, however, U.S. Constitutional law has exercised a strong influence on Latin-American countries. As a result, most of them have adopted a judicial system with "general jurisdiction," meaning that the same courts handle both ordinary and administrative disputes. [16] Since those countries have not managed to cut all their ties with the European legal culture, however, their adoption of the U.S. model of general jurisdiction has not been entirely successful. Countries that have organized their Judiciary with general jurisdiction are now suffering from the weaknesses of both predecessor systems: the lack of specialized administrative courts in the U.S. model, combined with the absence of quasi-judicial bodies within the administrative authorities themselves, which is typical of the Continental European model.[17]

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13 *See* Peter Cane, Administrative Law, 96 (5th ed. 2011). *See also* Peter L. Strauss, An Introduction to Administrative Justice in the United States (1989).

14 See generally Michael Asimow, *Five Models of Administrative Adjudication,* 63 Am. J. Comp. L. 3, 8-9 (2015).

15 On the subject of European models of administrative justice, see Michel Fromont, Droit Administratifs des Èтats Européens [Administrative Law of the European States] 120 et seq. (2006). *See also* Jacques Ziller, Administrations Comparées: Les systémes Politico-Administratifs de L'Europe des Douze [Compared Administrations: the Politico-administrative Systems of the Europe of the Twelve] 381 (1993).

16 See Perlingeiro, *supra* note 6.

17 *Id*. at 245-46.

The adoption of a judicial system with courts of unified jurisdiction within a predominantly Continental European legal culture has led to the following situation in Latin America. At one extreme, in courts of general jurisdiction, Latin American judges are tempted to imitate the U.S. courts by refusing to review questions of fact underlying the challenged administrative decisions, merely checking for possible violations of the principles of legality and (above all) procedural due process.[18] Such deference to administrative authorities gives Latin Americans the impression of the immunity of the State that makes them feel vulnerable, since decisions are made by administrative authorities that lack the necessary prerogatives to exercise their duties independently, without having to fear negative repercussions from other authorities.

At the other extreme, the broad powers of review of administrative decisions enjoyed by Latin American courts, based on the European model, may paradoxically lead to undermining the effectiveness of judicial protection. Given the absence of specialized administrative courts, judges with excessively broad powers are able to rule on cases involving administrative agencies as though they were disputes between individuals, without due consideration for public interests; in other words, they tend to apply principles of private law and civil procedure to disputes with public administrative authorities. [19] This is especially true in Brazil, which, to this very day, still has no general code of judicial procedure for administrative adjudication.[20]

As we have seen, the justice system in Latin America has serious deficiencies.

E. What Is the Solution?

After over two centuries of a judicial system consisting solely of courts of general jurisdiction, it would not seem the best option at this point to start discussing specialization of the courts. Indeed, the future of Latin American administrative justice depends on compensating for the lack of specialized administrative courts by endowing administrative agencies with guarantees of procedural due process, as established by the 5th and 14th Amendments to the U.S. Constitution and adopted by most Latin American national constitutions.[21]

Yet there is another problem, as well. It is indispensable for the state to provide independent and impartial dispute-resolution mechanisms, whether exercised by the courts in fair trials, or by the public authorities in fair hearings. Similarly, the

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18 Chevron U.S.A., Inc, v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984).

19 Dicey considered "the possibility of suing government officials in the ordinary courts according to principles of private law to be a element of the rule of law", which is now facilitated in common-law systems by a fair hearing in the administrative phase (Cane, *supra* note 14, at 44), and does not yet exist in practice in Latin America.

20 Ricardo Perlingeiro, *Due Process Prior to Administrative Decision and Effective Judicial Protection in Brazil: A New Perspective?* Vienna J. Int'l Const. L., 10, 30-62 (2016).

21 Const. of Colombia (1991) art. 29; Const. of Brazil (1988) art. 5 LIV and LV; Const. of Venezuela (1999) art. 49; Const. of Dominican Republic (2010) art. 69; Const. of Nicaragua (1995) art. 34; in Ecuador, art. 23.27 of the Constitution of 1998 and arts. 76 and 169 of the Constitution of 2008.

executive duties (implementation functions) falling within the competence of the administrative authorities must not be left out of the equation, because it is the faulty performance of such duties that is the root cause of individual complaints against the administrative agencies.

The increasing number of such disputes is an obvious sign that the administrative agencies are not functioning properly and that citizens have lost faith in their primary activities (implementation functions), or at least have greater faith in the courts than in the administrative authorities. Civil servants commonly tell citizens that although their claims may be well-founded they have no chance of success within their own agency, so that they should assert their claim in court. The primary question is what the role of the executive agencies should be in contemporary society. Should they merely apply administrative regulations and statutes to the letter, or should they also respect the guarantees of fundamental rights under national constitutions, international conventions and case law of international courts of human rights?

Although it may seem obvious that administrative authorities should seek to protect fundamental rights, the question is *how* they should do so. What structure should be used? Do civil servants in decision-making positions require legal qualifications? Do they need to be independent? [22] Do they need to be impartial? It is time for us to look for a model of administrative authorities that are equipped with (quasi-judicial) instruments allowing them to be guided by the public interest and by the principle of proportionality in order to make difficult choices when confronted with conflicting fundamental rights in favor of an individual or a community.

It is a rather thorny issue but needs to be addressed, especially now that the notion of "diffuse conventionality control" has been introduced by the Inter-American Court of Human Rights. According to that concept, formulated in 2014 in the *Cas*e *of Expelled Dominicans and Haitians v. the Dominican Republic*, the duty to comply with American Convention of Human Rights, as interpreted by the Inter-American Court, extends to all administrative agencies, without exception.[23]

It is therefore necessary to rethink the current model of public administrative authorities in Latin America; should they continue to be entities inseparable from the government, with key decision-making positions occupied by officials who are appointed and removed on the basis of political criteria rather than qualifications and expertise? In fact, the extent to which the Judiciary requires a branch specializing in administrative disputes is inversely proportional to the degree to which administrative authorities play their role properly: the more effective the protection of fundamental rights by administrative agencies, the more citizens will have faith in them and the more deference will be shown to them by the courts, and thus the less need there will be for specialized administrative courts.

F. Conclusion

In conclusion, it is time to stop pinning all the blame for the ineffectiveness of administrative justice on the judicial system and laws of procedure alone. On the

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22 Case of Palamara Iribarne v. Chile, Inter-Am. Ct. H.R., ¶ 9 (c) (Nov. 22, 2005), *available at:* http://bit.ly/2408ANi. Concurring opinion of Judge Sergio García Ramírez.

23 Case of Expelled Dominicans and Haitians v. Dominican Republic, Inter-Am. Ct H. R., ¶ 497 (Aug. 28, 2014).

contrary, Latin America should come to terms with its judicial system of courts of general jurisdiction, while progressively reducing the role played by the courts in administrative disputes thanks to an administrative reform ensuring the primacy of fundamental rights in the implementation and adjudication functions of the agencies.

We need to think about a reform that would induce administrative authorities to act as a voice of the public interest rather than as an end in themselves or as entities for the protection of their own momentary financial and political interests that are not clearly bound by a duty to protect fundamental rights.

III Annex: Terminology and Specific Procedural Issues

A. Specialized Courts in Latin America

When I refer to "specialised courts", I mean "a branch" of the Judiciary devoted to conflict resolution in the area of administrative law, in which the judges are hired for the expertise in administrative law and always work in that field of specialisation.I do not consider "specialised courts" to include courts whose judges are not appointed by law to act exclusively and specifically in a court specializing in administrative law. Latin America generally has courts of general jurisdiction (including both private law and administrative law).[24] They are specialized only under certain circumstances, at certain times or in certain places, through the internal organization of the Judiciary itself, without uniformity and with no guaranteed tenure of the judges who perform such specialized duties. In Brazil, for example, there is the Federal Justice System, which approximates the concept of a specialized court but is not exactly a court specializing in administrative law. Since Brazil is a 3-level federal republic, the Federal Justice System exercises jurisdiction over administrative law in cases of interest to the federal administrative authorities.

Yet this involves not only conflicts of administrative law, but also conflicts between private citizens as well as criminal cases of interest to the federal administrative authorities. The federal judges are not hired solely for their expertise in administrative law and are not guaranteed a permanent position in bodies specializing exclusively in administrative law. Over the course of their career, they may be transferred to other bodies of the Federal Justice System.

Thus, in my opinion, there are no special administrative law courts in Brazil, or in

[24] Const. of Bolivia (2008) art. 179; Const. of Brazil (1988); Const. of Costa Rica (1949); Const. of El Salvador (1983) art. 131.31; Const. of Ecuador (2008) arts. 188.3 and 173; Const. of Honduras (1982); Art. 163 of the Law partially amending the Constitution of the Republic of Nicaragua (1987). *See* Corte Suprema de Justicia de República de Nicaragua, Sala de lo Contencioso Administrativo. Antecedentes y Creación de la Sala de lo Contencioso Administrativo [Administrative Law Division of the Courts: History and Creation of Administrative Litigation], 2016; Const. of Panama (1972) art. 206; Const. of Paraguay (1992) art. 248. On the "judicialist" Paraguayan system in which the Judiciary exercises jurisdiction over administrative disputes, see Luis Enrique Chase Plate, *La Justicia Constitucional y la Justicia Administrative* in Derecho administrativo iberoamericano, 2, 1212 (Víctor Hernández-Mendible, ed., 2007).

Latin America in general, with the exceptions of Colombia, Guatemala, Dominican Republic, Uruguay and Mexico, which have real specialized administrative law courts.[25]

B Administrative Agencies

When I refer to administrative agencies, I am thinking of the U.S. model of adjudication of administrative disputes. Administrative agencies are bodies of the Public Administration, which I consider synonymous with the term "administrative authorities". Such authorities or agencies may do double duty, with purely executive duties typical of bodies of the Executive Branch, as well as quasi-judicial duties of adjudication to resolve disputes between citizens and public administrative authorities.

The agencies and authorities that exercise quasi-judicial duties of adjudication are also called administrative tribunals, which are not to be confused with administrative courts. Administrative tribunals are bodies of the Executive Branch (agencies and authorities), typical of the adjudicative models of the United States, United Kingdom and Australia;[26] administrative courts are specialized bodies of the Judicial Branch, typical of the adjudicative models of Continental Europe. Brazil and Latin America have adopted the U.S. model's courts of unified jurisdiction but without incorporating the compensatory mechanism typical of the U.S. system, namely intra-administrative dispute resolution through specialized administrative tribunals or quasi-judicial bodies within the agencies or administrative authorities themselves. In Latin America, there are no extra-judicial bodies capable of final and enforceable decisions in conflicts between citizens and public administrative authorities. Only the courts of the Judiciary are empowered to issue a final and enforceable judgement in such cases. The only exceptions are Uruguay and Mexico, which have court-like tribunals outside the Judiciary.[27]

C. Principle of party autonomy

I wish to say a few things about the principle of party autonomy, a term borrowed from Dr. Nataliya Bocharova, who discussed the subject so well in Volume 3 of the Brics Law Journal.[28]

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[25] Const. of Colombia (1991) art. 231; Const. of Guatemala (1945) art. 164, (1956) arts. 193 and 194, (1965) art. 255 and (1985) art. 221; Const. of the Dominican Republic (2010) arts. 164 and 165; Const. of Uruguay (1967) arts. 307 to 321; Const. of Mexico (1917) art. 73 XXIX, 94, 116 V and 122 *Base Quinta*. On the nature of Federal Administrative Tax Court, see Emilio Margáin Manautou, De lo Contencioso Administrativo: De Anulación o de Ilegimidade, 2 et seq. (2009); Const. of Mexico (1917) art. 107 IV and V (b). On the subject of judicial review of the public administrative authorities in general, see Jorge Fernández Ruiz, *Panorama General del Derecho Administrativo Mexicano [General Overview of Mexican Administrative Law]* in S. González-varas Ibáñez, el derecho administrativo iberoamericano, 462-463 (2005). On the nature of the "autonomous tribunal" relative to the Judiciary of the administrative tribunals of Mexico and Uruguay, see Perlingeiro, *supra* note 6.

[26] See in general Peter Cane, Administrative Tribunals and Adjudication (2009).

[27] Perlingeiro, *supra* note 6.

[28] N. Bocharova, *Party Autonomy in Administrative (Judicial) Proceedings*, 3 BRICS L. J.,

The principle of party autonomy, also known as the dispositive principle, gives rise to arbitration and other mechanisms of consensual dispute resolution between citizens and public administrative authorities. In Brazil, the term "*direitos indisponíveis*" ("inalienable" or "unavailable" rights), which sets the limits of the principle of party autonomy, is not well defined. Such "inalienable rights" are often confused with the interests of the administrative authorities.[29] In fact, however, only "public interests" rather than the interests of the administrative authorities should qualify as "inalienable rights". This means that in Brazil, in practice, only questions of private law involving administrative authorities are subject to the principle of party autonomy and related consensual dispute resolution mechanisms, such as arbitration and mediation.[30] I'm sorry to say that this lack of distinction between the public interest and the interests of the public authorities is the fault of the justice system and procedural laws in matters of administrative law. Since it is not necessary to determine whether a dispute should be classified as a matter of administrative law or ordinary law in order to assign it to an ordinary court or specialized administrative law court, there is no reason to define detailed criteria to distinguish between the public interest and the interests of the authorities.

Brazil's backwardness in arbitration and other means of consensual conflict resolution between authorities and citizens can also be explained by the low level of expertise of the civil servants in charge of decision-making within the administrative agencies. In addition to better legal training, Brazilian civil servants should be provided with institutional guarantees allowing them to make independent and impartial decisions without fearing negative repercussions from other authorities.

D. Control of Exercise of Discretionary Powers

In a judicial review to determine whether or not an administrative authority exceeded its proper margin of discretion, several factors must be taken into account; the greater the authority's independence, impartiality, legal qualifications and specialized expertise in specific subject areas, such as health, environment and energy, the less likely it is to make arbitrary decisions and the less judicial review will be necessary.[31] In practice, administrative authorities endowed with such characteristics should be granted a greater margin of discretion and the resulting decisions should be shown greater deference by ordinary courts of law. Since the authorities generally lack such characteristics in Brazil, the courts have full powers to review the exercise of their discretionary powers.[32] In that situation,

2, 153-163 (2016).

29 Arts. 345, II, 292 and 373, ¶ 3, I of the Brazilian Civil Procedure Code [Código de Processo Civil Brasileiro] / Law n. 13.105, of 16 March 2015.

30 Art. 1, ¶ 1 of the Arbitration law [Lei de arbitragem] / Law nº 9.307, of 23 September 1996, whose wording was adopted by Law nº 13.129/2015; Art. 3º of Law on mediation between individuals as a mechanism of consensual and amicable dispute resolution in conflicts involving public adminstrative authorities [Lei sobre mediação entre particulares como meio de solução de controvérsias e sobre a autocomposição de conflitos no âmbito da administração pública] / Law nº 13.140, of 26 June 2015.

31 *See* Ricardo Perlingeiro, *Contemporary Challenges in Latin American Administrative Justice*. 3 BRICS L. J., 2, 52 (2016).

32 *See* Perlingeiro, *Due Process , supra* note 21, at 35-36 (2016).

judicial review of administrative powers always reveals that the authorities exceed their statutory limits of authority or violate fundamental rights and principles such as equality before the law, proportionality and legitimate expectations. Such assertions are not provided for by law but that is what happens in practice in Brazil.[33]

E. Injunctive Relief Measures

Regarding injunctive relief measures, first of all it should be remembered that Brazil does not have a specific code of procedure for administrative law cases. We use the Code of Civil Procedure, which contains certain specific articles for causes of interest to the administrative authorities, but in general administrative law cases are governed by the same rules of procedure as private-law cases.[34] In this context, in principle, non-specific injunctive measures (including measures to preserve the status quo pending final judgment or to join similar claims in the interests of procedural efficiency) are permitted for any type of claim against the administrative authorities. A common example of an unspecified injunctive relief measure is a provisional court order instructing the authorities to supply a medicine or health care service to a private claimant. If the authority fails to comply with the court order, the judge is empowered to seize the corresponding amount of money and pay it to the claimant.

There are certain restrictions on granting injunctive relief, however: general and specific restrictions. One example of a general restriction is protection of the public interest;[35] no such measure can be granted if it would create a risk of harming the public interest. An example of a specific restriction is the prohibition on injunctive relief to increase the remuneration of civil servants.[36]

F. Enforcement of Judgments Against Authorities

The traditional form of enforcement of orders instructing an administrative authority to pay a certain amount is called "precatório".[37] It consists of an extrajudicial administrative procedure in which the administrative authority asks the Legislative Branch for budgetary resources and, once such funds are available, they are passed on to the Judiciary, which then pays the claimant.[38] In case of urgent need, however, case law allows for debt enforcement against the authorities, that is to say enforcement through expropriation of public funds that

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33 AI 800.892, Agr/BA, Federal Supreme Court of Brazil [Supremo Tribunal Federal] (Mar. 12, 2013); RMS 24.699, Federal Supreme Court of Brazil [Supremo Tribunal Federal] (Jun. 01, 2005).

34 Perlingeiro, *Due Process,supra* note 21, at 10, 43 (2016).

35 Art. 15 of the Law of Individual and Collective Writs of Mandamus [Lei do Mandado de segurança individual e coletivo] / Law nº 12.016, of 7 August 2009.

36 Art. 2-B of the Law nº 9.494, of 10 September 1997, that establish the applicability of interim relief measures against the administrative authorities.

37 Const. of Brazil (1988) art. 100.

38 Ricardo Perlingeiro, Excecução contra a Fazenda Pública, 115-118 (1999).

are not allocated to an essential public service.[39] The enforcement of other types of claims against the authorities (not involving orders to pay) is handled in the same way as enforcement of judgments against private entities. That is to say, they are enforcement measures of financial coercion, such as an order to a civil servant to pay a per-diem fine payable by the civil servant until he complies with a court order.[40]

In practice, however, such enforcement must respect public interests (although there are no provisions of the Code of Civil Procedure specifying the public interest as a factor limiting the enforceability of judgments against the authorities). The only restrictions on the enforcement of judgments against public administrative authorities are provided by certain specific procedural laws.[41]

G. Excessive Litigation in Brazil

There are at least 65 million administrative law cases pending trial in Brazil, about 40 million of which concern the enforcement of decisions by the tax office that restrict individual rights.[42] Most of the claims are repetitive, mainly because even when the court rules in favor of an individual's claim based on a general interest to society, the administrative authorities do not willingly recognize the same right among the general public. For example, if a court grants one civil servant's claims for a salary adjustment, the other civil servants must each go to court in order to obtain the same benefit. The authorities prefer to await a final decision of the Supreme Court, which means there is a tendency for all the civil servants to file a new legal action.

Another major cause for the high number of legal actions in Brazil is that authorities tend to use the Judiciary as a means of enforcing their administrative decisions that restrict individual rights. [43] In general, the authorities do not have

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39 Agravo de Instrumento/RJ 0000305-30.2016.4.02.0000, Federal Regional Court of the 2nd Region [Tribunal Regional Federal da 2ª Região] (Feb. 23, 2016), *available at* : http://bit.ly/2gea9Y5.

40 Apelação Civil/RJ 0000268-65.2012.4.02.504, Federal Regional Court of the 2nd Region [Tribunal Regional Federal da 2ª Região] (Apr. 19, 2016), *available at*: http://bit.ly/2f2v3eU.

41 Art. 12 ¶1º Law on Public Class Actions [Lei de Ação Civil Pública] / Law nº 7.347, of 24 July 1985; Art. 15 of the Law of Individual and Collective Writs of Mandamus [Lei do Mandado de segurança individual e coletivo] / Law nº 12.016, of 7 August 2009.

42 Conselho Nacional de Justiça [National Justice Council], Justiça em Números: ano-base 2013, 39 (2014), *available at:* http://bit.ly/1OtkVTC. *See also* Conselho Nacional de Justiça [National Justice Council], Justiça em Números: Ano-Base 2014 (2015), *available at*: http://bit.ly/1UDrJju. On excessive judicial review of administrative decisions in Chile, see Supreme Court of Chile [Corte Suprema], Acta 176, Oct. 24, 2014.

43 Laws providing judicial tax enforcement: Art. 653 of the Venezuelan Organic Tax Code [Código Orgánico Tributario da Venezuela] / Decree nº 1.434, of 17 November 2014; Brazilian law on tax enforcement [Law on Judicial Collection of Outstanding Tax Claims of the Public Authorities] / Law nº 6.830, of 22 September 1980. In contrast, for the admissibility of tax enforcement by the public authorities themselves, see: Articles 98-101 of the Colombian Law of (Judicial and Extrajudicial) Administrative Procedure;

the necessary prerogatives to conduct independent adjudication and the decisions are made by civil servants with no legal training. As a result, citizens have lost faith in the administrative authorities. This is the reason why the laws of procedure continue assigning to the Judiciary the role of enforcing administrative decisions against individuals.[44]

In fact, judicial enforcement of administrative decisions is dysfunctional. It is a case of role reversal: the administrative authorities cease to exercise their power of "*autoexecutoriedade*," according to which they should be able to enforce their own decisions without judicial interventions, while the courts enforce administrative decisions instead of protecting the rights and settling the disputes of private claimants.

H. Conventionality Control or Review of Compliance with International Conventions

According to the case law of the Inter-American Court of Human Rights, all administrative authorities are required to respect the American Convention of Human Rights as interpreted by the Inter-American Court.[45] That means that whenever the authorities are faced with a national law that is contrary to the American Convention of Human Rights, it should interpret that law in such a way as to comply with that Convention. Nevertheless, if the resulting interpretation tends to interfere with the intended purpose of law then the administrative authority must apply to the Supreme Court for a preliminary opinion on the constitutionality of national laws.

In any case, the system of "conventionality control" is a way of forcing the administrative authorities to respect the supremacy of fundamental rights. To do so, however, the administrative authorities need legal training and prerogatives to act with greater independence vis-à-vis other authorities with contrary political interests.

The doctrine of "conventionality control" favors a harmonious relationship between the Executive and Judiciary powers, which come to act rationally, always searching to protect fundamental rights.

Art. 3 of the Chilean Law of Administrative Procedure; Art. 149 of the General Public Administration Act of Costa Rica; Art. 145 (1) of the Mexican Federal Tax Code [Código Fiscal de la Federación]; Art. 69 (1) of the Tax Code of the Dominican Code [Código Tributário de la República Dominicana] / Law nº 11, of 16 May 1992.

44 Marcos de Vasconcellos, *Ministros do STJ São Contra Execução Fiscal sem Juiz [Judges of the STJ (Superior Court of Justice) against tax enforcement without a judge],* Revista Consultor Jurídico (2012).

45 Case of Cabrera García and Montiel Flores v. Mexico, opinion of Eduardo Ferrer Mac-Gregor Poisot, ad hoc Judge Inter-Am.Ct. H.R. (Nov. 26, 2010). Case of Expelled Dominicans and Haitians v. the Dominican Republic, Inter-Am.Ct. H.R., ¶ 497 (Aug. 28, 2014)). *See also* Eduardo Ferrer Mac-Gregor, The Constitutionalization of International Law in Latin American Conventionality Control: The New Doctrine of the Inter-American Court Of Human Rights, American Society of International Law-Ajil Unbound, 109, 93-99 (2015).

I. Model Code of Administrative Procedure in Judicial and Extrajudicial Proceedings

The Ibero-American Institute of Procedural Law's Model Code of Administrative Procedure in Judicial and Administrative Proceedings is not an enforceable law but rather an academic proposal drawn up by legal scholars affiliated with the Ibero-American Institute that may serve as a model to be followed by Latin American countries of Iberian origin.[46]The Model Code has incorporated the experiences of certain countries with judicial and extrajudicial proceedings involving administrative law cases. As a result, the Model Code has consolidated such experiences related to basic principles of administrative justice that may be of benefit to other Latin American countries.

The Model Code takes as its premise that administrative authorities lack dispute-resolution proceedings guaranteeing due process and therefore proposes innumerable duties to be imposed on the authorities in dispute-resolution, such as respect for the principles of impartiality, proportionality and legitimate expectations. Consequently, the Code encourages courts to perform close judicial review of both procedural and substantive issues of administrative decisions, including the exercise of their margin of discretion.

I am not aware of any national law in Latin America that has adopted the Model Code or any of its articles. Nevertheless, there is a noticeable trend for case law in Latin American countries to adopt principles similar to those expressed in the Model Code. Here are three examples:

1. Standing to sue is recognized for individuals who claim that their legitimate individual rights or interests have been violated, or are at risk of violation, by a public authority or by an individual holding public office. The legitimacy of class actions has also been recognized for the assertion of diffuse collective interests and to challenge administrative regulations, as well as the possibility, when an administrative decision harms a group of individuals, for any member of injured group or other interested party to sue for compensation for all concerned.
2. Debt enforcement measures are permitted against the administrative authorities, allowing for seizure of public assets that are *not allocated to an essential public service*.[47] It is also permitted to impose punitive and coercive fines– that is *civil contempt* or *criminal contempt of court*, *astreintes* –, as well as awards of damages to the individual claimant if the authority delays in complying with a court order.
3. The utilization of suitable means of consensual dispute resolution

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[46] *See* Ada Pellegrini Grinover & Ricardo Perlingeiro et al. Código Modelo de Procesos Administrativos - Judicial y Extrajudicial - para Iberoamérica, Seminário de demandas Repetitivas na Justiça Federal, 29, 107-120 (2014).

[47] *See* art. 170 of the Costa Rican Code of Administrative Justice [Código Procesal Contencioso-Administrativo] / Law nº 8.508, of 28 April 2006 . On the subject of public interest (essential service to the community) as grounds for stay of execution of a judgement, see art. 41(a) da Law of Administrative Justice of El Salvador [Ley de la Jurisdicción Contencioso-Administrativa] / Decree n 81, of 14 November 1978. See also art. 110.2 Organic Law of Administrative Justice of Venezuela.

> has been facilitated, subject only to the principle of legality, in order to protect public assets and compliance with the legal system, and to the principle of equality before the law, so that agreements on acts of general scope will have the same effects on every individual in the same situation even if he did not take part in the agreement.

J. Euro-American Model Code of Administrative Justice

The Euro-American Model Code of Administrative Justice was an initiative of Federal Fluminense University in Rio de Janeiro, in partnership with the University of Speyer, in Germany.[48] Contributions to the Code were made by legal scholars from the University of Buenos Aires, Universidad Externado da Colombia, the University of São Paulo, the Max Planck Institute of Munich, the University of Erfurt, University of Milan, University of Paris 1 and the University of Jaume 1, in Spain. The Euro-American Model Code was finished in 2010, two years before the Ibero-American Model Code, but it was not published until 2014.
The basic differences between the two model codes are as follows:

1. The Ibero-American Model Code is addressed to Latin American countries, whereas the Euro-American Model Code also includes European countries. Incidentally, the Hungarian Ministry of Justice translated the Euro-American Code into Hungarian and used it in the studies for the reform of Hungarian laws of administrative procedure.[49]
2. The Ibero-American Code includes extrajudicial proceedings, whereas the Euro-American Code is limited to judicial proceedings.

In terms of the contents, there are few differences with respect to administrative adjudication in court. Both model codes adopt the premise that administrative authorities do not perform the function of quasi-judicial adjudication. The procedural principles of both model codes therefore allow for full, close judicial review of administrative decisions.

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48 *See* Perlingeiro & Sommermann, *supra* note 7.

49 A Közigazgatási Bíráskodás Mintakódexe [Model Code of Administrative Jurisdiction]. Közjogi Szemle, 3, 65-71 (2015), *available at* SSRN: https://ssrn.com/abstract=2688812.

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Two Concepts of Freedom in Criminal Jurisprudence

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ABSTRACT

The goal of this essay is to identify and discuss two aspects of liberty by examining the distinction between act and omission in criminal jurisprudence. Criminal law makes a significant distinction between harmful actions and harmful omissions and, consequently, between killing and letting die. Any act that causes death is grounds for a homicide conviction -- subject, of course, to the existence of the other elements necessary for establishing criminal liability, such as causation and mens rea. However, liability for death by omission is subject to the additional identification of a duty to act. In other words, the defendant will be liable only if we can identify such a duty and show that the breach of this duty resulted in the victim's death. This distinction between act and omission is rooted in an ethical perspective, in which we instinctively see a difference between actively behaving in a manner that causes harm and passively failing to prevent such harm. Nevertheless, since the beginning of the 1960s, there has been a significant movement to attack and criticize this moral distinction. This critique impacts upon the legal sphere as well, since if the moral distinction between act and omission is not obvious, the legal distinction cannot be clear-cut either. This lack of clarity has led to many attempts to lay a logical foundation for the intuitive understanding that there is indeed a legal distinction between act and omission.

This essay focuses on two principles that reflect different aspects of human liberty which are reflected in criminal jurisprudence. The first is liberal liberty, and the second which I propose, is personal autonomy. While both relate to liberty of the individual, they approach it from different angles, and this difference in perspective results in different definitions of act and omission in criminal jurisprudence.

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I. Introduction

The goal of this essay is to identify and discuss two aspects of liberty by examining the distinction between act and omission in criminal jurisprudence. Criminal law makes a significant distinction between harmful actions and harmful omissions and, consequently, between killing and letting die. Any *act* that causes death is grounds for a homicide conviction – subject, of course, to the existence of the other elements necessary for establishing criminal liability, such as causation and *mens rea*. However, liability for death by omission is subject to the additional identification of a duty to act. In other words, the defendant will be liable only if we can identify such a duty and show that the breach of this duty resulted in the victim's death. This distinction is further reflected in the proposed Model Penal Code, which states in section 2.01(3)(b) that liability for an offense may not be based on an omission unless a duty to perform the omitted act is otherwise imposed by law.

This distinction between act and omission is rooted in an ethical perspective, in which we instinctively see a difference between actively behaving in a manner that causes harm and passively failing to prevent such harm. Nevertheless, since the beginning of the 1960s, there has been a significant movement to attack and criticize this moral distinction.[1] The primary question is whether there is, in fact,

[1] For the ethical perspective, *see* O.H. Green, *Killing and Letting Die*, 17 APQ (1980) 195; Philippa Foot, *Killing and Letting Die*, in Killing and Letting Die (Bonnie Steinbock and Alastair Norcross eds., 1994) 283; Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, in Killing and Letting Die (Bonnie Steinbock and Alastair Norcross eds., 1994) 383; P.J. Fitzgerald, *Acting and Refraining*, 37 Analysis 133 (1967); Tracy L. Isaacs, *Moral Theory, Action Theory, Killing and Letting Die*, 32 APQ 355 (1995); Jonathan Bennett, *Whatever the Consequences,* in Killing and Letting Die (Bonnie Steinbock and Alastair Norcross eds., 1994) 167; Bruce Russell, *Presumption, Intrinsic Relevance, and Equivalence*, 4 J. of Med. & Phil. 263 (1979); James Rachels, *Killing and Starving to Death*, 54 Phil. 159 (1979); James Rachels, *Active and Passive Euthanasia*, in Killing and Letting Die 112 (Bonnie Steinbock and Alastair Norcross ed., 1994); John Harris, *The Marxist Conception of Violence*, 3 Phil. & Pub. Aff. 192; Shelly Kagan, The Limits of Morality 83-127 (1991); Michael Tooley, *An Irrelevant Consideration: Killing Versus Letting Die*, in Killing and Letting Die 103 (Bonnie Steinbock and Alastair

a moral distinction between causing harm and letting harm happen; more specifically, is there such a distinction between killing and letting die? Furthermore, if, in fact, one can make such a moral distinction, what is the moral imperative behind it? According to these critics, when the two scenarios are otherwise equal in all respects – that is, the intent, the expense of preventing death, and the result are all the same in both cases, there is no moral ground for drawing a distinction between killing and letting die.

Obviously, this critique impacts upon the legal sphere as well, since if the moral distinction between act and omission is not obvious, the legal distinction cannot be clear-cut either. This lack of clarity has led to many attempts to lay a logical foundation for the intuitive understanding that there is indeed a legal distinction between act and omission, yet it seems that creating this clear distinction is easier said than done.[2]

Among the various rationales that have been presented for this distinction, this essay focuses on two principles that reflect different aspects of human liberty that are reflected in criminal jurisprudence. The first is liberal liberty, and the second is personal autonomy. While both relate to liberty of the individual, they approach it from different angles, and this difference in perspective results in different definitions of act and omission in criminal jurisprudence.

The essay is structured as follows: part 2 describes two U.S. court decisions, involving manslaughter conviction in cases of omission, that emphasize the distinction between action and omission. Part 3 presents the liberal liberty principle and explains how it provides a reason for this distinction in the criminal context. The chapter goes on to specify the definitions of act and omission that are consistent with this rationale and concludes by discussing difficulties that arise in the context of this analysis. Part 4 introduces a new rationale for the distinction between act and omission, that of personal autonomy. Part 4 continues to compare the two rationales and their respective implications for the distinction between killing and letting die. Part 5 applies these two rationales, respectively, to the analysis of the U.S. decisions presented in Part 2.

While the distinction between act and omission is general in nature, this article focuses on the distinction between killing and letting die, since that is the primary

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Norcross ed., 1994); Tracy L. Isaacs, *Moral Theory, Action Theory, Killing and Letting Die*, 32 APQ 355 (1995).

For the legal perspective, see George Fletcher, *On the Moral Irrelevance of Bodily Movements,* 142 U. Pa. L. Rev. 1443 (1994); George P. Fletcher, Rethinking Criminal Law 593-602 (1978); George P. Fletcher, Basic Concepts of Criminal Law 59-70 (1998); Joel Feinberg, Harm to Others 159-181 (1984); Arthur Leavens, *A Causation Approach to Criminal Omissions,* 76 Cal. L. Rev. 547 (1998); Michael S. Moore, Act and Crime: The Philosophy of Action and Its Implications for Criminal Law 25-26 (1993); Michael S. Moore, *More on Act and Crime*, 142 U. Pa. L. Rev. 1749 (1994); F. M. Kamm, *Action, Omission, and the Stringency of Duties,* 142 U. Pa. L. Rev. 1493 (1994); Leo Katz, *Proximate Cause in Michael Moore's Act and Crime*, 142 U. Pa. L. Rev. 1513 (1994).

2 For example, Honore states, "My reason for discussing the acts and omissions doctrine is that, though law is strongly committed to it, lawyers have not been very successful in finding a rationale for it." Tony Honore, Responsibility and Fault 41(1999).

example used in philosophical and legal discourse to elucidate the distinction between act and omission.

II. Two U.S. Cases

In *State of Wisconsin v. Dale Neuman*,[3] an eleven-year-old girl died as a result of her diabetes because her parents chose to treat her by prayer rather than seek the medical care that, apparently, would have saved her life. The parents continued to pray and not to treat their daughter with conventional medicine as the girl's condition deteriorated and even when she eventually lost consciousness. The parents were convicted of manslaughter because of their failure to procure medical care.

The court held that:

> Although the second-degree reckless homicide statute, Wis. Stat. Section 940.06(1) does not include specific language criminalizing an omission, the parties agree, as do we, that an actor may be criminally liable for a failure to act if the actor has a legal duty to act.[4]

In this case, the court found, the parents had a duty to provide appropriate medical care and not to rely on prayer in a situation where there was a medical threat to the child. Thus, had there been no such duty to care for their daughter through conventional medicine (as the parents argued), they would have been acquitted.

In *People v. Carol Ann Oliver*,[5] the decedent met the defendant in a bar. He escorted her home and entered her bathroom to inject himself with heroin, using a spoon provided by the defendant. Consequently, the decedent fell to the floor unconscious. The defendant observed what had occurred and left the house after requesting her daughter to remove the decedent from the house. The next day, he was found dead of an overdose.

The defendant was convicted of involuntary manslaughter under Pen Code 192(b). She argued in her defense that she could not be convicted because there was no duty incumbent upon her to care for the decedent under law since there was no relationship between them. The court disregarded this argument and held that while there is not generally any duty to save a stranger, here, where the decedent had been invited into defendant's home and went into the bathroom after receiving a spoon from her, the risk to his life was heightened, and therefore defendant had a duty to call for medical assistance in order to save him.[6] In this case as well, it is apparent that had there been no duty to act she would not have been convicted simply because she had the ability to save the decedent by summoning medical assistance.

These two cases are but two examples of U.S. case law, in which many have been convicted of homicide in instances of omissions. However, these cases

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3 State of Wisconsin v. Dale Neuman 348 Wis. 2d 455 (2013).

4 *Id*. at 94.

5 People v. Carol Ann Oliver 210 Cal. App. 3d. 139 (1989).

6 *Id.* at 149.

illustrate that, as opposed to instances that involve acts, where any act can be the basis for a conviction (assuming causation and intent), cases of omission require identification of a duty to act. This duty can originate in explicit legal provision or in a relationship between the victim and the defendant, but without such duty there will be no conviction.

The question, then, is what rationale distinguishes between act and omission with regard to the existence of a duty to act? Why can someone be convicted for an omission that cases harm only where a duty to act has been identified? This distinction is not a given, particularly considering the many scholars that contend that there is no ethical distinction between act and omission.

III. The Liberty Rationale

A. The Principle

One of the principal theories behind the distinction between act and omission is rooted in the value of personal liberty.[7] According to this theory, the prohibition against a harmful act does not cause significant loss of personal liberty since all that is required of a person is to refrain from acting. However, a prohibition against a harmful omission does cause significant loss of liberty since it requires the individual to stop whatever she is doing in order to prevent harm from befalling another person. If people were liable for omission even in the absence of a specific duty to act, they would be forced to drop everything and act at a moment's notice, at any time. Since the legal system must allow people to maintain a routine without being forced to stop and go out on random rescue missions, criminal law maintains that liability for omission exists only if a duty to act can be specifically identified.[8]

In this vein, let us assume that John, who lives in Joe's neighborhood, is faced with life-threatening danger. Joe knows this. If Joe were liable even without having a duty to act, he would be forced to drop everything in order to help John since not doing so would risk liability for voluntary and negligent manslaughter.

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7 *See* A.P. Simester & G.R. Sullivan, Criminal Law: Theory and Doctrine 61-70 (2000); David Ormerod, Smith and Hogan's, Criminal Law (13th edition) 65 (2011); A.P. Simester, *Why Omissions Are Special*, 1 Leg. Theory 311, 333-35 (1995).

8 Simester, *id.* A different rationale is sometimes presented in the context of the liberty theory. Some contend that criminal law limits crimes of omission as they restrict personal liberty more than classifying particular acts as criminal. The contention is that prohibiting omission allows an individual to perform a particular act, but it prevents him from doing multiple other ones. However, prohibiting a particular act limits only that act itself and does not prevent the performance of multiple other ones. Critics of this theory contend that it is inaccurate to state that criminalizing omission causes more loss of liberty than crimes of action. The issue of loss of personal liberty relates to the person who is the object of the crime and to his preferences. For example, the prohibition against smoking does not affect a person who has no interest in smoking, but it severely affects a person who is a chain smoker. The fact that the latter can sing or dance instead of smoking does not prevent the loss of personal liberty.

In cases of omission, then, the purpose of requiring a duty to act is to limit the number of scenarios in which an individual must act to prevent harm from befalling others. This limits the individual's loss of liberty and allows him to maintain his normal routine, with minimal interference.

In this context, anything that imposes a duty to act (whether under criminal or civil law) can serve as a basis for conviction of a result crime such as manslaughter because the legislature's decision to impose such a duty indicates that it has determined that the consideration of liberty in the case at hand is set aside. Once liberty is not to be taken into consideration, there is no longer any basis to distinguish between act and omission where they result in identical harm. This is relevant to an analysis of the cases presented above, as will be elaborated upon in Part IV below.

B. Legal Definitions

According to the liberty theory, the accepted test for defining act and omission is bodily movement. By this test, a muscle twitch that causes harm is classified as an act, while the lack of such a movement is classified as omission.[9] More specifically, a muscle twitch that causes death is classified as a killing, while the lack of such a movement is classified as a letting die.

The bodily movement test is consistent with the liberty theory: a prohibition against an act (a bodily movement) does not cause significant loss of liberty since the protagonist maintains multiple other avenues of action. On the other hand, a prohibition against omission, which is classified as non-action, does in fact cause loss of liberty as such a prohibition requires the individual to perform certain acts, which, when they recur on a regular or semi-regular basis, prevent her from maintaining a regular routine. If a person is subject to a general obligation to prevent harm, then each time that she becomes aware of a possibly harmful event, she must act to prevent it.

Since a person cannot be in two places, or do two things, at once, she must almost always abandon her routine in order to prevent the harmful event. When such events occur relatively frequently, a person becomes hard-pressed to maintain a normal lifestyle. However, a prohibition against actively causing a certain outcome is different. When one is faced with the option to actively cause a prohibited result, and is forced to choose an alternative mode of action, the fact that a choice is involved means that the loss of liberty is minimal.

In order to complete the picture, it should be noted that the issue of classification as act or omission is independent of the manner in which the act is "expressed." For example, in a case in which a father does not feed his son for a certain period of time, and this leads to the son's death, we would say that the father starved his son. The word "starved" implies an act. Nevertheless, since starving the son did not actually require any act at all, this is in fact an omission. Therefore, the father is liable only because in this particular case there is a duty to act, and not because starving his son is considered an act.

The liberty theory has several aspects that make it imperfect for our purposes. First, the liberty theory is more relevant to crimes of recklessness or negligence. If omission in these crimes did not require a duty to act, people would be liable in

[9] Simester & Sullivan, *supra* note 7, at 70.

any event in which they did not assist someone in need. These events are relatively frequent (as we require real *or* potential knowledge of the elements of the crime), and creating liability for them would cause severe loss of liberty. However, in cases that require intent, this issue is almost nonexistent since liability does not arise unless the person intended for the prohibited result to take place (and cases such as these are, by nature, limited in number). Since criminal law distinguishes between act and omission without considering *mens rea*, it follows that this distinction cannot be founded on the liberty theory alone.

Furthermore, following the liberty theory alone would, theoretically, lead to the conclusion that a person should not be convicted of manslaughter in situations where her liberty would be lost if she refrained from *active killing*. Thus, if abstaining from killing would cause loss of liberty or negatively affect one's ability to make a living, then, according to the liberty theory, it would be incorrect to convict of manslaughter since in this particular scenario the prohibition against killing causes significant loss of liberty.[10] In this instance, the individual's obligation not to kill should be less absolute. Legally, however, this is obviously not the case. The legal obligation not to kill a person actively does not become less acute in proportion to the individual's loss of personal liberty.

The bodily movement test also does not completely lend itself to distinguishing between act and omission. Theoretically, conviction in cases involving bodily movement may still require a duty to act. Consider the following two cases:

"*Movement*" – John shoots at Joe (who is wearing body armor and would not be injured), and Joe moves to avoid the bullet. The bullet hits Jane and kills her.

According to the bodily movement test, Joe's movement would be classified as killing since it caused Jane's death. Nevertheless, his act is seemingly more accurately defined as a letting die, and, therefore, Joe would be liable only if we could identify a duty to stand in one place and not move.

"*Freezing to death*" – Joe is about to freeze to death. In order to survive, he tries to enter John's house. John blocks Joe by locking the door. Joe dies.

Even if we assume that Joe would have survived if John had not locked his door, there appear to be no grounds for convicting John of manslaughter. This scenario appears to be a case of failure to rescue rather than one of homicide.

Considering the difficulties in applying the liberty rationale to certain situations, it may be helpful to look at the entire issue from a new and different perspective. While the approach suggested in Part III also revolves around infringement upon human liberty, it does so from a different starting point.

IV. The Personal Autonomy Rationale

A. The Principle

Perhaps the distinction between killing and letting die is rooted in the different values that lie at the core of each prohibition. The underlying premise of the liberal liberty theory is that the interests and values behind the prohibitions are similar. The

[10] See Kagan, *supra* note 1, at 92-94.

assumption is that in drowning Joe and in not rescuing Joe, John is disregarding the same core value, Joe's life. Is this really the case, however? Perhaps the values at the root of the prohibition against killing are broader and more substantial than those at the root of the prohibition against letting die, and this is what distinguishes the two prohibitions.

In order to examine the interests and values at the core of these prohibitions, we must ask two preliminary questions:

1. What would happen if the prohibition against killing did not exist?
2. What would happen if there were a prohibition against killing (and it were enforced) but there were no prohibition against letting die?

The answers to these two questions can clarify what the reality would be without each prohibition, providing us deeper insight into the purpose of each.

It is likely that without a prohibition against killing, we would be forced to live our lives in constant fear of life-threatening dangers. This fear would cause a significant loss of our basic sense of security, which in turn would lead to a real loss of personal autonomy. People would then be hard-pressed to maximize their personal development as fear would force them to be constantly on the defensive. In this context, Hobbes' words regarding the natural condition are particularly relevant:

> And from this diffidence of one another, there is no way for any man to secure himselfe, so reasonable, as Anticipation; that is, by force, or wiles, to master the persons of all men he can, so long, till he see no other power great enough to endanger him…
>
> Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit thereof is uncertain; and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.[11]

According to Hobbes, a reality in which any person is permitted to kill any other person is untenable. There is no humaneness, no culture, no creativity, and, worst of all, a person is forced to live in constant fear of death. It is important to note, in this regard, that this theory does not require that everyone would try to kill everyone else. Even if only part of the population tries to kill another part, every person would still live in constant fear of being killed. Furthermore, even if we are not sure whether or not people would actually try and kill each other, the element of fear

[11] Thomas Hobbes, Leviathan or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill 95-97 (Oxford at the Clarendon Press ed., 1952).

itself (drawn from the knowledge that there is no prohibition against killing) would significantly infringe upon people's personal autonomy.[12]

Robert Nozick describes a society lacking laws prohibiting killing, assault, rape, etc. in the following manner:

> A system that allowed assaults to take place…would lead to apprehensive people, afraid of assault, sudden attack, and harm…to avoid such general apprehension and fear, these acts are prohibited and made punishable.[13]

However, the absence of a prohibition against letting die would not lead to the same apprehension. Such a reality may not be optimal, but people certainly would not all be living in constant fear of death (or violence). Human culture would still exist. People would have to beware of dangerous situations, but this is more of an individual concern than a societal one – people would have to take individual responsibility and not place themselves in situations of undue risk.

The differences in the answers to the two questions highlight the differences in the values at the core of each prohibition. The purpose of the prohibition against killing is to protect interests and values much more basic and critical to social norms than the prohibition against letting die. The purpose of the prohibition against killing is to allow individuals to live purposeful lives and maintain personal autonomy without being constantly afraid of losing this ability. When viewed this way, the prohibition against killing is one of the most basic elements of personal autonomy. On the other hand, although the prohibition against letting die may serve to enhance personal autonomy, it is not fundamental to it.[14]

While it may be the case that not every act of homicide has the same detrimental effect on our sense of personal security, nonetheless, killing is still more severe than letting die, as the severity of the act is measured against the severity of the prohibition, and the severity of the prohibition is measured against the interests that it is intended to protect.[15] In order to further explore the significance of the distinction indicated by the personal autonomy analysis, we turn to Rawls' theory of social contract.

B. The Rawlsian Social Contract

The personal autonomy rationale can be based, among others, upon Rawls's theory of social contract.

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12 *See* Gregory S. Kavka, Hobbesian Moral and Political Theory 81-82 (1999).

13 Robert Nozick, Anarchy, State and Utopia 66 (1974).

14 In this context, it is important to note that although the prohibition against letting die does enhance personal and societal autonomy in some respects, as people know that when necessary they will be rescued, in other respects it actually limits such autonomy since it forces people to be prepared to perform an act of rescue at any given time.

15 The distinction between killing and letting die is just one example (though perhaps the primary one) of the general difference between doing harm and allowing it. Any injurious act is a more serious transgression than causing injury by omission since the prohibition against actively causing injury is a more significant safeguard of personal autonomy than the prohibition against causing injury by omission. Similarly, actively causing damage to personal property creates a greater loss of personal autonomy than causing damage by omission.

In his book "A Theory of Justice," Rawls presents a theory that purports to serve as a basis for the building blocks of national government.[16] Rawls assumes that in each society there are both shared and conflicting interests. Shared interests stem from the realization that cooperation is preferable to each individual acting alone. Conflicting interests are rooted in each individual's concern with the societal distribution of rights and obligations.[17] For this reason, says Rawls, it is necessary to create several principles to allow for the just distribution of rights and obligations among individuals as well as the proper distribution of resources. These principles are the rules of justice of basic societal institutions.

Rawls uses the social contract to discover and justify the principles that serve society's basic institutions.[18] These are the fundamental principles for distribution of rights, obligations and resources among the members of society that free and rational people, concerned with furthering their own interests, would accept in an initial position of equality, or the original position.[19] Rawls emphasizes that this is not a real contract between particular people, but rather an intellectual exercise designed to determine which principles would be accepted by people in the original position.[20] People who are in the "initial position of equality" do not know their social position and financial status. They do not know if they are sharp or obtuse, rich or poor, and so forth.[21] In a situation in which an individual does not know his true position, there is complete equality. This is why Rawls theorizes that laws that are created in the original position are fair.[22]

Rawls suggests that people in the original position would agree on two principles:[23]

1. Each person is to have an equal right to the most extensive scheme of basic liberties.
2. Social and economic inequalities are to be arranged so that they are both reasonably expected to be to everyone's advantage, including society's weakest elements.

Rawls states that the first principle takes priority over the second as the economic advantage does not justify loss of liberty. Liberties can only be compromised when they conflict with other liberties.[24] The liberties that Rawls discusses are political liberty (the right to vote and to hold public office); freedom of speech and assembly; liberty of conscience and freedom of thought; and freedom of the person, which includes freedom from psychological oppression, physical assault and dismemberment.[25]

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16 John Rawls, A Theory Of Justice (rev. ed., 1999).
17 *Id.* at 4.
18 *Id*. at 10.
19 *Id*.
20 *Id*. at 11, 14.
21 *Id*.
22 *Id*. at 17.
23 *Id*. at 53.
24 *Id*. at. 53-54. For a critique of this position, see H.L.A. Hart, *Rawls on Liberty and Priority*, 40 U. Chi. L. Rev. 534-55 (1973).
25 Rawls, *supra* note 16, at 53.

Rawls' idea that people in the original position would agree to these principles can be related to the distinction between killing and letting die. As already discussed, the prohibition against killing prevents the individual's life from being wrought with fear. This fear can be translated into a general loss of Rawls' basic liberties. There is no political liberty, no freedom of speech, no freedom of thought and obviously no freedom from psychological oppression and physical assault. It is clear, then, that in order to preserve these liberties, individuals in the original position would agree to the prohibition against killing.

Nickel makes a similar argument:

> Creating an effective system of protections of security rights through the criminal law is one of the most important things that can be done to make possible the enjoyment of other liberty below. If those who would invade people's liberties and rights are unrestrained in their ability to threaten death, harm, violence, and loss of property, few if any liberties can be enjoyed. Security rights, like due process rights, are essential building blocks for a system of liberty.[26]

However, preservation of these liberties is not dependent on a rule obligating rescue of others from danger. Such a rule has no bearing on political liberty, freedom of speech, freedom of thought and freedom from psychological oppression and physical assault.

This does not mean that people in the original position would not agree to a rule requiring rescue in certain situations, only that, even if accepted, such a rule would be much more limited and minor than the prohibition against killing. Rawls himself suggests that people in the original position would agree to a rule requiring rescue, as it would improve people's quality of life even absent the need for actual assistance.

> A sufficient ground for adopting this duty is its pervasive effect on the quality of everyday life the public knowledge that we are living in a society in which we can depend upon others to come to our assistance in difficult circumstances is itself of great value…the primary value of the principle is not measured by the help we actually receive but rather by the sense of confidence and trust in other men's good intentions and the knowledge that they are there if we need them.[27]

Rawls' argument in favor of a duty to rescue can assist us in better understanding the prohibition against killing. Everyone would agree to the prohibition against killing as it has great effect on our quality of life. The knowledge that no one will harm us is very valuable. Imagine society in general, and each individual in particular, without such a prohibition. People would live in constant fear without the ability to do anything to alleviate it.

As mentioned above, some killings do not infringe upon the prohibition's protected interests; thus, perhaps not every killing is truly different from a letting die. According to the social contract theory, however, we do not examine each specific case. The severity of the act must be assessed based on the principle that would have

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[26] James W. Nickel, *Rethinking Rawls's Theory of Liberty and Rights*, 69 Chi.-Kent. L. Rev. 763, 768 (1994).

[27] Rawls, *supra* note 16, at 297-98.

been agreed to in the social contract, the contract agreed to in the original position of equality. The basic principle that would be generally accepted is the prohibition against killing, and not the rule requiring rescue, as the interests protected by the former are broader and weightier than those protected by the latter.

Under the personal autonomy rationale, the duty to act, in cases of omission, does not mitigate the loss of liberty or replace the need for direct cause and effect; rather it rectifies the omission's relative moral inferiority. This moral inferiority is reflected in the distinctive core values that are at the root of the prohibitions against killing and letting die.

Nonetheless, a person may experience a significant loss of personal autonomy if she knows that in certain situations she will not receive assistance. There are times when an individual becomes embroiled in a dangerous situation through no fault of her own, such as in cases of illness or natural disaster. Loss of autonomy may also result from the person withdrawing from certain activities out of fear that she will not receive assistance when needed. This is why society appoints certain "agents" whose responsibility it is to provide security to those who are in harmful situations. These agents are charged with providing stability and security: doctors to treat illness, lifeguards to prevent drowning, parents to monitor children, etc. These agents provide a vital service as they allow society and its members to realize their autonomy.

If we were to do away with the duty to rescue, even with respect to agents such as police, parents or doctors, personal autonomy would be greatly compromised by the realization that certain things are completely out of our control. This could have the effect of severely hindering societal development. The breach of this duty, then, can sometimes approximate the loss of autonomy caused by an act.

C. Comparison With the Liberty Rationale

Both rationales afford a preeminent value to individual liberty and the individual's ability to conduct his life in a reasonable manner. However, there are several fundamental differences. Under the liberal liberty principle, both the prohibition against active killing and that against letting die protect the same interest, human life. The only reason for distinguishing between the two, then, is because if the legal system were to convict people for omissions with no requirement that there be a duty to act, human liberty would be infringed upon in that people would have to go at the drop of a hat to rescue others. That is, the distinction between killing and letting die is intended to preserve individual liberty.

On the other hand, under the personal autonomy principle, the prohibition against killing protects a broader and more significant interest than does that against letting die. The prohibition against killing is directed to the autonomy of man, since without such a prohibition a person would live in constant fear of being killed, while a prohibition against letting die may broaden individual's autonomy but is not a prerequisite for it. Thus, the essence of this distinction in criminal jurisprudence is not in order to preserve liberty; rather, it reflects the fact that killing is a greater infringement on personal autonomy than letting die. In other words, the distinction in and of itself, reflects the fact that the prohibition against killing is a prerequisite for autonomy while that against letting die is not.

Moreover, liberty under the liberty rationale differs from liberty discussed in this chapter. Under liberty analysis, making this distinction is intended to protect the

individual's ability to live a routine life without interference from a legislator who obligates him to save others on a constant basis. However, such an infringement upon liberty does not infringe upon the dignity of man as man and does not infringe upon his very humanness. Thus, were there no such distinction, while there would be significant challenges for the individual who is attempting to live his normal life, it would not prevent him from living a meaningful life. There would still be some "islands" where he could exercise his liberty; for example when it was clear that there is no one around in need of rescue or when the individual does not have the ability to save someone else. In addition, while it might, indeed, be difficult to live a normal life, it would be possible to save lives of others, and this ability to save others has significance in that it gives a person an opportunity to exercise his abilities in such instances.

On the other hand, personal autonomy does not focus on human liberty, the right to live without interference by a legislator that requires him to save others. This analysis focuses on a person's ability to live a life free of constant fear and with a basic sense of security, without constant threats from others. This is the primary liberty that the personal autonomy rationale protects, since this infringement significantly impacts the very humanity and dignity of a person. Moreover, without a basic sense of security a person's ability to plan his life would be seriously compromised. The only way to protect this aspect of liberty is via prohibiting killing, as without such a prohibition a person lives in constant fear. In contrast, absence of a prohibition against letting die would still enable a person to live a reasonable life, with personal autonomy and a sense of security, such that this prohibition is much less significant. Consequently, we do not convict of such an omission without identifying a duty to act.

D. Loss of Personal Autonomy – Legal Definition

As mentioned above, the definition of act and omission used must reflect the rationale of a threat to personal autonomy. Therefore, killing must be defined such that the relevant prohibition enables life without fear. Letting die, on the other hand, must be defined such that the relevant prohibition reflects the values of assistance and broad personal autonomy. In my opinion, in order to provide for a basic sense of security without fear, the prohibition against killing must cover intrusion into the individual's protected space. Intrusion into the life of another is caused largely by the creation of a risk or removal of certain defenses relating to the victim. The definition of killing, then, is sometimes also connected to the question of ownership – i.e., who is the owner of the defense that was removed. The general concept is to create a protected space, a secure area that may not be intruded upon. If a person dies as a result of such an intrusion, it would be classified as a killing. We would not require, then, the identification of a duty to act in order to convict the defendant. However, if a person dies other than as a result of an intrusion into her protected space, the event would be classified as a letting die. There are, therefore, certain situations that involve bodily movement that are not considered killing as the movement did not breach a protected space, while there are other situations that do not involve bodily movement but are still considered killing as they do involve such a breach.

In this context, ownership of the defense is not a matter of a right to personal property as an ideal in and of itself. Removal of a defense belonging to the victim should not be classified as a killing because of the loss of personal property. Rather, it is the fact that individuals protect themselves largely via their bodies and property

that causes removal of a defense belonging to the victim to infringe upon the interests that are at the immediate root of the prohibition against killing.[28]

i The Implications of Ownership of the Defense

a. Who owns the defense: the agent or the victim?

A basic assumption is that when the agent creates the risk, the act is classified as a killing. By drowning Joe in the sea, John caused Joe's death and therefore John's act is a killing. This scenario involves a breach of the individual's protected space by directly harming his person.[29] On the other hand, when John sees Joe drowning and does not jump to his rescue, John did not create the risk and breach Joe's protected space (even if he had a direct causal effect on Joe's death), and therefore John's conduct is a letting die.

Nevertheless, the issue of the removal of the defense, along with its ownership, bears further analysis.

The following two scenarios will help clarify my approach:

(A) *Mid-ocean escape*: John is about to die at sea. Suddenly, he notices Joe standing on the deck of his boat, watching. John swims over to the boat in order to save himself. Joe is not interested in saving John and sails the boat away. John dies.[30]

(B) *Movement*: John shoots at Joe (who is wearing body armor and would not be injured), and Joe moves to avoid the bullet. The bullet hits Jane and kills her.

According to the personal autonomy theory, neither scenario is a killing, even though both involve bodily movement. This is because in both scenarios Joe removed a defense that belonged to him and not to the victim. In the first scenario, Joe moved his boat, which itself served as a defense against John's death. Similarly, in the second scenario Joe moved his own body, which at the time served as a defense against the airborne bullet.

A slight modification of the scenarios will hone the moral significance of this point:

(C) *Mid-ocean escape 1*: Joe stands on *John's* boat and pilots the boat to shore. John dies.

(D) *Movement 1*: Joe places Jane so that she will be hit by John's bullet.

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[28] The context in which ownership is used here is independent of the libertarian concept of property as sovereignty. Libertarianism demands that personal property be preserved in order to maximize negative liberty, which in turn is required for "human flourishing." In addition, my ideas here do not depend on the notion of property as defining the individual, as part of the "self." Ownership here is relevant because it serves to protect the protected space from intrusion. Such protection is needed not against tyrannical government, but against other individuals. According to my theory, the protected space allows people to live without fear in order to carry on their normal lives.

[29] Obviously, that creation of the risk may not be directly connected to the individual's physical person. For example, planting a bomb that causes mass death. Nonetheless, even a scenario such as this involves intrusion into the individual's protected space, even if the person who planted the bomb did so in his own home.

[30] For a parallel scenario, see the scenario *Freezing to Death* in Part 2 above.

The latter two scenarios should be classified as killings as here Joe prevents the victims from utilizing their own defenses.

The difference between scenarios A and B as opposed to C and D is ownership of the defense. In scenarios A and B, the defense belongs to the agent, while in scenarios C and D it belongs to the victim. Ownership of the defense is not a mere technicality. Removing a defense that belongs to the agent is not considered a breach of the victim's protected space, while removing a defense that belongs to the victim is. Intruding on this space means loss of personal and social autonomy and merits a more severe conviction.[31]

It is possible to demonstrate certain cases in which the agent damaged or removed a resource that belonged to the victim, causing the victim to die, and yet the agent is still not guilty of manslaughter. This, however, would be due to lack of legal causation. In such cases, the defense's removal is critical to the end result, but the agent is not convicted of manslaughter because of his circumstantial distance from the actual harm. Imagine a case in which A steals money from certain people who had intended to donate it to the hospital in order to purchase drugs and life support machines. The theft prevented the donation and several patients died as a result. A is unlikely to be convicted of manslaughter due to the lack of legal causation as a result of circumstantial distance from the effect. The distinction between removing a defense belonging to the victim and removing one that belongs to the agent is valid only in cases where we can identify legal cause and effect.

b. When the defense belongs to a third party, or to no one at all

What is the rule when the defense does not belong to the agent or to the victim, but to a third party or to no one at all? Will the agent's removal of the defense be classified as a killing or as a letting die? Will we require a duty to act?

When the defense belongs to a third party, we must distinguish between whether the third party allowed the victim to use the defense or not. If the defense was at the victim's disposal, it is tantamount to actually belonging to the victim, and the agent's act would be classified as a killing. If Joe disconnects John from a hospital-owned ventilator, Joe's act would be classified as a killing since he removed a

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[31] Because the loss of personal autonomy theory is based on the concept that an individual's person and resources create a protected space in which he can live in basic security, it follows that we should distinguish between resources that define a protected space and those that do not. Based on this distinction, there may be times where the agent removes a protective defense belonging to him, and the case would still be classified as killing. For example: A jumps from the roof of a building, with the knowledge that B has a safety net spread at the bottom of the building that will save A if he falls directly on it. B moves the net, and A dies. In this case, even though the net belongs to B, we may not require a duty to act in order to convict B of killing. This is because it is possible that not every resource belonging to the agent defines his own protected space. *Under these particular circumstances*, it is possible that the net does not define the individual's personal protected space, and therefore its removal constitutes killing. On the other hand, a person's house does constitute his personal protected space, and therefore A locking his own door so that B freezes to death outside would be classified as letting die and require a duty to act for a conviction. In other words, a hypothetical social contract defines when certain resources constitute personal protected space in order to ensure life without fear. There are resources that will always be considered protected space (such as a person's home) and there are others that will constitute such a space only in specific cases (such as the net).

defense that was provided to John by the hospital. However, if the third-party owner did not grant the victim use of the defense, the situation becomes somewhat ambiguous. How would we classify a case in which Joe pilots Bill's boat to shore, while leaving John to drown?

The answer apparently lies in the agent's need for the defense. The greater the agent's need for the defense, the less his act is considered a killing. When the victim's need for the defense is greater than the agent's, the victim has a "need right" to the defense.[32] Removal of the defense in such a case would constitute a breach of the victim's protected space. However, when both the agent and the victim have an acute need for the defense, they would both qualify as having a "need right." In such a case, both parties have an equal claim to the defense and there is no breach of protected space (since both parties have equal rights to the defense, there is no protected space to begin with).[33]

The scenario in which the defense does not belong to anyone appears more complicated. For example, how would we classify a case in which the agent pilots away a boat that does not belong to anyone? On the one hand, perhaps the answer here too depends on each party's need for the defense. However, intuitively we may also suggest that the answer here is different. Imagine the following scenario:

Death from disease: John will die from a certain disease unless he undergoes a particular, and extremely expensive, medical procedure. John, much to his delight, becomes aware of a treasure hidden outside his house that will allow him to finance his procedure. Joe also becomes aware of the treasure and runs to dig it up before John can get to it. Joe then proceeds to spend the treasure on his own needs. As a result, John does not have the procedure and dies.

In this scenario, both parties have equal rights to the treasure, though John has the greater need. Nevertheless, Joe's act should still be classified as a letting die. In order to convict Joe of manslaughter or murder we would need to identify a duty to act, i.e. a specific duty obligating Joe to rescue John. However, if John had been the owner of the treasure, then Joe's act would be classified as a killing and he could be convicted of manslaughter or murder regardless of the existence of a duty to act.[34]

Thus, one can distinguish between situations in which the defense belongs to a

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[32] The term is coined by Kai Draper in *Rights and the Doctrine of Doing and Allowing*, 33 PPA 253, 271 (2005). Draper himself uses the term to suggest that even if the defense belongs to the agent, when the victim has a "need right" the defense's removal would be considered killing.

[33] Draper suggests a scenario in which both parties have equal rights to the defense. Two people are on a sinking ship, but there is only one life vest that belongs to neither one of them. Each party obviously has a right to use the life vest and if one had been holding it, he would not be considered the other party's killer. However, if neither party was holding the vest and one party reached it before the other, the taking of the vest from the one who reached it first, would be considered an act of killing. Draper *supra* note 32, at 274.

[34] I think it important to reiterate here that the emphasis is not on ownership. I am not suggesting that the treasure belonging to John makes the case a more severe one. I am proposing that in the framework of a social contract, we would agree that these rules are necessary to allow for life without fear. Such a contract would initially prohibit acts of killing that are brought about by harming our person or property. After that, the contract would prohibit acts of killing brought about by causing loss of third-party resources (such as removing a defense belonging to a third party). Only then would the contract prohibit letting die, meaning not providing assistance or removing a defense belonging to the agent himself.

third party and the defense is ownerless. When the defense belongs to a third party, classifying the act depends on the "need right" of the agent and the victim. However, when the defense does not belong to anyone, the classification is independent of "need right."

This distinction between killing and letting die based on the question of ownership of the defense is supported by several authors.

This appears to be Frances Kamm's approach as well:

> Essentially, removing a defense against a potential cause of death – this could be a cause that had at one time already threatened the person or something entirely new – is a killing if the person who dies was not dependent for the defense on the person who terminates it. *If an agent terminates aid and so allows a potential cause of death actually to kill someone, but it is aid that the agent himself was providing, or aid that belongs to the agent, then we have a letting die (this disjunctive set of conditions is meant to include cases in which A takes what is B's to help C, and B then removes it)*.[35]

That is, when the defense belongs to the agent, its removal is a letting die. When the defense belongs to the victim, its removal is a killing.

c. Separating Conjoined Twins – Act or Omission?

The personal autonomy theory is reinforced by a UK ruling regarding the separation of conjoined twins. Jodie and Mary were born conjoined twins. Each girl had her own brain, heart, kidneys, arms, legs and other organs. However, Mary's heart and liver received blood and oxygen from Jodie. Without Jodie, Mary would have died at birth.

The case presented to the court was as follows. If the girls were not separated they would both die within several months as Jodie's heart was not strong enough to support both of them. If the girls were separated, Jodie would survive and Mary would die immediately. The twins' parents could not agree to the procedure as it would mean killing one girl to save the other.

During the hearing, the question was posed as to whether separating the twins would be tantamount to murdering Mary. Among other issues, the court debated whether separating the twins was considered act or omission. Some suggested that separation was equivalent to removing life support (as Jodie provided Mary with blood and oxygen), and thus, according to the Bland precedent, considered omission.[36]

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[35] F.M. Kamm, Morality, Mortality: Rights, Duties, and Status 28-29 (1996). The emphasis is mine. Although it is unclear according to McMahan and Kamm what the ruling would be when the agent placed a defense belonging to the victim and subsequently removed it, it is clear that the definition of killing and letting die is based, at least somewhat, on ownership of the defense. *See also* Judith Jarvis Thomson, *Physician – Assisted Suicide: Two Moral Argument*, 109 Ethics 497, 503-504 (1999). According to Thomson, if A provided a defense for B, at A's effort and expense, and then removes the defense, it is considered letting die only so long as A did not undertake to provide B with said defense. If he did so undertake, Thomson would classify this as killing.

[36] Airedale NHS Trust v. Bland [1993] AC. 789.

The court, however, did not accept this comparison. This was because separating the twins required an *invasion* of Mary's body and not just treatment of Jodie's organs. The invasion of Mary's body turned the instance to act as opposed to omission.

> 7.7 Act or omission in this case?
> I set out earlier (I realise with embarrassment a lot earlier) how this operation would be performed. The first step is to take the scalpel and cut the skin. If it is theoretically possible to cut precisely down the mid-line separating two individual bodies, that is not surgically feasible. Then the doctors have to ascertain which of the organs belong to each child. That is impossible to do without *invading Mary's body in the course of that exploration. There follow further acts of separation culminating in the clamping and then severing of the artery. Whether or not the final step is taken within Jodie's body so that Jodie's aorta and not Mary's aorta is assaulted, it seems to me to be utterly fanciful to classify this invasive treatment as an omission in contra-distinction to an act.* Johnson J.'s valiant and wholly understandable attempt to do so cannot be supported and although Mr. Whitfield Q.C. did his best, he recognised his difficulty. The operation has, therefore, to be seen as an act of invasion of Mary's bodily integrity and unless consent or approval is given for it, it constitutes an unlawful assault upon her.[37]

In other words, the court explained that it was not a case of omission, not because it involved a bodily movement, but rather because the procedure required an invasion of Mary's body. An invasion of bodily integrity cannot be classified as omission. From the ruling it appears that if it had been possible to separate the twins solely by operating on Jodie's body, then the scenario would have been defined as omission. However, because the procedure involved an invasion of Mary's body it must be defined as act.

E. Criticism of the Personal Autonomy Analysis

The personal autonomy theory appears to be based on the assumption that the prohibition against killing prevents people from killing each other, thus preventing fear and the loss of personal autonomy that is a by-product of this fear. This assumption, however, is not indisputable as the opposite may also be true. Why not assume that human nature is inherently good and that the majority of people would not try to kill each other? If this were the case, then even without the prohibition against killing, people would not experience the fear that leads to loss of personal autonomy.

Even if we do not approach Hobbes' extreme natural condition of war of all against all, it is likely that at minimum there will be certain people who will act belligerently toward others. This likelihood creates loss of a basic sense of security and personal autonomy. Furthermore, even if no one actually exercises the ability

[37] Re A (children) (conjoined twins: surgical separation) [2000] 4 All E.R. 961, 1003. The emphasis is mine.

to attack others, it is likely that the uncertainty regarding personal safety will create a general sense of fear. The prohibition against killing mitigates the likelihood of attack by another and thus, at least theoretically, also decreases the fear of such an attack. Fear does not only stem from actuality, but also from the possibility of such an actuality. In this way, the prohibition against killing represents a safeguard of a basic element of our normal existence.

Moreover, irrespective of the dispute regarding basic human nature and what would happen without a prohibition against killing, lawmakers are charged with taking a more conservative approach and must assume the worst. Assuming otherwise would be foolish as the risks in taking a more lenient approach are very high. Therefore, even though it may be unclear what exactly the result would be of not having a prohibition against killing, it is reasonable to assume that certain motivations (hatred, personal gain, survival, etc.) would push people to try and kill each other.

A question that challenges this approach is: Isn't the prohibition against homicide intended to protect physical life in and of itself? If so, what justifies the distinction between killing and letting die? Why shouldn't we convict someone who could have prevented the death of another and failed to do so, since this failure to save infringed upon the protected value of human life (even if it does not affect society's sense of security)?

However, it is not that the liberty rationale is not relevant with regard to distinguishing between act and omission in criminal jurisprudence but that it should be supplemented with the personal autonomy rationale. On the one hand, we desire that people be able to live free from constant fear, while on the other hand, we desire that people be able to live without a constant obligation to interrupt their lives and save others. In order to balance these goals, when the purpose of a prohibition is to enable people to live with a sense of security, considerations of liberty take a backseat. Consequently, even if prohibiting killing does infringe upon liberty, this prohibition is still appropriate because it enables people to live their daily lives free of fear. On the other hand, when the prohibition is not intended to ensure that people will live free of fear, considerations of liberty remain at the fore. Thus, since the prohibition against letting die is not required in order to permit people to live free of fear, we do not choose to require people to save others at a significant cost to their liberty.

In other words, prohibiting active killing enables people to live without constant fear and does not infringe overly much upon personal liberty, so we choose to apply it across the board. However, the prohibition on letting die is not aimed at allowing people to live without fear and significantly infringes upon liberty. Thus, we do not apply cross the board. That is, the consideration of liberty as expressed in the liberty rationale is relevant only because in the absence of the prohibition people would still live without constant fear. If we fail to distinguish between the prohibition that protects society's sense of security (killing) and that which does not do so (letting die), considerations of liberty in and of themselves are not helpful.

Finally, in situations in which a personal sense of security would be significantly infringed upon were their no requirement to rescue, the duty to rescue is much more significant even though it does infringe upon personal liberty. Consequently, it is appropriate to convict of homicide for an omission.

V. A Return to *Neuman* and *Oliver*

Applying the two rationales to the cases presented above will achieve the same result in *Neuman* but different results in *Oliver*. In *Neuman* the duty to act originated in the relationship between the defendants and the victim. Under the liberal liberty analysis, the legislator's decision to impose a duty to act on parents determines *a priori* that considerations of liberty retreat where a daughter is in dire straits. Thus, where the parents breach their legal duty to act, resulting in the death of their daughter, they can be convicted of homicide.

Under the personal autonomy analysis, this case would fall into the category of situations in which there is equal moral weight to active killing. The legal duty attributed to the parents because of the relationship originates both in the fundamental ethical duty of parents vis-a-vis their children and in the fact that the absence of such a duty would infringe significantly upon the child's autonomy. As such, here too the parents can be convicted.

With regard to *Oliver*, however, there was no relationship between the parties at the outset. The court held that the duty to act originated from the fact that the risk was intensified as a result of the defendant's actions of admitting the decedent into her home and providing him with a spoon to take into the bathroom. In fact, this added risk was minor, and the primary risk was caused by the actions of the decedent himself. Nonetheless, under liberal liberty analysis, the defendant's conviction makes sense, since imposing a duty to act on someone in such a situation does not infringe upon his liberty, as we are dealing with a situation that occurs rarely. That is, curtailing liberty in such situations still allows people in general to lead normal lives.

In contrast, under personal autonomy analysis, the fact that the infringement upon liberty is minor does not suffice. Under this analysis, we must prove that there is a significant duty originating in the relationship between the defendant and the victim (parent/child) or between the victim and the source of danger (lifeguard) or a duty such that the absence thereof infringes significantly upon individual liberty. In *Oliver* there was no duty of such magnitude; thus, the defendant should not have been convicted.

VI. Conclusion

This article presents two aspects of liberty by analyzing the distinction between act and omission in the context of criminal jurisprudence. Under the liberal liberty rationale, the distinction between act and omission in criminal jurisprudence is necessary to preserve human liberty. In the absence of the requirement to identify a duty to act in order to convict for an omission, people would be forced to act constantly to save lives and would be prevented from living their normal lives. This analysis is consistent with use of the bodily movement test for defining act and omission.

This article proposes a different rationale for the distinction between act and omission, the infringement upon personal autonomy. Under this analysis, the distinction between prohibiting active killing and prohibiting letting die is due to the different interests at the root of these prohibitions. Consideration of the following

question helps to demonstrate these different interests: What would happen if there were no prohibition against killing, and what would happen if there were a prohibition against killing but not against letting die?

In answer to the first question, in the absence of a prohibition against killing, it is likely that people would live in fear, without a basic sense of security. This fear would cause a loss of personal autonomy, regardless of whether it was realized or not. However, personal autonomy would not be compromised (or minimally so) absent the existence of a prohibition against letting die. This approach conforms to the Hobbesian and Rawlsian theories of social contract. Finally, the article presents a new definition for killing and letting die, one that is independent of the agent's bodily movement.

This personal autonomy analysis, coupled with the classic liberty analysis, allows us to achieve the dual goals of enabling people to live free both from a constant fear of attack and from an imperative to spend their lives on call for rescue missions. At the same time, it refines our process for determining whether or not we require the identification of a duty to act in order to convict for an omission.

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The Original Public Meaning of Amendment in the Origination Clause Versus the Patient Protection and Affordable Care Act

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ABSTRACT

Robert Natelson recently published his article, The Founders' Origination Clause and Implications for the Affordable Care Act, in the Harvard Journal of Law & Public Policy. This article argued the original understanding of the scope of the Senate's power to amend the House of Representatives' bills for raising revenue in the Origination Clause permits complete substitutes that are new bills for raising revenue, such as the Patient Protection and Affordable Care Act (PPACA). The original understanding of a constitutional word or provision is what the ratifiers of the Constitution thought was the meaning of the word or provision. When the Senate originated PPACA as an amendment to the House's Service Members Home Ownership Tax Act of 2009, the Senate replaced the entire House bill, except for the bill's number, with PPACA.

I consider the original public meaning—not the original understanding—of a constitutional word or provision, unless unrecoverable, to be the controlling meaning of that word or provision. The original public meaning is the meaning that a "reasonable speaker of English" during the founding era would have ascribed to the word or provision.

My article argues the original public meaning of amendment is clear and disallows complete substitutes. For instance, founding-era dictionaries indicate an amendment was a change or alteration to something that transformed the thing from bad to better. This definition suggests an amendment must not be a complete substitute because an amendment must preserve at least a part of the thing being amended so that there is something to transform from bad to better.

My article further argues the preponderance of evidence suggests the original understanding of the scope of an amendment actually disallows complete substitutes. For example, much evidence from the Philadelphia Convention, Confederation Congress, state legislatures, and state conventions suggests the dominant view among the founders was that an amendment to the Articles of Confederation, the legal compact between 13 states enacted in 1781, could not be a complete substitute.

My conclusion argues PPACA or any other such complete substitute violates the original public meaning of the scope of an amendment.

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> As far as I can learn, the express purpose of the [Philadelphia] [C]onvention was, to revise and *amend*, the [A]rticles [of Confederation]…. Instead of this…. they built a stately palace [new constitution] after their own fancies…. Had they preserved only one article of the union [the Articles], and built the present [new] constitution to it, the objection of innovation would be unreasonable[.]
>
> — Denatus, *Virginia Independent Chronicle*, June 11, 1788

I. Introduction

Robert Natelson's recent article, *The Founders' Origination Clause and Implications for the Affordable Care Act*,[1] is the largest study to date of the original understanding of the Constitution's Origination Clause. The original understanding of a constitutional word or provision is what the ratifiers of the Constitution thought was the meaning of the word or provision.[2] The Origination Clause reads as follows:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments [on House bills for raising revenue] as on other Bills.[3]

Natelson examined the Origination Clause relative to the Patient Protection and Affordable Care Act (PPACA or the Affordable Care Act) because several lawsuits alleged PPACA violates this clause.

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1 Robert G. Natelson, *The Founders' Origination Clause and Implications for the Affordable Care Act*, 38(2) Harvard J. L. & Pub. Pol. 629 (2015) [hereinafter *Natelson, Origination Clause*].

2 *See generally* Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 Ohio St. L.J. 1239-1305 (2007) [hereinafter *Natelson, Founders' Hermeneutic*].

3 U.S. Const. art. I, §7.

In 2012, the Pacific Legal Foundation (PLF) launched one such lawsuit with *Sissel v. United States Department of Health & Human Services,*[4] although this lawsuit ultimately failed.[5] *Sissel* was a reaction to the decision by the Supreme Court earlier that year in *National Federation of Independent Business (NFIB) v. Sebelius.* The Court declared the individual mandate in PPACA was constitutional only because it was a valid exercise of Congress' power to tax.[6] In 2014, it was estimated the individual mandate raises $5 billion in revenue every year by fining individuals and families who do not purchase health insurance.[7] PPACA also contains several other taxes, such as the additional Medicare tax and the medical device tax, and many health regulations and appropriations.

As PLF noted, the Senate originated the individual mandate and the rest of PPACA by amending House Resolution (H.R.) 3590, titled the Service Members Home Ownership Tax Act of 2009.[8] No part of the Service Members bill would have regulated health care. The bill would have, among other actions, granted tax credits to service members seeking their first homes and temporarily increased estimated tax payments for certain companies. The Senate's amendment to the Service Members bill completely replaced the bill's title and text with PPACA's title and text. All that remained was the number of the Service Members bill.[9] With the Senate's amendment, a 6-paged House bill became the 2,407-paged PPACA. PLF argued the individual mandate was a bill for raising revenue that originated in the Senate, not the House, and therefore violates the Origination Clause. PLF further argued that, as the individual mandate is essential to the implementation of PPACA, courts should invalidate all of PPACA.[10]

A. Natelson's Argument

Before examining Natelson's argument regarding the Origination Clause and PPACA, it is important to note his methodology for discovering the original understanding of a constitutional word or provision. Natelson's book titled *The Original Constitution: What It Actually Said and Meant* (2d ed., 2011) outlines his methodology,[11] which is primarily to analyze the debates among the 1,648 ratifiers of the Constitution at the

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4 *See generally* Amended Complaint for Declaratory Judgment and Injunctive Relief, Matt Sissel v. United States Department of Health and Human Services, 2012 Case No. 10-1263 (BAH) (D.D.C. 2013) [hereinafter Amended Complaint].

5 *See, e.g.,* Tom Howell, Jr., *Supreme Court Refuses to Take another Obamacare Case* (January 19, 2016), *available at* http://www.washingtontimes.com/news/2016/jan/19/supreme-court-refuses-take-another-obamacare-case/.

6 Nat'l Fed. of Independent Business v. Sebelius, 132 S.Ct. 2566 (2012).

7 Congressional Budget Office, Payments of Penalties for Being Uninsured Under the Affordable Care Act: 2014 Update, June 2014, *available at* https://www.cbo.gov/publication/45397.

8 H.R. 3590, 111th Cong. (2009).

9 Daniel Smyth, *The Origination Clause: Die Harder, ObamaCare!* (October 19, 2012), *available at* http://www.americanthinker.com/articles/2012/10/the_origination_clause_die_harder_obamacare.html. *Compare* the Service Members Home Ownership Tax Act of 2009, H.R. 3590, 111th Congress (2009), with Amendments to H.R. 3590, 111th Congress (passed December 24, 2009).

10 Amended Complaint, *supra* note 4, at 6, 12.

11 Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 29-41 (2d ed., 2011) [hereinafter Natelson, Original Constitution].

13 state conventions held between 1787 and 1790. To provide background and help illuminate the original understanding of a constitutional word or provision, Natelson analyzes records from relevant settings during the founding era. For instance, Natelson often examines relevant practices and procedures of the British parliament in the eighteenth century. The parliament's practices and procedures heavily influenced the writing of the Constitution.[12] Natelson also often examines the recorded views of the Constitution's framers, who were the delegates to the Philadelphia Convention of 1787. The Convention assembled for what many founders, who included the ratifiers, the framers, and the others who significantly influenced the proposal or ratification process of the Constitution,[13] and others had understood to be the purpose of amending the Articles of Confederation.[14] The Articles was the legal compact between 13 states enacted in 1781 in which each state was equally responsible for national affairs. The expectation was that amendments would simply add powers to the Confederation Congress, such as the power to regulate interstate trade. However, during the Philadelphia Convention, many framers evidently came to believe the Articles was an insufficient document for having an effective system of government. Instead of simply adding powers to the Confederation Congress, the Philadelphia Convention proposed the Constitution to replace the Articles.[15]

In his article on the Origination Clause, Natelson argued the original understanding of a bill for raising revenue is any bill that derives its constitutional authorization exclusively from Congress' power to tax and that increases or reduces taxes or otherwise changes tax laws. Natelson claimed the individual mandate should be considered to have been a bill for raising revenue only because the Supreme Court in effect ruled, in *NFIB*, that the individual mandate was such a bill. Natelson claimed the Service Members bill was a bill for raising revenue according to the original understanding of that term because the Service Members bill derived its constitutional authorization exclusively from Congress' power to tax and would have reduced taxes for service members while "effectively rais[ing]" taxes on certain companies.[16]

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12 Natelson, Original Constitution, *supra* note 11, at 14-15.

13 *Id.* at 10.

14 In an online essay, Natelson noted that, contrary to popular opinion, states—not the Confederation Congress—authorized the Philadelphia Convention. Natelson argued the states thereby held the Convention "outside the framework of the Articles [of Confederation.]" According to Natelson, most of the 13 states in the confederation gave their respective representatives to the Convention enough power to permit the Convention to completely replace the Articles. For instance, Natelson said the following: "[Most of the states'] calls provided for the [Philadelphia] [C]onvention to propose changes in the 'federal constitution' without limiting the gathering to amendments to the Articles. The unanimous authority of 18th century dictionaries tells us that 'constitution' in this context meant the entire political system, not merely the Articles as such." *See* Rob Natelson, *The Constitutional Convention Did Not Exceed Its Power and the Constitution is not "Unconstitutional"* (June 2, 2013), *available at* https://www.i2i.org/the-constitutional-convention-did-not-exceed-its-power-and-the-constitution-is-not-unconstitutional/. Regardless, as shown in my article, the understanding of many founders and others was that the Philadelphia Convention would amend and not completely replace the Articles.

15 *See generally* Jack N. Rakove, *The Collapse of the Articles of Confederation*, in The American Founding: Essays on the Formation of the Constitution 225-44 (J. Jackson Barlow, Leonard W. Levy, & Ken Masugi eds., 1988) [hereinafter *Rakove, Collapse*].

16 *Natelson, Origination Clause, supra* note 1, at 706-07.

Natelson also examined the original understanding of amendment, as (emphasis added) "the Senate may propose … *Amendments* [on House bills for raising revenue] as on other Bills." According to Natelson, if the original understanding of amendment permits complete substitutes, then parts or all of PPACA could comply with the original understanding of the Origination Clause. Natelson said a complete substitute occurs when "all the language in a bill or resolution after the enacting clause (or after some other clause very early in the text) [i]s removed and replaced with new language."[17]

In analyzing records of the Philadelphia Convention, state legislatures, state conventions, and other settings,[18] Natelson found evidence that the original understanding of amendment was a germane (i.e., of the same subject) change to legislation that could be a complete substitute.[19] Natelson argued the Senate can meet the germaneness requirement for a complete substitute to a House bill for raising revenue by simply making the complete substitute a tax(es). Natelson noted such a complete substitute could not add regulations, appropriations, or other non-taxes to the original bill.[20]

Thus, Natelson said the Senate could, as an amendment, completely replace the House's Service Members bill with the individual mandate and other taxes in PPACA. Natelson declared that PPACA's other parts, including its health regulations and appropriations, were non-germane to the original bill and therefore in violation of the original understanding of amendment.

Natelson thereby concluded the individual mandate and other taxes in PPACA amounted to a valid amendment to—and thus a continuation of—the Service Members bill. Natelson claimed these parts of PPACA therefore originated in the House as that bill for raising revenue and comply with the original understanding of the Origination Clause.[21]

B. My Argument

As do many constitutional scholars,[22] I consider the original public meaning—not the original understanding—of a constitutional word or provision, unless unrecoverable, to be the controlling meaning of that word or provision. The original public meaning is the meaning that a "reasonable speaker of English" during the founding era would have ascribed to the word or provision.[23] The original understanding and original public meaning of a constitutional word or provision are often identical, but a conflict is possible.[24]

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17 *Id.* at 682.

18 *Id.* at 680-705.

19 *Id.* at 706.

20 *Id.*

21 *Id.* at 706-09.

22 *See, e.g.,* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 89-130 (2004); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47-80 (2006); Larry Solum, *Semantic Originalism*, Illinois Public Law and Legal Theory Research Papers Series No. 07-24 (November 22, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244

23 Randy E. Barnett, *The Gravitational Force of Originalism,* 82 Fordham L. Rev. 415, 417 (2013).

24 As one example, Natelson noted there appears to be a conflict between the original understanding and original public meaning of the ex post facto clauses. *See Natelson, Founders' Hermeneutic*, *supra* note 2, at 1243-45.

My article does not examine the original public meaning of a bill for raising revenue and whether the individual mandate, other taxes in PPACA, or Service Members bill complied with this meaning of a bill for raising revenue. However, to examine whether PPACA was a valid amendment to the Service Members bill according to the original public meaning of amendment, my article assumes the individual mandate or another tax(es) in PPACA and the Service Members bill complied with the original public meaning of a bill for raising revenue. Assuming otherwise would make my examination of the amendment question unnecessary. If the individual mandate or another tax(es) in PPACA did not comply with the original public meaning of a bill for raising revenue, then according to my originalist method the Origination Clause would not apply to PPACA. If the Service Members bill did not comply with that meaning of a bill for raising revenue and the individual mandate or another tax(es) in PPACA did comply therewith, then according to my originalist method it would be impossible to argue that PPACA was the continuation of a House bill for raising revenue. It would be evident that PPACA represented a new bill for raising revenue that originated in the Senate.

My article argues the original public meaning of amendment is clear and disallows complete substitutes. Therefore, PPACA or any other complete substitute by the Senate to a House bill for raising revenue that is a new bill for raising revenue violates the original public meaning of the scope of an amendment. Furthermore, my article argues the preponderance of evidence suggests the original understanding of the scope of an amendment actually disallows complete substitutes.

Part II explores the original public meaning of amendment. Part III rebuts Natelson's claim that the original understanding of the scope of an amendment permits complete substitutes. Specifically, Part III presents evidence from the British parliament in the eighteenth century that shows the parliament most likely disallowed amendments on bills to be complete substitutes in the decades leading up to the founding. Part III then examines the origination of the Constitution at the Philadelphia Convention and the Constitution's ratification process to show the dominant view among the founders was that an amendment to the Articles of Confederation could not be a complete substitute. During the ratification process, the Confederation Congress was the first body to consider the Constitution, followed by the state legislatures and then state conventions. The Articles was a legal document ratified by 13 states, and therefore discussions by the founders about the permissible scope of an amendment to the Articles reflected what they thought was the permissible scope of an amendment to legislation, such as bills, resolutions, and existing laws.[25] As appropriate, Part III evaluates the evidence Natelson used to argue the original understanding of the scope of an amendment permits complete substitutes. The Conclusion summarizes my evidence versus Natelson's evidence, defines a complete substitute according to the original public meaning of the scope

[25] I found no evidence that suggests the founders or others distinguished between the permissible scope of an amendment to the Articles of Confederation and the permissible scope of an amendment to legislation. My finding is thus consistent with Natelson's finding that "[i]n America … how the word [amend] was used [by the founders and legislators during the founding era] did not hinge on the nature of the item being amended." As Natelson noted, it did not matter whether, for example, "th[e] item [being amended] was a bill from the same house, a bill from the other house, a resolution, a report, or a prior law." See *Natelson, Origination Clause, supra* note 1, at 658, 681.

of an amendment, and explains exactly how PPACA or any other such complete substitute violates this meaning of the scope of an amendment.

It should be noted that my research found several discussions by "reasonable speakers of English" and founders about how alterations, revisions, or repairs—not just amendments—to the Articles of Confederation could not be complete substitutes. The reason is that technically the Articles permitted alterations—not amendments—to itself.[26] And before the Philadelphia Convention assembled, the Confederation Congress had given the convention the mission of revising and altering the Articles.[27] It was simply the case that "reasonable speakers of English" and the founders often referred to the Philadelphia Convention's power to alter or revise the Articles as the power to amend the Articles.

For several reasons, my article includes these discussions about how alterations, revisions, or repairs to the Articles could not be complete substitutes as evidence of the original public meaning of amendment and original understanding of the scope of an amendment. For one, regarding the word alteration in particular, founding-era dictionaries consistently defined "alter" (to change, vary, or make something different) as a concept that was similar to but more expansive than "amend" (to correct or grow better),[28] and several dictionaries actually defined "amendment"

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26 Articles of Confederation art. XIII.

27 *See infra* Part III (discussing the context of the Philadelphia Convention).

28 *Compare* the definitions of "amend" in Part II with the following definitions of "alter." Of 10 commonly-cited, regular dictionaries from the founding era, the following six dictionaries defined "alter" as to change, vary, or make something different:

- John Ash, the New and Complete Dictionary of the English Language (London, 1775) [hereinafter Ash].
- Thomas Dyche & William Pardon, A New General English Dictionary (London, 18th ed. 1781) [hereinafter Dyche & Pardon].
- William Perry, The Royal Standard English Dictionary (Worcester, 1st Am. ed. 1788) [hereinafter Perry].
- Thomas Sheridan, A Complete Dictionary of the English Language (2 volumes, London, 3d ed. 1790) [hereinafter Sheridan].
- John Walker, A Critical Pronouncing Dictionary (London, 1791) [hereinafter Walker].
- Frederick Barlow, The Complete English Dictionary (2 volumes, London, 1772-73) [hereinafter Barlow].

The following two dictionaries explicitly stated "alter" did not mean "to completely replace" but was nevertheless an expansive concept (emphasis added):

- Samuel Johnson, A Dictionary of the English Language (London, 1755) [hereinafter Johnson]: 1) "To change; to make otherwise than it is. *To alter, seems more properly to imply a change made only in some part of a thing; as, to alter a writing, may be, to blot or interpolate it; to change it, maybe, to substitute another in its place*," 2) "To become otherwise than it was; as, the weather alters from bright to cloudy."
- William Kenrick, A New Dictionary of the English Language (London, 1773) [hereinafter Kenrick]: 1) "To change; to make otherwise than it is. *To alter, seems more properly to imply a change made only in some part of a thing, as, to alter a writing, may be, to blot or interpolate it; to change it, may be, to substitute another in its place,"* 2) "To become otherwise than it was."

Only the following dictionary suggested "alter" could be "to completely replace" (emphasis added):

- James Barclay, Complete and Universal English Dictionary (London, 1792) [hereinafter Barclay]: "To change; to make a thing different from what it is; *used both of a part and the whole of a thing*, and applied both in a good and bad sense. Used neuterly [sic], to change; to become different from what it has been."

as a type of alteration that corrects something.[29] Thus, it can be concluded that "reasonable speakers of English" and founders who argued that the power to alter disallowed complete substitutes would have argued the same for the lesser, related power to amend. Also, the founders and others often used the words alter and amend as synonyms.[30] Furthermore, it is reasonable to conclude from the text of the discussions about how revisions or repairs to the Articles could not be complete substitutes that these discussions used those words as synonyms for either the word alteration or the word amendment.

II. The Original Public Meaning of Amendment

To discover the original public meaning of amendment, I first examined numerous law and regular dictionaries from the founding era for their definitions of amendment and amend. Then, I analyzed the use of amend and words with the root of amend, such as amendment and amends, in articles, pamphlets, letters, and other writings in the most prominent compilations of records from the Constitution's ratification period, such as *The Documentary History of the Ratification of the Constitution,*[31] *The Federalist Papers,* and *The Complete Anti-Federalist*.[32]

A. Dictionary Definitions of Amendment

I examined five legal dictionaries[33] and 10 commonly-cited, regular dictionaries.[34] No legal dictionaries defined "amendment" or its verb form "amend." Each regular dictionary defined "amendment" as a change or alteration to something that transformed the thing from bad to better.[35] For instance, Samuel Johnson's *A*

This dictionary provided no definition of "alter":

- Nathan Bailey, The New Universal Etymological English Dictionary (4th ed., London, 1756) [hereinafter Bailey].

29 *See infra* Part II (defining the word amendment).

30 *Natelson, Origination Clause, supra* note 1, at 681.

31 The Documentary History of the Ratification of the Constitution Digital Edition (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber &Margaret A. Hogan eds., 2009) [hereinafter Documentary History Digital].

32 The Complete Anti-Federalist (Herbert Storing ed., 1981) [hereinafter Complete Anti-Federalist].

33 Richard Burn & John Burn, A New Law Dictionary (2 volumes, London, 1792); Timothy Cunningham, A New And Complete Law-Dictionary (London, S. Crowder et al. 1764) (two volumes); Giles Jacob, A New Law Dictionary (6th ed. 1750); Thomas Blount, A Law-Dictionary And Glossary (1717); John Cowell, A Law Dictionary Or The Interpreter (1777).

34 *See supra* note 28.

35 Aside from the definitions of "amendment" mentioned in the text, the relevant definitions are as follows:

- Perry, *supra* note 28: "A change for the better"
- Sheridan, *supra* note 28: 1) "A change from bad for the better," and 2) "in law, the correction of an errour [sic] committed in a process."

Dictionary of the English Language (1755), the most widely used dictionary at the ratification of the Constitution, defined "amendment" as a "change from bad for the better" and "signifies, in law, the correction of an error committed in a process."[36] John Ash's *The New and Complete Dictionary of the English Language* (1775) stated "amendment" was a "change for the better, a reformation, a recovery" and "[i]n law, the correction of an error in a process."[37] According to Thomas Dyche and William Pardon's *A New General English Dictionary* (1781), an "amendment" involved "improving, growing, better correcting what is amiss" and "in law, it is rectifying or supplying a mistake or omission to a process."[38]

Regular dictionaries defined "amend" as "to correct," "to grow better," or a similar phrase.[39] And several dictionaries further noted, as Johnson's dictionary did, that "[t]o amend differs from [to] improve; to improve supposes or not denies that the ... [thing being amended] is well already, but to amend implies something wrong."[40]

- Walker, *supra* note 28: 1) "A change from bad for the better," and 2) "in law, the correction of an errour committed in a process."
- Barlow, *supra* note 28: 1) "An alteration for the better; a correction," and 2) "Applied to the constitution, it signifies a change from sickness towards health: a recovery."
- Kenrick, *supra* note 28: 1) "A change from bad for the better," and 2) "It signifies, in law, the correction of an error committed in a process."
- Barclay, *supra* note 28: 1) "An alteration which makes it better; a correction," and 2) "It signifies a change from sickness towards health; a recovery."
- Bailey, *supra* note 28: Bailey does not define "amendment." However, he mentions the word "amendement" [sic] in the definition of "amendableness, " which he defined as follows: "(of amendement…) capableness of being amended."

36 Johnson, *supra* note 28.

37 Ash, *supra* note 28.

38 Dyche & Pardon, *supra* note 28.

39 The relevant definitions of "amend" are as follows:

- Johnson, *supra* note 28: 1) "To correct; to change any thing that is wrong to something better," and 2) "To grow better."
- Ash, *supra* note 28: "To correct, to reform, to restore; to grow better."
- Dyche & Pardon, *supra* note 28: "to improve in art, to reform or correct what has been done amiss, to behave better than heretofore."
- Perry, *supra* note 28: "to correct, to grow better."
- Sheridan, *supra* note 28: 1) "to correct, to change any thing that is wrong," and 2) "to grow better."
- Walker, *supra* note 28: 1) "To correct, to change any thing that is wrong," and 2) "to grow better."
- Barlow, *supra* note 28: 1) "to alter for the better," 2) "to correct," 3) "to reform," and 4) "used neuterly [sic] and applied to both, to grow from a more infirm state to a better; to recover."
- Kenrick, *supra* note 28: 1) "To correct; to change any thing that is wrong to something better," and 2) "To grow better."
- Barclay, *supra* note 28: "to alter something faulty for the better. Applied to writings, to correct…To grow from a more infirm state to a better; to recover."
- Bailey, *supra* note 28: Bailey provided no definition of "amend." However, Bailey defines "to mend" as follows: 1) "To repair from breach or decay," 2) "To correct, to alter for the better," 3) "To help, to advance," and 4) "To improve, to increase." In another entry for "To Mend," Bailey provides these definitions: "to grow better, to advance in any good, so to be changed for the better."

40 Johnson, *supra* note 28. Besides Johnson's dictionary, the following two dictionaries distinguished between "amend" and "improve":

Of course, the implication of all these definitions of "amendment" and "amend" is that an amendment must be germane to what is being amended, as correcting something requires relevant changes. Also, an amendment must preserve at least a part of the thing being amended so that there is something to transform from bad to better.

B. Articles, Pamphlets, Letters, and Other Writings

I searched for every occurrence of amend and words with the root of amend in the following, prominent compilations of records from the Constitution's ratification period: *The Documentary History of the Ratification of the Constitution*, *The Federalist Papers*, *Friends of the Constitution: Writings of the "Other" Federalists*,[41] *The Complete Anti-Federalist*, and *The Anti-Federalist Papers*.[42] These compilations contain articles, pamphlets, letters, and other writings that can reveal how "reasonable writers of English" used and understood words and phrases from the Constitution in different contexts. Also, many writings in these compilations were main sources of information for "reasonable readers of English" during the ratification period.

1. Amendments Could Not Be Complete Substitutes

The compilations of records abound with over 60 examples of writings, most of which concern the Articles of Confederation, suggesting amendments could not be complete substitutes. Since my examples are so numerous, the Appendix lists those not discussed in my article. My examples are consistent with the evidence presented in the recent article on the Origination Clause by Professor Priscilla Zotti and scholar Nicholas Schmitz. Their article documented numerous examples of writings from the ratification period, and none to the contrary, suggesting the original public meaning of the Origination Clause did not contemplate the possibility that the Senate could originate revenue bills in any way, including as complete substitutes.[43] For example, Zotti and Schmitz noted an American Citizen, in an article in the *Philadelphia Independent Gazetteer* on September 28, 1787, argued that "[t]hey [the Senate] may restrain the profusion of errors of the [H]ouse

- Barlow, *supra* note 28: "This word ['amend'] and 'improve,' are very far from being synonymous, tho' they are often used promiscuoutly [sic]; for amend carries with it the secondary idea of some preceding defect, or fault; but improve though it implies the advancing to a greater degree of perfection, does not imply that the precedent state was culpable; for a person may be virtuous and still improve in virtue.
- Kenrick, *supra* note 28: "To amend differs from to improve; to improve supposes or not denies that the thing is well already, but to amend implies something wrong."

41 Friends of the Constitution: Writings Of The "Other" Federalists (Sheehan & McDowell, eds., 1998) [hereinafter Friends of the Constitution].

42 The Anti-Federalist Papers (Morton Borden ed., 1965) [hereinafter Anti-Federalist Papers].

43 Priscilla H.M. Zotti & Nicholas M. Schmitz, *The Origination Clause: Meaning, Precedent, and Theory from the 12th to 21st Century,* 3 Br. J. Am. Leg. Studies 116, 135-39 (2014) [hereinafter *Zotti & Schmitz, Origination Clause*].

of [R]epresentatives [regarding a bill for raising revenue], but they [the Senate] cannot take the necessary measures to raise a national revenue."[44]

Among the over 60 examples that I found are a few from Federalists regarding the Origination Clause that suggest the Senate's amendment power was not so expansive as to permit complete substitutes. The first example is the article by Brutus, who is not to be confused with the popular Anti-Federalist of the same pseudonym, in the *Virginia Journal* on December 6, 1787. Brutus defended the new constitution against the criticisms of George Mason, which the journal published two weeks earlier. Among other criticisms, Mason disapproved of the new constitution's stipulation that states and not "the people" would elect senators. According to Mason, this stipulation made the Senate unaccountable to "the people." Mason claimed the Senate's powers, such as its power to amend bills for raising revenue, could destroy people's liberty. Brutus countered that the Senate's amendment power, which he called the "power of doing good," was necessary because the House could never make a bill "perfect in all its parts."[45] Brutus' language reflected that he agreed with the dictionaries' definitions of "amendment," described above, as a change or alteration to something that transforms the thing from bad to better. Brutus also said the Senate could "go no further" than proposing amendments, suggesting that the amendment power substantially limited the Senate in affecting a House bill for raising revenue.

A second example is Marcus' article in the *Norfolk and Portsmouth Journal* of Virginia on February 20, 1788. His article was another response to George Mason's criticisms of the new constitution. Marcus said Mason should be unconcerned with the Senate's amendment power because the House must (emphasis added) "originate *all* money bills" while "[t]he wisdom of the Senate may sometimes point out amendments, the propriety of which the … House [of Representatives] may be very sensible of, though they had not occurred to [the House]."[46] These comments suggest Marcus thought of an amendment as only a correction to a bill, not as a procedure by which the Senate could originate its own revenue bills.

A third example is a Native of Virginia's pamphlet titled *Observations upon the Proposed Plan of Federal Government*, which was published on April 2, 1788. This pamphlet rebutted many Anti-Federalists' objections to the new constitution. Before addressing the Origination Clause, a Native of Virginia remarked that the Philadelphia Convention was supposed to have amended the Articles of Confederation but, noticing so many "radical defects," decided to "new-model the Federal Constitution." Here, a Native of Virginia implied the Convention did not amend but rather completely replaced the Articles with a new model. Later in the pamphlet when a Native of Virginia discussed the Origination Clause in a general sense, he said "the Senate cannot originate … bills [for raising revenue]" but "have the power of amending them."[47] Thus, considering a Native of Virginia's remarks about the Articles and Origination Clause, if the Senate noticed "radical defects" in a House bill for raising revenue and completely

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44 *Id.* at 135.

45 Brutus, Virginia Journal, 6 December 1787, *reprinted in* Documentary History Digital, *supra* note 31.

46 Marcus I, Norfolk and Portsmouth Journal, 20 February 1788, *reprinted in* Documentary History Digital, *supra* note 31.

47 A Native of Virginia: Observations upon the Proposed Plan of Federal Government, 2 April 1788, *reprinted in* Documentary History Digital, *supra* note 31.

replaced it with a "new model" then the replacement would be an origination and not an amendment.

Of the numerous examples of writings suggesting amendments to the Articles of Confederation could not be complete substitutes, several examples allegorized the Articles to make the point. One example involves the popular pamphlet of letters written by the Federal Farmer, who was actually an Anti-Federalist, titled *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention*. In a letter dated November 8, 1787, the Federal Farmer discussed the circumstances leading up to the Philadelphia Convention, saying that "had the idea of a total change [to the Articles] been started, probably no state would have appointed members to the convention." The Federal Farmer continued his letter with the following ship allegory for the Articles (emphasis added):

> [Leading up to the Philadelphia Convention,] not a word was said about destroying the old constitution, and making a new one–*The states still unsuspecting, and not aware that they were passing the Rubicon [river] [i.e., the point of no return],* appointed members to the new convention, *for the sole and express purpose of revising and amending the confederation*–and, probably, *not one man in ten thousand in the United States*, till within these ten or twelve days, *had an idea that the old ship was to be destroyed, and he put to the alternative of embarking in the new ship presented, or of being left in danger of sinking*[.][48]

According to the Federal Farmer, the Articles was the old ship that, after passing the Rubicon, was not fixed but destroyed and replaced with a new ship.

Ship News, in an article in the *Boston Gazette* on February 4, 1788, used another ship allegory for the Articles. Ship News described two ships, one named Confederation and the other Constitution. Confederation fit this description:

> [It] is a very leaky weak vessel, built at a time when season'd timber could not be procured; the necessity of her being built immediately was the cause of the Builders throwing her so slightly together, and not more firmly and consistently uniting the various parts. That many of her planks are rotten; that her timbers in many parts are defective; that should she engage an enemy of one third of her guns, on the reception of the first well-aim'd broadside, she would be effectually ruined: in short, that she is beyond repair.

Ship News said Constitution, by contrast, was "beautiful," "far superior to any [other ship]," and "well calculated for … American service."[49] Thus, Ship News implied that nothing from the Articles was salvageable and therefore no alteration or amendment was possible and America needed the new constitution.

Another popular allegory was Federalist Francis Hopkinson's "The New Roof," published in the *Pennsylvania Packet* on December 29, 1787. Hopkinson discussed

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48 Federal Farmer, Letters to the Republican-- Letter I, 8 November 1787, *reprinted in* Documentary History Digital, *supra* note 31.

49 Ship News, Boston Gazette, 4 February 1788, *reprinted in* Documentary History Digital, *supra* note 31.

how the roof of a family's mansion, representing the Articles, needed repairs. The family invited "skillful architects," representing the Federalists at the Philadelphia Convention, to inspect the roof. The architects found major problems, such as a weak frame and unconnected rafters, and decided the following:

> [T]hat it would be altogether vain and fruitless to attempt any alterations or amendments in a roof so defective in all points; and therefore proposed to have it entirely removed, and that a new roof of a better construction should be erected over the mansion house.

The architects then proposed a plan to install a new roof, which represented the new constitution and which the family would have to consider.[50] This part of Hopkinson's allegory demonstrated the new constitution, as a complete substitute to the Articles, was not an amendment but a new proposal.

Many other examples, mostly from Anti-Federalists, argued the Philadelphia Convention's amendment power disallowed complete substitutes to the Articles. One example is a letter by Robert Yates and John Lansing, representatives of New York at the Philadelphia Convention, to George Clinton, governor of that state, on December 21, 1787. Describing why they opposed the new constitution, Yates and Lansing said, among other arguments, that the Philadelphia Convention "exceed[ed] the powers delegated to us" by, instead of amending the Articles, proposing a "general Constitution in subversion of … the [Articles.]" Yates and Lansing further said the (emphasis added) "leading feature of every amendment ought to [have] be[en] *the preservation of the individual States, in their uncontroled [sic] constitutional rights*" along with grants of additional powers, such as the power to regulate commerce, to the Confederation Congress.[51]

Cato, a popular Anti-Federalist, provides another example with his article in the *New York Journal* on October 11, 1787. Cato said the framers had power only to revise and alter the Articles but "exceeded the authority given to them" as follows:

> [The framers] transmitted to [the Confederation] Congress a new political fabric [the new constitution], essentially and fundamentally distinct and different from it [the Confederation], in which the different states do not retain … their sovereignty and independency [sic], united by a confederated league[.]

Then, Cato emphasized the "new government" consisted of a national structure and powers "not known to the articles of confederation." Cato further claimed the framers proposed the new constitution under an "assumption of power [and therefore not under the amendment power]" and "in usurpation."[52]

In an article in the *Massachusetts Centinel* on January 12, 1788, the Republican Federalist, who was another Anti-Federalist with a contradictory pseudonym,

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50 The New Roof, Francis Hopkinson, Pennsylvania Packet, 29 December 1787, *reprinted in* Documentary History Digital, *supra* note 31.

51 Robert Yates and John Lansing, Reasons of Dissent, New York Journal, 14 January 1788, *reprinted in* Documentary History Digital, *supra* note 31.

52 Cato II, New York Journal, 11 October 1787, *reprinted in* Documentary History Digital, *supra* note 31.

lamented how the Philadelphia Convention, instead of amending the Articles, "reported a system … which destroys the [A]rticles … and completely embraces the consolidation of the union[.]" Echoing Cato, the Republican Federalist blasted the "new system" as "founded in usurpation," "unauthorized … unexpected," and "not merely an innovation, but an interchange of the 'established form' of government."[53]

In the same article, the Republican Federalist gave the following warning given what he perceived as a precedent for permitting an amendment to be a complete substitute (emphasis added):

> But supposing a Convention should be called [to amend the new constitution], what are we to expect from it, after having ratified the proceedings of the late federal [Philadelphia] Convention? *They will be called to make 'amendments' an indefinite term, that may be made to signify any thing*…. [P]erhaps … [someone] will think a system of despotism … [to be a good] amendment to the present plan [the new constitution], and should the next change be only to a monarchial government, the people may think themselves very happy[.][54]

According to the Republican Federalist, the Philadelphia Convention had corrupted the definition of amendment to permit complete substitutes and amendments could now "signify any thing."

Another example involves Anti-Federalist Silas Lee's letter to Federalist George Thatcher on February 14, 1788. The following excerpt made a similar warning as the Republican Federalist's article (emphasis added):

> But I hope the precedent of the late federal [Philadelphia] Convention will not be followed by the next [convention to amend the new constitution] that may be appointed; viz *instead of revising or amending this [new constitution] in certain parts ... they will not with one Stroke wipe the whole away ... & propose a new one[.]*[55]

Lee thereby suggested the Philadelphia Convention violated its amendment power by proposing a new constitution.

An additional example is Exeter, N.H.'s article in the *Freeman's Oracle* of New Hampshire on March 21, 1788. Exeter, N.H., said the Philadelphia Convention discovered the "impropriety of attempting an amendment of the Confederation" and therefore pursued a "Government of these States de novo … proceeding upon original principles." Exeter, N.H., emphasized that, in proposing a complete substitute to the Articles, the framers could not "ac[t] in their official characters, upon the [amendment] powers given them by the respective states[.]" In Exeter, N.H.'s opinion, the framers were instead acting as "private persons inspired with disinterested love to [sic] their country[.]"[56]

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53 The Republican Federalist IV, Massachusetts Centinel, 12 January 1788, *reprinted in* Documentary History Digital, *supra* note 31.

54 *Id*.

55 Silas Lee to George Thatcher, Biddeford, 14 February 1788, *reprinted in* Documentary History Digital, *supra* note 31.

56 Exeter, N.H., Freeman's Oracle, 21 March 1788, *reprinted in* Documentary History Digital, *supra* note 31.

An example from the South involves a Georgian's article in the *Gazette of Georgia* on November 15, 1787. He said the Philadelphia Convention's only power was to alter the Articles, so the Convention should have simply entrusted the Confederation Congress with such additional powers as regulating foreign and internal trade. A Georgian remarked that the Convention instead "thought fit to destroy such an [sic] useful fabrick [sic], as the [A]rticles … and, on the ruins of that, raised a new structure[.]"[57]

Several more examples involve three towns' instructions to their respective representatives at the Massachusetts Convention. On November 26, 1787, the Town of Grate Barrington directed representative William Whiting to oppose the new constitution given these two reasons (emphasis added and the original text included all the spelling errors):

> First as the Constitution of this Commonwealth Invests the Legslature with no such Power as sending Delligates To a Convention for the purpose of framing a New System of Fedderal Goverment—*we conceive that the Constitution now offered us is Destituce of any Constituenal authority either states or fedderal*.
>
> 2nd had the Delligates from this state been Constituenaly appointed yet *their Commission extended no further than the Revising and amending the former articles of Confedderation—and therefore they could not pretend to the Least Colour of Right or authority from their Principles to Draw up a new form of Fedderial Goverment*.[58]

Thereby, the Town of Grate Barrington stated the Convention's amendment power disallowed complete substitutes, such as the new constitution.

On December 16 of the same year, the town of Harvard told representative Josia Witney to "give your negative vote" to the new constitution. The town explained that (emphasis added) "amendments may be made upon the Confederation of the United States, by vesting Congress with greater Powers, [but] *without so totally changing and altering the same, as the proposed Constitution has a tendency to*."[59]

Two weeks later on December 31, the town of Townshend recommended that representative Daniel Adams support the new constitution with certain amendments, such as the addition of a declaration of rights. However, the town also noted the Philadelphia Convention was supposed to have only amended the Articles "yet ... instead of that [amendment] … Sent out a [new] fraim [sic] of government[.]"[60]

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57 Essay by A Georgian, Gazette of the State of Georgia, 15 November 1787, *reprinted in* Documentary History Digital, *supra* note 31.

58 Town of Grate Barrington's (Massachusetts) Draft Instructions, 26 November 1787, To William Whiting Esq., *reprinted in* Documentary History Digital, *supra* note 31.

59 Town of Harvard's (Massachusetts) Instructions, 17 December 1787, To Josiah Witney, Esq., *reprinted in* Documentary History Digital, *supra* note 31.

60 Town of Townshend's [Townsend's] (Massachusetts) Instructions, 31 December 1787 — To Capt. Daniel Adams —, *reprinted in* Documentary History Digital, *supra* note 31.

2. Amendments Had to Preserve Something

Several examples from Anti-Federalists emphasized that, if the new constitution had preserved a part(s) of the Articles of Confederation, then the Philadelphia Convention may have avoided exceeding its amendment or alteration power. In the *Virginia Independent Chronicle* on June 11, 1788, Denatus said the framers failed to amend the Articles and instead built an entirely new constitution "after their own fancies." Denatus noted that, "[h]ad they [the framers] preserved only one article of the union [the Articles], and built the present [new] constitution to it, the objection of innovation would be unreasonable."[61] On November 28, 1787, in his "A Review of the Constitution," a Federal Republican said that for the Philadelphia Convention to "frame a Constitution entirely new … was out of their province." He continued that the framers should have "reserved that which was known to be good [in the Articles], and to have amended that only which was found defective from experience."[62] In 1788, the Federal Farmer compared the Articles with the new constitution in another pamphlet of letters, titled *An Additional Number of Letters from the Federal Farmer to the Republican*. He said "there is no kind of similitude between the two [documents]," "[t]he new plan is totally a different thing," and "no part of the confederation ought to be adduced for supporting or injuring the new constitution."[63] If, in the Federal Farmer's opinion, the new constitution preserved a significant part(s) or maintained a significant similarity to the Articles, then the new constitution could have qualified as an alteration or amendment to the Articles.

Several other examples, all from Federalists, countered that the new constitution did, in fact, preserve enough of the Articles to qualify as an alteration or amendment and to thereby not be a complete substitute. On January 16, 1788, State Soldier's article in the *Virginia Independent Chronicle* argued the new constitution, as an alteration and amendment to the Articles, preserved parts of the Articles while adding necessary "energy and power." He mentioned some preserved parts were the union among states, the credit of the union, a stipulation for appropriating "monies under pretence [sic] of providing for our national defence [sic]," and "state security for … rights," such as "liberty of the press."[64]

Two days later in the *New York Packet*, James Madison, writing as Publius, made an argument similar to State Soldier's. Madison argued the Philadelphia Convention's alteration power disallowed complete substitutes but included the power to "change the title; to insert new articles; [and] to alter old ones." Madison maintained the new constitution was not "absolutely new" but rather the "expansion of principles which are found in the articles of Confederation." For instance, Madison claimed the new constitution protected the state independence found in the Articles. Also, the new constitution required the state legislatures—not "the people"—to elect Senators, and this process was similar to how state legislatures

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61 Denatus, Virginia Independent Chronicle, 11 June 1788, *reprinted in* Documentary History Digital, *supra* note 31.

62 A Federal Republican, A Review of the Constitution, 28 November 1787, *reprinted in* Documentary History Digital, *supra* note 31.

63 Federal Farmer, Letter X, January 7, 1788, *reprinted in* 2 Complete Anti-Federalist, *supra* note 32, at 283.

64 State Soldier; Essay I, Virginia Independent Chronicle, Richmond, 16 January 1788, *reprinted in* Friends of the Constitution, *supra* note 41, at 115-17.

elected all members of the Confederation Congress under the Articles. Madison claimed the Articles was "so feeble and confined" that it "require[d] a degree of enlargement which g[ave] to the new system the aspect of an entire transformation of the old."[65] So, in Madison's opinion, the new constitution appeared to be a complete substitute but was only an extensive alteration to the Articles.

Colonel John Banister's article in the *Petersburg Virginia Gazette* on October 25, 1787, described a meeting of Petersburg residents at "Mr. Hare's tavern" about the new constitution. Banister noted all the attendees approved a resolution praising the new constitution as the Philadelphia Convention's valiant attempt to amend the Articles. The resolution described the new constitution as "a plan of government" that, among other accomplishments, "secure[d] the rights of the respective states [found in the Confederation]," "cement[ed] the union of the states [that the Confederation created]," and "extend[ed] an [sic] uniform administration of justice [that was in the Confederation]." The resolution stated the new constitution, in a general sense, was "founded upon the most enlarged principles [of the Confederation]."[66]

A Citizen of Philadelphia's "Remarks on the Address of Sixteen Members," published on October 18, 1787,[67] responded to "The Address of the [Sixteen] Seceding Assemblymen" in the *Pennsylvania Packet* in which 16 legislators from Pennsylvania described their opposition to the new constitution.[68] In particular, a Citizen of Philadelphia contested the 16 assemblymen's claim that the new constitution exceeded the Philadelphia Convention's amendment power. He said "I suppose the whole force of their [the 16 assemblymen's] meaning must rest on the word amend." Then, he said the definition of an amendment within a legislative context was as follows (emphasis added):

> [A]n amendment in the sense of legislative bodies, means either to strike out *some* words, clauses or paragraphs in a bill, without substituting any thing in the place of them, or to insert new words, clauses or paragraphs where nothing was inserted before; or to strike out *some* words, clauses or paragraphs, and insert others in their room, which will suit better[.]

Thereby, a Citizen of Philadelphia said the definition of amendment according to legislators permits the deletion or replacement of "some"—not "all"—parts of a bill. He then said, "I challenge the whole sixteen members to shew [sic] that the convention have done an iota more than this[.]"[69] Thus, in a Citizen of Philadelphia's opinion, the new constitution was an amendment to the Articles and not a complete substitute.

In the *New Haven Gazette* on December 25, 1787, a Citizen of New Haven said the Convention was to "make amendments" and the "new constitution contain[ed] the powers vested in the federal government, under the former [Articles], with such additional powers as they deemed necessary to attain the ends the states had in view, in their appointment." He said preserved parts of the Articles included significant

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65 The Federalist No. 40 (James Madison).

66 Colonel Banister, Petersburg Virginia Gazette, 25 October 1787, *reprinted in* Documentary History Digital, *supra* note 31.

67 A Citizen of Philadelphia, Remarks on the Address of Sixteen Members, 18 October 1787 (excerpt), *reprinted in* Documentary History Digital, *supra* note 31.

68 3 Complete Anti-Federalist, *supra* note 32, at 11.

69 A Citizen of Philadelphia, Remarks on the Address of Sixteen Members, 18 October 1787 (excerpt), *reprinted in* Documentary History Digital, *supra* note 31.

state sovereignty from a national government, "the objects of expenditure," and "the number of members of Congress."[70]

William Cushing of Massachusetts' undelivered speech dated February 4, 1788, made a claim similar to a Citizen of New Haven's. First, Cushing implied the new constitution was not an alteration or amendment to the Articles by saying (emphasis added and the original text included all the shorthand) "[s]ome Gentlemen say—*Alter or amend* the old Confederation—not make a new System, [but] *why not make a new System*, if yt. were necessary for ye. Salvation of ye Country?" However, Cushing then suggested the new constitution may have been a valid alteration and amendment to the Articles because (emphasis added and the original text included all the shorthand) "the Confederation, *in appearance* imparted many, if not most of the great powers, now inserted in the proposed Constitution; such as making war & peace, borrowing money without bounds upon ye. Credit of the united states,—building & equipping a navy—demanding men & money without limitation—& of appropriating money to defray the public expenses[.]"[71]

3. Amendments Could Be Extensive

Several examples of writings in the compilations emphasized that amendments could be extensive but not complete substitutes. Two of these examples involve writings by Alexander Hamilton under the pseudonym of Publius. His first example is from his article in the *Independent Journal* of New York on December 1, 1787. Hamilton claimed there were "fundamental errors in the structure of the [Confederation]," not "minute or partial imperfections." Hamilton concluded the Confederation (emphasis added) "cannot be amended otherwise than by an alteration in the *first principles* and *main pillars* of the fabric."[72] His second example is from his article in the *New York Pack*et two weeks later. He said the Confederation (emphasis added) "is … so radically vicious and unsound, as to admit not of amendment but by an entire change in its *leading* features and characters."[73] Both of Hamilton's examples stopped short of advocating for a complete substitute to the Articles, as his examples permitted amendments that preserved secondary or minor parts of the Articles.

A third example is from a Columbian Patriot, the pseudonym of Mercy Otis Warren, who published a pamphlet titled *Observations on the New Constitution, and on the Federal and State Conventions* in 1788. Among other discussions, Warren noted Federalists often argued that states should accept or reject the new constitution in total and without amendments.[74] She then remarked (emphasis added) "the framers [therefore] dare not risque [sic] to the hazard of revision, *amendment*, or reconsideration, *least the whole superstructure should be demolished* by more skilful [sic] and discreet architects."[75] According to Samuel Johnson's dictionary,

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70 A Citizen of New Haven [Roger Sherman], The Letters: I-II, New Haven Gazette, 25 December 1788, *reprinted in* Friends of the Constitution, *supra* note 41, at 267-68.

71 William Cushing: Undelivered Speech, c. 4 February 1788, *reprinted in* Documentary History Digital, *supra* note 31.

72 The Federalist No. 15 (Alexander Hamilton).

73 The Federalist No. 22 (Alexander Hamilton).

74 *See also* Pauline Maier, Ratification: The People Debate the Constitution, 1787-1788 50-69 (2010).

75 Observations on the New Constitution, and on the Federal and State Conventions, by A Columbian Patriot, Boston, 1788, *reprinted in* Documentary History Digital, *supra* note 31.

"superstructure" meant "that which is raised or built upon something else."[76] Thus, Warren suggested an amendment to the new constitution could have replaced major but not foundational parts of the constitution.

4. Amendments Could Be Complete Substitutes

Four examples of ratification records[77] from the compilations suggested amendments could be complete substitutes, as opposed to the preponderance of evidence that suggested the contrary. The first example is from Aristides' article in the *Maryland Gazette* on January 31, 1788. Among other assertions, he objected to how the "[Philadelphia] [C]onvention has been censured for an excess of its authority." Aristides first contended the Convention had no power to amend per se and the power only to recommend amendments that the Confederation Congress and states would have to approve. But then Aristides claimed the following (emphasis added):

> Had it [the Philadelphia Convention] been even invested with full powers to amend the present compact [Articles], their proposed plan would not have exceeded their trust. *Amendment, in parliamentary language, means either addition, or diminution, or striking out the whole, and substituting something in its room.*[78]

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[76] JOHNSON, *supra* note 28.

[77] One other record came close to suggesting an amendment to the ARTICLES OF CONFEDERATION could be a complete substitute. In an article in the *Independent Chronicle of Massachusetts* on January 3, 1788, Remarker ad corrigendum rebutted the Republican Federalist's criticism from several days earlier in the *Massachusetts Centinel* that the Philadelphia Convention was supposed to amend and preserve—not abolish—the Articles (*see infra* Appendix, number 9). Remarker ad corrigendum first remarked that "[e]very article of power, or provision in the former Constitution [the Articles], that was found to be beneficial to our country, is transferred to the new one, under some shape or other[.]" Then, in the following passage, Remarker ad corrigendum further argued the Philadelphia Convention could have nevertheless proposed a complete substitute (emphasis added):

> *[Even] if there were not a trace of the former [Confederation] existing in it [the new constitution], the Convention could not be charged with having gone beyond their sphere. What do the terms revise, and alter import [referring to the power that the Confederation Congress gave the Philadelphia Convention]?* The object of a revision, was to see what parts were unnecessary or defective, and *which therefore should* be *amended*. *To alter, in consequence of this, was to correct or erase such parts as upon revision, it would be found necessary to do*. Can we then, have the least ground for such an imputation [by the Republican Federalist] to [the] Convention? No, my fellow-citizens[.] [See Remarker ad corrigendum, Independent Chronicle, 3 January 1788, *reprinted in* DOCUMENTARY HISTORY DIGITAL, *supra* note 31.]

However, Remarker ad corrigendum directly addressed only the meaning of the Convention's power to alter and revise the Articles, which he said permitted complete substitutes. It is unclear if he thought the same for the power to amend the Articles, which he framed as a power that was inherent to—and thus less significant than—the power to alter and revise the Articles.

[78] Aristides (Alexander Contee Hanson): Remarks on the Proposed Plan, 31 January 1788, *reprinted in* DOCUMENTARY HISTORY DIGITAL, *supra* note 31.

Aristides thereby suggested only that the definition of amendment according to legislators permitted complete substitutes. He did not suggest "reasonable speakers of English" would have defined amendment in this way. Aristides then warned the public against attempting amendments to the new constitution before its ratification. According to Aristides, there may "never be an end" to amendments, resulting in a complete substitute to the new constitution.

The second example involves a Citizen's article in the *Lansingburgh Northern Centinel* of New York on January 29, 1788. He responded to the letter that Robert Yates and John Lansing wrote Governor George Clinton after the Philadelphia Convention explaining their opposition to the new constitution. In particular, a Citizen countered Yates' and Lansing's argument that the Philadelphia Convention's amendment power disallowed a complete substitute to the Articles. A Citizen described the amendment power as including the power to completely replace the Articles as follows (emphasis added):

> The powers given to the [Philadelphia] Convention were for the purpose of proposing amendments to an old Constitution [the Articles]; one is an old one made new, the other new originally. and [sic] *I conceive*, *with powers so defined, if this body saw the necessity of amending the whole, as well as any of its parts, which they undoubtedly had an equal right to do, thence it follows, that an amendment of every article from the first to the last, inclusive, is such a one as is comprehended within the powers of the Convention*, and differs only from an entire new Constitution in this, that the one is an old one made new, the other new originally.[79]

However, a Citizen may have qualified his remarks by saying "*I conceive*, with powers so defined, [that an amendment can be a complete substitute.]" This possible qualification suggests a Citizen may have thought he was making a novel argument about the scope of an amendment. Therefore, one should not consider this passage to be evidence of how "reasonable speakers of English" in general would have defined the word amendment.

The third example involves Brutus, the pseudonym of Robert Yates, in *the New York Journal* on April 10, 1788. His article analyzed the implications of each Senate power in the new constitution. When discussing the Senate's amendment power in the Origination Clause, he claimed the Senate "will possess equal powers in all cases with the house of representatives" given this rationale (emphasis added):

> [F]or *I consider* the [Origination] [C]lause which gives the house of representatives the right of originating bills for raising a revenue as merely nominal, *seeing* the senate are authorised [sic] to propose or concur with amendments."[80]

Yates did not explain why he equated the amendment power to the origination power, but his implication appears to be that the amendment power permits complete

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79 A Citizen, Lansingburgh Northern Centinel, 29 January 1788, *reprinted in* Documentary History Digital, *supra* note 31.

80 Brutus XVI, New York Journal, 10 April 1788, *reprinted in* Documentary History Digital, *supra* note 31.

substitutes to bills. However, similar to how a Citizen said "I conceive [that an amendment can be a complete substitute]" in the previous example, Yates may have qualified his remarks by saying "I consider" before declaring the amendment power equivalent to the origination power. This possible qualification suggests Yates' understanding of amendment may have been an anomaly. Therefore, one should also not consider this passage to be evidence of what "reasonable speakers of English" in general thought was the meaning of amendment. Regardless, Yates' article broke from his understanding of amendment as something short of a complete substitute expressed months earlier in his letter with Lansing to Governor Clinton.

The fourth example involves Thomas a Kempis' article addressed to "Mr. Russell" in the *Massachusetts Centinel* on December 29, 1787. Given the precedent of proceedings in the Massachusetts legislature, Kempis made the following observation that the power to amend the Articles may permit such a complete substitute as the new constitution (emphasis added and the original text included all the spelling errors and shorthand):

> Mr. RUSSELL, I have seized a moment to inform you, that in my last, haste precluded me from asking the Hon. Mr. ADAMS, or the Hon. Mr. AUSTIN, jun. or some other Candid gentleman, acquainted with Legislative proceedings, *whether* agreeably to the *language of legislation, to case or dele one Act, Resolve, Sec. and to Insert in the room thereof, some other Act, Resolve, Sec. is not called an AMENDMENT*? *And if it is, whether the erasing or deleing the Old Confederation, and inserting the New Constitution, is not in the language of legislation, a proper AMENDMENT? It was called an amendment when in an Act of the last session, which originated in the Senate, the House, in the appointment of Commissioners on the Western Lands, deled the names of the Governour and two others, and Inserted that of the Hon, James Warren.*[81]

However, the inquisitive tone of Kempis' article suggests he thought his observation that amendments might be able to be complete substitutes was unique.

C. Summary of the Original Public Meaning of Amendment

According to the definitions of "amendment" and "amend" in the founding-era dictionaries, an amendment is a change or alteration to something that transforms the thing from bad to better. The dictionary definitions suggest an amendment must be germane to what is being amended, as to correct something requires relevant changes. The definitions further suggest an amendment must preserve at least a part of the thing being amended so that there is something to change from bad to better.

Over 60 ratification records representing the views of Federalists and Anti-Federalists suggested amendments must be short of complete substitutes. These records ranged from a Native of Virginia's pamphlet suggesting the Senate could not amend a money bill with a "new model" to the Town of Grate Barrington's

[81] Thomas a Kempis, Massachusetts Centinel, 29 December 1787, *reprinted in* Documentary History Digital, *supra* note 31.

(Massachusetts) proclamation that the Philadelphia Convention's amendment power disallowed the proposal of a "new form of Fedderial [sic] Government."

Some records implied an amendment had to be germane to the document being amended. For instance, articles about the Origination Clause, such as Brutus' article, suggested any bill amendments would only correct a given bill and thereby be relevant.

Other records suggested an amendment had to preserve at least a minor but significant part of the substance—not the intention or purpose—of the document being amended. My research shows that a "significant part" means a distinct portion that served a function within the document. One such record was Denatus' argument, which said that, if the new constitution had preserved only one article from the Articles of Confederation, then "the objection of innovation would be unreasonable." Article 11 of the Articles stated only that Canada could join the Confederation at any time,[82] but Denatus evidently would have been satisfied with the preservation of this article.

Several other records indicated an amendment could preserve simply the essence—not the exact language—of the given part. William Cushing's undelivered speech made this point by arguing the new constitution appeared to have kept, among other parts of the Articles, the power to form a navy. The Articles stated the Confederation Congress may "build and equip a navy,"[83] whereas the new constitution states the U.S. Congress may "provide and maintain a Navy."[84]

Four ratification records suggested amendments could be complete substitutes. In one example, Aristides said an amendment can involve "striking out the whole" of a legislative document and "substituting something in its room." In another example, a Citizen claimed the Philadelphia Convention's amendment power permitted the replacement of "the whole" of the Articles.

However, all of these four records suggested only that the view that amendments could be complete substitutes was or may have been the view of at least some legislators or other select individuals, not necessarily "reasonable speakers of English" in general. For example, in his article, Thomas a Kempis made what he perceived to be the unique observation that procedures in the Massachusetts legislature may have permitted amendments to be complete substitutes.

The totality of evidence from the founding-era dictionaries and compilations of ratification records indicates most "reasonable speakers of English" during the founding era would not have been aware of the argument that amendments could be complete substitutes, let alone defined the word amendment as permitting of complete substitutes.

The totality of evidence shows the original public meaning of amendment is a change or alteration to something that must 1) be germane to that something, 2) preserve at least the essence of a significant part of the substance of that something (a "significant part" being a distinct portion that served a function within that something), and 3) make that something transform from bad to better.[85]

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[82] Articles of Confederation art. XI.

[83] Articles of Confederation art. IX.

[84] U.S. Const. art. I, §8.

[85] The only other part of the original Constitution that contained the words amend or amendment is Article V, which reads as follows (emphasis added):

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose *Amendments* to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention

III. The Original Understanding Of The Scope Of An Amendment

As discussed in the Introduction, this part rebuts Natelson's claim that the original understanding of the scope of an amendment permits complete substitutes. This part first examines evidence from the British parliament, followed by evidence from the Philadelphia Convention, Confederation Congress, state legislatures, and, lastly, state conventions.

A. British Parliament

My previous research on the Origination Clause examined the practice of the British parliament in the eighteenth century regarding bill amendments.[86] The research noted that, during the Philadelphia Convention, the drafters of the second half of the Origination Clause borrowed the language verbatim from the Massachusetts Constitution of 1780.[87] John Adams, a student of British parliament and philosophy,[88] drafted the entire Massachusetts Constitution.[89] According to Professor James McClellan, the U.S. Constitution, based largely on the Massachusetts Constitution, is "rooted in British practices and customs."[90] Thus, the practice of amending bills in British parliament during the eighteenth century is particularly relevant to discussions of the original understanding of the scope of an amendment. But, as Natelson's article discussed, it is worth noting the British parliament's records from this time period have limitations, including being incomplete and biased toward the viewpoints of legislators who distributed their written speeches.[91]

> for proposing *Amendments*, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no *Amendment* which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. [*See* U.S. Const. art. V.]

The original public meaning of amendment also applies to Article V. Thus, any amendment to the Constitution must 1) be germane to the Constitution, 2) preserve at least the essence of a significant part of the substance of the Constitution, and 3) make the Constitution transform from bad to better.

86 Daniel Smyth, *The Origination Clause III: ObamaCare's a Good Amendment to Die Hard* (November 29, 2013), *available at* http://www.americanthinker.com/articles/2013/11/the_origination_clause_iii_obamacares_a_good_amendment_to_die_hard.html.

87 2 The Records Of The Federal Convention Of 1787 552 (Max Farrand ed., 1937) [hereinafter Farrand's Records].

88 James Mcclellan, Liberty, Order, and Justice: An Introduction to the Constitutional Principles of American Government 49-50 (3d ed., 2000) [hereinafter Mcclellan, Liberty, Order, and Justice].

89 Robert J. Taylor, *Construction of the Massachusetts Constitution*, 90 PROC. AM. ANTIQ. SOC. 326 (1980).

90 Mcclellan, Liberty, Order, and Justice, *supra* note 88, at 25.

91 *Natelson, Origination Clause, supra* note 1, at 646, n.60.

1. Amendments Could Not Be Complete Substitutes

Natelson's article confirmed much of my previous research, which argued the British parliament most likely disallowed amendments that were complete substitutes. Natelson examined the years 1740 through 1790, and he analyzed many sources, such as the official journals of the House of Commons and House of Lords.[92] My previous research examined the 23 volumes of Cobbett's *Parliamentary History of England* that cover 1688 to 1789, the century before the founding.[93] Although not published until the nineteenth century, Cobbett's *Parliamentary History* is the best source of parliamentary debates between 1066 and 1803.[94] Cobbett compiled multiple records of British parliament, including parts of the journals of the Lords and Commons and newspaper accounts of legislators' speeches. In the 23 volumes, I searched for occurrences of amend and words with the root of amend. I found no examples of bill amendments that were complete substitutes. In fact, three passages from debates on various bills declared or suggested that parliamentary procedure prohibited such amendments.

The most revealing example occurred in 1736 when the Lords received the Commons' "Bill for the more easy recovery of the Tythes, Church Rates, and other Ecclesiastical Dues, from the people called Quakers." After the second reading of this bill by the Lords and in the context of proposing amendments to the bill, a lord whose name the *Parliamentary History* does not mention said the following to oppose the bill:

> I think it impossible to make a proper Bill of that we have now before us, without altering the whole, which, according to our methods of proceeding, cannot be done in the committee; for as the Bill would then be a new Bill, it could not be pretended that such a Bill had been twice read, then committed, and after that read a third time, which is the method of passing Bills constantly observed in this House.

Other lords who debated this Quaker bill agreed with the above assessment. For example, one lord proposed an amendment that would "be but a small and an easy amendment to the Bill; it will be very far from making it a new Bill."[95]

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92 *Id*.

93 William Cobbett, The Parliamentary History of England (vols. 5-27, 1809-16) [hereinafter Cobbett]. My article does not discuss John Hatsell's four-volume work titled *Precedents of Proceedings in the House of Commons*. This work was the most prominent publication on parliamentary procedures in the late 1700s. However, none of his volumes discussed procedures for originating, passing, or amending bills that are relevant to my article. His topics included "Privilege of Parliament" (1776), "Members, Speakers, &c." (1781), "Relating to Lords, and Supply" (1784), and "Conference, and Impeachment" (1796). Hatsell intended to write a volume about the passing of bills, but he never published this work. See Sheila Lambert, Bills And Acts: Legislative Procedure in Eighteenth-Century England 28 (1971).

94 "Records Frequently Asked Questions," Parliament of the United Kingdom, *available at* http://www.parliament.uk/business/publications/parliamentary-archives/archives-faqs/records-frequently-asked-questions/#jump-link-10.

95 9 Cobbett, *supra* note 93, at 1165-66, 1179, 1196, 1207.

A second example is from 1743 when the Lords debated the Commons' bill "For repealing certain Duties on Spirituous Liquors, and on Licences for retailing the same; and for laying other Duties on Spirituous Liquors, and on Licences for retailing the said Liquors." The Earl of Ilay declared his fellow lords should consider the bill as follows (emphasis added):

> If it be a Bill your lordships think essentially wrong, or such a one as cannot be *amended* so as to make it a *useful Bill*, you reject it upon a second reading: if it be a Bill which you think may be *amended*, so as to make it a *good bill*, you go through it in the committee, and if after having there made all the amendments you can, it appears still to be a defective or inconvenient Bill, you throw it out upon the report, or upon the third reading.

Thereby, the earl said the Lords could amend the Commons' bill to make it "useful" or "good," but not to make it a different bill.[96]

The third example was in 1719 when the Commons considered the Lords' "Act for the Settling [sic] 'the Peerage of Great Britain.'" Sir Richard Steele said this (emphasis added) "*unreasonable Bill* will be entirely rejected, since none can pretend to *amend* what is in its very nature incorrigible ... it would be in vain to attempt a good superstructure, upon a foundation which deserves nothing but indignation and contempt." If the Commons could amend the Lords' "unreasonable Bill" by completely replacing it with a "different and reasonable Bill," then surely Steele would have said the Commons could do so. The Commons rejected the bill.[97]

2. Amendments Could Be Extensive

According to the *Parliamentary History*, there were several examples of amendments that involved replacements to or modifications of many or most parts of the given bills. For example, in 1692, the Lords made "very many amendments" to the Commons' "Bill for regulating Trials, in cases of Treason." The Commons "agreed to all those Amendments, except the two last."[98] In 1744, the Lords made "so many alterations" to the Commons' "Bill for making it Treason to hold Correspondence with the Sons of the Pretender to his majesty's crown" that "[the bill's] original intention ... [was] almost forgotten." The Lords even amended the bill's title, and the Commons agreed to all the Lords' amendments.[99] And in 1753, Mr. William Beckford of the Commons said the following after the Commons "almost entirely altered" the Lords' "Bill for the better preventing of Clandestine Marriages":

> [W]hat may constitute a Bill to be the same or a new Bill, is a question that may admit of some disputes, and a question, I think, not very material; but if seven new clauses added to a Bill which at first consisted but of sixteen, and every one of those it consisted of at first very much altered, does not

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96 12 Cobbett, *supra* note 93, at 1191, 1246, 1247.
97 7 Cobbett, *supra* note 93, at 609, 615-16, 624.
98 5 Cobbett, *supra* note 93, at 691-92.
99 13 Cobbett, *supra* note 93, at 705, 806, 858-59, 895.

> make it a new Bill, I am sure, it shews [sic], that the Bill, as sent down to us [from the Lords], was a very inconsiderate and imperfect Bill[.]

The Lords agreed to all the Commons' amendments to this marriage bill.[100]

3. Summary of British Parliament

The British parliament's records from the eighteenth century are incomplete and have other limitations. Nevertheless, according to available sources, it is evident that, at least for the several decades before the founding, the British parliament prohibited bill amendments from being complete substitutes. The parliament permitted extensive amendments to bills, but extensive amendments could not amount to originations of new bills.

B. Philadelphia Convention

On May 25, 1787, the Philadelphia Convention began with what many framers had understood to be the purpose of amending the Articles of Confederation.[101] Leading up to the Convention, many national leaders, such as James Madison, advocated for amending the Articles by giving the Confederation Congress more powers, including the power to regulate interstate trade.[102] However, on May 29, Edmund Randolph of Virginia proposed the Virginia Plan, a collection of major amendments to the Confederation's structure that would have, among other changes, added an executive, a judiciary, and a bicameral legislature to the Confederation.[103] Discussion of this plan and rival plans dominated most of the Convention. Throughout much of the spring and summer, the Convention approved the Virginia Plan piecemeal and made many amendments to this plan's provisions. For instance, on May 31, the Convention approved a resolution creating a bicameral legislature.[104] On June 4, the Convention approved a resolution establishing a national judiciary,[105] which the Convention amended on June 13 by adding a provision empowering the Senate to appoint the judiciary.[106]

In late July, the Convention finished approving and amending the Virginia Plan, which amounted to 19 resolutions for having an effective government.[107] However, the Convention, instead of recommending that the Confederation Congress and states adopt the resolutions as amendments to the Articles, formed the Committee of Detail to draft a new constitution based on the resolutions.[108] On August 6, the committee proposed a draft of the new constitution, which was three times as long

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100 15 Cobbett, *supra* note 93, at 1, 32, 69, 86.

101 *See supra* note 14.

102 *See, e.g.*, *Rakove, Collapse, supra* note 15, at 232.

103 1 Farrand's Records, *supra* note 87, at 19-20 (Madison, May 29, 1787).

104 *Id.* at 48 (Madison, Thursday May 31).

105 *Id.* at 104-05 (Madison Monday June 4. In Committee of the whole).

106 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 188 (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter Elliot's Debates].

107 David O. Stewart, The Summer of 1787: The Men Who Invented the Constitution 178 (2007) [hereinafter Stewart, Summer].

108 *See, e.g.,* 2 Farrand's Records, *supra* note 87, at 88-96 (MADISON Monday. July. 23. in Convention).

as the 19 resolutions and which added numerous provisions not approved by the Convention, to replace the Articles.[109] Between that day and September 17, the Convention revised the draft. On September 17, the Convention approved and then sent the new constitution to the Confederation Congress for consideration.[110]

1. Natelson's Evidence

The only substantive evidence Natelson found regarding the framers' views concerning the scope of an amendment was comments by James Madison, a Federalist and perhaps the Convention's most influential participant. On August 13, 1787, the framers had been discussing the following draft of the Origination Clause (emphasis added):

> Bills for raising money for the purpose of revenue or for appropriating the same shall originate in the House of Representatives and shall not be so *amended or altered* by the Senate as to increase or diminish the sum to be raised, or change the mode of levying it, or the object of its appropriation.[111]

And then Madison commented as follows (emphasis added):

> *The words amend or alter, form an equal source of doubt & altercation.* When an obnoxious paragraph shall be sent down from the Senate to the House of Reps it will be called an origination under the name of an amendment. The Senate may actually couch extraneous matter under that name. In these cases, *the question will turn on the degree of connection between the matter & object of the bill and the alteration or amendment offered to it.* Can there be a more fruitful source of dispute, or a kind of dispute more difficult to be settled?[112]

Natelson argued Madison meant a bill amendment can be "very broad" but must address the bill's subject matter and object.[113] Thereby, Natelson implied Madison's comments fit into Natelson's larger narrative that amendments must be germane and can completely replace legislation.

However, Madison did not, as Natelson implied, say simply that an amendment must have a "degree of connection" with the bill's "matter & object." Madison said only that the answer to whether a bill amendment is acceptable requires an examination of the amendment's "degree of connection" with the bill's "matter & object." Madison did not specify the "degree of connection," which could be low or higher. Since a higher "degree of connection" could require the amendment to preserve a part(s) of the substance of the original bill, it is unclear from Madison's comments if he would accept a complete substitute to a bill.

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109 Stewart, Summer, *supra* note 107, at 178-180.

110 The Confederation Congress and the Constitution, 26-28 September 1787, *reprinted in* Documentary History Digital, *supra* note 31.

111 2 Farrand's Records, *supra* note 87, at 273 (Madison, Aug. 13, 1787).

112 *Id.* at 276.

113 *Natelson, Origination Clause, supra* note 1, at 705.

2. My Evidence

The Convention's most significant discussions of the scope of an amendment concerned the Articles of Confederation and not the Origination Clause. Article 13 of the Articles, which allowed alterations to the Articles, read in part as follows (emphasis added):

> [T]he Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any *alteration* at any time hereafter be made in any of them; *unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.*[114]

And on February 21, 1787, the Confederation Congress had given the Philadelphia Convention this mission (emphasis added):

> [To meet] for the sole and express purpose of *revising the Articles of Confederation* and reporting to Congress and the several legislatures such *alterations and provisions therein* as shall … render the federal constitution adequate to the exigencies of Government and the preservation of the Union.[115]

Of course, Article 13 and the Philadelphia Convention's mission stated the Confederation Congress and states could alter or revise the Articles. The word amend was not used. However, as indicated in the Introduction, the founders often used the words alter and amend as synonyms and several founding-era dictionaries actually defined an amendment as a type of alteration that corrects something. Thus, many framers discussed either explicitly or implicitly whether the Convention's amendment power permitted the proposal of a new constitution.

I searched *Farrand's Records*,[116] the primary source of the Convention's records, for occurrences of amend and words with the root of amend near the words Articles of Confederation. I found the following relevant records.

a. Amendments Could Not Be Complete Substitutes

Numerous records from the Convention suggest an amendment to the Articles could not be a complete substitute. On May 30, 1787, a day after Randolph proposed the Virginia Plan, someone proposed two resolutions that essentially said the Confederation could never be amended properly. For instance, the first resolution stated "[t]hat a union of the states, merely federal [i.e., the Confederation], will not accomplish the objects proposed by the Articles of Confederation, namely, common defence, security of liberty, and general welfare." A third resolution was also proposed that recommended the establishment of a national government featuring a supreme judiciary, legislature, and executive. Thus, together these three resolutions suggested the Convention should forget about amending the Confederation and

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114 Articles of Confederation art. XIII.
115 3 Farrand's Records, *supra* note 87, at 14.
116 Farrand's Records, *supra* note 87.

replace it with a new system of government. However, Charles Pinckney of South Carolina, evidently shocked at the first resolution in particular, objected to proposing new systems of government to replace the Confederation as follows:

> [I]t appeared to him [Pinckney] that their [the framers'] business was at an end; for as the powers of the house in general were to revise the present confederation, and to alter or amend it as the case might require; *to determine its … incapability of amendment or improvement, must end in the dissolution of the powers.*

Convention notes stated "[t]his remark had its weight, and in consequence of it" the framers withdrew the two resolutions suggesting the Confederation could never be amended properly.[117] If the framers had thought an amendment to the Articles could be a complete substitute, then the framers would have resolved that an amendment to the Articles could be a new system of government.

On June 9, a committee of the whole house discussed the Virginia Plan's rules for voting for the national executive.[118] Anti-Federalist Elbridge Gerry of Massachusetts then proposed amending the plan to give higher-populated states greater influence than lower-populated states in electing the executive. William Paterson of New Jersey, however, renounced Gerry's proposal and any future amendment that might erode state equality in the Confederation as follows:

> [T]he amendment of the confederacy was the object of all the laws and commissions on the subject … the articles of the confederation … [should] therefore [be] the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation. that [sic] the people of America were sharpsighted and not to be deceived. But the Commissions under which we acted were not only the measure of our power. they [sic] denoted also the sentiments of the States on the subject of our deliberation. The idea of a national Govt. [sic] as contradistinguished from a federal one, never entered into the mind of any of them, and to the public mind we must accommodate ourselves. *We have no power to go beyond the federal scheme [the Confederation.]*[119]

In particular, Paterson's comment that "[w]e have no power to go beyond the federal scheme [the Confederation]" suggested any amendment to the Articles could not fully replace the Confederation and had to preserve at least the Confederation's essential qualities.

On June 16, John Lansing of New York made a comment similar to Paterson's. The committee of the whole house was considering whether to scrap the Virginia Plan for the New Jersey Plan, [120] a plan proposed a day earlier. The New Jersey Plan was less ambitious than the Virginia Plan, and the New Jersey Plan proposed such changes to the Articles as an allowance for the Confederation Congress to

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117 1 Farrand's Records, *supra* note 87, at 38-39.
118 *Id.* at 175-76.
119 *Id.* at 177-78.
120 *Id.* at 249.

regulate interstate commerce.[121] Preferring the New Jersey Plan, Lansing criticized the Virginia Plan as exceeding the Convention's powers. Lansing declared that "the power of the Convention was restrained to amendments of a federal nature, having for their basis the Confederacy in being."[122]

On June 18, Alexander Hamilton of New York acknowledged the Virginia Plan may violate the Convention's amendment power because the plan drastically reduced the role of states, making "the people" the national government's ultimate source of power.[123] However, Hamilton justified any possible violation as follows (emphasis added):

> *[W]e ow[e] it to our Country, to do on this emergency whatever we should deem essential to its happiness*. The States sent us here to provide for the exigences [sic] of the Union. *To rely on & propose any plan not adequate to these exigences, merely because it was not clearly within our powers, would be to sacrifice the means to the end. It may be said that the States can not ratify a plan not within the purview of the article of Confederation providing for alterations & amendments.* But may not the States themselves in which no constitutional authority equal to this purpose exists in the Legislatures, have had in view a reference to the people at large.[124]

Thereby, Hamilton said an amendment to the Articles may have to preserve at least the essential quality of the Articles wherein states are the ultimate source of the national government's power. Of course, this argument appears more close-minded than Hamilton's arguments as Publius, discussed earlier, that suggested a valid amendment could preserve only secondary or minor parts of the Articles. Even so, all his arguments suggested amendments should be short of complete substitutes. Hamilton's invocation of the "country's happiness" as part of the justification for the possible violation by the Virginia Plan of the Convention's amendment power most likely made reference to *Salus Populi est suprema Lex*, which was the legal principle in the founding era that the welfare of the people is the supreme law.[125]

On June 30, Gunning Bedford, Jr., of Delaware discussed how lower-populated states could never accept the Virginia Plan, as it would give higher-populated states greater power in a national government.[126] After all, Article V of the Articles of Confederation stated, in part, that "[i]n determining questions in … Congress … each State shall have one vote."[127] And, one day earlier, the Convention had affirmed the part of the Virginia Plan that gave states proportional representation in the lower house of the national legislature.[128] Bedford claimed the empowerment of higher-populated states by the Virginia Plan would destroy the Confederation's

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121 *Id.* at 242-45.
122 *Id.* at 249.
123 *Id.* at 283
124 *Id.* at 282-83.
125 Thomas Branch, Principia Legis & Aequitatis: Being an Alphabetical Collection of Maxims, Principles or Rules, Definitions and Memorable Sayings in Law and Equity (London, 1753) 102 [hereinafter Branch, Principia].
126 1 Farrand's Records, *supra* note 87, at 500-01.
127 Articles of Confederation art. V.
128 1 Farrand's Records, *supra* note 87, at 460.

essence of having state equality in national affairs. Bedford further argued "[l]et us then do what is in our power—amend and enlarge the confederation, but not alter the federal system. The people expect this, and no more."[129] By saying "not alter the federal system," Bedford most likely meant "not destroy the confederation's essential qualities, particularly state equality under a national government." Bedford thus believed no amendment to the Articles could replace all of the Confederation.

b. Amendments Could Be Extensive

Several Convention passages suggest an amendment could be extensive but not a complete substitute. The following example occurred on June 16 when Governor Randolph responded to criticism that his Virginia Plan destroyed state equality:

> It has been contended that the 5th article of the confederation [state equality] cannot be repealed under the powers to new modify the confederation by the 13th article. This surely is false reasoning, since the whole of the confederation upon revision is subject to amendment and alteration[.][130]

Thus, Randolph said no part of the Articles was untouchable but stopped short of approving complete substitutes.

A second example occurred on June 19 when someone again claimed the Virginia Plan violated state equality.[131] Rufus King of Massachusetts responded by echoing the essence of Randolph's above idea as follows (the original text included all the shorthand):

> The Convention could clearly deliberate on & propose any alterations that Congs. could have done under ye. federal articles. and could not Congs. propose by virtue of the last article [Article 13], a change in any article whatever: And as well that relating to the equality of suffrage, as any other.[132]

King thereby emphasized that any given part of the Articles could be altered, but he did not declare an alteration could completely replace the Articles.

In another example from June 19, James Wilson of Pennsylvania, while discussing the controversy over state equality in the Virginia Plan, explained what he believed was the limit of the scope of the Convention's alteration power. "[E]—very article may be totally altered," he said, "except that wh[ich] destroys the Idea of a confedy [confederation]." Although Wilson did not identify the article(s) in the Articles of Confederation without which there would be no confederation, he said an extensive alteration must leave "to each State the right of regulating its private & internal affairs in the manner of a subordinate corporation[.]"[133] Article II of the Articles read, "[e]ach state retains its sovereignty, freedom, and independence, and

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129 *Id.* at 501-02.
130 *Id.* at 262.
131 1 Farrand's Records, *supra* note 87, at 324.
132 *Id.* at 324.
133 *Id.* at 332.

every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[134] Perhaps Wilson meant alterations to the Articles must preserve this article or include a similarly-worded one. Regardless, Wilson's comments suggest any alteration to the Articles could not be a complete substitute and had to preserve at least the Confederation's essence.

3. Summary of the Philadelphia Convention

Natelson's article presented no actual evidence from the Philadelphia Convention that the framers believed amendments could be complete substitutes. Natelson incorrectly implied that James Madison's comments regarding the Senate's amendment power in a draft of the Origination Clause demonstrated Madison approved of complete but germane substitutes to bills.

My article found no evidence from the Convention that suggested an amendment to the Articles of Confederation could be a complete substitute. Even Federalists never connected the proposal of the new constitution to the Convention's amendment power. Alexander Hamilton's comments regarding the Virginia Plan suggested *Salus Populi* could have authorized the proposal of the new constitution. Much evidence, such as comments by Pinckney, Paterson, and Bedford, suggested amendments to the Articles could not be complete substitutes. Other evidence, including comments by Randolph, King, and Wilson, suggested amendments could be extensive but not complete substitutes.

C. Confederation Congress

On September 20, 1787, the Confederation Congress received the Philadelphia Convention's new constitution to consider relaying to state legislatures. Between September 26 and 28, Congress discussed the new constitution's propriety.[135] I searched *The Documentary History of the Ratification of the Constitution,* which contains notes from these days in Congress, for occurrences of amend and words with the root of amend near the word confederation or other words with the root of "confed." I found the following two relevant records from September 27.[136]

1. Amendments Could Not Be Complete Substitutes

The first record was the proposed resolution by Anti-Federalist Richard Henry (R.H.) Lee that stated, in part (emphasis added), "the said Constitution [i.e., the Articles of Confederation] in the thirteenth article thereof *limits the power of Congress to the amendment of the present Confederacy … but does not extend it to the creation of a new confederacy*[.]" According to this resolution, R.H. Lee thought the new constitution was a complete substitute to the Articles and thus not an amendment.

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134 Articles of Confederation art. II.

135 The Confederation Congress and the Constitution, 26-28 September 1787, *reprinted in* Documentary History Digital, *supra* note 31.

136 Natelson's search of the official journals of the Continental Congress and Confederation Congress found no evidence that suggested the congresses permitted amendments that were complete substitutes. *See Natelson, Origination Clause, supra* note 1, at 681-82, 687.

Nevertheless, out of respect for the framers' efforts, his resolution asked Congress to relay the new constitution to state legislatures.[137]

The second record was notes by Delegate Melancton Smith. According to these notes, R.H. Lee's resolution instigated an interesting discussion about the new constitution's legal authority between Federalist Henry Lee, James Madison, Federalist William Samuel (W.S.) Johnson, and others. Henry Lee responded to R.H. Lee's resolution by saying "we [Congress] have a right to decide [the new constitution's fate] from the great principle of necessity or the [principle of] salus populi. This necessity justifies the measure." The founders knew the principle of necessity in Latin as *Necessitas est lex temporis*.[138] So, Henry Lee suggested the Confederation Congress would not exceed its power if it proposed the new constitution to state legislatures because Congress could invoke *Salus Populi* or *Necessitas*.[139]

James Madison likewise opposed the part of R.H. Lee's resolution that claimed Congress was exceeding its power. Madison argued Congress could invoke *Salus Populi* as it had done several other times. One example he gave was in 1784 when Congress began establishing state governments in territory west of the 13 states.[140] Madison repeated this *Salus Populi* argument in his letter to General George Washington on September 30, 1787. This letter further detailed Madison's objections to R.H. Lee's resolution.[141] Of course, Madison's argument in Congress was different from his argument as Publius, discussed earlier, that said the new constitution was an extensive alteration to the Articles. Nevertheless, both arguments suggested an amendment could not be a complete substitute.

W.S. Johnson opposed R.H. Lee's resolution because it could make "[t]he people … see [that] we, that Congress, act without power[.]" However, W.S. Johnson also suggested Congress' legal authority could be *Salus Populi*. He concluded Congress should simply "approve or disapprove" the new constitution and not attempt to bias state legislatures against the new constitution.[142]

After this exchange about the new constitution's legal authority, Congress postponed and thereby effectively defeated R.H. Lee's resolution.[143]

2. Summary of the Confederation Congress

This exchange suggests the delegates who debated R.H. Lee's resolution, whether Federalist or Anti-Federalist, thought the new constitution was a complete substitute to the Articles and thus not an amendment. Of course, R.H. Lee made this very argument in his resolution. But also, Henry Lee, James Madison, and W.S. Johnson

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137 Richard Henry Lee's Motion, Journals of Congress, 27 September, *reprinted in* Documentary History Digital, *supra* note 31.

138 Branch, Principia, *supra* note 125, at 63.

139 Melancton Smith's Notes, 27 September [I], *reprinted in* Documentary History Digital, *supra* note 31.

140 *Id.*

141 James Madison to George Washington, Sepr. [sic] 30. 1787, *reprinted in* 24 Letters Of Delegates To Congress, 1774-1789 457 (Paul H. Smith et al., eds., 1976-2000).

142 Melancton Smith's Notes, 27 September [I], *reprinted in* Documentary History Digital, *supra* note 31.

143 Melancton Smith's Notes, 27 September [II], *reprinted in* Documentary History Digital, *supra* note 31.

suggested the legal authority of the Philadelphia Convention and Confederation Congress to propose a new constitution was *Salus Populi* or *Necessitas* and not the amendment power.

D. State Legislatures

On September 28, 1787, the Confederation Congress relayed the new constitution to state legislatures, which would decide upon having state conventions that would consider ratification.[144] That day and despite having yet to receive official word of the approval by the Confederation Congress of the new constitution, the Pennsylvania legislature became the first to call for a convention. By the end of 1787, all of the 13 states in the Confederation had called for a convention except for South Carolina, New York, and Rhode Island. Over two years later in January 1790, Rhode Island became the last of the 13 states to call for a convention.[145]

1. Natelson's Evidence

To determine if any state legislatures had permitted amendments that were complete substitutes in the decades leading up to the founding, Natelson examined the legislatures' available records, such as official journals, from this time period. Natelson said he found examples of complete substitutes in the legislatures of Virginia, North Carolina, New Jersey, Pennsylvania, and Massachusetts.[146] However, Natelson correctly identified complete substitutes in only the Virginia legislature. As he documented, in 1780, two resolutions in the Virginia legislature involved complete substitutes. In the first example, the committee of the whole house reported a resolution calling for a tax "for the use of the continent" and new funds to reduce state debt and help with the Revolutionary War. The complete substitute stated Virginia should seek funding from the Continental Congress before issuing any new taxes.[147] In the second example, a proposed resolution stated Meriwether Smith, who represented Virginia in the Continental Congress, was guilty of abusing public money and should be recalled from service. The complete substitute declared only that Smith's use of public money "appear[s] to be unsatisfactory" and that he should settle any discrepancies.[148]

Natelson's examples of complete substitutes from the legislatures of New Jersey, North Carolina, Pennsylvania, and Massachusetts were examples of only extensive amendments to resolutions or bills. Natelson's example from New Jersey was in 1780 and involved the following resolution (emphasis added):

> That it is the Opinion of this Committee, that the Act for the Limitation of Prices, and to prevent the with-holding the Necessaries of Life from Sale,

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144 33 Journals of the Continental Congress, 1774-1789 548-49 (Worthington C. Ford et al. eds, 1904-37) (Friday, September 28, 1787).

145 Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution* 2009 (2) U. ILL. L. REV. 467-68 (2009) [hereinafter *Maggs, Concise Guide*].

146 *Natelson, Origination Clause, supra* note 1, at 682-86

147 *Id.* at 682, n.247.

148 *Id.* at 683.

> already agreed to be gone into at this Sitting, *will be sufficient to enable the Purchasers for the Army to procure all the Flour which this State will be able to furnish*.

Someone proposed an amendment that replaced the resolution except for the line, "will be sufficient to enable the Purchasers for the Army to procure all the Flour which this State will be able to furnish."[149] So, as the amendment kept the original resolution's directive to get purchasers for the Army enough flour for the state to furnish, the amendment was not a complete substitute.

Natelson's example from North Carolina occurred in 1777 when someone proposed an amendment to the following resolution (emphasis added):

> This House have resolved that the *Treasurers of this State be allowed* after the rate of five hundred pounds each per annum during their continuance in office *for the ensuing year in lieu and satisfaction of all services as Treasurers*.

The amendment read as follows (emphasis added):

> Resolved that the two *Treasurers of this State* hereafter chosen *be allowed* the sum of five hundred pounds each per annum *for the ensuing year*, *in lieu and satisfaction of all services as Treasurers*.[150]

The amendment avoided being a complete substitute by keeping the original resolution's stipulation that "Treasures of this State … be allowed" a certain payment "for the ensuing year … in lieu and satisfaction of all services as Treasurers."

Natelson's example from Pennsylvania involved a resolution in 1785 that called for "the appointment of a committee 'to bring in a bill directing the commissioners of the city and several counties in this state' to make out an assessment roll." According to Natelson, someone completely replaced this resolution by proposing "[that] the assessment roll … [instead] be prepared 'by each county within this state'" along with some "technical changes."[151] However, these amendments avoided completely replacing the resolution because the amendments kept the original resolution's overall directive that the legislature should appoint a committee to propose a bill that would direct state officials to make an assessment roll.

Regarding the Massachusetts legislature, Natelson noted there are few available records. He analyzed only one volume of journals, which was from 1784. This volume noted the senate so "[h]eavily amended" many of the house's money bills that the house had to write the original bills as "new draft[s]." Natelson suggested these new drafts must have amounted to complete substitutes. However, Natelson thereby assumed the new drafts excluded significant provisions from the original bills. Just because a bill became a "new draft" after extensive amendments does not mean "all the language in … [that] bill … after the enacting clause … was removed and replaced with new language."[152] Accordingly, Natelson's evidence from

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149 *Id.* at 683-84.
150 *Id.* at 684.
151 *Id.* at 685-86.
152 *Id.* at 686.

Massachusetts shows only that the legislature permitted extensive amendments to bills.

2. My Evidence

There is significant evidence regarding the original understanding of the scope of an amendment from debates in state legislatures about the new constitution. I searched *The Documentary History of the Ratification of the Constitution*, the primary source of these debates, for occurrences of amend and words with the root of amend near the word confederation or other words with the root of "confed." I also examined *Farrand's Records*, which contains some speeches given during these debates. I found the following relevant records from the legislatures of Pennsylvania, New York, and Maryland.

a. Pennsylvania Legislature

As mentioned earlier, on September 28, 1787, and without having received word of the approval by the Confederation Congress of the new constitution, the House of Representatives of Pennsylvania began debating the propriety of calling for a state convention that would consider ratifying the new constitution. Anti-Federalists Robert Whitehill and William Findley asked the House to await the official paperwork from Congress before proceeding. These assemblymen claimed the new constitution was an alteration to the Articles of Confederation because the framers were "limited to act federally … [and] acted federally" and the new constitution was on "federal ground." By saying the new constitution was on "federal ground," Whitehill and Findley most likely meant the constitution formed a government system in which states maintain independence from a national government. According to Whitehill and Findley, as the new constitution altered the Articles, Pennsylvania had to follow the rules for altering the Articles in Article 13, including the rule that the Confederation Congress must approve any alterations before state legislatures do so.[153] Thereby, both assemblymen implied the new constitution was not a complete substitute to the Articles because the new constitution preserved some essential aspects of the Confederation.

Several Federalists opposed Whitehill's and Findley's argument, claiming Pennsylvania could approve the new constitution before the Confederation Congress. These assemblymen said that, because the new constitution was not an alteration or amendment to the Articles, no states should follow Article 13. For instance, Assemblyman William Robinson said the new constitution was "new ground," "a different organization [than the Articles]," and "no alteration of any particular article of the Confederation, which is the only thing provided for." Robinson added the Convention "did not think of amending and altering the present Confederation, for they saw the impropriety of vesting one body of men [the Confederation Congress] with the necessary powers." Assemblyman Thomas Fitzsimmons asked Findley if he "ever looked at the new Constitution? If he has, he will see it is not an alteration of an article in the old, but that it departs in every principle from the other." Fitzsimmons further said the framers "found the Confederation … so decayed that it was impossible to graft a useful article upon it." Assemblyman Hugh

[153] Assembly Debates, A.M., *reprinted in* Documentary History Digital, *supra* note 31.

Brackenridge added the new constitution was "not on federal ground but on the wild and extended field of nature, unrestrained by any former compact[.]"[154] In other words, a new social contract in the form of the new constitution should not be restrained by rules from the Articles.

Despite these differences between Whitehill's and Findley's argument and the other assemblymen's arguments about whether the new constitution altered or amended the Articles, all the assemblymen agreed an alteration or amendment could not be a complete substitute. For Whitehill and Findley, if the new constitution had not, in their opinion, preserved aspects of the Confederation that maintained state independence from a national government, then the new constitution would not have qualified as an alteration to the Articles. For the other assemblymen, such as Robinson, if the new constitution contained at least one alteration of "any particular article of the Confederation," then the new constitution could have qualified as an alteration or amendment to the Articles.

Interestingly, a few days after making their above arguments, Whitehill and Findley signed "The Address of the [Sixteen] Seceding Assemblymen," mentioned earlier, in which 16 legislators from Pennsylvania described their opposition to the new constitution.[155] This address said that, instead of "amend[ing] … the present Confederation," the Convention "annihilate[d] the … Confederation and form[ed] a constitution entirely new[.]"[156] Thus, Whitehill and Findley evidently changed their minds about whether the new constitution altered the Articles.

It appears Whitehill's and Findley's original argument that the new constitution altered or amended the Articles was only a delay tactic. These assemblymen were probably trying to delay a vote regarding the new constitution so they would have time to convince other assemblymen to oppose the new constitution. Historians have noted that, after the Philadelphia Convention proposed the new constitution, Federalists in Pennsylvania rushed to ratify the constitution while Anti-Federalists scrambled to prevent a blitzkrieg.[157]

b. New York Legislature

On January 31, 1788, the New York State Assembly debated a resolution that stated a state convention should consider ratifying the new constitution. Representative Cornelius Schoonmaker wanted to amend the resolution by adding, among other statements, that "[the] Convention … instead of revising and reporting alterations and provisions in the Articles of Confederation, have reported a new Constitution for the United States[.]"[158] Representative Samuel Jones agreed with Schoonmaker, saying "ought we not … inform the people [about] the grounds on which the Convention have proceeded? That they had gone beyond their powers, and instead of amending the Confederation, had framed a new Constitution." Other representatives, such as Egbert Benson and Richard Harison, claimed Schoonmaker's amendment

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154 *Id.*

155 3 Complete Anti-Federalist, *supra* note 32, at 11.

156 The Address of the Seceding Assemblymen, *reprinted in* Documentary History Digital, *supra* note 31.

157 *See, e.g.,* David J. Siemers, The Antifederalists: Men of Great Faith and Forbearance 149-50 (2003).

158 Assembly Proceedings, Thursday, 31 January 1788 (excerpt), *reprinted in* Documentary History Digital, *supra* note 31.

unnecessarily biased people against the new constitution. Benson even suggested, but without elaboration, that the Convention had not exceeded its power by proposing the new constitution. Thus, it is unknown if Benson meant that an amendment could be a complete substitute, that the new constitution preserved enough of the Articles to qualify as an amendment, or that *Salus Populi* or *Necessitas* authorized the new constitution. Regardless, Schoonmaker's amendment lost 25 to 27, and the original resolution passed with related resolutions.[159]

A similar episode occurred when the Senate considered the Assembly's above resolution to hold a state convention. Senator Robert Yates, being consistent with the understanding of amendment he expressed months earlier as a delegate to the Philadelphia Convention in his letter with Lansing to Governor Clinton, motioned for a committee to amend the resolution by adding an introduction similar to Schoonmaker's failed amendment. Senator James Duane objected that the Senate sends only bills and never resolutions to committee for amendment. Yates retorted that state residents should nevertheless know the framers "went beyond their powers" and "have not amended, but made a new system." But Duane, perhaps following Representative Benson's lead, claimed any amendment to the resolution stating that the Philadelphia Convention exceeded its powers would be biased and unnecessary. Duane threatened that "[h]e was ready … to prove … the Convention had not exceeded their powers." But Duane continued that "this is not a question to be decided here[.]" Thus, just as with Benson, Duane did not clarify if he thought an amendment could be a complete substitute, *Salus Populi* or *Necessitas* authorized the new constitution, or another argument. Yates' motion lost 7 to 12.[160] Nevertheless, these episodes in the Assembly and Senate indicate many legislators believed the new constitution completely replaced the Articles and thus was not an amendment.

c. Maryland Legislature

On November 29, 1787, which was two days after the Maryland legislature had called for a state convention to consider ratifying the new constitution,[161] Luther Martin gave a speech to the House of Delegates of Maryland that passionately opposed the new constitution. Martin was not a member of the House of Delegates, but he had represented Maryland in the Philadelphia Convention and even served on the Convention's committee that proposed the first draft of the Origination Clause.[162] The House had invited him to recount his experience in Philadelphia.

Among other declarations, Martin condemned the actions of his fellow framers, saying (emphasis added) "we, contrary to the purpose for which we were intrusted [sic], consider[ed] ourselves as master-builders, *too proud to amend our original government* [the Articles of Confederation] … [and] *demolish[ed] it entirely ... erect[ing] a new system of our own*[.]" Martin then warned the House as follows that, given this precedent, a national convention in the future could replace the new constitution:

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159 Newspaper Report of Assembly Debates, Thursday, 31 January 1788, *reprinted in* Documentary History Digital, *supra* note 31.

160 Newspaper Report of Senate Debates Friday, 1 February 1788, *reprinted in* Documentary History Documentary History Digital, *supra* note 31.

161 *Maggs, Concise Guide, supra* note 145, at 468.

162 William L. Reynolds II, *Luther Martin, Maryland and the Constitution*, 47(1) Md. L. Rev. 291, 298 (1987).

> [A] short time might show the new system as defective as the old [Confederation], perhaps more so. Should a convention be found necessary again, if the members thereof, acting upon the same principles, instead of amending and correcting its defects, should demolish that entirely, and bring forward a third system, that also might soon be found no better than either of the former; and thus we might always remain young in government, and always suffering the inconveniences of an incorrect, imperfect system.[163]

Besides Martin's speech, there are evidently no other published debates from the House that day about whether a state convention should ratify the constitution.[164] It is unknown how delegates reacted to Martin. Regardless, because such a prominent and influential Marylander as Martin thought that an amendment to the Articles could not be a complete substitute, at least some delegates most likely had shared this view.

3. Summary of the State Legislatures

Natelson's evidence from state legislatures during the founding era that amendments could be complete substitutes amounted to two examples of complete substitutes to resolutions, both of which were from the Virginia legislature. All of Natelson's examples of complete substitutes from the legislatures of New Jersey, North Carolina, Pennsylvania, and Massachusetts were examples of only extensive amendments to resolutions or bills.

From debates in state legislatures about the new constitution, I found significant evidence that legislators—Federalists and Anti-Federalists alike—thought an amendment to the Articles of Confederation could not be a complete substitute. For instance, in Pennsylvania, William Robinson argued the new constitution was "new ground" and therefore "no alteration of any particular article of the Confederation, which is the only thing provided for." Also, in New York, many legislators wanted to amend a resolution to declare the Philadelphia Convention violated its alteration power by proposing the new constitution. Other legislators who opposed this amendment declared, without elaboration, that the Convention did not exceed its power. It is possible these legislators thought, as some argued in the Confederation Congress, that *Salus Populi* or *Necessitas* authorized the new constitution. Furthermore, in Maryland, Luther Martin articulated what was most likely the view of at least some delegates that the new constitution was a complete substitute to the Articles and thus not an amendment.

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163 3 Farrand's Records, *supra* note 87, at 180.

164 *See, e.g.,* Early State Records Online, Maryland State Archives, *available at* http://aomol.msa.maryland.gov/html/legislative2.html. The journals of the House of Delegates did not document any reactions to Martin's speech. *See* Thursday, November 29, 1787, and November 30, 1787, in Votes and Proceedings of the House of Delegates of the State of Maryland, November Session, 1787, *available at* http://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/003197/html/m3197-0802.html

E. State Conventions

Leading up to the state conventions, the preponderance of evidence shows members of the British parliament, Philadelphia Convention, Confederation Congress, and state legislatures consistently suggested amendments could not be complete substitutes. For example, in 1736, a member of the British parliament said, regarding amendments to a bill, "altering the whole [of the bill] … cannot be done … for … the Bill would then be a new Bill." Also, Anti-Federalists, such as John Lansing of the Philadelphia Convention, R.H. Lee of the Confederation Congress, and Representative Cornelius Schoonmaker of the New York Assembly, suggested an amendment to the Articles of Confederation could not be a complete substitute. Even some Federalists, such as James Madison of the Confederation Congress, suggested the amendment power disallowed the proposal of the new constitution. Madison said *Salus Populi* authorized the proposal.

On November 20, 1787, Pennsylvania became the first state to convene to consider ratifying the new constitution.[165] By December 7 of that year, Delaware was the first state to ratify.[166] On May 29, 1790, Rhode Island became the last of the 13 states of the Confederation to ratify the constitution.[167]

1. Natelson's Evidence

Natelson's primary evidence from the 13 state conventions that the original understanding of the scope of an amendment permits complete substitutes was Anti-Federalist William Grayson's comments in the Virginia Convention about the Origination Clause. Grayson said that, as an amendment to a House bill for raising revenue, "[t]he Senate could strike out every word of the bill, except the word whereas, or any other introductory word, and might substitute new words [and a new bill for raising revenue] of their own."[168] Natelson noted how James Madison then tempered Grayson's comment by saying "[Grayson] says, that there is no difference between the right of originating bills, and proposing amendments. There is some difference, though not considerable."[169] Zotti and Schmitz, in their article on the Origination Clause discussed earlier, noted Madison further declared, in response to Grayson's argument, that "I suppose the first part of the [Origination] [C]lause [i.e., the requirement that all revenue bills must originate in the House of Representatives] is sufficiently expressed to exclude all [of Grayson's] doubts [that the Senate is unable to originate its own revenue bills as complete substitutes to House revenue bills]. Zotti and Schmitz thus implied that Madison actually contradicted Grayson and declared Senate amendments to House bills for raising revenue could not be complete substitutes that are new bills for raising revenue.[170]

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165 George J. Graham, Jr., *Pennsylvania: Representation and the Meaning of Republicanism*, in Ratifying the Constitution 52 (Michael Allen Gillespie & Michael Lienesch eds., 1989) [hereinafter Ratifying].

166 Gaspare J. Saladino, *Delaware: Independence and the Concept of a Commercial Republic*, in Ratifying, *supra* note 165, at 29.

167 Michael Allen Gillespie and Michael Lienesch, *Introduction*, in Ratifying, *supra* note 165, at 17.

168 *Natelson, Origination Clause, supra* note 1, at 704.

169 *Id.*

170 *Zotti & Schmitz, Origination Clause*, *supra* note 43, at 115.

Natelson also cited an example of a complete substitute in the North Carolina Convention. As Natelson documented, in 1788, some delegates to the North Carolina Convention proposed an amendment that completely replaced a resolution to adopt the new constitution with another advocating for amendments to the new constitution. The Convention permitted the proposal of the amendment, but the amendment failed to pass.[171]

2. My Evidence

My article found significant evidence from state conventions that shows the dominant view among the ratifiers was that an amendment to the Articles of Confederation could not be a complete substitute. My evidence is consistent with the evidence of the original understanding of the Origination Clause presented in Zotti's and Schmitz's article. Their article documented many comments by ratifiers suggesting the ratifiers did not contemplate the possibility that the Senate could originate its own revenue bills as complete substitutes to the House's revenue bills. As one of Zotti's and Schmitz's examples, James Wilson of the Pennsylvania Convention said "[t]he two branches [the House and Senate] will serve as checks upon the other; they have the same legislative authorities, except in one instance. Money bills must originate in the House[.]"[172]

To find my evidence that ratifiers thought an amendment to the Articles could not be a complete substitute, I searched *Elliot's Debates*[173] and *The Documentary History of the Ratification of the Constitution* for occurrences of amend and words with the root of amend near the words Articles of Confederation or any words with the root of "confed." I discovered numerous relevant records from the conventions in Pennsylvania, Massachusetts, South Carolina, Virginia, New York, and North Carolina.

a. Pennsylvania Convention

Two ratifiers in the Pennsylvania Convention argued an amendment to the Articles could not be a complete substitute. On November 26, 1787, the Pennsylvania Convention was several days into debating the new constitution. Anti-Federalist Robert Whitehill, who during the debates about the new constitution in the Pennsylvania legislature claimed the Philadelphia Convention had properly altered the Articles, now argued the contrary. He said that the Philadelphia Convention was supposed to have only "give[n] more powers to [the Confederation] Congress" and that "[a new] general government was not thought of." Whitehill added that "[t]he Convention … made a plan of their own" and thereby "assumed the power of proposing."[174] Two days later, Whitehill further argued that "[t]he present [new] Constitution is a violation of our engagements under the Confederation. No state nor Convention had such powers."[175]

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171 *Natelson, Origination Clause, supra* note 1, at 685.

172 *Zotti & Schmitz, Origination Clause*, *supra* note 43, at 136.

173 Elliot's Debates, *supra* note 106.

174 Convention Debates, Monday, 26th Nov., 1787, P.M., *reprinted in* Documentary History Digital, *supra* note 31.

175 Convention Debates, November 28, 1787, *reprinted in* Documentary History Digital, *supra* note 31.

On December 4, Federalist James Wilson conceded the new constitution, which he viewed as totally different from the Articles, was based on "no power at all," including the Philadelphia Convention's amendment power. Wilson claimed the new constitution was only a proposal from "a private pen" for people to consider.[176] This argument was consistent with Wilson's argument in the Philadelphia Convention that alterations to the Articles must preserve at least the independence of states from a national government found in the Confederation. After all, the new constitution contained no provision such as the 10th Amendment, which was not ratified until several years later in 1791 and which reads, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[177]

In the same speech, Wilson reiterated how an amendment to the Articles could not be a complete substitute by telling the following story about Alexander Pope, the eighteenth-century poet and a hunchback:

> It was customary with him [Pope] to use this phrase; "God mend me!" when any little accident happened. One evening, a link-boy was lighting him along [with a torch], and, coming to a gutter, the boy jumped nimbly, over it. Mr. Pope called to him to turn, adding, "God mend me!"" The arch rogue [boy], turning to light him, looked at him, and repeated, "God mend you! He would sooner make half-a-dozen new ones."

Wilson added that "[t]his [story] would apply to the present [Articles of] Confederation; for it would be easier to make another [constitution] than to amend [the Articles.]"[178]

At the close of the Pennsylvania Convention, 21 members signed "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents." Newspapers throughout the country published the dissent, which said, among other arguments, that the framers "were not appointed for the purpose of framing a new form of government, but … were expressly confined to altering and amending the present articles of confederation."[179]

b. Massachusetts Convention

The Massachusetts Convention featured several comments arguing the new constitution amounted to a complete substitute to the Articles and thus was not an amendment. On January 18, 1788, General William Thompson argued Massachusetts should avoid adopting the new constitution until more states did so. Thompson noted the framers "were sent [to Philadelphia] … to amend this Confederation; but they made a new creature; and the very setting out of it is unconstitutional."[180]

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176 2 Elliot's Debates, *supra* note 106, at 470.

177 U.S. Const. amend. X.

178 2 Elliot's Debates, *supra* note 106, at 470.

179 Dissent of the Minority of the Convention, 18 December 1787, *reprinted in* Documentary History Digital, *supra* note 31.

180 2 Elliot's Debates, *supra* note 106, at 61.

On January 23, Thompson reiterated his above point as follows:

> It is my wish she [Massachusetts] may be one of the … dissenting states [to the new constitution]; then we shall be on our old ground [the Articles], and shall not act unconstitutionally. Some people cry, It [sic] will be a great charge; but it will be a greater charge, and be more dangerous, to make a new one. Let us amend the old Confederation.[181]

For Thompson, the new constitution could have been constitutional if it preserved some of the Articles' "old ground."

Another comment occurred on February 5 when Nathaniel Barrell claimed the new constitution, although "not … the most perfect system," was justified as follows:

> I am convinced the Confederation is essentially deficient, and that it will be more difficult to amend that [Articles] than to reform this [new constitution]; and as I think this [new] Constitution, with all its im] perfections, is excellent, compared with that [confederation], and … is the best constitution we can now obtain.[182]

Here, Barrell referred to the Articles and the new constitution as different documents. He did not say the new constitution was an amendment to the Articles, but he suggested the Articles was unamendable.

c. South Carolina Convention

Two ratifiers in the South Carolina Convention argued the new constitution amounted to a complete substitute to the Articles and thus was not an amendment. On January 16, 1788, Charles Pinckney argued for the new constitution but said the following (emphasis added):

> Those [at the Philadelphia Convention] who had seriously contemplated the subject [of amending the Articles of Confederation] were fully convinced that *a total change of system was necessary--that, however the repair of the Confederation might for a time avert the inconveniences of a dissolution, it was impossible a government of that sort could long unite this growing and extensive country*. They also thought that the public mind was fully prepared for the change …. Under these momentous impressions the Convention met, when the first question that naturally presented itself to the view of almost every member … *was the formation of a new [constitution], or the amendment of the existing system [Confederation]*…. [T]he states were unanimous in preferring a change. They wisely considered that, though the Confederation might possess the great outlines of a general government, yet that it was, in fact, nothing more than a [weak] federal union…. It was sufficient to remark that

[181] *Id.* at 80.
[182] *Id.* at 161.

> the Convention saw and felt the *necessity of establishing a government upon different principles*, which, instead of requiring the intervention of thirteen different legislatures between the demand and the compliance, should operate upon the people in the first instance.[183]

Pinckney thus claimed the new constitution, "a total change [to the Articles]," was necessary because amending the Confederation proved impossible. These remarks were consistent with his comment in the Philadelphia Convention that an amendment to the Articles could not be a complete substitute.

The next day, Anti-Federalist Rawlins Lowndes said states should hold another national convention to "add strength to the old Confederation, instead of hastily adopting another [the new constitution.]" He also asked, in reference to the replacement of the Articles with the new constitution by the Philadelphia Convention, "whether a man could be looked on as wise, who, possessing a magnificent building, upon discovering a flaw, instead of repairing the injury, should pull it down, and build another." According to convention notes, Lowndes "could not understand with what propriety the [Philadelphia] Convention proceeded to change the Confederation; for … the sole object of appointing a convention was to inquire what alterations were necessary in the Confederation[.]" Perhaps feeling outnumbered, Lowndes concluded with a "glowing eulogy on the old Confederation[.]"[184]

d. Virginia Convention

On June 4, 1788, two days into the Virginia Convention, several ratifiers opined that the new constitution was totally different from, and thus not an amendment to, the Articles. For instance, Anti-Federalist Patrick Henry wanted the Virginia Convention to hear readings of government documents from before the Philadelphia Convention that showed officials had expected the Philadelphia Convention to revise—not entirely replace—the Articles. Judge Edmund Pendleton objected that these readings would be irrelevant to the Virginia Convention's mission to discuss the new constitution's propriety. However, as follows, Pendleton conceded that the Philadelphia Convention's revision power disallowed complete substitutes: "[T]hose Gentlemen [the framers] were only directed to consider the defects of the old system … not devise a new one[.] [But] they found … [the confederation] so thoroughly defective as not to admit a revision, and submitted a new system[.]"[185]

Throughout that day, Henry called the new constitution many names, including "an entire alteration of government," "a proposal that goes to the utter annihilation of the [confederation]," and "a proposal to sever … [the] confederacy."[186] Henry said the framers "exceeded their power … [as they] ought to have amended the old system; for this purpose they were solely delegated."[187] Even Federalist Edmund Randolph agreed with Henry's rhetoric, claiming the framers, "[o]n a thorough contemplation of the subject," found the Confederation "impossible to amend" and therefore "suggested … a new plan."[188]

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183 4 Elliot's Debates, *supra* note 106, at 255-56.
184 *Id.* at 290.
185 3 Elliot's Debates, *supra* note 106, at 6.
186 *Id.* at 21-22.
187 *Id.* at 23.
188 *Id.* at 26-27.

June 6 saw more such comments by Henry, Randolph, and James Madison. In the following passage, Henry warned that, given what he viewed as the violation by the Philadelphia Convention of its revision power, Virginians who will attend a future U.S. Congress under the new constitution could similarly abuse their powers:

> When we trusted the great object of revising the Confederation to the greatest, and best, and most enlightened, of our [Virginia's] citizens, we thought their deliberations would have been solely confined to that revision. Instead of this, a new system, totally different in its nature, and vesting the most extensive powers in Congress, is presented. Will the ten men [Virginians] you are to sent [sic] to [the U.S.] Congress be more worthy than those seven [men who represented Virginia in the Philadelphia Convention] were? If power grew so rapidly in their hands, what may it not do in the hands of others?[189]

Thereby, Henry suggested the new constitution amounted to a complete substitute and thus was not a valid revision to the Articles.

Randolph suggested, with the following remarks, that nothing from the Articles was amendable:

> I come now … to the great inquiry, whether the Confederation be such a government as we ought to continue under…. Did I believe the Confederation was a good thread, which might be broken without destroying its utility entirely, I might be induced to concur in putting it together [with amendments]—but, I am so thoroughly convinced of its incapacity to be mended or spliced, that I would sooner recur to any other expedient…. The Confederation is, of all things the most unsafe, not only to trust to in its present form, but even to amend. [190]

For emphasis, Randolph added that no part of the Articles "deserves to be retained" and that the Confederation was now "an old benefactor."[191] Randolph had the perfect opportunity to argue that the Convention had amended the Articles by completely replacing it with the new constitution, but he did not.

James Madison discussed how similar the "feeble" Confederation was to other confederacies in history that he considered ineffective, such as the Achaean League of Greek states. In the following quote, Madison did not use the words amend, alter, or revise, but he implied the new constitution was a complete replacement—not an amendment and thus a continuation—of the "fatal" Articles (emphasis added):

> If we recur to history, and review the annals of mankind, I undertake to say that no instance can be produced … of any confederate government that will justify a *continuation* of the present system [i.e., the Articles], or that will not demonstrate the necessity of *this change*, *and of substituting, for*

[189] *Id.* at 144.
[190] *Id.* at 80.
[191] *Id.* at 83, 84.

> *the present pernicious and fatal plan, the system now under consideration [i.e., the new constitution], or one equally energetic.*[192]

Of course, this argument contradicted Madison's argument as Publius that the new constitution was an extensive alteration—not a complete substitute—to the Articles. Nevertheless, both arguments suggested an amendment could not be a complete substitute.

William Grayson provided the Virginia Convention's most intriguing comments regarding how an amendment to the Articles could not be a complete substitute. Of course, Natelson's argument depends significantly on Grayson's comment on June 14 that bill amendments could be complete substitutes, even though Madison immediately contradicted this comment.

Grayson made several comments before June 14 suggesting he thought differently regarding amendments to the Articles. For example, on June 11, Grayson said the Articles' "defects ... cannot be removed but by death," but if men are "capable of freedom and good government," then the Articles "should [nevertheless] be amended."[193] Grayson thereby said only the Articles' death could remove its defects, precluding the possibility that a complete substitute could do so. Grayson then argued that, if men are incapable of freedom and "can only be governed by force," then the country should "adopt the following government" instead of amending the Articles:

> [H]ave a President for life, choosing his successor at the same time; a Senate for life, with the powers of the House of Lords; and a triennial House of Representatives, with the powers of the House of Commons in England.[194]

Here, Grayson gave the options of amending the Articles or adopting his new, powerful government. He did not say the Convention could create his new government by amending the Articles.

Finally, late in the Convention on June 24 when Grayson argued Virginia should properly amend the new constitution before ratification, he said, "[t]he late Convention were not [even] empowered totally to alter the present Confederation. The idea was to amend. If they lay before us a thing quite different, we are not bound to accept it."[195] Here, Grayson distinguished between amending and totally altering the Articles, and he directly contradicted his statement 10 days earlier about how bill amendments could be complete substitutes. This contradiction proves Grayson was unsettled about the meaning of amend, as he used this word differently for bills than the Articles. Therefore, Grayson's contradictory comments, coupled with Madison's immediate contradiction of Grayson when he said Senate amendments to House revenue bills could be complete substitutes, nullify the importance of all of Grayson's comments regarding the meaning of amendment.

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192 *Id.* at 129.
193 *Id.* at 273, 278.
194 *Id.* at 279.
195 *Id.* at 614.

e. New York Convention

Two ratifiers in the New York Convention suggested an amendment to the Articles could not be a complete substitute. On June 19, 1788, two days into the New York Convention, Federalist Robert Livingston explained why the Philadelphia Convention proposed the new constitution as follows (emphasis added):

> [A] change … [was] necessary in the form of the government[.] [W]e could no longer retain the old principle of the confederacy, and were compelled to change its form, *we were driven to the necessity of creating a new constitution, and could find no place to rest upon in the old Confederation*[.][196]

So, since the Philadelphia Convention thought nothing of the Confederation was salvageable, Livingston suggested the new constitution was a departure from—not an amendment to—the Articles.

The next day, Federalist Alexander Hamilton argued that, given the Articles' concentration of all national power in the Confederation Congress,[197] the Philadelphia Convention appropriately replaced the Articles with the new constitution. He said the following (emphasis added):

> [I]t appears to me extraordinary, that, while gentlemen in one breath acknowledge that the old Confederation requires many material *amendments*, they should in the next deny that its defects have been the cause of our political weakness…. *Shall we take the old Confederation, as the basis of a new system? ... Certainly not.* Will any man, who entertains a wish for the safety of his country, trust the sword [the power to declare war] and the purse [the power to tax] with a single assembly [the Confederation Congress] organized on *principles so defective--so rotten*? Though we might give to such a government certain powers with safety, yet to give them the full and unlimited powers of taxation and the national forces, would be to establish a despotism; the definition of which is, a government in which all power is concentred [sic] a single body. *To take the old Confederation, and fashion it upon these principles, would be establishing a power which would destroy the liberties of the people.* These considerations show clearly that *a government totally different must be instituted*. They had weight in the Convention who formed the *new system*…. *The fundamental principle of the old Confederation is defective; we must totally eradicate and discard this principle before we can expect an efficient government.*[198]

However, Hamilton thereby advocated for the new constitution, a "government totally different [from the Confederation]," over any amendment to the Articles, suggesting he did not think a complete substitute could be an amendment. By saying the country must eradicate the "fundamental principle of the old Confederation …

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196 2 Elliot's Debates, *supra* note 106, at 215.

197 The Articles of Confederation did not create an executive or a judicial branch. Only the Confederation Congress, which had such powers as the powers to engage in war and coin money, made national decisions.

198 2 Elliot's Debates, *supra* note 106, at 231, 233-34.

before we can expect an efficient government," Hamilton indicated he may have been open to amendments that preserved the Articles' less fundamental principles. This argument was similar to his arguments as Publius that suggested an amendment could preserve only secondary or minor parts of the Articles.

f. North Carolina Convention

As discussed earlier, Natelson found an example of a complete substitute to a resolution in the North Carolina Convention. However, as with other state conventions, this convention featured several comments that suggested an amendment to the Articles of Confederation could not be a complete substitute. On July 23, 1788, William Davie argued for ratification of the new constitution but made this point (emphasis added):

> *The business of the [Philadelphia] Convention was to amend the Confederation by giving it additional powers.* The present form of Congress being a single body, it was thought *unsafe* to augment its powers, without altering its organization. [So the Convention created a new constitution.] [*But] [t]he act of the Convention is but a mere proposal, similar to the production of a private pen*.[199]

Davie thereby implied the new constitution was so different from the Confederation that the new constitution was a "mere proposal" and not an amendment.

In the following passage from July 30, Anti-Federalist William Lenoir lambasted the new constitution as a violation of the Philadelphia Convention's amendment power (emphasis added):

> When we consider this system collectively [the new constitution], *we must be surprised to think that any set of men, who were delegated to amend the Confederation, should propose to annihilate it; for that and this system are utterly different, and cannot exist together.*… [I]t appears to me, and every other member of this committee, that *they [the framers] exceeded their powers*. *Those gentlemen had no sort of power to form a new constitution altogether[.]*[200]

Lenoir then warned that, given what he viewed as this precedent for permitting an amendment to be a complete substitute, "it may be thought proper, by a few designing persons, to destroy it [the new constitution], in a future age, in the same manner that the old system [the confederation] is laid aside."[201]

Federalist Richard Spaight opposed Lenoir's argument that the Philadelphia Convention exceeded its power. Spaight, who attended the Philadelphia Convention, made this argument (emphasis added):

> I deny the [Lenoir's] charge [that the framers exceeded their powers]. We were sent with *a full power to amend the existing system*. This involved

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199 4 Elliot's Debates, *supra* note 106, at 23.
200 *Id.* at 201.
201 *Id.* at 203.

> every power to make every alteration necessary to meliorate and render it perfect. It cannot be said that we arrogated powers altogether inconsistent with the object of our delegation. There is a clause which expressly provides for future amendments, and it is still in your power. *What the Convention has done is a mere proposal. It was found impossible to improve the old system without changing its very form*; for by that system the three great branches of government are blended together [into the Confederation Congress]. All will agree that the concession of a power to a government so constructed is dangerous. *The proposing a new system ... arose from the necessity of the case.*[202]

However, Spaight thus borrowed William Davie's earlier argument that the new constitution was not an amendment but rather a "mere proposal" based on the situation's necessity.

3. Summary of the State Conventions

Natelson presented evidence from state conventions that ratifiers thought amendments could be complete substitutes. His evidence amounted to 1) William Grayson's remark on June 14, 1788, in the Virginia Convention, to which Madison immediately objected, that the Senate's power to amend House bills for raising revenue permits complete substitutes and 2) an example of a complete substitute to a resolution in the North Carolina Convention.

My evidence from state conventions suggests the dominant view among the ratifiers—Federalists and Anti-Federalists alike—was that an amendment to the Articles could not be a complete substitute. For instance, in the Massachusetts Convention, General William Thompson said the framers "were sent [to Philadelphia] … to amend this Confederation; but they made a new creature[.]" In the Virginia Convention, Grayson even later contradicted his above statement that amendments could be complete substitutes. When discussing the new constitution's propriety on June 24, Grayson claimed the new constitution "totally … alter[ed]" the Articles and thus was not an amendment. Such remarks by Thompson and Grayson were predictable given the wealth of evidence from the British parliament, Philadelphia Convention, Confederation Congress, and state legislatures indicating amendments could not be complete substitutes. Thus, the preponderance of evidence from the state conventions suggests the original understanding of the scope of an amendment disallows complete substitutes.

IV. Conclusion

My examination of founding-era dictionaries and analysis of various writings from the ratification period discovered the original public meaning of amendment in the Origination Clause. This meaning of amendment is a change or alteration to something that must 1) be germane to that something, 2) preserve at least the

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202 *Id.* at 206-07.

essence of a significant part of the substance of that something (a "significant part" being a distinct portion that served a function within that something), and 3) make that something transform from bad to better.

Natelson argued the original understanding of the scope of an amendment permits complete substitutes. His evidence amounted to 1) William Grayson's remark at the Virginia Convention, to which Madison immediately objected, that the meaning of the word amendment in the Origination Clause permits complete substitutes, 2) an example of a complete substitute to a resolution during the North Carolina Convention, and 3) two examples of complete substitutes to resolutions in the Virginia legislature.

However, as shown in my article, the preponderance of evidence leading up to and from the state conventions suggests the original understanding of the scope of an amendment actually disallows complete substitutes. For one, in the decades leading up to the founding, members of the British parliament consistently suggested bill amendments could not be complete substitutes, such as in 1736 when a lord said a bill amendment could never alter the whole of a bill because "the Bill would then be a new Bill." Also, much evidence from the Philadelphia Convention, Confederation Congress, state legislatures, and state conventions suggests the dominant view among the founders was that an amendment to the Articles of Confederation could not be a complete substitute. For instance, in the Philadelphia Convention, James Wilson explained what he believed was the limit of the scope of the Convention's alteration power. "[E]very article [of the Articles] may be totally altered," he said, "except that wh[ich] destroys the Idea of a confedy [confederation]." And late in the Virginia Convention, Grayson officially switched his position about the propriety of complete substitutes and argued the Philadelphia Convention "totally … alter[ed]" the Articles when "[t]he idea was to amend."

The original public meaning of the scope of an amendment provides a new definition of a complete substitute to a bill. As discussed earlier, Natelson's definition of a complete substitute focuses on whether an amendment preserves any exact language of a bill. He said a complete substitute occurs when (emphasis added) "*all the language* in a bill…after the enacting clause (or after some other clause very early in the text) [i]s removed and replaced with *new language*." However, according to the original public meaning of the scope of an amendment, a complete substitute occurs when every significant part of the substance of a bill, including the essence of every significant part, is removed and replaced with a new part(s).

It is therefore simple to determine if PPACA or any other amendment by the Senate to a House bill for raising revenue that is a new bill for raising revenue complies with the original public meaning of the scope of an amendment. One should ask if the given amendment preserved at least the essence of a significant part of the substance of the respective bill. PPACA, as the Senate's amendment to the House's Service Members bill, replaced every significant part of the substance of the Service Members bill, including the essence of every significant part, with new parts. PPACA preserved only the number of the Service Members bill, which was H.R. 3590 and which obviously served no function within the Service Members bill. PPACA thus was a complete substitute to the Service Members bill and violates the original public meaning of the scope of an amendment in the Origination Clause.

Appendix: Additional Ratification Records That Suggest Amendments Could Not Be Complete Substitutes

Source	Record	Excerpt (emphasis added)
Documentary History Digital, *supra* note 31.	1. Richard Henry Lee to George Mason, New York, October 1, 1787.	I might inform you how the Convention plan of Government was entertained by [the Confederation] Congress ... *Upon due consideration of the Constitution under which we now Act, some of us were clearly of opinion that the 13th article of the Confederation [the alteration power] precluded us from giving an opinion concerning a plan subversive of the present system and eventually forming a New Confederacy[.]*
	2. Edward Carrington to Thomas Jefferson, New York, October 23, 1787.	I have been honoured with your favor of the 4th. of August. *Inclosed [sic] you will receive a Copy of the report of our late federal Convention, which presents, not amendments to the old Confederation, but an entire new Constitution.*
	3. The Impartial Examiner I, *Virginia Independent Chronicle*, February 20, 1788.	[Arguing against the new constitution, the Impartial Examiner said the following:] To the free people of VIRGINIA. Countrymen and Fellow-Citizens…. that this system [the Articles] has prevailed but a few years; and now already *a change, a fundamental change [the new constitution]* therein is meditated…. *The best regulated governments have their defects, and might perhaps admit of improvement: but the great difficulty consists in clearly discovering the most exceptionable parts and judiciously applying the amendments.* A wise nation will, therefore, attempt innovations of this kind with much circumspection. *They will view the political fabric, which they have once reared, as the sacred palladium of their happiness;—they will touch it, as a man of tender sensibility toucheth the apple of his eye,—they will touch it with a light, with a trembling—with a cautious hand,—lest they injure the whole structure in endeavoring to reform any of its parts. In small and trivial points alterations may be attempted with less danger; but—where the very nature, the essence of the thing is to be changed: when the foundation itself is to be transformed, and the whole plan entirely new modelled;—should you not hesitate, O Americans?*

Source	Record	Excerpt (emphasis added)
Documentary History Digital, *supra* note 31.	4. A Federal Republican, *Norfolk and Portsmouth Journal*, March 5, 1788.	When these Deputies [in the Philadelphia Convention] met, *instead of confining themselves to the powers with which they were entrusted, they pronounced all amendments to the articles of Confederation wholly impracticable, and with a spirit of amity and concession truly remarkable! proceeded to form a government entirely new, and totally different in its principles and organization.*
	5. Federal Farmer, *Letters to the Republican*, November 8, 1787.	[Below, the Federal Farmer proclaimed that opponents of the new constitution should propose amendments to the new constitution or propose "some other system of government" as "a substitute." He did not suggest an amendment to the new constitution could be another entirely new constitution, and he thereby implied amendments could not be complete substitutes.] I admit improper measures are taken against the adoption of the system [the new constitution] as well as for it—all who object to the plan proposed ought to point out the defects objected to, *and to propose those amendments with which they can accept it, or to propose some other system of government, that the public mind may be known, and that we may be brought to agree in some system of government, to strengthen and execute the present, or to provide a substitute.*
	6. A Countryman I (Hugh Hughes), *New York Journal,* November 21, 1787.	[W]hen I consider the original Confederation, and Constitutions of the States which compose the Union, as well as the Resolutions of several of the States, *for calling a Convention to amend the Confederation, which it admits, but not a new one, I am greatly at a Loss to account for the surprizing [sic] Conduct of so many wise Men*, as must have composed that honorable Body. In fact, I do not know, at present, whether it can be accounted for; *unless it be by supposing a Predetermination of a Majority of the Members to reject their Instructions, and all authority under which they acted....* However, I do not even wish to think so unfavorably of the Majority; but rather, that several of them, were, by different Means, insidiously drawn into the Measures of the more artful and designing Members, who have long envied the great Body of the People, in the United States, the Liberties which they enjoy.
	7. A Citizen, *New York Journal*, November 24, 1787.	[T]he business of the conventioneers [in Philadelphia] was then evidently *not to form a new constitution for the United States, but to revise and amend the old one*, as far as was necessary and consistent with their delegation.

Source	Record	Excerpt (emphasis added)
Documentary History Digital, *supra* note 31.	8. A Countryman II (De Witt Clinton), *New York Journal*, December 13, 1787.	[While arguing against the new constitution by recalling a conversation with his neighbor, a Countryman said the following:] [H]e [my neighbor] said at the same time, that though my letter was very long, I had not been quite plain enough about one thing, for, he said, we should be careful not to give a bit more power to our rulers than we could well help; for they would always find a way to get more fast enough, and they knew how to keep it when they once had it, so that we could never get any part of it back again; and to prove what he said, he put me in mind, *that the convention was only sent to amend the old constitution, yet they sat about making a new one, though they had no power to do that at all[.]*
	9. The Republican Federalist I, *Massachusetts Centinel*, December 29, 1787.	[T]he delegates [to the Philadelphia Convention] of the State [of Massachusetts] were to *report measures not for abolishing but for preserving the articles of Confederation; for amending them*; and for increasing their powers consistently with the true republican spirit and genius thereof[.]
	10. Agrippa X, *Massachusetts Gazette*, January 1, 1788.	[Below, Agrippa argued for amending the Articles of Confederation instead of adopting the new constitution. This argument indicated he thought the new constitution was a complete substitute to the Articles and thus not an amendment.] *It is easier to amend the old confederation*, defective as it has been represented, *than it is to correct the new form* ... By adopting the form proposed by the [Philadelphia] convention, you will have the derision of foreigners, internal misery, and the anathemas of posterity. By amending the present confederation, and granting limited powers to Congress, you secure the admiration of strangers, internal happiness, and the blessings and prosperity of all succeeding generations. Be wise then, and by preserving your freedom, prove, that Heaven bestowed it not in vain.
	11. Samuel, *Independent Chronicle*, January 10, 1788.	*This [new] Constitution* does not wear the complexion of uniting the nation—but of dividing it. *Had we not much better keep on our old ground? The national covenant we are under [the Articles of Confederation], solemnly ratified to be perpetual, and amend that: It is, no doubt, as easy to amend that, as it will be to amend the new one*. And this I understand, was the sole purpose the federal Convention was appointed for, viz. *To revise the articles of confederation, not to destroy the covenant.* Why should we be fond of another revolution so soon? Why should we be fond of such an innovation?

Source	Record	Excerpt (emphasis added)
Documentary History Digital, *supra* note 31.	12. Ezra, *Massachusetts Centinel*, January 23, 1788.	Mr. PRINTER, The question with regard to the adoption or rejection of the [new] federal Constitution, now under consideration of the [Massachusetts] Convention, representing the several corporations of this Commonwealth, and now sitting in the town of Boston, is a question which ought to be maturely debated, and soberly judged upon; should this take place. *I imagine the result must be, a rejection of the [new] Constitution ... They (the people) are willing the federal Convention, should return to Philadelphia, and accomplish the business for which they were delegated, viz. to amend the Confederation.*
	13. Agrippa XVI, *Massachusetts Gazette*, February 5, 1788.	[Below, Agrippa argued that it would be better to amend the Articles of Confederation than to pass and then amend the new constitution. He referred to the new constitution as the "new constitution," "new one," and "proposed constitution." He stated the "confederation amended would be infinitely preferable to the proposed constitution." All this language suggests he thought the new constitution was a complete substitute to the Articles and thus not an amendment. Otherwise, he would have called the new constitution the "confederation amended."] I confess that I have yet seen *no sufficient reason for not amending the confederation*, though I have weighed the argument with candour. *I think it would be much easier to amend it than the new constitution*. But this is a point on which men of very respectable character differ ... Another reason which I had in stating the amendments to be made [to the new constitution], was to shew how nearly those who are for admitting the system with the necessary alterations, agree with those who are for *rejecting this system and amending the confederation*. In point of convenience, *the confederation amended would be infinitely preferable to the proposed constitution. In amending the former, we know the powers granted, and are subject to no perplexity; but in reforming the latter, the business is excessively intricate, and great part of the checks on Congress are lost.... If it [the new constitution] is rejected, the resolve should contain the amendations [sic] of the old system; and accepted, it [the resolve] should contain the corrections of the new one.*

Source	Record	Excerpt (emphasis added)
DOCUMENTARY HISTORY DIGITAL, *supra* note 31.	14. A Friend to Good Government, *Poughkeepsie Country Journal*, April 8, 1788.	[Below, a Friend to Good Government argued the new constitution preserved enough of the Articles of Confederation, including the union among states, to be a valid alteration and amendment.] [B]ut it was soon found even before the expiration of the war, that the confederation was too feeble, and very inadequate to the public exigencies.... *[T]his give [sic] rise to the Convention that framed the [new] Constitution*, in question; they were appointed by the State Legislatures, and *empowered by the letter of the authority under which they acted to report such alterations and amendments in the Confederation as would render the federal government adequate to the exigencies of government and the preservation of the Union—you will here perceive that the latitude given in the instruction, were amply large enough to justify the measures the Convention have taken. The objects in view were the welfare and preservation of the Union, and their business so far to new model our government as to encompass those objects.*
	15. A Plebeian, *An Address to the People of the State of New York*, April 17, 1788.	[Below, a Plebeian said that the new constitution was a "new form of government" that was "an *entire change* in the nature of our federal government." He implied that the new constitution was thus not an alteration to the Articles of Confederation.] Previous to the meeting of the convention, *the subject of a new form of government had been little thought of*, and scarcely written upon at all. *It is true, it was the general opinion, that some alterations were requisite in the federal system.* This subject had been contemplated by almost every thinking man in the union. It had been the subject of many well-written essays, and was the anxious wish of every true friend to America. *But it never was in the contemplation of one in a thousand of those who had reflected on the matter, to have an entire change in the nature of our federal government—to alter it from a confederation of states, to that of one entire government, which will swallow up that of the individual states.* I will venture to say, that the idea of a government similar to the one proposed, never entered the mind of the legislatures who appointed the convention, and of but very few of the members who composed it, until they had assembled and heard it proposed in that body: much less had the people any conception of such a plan until after it was promulgated.

Source	Record	Excerpt (emphasis added)
DOCUMENTARY HISTORY DIGITAL, *supra* note 31.	16. New York Federal Republican Committee (John Lamb) to Richard Henry Lee, New York, May 18, 1788.	[Below, the New York Federal Republican Committee said that alterations to the Confederation are needed and that the new government "proposed in its Room" would be dangerous to liberty. This language suggests the committee thought the new constitution was a complete substitute to the Articles and thus not an alteration.] The System of Government proposed by the late [Philadelphia] Convention to the respective States for their Adoption, involves in it Questions and Consequences in the highest Degree interesting to the People of these States. *While we see, in common with our Brethren of the other States, the Necessity of making Alterations in the present existing federal Government [confederation], we cannot but apprehend that the one [the new constitution] proposed in its Room contains in it Principles dangerous to public Liberty and Safety.*
	17. Sydney, *New York Journal*, June 13, 1788.	TO THE CITIZENS OF THE STATE OF NEW-YORK.... [A]s from every circumstance we have reason to infer that *the new constitution does not originate from a pure source[.] It was an outrageous violation in the [Philadelphia] convention on the 17th September, 1787,* to attempt a consolidation of the union and utterly destroy the confederation, and the sovereignty of particular states, when *their powers were restricted "to the sole and express purpose of revising and amending the confederation."*
	18. Richard Henry Lee to Samuel Adams Chantilly, April 28, 1788.	[T]hough it were admitted that some *amendments* to the present confederation would better promote the ends designed by it, *why, for that reason, exterminate the present plan [Articles of Confederation], and establish on its ruins another [the new constitution],* so replete with power, danger, and hydra-headed mischief?
	19. John De Witt II, *American Herald*, October 29, 1787.	In my last address upon the proceedings of the F[e]deral [Philadelphia] Convention, I endeavored to convince you of the importance of the subject, that it required a cool, dispassionate examination, and a thorough investigation, previous to its adoption—*that it [the new constitution] was not a mere revision and amendment of our first Confederation, but a compleat [sic] System for the future government of the United States*[.]

Source	Record	Excerpt (emphasis added)
DOCUMENTARY HISTORY DIGITAL, *supra* note 31.	20. John De Witt V, *American Herald*, December 3, 1787.	To the FREE CITIZENS of the COMMONWEALTH of MASSACHUSETTS.... And do you discover a desire in those who wish you to embrace this Government, to inform you of its principles, and the consequences which will probably ensue from such principles—why *they [the framers] have taken from you the sinews of your present government, and instead of revising and amending your Confederation; have handed you a new one, contrasted in the plenitude of its powers.*
	21. Cornelius, *Hampshire Chronicle*, December 11, 1787.	It may be observed in the first place, that *this [new] constitution is not an amendment of the confederation, in the manner therein stipulated; but it is an in tire [entire] subversion of that solemn compact.*
	22. Elbridge Gerry to the [Massachusetts] General Court New York, October 18, 1787.	*As the [Philadelphia] Convention was called for "the sole & express purpose of revising the articles of confederation*, & reporting to Congress & the several Legislatures such alterations & provisions as shall render the federal Constitution adequate to the exigencies of Government, & the preservation of the union," *I did not conceive that these powers extended to the formation of the plan proposed, but the Convention being of a different opinion, I acquiesced in it, being fully convinced that to preserve the union, an efficient Government was indispensibly [sic] necessary; & that it would be difficult to make proper amendments to the articles of confederation.*
	23. Sidney, *Albany Gazette*, January 24, 1788.	[T]hey call themselves federalists, when, in the same breath, they do not hesitate to say, *they mean to destroy! entirely to destroy the confederation!...* upon the start of the late convention, *when they refused to be guided by their credentials (which expressly confined their powers to be for the sole purpose of revising and amending the confederation) and presuming to recommend to the people this new instrument[.]*
	24. Thomas Lee Shippen to William Shippen, Jr., London, November 20, 1787.	They [the Articles of Confederation] had perhaps some defects, but they were easy to be remedied. Impatient of temporary inconveniences, *you have rashly overthrown the system* which was the gift of Heaven and have lost sight of a great object for which you have so nobly fought and bled in a 7 years war. You had erected a fine and stately fabric whereof some key stones were wanting, and which you should with a modest and reverent hand have endeavored to supply, *but instead of that, to amend its [the Articles'] defects you have demolished & destroyed the whole building, and I think sacrilegiously.*

Source	Record	Excerpt (emphasis added)
DOCUMENTARY HISTORY DIGITAL, *supra* note 31.	25. A Letter of his Excellency, Edmund Randolph, Esquire, On the Federal Constitution, October 10, 1787.	[Discussing whether the Articles of Confederation should be altered or there should be a new constitution, Edmund Randolph said the following:] But now, sir, permit me to declare, that in my humble judgment *the powers by which alone the blessings of a general government can be accomplished, cannot be interwoven in the confederation without a change of its very essence; or in other words, that the confederation must be thrown aside*...My suffrage, as a citizen, is also for additional powers...I saw however that the confederation was tottering from its own weakness, and that the sitting of the convention was a signal of its total insufficiency. *I was therefore ready to assent to a scheme of government, which was proposed, and which went beyond the limits of the confederation [including the limit of the alteration power in Article 13],* believing, that without being too extensive it would have preserved our tranquility, until that temper and that genius should be collected. [This excerpt was from a letter Randolph wrote explaining why he switched from being an Anti-Federalist to a Federalist. Thereby, even after he changed his mind and became a Federalist, Randolph still held the idea that the new constitution was not an alteration to the Articles. He said that nothing from the Articles was salvageable, that what was required for good government could not be interwoven into the Articles, and that the Articles should be "thrown aside."]
	26. Philadelphiensis IX, *Philadelphia Freeman's Journal,* February 6, 1788.	[In the following excerpt, Philadelphiensis called for a national convention to alleviate what he viewed as a political crisis caused by the Philadelphia Convention:] To preserve the peace of the country, every patriot should exert himself at this awful crisis [caused by the Philadelphia Convention], and use his influence to *have another federal convention called as soon as possible; either to amend the old articles of confederation, or to frame a constitution on revolution principles, that may secure the freedom of America to the remotest time*. [Thus, Philadelphiensis implied that the new constitution had not amended the Articles but was an entirely different system of government.]
	27. Unknown author, *Massachusetts Gazette*, June 12, 1787.	It is thought by many that the [Philadelphia] convention will continue to sit some months, and that *they will conclude their deliberations by recommending, not an amendment of the old system, but the introduction of one entirely new.*
	28. Unknown author, *Pennsylvania Herald,* December 26, 1787.	*The federal [Philadelphia] convention were called together to amend the old constitution, but they chose to make a new one* … this the writer does not complain of[.]

Source	Record	Excerpt (emphasis added)
Friends Of The Constitution, *supra* note 41.	29. Cato Essay, *Country Journal and Advertiser*, Poughkeepsie, December 12, 1787, at 345.	The radical defects in the constitution of the confederate government [the Articles of Confederation], was too obvious to escape the notice of a sensible, enlightened people…. *It is but a groveling business, and commonly ruinous policy, to repair by peace-meal a shattered defective fabric—it is better to raise the disjointed building to its formation, and begin a new. The confederation was fraught with so many defects, and these so interwoven with its substantial parts, that to have attempted to revise it would have been doing business by the halves, and therefore the Convention with a boldness and decision becoming freemen, wisely carried the remedy to the root of the evil; and have offered a form of government to your consideration on an entire new system*—much depends on your present deliberations.
Anti-Federalist Papers, *supra* note 42.	30. A Federal Republican, *The Power Vested in Congress of Sending Troops for Suppressing Insurrections Will Always Enable Them to Stifle the First Struggles of Freedom*, March 5, 1788, at 19.	Upon this principle, a general convention of the United States [the Philadelphia Convention] was proposed to be held, and deputies were accordingly appointed by *twelve of the states charged with power to revise, alter, and amend the Articles of Confederation. When these deputies met, instead of confining themselves to the powers with which they were entrusted, they pronounced all amendments to the Articles of Confederation wholly impracticable; and with a spirit of amity and concession truly remarkable proceeded to form a government entirely new, and totally different in its principles and its organization.*
	31. A Farmer and Planter, *On the Motivations and Authority of the Founding Fathers*, date not provided, at 110.	*That they [the framers] exceeded their power is perfectly clear …. The federal [Philadelphia] Convention ought to have amended the old system; for this purpose they were solely delegated; the object of their mission extended to no other consideration.* You must, therefore, forgive the solicitation of one unworthy member to know what danger could have arisen under the present Confederation, and *what are the causes of this proposal [the new constitution] to change our government.*
	32. Patrick Henry, *On the Motivations and Authority of the Founding Fathers*, date not provided, at 110.	A comparison of the authority under which the [Philadelphia] convention acted, and their form of government, will show that *they have despised their delegated power [to alter the Articles of Confederation], and assumed sovereignty; that they have entirely annihilated the old confederation, and the particular governments of the several States, and instead thereof have established one general government that is to pervade the union[.]*

Source	Record	Excerpt (emphasis added)
2 Complete Anti-Federalist, *supra* note 32.	33. Federal Farmer XVIII, *The Quantity of Power the Union Must Possess Is One Thing; The Mode of Exercising the Powers Given Is Quite A Different Consideration*, January 23, 1788, at 349.	The states all agreed about seven years ago [in the Articles of Confederation], that the confederation should remain unaltered, unless every state should agree to alterations: *but we now see it agreed by the convention, and four states, that the old confederacy shall be destroyed, and a new one ... be erected[.]*
4 Complete Anti-Federalist, *supra* note 32.	34. A Farmer, (New Hampshire), *Freeman's Oracle and New Hampshire Advertiser,* January 11, 1788, at 209.	[Discussing whether states should approve the new constitution, a Farmer said the following:] *I think the state of Virginia have ordered their convention to object, amend, or make a new one as they please*. I wish every state would do the same, then a continental convention would have a fair chance to frame a constitution most agreeable to the general sense of the people, and then let it be returned for their approbation. [A Farmer thereby distinguished between amending the new constitution and making "a new one." Thus, it appears he did not think an amendment to the new constitution could be a complete substitute.]
6 Complete Anti-Federalist, *supra* note 32.	35. Address of the Albany Antifederal Committee, *New York Journal*, April 26, 1788, at 122.	The [Philadelphia] convention, who were appointed for the sole and express purpose of revising and *amending the [Articles of] confederation*, *have taken upon themselves the power of making a new one.* They have not formed a federal but a consolidated government[.]

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