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Founded by Adam B. Ross & Dennis W. Donley Jr. in MCMXCVI

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PREFACE

The months since the *Review*'s most recent issue have been filled with events of national importance. To name a few, the Supreme Court ruled on the constitutionality of the Patient Protection and Affordable Care Act, popularly referred to as Obamacare; an expensive presidential campaign season culminated in the reelection of President Obama; and most of the country now anticipates significant tax increases in the wake of deals reached during Congress's fiscal cliff debates.

Obamacare, and the Supreme Court's treatment of it, has become a troubling illustration of government power and provides the modern foundation for discussions regarding the scope of the three branches of our government. The *Review* is fortunate to have Ilya Shapiro's *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling.* He provides a commentary on the Supreme Court's recent decision to uphold much of the substance of Obamacare in *National Federation of Independent Business v. Sebelius.* Mr. Shapiro's central role in the legal battle lends a unique perspective among the many critiques of Obamacare. He also articulates ten reasons why Chief Justice John Roberts was wrong in construing Obamacare's individual mandate provision as a constitutional tax.

Taxes in America are on the rise, and many state governments, like the federal government, are finding it difficult to eliminate budget deficits. Stuart Buck, in *The Legal Ramifications of Public Pension Reform,* proposes simple yet innovative policy solutions that would help governments in dire financial straits to cut expenses related to government employee pensions while protecting the contractual rights of recipients. We hope states will take note of his common-sense proposals and allow for state workers to be presumptively entitled to pension benefits that actually accrued for past work while permitting changes to future accruals.

Damien M. Schiff and Luke A. Wake discuss excessive bureaucratic power in *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach.* They call for a combination of deterring regulatory abuse and better empowering private individuals to defend their rights when the government seeks to violate them. The authors draw insight from Mr. Schiff's successful representation of the property owners at the Supreme Court in *Sackett v. Environmental Protection Agency.* The unanimous

Sackett ruling reminded federal agencies of the limits on their power, but agencies still have incentives for overreach; the authors discuss the incentives and offer several practical remedies to this problem.

We also have the privilege of playing host to an excellent contribution to the constitutional debate regarding the meaning of the First Amendment's Establishment Clause by Virginia Solicitor General E. Duncan Getchell, Jr. and Michael H. Brady: *How the Constitutions of the Thirty-seven States in Effect when the Fourteenth Amendment Was Adopted Demonstrate that the Governmental Endorsement Test in Establishment Clause Jurisprudence Is Contrary to American History and Tradition.* They provide a thorough survey of the development of the governmental endorsement test and religious language in post-Civil War state constitutions. In the process, they determine that nonestablishment principles embedded in constitutions did not address concerns about the endorsement of religion. The governmental endorsement test occasionally utilized by the judiciary is, therefore, antihistorical. This article could be just the encouragement the Supreme Court needs to reject the test once and for all.

We conclude with Benjamin A. Geslison's thoughtful examination of constitutional history, *What Were They Thinking: Examining the Intellectual Inspirations of the Framers and Opponents of the United States Constitution.* Mr. Geslison sheds light on contradictions the Framers faced in implementing the republican government we have today by gathering observations from two books: *Novus Ordo Seclorum: The Intellectual Origins of the Constitution,* by Forrest McDonald, and *What the Anti-Federalists Were For: The Political Thought of the Opponents of the Constitution,* by Herbert J. Storing. He notes that the arguments of the Anti-Federalists have increasing value and relevance in light of our nation's ballooning government.

Finally, I thank our staff of editors for the immense amount of work that makes this publication possible. We particularly appreciate the guidance and support provided by Adam Ross, Brantley Starr, and Scott Keller. We hope our distinguished authors' hard work and insight impel the nation's lawmakers to develop more reasoned and conservative policies.

Timothy B. George
Editor in Chief

Austin, Texas
December 2012

LIKE EASTWOOD TALKING TO A CHAIR: THE GOOD, THE BAD, AND THE UGLY OF THE OBAMACARE RULING

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* Senior Fellow in Constitutional Studies, Cato Institute, and Editor in Chief, *Cato Supreme Court Review*; A.B., Princeton University; M.Sc., London School of Economics; J.D., University of Chicago Law School. This article is an expanded, annotated, and edited version of a series of lectures on this subject that I gave around the country in September–October 2012. My thanks to Cato legal associate David Scott for his assistance with that transformation. Thanks also to the authors of the two articles about the Obamacare ruling that we published in the most recent volume of the *Cato Supreme Court Review*, from whom I've learned much. *See* David B. Rivkin Jr., Lee A. Casey & Andrew M. Grossman, NFIB v. Sebelius *and the Triumph of Fig-Leaf Federalism*, 2011–2012 CATO SUP. CT. REV. 31 (2012); James F. Blumstein, *Enforcing Limits on the Affordable Care Act's Mandated Medicaid Expansion: The Coercion Principle and the Clear Notice Rule*, 2011–2012 CATO SUP. CT. REV. 67 (2012). Finally, thanks to Randy Barnett, without whom my journey through this litigation—indeed, the litigation itself—would have been impossible.

I. INTRODUCTION

The legal challenge to the Patient Protection and Affordable Care Act, more commonly known as "Obamacare," was a case that comes along once every generation, if not less often.[1] Not because it could affect a presidential election or was otherwise politically significant—those cases come around more frequently—but because it reconsidered so many aspects of our constitutional first principles: the fundamental relationships between citizens and the government and between the states and the federal government; the role of the judiciary in saying what the law is and checking the political branches; and the scope of and limits to all three branches' powers. As I've repeated *ad nauseum* in more than a hundred speeches, debates, and panels on the subject, this case was not about the state of health care in America or how to fix this troubled area of public policy.[2] It was instead about how to read our nation's basic law and whether Congress was constitutionally authorized to use the tools it used in this particular instance.

Anyone reading this article will already know at least the basic outline of the Supreme Court's ruling. As I wrote on the leading Supreme Court blog in the wake of the decision, we—those who helped challenge the law—won everything but the case.[3] That is, the Supreme Court adopted all of the legal theories that I suggested in my briefing regarding the scope of federal regulatory authority.[4]

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1. I refer here collectively to the various lawsuits focused on the constitutionality of the individual mandate, which culminated in the Supreme Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius* (*NFIB*), 132 S. Ct. 2566 (2012). Many more lawsuits are still pending, *e.g.*, Liberty Univ. v. Geithner, No. 11-438, 2012 WL 5895687 (U.S. Nov. 26, 2012) (granting petition for rehearing and remanding to the Fourth Circuit), and others have been filed after that ruling, *e.g.*, Amended Complaint for Declaratory and Injunctive Relief, Pruitt v. Sebelius, No. 6:11-CV-00030 (E.D. Okla. Sept. 19, 2012). More will surely be filed in the future—including other types of challenges to the new tax on "choosing" not to purchase qualifying health insurance (because this is either an unapportioned, and therefore unconstitutional, direct tax or some sort of tax not authorized by the Constitution, *see* Editorial, *A Vast New Taxing Power: The Chief Justice's Obamacare Ruling Is Far From the Check on Congress of Right-Left Myth*, WALL ST. J., Jul. 2 2012, at A10). As with any major piece of legislation, we will not see the end of Obamacare litigation for quite some time.

2. *See generally* Ilya Shapiro, *A Long, Strange Trip: My First Year Challenging the Constitutionality of Obamacare*, 6 FLA. INT'L L. REV. 29 (2010).

3. Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (Jun. 29, 2012, 9:38 AM), http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/.

4. I filed a total of ten amicus curiae briefs on Cato's behalf over the course of the individual mandate litigation—two at the district court level; four in four different circuit courts of appeals; and four at the Supreme Court, one on each of the four specified

II. NO ECONOMIC MANDATES

On the Commerce Clause, which grants to Congress the power to regulate interstate commerce, the Court said that Congress *cannot* compel activity or create commerce in order to regulate it.[5] The Court distinguished Obamacare's requirement to buy health insurance from previous cases where there was already some sort of existing economic activity that the federal government then either regulated or prohibited.[6] In the foundational 1942 case of *Wickard v. Filburn*, for example, the Court upheld a federal law that prohibited farmers from exceeding crop quotas and required them to sell crops—in Roscoe Filburn's case, wheat—at set prices.[7] Similarly, if you run a car company, the federal government can require you to install seat belts and meet fuel efficiency and emissions standards. In short, as the *National Federation of Independent Business v. Sebelius* (*NFIB*) plaintiffs accepted, the federal government under modern doctrine can regulate even (certain types of) purely local economic activity when in the aggregate that local activity has substantial effects on interstate commerce.[8]

Or similarly, the federal government can look at that economic activity and say, "stop": It can prohibit it, it can criminalize it, and it can punish it. So, for example, sixty years after the wheat case, we had the *weed* case, *Gonzales v. Raich*.[9] There, Angel Raich and Diane Monson wanted a judicial ruling that their growth and consumption of marijuana for certain medicinal purposes as allowed under California state law would not subject them to federal prosecution under the Controlled Substances Act. They made clear that they were neither buying nor selling the marijuana nor were they transporting it across state lines. The Supreme Court ultimately ruled for the federal government; the theory was that these women were engaging in local economic activity—growth and consumption—that had an

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issues that the Court set for argument. Most notably, I represented seventeen organizations (including Cato) and 333 state legislators on a Supreme Court brief regarding the scope of the Commerce and Necessary and Proper Clauses. Brief for Cato Institute et al. as Amici Curiae Supporting Respondents (Individual Mandate Issue), *NFIB*, 132 S. Ct. 2566 (No. 11-398).

5. *NFIB*, 132 S. Ct. at 2589.
6. *Id.* at 2587.
7. Wickard v. Filburn, 317 U.S. 111, 133 (1942).
8. *NFIB*, 132 S. Ct. at 2588.
9. Gonzales v. Raich, 545 U.S. 1 (2005).

aggregate effect on illegal interstate commerce.[10] Justice Scalia famously concurred in that ruling, arguably espousing an even broader view of federal power, stating that the government can reach even *noneconomic* activity that, if left alone, can undermine a duly authorized national regulatory scheme.[11]

Here, in contrast, the Court agreed with the challengers that what Congress was doing, for the first time ever, was requiring people to do something, to engage in an activity or conduct a transaction that they were not otherwise pursuing.[12] Even though that mandate was part of a broader national regulatory scheme, it was a bridge too far:

> The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. . . . As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching [economic] "activity."
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> . . . .
>
> The Framers gave Congress the powers to *regulate* commerce, not to *compel* it . . . .[13]

This is very strong language, and there are many more examples of it, both in Chief Justice John Roberts's controlling opinion and in the dissenting opinion that was jointly authored by Justices Scalia, Kennedy, Thomas, and Alito.[14] For example: "The Commerce Clause isn't a general license to regulate an individual from cradle to grave, simply because he will

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10. *Id.* at 32–33.

11. *See id.* at 40 (Scalia, J., concurring). Many observers—both those who supported and opposed Obamacare—speculated that Justice Scalia's vote would be in play because of his *Raich* concurrence. They seem to have missed the fact that Scalia used the word "activity" forty-two times in that opinion.

12. *NFIB*, 132 S. Ct. 2566, 2587 (2012).

13. *Id.* at 2586–89 (citation omitted) (emphasis in original).

14. Chief Justice Roberts's opinion on the Commerce Clause and Necessary and Proper Clause speaks for a Court majority and is a binding ruling. *Id.* at 2599 ("The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity."); *id.* at 2600–01 ("It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that § 5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction."). These issues may be purely academic, however, given that a future Court's view on these doctrinal points will ultimately depend on that Court's composition.

predictably engage in particular transactions."[15]

The Court could not have more clearly adopted the articulation of the limiting principle to federal power under the Commerce Clause suggested by the plaintiffs—twenty-six states and the National Federation of Independent Business—and their amici. The lower courts that ruled against the government never did to such an extent; they essentially said that however the government articulates its view, there is no principled limit to federal power there.[16] No lower court clarified, as the Supreme Court did, that the federal government can regulate or prohibit existing economic activity but cannot mandate or compel new activity.

III. A LAW CAN BE NECESSARY BUT NOT PROPER

The Court's ruling was even more striking with regard to the Necessary and Proper Clause—which is actually intertwined with the Commerce Clause power in the "substantial effects" doctrine.[17] That is, Article I, Section 8 enumerates Congress's seventeen powers, including: coining money, raising armies, establishing post offices, and regulating interstate commerce. The eighteenth clause of that section says that Congress can also enact laws that are "necessary and proper for carrying into Execution the foregoing Powers."[18] Relying on these provisions, the government said that it is necessary for the functioning of a larger health care scheme—the relevant parts of which for purposes of this litigation everyone agreed were authorized regulations of interstate commerce—to require people to buy health insurance.[19]

As a matter of economics, that assessment is probably true; the government can't require coverage for preexisting conditions and impose price caps and other market distortions without also

15. *Id.* at 2591.

16. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d. 1235 (11th Cir. 2011); Goudy-Bachman v. U.S. Dep't of Health & Human Servs., 811 F.Supp.2d 1086 (M.D. Pa. 2011); Florida v. U.S. Dep't of Health & Human Servs., 780 F.Supp.2d 1256 (N.D. Fla. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F.Supp.2d 768 (E.D. Va. 2010).

17. The "substantial effects" doctrine is the Supreme Court's articulation of the outermost bounds of Congress's power under the Commerce Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 599 (1995) ("We conclude, consistent with the great weight of our case law . . . the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce.").

18. U.S. CONST. art. I, § 8. cl. 18.

19. *NFIB*, 132 S. Ct. at 2585.

requiring young, healthy people to pay more than they otherwise would. But the Court said that even if the individual mandate was necessary to Congress's regulatory scheme—which, by the way, may not be necessary to the regulation of interstate commerce, regarding health care or more broadly—it's not *proper*.[20] Finding justification for the individual mandate in the Necessary and Proper Clause

> would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting authority bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.[21]

That is something new; while the challengers and especially certain amici had been arguing that the "proper" part of the Necessary and Proper Clause had to be considered separately, no court had ever held that. On the Commerce Clause, the Court essentially made explicit the line that *Raich* left unstated: that the substantial effects test reached even noncommercial economic activity such as growth and consumption (or, per Scalia, even certain kinds of noneconomic activity[22]) but not inactivity or decisions to not engage in economic activity.[23] But the Necessary and Proper Clause ruling went further. This is the first modern acceptance of the idea that even if something might be necessary it might not be proper.[24] Why might it not be proper? As the joint dissent pointed out:

> The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other constitutional controls) could *not* be justified as necessary and proper for the carrying out of a general regulatory scheme. . . .

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20. *Id.* at 2592–93.

21. *Id.* at 2592.

22. *Id.* at 2626 (Ginsberg, J., concurring in part and dissenting in part) (quoting Gonzales v. Raich, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

23. *Id.* at 2586 (Roberts, C.J.).

24. The closest the modern Supreme Court has come to such a holding was in dictum in *Printz v. United States*, 521 U.S. 898, 923–24 (1997), where it discussed how the same circumstances that rendered the statute at issue there unconstitutional under our federal structure also could have rendered it improper under the Necessary and Proper Clause.

It was unable to name any.[25]

In other words, it's not proper to require people to engage in activity here because then there would be no limits on federal power. So however nicely the government crafted its theory here—which was not all that nice or coherent, as you'll recall from Solicitor General Donald Verrilli's answer to Justice Alito's request that he articulate this point "succinctly"[26]—it failed for lack of a limiting principle.

IV. CONGRESS CAN'T PULL A BAIT-AND-SWITCH ON THE STATES

Even more remarkable than the Commerce or Necessary and Proper Clause rulings, however—for the moment I'll skip the taxing power ruling, which was remarkable but not particularly important beyond upholding Obamacare (no mean feat, but not nearly as significant doctrinally)—was the Court's ruling on the states' challenge to Obamacare's Medicaid expansion. In the ruling that will likely have the greatest impact on constitutional litigation going forward, seven justices found that Congress's action here unconstitutionally coerced the states under the Spending Clause.[27]

This ruling was surprising in part because there isn't much precedent regarding Congress's spending power. The last

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25. *NFIB*, 132 S. Ct. at 2647 (joint dissent).

26. Transcript of Oral Argument at 44–45, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220. His response was:

> We got two and they are—they are different. Let me state them. First, with respect to the comprehensive scheme. When Congress is regulating—is enacting a comprehensive scheme that it has the authority to enact that the Necessary and Proper Clause gives it the authority to include regulation, including a regulation of this kind, if it is necessary to counteract risks attributable to the scheme itself that people engage in economic activity that would undercut the scheme. It's like—it's very much like *Wickard* in that respect. Very much like *Raich* in that respect.
>
> With respect to the—with respect to the—considering the Commerce Clause alone and not embedded in the comprehensive scheme, our position is that Congress can regulate the method of payment by imposing an insurance requirement in advance of the time in which the—the service is consumed when the class to which that requirement applies either is, or virtually most certain to be, in that market when the timing of one's entry into that market and what you will need when you enter that market is uncertain and when—when you will get the care in that market, whether you can afford to pay for it or not and shift costs to other market participants.
>
> So those—those are our views as to—those are the principles we are advocating for and it's, in fact, the conjunction of the two of them here that makes this, we think, a strong case under the Commerce Clause.

27. *NFIB*, 132 S. Ct. at 2604 (Roberts, C.J., joined by Breyer and Kagan, JJ.); *Id.* at 2662 (joint dissent).

Spending Clause case, *South Dakota v. Dole*, was decided twenty-five years ago and involved the federal government's conditioning of 5% of highway funds on states raising their drinking ages.[28] At the time, different states had different drinking ages, not the standard drinking age to which we have grown accustomed. Louisiana and South Dakota were the last two states to raise their drinking ages to twenty-one, and South Dakota argued that the government's condition was coercive. The Court upheld the condition but explained that there could be a time when "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[29] *NFIB* presented such a case.

Under Obamacare, the federal government offers states a lot of money to expand their Medicaid programs, but that money comes with many conditions: states have to increase the number of people covered by Medicaid; create new regulatory structures; transform the administration of health care; and, perhaps most importantly, spend more of their own money—even if that constituted a fraction of the federal funds.[30] The states could refuse to take this money and its attendant conditions; but, if they turned it down they would lose even the *existing* Medicaid funding that the federal government had been providing.[31] The twenty-six state plaintiffs thus argued that the new federal money represented the proverbial "offer they couldn't refuse."[32] No state had anticipated such a regulatory and financial burden when it signed up for Medicaid between 1965, the program's inception, and 1982, when the last state—Arizona—joined.[33] Yet, at this point, no state can afford to lose its federal Medicaid funding,[34] and even if a state decided to try somehow to provide alternative care to its Medicaid beneficiaries, its taxpayers would still have to pay Medicaid payroll taxes. Perhaps the states shouldn't have been so eager to make the original Faustian bargain—let that be a lesson for the future—but now that they'd

28. South Dakota v. Dole, 438 U.S. 203 (1987).
29. *Id.* at 211.
30. *See NFIB*, 132 S. Ct. at 2663 (joint dissent).
31. *Id.* at 2657; 42 U.S.C. § 1396c (Supp. II 2008).
32. *NFIB*, 132 S. Ct. at 2657 (joint dissent).
33. *See id.* at 2606 (majority opinion) (discussing how states could not have foreseen that Congress would so change the Medicaid program).
34. *See id.* at 2604 (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, FISCAL YEAR 2010 STATE EXPENDITURE REPORT, 11 tbl.5 (2011)) (discussing the portion of states' budgets dedicated to Medicaid spending and how integral federal funding is to the states).

made the bargain, they were stuck.

The Court agreed with this framing of the matter and—again, for the first time ever—struck down a federal law as exceeding Congress's "spending power" to attach conditions to money it gives or offers the states.[35] "[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."[36] In particular, it was the threat to the *existing* Medicaid funding that made Obamacare constitutionally toxic here: "The threatened loss of over [ten] percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce . . . ."[37]

Moreover, while states can anticipate and must accept modifications of an existing funding program, they can't be forced into something radically different from the program they originally joined.[38] Medicaid was originally a program to help four narrow categories of people—the disabled, the blind, the elderly, and poor children—which was later modified and expanded. It was *not* a national redistribution or health care program for the entire nonelderly population with income below 133% of the poverty line, which is what Obamacare creates.[39] "The Medicaid expansion . . . accomplishes a shift in kind, not merely degree," the Court concluded.[40] "It is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."[41]

The Court didn't provide an exact standard regarding when an offer of federal funds becomes coercive, but said that if we accept the idea that the federal government is capable of coercing states in an unconstitutional manner, then Obamacare's Medicaid expansion is clearly past that line.[42] In the future, courts hearing challenges to potentially coercive laws

35. *Id.* at 2591.
36. *Id.* at 2604.
37. *Id.* at 2605. It remains to be seen whether "dragooning" will join "commandeering" as an increasingly invoked term of art describing an action prohibited to Congress.
38. *Id.* at 2606 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981)).
39. *See id.* at 2605–06 (citing 42 U.S.C. § 1396a(a)(10) (Supp. V 2010) and discussing the expansion of the Medicaid program under the Affordable Care Act).
40. *Id.* at 2605.
41. *Id.* at 2606.
42. *Id.*

will consider factors such as: (1) the size of the grant that will be withdrawn if the state doesn't take the new money; (2) whether states are threatened with the loss of existing funds or just new ones; (3) whether the conditions attached to the funds in reality make the law a new program rather than just modifying the existing program; and (4) whether the conditions govern the use of the funds or are a threat to terminate other grants or otherwise alter other programs.[43]

The Court is saying that the federal government can attach conditions relating to the use of funds offered or relating to the program that the funds support, but it can't fundamentally transform the program once the states are in it. It can't get states addicted to federal largesse and then all of a sudden foist something else on them. Regardless of how courts apply the Supreme Court's coercion factors in the future, however, states will be increasingly wary the next time some new joint federal-state program comes along—because who knows what the federal government might try twenty or fifty years later?

V. OBAMACARE'S UNICORN TAX

So this has all been great so far, right? The challengers won all the big things they wanted. The Supreme Court held: (1) the federal government can't impose economic mandates under the Commerce Clause, (2) it might even have less regulatory authority given the Court's interpretation of the "proper" part of the Necessary and Proper Clause, and (3) there's a great new tool to limit federal overreach via the Spending Clause. Yet Obamacare stands for the most part. That leaves us with just one small part of the case that the challengers lost: the taxing power.

Chief Justice Roberts alone conceived of this manner of saving Obamacare, not by upholding the individual mandate but by reinterpreting that mandate as a unique tax with very special characteristics.[44] The government had preserved the taxing power argument as a back-up justification, but hadn't framed it quite the way Roberts did—and none of the justices seemed to buy that claim at oral argument.[45] Indeed, most law professors—including most whom I debated during more than two years of

43. *Id.* at 2604–06.
44. *Id.* at 2596–600.
45. Transcript of Oral Argument at 46–54, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220.

litigation—generally preferred the Taxing Clause argument because Congress's power there is broader than its power to regulate interstate commerce (as broad as the latter is). But they too didn't quite articulate it Roberts's way; both the government and academics considered the individual mandate to be simultaneously a regulation and a tax, with no judicially enforceable limit on Congress's power to legislate either when it comes to health care.[46] Chief Justice Roberts, on the other hand, admitted that the most "straightforward" and "natural" reading of the individual mandate is as a mandate—a regulation with a penalty attached for noncompliance.[47] But then he invoked the constitutional avoidance canon to reconstrue the provision as a tax and read certain qualifications into that tax to find it constitutional.[48]

Roberts got this wrong for at least ten reasons.[49]

First, Roberts misapplied the constitutional avoidance canon. He said that it's "fairly possible" to read the mandate as a tax and a court's "duty," if it can, is essentially to bend over backwards to save a piece of legislation.[50] But that's not the correct way to apply the constitutional avoidance canon. The constitutional avoidance canon really stands for the idea that if you have two equally reasonable ways of interpreting an ambiguous statute, you should use the interpretation that avoids a difficult constitutional question and decide the case on statutory grounds—whether that means striking a statute down or upholding it.[51] Here, the statute isn't ambiguous, and Roberts explicitly stated that the better reading of the statute was as a regulation.[52] Even Justice Ginsburg, who wrote the partial

46. Pet. for Writ of Cert. at 26, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2011 WL 5025286; Shapiro, *supra* note 2, at 48–49 (describing debates with academic proponents of Obamacare).

47. *NFIB*, 132 S. Ct. at 2593.

48. *Id.* at 2593–601.

49. For a different articulation of a similar collection of points, see Quin Hillyer, *John Roberts' Travesty, Point by Point*, CENTER FOR INDIVIDUAL FREEDOM (July 4, 2012), http://cfif.org/v/index.php/commentary/42-constitution-and-legal/1483-john-roberts-travesty-point-by-point.

50. *NFIB*, 132 S. Ct. at 2594.

51. Nicholas Quinn Rosenkranz, *Roberts Was Wrong to Apply the Canon of Constitutional Avoidance to the Mandate*, SCOTUSREPORT (July 11, 2012), http://www.scotusreport.com/2012/07/11/roberts-was-wrong-to-apply-the-canon-of-constitutional-avoidance-to-the-mandate/ ("It is crystal clear what the mandate requires: get insurance or pay a certain amount to the IRS.").

52. *See NFIB*, 132 S. Ct. at 2593 ("The most straightforward reading of the mandate is that it commands individuals to purchase insurance.").

concurrence and partial dissent for the four "liberal" justices, was highly—perhaps most—skeptical about the taxing power at oral argument.[53] And when she summarized her opinion from the bench, her body language and tone seemed to indicate that even though she was going along with the Chief Justice's taxing power argument, she much preferred the Commerce Clause argument.[54]

Second, Roberts managed to read the mandate as a tax for constitutional purposes after finding that it was not a tax in the context of the Anti-Injunction Act (AIA), a federal law that prevents taxpayers from challenging a tax until it has been levied or assessed.[55] This claim is less bizarre than it sounds because it's possible to draft a tax that's not subject to the AIA—the constitutional and statutory standards are different[56]—but Roberts's own analysis belies such a finding. That is, the very example Roberts uses to detail the different legal standards, the *Drexel Furniture* child labor tax case from 1922, speaks of how a tax becomes a penalty when Congress imposes fines on those who fail to comply with a particular regulation.[57] If anything, *Drexel Furniture* supports reading the individual mandate as just that; a tax that became a penalty because Congress is imposing fines on those who fail to comply with Obamacare.

Third, Roberts simultaneously found that there's no scienter requirement to the individual mandate, meaning no requirement of conscious or knowing violation of the law—and that people have a "choice" of whether to buy health insurance or to pay the tax.[58] This "choice," under Roberts's reading of the

53. *See* Transcript of Oral Argument at 47, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-398), 2012 WL 1017220 (Ginsburg, J., characterizing the mandate as a penalty to encourage the purchase of healthcare, rather than as a tax to raise revenue).

54. Oral Concurrence of Justice Ginburg at 1:03, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-393), *available at* http://www.oyez.org/cases/2010-2019/2011/2011_11_400.

55. *NFIB*, 132 S. Ct. at 2582 (citing Enochs v. Williams Packing & Nav. Co., 370 U.S. 1, 7–8 (1962)) ("Because of the Anti–Injunction Act, taxes can ordinarily be challenged only after they are paid, by suing for a refund."); *id.* at 2584, 2594; *see also* 28 U.S.C. § 2283 (Supp. V 2011).

56. *See NFIB*, 132 S. Ct. at 2594–95 (citing Bailey v. George, 259 U.S. 16, 20 (1922); Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922)) (noting an instance where legislation was intended by Congress to be treated as a tax for AIA purposes, and was so treated by the courts, even where the legislation exceeded Congress's constitutional taxing authority).

57. *See Drexel Furniture*, 259 U.S. at 38 ("But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.").

58. *NFIB*, 132 S. Ct. at 2596 (no scienter); *id.* at, 2600 ("But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long

mandate as a tax, stands in place of a command to do something accompanied by a punishment for failing to do that thing. That sounds like a bizarre choice to me—akin to a mugger asking you to "choose" either your money or your life—but even if we accept Roberts's characterization, doesn't a choice by definition involve scienter? Curiously, Roberts found it salient that the Obamacare tax is set low enough to allow a person to make a "reasonable financial decision" to pay it.[59] The amount of money isn't prohibitory, coercive, or punitive.[60] That's interesting, because if Congress ever wanted to raise the tax to an amount that actually approached the cost of the minimum-coverage health insurance plan, the tax would fail Roberts's constitutional test. So Congress can't create a program where people have an incentive to buy health insurance—which I thought was the point of the health care reform.

Fourth, the fact that the payment for non-insurance is collected by the IRS through "the normal means of taxation,"[61] another of Roberts's pro-tax factors, is irrelevant. The nature of a federal program isn't determined by the agency that administers it.[62] For example, federal involvement in K–12 education would not somehow become constitutional if administered by the constitutionally authorized army or postal service. Also, if where a function is located is so significant, why doesn't it matter that the mandate and penalty are found in Obamacare's operative core (Title I) rather than its "Revenue Provisions" (Title IX)?[63] Title IX contains all sorts of obvious revenue-raisers, including small ones like the tax on indoor tanning services (the so-called "Snooki tax").[64] If the Snooki tax made it into Title IX, why

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as he is willing to pay a tax levied on that choice.").

59. *Id.* at 2596.

60. *Id.* (citations omitted) (stating that the amount due won't be prohibitory, as the amount in *Drexel Furniture* was, and that the IRS isn't allowed to use punitive means to collect the tax).

61. *Id.*

62. *See, e.g.,* Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power,* 76 U. COLO. L. REV. 297, 300–01 (2005) (discussing congressional oversight and reporting requirements regarding the implementation of federal programs).

63. *Compare* Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 1501, 124 Stat. 119, 242-52 (2010) (laying out the operations of the mandate and the associated penalty within Title I of the statute), *with id.* §§ 9001–17 & 9021–23, 124 Stat. 847–83 (laying out the revenue raising provisions of the statute, but not addressing the mandate or penalty).

64. *See id.* § 10907, 124 Stat. 130, 1020 (modifying the language of Title IX to penalize the use of indoor tanning facilities).

didn't the so-called tax that's central to the entire reform? The nomenclature doesn't matter—if Congress had labeled the provision at issue an "apple," that wouldn't mean you could bake it into a pie—so running something through the IRS doesn't magically transform it into a tax. Finally, the Department of Health and Human Services administers part of the regulation.[65] Where multiple agencies are involved in a complicated program, are courts to evaluate which agency does a plurality of the work when determining that program's constitutionality?

Fifth, Roberts noted that the IRS can't punish people or attach any other "negative legal consequences" for the nonpayment of the Obamacare tax[66]—which is important because Congress can use only its regulatory authority to punish people, not its taxing power[67]—but this factor is too good to be true because money is fungible. Let me illustrate: Let's say you owe $1,000 in federal income tax and also $1,000 in Obamacare tax. You pay the IRS $1,000, thinking that you're settling your income tax obligation. The IRS, however, applies that payment to your Obamacare obligation. All of a sudden, you still owe $1,000 in federal income tax, the nonpayment of which carries definite criminal penalties. Now, the IRS hasn't yet issued its rule on how it will administer the Obamacare tax, but unless that rule gives you *three* options—buy the insurance, pay the tax, *or do nothing* (which would defeat the point of the whole exercise)—there are going to be very real legal consequences for not paying the Obamacare tax.

Sixth, Roberts conflated tax credits on ownership or activity with his new tax on inactivity. That is, a credit, whether a deduction or exemption, is an incentive to relieve a generally applicable tax burden.[68] For example, the deduction for mortgage interest is an incentive for homeownership, relieving someone from the generally applicable income tax. There is no generally applicable "health insurance tax" from which purchasers are exempt (though Congress could have structured Obamacare this way). There has also never been a tax on inactivity or the failure to purchase something, so all of the examples Roberts gives to analogize his new Obamacare tax are

65. 42 U.S.C. § 1320d-2 (Supp. IV 2010).
66. *NFIB,* 132 S. Ct. at 2596–97.
67. *Id.* at 2600.
68. *See generally* 26 C.F.R. §§ 1.30–1.51 (2012).

inapposite: A tax on the purchase of gas is of course a tax on the purchase of a particular product. A tax on earning income is of course an income tax (which required an amendment to the Constitution to make lawful). As for Roberts's hypothetical $50 tax on not having energy-efficient windows,[69] until this ruling, it was actually an open question whether such a novel thing—as opposed to a deduction for installing the windows—was constitutional. Congress has long induced purchases through tax credits, and under Roberts's logic, these provisions were hopelessly inefficient given that Congress could simply have taxed the non-ownership of electric cars or energy-inefficient windows. If the government truly had this direct way of achieving its goals, it would have used it long ago. Moreover, as the Court recently held in an opinion joined by Chief Justice Roberts, to think of tax credits and tax debits as the same thing for constitutional, as opposed to economic, purposes "assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands."[70]

Seventh, Roberts's correct statement that "the Constitution doesn't guarantee that individuals may avoid taxation through inactivity" is beside the point given that he goes on to rule out the precise types of taxes (capitations and other direct taxes; see the tenth point below) levied on something other than activity.[71] A capitation is a direct tax on a person—literally a "head tax"[72]—not on that person's inactivity. Instead, Roberts frames his view of the Obamacare tax as one "triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance."[73] Until Obamacare, the federal government had never claimed the ability to "tax" a particular status or condition, or the *decision* to remain inactive, or the non-purchase of something, however one articulates the ostensible subject of taxation here.[74]

Eighth, Roberts erroneously declined to examine Congress's motive, which was clearly intended to compel behavior rather

69. *NFIB*, 132 S. Ct. at 2597–98.
70. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011).
71. *NFIB*, 132 S. Ct. at 2599.
72. *Id.* at 2598.
73. *Id.* at 2599.
74. *See id.* at 2587 ("As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'").

than raise revenue. While the Court has of late eschewed evaluating whether a measure's primary purpose is to regulate or to raise revenue—which Roberts noted—it's quite obvious that Congress wouldn't have passed Obamacare if the mandate had been written as a tax. Indeed, Roberts himself said that "the essential feature of any tax" is that it "produces at least some revenue for the Government."[75] This mandate, however, is meant to discourage revenue because it's designed to compel as many people as possible to buy health insurance and thus avoid paying any penalty at all.[76] The scheme doesn't work as well if people "choose" to pay the tax, which is set at a level far less than the minimum cost of a qualifying insurance policy. Roberts himself states: "There comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."[77]

Ninth, building on the above point, Chief Justice Roberts, while thinking that he was throwing Obamacare back to the people for final judgment via the ballot box, actually allowed the political branches to escape political accountability. That is, if Congress had wanted to create a taxation system to fund Obamacare or incentivize health insurance purchases, it could've done so. It could've increased income taxes. It could've created a new payroll tax. It could've removed the "65 and older" requirement from Medicare[78]—making it Medicare for all. Under modern constitutional law, all these options would've been constitutional and the debate would've been between health care policy wonks instead of constitutional lawyers. But Congress didn't do those things, and that's a constitutionally significant fact. As the dissent put it:

> Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to

75. *Id.* at 2594.

76. *See id.* at 2580 ("The act aims to increase the number of Americans covered by health care.").

77. *Id.* at 2599 (quoting Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 779 (1994)).

78. 42 U.S.C. § 426 (Supp. II 2008).

the citizenry.[79]

Structure matters because the taxing power operates differently than the commerce power under the Constitution's system of checks and balances. That is, the taxing power is indeed quite broad but there's a greater political check on it than there is on the somewhat narrower federal regulatory authority. What Chief Justice Roberts allowed the political branches to do here was to run the easier political gauntlet and then the easier legal one, too. He didn't defer to Congress; he rewrote the law—on the remedy for the coercive Medicaid expansion also, making it voluntary rather than striking it down[80]—in order to save Congress's handiwork from its own infirmities.

Tenth and finally (and perhaps most importantly), Roberts never explained what kind of tax he was upholding. He goes out of his way to explain why this isn't a "direct tax" because those have to be apportioned among the states on the basis of population, which obviously isn't the way that the Obamacare tax operates.[81] But he never identifies what kind of indirect, constitutionally authorized tax we have here. The Constitution only allows for four kinds of taxes in addition to direct ones.[82] There are duties and imposts—which are taxes on international trade that aren't too relevant here because we don't import insurance policies on container ships from China—and then there are income taxes and excises. The Obamacare tax isn't an income tax because it's not a tax on the accrual of wealth—whether that be wages, interest, or capital gains. Yes, a person's income factors into how the Obamacare tax is calculated, but it's not the trigger. As Roberts himself described, if this is a tax then what it taxes is the condition of not having health insurance.[83] Using income as part of a formula for some payment doesn't make that payment an income tax. That leaves excises, which are actually the most common taxes.[84] The Medicare and Social Security payroll taxes are excises, for example, having been construed by courts as taxes on the activity of employment or the

79. *NFIB*, 132 S. Ct. at 2655 (joint dissent) (citation omitted).
80. *Id.* at 2608 (majority opinion).
81. *Id.* at 2599.
82. U.S. CONST. art. 1, § 8, cl. 1; U.S. CONST. amend. XVI.
83. *NFIB*, 132 S. Ct. at 2594.
84. *See* BLACK'S LAW DICTIONARY 563 (6th ed. 1990) ("[P]ractically every internal revenue tax except the income tax" is an excise tax.).

exchange of your labor for money.[85] Excises are thus taxes on activities, transactions, and the enjoyment of privileges. In Roberts's own words, there is no activity to be taxed here, but it's unclear whether he thinks that this is an excise on the privilege of not buying something or if the tax is something else.[86]

In short, Roberts's taxing power section simply doesn't compute. It's still unclear what the provision at issue is; even after the ruling, a debate rages over whether it's a tax or a penalty.[87] I've taken to calling it a unicorn tax—a creature of no known constitutional provenance that will never be seen again. It's also not a very big power—Congress can impose small non-coercive, non-punitive taxes for not buying something—and it's a power that comes with much political baggage. But regardless of the power's size, it won't be seen again any time soon because Congress won't be able to fool people in this manner again. It'll be difficult to pass any noxious regulation that has a hint of taxation about it because people will know that the Supreme Court might just uphold it in a similar manner. Roberts thus succeeded in crafting a ticket good for the Obamacare train only. He must have at some point posed to himself the conundrum of how to uphold this law without expanding federal power, and that's the result we got.

VI. WHAT WAS JOHN ROBERTS THINKING?

Despite his self-description as an umpire who just calls balls and strikes,[88] Chief Justice John Roberts in *NFIB* didn't so much "call 'em as he saw 'em," as rewrite a law to create a national regulatory scheme that differed from the one that the political branches enacted in several important ways. Obamacare's "minimum coverage provision" said that people "shall" buy qualifying health insurance or pay a penalty[89]—and yet Roberts, while correctly finding that such a command exceeded federal regulatory authority, reimagined it as a "choice" between doing

85. *See* Helvering v. Davis, 301 U.S. 619, 635 (1937).

86. *NFIB*, 132 S. Ct. at 2594. For more on this point, see *A Vast New Taxing Power*, *supra* note 1.

87. *See, e.g.*, Oliver Knox, *White House: Sorry, Roberts, Obamacare mandate is a penalty, not a tax*, ABC NEWS (Jun. 29, 2012), http://abcnews.go.com/Politics/OTUS/white-house-roberts-obamacare-mandate-penalty-tax/story?id=16679772#.UJxFkFH7WfQ.

88. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. On the Judiciary*, 109th Cong. 56 (2005) (Statement of John G. Roberts, Nominee to be Chief Justice of the United States).

89. 26 U.S.C. § 5000A (Supp. V 2011).

something and paying a tax. Obamacare expanded Medicaid such that states would be required to cover many more people than they currently do—and yet Roberts, while recognizing that expansion as coercive, merely made it optional rather than striking it down altogether.

The Chief Justice thus made a dog's breakfast of American health care. Some people will choose to buy insurance, but most will make the rational choice not to buy insurance. Some states will expand Medicaid, others will not—and that's on top of the "exchanges" that many states are already declining to establish, decisions that are apparently surprising both the legislation's drafters and the agencies charged with implementation.[90] It seems that we'll have a patchwork quilt rather than the comprehensive (if otherwise problematic) program Congress designed. In the words of the joint dissent:

> The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.[91]

In masterminding such a maneuver, Roberts damaged the reputation of the Court and of Congress, not to mention the freedom of the society to which these branches of government are supposedly accountable. Again, the dissenters put it best:

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90. In an unfortunate but not unexpected twist on Nancy Pelosi's infamous exclamation, the more we find out about Obamacare's details, the more legal and constitutional problems we discover. For example, the legislation provides tax credits and subsidies for the purchase of qualifying health insurance plans on state-run—but not federal-run—insurance exchanges. *See* 26 U.S.C. § 36B (Supp. V 2011). The IRS, however, is promulgating a rule that extends these credits and subsidies to the purchase of health insurance in *federal* exchanges, a rule that plainly lacks statutory authority. And this is no drafting error: the state-exchange-only subsidies are an attempt by Congress to provide incentives to states to create their own exchanges. Because the granting of tax credits can trigger certain fines on employers, the IRS rule will face a very credible legal challenge. *See* Jonathan H. Adler & Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits Under the PPACA*, HEALTH MATRIX (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2106789.

91. *NFIB*, 132 S. Ct. at 2676 (joint dissent).

> The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty.[92]

* * *

Look, there's a word for people who accurately predicted that Obamacare would be saved by a 5-4 vote with the Chief Justice providing the decisive vote and Justice Kennedy in dissent: liars. There are two words for those who additionally predicted that the individual mandate would be rewritten and upheld as an exercise of the taxing power: damned liars. There's a further word for those who also predicted that the Court, while holding that the individual mandate was invalid as an exercise of the commerce power, would nonetheless—and by a 7-2 vote—rule that the Medicaid expansion was impermissibly coercive under the Spending Clause: statisticians.[93]

Having filed ten amicus briefs, including one on each of the four issues that the Supreme Court set for oral argument, written dozens of articles, and attended all the appellate arguments—including in the lower courts in Richmond, Cincinnati, and Atlanta—I thought I knew what to expect. Indeed, before any district court had even ruled, I predicted that the Court would "either strike down the reform or find a technical way to avoid ruling on the constitutional merits and thus allow the law to stand."[94] And then in the summer of 2011, I argued that "the Supreme Court will not issue a decision ratifying a more expansive use of the commerce power than it did in *Raich*. It will either strike down this law or find some way to avoid the merits while effectively allowing the individual mandate to stand."[95] I

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92. *Id.*

93. If you liked that joke, good. If not, take it up with the folks from whom I stole it. *See* John P. Elwood & Eric A. White, *What Were They Thinking? The Supreme Court in Revue, October Term 2011*, 15 GREEN BAG 2d 405, 406 (2012).

94. Ilya Shapiro, *State Suits against Health Reform Are Well Grounded in Law—And Pose Serious Challenges*, 29 HEALTH AFFAIRS 1229, 1232 (2010). I was of course thinking of standing, ripeness, or, especially in the later stages, the Anti-Injunction Act.

95. Ilya Shapiro, *The Individual Mandate: An Unprecedented Expansion of Federal Power*, SCOTUSBLOG (Aug. 3, 2011, 3:38 PM), http://www.scotusblog.com/2011/08/the-individual-mandate-an-unprecedented-expansion-of-federal-power/.

was nevertheless gobsmacked as I sat in the marble palace courtroom that fateful morning of June 28, 2012, and heard Chief Justice Roberts give the government a bottom-line victory while neither expanding federal regulatory authority nor dismissing the case on some technical ground.

What I (and everyone else) missed was the possibility that the case would be decided on something other than the law. That is, eight justices decided *NFIB* using competing legal theories—four finding that the Constitution limits federal power,[96] four that constitutional structure must yield to "Congress'[s] capacity to meet the new problems arising constantly in our ever-developing modern economy"[97]—but one did something else, basing his decision on considerations that have nothing to do with constitutional law. I'm not concerned that that one may have changed his mind;[98] judges do that all the time, particularly in big, hard cases. Instead, what bothers me is that his taxing-power opinion simply doesn't make sense. It's not worthy of perhaps the most acute legal mind of his generation.

There are two regrettable inferences to draw, which most likely explain what happened. The first, which may be counterintuitive to some, is that Roberts adhered to an extreme judicial restraint, the idea that judges should defer to the political branches, if at all possible, regardless of how they view the law. That is, whereas the four Democratic appointees could be said to be "activist" in finding no judicially administrable limits on federal power—though I don't like the term "activism" because it typically refers to any ruling with which the speaker disagrees—John Roberts displayed a certain "pacifism," which is an unfortunate legacy of the knee-jerk conservative reaction to the liberal judicial excesses of the 1960s and '70s. Instead of engaging the judicial battle on the terrain of constitutional theory, pacifists express alarm at the overturning of democratically enacted laws. John Roberts's *NFIB* ruling is the fruit of that poisonous judicial philosophy.

The second inference—the more common one, though I

96. *NFIB*, 132 S. Ct. at 2642 (joint dissent).

97. *Id.* at 2629 (Ginsburg, J., joined by Breyer, Sotomayor, and Kagan, JJ., concurring in part and dissenting in part).

98. *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS, (July 1, 2012), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

don't think we know the relative salience of either—is that, for reasons of politics or reputation, Roberts decided that he needed to uphold the law while not expanding federal power. That's quite a dilemma, but it explains why we're left with a head-scratching tax on inactivity at the heart of a rewritten statute that no Congress would ever have passed.

The sad thing about this entire episode is that the Chief Justice didn't have to do what he did to "save the Court." For one thing, Obamacare has always been unpopular—particularly its individual mandate, which even a majority of Democrats thought was unconstitutional[99]—so upholding it, and in such a bizarre way, has actually hurt public trust in the Court.[100] For another, Roberts only damaged his own reputation by making this move after months of warnings from politicians—including President Obama—and pundits that striking down the law would sully the Court. (I don't at all believe that he succumbed to pressure of that sort, but many people do.) Perhaps most importantly, though, the reason we care about maintaining the Court's integrity is so it can make the tough calls in the controversial cases while letting the political chips fall where they may. Striking down Obamacare would have been just the sort of thing for which the Court needs all that accrued institutional respect and gravitas. Instead, we have a strategic decision dressed up in legal robes, judicially enacting a law Congress didn't pass.

But what was Roberts saving the Court for if not the sort of epochal case that *NFIB* was? In refraining from making the hard balls-and-strikes calls he discussed at his confirmation hearings, Roberts showed precisely why we don't want our judges playing politics.

In sum, the Constitution's structural provisions—federalism, separation and enumeration of powers, checks and balances—aren't just a dry exercise in political theory, but a means to protect individual liberty from the concentrated power of popular majorities. Justice Kennedy said it best in summarizing the joint dissent from the bench: "Structure means liberty."[101] If

99. *See, e.g.*, Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP (Feb. 27, 2012), http://www.gallup.com/poll/152969/americans-divided-repeal-2010-healthcare-law.aspx (summarizing results of Feb. 20–21 *USA Today/Gallup* poll).

100. Lydia Saad, Americans Issue Split Decision on Healthcare Ruling, GALLUP (June 29, 2012), http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx (summarizing results of June 28 *USA Today/Gallup* poll).

101. Oral Dissent of Justice Kennedy at 9:58, *NFIB*, 132 S. Ct. 2566 (2012) (No. 11-

Congress can avoid the Constitution's structural limits by "taxing" inactivity, its power is no more limited and liberty no better protected than if it were allowed to regulate at will under the Commerce Clause. The ultimate lesson to draw from this two-year legal seminar, then, is that the proper role of judges is to apply the Constitution regardless of whether it leads to upholding or striking down legislation. And a correct application of the Constitution inevitably rests on the Madisonian principles of ordered liberty and limited government that the document embodies.

393), available at http://www.oyez.org/cases/2010-2019/2011/2011_11_400. *See also* Bond v. United States, 131 S. Ct. 2355, 2365 (Kennedy, J., for a unanimous Court) ("Federalism secures the freedom of the individual.").

THE LEGAL RAMIFICATIONS OF PUBLIC PENSION REFORM

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I. INTRODUCTION

State pension systems are in financial trouble. According to a 2011 Pew report, state pensions are collectively some $660 billion short of the funding needed to meet their actuarial liabilities.[1] More alarmingly, that figure depends on the assumption that pensions' current investments will appreciate at about 8% per year indefinitely.[2] Under more realistic and less volatile assumptions, the unfunded liabilities rise considerably to as much as $3 trillion using the state debt interest rate, or $4.4 trillion using the zero-coupon Treasury yield.[3]

In light of these looming actuarial deficits, numerous states have begun taking steps to reform their pension systems, with some states making modest changes and others beginning to enact serious and fundamental pension reform.[4] In Rhode Island, State Treasurer Gina Raimondo spent all of 2011 warning of a looming $9 billion or so deficit in the pension systems there—a deficit so large that the state would soon be unable to pay what is needed for schools, roads, libraries, and more.[5] Despite weighty political opposition from the state's powerful labor unions, Rhode Island enacted groundbreaking pension reform in late 2011.[6]

Many states have found that reform legislation is just the

1. PEW CTR. ON THE STATES, THE WIDENING GAP: THE GREAT RECESSION'S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS 2 (2011), *available at* http://www.pewstates.org/uploadedfiles/pcs_assets/2011/pew_pensions_retiree_benefits.pdf.

2. *Id.*; JOSH BARRO & STUART BUCK, UNDERFUNDED TEACHER PENSION PLANS: IT'S WORSE THAN YOU THINK 2 (Manhattan Institute Civic Report No. 61) (2010), *available at* http://www.manhattan-institute.org/pdf/cr_61.pdf.

3. Robert Novy-Marx & Joshua D. Rauh, *Public Pensions Promises: How Big Are They and What Are They Worth?* 66 J. FIN. 1211, 1212–13 (2011).

4. *See* RONALD K. SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES, PENSIONS AND RETIREMENT PLAN ENACTMENTS IN 2011 STATE LEGISLATURES (2012), *available at* http://www.ncsl.org/documents/employ/2011EnactmentsFinalReport.pdf (describing changes to state pension plans across the United States in 2011); RONALD K. SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES, PENSIONS AND RETIREMENT PLAN ENACTMENTS IN 2010 STATE LEGISLATURES (2010), *available at* http://www.ncsl.org/LinkClick.aspx?fileticket=v6KpQROK1ws%3d&tabid=20836 (describing changes to state pension plans across the United States in 2010).

5. *See generally* GINA RAIMONDO, R.I. OFFICE OF THE GEN. TREASURER, TRUTH IN NUMBERS: THE SECURITY AND SUSTAINABILITY OF RHODE ISLAND'S RETIREMENT SYSTEM (2011), *available at* http://www.treasury.ri.gov/documents/SPRI/TIN-WEB-06-1-11.pdf (discussing the key drivers of Rhode Island's structural pension deficit and proposing a framework for future action).

6. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4, at 12 (referencing Rhode Island Public Law Chapter 408).

beginning. Within the past few years, at least twenty-five jurisdictions have faced lawsuits alleging that pension reform is unconstitutional, including Colorado, Minnesota, South Dakota, New Hampshire, New Mexico, Massachusetts, Florida, New Jersey, and Rhode Island.[7]

The most significant claim raised against pension reform legislation is that it violates the federal Contract Clause or a state constitutional parallel. In both the U.S. and state constitutions, a contract clause provides that the government may not pass laws that abrogate contractual responsibilities. Thus, the argument runs, a pension promised to a state employee is essentially a contract: the state employee was offered work in exchange for a compensatory package that included both salary and a pension benefit.[8] When legislation diminishes pension benefits, it alters the terms of the state's contractual obligation to provide the bargained-for remuneration, and is arguably unconstitutional.

A second claim raised against pension reform is that it violates the takings clauses of state and federal constitutions. These clauses prevent the government from taking away someone's property without just compensation. The argument is that state pension benefits are a promised stream of monetary payments with present economic value, and therefore arguably constitute an employee's "property."[9] Thus, if the state diminishes that stream of payments without some countervailing compensation, then some of the employee's property has been "taken" away.[10]

The claim that pension rights are contractual is not only plausible but has often succeeded in prior state court lawsuits.[11] As a result, many policymakers and courts have suggested that pension reform must be limited to changing the terms

7. Kristin De Pena, *Pension Litigation Update, August 2012*, STATE BUDGET SOLUTIONS (Aug. 1, 2012), http://www.statebudgetsolutions.org/publications/detail/pension-litigation-update-august-2012. *See, e.g.*, Justus v. Colorado, No. 11CA1507, 2012 WL 4829545, at *1 (Colo. App. Oct. 11, 2012).

8. *See, e.g.*, Parker v. Wakelin, 123 F.3d 1, 3 (1st Cir. 1997).

9. *See, e.g.*, Bailey v. State, 500 S.E.2d 54, 59 (N.C. 1998).

10. In most cases, a takings clause argument appears, if at all, only as a tag-along claim to a contracts argument. A takings violation miay arise only if the plaintiffs have a contractual right to the stream of payments, which in turn means that a takings claim usually rises or falls along with a contractual claim. *E.g.*, Nat'l Educ. Ass'n-R.I. *ex rel.* Scigulinsky v. Ret. Bd. of R.I. Employees' Ret. Sys., 172 F.3d 22, 30 (1st Cir. 1999).

11. *E.g.*, Madden v. Contributory Ret. Appeal Bd., 729 N.E.2d 1095, 1098 (Mass. 2000).

applicable to newly hired employees.[12]

However, states ought to have more options available to them with respect to current employees' benefits. Courts faced with pension reform questions have rarely considered exactly what types of pension reform ought to count as unfair contractual changes. Instead, most published decisions involved patently unfair pension changes, such as reducing the pension benefits for retirees who worked for their entire careers with the expectation that they would receive a higher benefit.[13]

This article will argue, however, that more modest changes to current workers' benefits ought to be allowed consistent with federal and state contracts clauses. In particular, it would be more consistent with the underlying considerations of established case law for state workers to be presumptively entitled to the pension benefits that they have actually accrued for past work, even while changes to future accruals are permissible. This theory is consistent with most of the case law construing federal and state contracts clauses.

Consider the case of pension benefit increases. Imagine, for example, that for twenty-nine out of thirty years of a state worker's working life, a statute provided that the cost of living allowance (COLA) for state employees' pensions would be 2.5%, but the statutory COLA was raised to 3% during the last year of that person's career. It is hard to see why that person would now be contractually entitled to a 3% COLA for the rest of his life, possibly another thirty years. Why is that so, given that the worker spent the overwhelming majority of his or her career contributing to a system that, at the time, was designed to allow for a lower COLA? Put more broadly, by what principle of contract law should retirees be guaranteed the highest level of benefit that might ever have momentarily been put in place during their entire working lives?

This standard does not seem a plausible application of principles of contract law. Pensions are merely an alternative way of structuring salary-based compensation, after all: rather than paying a worker's entire salary today, the state government sets aside a portion and invests it so as to be able to pay out a pension

12. *See* Jones v. Cheney, 489 S.W.2d 785, 790 (Ark. 1973).
13. *E.g.*, Kern v. City of Long Beach, 179 P.2d 799 (Cal. 1947).

after twenty-five or thirty years. If wages are increased—say, from $45,000 to $48,000—state employees with twenty-eight years of service at the lower wage would not therefore be entitled to receive back pay that brings all their previous twenty-eight years of salary up to $48,000. Those employees bargained for and worked for the lower wage for those twenty-eight years. To be sure, if they continue working under the wage increase, they will receive the higher salary on a going-forward basis, but they are not entitled to have their wages retroactively increased for all the previous years of employment; they never provided consideration for such a wage increase.

By the same reasoning, when pension benefits are increased, it is not plausible to argue that anyone within the system, no matter how near retirement, is then constitutionally entitled to receive that higher pension benefit during his or her entire retirement. Pensions are just back-loaded salary. If someone works for twenty-eight years with the expectation of a certain pension benefit, and that benefit is raised on a going-forward basis for the last two years of her employment, she is contractually entitled to the higher benefit for the last two years, but not for the earlier twenty-eight, since the higher benefit is not what she bargained for during all of her previous years of employment.

Consider, then, the case of pension benefit decreases. To what are employees entitled? Courts in several states have offered the suggestion, albeit without weighing the full implications thereof, that state workers have a contractual interest in the pension benefits as they exist on the date that a worker begins his or her career.[14] These courts seem driven to such a conclusion out of the fear that employees who contributed to a pension system for, say, five or ten years could then see those already-accrued benefits reduced or eliminated by the time they reach retirement.

Again, though, the prorated solution makes perfect sense. Consider the flip side of my initial analogy: imagine that the pension system includes a 3% COLA for the first year of an employee's thirty-year career, but is reduced to a 2.5% COLA for the remaining twenty-nine years of that employee's career. No

14. *E.g., id.* at 802; Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995).

court has faced exactly such a situation and thereupon held that such an employee would be entitled to the 3% COLA for his or her entire retirement, although several courts have indeed said that their state constitutions protect pension benefits as of the date of employment.[15]

Such a holding makes little sense. To return the analogy to regular wages, if the salary for a job is $30,000 during a worker's first year of work, but then is lowered to $29,000 in year two and thereafter, no constitutional problem arises. True, if the state attempted to demand a refund of $1,000 for salary paid during year one, that would be problematic, but it is presumptively constitutional to offer a lower salary on a going-forward basis. If the employee does not wish to work for the new and lower salary, he is free to seek employment elsewhere, thus providing a brake on any impulse for the state to lower salaries across the board.

The same logic applies in the pension context. If an employee was promised a 3% COLA only during one year of his career, but worked towards a 2.5% COLA for the overwhelming majority of his career, the employee's contractual entitlement is to a prorated COLA that was based on his one year of work under the 3%-COLA-system and his twenty-nine years of work under the 2.5%-COLA-system.[16]

By the same token, though, the employee could arguably be presumptively entitled to a prorated portion of whatever higher benefit had been promised for a given period of time. Thus, recent court decisions from Colorado and Minnesota arguably err in allowing state governments to reduce the COLA awarded to retirees all the way down to a new and lower level, without taking into account how long those employees might have worked towards the previous higher benefit.[17]

Thus far, I have merely described the default contractual protection that should apply to state pensions. But under current constitutional doctrine, even valid state contracts can be abrogated in an emergency situation.[18] Such a situation arguably

15. *E.g.*, *Kern*, 179 P.2d at 803–04; *Calabro*, 531 N.W.2d at 554.

16. The prorated average would be [(29*.025) + (1*.03)]/30 = .02517, or 2.517%.

17. Order and Memorandum, Swanson v. Minnesota, No. 62-cv-10-05285 (Minn. Dist. Ct. June 29, 2011), *available at* http://www.minnesotatra.org/IMAGES/PDF/judgejohnsonorder.pdf.

18. Balt. Teacher's Union v. Mayor and City Council of Balt., 6 F.3d 1012, 1020 (4th Cir. 1993).

exists in some states. In Rhode Island, for example, the state faces a $9 billion underfunding problem, or around $9,000 for every person in the state.[19] As the state treasurer there has pointed out, the proportion of state taxes devoted to pensions is projected to rise to a stunning 20% in 2018, up from 3% in 2002.[20] Without serious pension reform, the state of Rhode Island would not have enough money for many other state services, such as police, trash pickup, or schools.

Reducing benefits to retirees obviously upsets the reliance that retirees (most of whom are unfamiliar with actuarial calculations) may justifiably have had on their pension benefits. At the same time, the Constitution is not a suicide pact, as Justice Jackson famously said.[21] State judges will therefore be faced with a difficult choice in times of strapped budgets: either affirm the limitation of benefits that retirees relied on in good faith, or order a state to shortchange schoolchildren and other recipients of state services in order to pay retirees for pensions that neither they nor anyone else ever funded fully.

So, then, the key principle is this: contractual protection makes sense only for past benefit accruals (at most, and given the lack of a true emergency), but future benefit accruals can be changed in the same manner that future salaries can. The real challenge, however, is how to apply this key principle to actual cases—that is, to actual cases that have been litigated, and to actual reforms as to which the dividing line between past and future accruals is not always as clear as in the case of employee contributions. For example, it is not intuitively obvious how courts should treat raising the retirement age or changing the way final average salary is calculated. The signal contribution of this article is to examine numerous ways in which a state legislature could change future accruals or even change the pension system entirely, while still allowing contractual protection of past accruals.

The plan for the remainder of this article is as follows: Section II presents the background on how state pensions work. Section III discusses the constitutional arguments that have been raised against pension reform and analyzes their merits. It elaborates

19. *See* RAIMONDO, *supra* note 5, at 2.
20. *Id.* at 9.
21. Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

on the arguments made above that existing case law is best and most reasonably interpreted as protecting pension benefits as contracts under state and federal constitutions, but only to the extent that a particular form or level of pension accrual was already applied to previous years of service. It also expands on the point that even with such protection in place as the default, courts may still appropriately decide to allow retiree benefits to be limited where these benefits were never fully paid for and where the deficits pose a dire threat to state budgets. Most significantly, several subsections examine in detail how courts should apply the Contract Clause to several of the more analytically challenging types of pension reforms, such as changing the retirement age or moving to a contributory or hybrid system.

II. BACKGROUND ON PENSIONS

A. *The Structure of Pensions*

In defined contribution plans, such as the 401(k)s that are familiar in the private sector, the employee contributes money to the account, that money is invested, and whatever exists in the account at retirement belongs to the employee—nothing more and nothing less. In a defined benefit plan, however, the system promises to pay a particular benefit during retirement, even if the present value of benefits is much higher than what the employee and/or employer expected to pay into the pension system.

A defined benefit pension is typically calculated as a percentage of final average salary (this can be the final year of work, or the average of some longer period, such as three or more years). The percentage is derived by applying a multiplier to the employee's years of service. Thus, for example, if a state employee retires with thirty years of service, with a final average salary of $100,000, and with a multiplier in place of 2%, then the yearly pension payment will be thirty years times 2% times $100,000—that is, $60,000 per year for the rest of the employee's life.[22] The typical pension plan has various age and/or service

22. *See* Douglas Fore, *Going Private in the Public Sector: The Transition from Defined Benefit to Defined Contribution Pension Plans, in* PENSIONS IN THE PUBLIC SECTOR 267, 267–68 (Olivia S. Mitchell & Edwin C. Hustead eds., 2001).

requirements in order to retire with a full pension; in a given plan, for example, an employee might be able to retire after reaching age sixty-five with ten plus years of service, or after reaching thirty years of service regardless of age.[23]

Most pension plans also include some sort of cost-of-living allowance, or COLA, by which the pension payments paid to retirees increase over time. As we shall see below, some states have set a statutory COLA at a particular number (say, 2% per year), while others base the COLA on the rate of inflation, while others base it on inflation but with a cap, while still others have caps and floors on a cumulative adjustment.[24] A further distinction is whether the COLA is simple (that is, applied to the original base amount each year) or compounding (that is, applied to whatever the pension payment actually was in the previous year, with all previous COLAs having been applied to that payment as well).

Defined benefit plans are funded as follows: public employers (such as school districts) set aside a certain percentage of their payroll every year, while employees typically set aside a certain percentage of their salaries as well.[25] In many cases, however, the state employer "picks up" the employee contribution, in essence making both the employer and "employee" contribution at once.[26] This is expressly allowed under the Internal Revenue Code, which provides that "where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions."[27]

This all may seem like a matter of semantics at first glance. If the employer offers a salary of $45,000 and "picks up" an employee contribution requirement of $5,000 per year, how is

23. Olivia S. Mitchell, David McCarthy, Stanley C. Wisniewski & Paul Zorn, *Developments in State and Local Pension Plans, in* PENSIONS IN THE PUBLIC SECTOR 10, 21–22 (Olivia S. Mitchell & Edwin C. Hustead eds., 2001).

24. *Id.*

25. *See* Karen Steffen, *State Employee Pension Plans, in* PENSIONS IN THE PUBLIC SECTOR 41, 43 (Olivia S. Mitchell & Edwin C. Hustead, eds., 2001). The distinction between employee and employer contributions is semantic, of course; all of the money at issue comes from state taxes, whether or not it is first delivered to the employee under the heading of "salary."

26. I.R.C. § 414(h)(2) (2006).

27. *Id.*

that any different from offering a salary of $50,000 and demanding an employee contribution of $5,000 per year? The answer is that when the employee makes a contribution to a defined benefit pension plan and it is defined as an "employee contribution" by the plan itself, income taxes and FICA (Social Security and Medicare) taxes are still owed on the amount contributed. But if the employer "picks up" the employee contribution, the employee owes no income or FICA taxes on the contribution.[28] Further, if the employer pick-up is done for tax purposes and is taken out of the stated salary, the employee is entitled to withdraw it upon early retirement or withdrawal. Indeed, federal law does not recognize pre-tax employee contributions at all: even in the case of 401(k) plans, the federal tax code refers only to "employer contributions."[29]

The employer and employee contributions, if any, in a given year do not represent the full dollar value that is expected to be paid out in pensions one day. Instead, the total contributions are typically limited to the "normal cost" of the pension system plus any extra employer contributions that go towards unfunded liabilities. The yearly "normal cost" of the pension system is simply the amount of money that represents the system's best estimate of (1) what this year's employees will one day be paid in pensions due to this year's worth of work; and (2) what smaller amount of money needs to be set aside today in order to compound (via interest or investments) to pay the higher amount in (1).

We thus arrive at the concept of "accrual." Accrual has at least three different definitions. By the economic definition, as used in Costrell and Podgursky (2010), a year's accrual refers to the amount by which the present value of pension benefits rises for one employee after one year of work, over and above interest on prior pension wealth and the employee's own contributions.[30] In

28. *See generally Employer "Pick-Up" Contributions to Benefit Plans*, INTERNAL REVENUE SERVICE (Aug. 03, 2012), http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Employer-Pick-Up-Contributions-to-Benefit-Plans (explaining how an employer "pick up" of an employee contribution results in no income or FICA taxes on the contribution).

29. I.R.C. § 401(k)(2)(B) (2010).

30. *See* Robert M. Costrell & Michael Podgursky, *Distribution of Benefits in Teacher Retirement Systems and Their Implications for Mobility*, 5 EDUCATION FINANCE & POLICY 4, 519–57 (2010).

other words, if an additional year of work at present entitles the employee to another 2% of his final average salary during each year of retirement, and if there is nothing deemed an "employee contribution," then that year's accrual would simply be the discounted value of that increment of 2% of final average salary.

There is a second and very different concept of accrual used by actuaries to calculate the normal cost of an employee's pension. In the actuarial usage, accrual is not directly tied to the extra incremental payment that an employee is actually eligible to receive if she retired in any given year of employment. Instead, actuarial accrual is smoothed out such that it represents the normal cost of what should be contributed to the pension system each year so that, assuming the employee works until retirement age, the employee's pension will be fully funded at that time.

In this article, I rely on yet a third variant of accrual, as used by the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA). In those federal laws, an "accrued benefit" means one's pension wealth expressed in the form of what it would cost to purchase an annuity at retirement age, discounted back to present value.[31] This is obviously quite close to the economic concept of accrual used by Costrell and Podgursky, with the main difference being the inclusion of employee contributions in the total value of what is accrued during a given year.

ERISA sets out three alternative schedules for the accrual of benefits under private defined benefit plans.[32] First, a plan can provide that a worker's accrued benefit each year rises by a 3% increment of what his "normal retirement benefit" would be if he started working at the earliest possible age and worked until sixty-five or full retirement.[33] Second, a plan can provide that the amount by which retirement benefits accrue in any one year is no more than one and one-third times the rate in which benefits accrue in any other year of the employee's career.[34] Third, a plan can provide that if a worker leaves employment before

31. United States General Accounting Office, *Answers to Key Questions About Our Private Pensions*, GAO, 13 (Sept. 18 2002), http://www.gao.gov/assets/100/91509.pdf.
32. 29 U.S.C. § 1054(b)(1) (2006).
33. *Id.*
34. *Id.*

retirement age, the plan must divide his actual years of employment by the total years that would have been necessary to reach the normal retirement age; then that fraction is multiplied by the retirement benefit he would have gotten if, at the date of separation, he had actually been completing a full career and retiring normally.[35] In other words, if a worker leaves after fifteen years of employment with fifteen years left to reach the normal retirement age, his pension benefit would be calculated by pretending that he had actually just completed thirty years of employment ending at that particular salary, then multiplying by half to account for the fact that he had worked only half a career. All of these standards ensure that accrual is fairly even throughout each worker's career. In other words, it is not legal under ERISA to structure a pension plan as many governmental plans have, letting workers accrue little, if anything, during their first ten or fifteen years of employment but then providing a huge accrual bump at some later date.[36]

Whereas accrual is about the "*amount* of the benefit to which the employee is entitled," vesting is about "when an employee has a *right* to a pension."[37] Vesting generally refers to giving the employee a guaranteed entitlement to part or all of the accrued benefits arising from employer contributions. Black's Law Dictionary defines "vested" as "[h]aving become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute."[38] Under the Internal Revenue Code—which, here, does not apply to governmental plans[39]—the following standards apply. First, an employee must always have a "nonforfeitable" right to his own contributions.[40] Second, in the case of a defined benefit plan, one of two vesting standards must be satisfied, by either of which the employee has a right to the accrued benefit arising from employer contributions: 100% at five years of service, or a 20%-40%-60%-80%-100% schedule for years three through seven of employment.

35. *Id.*
36. *See* Costrell & Podgursky, *supra* note 30, at 519–57.
37. Stewart v. Nat'l Shopmen Pension Fund, 730 F.2d 1552, 1562 (D.C. Cir. 1984) (emphasis in original).
38. BLACK'S LAW DICTIONARY (8th Ed. 2004).
39. I.R.C. § 411(e)(1)(A) (2006).
40. *Id.* § 411(a)(1).

In pension jurisprudence, "vesting" is often treated as essentially synonymous with the question of whether the pension is "contractual"[41]—if a pension benefit is vested, then it presumptively receives constitutional protection, and vice versa.[42] That said, there are various state courts that have used a completely different sense of vesting, by which vesting occurs at the time of retirement, not before. For example, one state court found that "although we find vested rights, we do not find contractual rights," on the theory that for vesting to become "mature," the final statutory condition of actually retiring must be met first.[43]

Any employer and employee contributions become part of the current assets of the pension system, and are invested in any number of ways (stocks, bonds, real estate, hedge funds, etc.), depending on the pension system's choices. The asset base of the pension system is then assumed to grow at some rate of return for the indefinite future. Pension systems have typically assumed a rate of return in the vicinity of 8%, although a few systems have begun to lower that estimate due to the recent economic downturn.[44]

Unfunded liabilities arise when the actuarial liabilities of the system exceed both the future normal contributions and the current actuarial assets. To unpack those terms, previously, the value of the assets used for actuarial purposes has not been the current market value but the "actuarial value" of the assets, which means average value over a rolling period of three to five or more years depending on the choices made by state law or a pension board. By using a rolling average, the actuarial value does not fluctuate as wildly every time the market swings up or down. A new Government Accounting Standards Board rule will eliminate this type of asset smoothing for purposes of financial reporting.

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41. *See* Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985).

42. White v. Davis, 68 P.3d 74, 99 (Cal. 2003) ("Once vested, the right to compensation cannot be eliminated without constitutionally impairing the contract obligation.").

43. Pierce v. State, 910 P.2d 288, 302 (N.M. 1995). *See also* Robinson v. Taylor, 29 S.W.3d 691, 693 (Ark. 2000).

44. Mary W. Walsh & Daniel Hakim, *Public Pensions Faulted for Bets on Rosy Returns*, N.Y. TIMES, May 27, 2012, http://www.nytimes.com/2012/05/28/nyregion/fragile-calculus-in-plans-to-fix-pension-systems.html?pagewanted=all&_r=0.

On the liabilities side, actuaries calculate what the pension system expects to be paying out to retirees over time given whatever benefits have been accrued via past service to date. This is a calculation that involves a huge number of assumptions, such as how many employees will continue in service, when they will retire, what their salaries will be at retirement, what their life expectancies will be, and the like.

Finally, the unfunded actuarial liability is found by comparing the total actuarial liabilities to the expected value that the actuarial assets will have when they are needed to pay out pensions plus the future normal contributions to the pension system.[45] If assets plus future contributions will not be enough to pay for pensions as they come due, then the pension system has an unfunded actuarial liability that must be paid down over time. As noted above, state pensions and retiree healthcare systems have a collective $1.26 trillion in unfunded liabilities as of 2009, according to the Pew 2011 report.[46]

This $1.26 trillion sum does not need to be paid off in one fell swoop, but rather can be paid over a twenty- or thirty-year amortization period. Even so, this collective underfunding is likely to be a significant financial strain on state budgets in the years ahead. As Novy-Marx and Rauh have pointed out:

> Without policy changes, contributions to these systems would have to immediately increase by a factor of 2.5, reaching 14.2% of the total own-revenue generated by state and local governments (taxes, fees, and charges). This represents a tax increase of $1,398 per U.S. household per year, above and beyond revenue generated by expected economic growth.[47]

B. *Private Pensions vs. Public Pensions*

1. Regulatory Treatment

Private and public pension systems are subject to very different regulatory structures under federal law. Private pension plans are governed by the Internal Revenue Code and by ERISA, which

45. *See generally* Mitchell et al., *supra* note 23, at 25; 29 U.S.C. § 1002 (29)–(30) (defining accrued liability and unfunded accrued liability).

46. PEW CTR. ON THE STATES , *supra* note 2, at 1.

47. Robert N. Marx & Joshua D. Rauh, *The Revenue Demands of Public Employee Pension Promises* 1 (NBER WORKING PAPER SERIES NO. 18489, 2012), *available at* http://www.nber.org/papers/w18489.pdf.

often mirror each other. Public pension plans, by contrast, are generally left unregulated by ERISA, and are subject only to parts of the Internal Revenue Code.

ERISA was enacted in 1974 out of a desire to address many abuses that occurred in private pension plans.[48] Congress specifically found:

> that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.[49]

Congress specifically exempted "governmental plans" from all ERISA provisions.[50]

Title I of ERISA contains the substantive and procedural requirements that private pension plans must follow.[51] Title II of ERISA is codified in the Internal Revenue Code and contains requirements about how pension plans qualify for favorable income tax treatment.[52] Finally, Title III contains certain administrative and enforcement provisions,[53] while Title IV establishes the Pension Benefit Guaranty Corporation, which insures pension plans that terminate without enough assets to pay the promised pension benefits.[54]

Title I is the main source of regulatory obligations for private pensions.[55] As for reporting and disclosure obligations, pension plans must provide all participants with a summary plan

48. H.R. REP. NO. 93-533 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639–41.
49. 29 U.S.C. § 1001(a) (2006).
50. *Id.* § 1003(b)(1) ("The provisions of [Title I] shall not apply to any employee benefit plan if—such plan is a governmental plan."). Instead, ERISA expressly states that Congress wishes to study state and municipal plans in the future, including "(1) the adequacy of existing levels of participation, vesting, and financing arrangements, (2) existing fiduciary standards, and (3) the necessity for Federal legislation and standards with respect to such plans." *Id.* § 1231(a) (2006).
51. *Id.* §§ 1001 *et seq.*
52. I.R.C. §§ 401 *et seq.* (2006).
53. 29 U.S.C. §§ 1201 *et seq.*
54. *Id.* §§ 1302 *et seq.*
55. *Id.* §§ 1001 *et seq.*

description,[56] file annual and supplemental reports with the Secretary of Labor,[57] notify participants if the minimum funding standard is not met,[58] provide annual funding reports to participants and to the Pension Benefit Guaranty Corporation,[59] provide pension benefit statements to individual participants at least every three years for defined benefit plans (or quarterly for employees who are investing their own accounts),[60] and more.

As for participation and vesting obligations, private pension plans have to follow specific guidelines. For example, pension plans must generally be available to all employees who have turned twenty-one or completed one year of service (or two years, if employees are fully vested at that time).[61] Pension plans must protect employees' own contributions as "nonforfeitable,"[62] and in the case of defined benefit plans, must allow the employees to be 100% vested in the employer's contribution by five years of service (or under an alternative vesting schedule in the statute).[63] For employees in a defined benefit plan, the yearly benefits (as a percentage of what the total pension benefit would be at retirement age) have to be accrued at one of three possible rates during the employee's career.[64] Vested participants in a pension plan must be given certain survivor benefits.[65] Finally, as for funding obligations, private employers who offer a defined benefit plan must make the "minimum required contribution" to the plan each year.[66] This minimum contribution is based on the plan's normal cost (the cost of funding each year's accrued benefits) and any amortization costs for shortfalls.[67]

Turning to the Internal Revenue Code, Section 401(a) includes various requirements that private plans must meet in order to receive favorable tax treatment. A plan that meets all of the requirements is referred to as a "qualified plan."[68] The plan

56. *Id.* § 1021(a)(1).
57. *Id.* § 1021(b).
58. *Id.* § 1021(d).
59. *Id.* § 1021(f).
60. *Id.* § 1025(a).
61. *Id.* § 1052(a).
62. *Id.* § 1053(a)(1).
63. *Id.* § 1053(a)(2).
64. *Id.* § 1053(b).
65. *Id.* § 1055.
66. *Id.* § 1082(a)(2).
67. *Id.* § 1083(a).
68. I.R.C. § 401(a).

must be in writing[69] and the assets of the plan must be held in trust.[70] The Code also provides that such plans must follow certain participation standards[71] and must not discriminate in favor of highly compensated employees.[72] The Code imposes maximum vesting periods[73] and specifies benefit accrual standards that must be followed.[74] There are also dollar amount limits on the contributions to and benefits that can be paid from such plans, as well as the compensation levels that can be taken into account in calculating such amounts.[75] Benefits offered under such plans are protected against retroactive reductions, as well as from the reach of creditors.[76] In addition, the Code provides a complex set of rules addressing both the form and timing of plan benefit distributions.[77]

Governmental plans, however, are subject to significantly fewer qualification requirements. The main qualification requirements for a governmental plan include the following: a plan must be established and maintained by the employer for the exclusive benefit of the employer's employees or their beneficiaries,[78] provide definitely determinable benefits,[79] satisfy the eligible rollover rules,[80] limit compensation in accordance with Section 401(a)(17), comply with required minimum distribution rules,[81] fully vest benefits upon a plan termination,[82] and comply with Section 415 benefit limitations.[83] Notably, governmental plans do not have to comply with the more stringent vesting requirements applicable to private employer plans,[84] nor with non-discrimination rules[85] or various benefit

69. *Id.*; Treas. Reg. §1.401-1(a)(2) (2012).
70. I.R.C. § 401(a)(1), (3), (5).
71. *Id.* §§ 401(a)(3), 410.
72. *Id.* § 401(a)(4).
73. *Id.* §§ 401(a)(7), 411(a).
74. *Id.* §§ 401(a)(7), (35), 411(b).
75. *Id.* §§ 401(a)(16), (17), (30), 402(g)(1), 404, 415.
76. *Id.* §§ 401(a)(7), (13), 411(d)(6).
77. *Id.* §§ 401(a)(9), (11), 417.
78. *Id.* § 401(a).
79. *Id.* § 401(a)(25).
80. *Id.* § 401(a)(31).
81. *Id.* § 401(a)(9).
82. *Id.* § 401(a)(10).
83. *Id.* § 401(a)(16).
84. *Id.* § 411(e)(1)(A) (exempting governmental plans from minimum vesting standards).
85. *Id.* § 410(c)(1)(A) (exempting governmental plans from participation rules).

protections, such as the minimum funding standards.[86]

Why does federal law so broadly exempt state and municipal plans from the many requirements in ERISA and the Internal Revenue Code? As the Second Circuit has noted, ERISA's governmental exemption arose for at least three reasons.[87] First, Congress thought that private plans were more likely than public plans to incorporate unduly restrictive and unfriendly provisions towards employees; hence, private sector employees would need more protection in the form of regulating the terms and conditions of pension plans.[88] Second, Congress believed that "the ability of the governmental entities to fulfill their obligations to employees through their taxing power" eliminated much of the need to regulate how governmental pension plans were funded.[89] Third, Congress worried that imposing minimum funding and similar standards would "entail unacceptable cost implications to governmental entities."[90] Of course, underlying these three reasons was the idea that federal regulation of state pension plans would present federalism concerns; Congress thus wanted to avoid imposing too much national oversight of state and municipal pension plans.[91] After all, these plans are established and primarily regulated by state legislatures, and Congress does not presume that state legislatures' regulation of such matters needs to be overridden by federal regulation.

2. How Private and Public Pension Plans are Structured

As of 2008, there were "over 2,500 different public employee retirement systems providing benefits to the over 20 million individuals employed in the public sector."[92] The majority of these systems (1,659 of them) are municipal, while 218 exist at

86. *Id.* § 412(e)(2)(C) (exempting governmental plans from funding standards).
87. Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 914 (2d Cir. 1987).
88. *Id.*
89. *Id.*
90. *Id.* (citations omitted).
91. *Id.*; *see also* Roy v. Teachers Ins. & Annuity Ass'n, 878 F.2d 47, 50 (2d Cir. 1989) ("We think it clear that the congressional goal of preserving federalism requires that when a pension plan has been established by a governmental entity for its employees and the governmental entity's status as employer has not changed, the plan must be exempt from ERISA as a governmental plan.").
92. John Beshears, et al., *Behavioral Economics Perspectives on Public Sector Pension Plans* 4 (NBER WORKING PAPER SERIES NO. 18489, 2011), *available at* http://www.nber.org/papers/w16728.pdf (citing data from the U.S. Census Bureau and the U.S. Bureau of Labor Statistics).

the state level.[93] Although these state pension systems differ in some respects, some broad generalities remain true.

With only a handful of exceptions that have traditionally been optional, state pension systems consist of defined benefit plans, not defined contribution plans.[94] In sharp contrast, private pension plans, which used to be defined benefit for the most part, have overwhelmingly been transformed or replaced by cash balance or defined benefit plans.

What makes states choose defined benefit plans over defined contribution plans? There are at least three reasons. First, the advantage of a defined benefit plan, as currently structured, is that it can provide a comfortable living for retirees who spend their entire careers working for a single state. The prospect of receiving a defined pension benefit can encourage workers to stay long-term in a particular job, reducing turnover and any associated costs with training new workers. If certain workers benefit from experience such that they become more valuable over time, and if such workers might otherwise be tempted to earn more income elsewhere based on that experience, states might rationally wish to give those workers an incentive to remain in state employment for the long term. This rationale appeals to a traditional view of public service as a lifetime calling, one in which public servants accept lower wages in exchange for having a meaningful pension in their old age.

Second, defined benefit plans have been adopted out of the desire to shift risk. Having a guaranteed benefit is beneficial to many employees, in that it displaces any risk of bad investments or inadequate savings onto the state and ultimately onto the taxpayer. With a defined benefit plan, individual workers typically do not have to worry if the plan is underfunded due to insufficient contributions or poor investment performance because the government provides a backstop against any losses. By contrast, a defined contribution plan places more risk onto the individual workers, whose pension payments could be

93. *Number and Membership of State and Local Public Employee Retirement Systems by State: Fiscal Year 2008*, U.S. CENSUS BUREAU (Sep. 29, 2011), http://www.census.gov/govs/retire/2008ret05a.html.

94. *See* Edwin C. Husted & Olivia S. Mitchell, *Public Sector Pension Plans: Lessons and challenges for the Twenty-First Century*, PENSIONS IN THE PUBLIC SECTOR 3, 4 (2001); Beshears et al., supra note 92 at 4–5.

reduced if their investments turn out to be less profitable than expected or if their contributions are not sufficient to last for their entire retirement.

Third, the inherent characteristics of a democratic political system make it easier to adopt defined benefit plans. As public choice theory explains, the desire of concentrated, organized interest groups to extract money from the public fisc vastly exceeds the public interest in the subject or commitment to opposing the policies because of the diffuse incentives taxpayers have. Given overly optimistic assumptions about how fast the money set aside today will grow, defined benefit plans allow today's legislators to promise an ever-higher level of benefits while leaving the problem of actually paying for the benefits to tomorrow's legislators. One of many examples can be seen in California, which in 1999 passed what became known as the "3% at 50" rule.[95] This allowed police and fire employees to retire by age fifty with a pension equal to their years of service times 3% of their final salary (the multiplier had previously been 2%). This increased benefit was even made retroactive, such that police or fire employees on the eve of retirement could retire with this new benefit in place, even though neither they nor anyone else had ever set aside nearly enough money to pay for it. This new, increased benefit is to blame for driving at least one California city into bankruptcy.[96] At the time, however, CalPERS essentially claimed that the rising stock market would make the expansion in benefits cost little or nothing: "CalPERS told legislators that state costs would not rise above the previous year's rate for a decade. Its actuaries actually *did* forecast that costs could soar if investment earnings fell—but the seventeen-page brochure CalPERS gave to legislators only reflected the optimistic scenario."[97]

Today's defined benefit plans do harm some employees,

95. *See, e.g., Benefit Factors,* CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, http://www.calpers.ca.gov/eip-docs/member/retirement/service-retire/benefit-charts/pub-7-3percent-50.pdf (last visited Dec. 15, 2012).

96. Bobby White, *California Cities Cut Police Budgets,* WALL ST. J., Oct. 31, 2008, http://online.wsj.com/article/SB122540831980086085.html ("By 2007, 80% of Vallejo's budget was dedicated to police and firefighters.").

97. Teri Sforza, *9/11 Legacy: Enormous Public Safety Pensions,* ORANGE COUNTY REGISTER, Sept. 11, 2011, http://taxdollars.ocregister.com/2011/09/11/911-legacy-enormous-public-safety-pensions/96425/ (emphasis in the original).

however: those who do not spend their entire careers within state government or who move between states. Consider, for example, what happens to a new teacher who either changes careers or moves to another state before the vesting period (sometimes five or seven years) has expired. She may be able to get her own contributions back from the pension system, but she loses any right to obtain a pension at retirement, and has to start over somewhere else. Even if she works past the vesting period before moving or quitting—say, for fifteen years—she is still relatively harmed. While she may eventually obtain a pension at retirement age based on those fifteen years of service, the pension will likely be much less than a pro rata portion of a full pension benefit.[98] If she then participates for fifteen years in the teacher pension system in another state, her total pension will be much less than what she would have gotten had she spent the full thirty years in either state.

As economists Costrell and Podgursky have shown by analyzing the pension systems of six states in detail, "teachers who split a thirty-year career between two pension plans often lose over half their net pension wealth compared with teachers who complete a career in a single system."[99] Today's defined benefit plans are therefore disadvantageous to teachers who are more mobile or have worked (or will work) in different careers, and whose participation in the pension system is used to subsidize older workers who stay within the same state for their entire careers.

This unfairness to mobile workers is not an *inherent* feature of defined benefit plans, however. Rather, it is due to highly uneven accrual and vesting patterns, whereby the early years of a worker's career carry little or no entitlement to any pension, but the later years of a career provide a huge boost to the pension payment.

One alternative type of defined benefit plan that smooths out the economic accrual pattern is known as a "cash balance" plan. In cash balance plans, the state pension system provides each worker with a notional investment account whose value is based on the employee and employer contributions.[100] The state then

98. *See* Fore, *supra* note 22, at 274–75.
99. Costrell & Podgursky, *supra* note 30.
100. *See* Andrew Biggs, *Public Sector Pensions in Nebraska: Are Cash Balance Plans the*

guarantees the employee a particular rate of return (such as 5%, as is the case for Nebraska's cash balance plan[101]). Thus, cash balance plans leave the risk of investment loss on the state rather than the worker, but are much more fiscally sustainable than today's defined benefit plans. That is, because the benefit is ultimately based on the actual contributions made by the employee and/or employer, politicians are less likely to enact a new benefit that is retroactive and wildly in excess of any contributions that have ever been made. At the same time, cash balance plans are still technically "defined benefit" plans under federal law, and are regulated as such.[102]

III. AN ASSESSMENT OF THE CONSTITUTIONAL ARGUMENTS AGAINST REFORM

A. *The Contract Clause*

The major complaint about pension reform is that it violates the U.S. Constitution's Contract Clause, which states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[103] Federal Contracts Clause cases revolve around the following inquiry: "(1) Does a contractual relationship exist, (2) does the change in the law impair that contractual relationship, and if so, (3) is the impairment substantial?"[104] State contracts clauses are usually interpreted and applied in parallel with that of the U.S. Constitution.[105]

However, legislative abridgement of a contractual right does

Answer?, PLATTE INST. POL'Y STUDY 3 (Oct. 2011), *available at* http://www.platteinstitute.org/docLib/20111212_Public_Sector_Pensions_in_Nebraska.pdf.

101. *Id.*

102. *See, e.g.*, Register v. PNC Fin. Serv. Grp., 477 F. 3d 56, 62 (3d Cir. 2007).

103. U.S. Const. art. I, § 10, cl. 1.

104. Koster v. City of Davenport, Iowa, 183 F.3d 762, 766 (8th Cir. 1999) (quoting Honeywell, Inc. v. Minn. Life and Health Ins. Guar. Assoc., 110 F.3d 547, 551 (8th Cir. 1997) (en banc)).

105. *See, e.g.*, Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868, 872 (Minn. 1986) (under state contracts clause, "a court initially considers whether the state law has, in fact, operated as a substantial impairment of a contractual obligation," and if a substantial impairment is found, "those urging the constitutionality of the legislative act must demonstrate a significant and legitimate public purpose behind the legislation."); R.I. Bd. of Corr. Officers v. Rhode Island, 264 F. Supp. 2d 87, 92 (D.R.I. 2003). Even New Hampshire, whose state constitution lacks an express contracts clause, applies the federal test. *See* Tuttle v. N.H. Med. Malpractice Joint Underwriting Ass'n, 159 N.H. 627, 641 (2010).

not doom the legislation to unconstitutionality. Instead, the court must ask whether "the State, in justification, [has] a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem."[106] This requirement guarantees that "the State is exercising its police power, rather than providing a benefit to special interests."[107] Thus, while courts have a presumption against construing a statute so as to create contractual obligations, once a statute has been so construed, courts may then be *more* wary of the state's justification for changing a contract to which it is a party. The result is that courts show less deference when the state is a party to the contract "because the State's self-interest is at stake."[108]

State and federal contracts clauses are the most likely avenue of success for any lawsuit seeking to block pension reform. But as we shall see, judicial opinions are often couched in language that is far overstated compared to the actual situations before the courts. Given the financial situation affecting state and municipal pension systems today, state courts should take the opportunity to reinterpret past precedent consistent with the theory that workers have a constitutional right to the pension benefits that were accrued during their working years—which includes a prorated portion of benefits that were increased in mid-career—no more and no less. As the Arkansas Supreme Court once said in a retirement benefit case, "The permissible changes, amendments and alterations provided for by the Legislature can apply only to conditions in the future, and never to the past."[109] This should be the baseline protection, but not a

106. Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983).

107. *Id.* at 412 (citation omitted); *see also* Denning v. Kan. Pub. Emp. Ret. Sys., 180 P.3d 564, 570 (2008) ("[O]ur precedent has recognized that there may be times when pension system changes are necessary for the greater good, even if an individual employee or retirant may suffer some marginal disadvantage. Changes may be made, for example, to protect the financial integrity of the system or for some other compelling reason. Changes may be necessary to preserve or protect the pension system; to maintain flexibility; to permit necessary adjustments due to changing conditions; to protect the beneficial purpose of the system; to maintain the system on a sound actuarial basis or by reason of administrative necessity.") (internal quotation marks and citation omitted).

108. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25–26 (1977); *Energy Reserves Grp.*, 452 U.S. at 412 n.14 ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations.").

109. *Jones*, 489 S.W.2d at 789–90.

guarantee that stands even in situations of dire economic emergencies.

A substantial question is how prorating would be accomplished as to any given pension reform—COLA reductions, contribution increases, multiplier reductions, retirement age increases, and conversions of defined benefit plans to alternative plans (cash balance, defined contribution, or hybrid plans). That is one of the main questions that this article attempts to answer.

1. Is There a Contract at All?

As an initial matter, there is the question of whether state pension laws are really "contracts" at all. After all, in the typical case, public employees and state governments have not literally sat down at a bargaining table and signed an actual contract. Instead, the state legislature has enacted a pension law creating a pension system with certain terms and conditions. The argument, therefore, is that when people elect to accept public employment given a particular pension law then in existence, that pension law somehow transforms into what is effectively an employment "contract" between the government and the individual.

The U.S. Supreme Court has explained that, "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'"[110]

Moreover, the party asserting the existence of a contract bears the burden of overcoming this presumption.[111] Indeed, "normally state statutory enactments do not of their own force create a contract with those whom the statute benefits" because the potential "constraint on subsequent legislatures" is so significant.[112]

Historically, public pensions were viewed legally as a gratuity

110. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465–66 (1985) (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)).

111. *Id.* at 466.

112. Parella v. Ret. Bd. of the R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999) (quoting Hoffman v. City of Warwick, 909 F.2d 608, 614 (1st Cir. 1990)).

that imposed no legal obligation on the state whatsoever.[113] Indeed, as recently as 2000, the Arkansas Supreme Court said that a pension funded entirely by the employer, rather than by employee contributions, was "merely a gratuitous allowance."[114]

Throughout the middle of the twentieth century, however, most states abandoned the old gratuity approach.[115] Today, most state courts have held that pension laws are effectively contracts on the theory that government has offered compensation, and the individual has accepted that compensation in exchange for his or her work.[116] Such an arrangement basically mimics an employment contract, even if the terms are printed in a collection of statutes rather than in a separate "contractual" document. Indeed, several state constitutions, including Michigan and New York, have been amended to expressly designate public pensions as a contract.[117]

Other states' contractual protection arises from state court rulings or state statutes. For example, the Massachusetts retirement system has been held to "create a contractual relationship between its members and the State."[118] By statute, most pension provisions (including the definition of "wages"):

> shall be deemed to establish . . . a contractual relationship under which members who are or may be retired . . . are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits provided for thereunder.[119]

The Massachusetts Supreme Judicial Court has explained that the term "contract" in this context is best understood "in a special, somewhat relaxed sense," i.e., "as meaning that the retirement scheme has generated material expectations on the part of employees and those expectations should in substance be

113. *See, e.g.*, Mell v. State *ex rel.* Fritz, 199 N.E. 72, 73 (Ohio 1935).

114. Robinson v. Taylor, 29 S.W.3d 691, 694 (Ark. 2000).

115. Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 HARV. L. REV. 992, 994–1003 (1977).

116. *See, e.g.*, Beckenhus v. City of Seattle, 296 P.2d 536, 540 (Wash. 1956); Cloutier v. State, 42 A.3d 816, 823 (N.H. 2012).

117. *See, e.g.*, ALASKA CONST. art. XII, § 7; HAW. CONST. art. XVI, § 2; ILL. CONST. art. 13, § 5; MICH. CONST. art. IX, § 24; N.Y. CONST. art. V, § 7.

118. Madden v. Contributory Ret. Appeal Bd., 729 N.E.2d 1095, 1098 (2000).

119. MASS. GEN. LAWS, ch. 32, § 25(5) (2009).

respected."[120]

As for the specific states that have recently been sued, courts have taken both sides as to whether state pension systems create a contractual benefit or not.[121] Massachusetts has already recognized contractual protection for its state pension system, as noted above. The Colorado Supreme Court has found that "rights which accrue under a pension plan are contractual obligations which are protected under article II, section 11, of the Colorado Constitution."[122] The South Dakota Supreme Court has likewise held that pensions are considered a form of contract.[123]

Only a few states have said that their pension benefits are not contractual, at least not for constitutional purposes.[124] The reasoning usually starts from the premise, long acknowledged in federal constitutional cases, that a statutory enactment is generally presumed not to create:

> contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.... Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.[125]

As the First Circuit has noted:

> Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons. Because of this constraint on subsequent legislatures, and thus on subsequent decisions by those who represent the public, there is, for the purposes of the Contract Clause, a higher burden to establish that a contractual obligation has been

120. Opinion of the Justices, 364 Mass. 847, 861–62 (Mass. 1973).

121. *See, e.g.*, Colo. Springs Fire Fighters Ass'n, Local 5 v. City of Colo. Springs, 784 P.2d 766, 770 (Colo. 1989) (en banc); *Nat'l R.R. Passenger Corp.*, 470 U.S. at 456–66 (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)). *See also Koster*, 183 F.3d at 766–67 (finding no contractual right to an Iowa pension plan).

122. *Colo. Springs Fire Fighters Ass'n, Local 5*, 784 P.2d at 770.

123. Tait v. Freeman, 57 N.W.2d 520 (1953).

124. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4.

125. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 456–66 (quoting Dodge v. Bd. of Educ., 302 U.S. 74, 79 (1937)). *See also Koster*, 183 F.3d at 766–67 (finding no contractual right to an Iowa pension plan).

created.[126]

Thus, in Maine, the state supreme court has held that while retirement benefits may be a form of property that cannot be taken away without due process, they nonetheless fall short of a full contractual right: "[t]o rule otherwise would prohibit the State from amending its retirement plan without giving many years of notice and would unduly restrict the power of the legislature."[127] The Connecticut Supreme Court said that "[i]f that reasoning were carried to its logical conclusion, the state would be powerless to reduce the pay or shorten the tenure of any state employee without posing a possible contract clause violation."[128]

As an example of how exactingly courts might look for a clear statement of contractual liability, consider the First Circuit's ruling in *Parker v. Wakelin*.[129] Maine revised its teachers' pension system by, among other things, requiring vested members to contribute at a higher rate, capping salary increases that would be used to calculate teachers' pensions, and delaying the first COLA by six months for future retirees.[130] At the time, Maine law provided that "no amendment . . . may cause any reduction in the amount of benefits which would be due a member . . . on the date immediately preceding the effective date of the amendment."[131] In the First Circuit's view, the word "due" could easily have meant payments that were *immediately due* to a retiree, not the *mere prospect* of future payments. Thus, the Maine statute had not "unmistakably" given current workers a contractual right to avoid any increased contributions or other changes to their future pensions.[132]

The above analysis, however, misses the boat in a significant way: the First Circuit seemed to assume that allowing contract rights at all would prevent Maine from raising the contribution rate for future payments into the system; since the court viewed

126. Parella v. Ret. Bd. of the R.I. Emps.' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999).

127. Spiller v. Maine, 627 A. 2d 513, 517 & n.12 (Me. 1993). *See also* Parker v. Wakelin, 123 F.3d 1, 7–9 (1st Cir. 1997) (finding no contractual right to the benefits of Maine's pension plan).

128. Pineman v. Oechslin, 488 A.2d 803, 809–10 (Conn. 1985).

129. 123 F.3d 1 (1st Cir. 1997).

130. *Id.* at 3.

131. *Id.* at 8.

132. *Id.* at 8–9.

an increase in contribution rates as a reasonable policy that had not been forsworn by the state, it rejected contract rights. But treating pension plans as providing a contractual guarantee need not mean that pension benefits are set in stone forever. Rather, it would merely mean that pension benefits already accrued by a given employee could not be taken away, barring a financial emergency. Even if pensions are treated as contracts in that sense, states would retain the right to raise contribution rates or otherwise amend the pension benefit scheme on a going-forward basis, just as the state can amend the wage schedule or the health insurance package or any other aspect of employment as long as it does not take away past benefits.[133] But given the First Circuit's cramped view of what "contract rights" would mean, it ended up using language that would allow the state to take away past and already-accrued benefits.

In any event, the vast majority of states treat pension laws as creating a contractual entitlement to *something*.[134] As seen in the next section, the real question is what that *something* is.

2. What Does the Contract Actually Protect?

Even if pension benefits in a given state are a form of contractual obligation, that is only the beginning of the analysis. A much more important question is what the contract actually protects. As the U.S. Supreme Court has noted, "we begin by identifying the precise contractual right that has been impaired and the nature of the statutory impairment."[135]

In a number of states, including New York, courts have actually suggested that public employees have a contractual right to the pension terms in existence *as of the date of employment*.[136]

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133. *See* Blackwell v. Quarterly Cnty. Ct. of Shelby Cnty., 622 S.W.2d 535, 541 (Tenn. 1981).

134. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4.

135. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 504 (1987).

136. *See, e.g.*, Calabro v. City of Omaha, 531 N.W.2d 541, 551 (Neb. 1995) ("We now adopt the California rule as the rule in Nebraska and hold that a public employee's constitutionally protected right in his or her pension vests upon the acceptance and commencement of employment, subject to reasonable or equitable unilateral changes by the Legislature."); Ballentine v. Koch, 674 N.E.2d 292, 294 (N.Y. Ct. App. 1996) ("Article V, § 7 of the NY Constitution protects as 'a contractual relationship' the benefits of membership in a public pension or retirement system against diminishment and impairment. The provision fix[es] the rights of the employees at the time of commencement of membership in [a pension or retirement] system, rather than as previously at retirement.") (internal quotation marks omitted); Pub. Emps. Fed'n, AFL-

For example, in one case, the California Supreme Court held that "[a] public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity."[137] In another case, the Arizona Supreme Court held that "[o]ther states, and we believe those having the better rationale, have reached the same conclusion that the right to a pension becomes vested upon acceptance of employment."[138] In yet another case, the Oregon Supreme Court held that "[a]n employee's contract right to pension benefits becomes vested at the time of his or her acceptance of employment. On vesting, an employee's contractual interest in a pension plan may not be substantially impaired by subsequent legislation."[139]

Other state courts have held that pension rights become contractual at some point later than the beginning of employment, although the exact period is usually undefined.[140] For example, in one case, the Kansas Supreme Court held that a public employee has a contractual right in the state pension system after "continued employment over a reasonable period of time during which substantial services are furnished to the employer, plan membership is maintained, and regular contributions into the fund are made."[141] As the Tennessee Supreme Court held:

> While we agree with the implicit holding of the courts below that a public employer may from time to time offer additional benefits which employees may accept expressly or by acquiescence, nevertheless we are not convinced that a plan is 'frozen' against detrimental changes or modifications the moment an employee begins to participate in it, where such

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CIO v. Cuomo, 467 N.E.2d 236, 239 (N.Y. 1984) (noting that the purpose of the New York Pension Clause "was to fix the rights of the employee at the time he became a member of [a pension] system" and "[i]f the changes were applied retroactively to prior members of a public retirement system, they were held unconstitutional on the theory that a member's rights were frozen as of the date of the employment and that any changes lessening benefits must be made prospectively.")

137. Betts v. Bd. of Adm'rs of Pub. Emps. Ret. Sys., 582 P.2d 614, 617 (Cal. 1978).

138. Yeazell v. Copins, 402 P.2d 541, 545 (Ariz. 1965).

139. Hughes v. Oregon, 838 P.2d 1018, 1029 (Ore. 1992) (internal citations omitted).

140. Singer v. City of Topeka, 607 P.2d 467, 474 (Kan. 1980).

141. *Id.*

> changes are necessary to preserve the fiscal and actuarial integrity of the plan as a whole. It seems to us that public policy demands that there be a right on the part of the public employer to make reasonable modifications in an existing plan if necessary to create or safeguard actuarial stability, provided that no then accrued or vested rights of members or beneficiaries are thereby impaired.[142]

Still other states have suggested that pension rights become contractual at the time of retirement or eligibility for retirement.[143] For example, the Oklahoma Supreme Court has said, "We hold that under Oklahoma law the right to the retirement pension benefits provided to firefighters and police officers under our state statutory schemes becomes absolute at the time those benefits become payable to those eligible."[144] Or as the Nevada Supreme Court held:

> Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when the conditions are satisfied, at that time retirement pay becomes a vested right of which the person entitled thereto cannot be deprived; it has ripened into a full contractual obligation.[145]

In *Sylvestre v. Minnesota*,[146] for example, the Minnesota Supreme Court considered a judicial pension system in which retired judges had been promised a pension of half the salary currently allotted to judges even if that salary increased after a given judge had retired, but the pension law had been revised to hold judicial pensions to half of the actual salary the judge had been receiving at the time of retirement or as of July 1, 1967, whichever was greater.[147] Retired judges sued, saying that their pension rights had been unlawfully diminished by no longer tying the pension to the current salary of working judges. The Minnesota Supreme Court agreed with the judges, saying:

> Here, a judge gives up the right to continue in the only field of

142. Blackwell v. Quarterly Cnty. Ct. of Shelby Cnty., 622 S.W.2d 535, 541 (Tenn. 1981).

143. Baker v. Okla. Firefighters Pension & Ret. Sys., 718 P.2d 348, 353 (Okla. 1986).

144. *Id.*

145. Nicholas v. Nevada, 992 P.2d 262, 264 (Nev. 2000) (quoting Police Pension and Relief Bd. of Denver v. McPhail, 338 P.2d 694, 700 (1959)).

146. 214 N.W.2d 658 (Minn. 1973).

147. *Id.* at 660.

> endeavor in which he has been educated and is experienced in order to accept a position, often for a much smaller financial reward, anticipating that upon retirement the state will continue to pay him part of his salary. Inflation affects retired judges the same as it does anyone else; and a judge's reliance upon the state's offer to pay, upon his retirement, a part of the salary allotted to his office surely is one of the significant considerations that induces the judge to remain in office during the required period of time and until the age permitting retirement."[148]

Then in *Christensen v. Minneapolis Municipal Employees Retirement Board*,[149] an employee had retired from the city of Minneapolis at age thirty-eight after ten years of service, but his pension was later suspended when the retirement age was raised to age sixty.[150] The Minnesota Supreme Court found that raising the retirement age retroactively was an "unconstitutional impairment of contractual obligations to the extent that it purports to apply to elected city officials . . . already retired at the time of its enactment."[151] Moreover, there is federal case law to the effect that pensions are contractual promises that become enforceable when the employee completes the required term of service.[152]

In the classic case of *Police Pension and Relief Board of City and County of Denver v. McPhail*,[153] the Colorado Supreme Court seemed to indicate that pension rights are fully protected only at the time of eligibility to retire:

> Until an employee has earned his retirement pay, or until the time arrives when he may retire, his retirement pay is but an inchoate right; but when his retirement pay becomes a vested right of which the pension entitled thereof cannot be

148. *Id.* at 666.
149. 331 N.W.2d 740 (Minn. 1983).
150. *Id.* at 742–43.
151. *Id.* at 752.
152. *See, e.g.*, Hoefel v. Atlas Tack Corp., 581 F.2d 1, 4–5 (1st Cir. 1978) (explaining that "the promise of a pension constitutes an offer which, upon performance of the required service by the employee[,] becomes a binding obligation."); Pratt v. Petroleum Prod. Mgmt., Inc. Emp. Sav. Plan & Trust, 920 F.2d 651, 661 (10th Cir. 1990) (stating that a "pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years.") (quoting Hurd v. Ill. Bell Tel. Co., 234 F.2d 942, 946 (7th Cir.)).
153. 338 P.2d 694 (1959).

deprived, it has ripened into a full contractual obligation.[154]

But later Colorado cases have indicated that pension amendments prior to retirement need to be balanced so that they do not pose an overall detriment to workers.[155]

What are we to make of all this disagreement over the timing of when pension benefits receive contractual protection? It may seem counterintuitive—given the disparity between saying that contractual protection arises on the first day of employment versus at the time of retirement—but there ought not be as much disagreement as meets the eye. A common theme can be seen emerging from the case law, no matter what the putative holding: employees have a right to pension benefits that they have already accrued, but not necessarily to the accrual of future benefits. Courts should explicitly recognize this principle in current and future lawsuits.

In most of the previous cases suggesting that pensions are contractually protected from the outset of employment, the actual situation before the court was one in which the employees had worked for a number of years, or even their entire careers, with a particular level of expected pension benefits that were then lowered as to the employee's entire career.[156] What motivates these courts is evidently the fear that states might try to take away pension benefits that were accrued in year one, year two, and so forth. But in most of these cases, the court did not consider the question of whether employees have a right to the benefits they accrued in previous years and a right to block any changes made on a forward-looking basis only as to future accruals.[157]

Take, for example, the much-cited California case of *Kern v. City of Long Beach*[158] that found that an employee had "pension rights as soon as he has performed substantial services for his employer."[159] This would seem to indicate maximal protection,

154. *Id.* at 700 (quoting Ret. Bd. of Allegheny Cnty. v. McGovern, 174 A. 400 (Pa. 1934)); *see also* Police Pension and Relief Bd. of Denver v. Bills, 366 P.2d 581, 583–84 (1961) ("retirement rights [at eligibility to retire] thereupon become a vested contractual obligation, not subject to a unilateral change of any type whatsoever.").

155. *Id.*

156. Betts v. Bd. of Adm'rs of Pub. Emps. Ret. Sys., 582 P.2d 614, 617 (Cal. 1978).

157. *Id.*

158. 29 Cal.2d 848 (Cal. 1947).

159. *Id.* at 855.

starting very early in an employee's career if not on the first day of employment. But the actual situation before the court was one of gross unfairness, in which Kern had worked for nearly twenty years as a fireman, but the city completely repealed its pension plan just thirty-two days before he finished the twenty-year eligibility period.[160] As a result, he would have gotten no pension at all despite having contributed to the pension system for many years.[161] Whatever language the court might have used about the timing of when pensions are somehow locked in place, the factual situation before the court was not remotely akin to a state pension plan that reduces forward-looking accrual after a year or two of employment while protecting past accruals.

Consider as well the prominent Colorado Supreme Court case *Police Pension and Relief Board of City and County of Denver v. Bills*, in which the court held that after a public employee begins working, but before he attains retirement eligibility, the terms of his pension benefit can be modified only "if these changes strengthen or better it, or if they are actuarially necessary."[162] As in other states, the Colorado Supreme Court held that it is impermissible to alter pension benefits even on a going-forward basis, except in certain limited circumstances.[163] But as with the other cases discussed above, *Bills* did not concern plaintiffs who had merely begun working and whose benefits were altered on a forward-looking basis at some point after day one.[164] To the contrary, the plaintiffs had already retired from the Denver Police Department at a time when the city charter provided that pensions would rise at half the rate of increases to the salaries of current police officers.[165] After the plaintiffs retired, the city charter was amended to repeal this so-called "escalator clause," but the court said that the amendment could not be applied retroactively to workers who were retired or eligible to retire.[166]

160. *Id.* at 850.
161. *Id.* at 850–52.
162. 366 P.2d 581, 584 (Colo. 1961).
163. *Id.*
164. *Id.* at 582.
165. *Id.*
166. Knuckey v. Pub. Emps.' Ret. Ass'n, 851 P.2d 178, 180 (Colo. App. 1992) ("[T]here can be a limited vesting of pension rights prior to actual retirement and also even prior to eligibility to retire. . . . Until benefits fully vest, a pension plan can be changed; but any adverse change must be balanced by a corresponding change of a beneficial nature, a change that is actuarially necessary, or a change that strengthens or

Similarly, in *Betts*, the plaintiff had worked from 1959 to 1967, and wanted to avoid a reduction in benefits passed in 1974.[167] In the Arizona case of *Yeazell v. Copins*,[168] the plaintiff had worked from 1942 to 1962, and wished to have the benefit of the pension benefit promised before a 1952 amendment to the plan.[169] In other words, he had worked for ten years under the old benefit.[170] In the Oregon case of *Hughes v. State of Oregon*,[171] the court merely held that a 1991 pension reform law subjecting pensions to taxation was "a nullity as it relates to PERS retirement benefits accrued or accruing for work performed before the effective date of that 1991 legislation."[172] Thus, in none of these cases did the court actually hold that a plaintiff was contractually entitled to a pension benefit that had been in place only for a month or two at the very beginning of his or her career and that had been altered only on a forward-looking basis.

As for cases finding contractual protection at some mid-career point, the usual point of such cases is to acknowledge the state's ability to change pension accrual on a forward-looking basis.[173] In the Delaware case of *Petras v. State Board of Pension Trustees*,[174] for example, the state supreme court held:

> Because in 1964 the period for vesting of pensions was 30 years, Petras, who had only completed two years service before the free credit provision was changed, had no vested right in that provision or, for that matter, in the plan as a whole. The General Assembly's modification of the pension plan, therefore, did not violate any contractual right.[175]

As the West Virginia Supreme Court said, "[C]hanges can be made with regard to employees with so few years of service that they cannot be said to have relied to their detriment. Line drawing in this latter regard must be made on a case-by-case basis, but after ten years of state service detrimental reliance is

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improves the pension plan.").

167. Betts v. Bd. of Adm'rs of Pub. Emps. Ret. Sys., 582 P.2d 614, 616 (Cal. 1978).
168. 402 P.2d 541 (Ariz. 1965).
169. *Id.* at 542.
170. *Id.*
171. 838 P.2d 1018, 1020 (Ore. 1992).
172. *Id.*
173. *E.g.*, Petras v. State Bd. of Pension Trs., 464 P. 2d 894 (Del. 1983).
174. *Id.*
175. *Id.* at 896.

presumed."[176]

Finally, as for cases finding contractual protection at the time of retirement or thereabouts, the purpose once again is to preserve the state's ability to make forward-looking changes to the pension system. As the Louisiana Supreme Court said:

> As in the area of retirement benefits, where courts have consistently held that a public employee's right to retirement benefits does not 'vest' until eligibility for retirement is attained, reemployment benefits for retirees likewise do not vest until eligibility as to age and service is attained. Prior to the achievement of eligibility, courts have deemed the right to be inchoate and the details of a contributory retirement system, such as rate of contribution, benefits, length of service, and age requirements could be modified to the prejudice of the employee.[177]

As a federal district court in Oregon pointed out: "The Contract Clause does not prohibit legislation that operates prospectively,"[178] and "[i]f the State of Oregon is to be bound to provide employees a set level of benefits in perpetuity, such a legislative intent must be clear."[179] That court found that Oregon statutes had not given employees a contractual right "not only to what was in their accounts, but also to the terms in existence at the time of their employment for future service."[180] Another federal district court held that "an immutable, unalterable pension plan as to future benefits to be earned pro rata by future employment service" would be "*void ab initio* as a surrender of an essential element of the State's sovereignty."[181]

So in all these types of cases, whatever the court says about the *timing* of contractual protection, a consistent theme arguably emerges: employees ought to have a right to pension benefits that they have already accrued, but the state should still have the

176. Booth v. Sims, 456 S.E.2d 167, 172 (W.Va. 1994).

177. Smith v. Bd. of Trs. of La. State Emps.' Ret. Sys., 851 So. 2d 1100, 1107 (La. 2003).

178. Robertson v. Kulongoski, 359 F. Supp. 2d 1094, 1100 (D. Ore. 2004). *See also* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 18 n. 15 (1977) ("States undoubtedly [have] the power to repeal the covenant prospectively.") (citing Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 6 L. Ed. 606 (1827)).

179. *Robertson*, 359 F. Supp. 2d at 1100.

180. *Id.* at 1101. *See also* Olson v. Cory, 156 Cal. Rptr. 127, 135 (Cal. Ct. App. 1979) (construing previous California case law as holding that "the thwarting of expectation of future accrual of an increased pension does not infringe present vested right.").

181. Md. State Teachers Ass'n v. Hughes, 594 F. Supp. 1353, 1364 (D. Md. 1984).

flexibility to modify the pension system going forward. It's just that in the most employee-protective cases, the legislature had *not* modified the pension system going forward, but had tried to take away pension benefits earned years before. In such circumstances, it is not surprising that a court might have used language suggesting that the employees were entitled to pension benefits when earned (that is, starting in those early years of employment). But such holdings do not really address the question of whether employees have a right not just to past accruals but to keep accruing pension benefits at the same or higher rate in the future.

Indeed, what would we make of a seemingly employee-protective rule giving employees the right to block forward-looking modifications to how pension benefits were to be accrued in future years of service? Such a holding would be curious, given that state governments retain the power to control salaries and jobs.[182] That is, I am unaware of any court holding that state governments are constitutionally forbidden from implementing, on a going-forward basis, an across-the-board salary reduction or diminishment in the workforce.[183] Thus, it would be odd for a court to suggest that state workers are, from day one, contractually entitled to receive a particular pension formula, when that formula itself is based on salaries and employment that the state *can* alter.

To take a hypothetical example, imagine that a state pension system offers a pension that is based on a 2% multiplier: if an employee retires with thirty years of service, his pension would then be 60% (or thirty years times 2%) of his final average salary. Under the hypothetical right to block future modifications, someone who started working today would be entitled to a 2% multiplier thirty years from now.

But suppose that after fifteen years of a particular worker's career, the state pension system tries to decrease the benefit to a 1.5% multiplier. We can distinguish at least two ways that the

182. Newton v. Comm'rs, 100 U.S. 548, 559 (1879) ("[T]he legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.").

183. Nor is it likely that judges would attempt to create such a constitutional constraint in an era of decreased tax receipts, tight state budgets, and cutbacks made pursuant to balanced budget requirements.

state might go about this change. First, suppose the state literally tries to abolish the 2% multiplier forever, such that the employee can no longer count on a 2% multiplier at all when he retires fifteen years down the road. That change would seem unfair, because the employee had already worked for fifteen years under a compensation package that was based on a particular current salary plus a particular pension later—including the 2% multiplier. That package was what he had bargained for. So it does seem intuitively wrong for the state to attempt to deny him any portion of the 2% multiplier at any point.

However, suppose that the state merely changes the pension multiplier going forward to 1.5%, while allowing current and former employees to receive a prorated multiplier based on their years of service. In the case of the fifteen-year employee who is planning on retiring after another fifteen years, he would have worked half his career while planning on a 2% multiplier and half his career while planning on a 1.5% multiplier. Thus, at retirement he is given a multiplier that splits the difference: 1.75%. Indeed, Rhode Island did something very similar in its 2011 reform package (*i.e.,* it changed the multiplier for future years of service to 1%, as part of a hybrid plan).[184] Does the worker have any contractual claim to anything more than that?

By the normative theory presented in this article, he does not. Not only does he have no contractual right to anything more than that, but if a court holds that he does, then what is to stop the state from freezing or reducing his salary, such that his pension in retirement equals whatever it would have been with a lower multiplier? For that matter, what is to stop the state from laying off the worker at twenty years of service, thus lessening the pension that he is eligible to receive?

State employees have no constitutional right to perpetual employment. Even if they have a property right to their jobs (as is the case with academic tenure, for example), they can be fired after due process is afforded them. It could still be the case that an employee should be treated in some cases as having a constitutional right to a particular level of pension, but it is an odd constitutional right that can so easily and legitimately be extinguished.

184. Snell, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4, at 12.

Recall why we think pension benefits are contractual in the first place: because pension benefits "represent a form of deferred compensation for services rendered."[185] As the West Virginia Supreme Court pointed out: "By promising pension benefits, the State entices employees to remain in the government's employ, and it is the enticement that is at the heart of employees' constitutionally protected contract right after substantial reliance not to have their own pension plan detrimentally altered."[186] Similarly, as the Washington Supreme Court put it, "[W]here an employer has a pension plan and the employees know of it, continued employment constitutes consideration for the promise to pay the pension.... A retirement pension is pay withheld to induce continued faithful service. It amounts to delayed compensation for services rendered."[187]

If pension benefits are akin to deferred salary, then it follows that pension benefits, just like wages themselves, are—or ought to be—tied to specific periods of service. If I work for one year at a given salary plus a given level of pension benefits that are promised for some future date, then the salary plus pension represents the total compensation package that I bargained for in that year of service. If I then work for a second year at a higher salary plus the same pension benefit, that package represents the total compensation that I bargained for in that second year of service. If I then work for the same salary but a higher pension benefit for a third year, that compensation package represents what I bargained for in that third year of service.

All of this may seem needlessly rudimentary, of course. But it leads to an important point: if I work for Salary X in years one through ten, and then for Salary X+$10,000 in years eleven through twenty, my rights have not been harmed at all by the fact that the salary was lower in years one through ten. During the first ten years, I was willing to work for Salary X. The mere fact that the salary was raised in later years cannot possibly cause me to be injured, such that I could then sue the employer to demand that the salary in years one through ten be retroactively raised to X+$10,000.

185. *In re* Marriage of Gallo, 752 P.2d 47, 51 (Colo. 1988).
186. Booth v. Sims, 456 S.E.2d 167, 172 (W.Va. 1994).
187. Jacoby v. Grays Harbor Chair & Mfg. Co., 468 P.2d 666, 669 (Wash. 1970).

The same logic should apply to pensions. At the extreme case, imagine that I accrue pension benefits that include a 2% COLA during twenty-nine years and 364 days of employment, and then that COLA is raised to 3% on my last day of employment. Thus, the contractual bargain that I struck during all but one day of my employment was for a 2% COLA. If I start receiving the 3% COLA during retirement—let's say for the first five years of retirement—and that COLA is then lowered to 2%, have I been injured at all? The opposite seems the case: given that I worked for nearly all my career while planning on a 2% COLA, it seems that the 3% COLA was an undeserved windfall.

This reasoning can then be extended. If I accrue a particular level of pension benefits during years one through fifteen of employment, and then accrue a higher level of pension benefits during years sixteen through thirty, it would seem odd if I am then able to claim a legal right to receive only the higher level of pension benefits for the entirety of my retirement years. After all, didn't I spend half my career working for the lower level of retirement benefits? How can it be that I have a right to receive only the higher level of retirement benefits, any more than I have the right to receive back pay for the years during which I worked at a lower wage?

The *Lyon* case from California sets forth this principle.[188] In that case, a legislator retired and began receiving a pension that, by the law at the time, was tied to the salaries of current legislators. For more than ten years he received no adjustments, as legislative pay remained stuck at $500 per month.[189] In 1963, the California legislature adopted a COLA for retired legislators, and then in 1966, the California constitution was amended to raise legislative salaries to $16,000 per year while prohibiting any pensions from being adjusted upwards based on the new higher salary.[190] Lyon's widow sued, claiming she was entitled to a higher benefit tied to current legislative salaries, but the California appellate court disagreed.[191] That court held that the purpose of tying pensions to current salaries was to mimic a cost-of-living allowance, but the large increase to $16,000 a year had

188. Lyon v. Flournoy, 271 Cal.App.2d 774 (Cal. Ct. App. 1969).
189. *Id.* at 784–85.
190. *Id.* at 777–78.
191. *Id.* at 778–79

nothing to do with an increase in the cost of living.[192] Given the new statutory COLA in place, Lyon's widow had no reasonable expectation of getting a cost-of-living increase based on the fact that legislative salaries more than doubled in a single year, particularly given that Lyon himself had contributed to the pension system based on the old lower salary. To let Lyon's widow have such a huge COLA would amount to a "windfall."[193]

For federal law purposes, employers can modify pension plans prospectively, or even terminate such plans, as long as past accrued benefits are protected.[194] The theory I have outlined was essentially followed by one federal district court in *Howell v. Anne Arundel County*.[195] In *Howell*, the plan at issue had changed its calculation of COLAs, with pre-amendment service still accruing a COLA under the old formula but new service accruing a COLA under the new formula.[196] In other words, the COLA amendment applied only "prospectively to benefits not yet earned by an employee on its effective date."[197] The court held that as no Supreme Court case had ever struck down a state law "with only prospective effect under the Contract Clause," neither would the Maryland law be struck down.[198] "The County's prospective reduction in the rate of increase of future pension benefits which had not yet vested does not constitute an 'impairment' that entitles an employee to obtain judicial relief."[199]

3. Literature Review on the Contract Clause and Pensions

To date, almost no legal scholars have written about how the Contract Clause applies to pension reform. Two exceptions are Paul Secunda and Amy Monahan.

Secunda's article considers pension reform specific to Wisconsin, where Governor Walker successfully proposed to cut back on public employees' collective bargaining rights.[200] His

192. *Id.* at 785.
193. *Id.* at 783–86.
194. Lockheed Corp. v. Spink, 417 U.S. 882, 890–91 (1996).
195. 14 F. Supp. 2d 752 (D. Md. 1998).
196. *Id.* at 753.
197. *Id.* at 756.
198. *Id.*
199. *Id.* at 755.
200. Paul Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 2, 263-300 (2011).

article reviews the basics of the Contract Clause and a few recent pension cases.[201] His main substantive point is that Wisconsin may have gone too far in proposing that Wisconsin public employers can no longer "pick up" any required employee contributions.[202] Secunda argues that this new law would unduly interfere with current arrangements without making much financial difference to the state's budget, and hence is likely unconstitutional.[203]

In Monahan's first foray into this area, she provided a fairly exhaustive overview of pension jurisprudence in dozens of states.[204] Marshalling all of this jurisprudence, she contends that pension benefits can be protected to the extent they are "already accrued," but that on a forward-looking basis, the state "may change employment conditions such as salary or benefits, and the employee may choose whether or not to accept such changes by either continuing to work for the state or electing instead to seek employment elsewhere." What is important, in Monahan's view, is that "courts are precise about the duration of the contract"—i.e., that it extends backward and protects work already performed, but does not extend indefinitely as to future accruals.[205]

In Monahan's next foray, she squarely critiques all of the thirteen states (most notably California) that have held "not only that state retirement statutes create contracts, but that they do so as of the first day of employment," the result being that "pension benefits for current employees cannot be detrimentally changed, even if the changes are purely prospective."[206] She criticizes this legal rule on several grounds. First, it contradicts the standard legal presumption that statutes do not create certain contractual rights unless there is unmistakable evidence that the legislature intended to bind itself into the future.[207] But there is no evidence that state pension statutes are written with a specific

201. *Id.*
202. *Id.* at 295–96
203. *Id.* at 297
204. Amy Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y 617 (2010).
205. *Id.* at 652.
206. Amy Monahan, *Statutes as Contracts? The "California Rule" and its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1032 (2012).
207. *Id.* at 1037–38

and unmistakable guarantee that the rate of accrual can never be changed for any employee within the system. Second, protecting even the rate of future accrual against changes is contrary to all the federal Contract Clause jurisprudence holding that prospective changes to a contract are constitutional.[208] Third, we should not set in stone merely one aspect of employee compensation (pension accrual rates) while states "can terminate employees, lower their salaries, and change their fringe benefits."[209] Employees may well prefer to have a compensation package that is structured differently, and it inhibits labor market efficiency to lock pension benefits in place. Moreover, Monahan points out, the benefit of such strong constitutional protection for pension accrual is "illusory," given that the only option left to a state employer with budgetary trouble is to lay off employees or freeze salaries.[210]

This article adds to the legal literature by explaining for the first time the specifics of how it is possible to change the rate of future accrual and protect past accruals as to a wide variety of pension reforms and in a wide variety of recent legal cases.

4. Specific Types of Pension Reform

The question in this section is central to the article: how can legislatures discard the principle of protecting past accruals while allowing future accruals to change, and apply it to *particular* types of pension reform, so that these reforms are best positioned to be defensible in the inevitable court challenges? The section will begin with the easiest cases and move to the most difficult ones (i.e., changing to a different pension system entirely).

a. *Contribution Increases*

Several states have recently increased the required employee contribution.[211] At the same time, several state courts have held that increasing the required employee contribution is an unconstitutional violation of the Contract Clause.[212] For

208. *Id.* at 1032–33.
209. *Id.* at 1033.
210. *Id.*
211. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4.
212. Ass'n of Pa. State and Univ. Faculties v. State Sys. of Higher Ed., 479 A.2d 967,

example, the Kansas Supreme Court held that legislation raising the contribution rate from 3% to 7% was unconstitutional, and that the state can make reasonable modifications to the pension plan, but only if disadvantages are offset by other advantages.[213] Similarly, the Massachusetts Supreme Judicial Court held that "legislation which would materially increase present members' contributions without any increase of the allowances fairly payable to those members or any other adjustments carrying advantages to them, appears to be presumptively invalid."[214] The Pennsylvania Supreme Court held it unconstitutional to raise the contribution rate from 5.25% to 6.25%, because it devalued the pension benefits.[215] The rationale for such a holding is that increasing the contribution rate

> alters the state's contractual obligation . . . by increasing plaintiffs' cost of retirement benefits for services that, absent a lawful separation of employment, they will provide in the future. That consequence, if approved, would permit the state to retain the benefit of plaintiffs' labor, but relieve the state of the burden of paying plaintiffs what it promised for that labor.[216]

But a few other courts have disagreed. In *AFSCME Councils 6, 14, 65 & 96 v. Sundquist*,[217] the Minnesota Supreme Court held that "because . . . appellants have failed to establish a right, based either on conventional contract or promissory estoppel theories, to a fixed level of employee pension contributions, we need not address the issue of whether the Act operates to unconstitutionally impair such a right,"[218] and given the long

967–69 (Pa. 1984); Allen v. City of Long Beach, 287 P.2d 765, 768 (Cal. 1955); Valdes v. Cory, 139 Cal. App. 3d 773, 780 (Cal. Ct. App. 1983); McDermott v. Regan, 82 N.Y.2d 354 (1993); Fla. Sheriffs' Ass'n v. Dept. of Admin., 408 So.2d 1033, 1036–37 (Fla. 1981); Or. State Police Officers' Ass'n v. Oregon, 918 P.2d 765, 775 n.18 (Or. 1996) ("Cases from other jurisdictions that follow a contractual view of public pensions likewise have concluded that legislative enactments that increased the level of public employee contributions, without providing offsetting benefits, violated either the state or federal contract clauses."); Booth v. Sims, 456 S.E.2d 167, 185 (W. Va. 1995) ("[T]he legislature cannot . . . raise the contribution level without giving the employee sufficient money to pay the higher contributions."); Marvel v. Dannemann, 490 F. Supp. 170, 176–77 (D. Del. 1980).

213. Singer v. Topeka, 607 P.2d 467, 476 (Kan. 1980).
214. Dow Jones & Co., Inc. v. Superior Court, 303 N.E.2d 847, 864 (Mass. 1974).
215. Pa. Fed'n of Teachers v. Sch. Dist. of Phila., 484 A.2d 751, 753 (Penn. 1984).
216. *Or. State Police Officers' Ass'n*, 918 P.2d at 775.
217. 338 N.W.2d 560 (Minn. 1983).
218. *Id.* at 566.

history of varied contribution levels, "an expectation that contribution rates would remain fixed is patently unreasonable."[219]

Similarly, a Pennsylvania pension system started requiring an employee contribution for the first time, and employees sued for a violation of the Contract Clause. But the plain language itself stated that the

> Board shall have the power, at any time and from time to time, . . . to modify, alter or amend the Plan and/or Master Trust in any manner which it deems desirable provided that no amendment . . . may affect the rights, duties or responsibilities of the Trustee without its prior written consent.[220]

The Third Circuit held that this reservation of rights could not be ignored, and that under basic principles of contract law

> the rule vesting unilateral contract rights at the beginning of performance "is designed to protect the offeree in justifiable reliance on the offeror's promise, and the rule yields to a manifestation of intention which makes reliance unjustified. A reservation of power to revoke after performance has begun means that as yet there is no promise and no offer."[221]

How should we think about the contribution issue? Under the framework I have laid out, asking employees to make greater contributions in future years should be presumptively constitutional, as much so as asking employees to take a salary freeze. Increased contributions are inherently forward-looking, after all. That is, unlike multipliers or some other benefit calculation, contribution rates are inherently changed on a pro rata basis. If the multiplier is lowered from 3% to 2%, the legislature would need to make it explicit that the 2% multiplier was to be applied only to future service and that the final pension payment would be calculated by averaging the 2% multiplier for certain years with a 3% multiplier for previous years. With a contribution rate, however, the future years' contribution rate inherently applies only to future years, and if

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219. *Id.* at 569. *See also* Redden v. Bd. of Trs., Pub. Emps. Ret. Sys., 2008 WL 612244, at *3 (N.J. Mar. 7, 2008); Ass'n of Prof'l & Technical Emps. v. City of Detroit, 398 N.W. 2d 436, 438–39 (Mich. Ct. App. 1987).

220. Transp. Workers Union of Am., Local 290 v. Se. Pa. Transp. Auth., 145 F.3d 619, 621 (3d Cir. 1998).

221. *Id.* at 624 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 45, cmt. b).

one wants to know the overall contribution rate that a given employee paid during his career, averaging together on a pro rata basis is the default way to do it.

Moreover, a higher contribution rate is the functional equivalent of a salary freeze. If, say, Florida teachers are asked to contribute 3% to their pensions,[222] and they had previously contributed nothing at all, the result to their take-home pay is the same as if they had foregone a 3% pay raise. Yet no one thinks that employees generally have a constitutional right to get pay raises every year: a new year brings with it new financial conditions, and given that an employee has not yet performed any work within that new year, the employee is free to take or leave the new conditions at his or her discretion.

Indeed, courts have held that the Contract Clause does not protect state employees from having their salaries frozen or reduced; such matters are seen as within legislative discretion.[223] In one case, San Diego changed its pension system by reducing salaries for deferred retirement employees and reducing the employer "pickup" of the employees' contributions.[224] The Ninth Circuit held that, based on numerous California state court holdings, these changes did not violate the Contract Clause or the Takings Clause: "as California courts have noted, '[i]t is well established that public employees have no vested rights to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority."[225] Thus, "indirect effects on pension entitlements do not convert an otherwise unvested benefit into one that is constitutionally protected."[226]

Similarly, in a California Supreme Court case—and remember that California purports to protect pension accruals as of the first date of employment—a public employee alleged that reducing the retirement age from seventy to sixty-seven prevented him from accumulating as many years of service, and thereby lowered

222. Dave Heller, *Florida Teachers Sue over 3 Percent Contribution*, FIRST COAST NEWS, (June 20, 2011, 4:26 PM) http://www.firstcoastnews.com/news/article/208234/4/Florida-Teachers-Sue-over-3-Percent-Pension-Contribution.

223. *See, e.g.*, Perry v. Rhode Island, 975 F. Supp. 418, 428 (D.R.I. 1997).

224. San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 730–31 (9th Cir. 2009).

225. *Id.* at 737 (quoting Tirapelle v. Davis, 19 Cal. App. 4th 1317, 1319 (Cal. Ct. App. 1993)).

226. *Id.* at 738.

his pension in violation of the Contract Clause.[227] The California Supreme Court held:

> [I]t is well settled in California that public employment is not held by contract but by statute and that, insofar as the duration of such employment is concerned, no employee has a vested contractual right to continue in employment beyond the time or contrary to the terms and conditions fixed by law. . . . Nor is any vested contractual right conferred on the public employee because he occupies a civil service position since it is equally well settled that "[the] terms and conditions of civil service employment are fixed by statute and not by contract."[228]

The court added that "[t]he fact that a pension right is vested will not, of course, prevent its loss upon the occurrence of a condition subsequent such as lawful termination of employment before completion of the period of service designated in the pension plan."[229] The court clarified that it is the "advantage or disadvantage to the particular employees whose own contractual pension rights, *already earned,* are involved which are the criteria by which modifications to pension plans must be measured."[230]

These same results should apply in cases involving an increased employee contribution rate. (No state of which I am aware has attempted to increase contribution rates retroactively, which would present quite a different question, more akin to demanding a refund of wages from past years.) On a going-forward basis, states should have the legislative prerogative to decide that a higher employee contribution will be needed to fully fund the promised pension benefits.

b. *COLA Reductions*

In most previous cases where a state pension system attempted to change the COLAs given to retirees, the retirees were likely to win in court. For example, in *United Firefighters of Los Angeles City v. City of Los Angeles,*[231] the court held that where firefighters' rights to pension benefits had vested under a pension statute that provided uncapped post-retirement COLAs, the later

227. Miller v. California, 557 P.2d 970, 971–72 (1977).
228. *Id.* at 973.
229. *Id.* at 975 (internal quotation marks omitted).
230. *Id.* (emphasis added) (internal quotation marks omitted).
231. 210 Cal. App. 3d 1095 (1984).

imposition of a 3% cap on the COLAs violated the Contract Clause.[232] Similarly, in *Booth v. Sims*,[233] the West Virginia Supreme Court struck down a law reducing the pension COLAs from 3.75% to 2% for active State Troopers whose benefits had previously vested and who were eligible for retirement.[234] In *Arena v. City of Providence*,[235] the Rhode Island Supreme Court struck down a COLA reduction that had been applied to firefighters who retired under a city pension plan.

Despite these previous cases, the logic of prorating accruals over the span of a worker's career makes sense as to COLAs. Consider the Colorado pension reform bill that is currently the subject of a lawsuit.[236] From 1994 to 2000, the COLA for retirees was based on a formula that resulted in COLAs ranging from 1.34% to 2.91% per year.[237] The COLA was raised to a flat 3.5% in 2001, and then most recently was downgraded to 2%.[238] Given that the lawsuit purports to represent anyone who retired between 1994 and 2010, there are likely plaintiffs in the class who worked for almost their entire careers with no expectation of a COLA at all, and who retired in 1994 after the first official COLA was adopted.

It is hard to see why such plaintiffs were not given a windfall for the past seventeen years. The same logic applies to people who retired in Colorado between 2001 and 2010. Even though they retired after the 3.5% COLA was in place, most of these employees would have begun their careers before 2001, at a time when COLAs could be as low as 1.34% (depending on the formula) or even at a time when COLAs were not offered at all.[239] So for some or most of these individuals' careers, they were

232. *Id.* at 1108.

233. 456 S.E.2d 167 (W.Va. 1995).

234. *Id.* at 187 ("Requiring the petitioners to protect the future solvency of the pension system is an unconstitutional shifting of the state's own burden.").

235. 919 A.2d 379 (R.I. 2007).

236. *See* Justus v. Colorado, No. 11CA1507, 2012 WL 4829545, at *12 (Colo. App. Oct. 11, 2012).

237. *Id.*

238. Jeanette Newman, *Pension Cuts Face Test in Colorado, Minnesota*, WALL ST. J., June 12, 2010, http://online.wsj.com/article/SB10001424052748704463504575301032631246898.html.

239. Retirees in Colorado can retire at age 65 with 5 years of service, or at age 60 with 5 years of service and reduced benefits, but typically must work at least 20 years even to get reduced benefits. *See Information for New Members*, PUB. EMPS. RET. ASS'N OF COLO., https://www.copera.org/PDF/5/5-57.pdf (last visited Dec. 5, 9:11 PM). It seems safe to assume that many retirees worked for a number of years under a system with no

working and contributing to a pension system that offered a lower or no COLA. By the logic outlined above, it is difficult to see why individuals should be guaranteed a lifetime right to the highest pension benefit that was ever put in place during their working life, any more than they have a right to have the highest salary retroactively applied to their entire working life.

Even if pension decreases have to be accompanied by countervailing increases, as many courts have held, the question remains as to what exactly counts as a decrease in the first place. It is at least arguable, if not obvious, that hardly any relevant decrease has taken place if someone works for nineteen years with no COLA, works for ten years with a variable COLA, and then is given a 3.5% COLA the month before retiring. If that person spent the overwhelming majority of his career contracting for a pension that had either no COLA or a variable COLA that was never more than 2.91%, why is he entitled to a 3.5% COLA for twenty or thirty years of retirement? If he gets a 3.5% COLA for ten years of retirement, and then the 3.5% COLA is reduced, what increase would be needed to balance out the windfall he has already received?

To be sure, COLAs in the real world are often not simple percentages set in statute (indeed, it makes little sense that such percentages are ever written into law), but consist of formulas that are tied to inflation or that include some sort of cap and/or floor. What then? The answer is that such COLAs can still be pro-rated for retirees in a fairly straightforward manner. For example, consider a hypothetical worker whose thirty-year career saw the following COLAs in place: years one through ten had a variable COLA set at the legislature's discretion; years eleven through twenty had a COLA set based on any given year's CPI but with a 3% cap; and years twenty-one through thirty had a statutory 3% compounding COLA.

Here is what that worker should then receive in each year of retirement: First, find the average COLA that was actually implemented in years one through ten at the legislature's discretion (say this average is 2%). Second, apply the statutory formula from years eleven through twenty to the particular year of retirement (say that in the retirement year under

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guaranteed COLA at that time.

consideration, this amounts to 2.5%). Third, take the 3% statutory level from years twenty-one through thirty. Finally, average all of these together weighted by years of service. In this case, since each COLA was earned during an equal one-third of the worker's career, this would mean averaging 2%, 2.5%, and 3%, for a final 2.5% COLA in that particular year of retirement. Alternatively, if the COLA promised in some or all years was compounding, the geometric average could be used as a more accurate way to average growth rates that compound over time.

In short, the best way for a court to consider the issue of COLA manipulations is as follows: each worker in retirement is presumptively entitled (barring state fiscal distress) to a COLA that is prorated according to whatever was earned during particular years of service.

c. *Changing the Multiplier*

Changing a multiplier applied to the final average salary is also one of the more straightforward applications of the prorating principle. If a 3% multiplier was in place for years one to fifteen but a 1% multiplier was in place for years sixteen to thirty, then the final multiplier would be 2% (the average of 3% and 1%).

This is exactly what was done in Rhode Island's 2011 pension reform. Section 36-10-10 of the Rhode Island pension law already had prorated multipliers in place for employees eligible to retire before September 30, 2009 (1.7% for years one to ten, 1.9% for years eleven to twenty, 3% for years twenty-one to thirty-four, and 2% thereafter), and for employees eligible to retire after October 1, 2009 (1.6% for years one to ten, 1.8% for years eleven to twenty, 2% for years twenty-one to twenty-five, 2.25% for years twenty-six to thirty, 2.5% for years thirty-one to thirty-seven, and 2.25% thereafter).[240] Then, the 2011 pension reform law restricted those multipliers to any years of service prior to July 1, 2012. For all service after July 1, 2012, the multiplier will now be 1% for the defined benefit portion of the now-hybrid plan.[241]

Clearly, then, the Rhode Island defined benefit pension plan

240. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2010), *supra* note 4, at 9.

241. *See* SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES (2012), *supra* note 4, at 12.

now involves prorating the multiplier according to years of service, and it reduces the multiplier only on a forward-looking basis while preserving the higher prorated multipliers in effect for years of service before July 1, 2012. This sort of prorating should be presumptively constitutional, just as much as any other salary or benefit terms that a government chooses to offer for service in a particular year. On the other hand, it would arguably be reducing accrued benefits if a state reduced the multiplier outright, including for all previous years of employment.

d. *Changing What Components of Compensation Are Included*

Recall that the typical defined benefit pension is calculated by multiplying a percentage factor for each year of employment by the final average salary. But states differ on what exactly is included in calculating the final average salary itself. For example, a pension could include base wages and nothing else, or it could add allowances for clothing, travel, housing, or other extras, health insurance subsidies, extra money made from moonlighting part-time or from working overtime, extra pay from filling in for a supervisor, or anything else that might somehow boost whatever is paid. Given that a boost to the final average salary will then boost the actual pension payment for the rest of a retiree's life—which could be as much as another thirty years or more—it makes a significant difference what is included in that final average salary. Hence, states may wish to reform their pension systems by cutting back on any extras that were allowed and limiting final average salary to base wages alone.

How is prorating to be done here so as to protect accrued benefits while restricting future accruals? In fact, prorating may not be as difficult as one might imagine. Say that the final average salary included three extra components during fifteen years of a worker's career, but that it was limited to base wages for the next fifteen years. What should the worker get on retirement? The answer is determined by how much his final average salary really was boosted above base wages during that final year or two or three (in other words, how much overtime did he really work, or how much did he really get in clothing allowances, etc.). Then prorate that addition to base wages based on how many years of his career were spent with those components being included in final average salary.

A further complication is what to do about incremental boosts to wages that are eliminated entirely. Suppose, for example, that after year fifteen of a worker's career, a police force not only stops including clothing allowances in final average salary but eliminates clothing allowances altogether. In such a case, prorating obviously cannot be based on whatever clothing allowance a police officer received during the final years of his career. One possible solution would be to consider how much the officer was paid in clothing allowances (on average) during the first fifteen years of his career, including any upward or downward trend, and then extrapolate to what a given police officer would have earned in clothing allowances during his final fifteen years of his career given the historical trend. Prorating would then be done based on that extrapolated figure. This is obviously a far from perfect way of determining pension benefits, but it is preferable to a judicial holding that clothing allowances (or any other extra add-on) can never be altered except for new employees.

e. *Changing the Averaging Period*

One way to clamp down on artificial attempts to boost the final salary would be by extending the averaging period to three years, five years, or longer. A pension would then be based on whatever the final average salary was for a lengthier time period.

An initial question, of course, would be whether lengthening the averaging period reduces any previously accrued benefit at all. The argument that a plaintiff might make would run as follows: Salaries generally increase on a yearly basis. If my salary at age sixty-four is expected to be higher than the yearly average salary I will receive from ages sixty to sixty-four, then perforce a pension based on my age-sixty-four salary would be higher than a pension based on the yearly average salary from ages sixty to sixty-four. That being the case, the yearly accrual that I earned at, say, age thirty was based on the then-present value of a higher age-sixty-four salary, but that accrual has now been retroactively reduced so that it was really based on the then-present value of a lower final average salary. The same is true for all previous years of employment: the present value of any accrual in any previous year is going to be retroactively reduced when the final average salary is reduced.

Strictly on economic terms, this plaintiff's argument is fairly sound. How then would the prorating idea be applied here?

The answer is that prorating could be done along with any prorating of the multiplier itself. Here is an example. Suppose John Smith works for fifteen years with the promise of a pension based on 3% times years of service times final year's salary. Then, for the next fifteen years, he works with the promise of a pension based on 2% times years of services times the five-year final average salary. Suppose that his final year's salary is $60,000 but that his final five-year average salary is $58,000. What would his pension be, just based on these terms alone? The answer is as follows: [15 * .03 * $60,000] + [15 * .02 * $58,000], or $44,400.

To be sure, changing final average salary calculations is not likely to change the pension system's liabilities substantially. In the previous example, changing the final average salary term by itself saved only $600 per year. Nonetheless, final average salary calculations are a component of many modern pension reform bills, and it is important for courts and legislatures to be aware that prorating is possible so as to protect past accruals while allowing forward-looking changes.

f. *Changing the Retirement Age*

Raising the retirement age means both that employees work and contribute to the pension system longer, and that they retire at an age when they are closer to death (which leads to lower average payouts).

But when the retirement age is raised for current employees rather than new hires only, an obvious question of fairness arises. At one extreme, it would seem unfair and a contractual violation if someone, on the literal eve of retirement, was suddenly told that she must work an extra three years to be eligible to retire. Such a last minute change would upset all the plans she had made in reliance on the earlier retirement date. At the other extreme, a twenty-two-year-old who only worked for one day can hardly be said to have a substantial reliance interest in retiring at age sixty-two rather than sixty-five. And if a three-year addition to the retirement age is intolerable to the twenty-two-year-old then she has many years in which to find employment that better suits her wish to retire at sixty-two.

How, then, could the retirement age be raised for current

employees in a manner that would be most fair? Prorating turns out to be possible here as well. Rhode Island's 2011 pension reform raised the retirement age in a way that was prorated based on previous years of service.[242] As an initial matter, the retirement age increase applies only to employees who were not already eligible to retire as of July 1, 2012.[243] This provision protects the interests of workers who, as mentioned above, might already be literally on the eve of retiring. Then, as a general matter, employees who have fewer than five years of service on June 30, 2012 have to work until the Social Security retirement age to retire. This provision is similar to what I mentioned above—i.e., the fairly young employees who do not yet have a substantial interest in retiring at some earlier age.

Next is where the prorating comes in: for all of the in-between employees (i.e., those who do have more than five years of service but are not already eligible to retire), the retirement age is "adjusted downward in proportion to the amount of service the member has earned as of June 30, 2012," subject to a lower bound of age fifty-nine.[244] The specifics of the calculation are as follows: First, divide the total service by June 30, 2012 by the projected service at the retirement age in effect on June 30, 2012. For example, if an employee had worked ten years but was fifteen years away from the pre-existing retirement age, the fraction would be ten twenty-fifths, or two-fifths. Then determine how much the retirement age, as of June 30, 2012, differed from the Social Security retirement age. For example, if an employee's retirement age was sixty prior to the pension reform but sixty-five under Social Security, the difference would be five years. Then, multiply the two figures together: two-fifths times five years, for a total of two years. At that point, the retirement age for the employee is simply the Social Security retirement age (sixty-five) minus those two years.

For another example, if an employee had worked twenty-four out of twenty-five years towards the previous retirement age of sixty, the new retirement age would now be [sixty-five minus (twenty-four twenty-fifths times five)], or 60.2 years; the retirement age for this employee would have been raised by a

242. R.I. GEN. LAWS § 36-10-9(1)(a)(ii) (2012).
243. *Id.* §36-10-9(1)(b)(ii).
244. *Id.*

mere 2.4 months.

In other words, the formula in Rhode Island now prorates any increase in retirement age in inverse proportion to how many years the employee had already worked towards the previous retirement age.[245]

How should a court think of this prorated formula? Does it properly protect prior accruals while affecting only future accruals? That is a conceptually more difficult question. Just as with changing the final salary-averaging period, a plaintiff could argue that an increase in the retirement age during one's working life inherently reduces the present value of all past accruals, because that present value would have to have been calculated by discounting for a longer period. In other words, if I am thirty-five and now have to work to age sixty-four rather than age sixty-two, the then-present value of what I earned at age twenty-five, twenty-six, twenty-seven, etc., would all have been determined by discounting back from age sixty-four rather than sixty-two, and with any discount rate above zero, that will automatically make the present value of those accruals lower.

There is not an easy answer to this. Prorating the retirement age by itself (as in Rhode Island) does not solve the problem. This is because, even if the retirement age increase is prorated, any increase whatsoever could be thought of as having retroactively reduced the present value of previous accruals.

That said, there is a way that prorating could be done so as to preserve the present value of previous accruals, even while raising the retirement age. Say the retirement age is raised from sixty-two to sixty-five, including any prorating as in Rhode Island. Then, for any given worker, establish the amount that was accrued (taking into account all of the applicable terms, such as the multiplier) as of the effective date of the legislation. Fast forward that amount, with interest, to age sixty-two, when that worker would previously have been eligible to retire. At that point, pretend that the worker was presently eligible for an annuity that equals the age-sixty-two present value of all the accruals that the worker had accumulated up to the effective date of the legislation. In other words, if John Smith is forty in 2012, but pension legislation is passed raising the retirement age

245. *Id.* § 36-10-9(1)(c)(ii).

from sixty-two, figure out his accruals as of 2012, and establish what that total would be as of 2034, when he would formerly have been able to retire at age sixty-two.

Then, carry that annuity forward up to the worker's *actual* retirement age, using the same interest rate that is otherwise used as a discount rate (and in the meantime, the worker is still working and accruing more benefits at whatever rate is currently in place). In the John Smith example, figure out what his total accruals as of 2012 would be worth in 2034, and then start imputing interest to that amount for another three years to age sixty-five. At the new actual retirement age, the worker retires with a pension based on the sum of: (1) all the new accruals after the legislation's effective date, plus (2) all the accruals prior to the legislation's effective date, except with interest applied during whatever gap existed between the old retirement age and the new retirement age.

If that calculation is carried out appropriately there will have been no retroactive impairment of the present value of prior accruals. That is, because all prior accruals are now going to effectively receive interest equal to the discount rate during any increase in the retirement age, then it automatically follows that discounting the retirement benefit at the new retirement age back to all of those prior years of employment would result in the exact same present value. Thus, no prior accruals would have been touched, but the retirement age would have been increased nonetheless.

To be sure, I am not suggesting that such a system is necessary: given the financial emergency in Rhode Island, that state probably hit upon the fairest way to raise the retirement age in a way that was more effective at reducing unfunded liabilities. But what I have outlined here is a way to implement the principle of protecting prior accruals while changing future accruals.

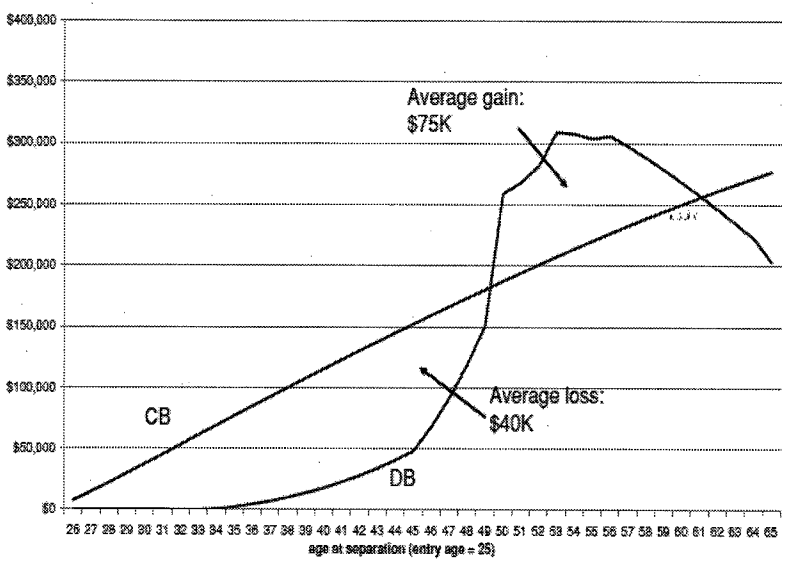
g. *Converting to a Different Pension System Entirely*

Converting a traditional defined benefit plan to a completely different structure might seem, at first, to create the most challenging difficulties about how to protect past accruals while changing future accrual patterns. Even so, this article argues that there are clear solutions that should allow legislatures a way forward.

Cash Balance Plans

A cash balance plan is a type of defined benefit plan that promises a particular benefit to participants. Still, it resembles a defined contribution plan insofar as the ultimate benefit consists of a promised rate of return on the contributions actually made on behalf of a given employee. Because the rate of return is inherently fixed to the amount of contributions, pension benefits can no longer exceed contributions by more than the fixed amount. On the other hand, workers' contributions are not subject to all the riskiness of market fluctuations, which can undermine retirement security for some defined contribution plans.

The difficulty, in constitutional terms, arises because the accrual pattern in a cash balance plan differs so dramatically from the accrual pattern in a typical defined benefit plan. As noted above, a cash balance plan involves a steady accrual pattern throughout each worker's career rather than back-loading benefit accrual to the later years of one's employment. This graph from Costrell and Podgursky (2010) shows how the accrual patterns might differ over an employee's working lifetime.[246]



Present Value at Entry of Future Net Pension Wealth in Missouri where 46% Net Pension Wealth is Redistributed

246. Costrell & Podgursky, *supra* note 30, at 519–57.

A state could convert a defined benefit plan to a cash balance plan. Because no state has done so yet,[247] no court has yet considered any of the legal challenges that would probably arise. Consider the graph from Costrell and Podgursky. If the goal was to allow workers early on in their careers to be able to leave with more money in their "accounts," but to do so without spending extra money on the pension system, it would be unavoidably necessary to reduce the future accruals earned by older employees for roughly a ten-year period towards the end of their careers.

To be sure, a state could always keep the older employees happy by keeping their higher accruals while raising the accruals of younger employees—thus creating a smooth accrual curve with a higher intercept than is depicted in the graph above. But that sort of transition to a cash balance system would result in considerably higher expenditures, potentially for decades (until all of the older employees died). Assuming that states do not have the resources to raise benefits substantially for younger workers while leaving older workers to collect outsized benefits, states would have to transition to a cash balance plan by raising the accrual of younger workers and lowering the accrual of older workers.

Thus, if a transition to a cash balance system involved reductions in the pension paid to older workers who retired during the "bump" that Costrell and Podgursky identify, one would expect older workers to file a lawsuit claiming that the old system entitled them to a particular level of benefits, and that the switch to a cash balance plan had deprived them of contractually guaranteed rights. Given that this sort of legal challenge would be new, it is difficult to predict what any court would do. Nonetheless, there are good arguments that a fiscally neutral transition to a cash balance plan should be a viable option under federal and state constitutions.

Before getting to the constitutional question, though, it is necessary to take a short detour through the case law regarding the legality of private companies' decisions to switch from defined benefit plans to cash balance plans. Such private

247. Nebraska's cash balance plan arose from a (rare) governmental defined contribution plan, and therefore does not raise the same issue of uneven accrual patterns being converted to even accrual patterns.

decisions obviously do not implicate the Contract Clause, which applies only to legislatively-imposed contractual changes. Instead, the legal challenges involved claims of age discrimination. These cases are still relevant here, because the underlying premise of either an age discrimination claim or a Contract Clause claim is that the pension plan has been changed in a way that disfavors the older employees who were expecting larger pension payments.

The most well known such case is *Cooper v. IBM Personal Pension Plan.*[248] In that case, IBM had switched from a traditional defined benefit plan to a cash balance plan, but was sued for age discrimination.[249] The basis for this argument was that the 5% interest credit was applied to younger workers' accounts for a longer period of time, thus making their yearly accruals greater in value.[250] The district court had noted that under ERISA, an "accrued benefit" is defined as an amount "expressed in the form of an annual benefit commencing at normal retirement age."[251] But someone who "leaves IBM at age fifty, after twenty years of service, will have a larger annual benefit at sixty-five than someone whose twenty years of service conclude with retirement at age sixty-five."[252] This pattern of accruals therefore favored younger employees, according to the district court.

The Seventh Circuit disagreed, however, noting that the time value of money is not the same thing as age discrimination.[253] As long as the contributions to workers' accounts are equal without regard to age, and as long as the interest awarded to accounts each year is the same, it is not employment discrimination against older people merely because they are not leaving their money in the accounts for as long a period of time.[254] Even worse, the district court's analysis had left out a crucial component: while the court had used the power of compound interest to treat younger workers' accruals as worth "more" at

248. 457 F.3d 636 (7th Cir. 2006). *See also* Register v. PNC Fin. Servs. Grp., 477 F.3d 56 (3d Cir. 2007).

249. *Cooper*, 457 F.3d at 642 (7th Cir. 2006).

250. *Id.* at 638.

251. 29 U.S.C. § 1002(23)(A) (2006). *See also* Cooper v. IBM Pers. Pension Plan 274 F. Supp. 2d 1010, 1016 (2003), *rev'd*, 457 F.3d 636.

252. *Cooper*, 457 F.3d at 638.

253. *Id.* at 639.

254. *Id.* at 639–40.

retirement age, it left out the power of the discount rate to discount that value at retirement age back to the present value.

Notably, the Seventh Circuit included a passage addressing whether the shift in pension systems had worked to "diminish vested interests."[255] The Seventh Circuit concluded that it did not, because IBM gave its employees the following: "the greater of the present value of their pension entitlements as of the transition date or the account balance that they would have had if IBM had a cash-balance plan in effect since the employee came to work."[256] Just as notably, the Seventh Circuit said that this shift did not "diminish vested interests" even though it "disappointed expectations."[257] In other words, giving older employees the present value of their pension entitlements earned to date might have still frustrated those older employees (if they were expecting a still-higher payout after another year of work), but such a change was not enough to harm the vested interests already earned. That, in the Seventh Circuit's analysis, was the key point: protecting the past accrued benefits, while allowing IBM to shift to a new system of accrual for future benefits.[258]

In light of what the Seventh Circuit said here, one obvious way to convert a traditional defined benefit plan to a cash balance plan would be to freeze workers' accrued benefits at current levels, while changing how benefits are accrued going forward. Under such a reform, workers in their early fifties might currently be in the period when the former plan entitled them to unduly large pension wealth, and hence they would receive unduly large opening cash balances; conversely, younger or newer workers at the lower point of the pension wealth curve would receive unduly low cash balances. Nonetheless, it may all balance out in the end, as the newer workers would see their cash balance accounts increase more sharply in value over time with a more even accrual pattern. Setting opening cash balances based on the present value of the accrued pension wealth is lawful under ERISA when a private company converts from a traditional defined benefit plan to a cash balance plan.[259] As

255. *Id.* at 642.
256. *Id.*
257. *Id.*
258. *Id.*
259. Sunder v. U.S. Bancorp Pension Plan, 586 F.3d 593, 601 (8th Cir. 2009).

noted above, ERISA protects past accruals while allowing changes to or even the elimination of future accruals altogether.[260] In at least one federal appellate case, the question arose whether a company had sufficiently protected past accruals when it eliminated a traditional defined benefit plan and offered its employees a starting "cash balance" representing the current value of their prior accruals.[261] What the company did—and this was upheld by the Eighth Circuit—was ignore any possible future accruals, determine what it would cost to purchase an annuity at the workers' normal retirement date that would pay them a monthly pension based on what they had accrued as of the switch in pension plans, and then discount that annuitized value back to the present value using the same discount/interest rate that the cash balance plan itself was going to use (in the Eighth Circuit case, this was a generous 8%).[262] The plaintiffs argued that a lower discount rate (one that the IRS periodically sets to determine how to calculate lump sum distributions) should have been used, but the Eighth Circuit held that setting an initial cash balance is not the same as a lump sum distribution and there is no statutory obligation to use a lower discount rate here.[263]

Similarly, the Department of Labor has this explanation and example of what must occur when a private company switches pension plans:

> In addition, while employers may amend their plans to cease future benefits or reduce the rate at which future benefits are earned, they generally are prohibited from reducing the benefits that participants have already earned.... For example, assume that a plan's benefit formula provides a monthly pension at age 65 equal to 1.5 percent for each year of service multiplied by the monthly average of a participant's highest three years of compensation, and that the plan is amended to change the benefit formula. If a participant has completed 10 years of service at the time of the amendment, the participant will have the right to receive a monthly pension at age 65 equal to 15 percent of the monthly average of the participant's highest three years of compensation when the

260. *See id.* at 600 (citing Campbell v. BankBoston, N.A., 327 F.3d 1, 8 (1st Cir. 2003)).
261. *Id.*
262. *Id.* at 603.
263. *Id.*

plan amendment is effective.[264]

Obviously, the Department of Labor here is merely explaining how ERISA rules apply to private pension plans; its analysis does not apply to constitutional regulation of governmental plans. Still, ERISA is useful for analogical purposes. After all, ERISA regulates private pension plans extensively based on the presumption that workers need special statutory protection of their accrued pension benefits.[265] If even ERISA, as an employee-protective contractual framework, allows forward-looking changes while guiding how past accruals are to be protected, then by analogy one could argue that the federal or state constitutions could be interpreted similarly barring strong evidence that even greater contractual protection was intended.

Older workers might still complain that they had struck a contractual deal whereby they paid too much into the system earlier in their careers in exchange for the right to withdraw outsized amounts if they stuck around long enough to retire at the right time. Thus, their argument might continue, to change the pattern of accruals mid-stream—even on a forward-looking basis—would upset the expectations that the state pension system originally set in place precisely to encourage longevity in its workforce.

Legislatures and courts, however, should reject this argument. Even if older workers' pension accrual is reduced looking forward, that is only because they are currently in a position to get a windfall at the expense of more mobile workers. To the extent that the uneven curve in Figure 1 differs from a smooth line, it is because more mobile workers are paying too much into the system, which transfers their money to older workers, compared to the benefits that they themselves receive if they moved or changed jobs. In a certain respect, traditional defined benefit plans resemble a Ponzi scheme, in that the fiscal viability of the oversized accruals given to some older workers depends on consistently finding more and more new recruits who can be convinced to pay too much money into the system. It is therefore

264. *Frequently Asked Questions About Cash Balance Pension Plans*, U.S. DEP'T OF LABOR, http://www.dol.gov/ebsa/FAQs/faq_consumer_cashbalanceplans.html (last visited Dec. 15, 2012).

265. Robert Novy-Marx & Joshua D. Rauh, *Public Pensions Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1211, 1211–49 (2011). *See also* 29 U.S.C. § 1001 (2006).

unclear that the basic fairness issue normally raised as to pension changes would weigh in older workers' favor.

A second consideration is that it arguably makes more sense to view each worker's interest as a comprehensive lifetime whole, rather than as a slice of time late in one's career. One might say to an older worker, "Yes, you have been told that at age fifty-five, you can retire with more benefits than were ever paid in on your behalf. But that is only because your own pension wealth five years ago was too low, and will be too low again if you work until age sixty. With a cash balance plan, you can keep working to a normal retirement age, and have even more pension wealth than you have today, in addition to the ability to leave that wealth to your descendants." In other words, over a particular worker's lifetime, the worker will be advantaged overall from not having nearly as many time periods when his pension wealth is unfairly low, even if his excess pension wealth no longer spikes to an all-time high during one relatively short time period.

On a lifetime view, then, a cash balance plan is not any worse for workers than the traditional defined benefit plan, and there is no reason to think that workers on average would be better off with an outsized benefit during a particular five- or ten-year window rather than a fair benefit at all times during their working lives. As Judge Easterbrook said in the *Cooper* case, "removing a feature that gave extra benefits to the old differs from discriminating against them," and "replacing a plan that discriminates against the young with one that is age-neutral does not discriminate against the old."[266]

Hybrid Plans

Rhode Island is the most prominent recent example of a state that moved its current employees from a strict defined benefit plan to a hybrid defined benefit/defined contribution plan.[267] What does this mean? The defined benefit plan already in existence still remains, but has been scaled back by, as discussed above, lowering the multiplier for future service to 1% from 2% or more, raising the retirement age, and more.[268] Then, in a

266. Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 642 (7th Cir. 2006).
267. R.I. GEN. LAWS § 36-10-9 (2012).
268. *Id.*

separate move, the Rhode Island legislation creates a new defined contribution plan that starts as of July 1, 2012.[269] The terms of the defined contribution are mostly drawn straight from 26 U.S.C. § 401(a), which sets out terms that any pension plan must follow to be tax-exempt under the tax code.[270] The employee/employer contribution rates are set by statute at a total of 6% (divided into 5% and 1% respectively) for employees who are also in Social Security, and a total of 10% (5% from employers) for employees who are not in Social Security.[271] In other words, the predominant source of retirement benefits is being shifted towards the new defined contribution plan and away from the traditional defined benefit plan. The main sense in which this is a "hybrid" plan, then, is just that two basically separate plans now exist side-by-side.

Obviously, the rate and everything else about future accruals has been changed. How should such a new hybrid plan protect prior accruals? As noted above, all one needs to do is take the annuitized value of the defined benefit pension wealth at the time of the pension shift for each employee. Then let that annuitized value continue to earn imputed "interest" each year until a given employee actually retires. Thus, any pension wealth accumulated in the old defined benefit plan will continue to retain all of the present value that it had, with no previous accruals having been lowered retrospectively. And in the meantime, new accruals can occur according to the terms of the new plan (whether that is a hybrid plan or a completely different plan altogether).

5. What about Emergency Exceptions?

As noted above, even state legislation that substantially impairs contractual rights can be permissible if, in the end, the state justifies its action by a showing of financial necessity or need. Court holdings on the necessity exception tend to veer in different directions. On one hand, some cases suggest states cannot rely on the mere desire to lower their own financial expenditures as a justification for breaking contractual

269. *Id.*
270. 26 U.S.C. § 401(a) (2006).
271. *Id.* § 401(k)(12)(B).

obligations.[272] The U.S. Supreme Court has explained that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised.[273] If a state could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all."[274] Thus, in *AFSCME v. City of Benton, Arkansas*,[275] a city had sought to stop paying retiree health insurance premiums on grounds of economic need, but the Eighth Circuit was skeptical:

> Although economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to "unprecedented emergencies," such as mass foreclosures caused by the Great Depression. . . . Further, to survive a challenge under the Contract Clause, any law addressing such concerns must deal with a broad, generalized economic or social problem.[276]

By contrast, in *Baltimore Teachers Union v. Mayor and City Council of Baltimore*,[277] the Fourth Circuit held that Baltimore's salary reduction plan—adopted because of budget problems—did not violate the Contract Clause. In explaining their reversal of the district court's opinion striking down the legislation, the court explained that a real emergency existed and that Baltimore had already tried other means of addressing the financial shortfall.[278]

As for the states that recently enacted pension reform, consider Colorado. In *Peterson v. Fire and Police Pension Association*,[279] the Colorado Supreme Court found that while police officers had a limited vesting of survivor pension benefits in a city plan, those pension benefits could be altered (as was the case by the city plan's replacement with a statewide plan). The court held:

> Had the General Assembly not changed the funding scheme

272. Balt. Teachers Union, Am. Fed'n of Teachers Local 340, AFL-CIO v. Mayor & City Council of Balt. 6 F.3d 1012, 1015 (4th Cir. 1993).
273. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).
274. *Id.*
275. 513 F.3d 874 (8th Cir. 2008).
276. *Id.* at 882.
277. *Balt. Teachers Union*, 6 F.3d at 1015.
278. *Id.* at 1020–21.
279. 759 P.2d 720 (Colo. 1988).

> for death and disability pensions, the City and County of Denver eventually would have exhausted its pension funds. We conclude that ensuring that the individual petitioners receive survivor benefits as long as they remain eligible offsets the harm the petitioners are suffering due to their lower monthly benefit payments. . . . In order to avoid bankrupting the Denver system and others throughout the state, it was necessary to reduce the benefits for the group as a whole. Ensuring that the statewide pension system is actuarially sound justifies any corresponding detriments to the group.[280]

Suppose that a state's financial emergency does seem to require lowering pension payments that have been accrued in previous years. How can such restrictions be enacted most fairly, given that retirees have relied on the pension promises made to them? Imagine dividing a pension payment into the following categories: (1) the amount that is due to new increases enacted during the worker's career, but that was not paid for at all by increased contributions (this category would obviously include those pension increases that are made retroactive to previous years of employment); 2) the amount that is due to new increases during a worker's career, and that was paid for in part via contributions, albeit at a contribution rate lower than would be necessary to pay for a full lifetime pension; 3) the amount that was promised to the employee for his or her entire career but that is in excess of what contributions could have paid for given accurate actuarial assumptions; 4) the amount that was promised to the employee for his or her entire career and that was fully paid for via contributions.

Category 4 is the easiest: these amounts of money were fully paid for via contributions at the time, and therefore cannot be part of any unfunded liability. They should therefore be fully protected by the Contract Clause, even in the case of financial emergency. The other categories should receive less protection, culminating in Category 1 (which should receive the least protection of all). Category 3 was not fully paid for at the time, but was promised to the employee for his or her entire career, and the employees therefore have a strong reliance interest in obtaining a pension of that amount. Category 2 was neither fully paid for, nor was it promised for an employee's entire career;

280. *Id.* at 725–26.

hence there is less of a claim on the employee's part to have relied on the promise or to have paid for the benefit in question. And finally, Category 1 was never paid for at all, and includes increases that were made retroactive. Hence, no one could have relied on that pension promise during those retroactive years; after all, if I go to work for a state agency in 1985 and am promised a pension of $X, and if the pension is increased retroactively in 2005, I could not possibly have spent the years between 1985 and 2004 justifiably relying on the hope that a retroactive pension increase would someday be enacted.

Thus, if benefits must be cut to current retirees, the state should calculate what amounts of money fall into what categories for each employee. Then any cuts should affect Category 1 for all retirees first—that is, the state should first cut (if at all) payments that were promised retroactively but never paid for. These payments do not represent anything that the employee bargained for or gave consideration for in the first place. If cuts to Category 1 are not enough, the state should proceed to Category 2, making cuts proportionate to the amount of a worker's career that was spent making contributions towards the increased benefit—and so forth.

This may not be a perfect system, but it allows the state to urge that it is attempting to be fair by cutting first (and hopefully only) those benefits that were closest to a gratuity.

B. *The Takings Clause*

In some of the lawsuits currently before state courts, plaintiffs have raised the argument that pension reform is a violation of state or federal takings clauses: if state employees do not receive the pension benefits to which they are entitled, their property right to the money at issue has been violated.[281]

The U.S. Constitution provides that private property shall not be "taken for public use, without just compensation."[282] Just as with the Contract Clause, state courts overwhelmingly tend to construe their own state constitutions' takings clauses in parallel with the U.S. Constitution.[283]

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281. U.S. CONST. amend. V.

282. *See, e.g.*, Justus v. Colorado, No. 11CA1507, 2012 WL 4829545, at *12 (Colo. App. Oct. 11, 2012).

283. *See, e.g.*, E-470 Pub. Highway Auth. v. Revenig, 91 P.3d 1038, 1045 n.10 (Colo.

The question is whether and how this might apply to state legislation that "takes" away pension rights. Arguably, the Takings Clause addresses every type of interest a citizen may possess, and pension recipients have a legitimate expectation that they will receive annual pension increases at the levels specified under the law when they retire.

Thus, in a North Carolina case, the state supreme court relied on the Takings Clause to strike down pension legislation that subjected pension benefits to taxation.[284] The court held:

> Plaintiffs contracted, as consideration for their employment, that their retirement benefits once vested would be exempt from state taxation. The Act now undertakes to place a cap on the amount available for the exemption, thereby subjecting substantial portions of the retirement benefits to taxation. This is in derogation of plaintiffs' rights established through the retirement benefits contracts and thus constitutes a taking of their private property.[285]

The question of whether a plaintiff has a property right to a pension is basically the same under the Contract Clause and the Takings Clause.[286] As the First Circuit said:

> It is clear that this case does not involve tangible personal property or real property. It does not involve an effort to reclaim benefits already paid. The only property interest alleged is an expectancy interest claimed to derive from a contract between the state and the plaintiffs to afford a certain level of pension benefits. The facts here require us to consider whether plaintiffs had the requisite property right to support a Takings Clause claim by analyzing their claim under the Contract Clause.[287]

By the same token, pension benefits that are not contractually

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2004) ("Although the language of article II, section 15 of our constitution differs from its federal counterpart, we have considered decisions of the United States Supreme Court construing the federal takings clause as a guide in determining what constitutes a taking.") (quotation omitted); Wensmann Realty v. City of Eagan, Inc., 734 N.W.2d 623, 631–32 (Minn. 2007).

284. Bailey v. North Carolina, 500 S.E.2d 54, 69 (N.C. 1998).

285. *Id.*

286. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003 (1984) (noting that valid contracts are property within the meaning of the Takings Clause); R.I. Bd. of Corr. Officers v. Rhode Island, 264 F. Supp. 2d 87, 103 (D. R.I. 2003) ("In sum, without a contract, there is no property right, and without a property right, there is no Takings Clause violation.").

287. Parella v. Ret. Bd. of the R.I. Emps.' Ret. Sys., 173 F.3d 46, 58–59 (1st Cir. 1999).

protected "are not property as to which the government, before repealing, must provide just compensation."[288] Thus, because a Takings Clause claim is parasitic on a Contract Clause claim, it would not result in any additional relief under current doctrine.[289]

Nor should the Takings Clause require a different result than the Contract Clause theory I have laid out. When a state modifies the way that pension benefits are accrued in future years, or the contribution rate that employees pay in future years, it is difficult to see how any genuine property interest of the employees has been affected. To think that the Takings Clause is independently implicated in such a circumstance, one would have to show that employees have a property interest not just in money that they have already been paid or promised for past work, but also in a particular benefit rate that they had hoped to accrue in the future for work not yet performed.

One additional issue arises in the Takings Clause context: some state governments have attempted to defend pension legislation by arguing that the Takings Clause simply does not apply to takings of money. They cite, for example, a Federal Circuit holding that "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment."[290]

What such cases are really about, however, is whether taxes

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288. Hoffman v. City of Warwick, 909 F.2d 608, 616 (1st Cir. 1990).

289. *See, e.g.*, Nat'l Educ. Ass'n-R.I. *ex rel.* v. Ret. Bd. of the R.I. Emps.' Ret. Sys., 172 F.3d 22, 30 (1st Cir. 1999) ("It would make nonsense of such rulings—and the clear intent requirement—to conclude that an expectancy insufficient to constitute an enforceable contract against the state could simply be renamed 'property' and enforced as a promise through the back door under the Takings Clause."); R.I. Council 94, A.F.S.C.M.E. v. Rhode Island, 705 F. Supp. 2d 165, 182 (D. R.I. 2010) ("Since the Court has concluded that there is no valid contract binding the State of Rhode Island for the prospective retiree health benefits affected by Article 4, Plaintiffs have failed to allege sufficient facts that would support a Takings Clause claim."); Order, Justus v. Colorado, 2010 CV 1589 (Denver, Colo. Dist. Ct., June 29, 2011), at 11 ("Any arguable property right here is premised on the notion that the Plaintiffs have a contractual right to a particular COLA and thus fails where there is no such right."); Order and Memorandum, *Swanson v. Minnesota*, Court File No. 62-CV-10-05285 (Second Judicial District, Ramsey County, Minn., June 29, 2011), at 26 ("Plaintiffs' Takings claims fail because they rest ultimately on the expectation that future adjustments would be made pursuant to a particular formula. As shown above, that expectation has neither a contractual basis, nor a reasonable basis enforceable by estoppel principles.").

290. Commonwealth Edison, Co. v. U.S., 271 F.3d 1327, 1340 (Fed. Cir. 2001).

and fees can violate the Takings Clause.[291] The reason for holding the Takings Clause inapplicable is that to hold otherwise would eviscerate the government's ability to tax. But such cases do not answer the question whether the government has improperly taken someone's property not when it imposes a tax or fee, but when it directly reduces a benefit that has been promised to someone. Return to the idea that pension benefits are really a form of back-loaded wages. No one doubts that the Takings Clause does not prevent the government from imposing an income tax. But it would be a different matter altogether if the government passed legislation that specifically targeted a group of workers to have their salaries retroactively reduced. The Takings Clause might then apply, even if it does not yet protect those workers' salaries or pension benefits that might be earned in future years.

IV. CONCLUSION

States that engage in pension reform will have to do so with an eye towards lawsuits that allege a Contract Clause violation. Courts should beware of two alternative extremes that have so far won the day in multiple states. At one extreme, courts in some states (such as Florida, New Hampshire, and Arizona) have all recently held that state employees are essentially entitled to keep accruing pension wealth at the same rate in all future years of employment, with no increase in contribution rates and with no alteration even for employees who just started work yesterday.[292] This extreme version of pension protection needlessly hamstrings the capabilities of state legislatures and municipal employers, given that they need to be able to adjust the entire package of salaries and benefits in order to best compete in the labor market. Moreover, as Amy Monahan has pointed out, this form of pension rights likely harms many of the workers that it is intended to protect, because the state's remaining avenue for saving money would be to freeze salaries or lay off workers.[293] Given that many workers may prefer to retain a job, or to have a different balance of current salary versus pension, it makes little

291. *See, e.g.*, Kitt v. United States, 277 F.3d 1330 (Fed. Cir. 2002).

292. *E.g.*, Fla. Sheriffs' Ass'n v. Dept. of Admin., 408 So.2d 1033, 1036–37 (Fla. 1981); Yeazell v. Copins, 402 P.2d 541, 546–47 (Ariz. 1965).

293. Monahan, *supra* note 206, at 1033.

sense to tie the legislature's hands only as to one component of the employment package.

At the other extreme, however, courts in other states (most recently Colorado, Minnesota, South Dakota, and New Jersey) have held that legislatures are entitled to reduce benefits even for people who already completed their entire careers and are now retired.[294] Such holdings typically glide over the fact that retirees spent at least part of their careers working with the promise of a particular benefit calculation when they retired, and at a minimum, a court should start the contractual analysis by assuming that the retirees have a right to the pro rata portion of benefits calculated in that manner. With that baseline protection in place, courts can of course proceed to determine whether the contractual alteration was justified by an important public purpose, such as a financial emergency.

In any event, states should have the prerogative both to change the terms of pension accrual on a going-forward basis for current employees, and even to cut retiree benefits on a pro-rated basis to the extent that those retirees spent some portion of their career having been promised a different benefit.

This article explained how such pro rata reductions could be most logically implemented. In the case of changes to the multiplier, changes to the COLA, and changes to the contribution rate, it is fairly easy and intuitive to calculate a weighted average. Even for changes to the retirement age, Rhode Island has now showed how it is possible to raise the retirement age in inverse proportion to the years already served towards the current retirement age (and it would be further possible, as explained above, to annuitize the value of benefits as would have been received at the previous retirement age and then carry forward that value with interest to the new retirement age, thus preserving any previously accrued value to the penny).[295] Changes to the way final average salary is calculated can also be prorated, as described above. Finally, even wholesale

294. *E.g.*, Colo. Springs Fire Fighters Ass'n, Local 5 v. City of Colo. Springs, 784 P.2d 766, 770 (Colo. 1989) (en banc); Tait v. Freeman, 74 S.D. 620, 57 N.W.2d 520, 521–22 (1953); Order and Memorandum, Swanson v. Minnesota, No. 62-cv-10-05285 (Minn. Dist. Ct. June 29, 2011), *available at* http://www.minnesotatra.org/IMAGES/PDF/judge johnsonorder.pdf.

295. R.I. GEN. LAWS § 36-10-9(1)(c)(ii) (2012).

revisions to the retirement system, such as replacing a defined benefit plan with a cash balance plan or 401(k)-style plan, can preserve prior accruals by annuitizing the present value of pension wealth at the point of conversion to the new plan, and then carrying forward that value with interest until retirement.

In short, while any actual pro rata calculations may seem daunting to a non-actuary, the underlying principles are fairly straightforward and could be reasonably understood by any state or federal judge who hears a pension reform lawsuit. Judges should therefore start with these principles as a baseline contractual protection, subject to reduction in cases of demonstrated financial need.

LEVELING THE PLAYING FIELD IN DAVID V. GOLIATH: REMEDIES TO AGENCY OVERREACH

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I. INTRODUCTION

For the past two decades, small business owners have consistently reported that regulatory burdens, and the onerous paperwork that compliance requires, are among their top concerns.[1] They know firsthand how difficult it can be to obtain the necessary approvals and to meet multifarious regulatory requirements simply to make an honest living. They must navigate through the complexities of an ever-changing regulatory system governing their daily activities.[2]

Whereas a Fortune 500 company will have a team of compliance officers and attorneys ready to tackle regulatory issues like a swarm of wasps, a typical small business has only ten employees and lacks the financial resources to address regulatory roadblocks in the same manner.[3] Without a standing army of experts, small businesses cannot efficiently clear regulatory hurdles; therefore, the cost of compliance is necessarily higher for them.[4] Indeed, small business owners are put in a real bind when they cannot obtain or afford necessary permits, when their costs of compliance are too high, or when they are faced with litigating a case against a federal agency with a large and comparatively bottomless budget. Regulatory burdens bar entry into the market. They prevent many potential businesses from

1. HOLLY WADE, NAT'L FED'N OF INDEP. BUS. RESEARCH FOUND., SMALL BUSINESS PROBLEMS & PRIORITIES, 24–25 (Aug. 2012), *available at* http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf.

2. BRUCE D. PHILLIPS & HOLLY WADE, NAT'L FED'N OF INDEP. BUS. RESEARCH FOUND., SMALL BUSINESS PROBLEMS & PRIORITIES, 9 (June 2008), *available at* http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf ("[Unreasonable government regulation] costs small businesses in several ways: understanding and keeping up-to-date with compliance requirements, cost of consultants, employee time, management time, direct outlays, lost productivity and/or sales, foregone opportunities, etc. The federal government alone proposes approximately 150 new rules every year that cost business owners over *$100 million per rule* in compliance costs. Adding state and county laws that sometimes duplicate federal laws, merely raise the cost and frustration level.").

3. *See Who NFIB Represents*, NAT'L FED'N OF INDEP. BUS., www.nfib.com/about-nfib/what-is-nfib/who-nfib-represents (last visited Dec. 4, 2012) ("While there is no standard definition of a 'small business,' the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.").

4. Joseph A. Castelluccio III, *Sarbanes–Oxley and Small Business: Section 404 and the Case for a Small Business Exemption*, 71 BROOK. L. REV. 429, 444 (2005) ("In the case of small businesses, the relative costs of compliance with federal regulations can be disproportionately high, both in terms of dollars and manpower. This is the result of economies of scale, the idea that the average costs per dollar of proceeds decrease as the size of the company or transaction increases because fixed costs can be spread out.") (citations omitted).

getting off the ground and sometimes force business owners to forgo business opportunities, downsize, or fold up shop.[5]

Small business owners understand how frustrating it can be to work with regulators because they must do so on a regular basis. A typical individual, however, will inevitably feel the same frustrations when confronted with a regulatory problem in his or her personal life. Something as seemingly simple as obtaining a permit to build a modest addition to a home—on one's own property—can become an administrative nightmare. Most individuals, like most small businesses, lack the resources to defend their rights when they fall under the bureaucratic thumb of indiscriminate regulators.[6]

Regulators exacerbate this problem when they adopt a "shoot first, ask questions later" mentality, as demonstrated in *Sackett v. Environmental Protection Agency*.[7] Decided this past Term in the United States Supreme Court, the case concerned the troubles of Mike and Chantell Sackett—an ordinary couple of modest means. In 2007, the Sacketts received a compliance order from the EPA alleging that they had violated the Clean Water Act (CWA)[8] when they began construction on their dream home on an approximately half-acre patch of dry land in the Idaho panhandle.[9] In the compliance order, the EPA asserted that the Sacketts' property was a jurisdictional wetland, but the order provided no evidence to substantiate the allegation.[10] The

5. *See* Johan Eklund & Björn Falkenhall, *The Costly Effects of Regulatory Burdens*, REGBLOG (Oct. 17, 2011), https://www.law.upenn.edu/blogs/regblog/2011/10/the-costly-effects-of-regulatory-burdens.html ("Beyond just the direct costs that businesses incur in coming into compliance with rules, the indirect costs of regulations include raising barriers to entry into markets, harming competition and entrepreneurship, affecting production dynamics, skewing resource allocations, and reducing yields on investments.") (citing *The Economic Effects of the Regulatory Burden*, SWEDISH AGENCY FOR GROWTH POL'Y ANALYSIS, (2010), http://www.tillvaxtanalys.se/download/18.6288e13b13a4f43c5882b04/1352190193573/Report_2010_14.pdf); *see also Obamacare's Employer Penalty and its Impact on Temporary Workers Before the Subcomm. on Health Care, D.C., Census, & the Nat'l Archives of the H. Comm. On Oversight & Gov't Reform*, 112th Cong. 2 (2011) (statement of Rep. Trey Gowdy, Member, Subcomm. on Health Care, D.C., Census, & the Nat'l Archives) (addressing the fact that many businesses are cutting staff in order to avoid the burdens of the employer-mandate tax penalty in the Affordable Care Act).

6. Setting aside enforcement actions, between 1998 and 2010 the Justice Department spent at least $43 million ($3.3 million annually) in defending the Environmental Protection Agency (EPA) alone. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 19 (2011).

7. 132 S. Ct. 1367 (2012).

8. 33 U.S.C. §§ 1251–1387 (2006).

9. Sackett v. EPA, 132 S. Ct. 1367, 1370–71 (2012).

10. *Id.*

Sacketts wished to contest the EPA's jurisdiction over their property, but the couple was denied any opportunity to challenge the Agency's compliance order.[11] According to the EPA, their only option was to take immediate action to remedy the alleged violation or face ruinous fines of as much as $75,000 per day.[12] The Sacketts had to fight all the way to the Supreme Court simply for the chance to contest the EPA's jurisdiction to issue the compliance order—an order that was issued without any probable cause that the Sacketts had violated the law and without on-site analysis to confirm the existence of federally regulable wetlands.[13] The absence of probable cause and supporting evidence is particularly troubling given that a jurisdictional wetlands determination is very fact-intensive and site-specific.[14] Ultimately, the Supreme Court would hold that

11. *Id.* at 1371.

12. By the time the case got to the Supreme Court, the Sacketts were subject to daily fines of up to $37,500 for allegedly violating the CWA, and additional daily fines of $37,500 for violation of the compliance order (totaling up to $75,000 in daily fines). *Sackett*, 132 S. Ct. at 1370. The justices were unmoved by the Agency's argument that it rarely seeks the statutory maximum when it brings a civil action. During oral argument, Justice Scalia scoffed at that suggestion: "I'm not going to bet my house on that." Transcript of Oral Argument at 30–31, *Sackett*, 132 S. Ct. 1367 (No. 10-1062). The threat of ruinous fines is coercive because it is an effective psychological weapon. The EPA meant to scare the Sacketts into compliance—regardless of whether their property was a jurisdictional wetland. One can only imagine the sinking feeling that Mike and Chantell Sackett must have felt—the shock, the fear, and the feeling of exasperation—upon receiving the compliance order. The EPA's message was clear: Resistance is futile (and never mind your constitutional rights).

13. Petitioners' Brief on the Merits, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 4500687, at *7.

14. Jonathan Adler, *Wetlands, Property Rights, and the Due Process Deficit*, 2011–2012 CATO SUP. CT. REV. 139, 141 (2012) (citing *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring)) ("The CWA is 'notoriously unclear' as to the extent to which it projects federal regulatory authority over private land."). The Supreme Court's most recent decision addressing CWA jurisdiction is *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Court rejected the Government's expansive understanding of its regulatory authority but could not produce a single rationale supported by a majority of the justices. The *Rapanos* plurality of four justices asserted that federal jurisdiction under the CWA extends only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to bodies which are 'waters of the United States' in their own right." *Id.* at 739, 742. Justice Kennedy wrote a separate concurring opinion in which he agreed with the plurality "that the statutory term 'waters of the United States' extends beyond water bodies that are traditionally considered navigable[, but he] . . . concluded that wetlands are 'waters of the United States' 'if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" ENVTL. PROTECTION AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* 2–3 (2008) (quoting *Rapanos*, 547 U.S. at 767, 780 (Kennedy, J., concurring)), *available at* http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (last visited Dec. 21, 2012). The federal circuit

the Sacketts had a right to sue the EPA pursuant to the Administrative Procedure Act.[15]

In their victory in the Supreme Court, the Sacketts not only vindicated their individual rights, they established the important precedent that a federal agency cannot issue a compliance order without giving its recipient a meaningful opportunity to contest the agency's jurisdiction.[16] Previously, the EPA could issue compliance orders on a whim, based only on speculative conjecture as to whether the property in question was in fact a jurisdictional wetland.[17] At the Supreme Court, the EPA argued against judicial review in part because it would force the Agency to make a more thorough assessment before issuing such orders.[18] The EPA asserted that concerns for administrative expediency should allow the Agency to take quick action to prevent possible environmental harms.[19] But, in holding that the Sacketts may challenge the EPA's compliance order, the Court made clear that the Agency must be prepared to defend its jurisdictional assertion if it insists on issuing compliance orders.[20]

Because of *Sackett*, agencies have a disincentive to issue compliance orders without substantiating the facts necessary to justify their issuance. Hence, the decision is a victory for individual rights not only because it establishes the right of

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courts are split as to which test controls, and the question of how to apply these tests remains one of the most vexing issues in environmental law today. *See* Cathryn Henn, *Enemy of the People: The Need for Congress to Pass the Clean Water Restoration Act*, 6 FLA. A & M U. L. REV. 257, 282 (2011).

15. *Sackett*, 132 S. Ct. at 1374.

16. This is at least true with regard to statutes that do not explicitly foreclose the possibility of judicial review. *Id.* But the absence of any opportunity for judicial review raises serious due process concerns. *See* Damien Schiff, Sackett v. EPA*: Compliance Orders and the Right of Judicial Review*, 2011–2012 CATO SUP. CT. REV. 113, 120 (2012) ("[W]e argued that another reason why the Sacketts should not have to wait until an EPA lawsuit for them to get judicial review is that it would violate the principle of *Thunder Basin* and *Ex parte Young*—that the right to judicial review would be conditioned on the Sacketts' violating the compliance order and thereby risking significant civil liability.").

17. *See* Adam D. Link, *United States Supreme Court Reverses Ninth Circuit, Holds Individuals May Bring Action Under Administrative Procedure Act Challenging U.S. Environmental Protection Agency Compliance Orders*, SOMACH SIMMONS & DUNN (Apr. 3, 2012), http://www.somachlaw.com/alerts.php?id=162 ("[The] EPA issues approximately 1,500 to 3,000 compliance orders annually, and while many of these will not be challenged because the grounds for enforcement and liability may be clear, [*Sackett v. EPA*] will afford those who question the validity of that order an opportunity to challenge [the] EPA at an earlier stage of the proceedings.").

18. *See* Brief for the Respondents, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 5908950, at *22 (noting that the EPA can better conserve resources outside judicial-enforcement settings).

19. *Sackett*, 132 S. Ct. at 1374.

20. *Id.*

judicial review for compliance orders, but also because it reduces the incentive for agencies to adopt cavalier positions when threatening individuals with ruinous fines. Nevertheless, agencies after *Sackett* still have perverse incentives to take unnecessarily aggressive positions, a fact that endangers our rights.[21] The phenomenon persists because: (a) most individuals lack the resources to vindicate their rights; (b) the costs of litigation will often outweigh the benefits of vindicating one's rights; and (c) agencies benefit from rules that stack the deck against private litigants.

The Sacketts' rights would never have been vindicated if they had not had pro bono counsel from the Pacific Legal Foundation.[22] Like most of us, the Sacketts lack the resources to challenge the EPA on their own. Are there remedies for folks targeted by administrative agencies who do not have unlimited resources or the assistance of pro bono counsel? As we explain below, Congress could provide such remedies by instituting certain reforms. In Section II, we discuss the problem of regulatory overreach in the context of *Sackett.* In Section III, we address the incentives that may contribute to self-aggrandizing agency behavior at the expense of individual rights. In Section IV, we offer a number of suggestions to help level the playing field and to discourage agencies from advancing unfounded legal positions. Finally, in Section V we argue that substantive reforms would help to better secure individual rights. We conclude that we can more effectively protect individual rights, without discouraging prudent administrative action, if these policy proposals are adopted.

II. REGULATORY OVERREACH AND *SACKETT V. EPA*

The EPA's compliance order put the Sacketts in a particularly unenviable position. The Agency issued the order after the Sacketts had begun developing the land for their planned

21. *See id.* at 1375 ("The Court's decision provides a modest measure of relief.... But the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.") (Alito, J., concurring).

22. *A Heartfelt Thanks to Our Supporters from the Sacketts,* PLF LIBERTY BLOG (Mar. 14, 2012), http://blog.pacificlegal.org/2012/A-heartfelt-thanks-to-our-supporters-from-the-sacketts/.

home.[23] The EPA demanded that the Sacketts spend thousands of dollars to remove the gravel and to return their property to its alleged pre-disturbance wetlands condition.[24] But the Sacketts believed that the Agency was wrong to assert that their property was a jurisdictional wetland.[25] Although the parcel was in the vicinity of Priest Lake, it was surrounded by developed lots and country roads.[26] It even had an existing sewer hookup.[27] And once the compliance order was issued, the Sacketts also obtained expert opinions supporting their contention that the property is not a wetland.[28] Accordingly, the Sacketts felt confident in their position and wished to stand their ground despite the threat of ruinous fines which hung over them like a Damoclean sword. But without a procedure to contest the EPA's jurisdiction, they had no meaningful way to fight back.

Before the Supreme Court's decision in *Sackett*, every court to address the issue had ruled that a landowner has no right to sue to challenge a compliance order.[29] The courts had concluded that a landowner has only two unpleasant choices: ignore the order and risk financial ruin by incurring incalculable civil-penalty liabilities, or submit to the agency's demands. Under this pre-*Sackett* scenario, the better option was to comply—even if at great expense—with the order, even if one firmly believed that it

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23. *Sackett*, 132 S. Ct. at 1370.

24. *Id.* at 1371. ("On the basis of [the EPA's] findings and conclusions, the order direct[ed] the Sacketts, among other things, 'immediately [to] undertake activities to restore the Site in accordance with [an EPA-created] Restoration Work Plan' and to 'provide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives.'").

25. Adler, *supra* note 14, at 149 ("Given [the EPA and the Corps's] history of overzealous assertions of their own authority, one could excuse landowners for doubting the jurisdictional claim made by an agency enforcer—yet acting on such doubts could have serious legal and financial consequences, as the Sacketts discovered.").

26. Carmen R. Toledo, Sackett v. EPA*: The Supreme Court Hears Argument in Wetlands Case*, THE COURT REPORTER – COMMENTARY (DRI Today) (Jan. 12, 2012) http://www.kslaw.com/imageserver/KSPublic/library/publication/2012articles/1-12DRITodaySackettvEPAToledo.pdf.

27. Petition for Writ of Certiorari, *Sackett*, 132 S. Ct. 1367 (No. 10-1062), 2011 WL 688727, at *4.

28. *See* Brandon Middleton, Sacket v. EPA*: The* Real *Rest of the Story*, PLF LIBERTY BLOG (April 2, 2012), http://blog.pacificlegal.org/2012/sackett-v-epa-the-real-rest-of-the-story/.

29. Sackett v. EPA, 622 F.3d 1139, 1143 (9th Cir. 2010), *rev'd*, 132 S. Ct. 1367 (2012); *see also* Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir. 1995); S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement, 20 F.3d 1418 (6th Cir. 1994); S. Pines Assocs. v. United States, 912 F.2d 713 (4th Cir. 1990); Hoffman Grp., Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990).

was unconstitutional. The lower courts reasoned that once the landowner had complied with the order, he or she could apply for a costly wetlands fill permit. At that point, the landowner would have to wait for the Army Corps of Engineers to deny the permit application before being allowed to challenge the Agency's assertion of jurisdiction over the property.[30] But, as the Sacketts successfully argued, it would be grossly unfair to require a landowner to spend thousands of dollars to comply with a compliance order when the owner believes that the Agency lacks jurisdiction to issue or enforce the order in the first place. And it would simply be absurd to then require the landowner to apply for a permit to build on "wetlands" when the owner thinks he or she should not need a permit at all. But the only alternative—according to the courts—was for the landowner to wait and see whether the EPA would sue to enforce the order in court, at which point the landowner would be able to challenge the EPA's jurisdiction. The landowner, however, would stand to lose everything if he or she lost the case.[31] Instead of acceding to the government's demands and submitting to these unjust procedures, the Sacketts chose to fight a protracted legal battle for the right to challenge the compliance order up front.

But the district court dismissed the Sacketts' suit and the Ninth Circuit affirmed,[32] holding that the Sacketts had no right to contest the EPA's jurisdiction until either the EPA brought its own civil action or the Sacketts had obtained a decision from the Army Corps on a wetlands fill permit.[33] At that point their suit was all but lost; their only hope was in a Hail Mary—a petition for certiorari to the United States Supreme Court. But, in June 2011, the Court granted review, and, in a decision issued in March 2012, the Court unanimously ruled in the Sacketts' favor.[34]

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30. Under the CWA, the Corps has primary responsibility for regulating the discharge of dredge and fill material. *See* 33 U.S.C. § 1344(a); Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 266 (2009).

31. *Sackett*, 622 F.3d at 1146 ("The Sacketts further allege that forcing them to wait until the EPA brings an enforcement action 'ignores the realities of [their] circumstances,' because of the 'frightening penalties' they risk accruing by refusing to comply.").

32. Sackett v. EPA, 132 S. Ct. 1367, 1371 (2012).

33. But the panel was sympathetic to the Sacketts' plight and encouraged the parties at the end of oral argument to pursue mediation. Oral Argument at 23:56, *Sackett*, 622 F.3d 1139 (9th Cir. 2010) (No. 08-35854), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004620.

34. *Sackett*, 132 S. Ct. at 1374.

In an opinion authored by Justice Scalia, the Court held that the Sacketts were entitled to review under the Administrative Procedure Act (APA) because the compliance order was a final agency action and the CWA does not preclude judicial review.[35] The Court rejected the EPA's assertion that the CWA foreclosed the possibility of judicial review of compliance orders. The APA provides that final agency action is presumed judicially reviewable, and the Court was unimpressed by the EPA's suggestion that the presumption should be overcome by concerns over administrative efficiency.[36] (Arguably, *Sackett* has resurrected the Court's older, stricter standard of "clear and convincing evidence" to prove that Congress has foreclosed judicial review of otherwise final agency action.[37]) In so holding, the Court rebuffed the EPA's cavalier position while expressing grave concern over the plight of ordinary landowners caught in the EPA's regulatory trap. In holding that the Sacketts could seek review under the APA, the Court avoided having to determine whether the preclusion of such review would violate the Sacketts' due process rights. Yet despite the absence of a due process analysis, due process concerns seemed to have influenced the Court's decision.[38]

Indeed, the Court recognized the fundamental injustice of denying the Sacketts an opportunity to contest an order of this nature.[39] As Justice Alito aptly noted, most homeowners upon hearing the facts of a case like this "would say this kind of thing can't happen in the United States[.]"[40] Yet it happened, and with the blessing of the lower courts. How could all the lower courts have gotten it so terribly wrong?

This failure may be explained, in part, because courts tend to

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35. *Id.*

36. *Id.* at 1373.

37. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967) (requiring "clear and convincing evidence").

38. *See Sackett*, 132 S. Ct. at 1375 ("In a nation that values due process, not to mention private property, such treatment is unthinkable.") (Alito, J., concurring).

39. *Id.* at 1374 (majority opinion) ("The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction."); *see also* Transcript of Oral Argument, *supra* note 12, at 42 (Kagan, J., commenting, "[The EPA is] arguing that the presumption of reviewability does not apply . . . . And that seems a very strange position. Why would the presumption of reviewability not apply?").

40. Transcript of Oral Argument, *supra* note 12, at 37.

give significant deference to agency positions.[41] This is especially true in environmental cases. The increasingly aggressive and ambitious regulatory agenda of administrative agencies derives support from the advantage that regulators have in litigation.[42] Agencies are emboldened to take more aggressive and daring positions on the assumption that courts are unlikely to rebuff their actions.

Perhaps the judicial tendency to side with government may be justified by the assumption that government acts virtuously because it represents the public good. This view, however, embodies collectivist-utilitarianism, which would sacrifice the individual for the sake of administrative expediency and societal progress.[43] It also discounts the institutional self-aggrandizing interests of regulatory agencies, which do not necessarily comport with Congress's intent or with the constitutional principle that government should act to protect, not to undermine, individual rights.[44]

Still other factors encourage regulatory overreach in cases involving normal individuals and typical small businesses. As we explain below, the country needs policies that guard against agency self-aggrandizement. Without meaningful protection against administrative abuse, there is little reason to expect that regulators will err on the side of respecting individual rights.[45]

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41. The shift towards judicial deference to administrative action is likely a product of the "Populist-Progressive movement." Kate T. Spelman, *Revising Judicial Review of Legislative Findings of Scientific and Medical "Fact": A Modified Due Process Approach*, 64 N.Y.U. ANN. SURV. AM. L. 837, 846 (2009).

42. *See* Adler, *supra* note 14, at 163 ("The EPA and Army Corps of Engineers exercise their regulatory power without due regard for the limits on their own authority or the need to provide private landowners with adequate notice of what federal law may require of them.").

43. Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 171 (2010) ("Because utilitarianism conceives of the public good in the aggregate, it fails to take seriously the distinction between persons and is formally indifferent regarding the allocation of benefits and burdens."); Christopher Roederer, *Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory*, 27 SEATTLE U. L. REV. 385, 438 (2003) ("For [Dworkin], utilitarianism and pragmatism do not take the rights of individuals seriously enough. This is because individuals in hard cases would not necessarily have their rights vindicated, as any such notion of rights could always be sacrificed to the common good or to progress (as dictated by utilitarianism or pragmatism).").

44. *See* Nathan A. Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1504 (2009) ("Agencies might focus on matters that advance their own institutional interests, as distinct from the interests Congress tasked them with serving.").

45. *Id.* at 1549.

Instead, they will predictably push the proverbial envelope.[46]

III. INCENTIVES FOR REGULATORY OVERREACH

Most Americans operate with the basic understanding that government exists to serve the people.[47] This notion means different things to different people, especially in the age of the modern welfare state. But the founding generation—inspired by the ideas of classical liberalism in the struggle for independence—held a near uniform and crystallized concept of the proper role of government when ratifying the Constitution.[48] Indeed, scholars have meticulously documented that the Framers, and the delegates to the ratifying conventions, intended the Constitution and the Bill of Rights to institutionalize the Lockean concept that government exists for the sole purpose of protecting individual rights.[49]

Regardless of whether one expressly subscribes to this Lockean view of government's relationship to its citizens, agencies should be deterred from violating our legal rights. Although individuals may disagree as to the nature and scope of legal rights, society should promote rules that both encourage prudent regulatory decisions *and* minimize the risk of self-aggrandizing regulatory powers. To that end, society should promote policies and rules that encourage individuals to vindicate their rights and that remove unfair advantages that an agency may have over private litigants.

A. Institutional Advantages over Private Litigants

Only weeks before agreeing to hear the Sacketts' case, the

46. *See id.* (noting that agencies have "natural incentives to aggrandize" their powers).

47. *E.g.*, ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD 87 (2007) ("Government exists to protect us from each other. Where government has gone beyond its limits is in deciding to protect us from ourselves.") (quoting President Ronald Reagan).

48. RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 54–55 (2004) ("The founding generation universally believed that enactments should not violate the inherent or 'natural' rights of those to whom they are directed.").

49. *See* Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 342 (2012) ("The proposition that government exists for the public good and not for the 'ruler's self-interest is complicated by the operations of a democracy, in which legitimate rule for the benefit of the governed can easily be confused with the improper rule of the majority for its own self-interest. That is a distinction the Framers took care to maintain."); Michael W. McConnell, *The Ninth Amendment in Light of Text and History*, 2009–2010 CATO SUP. CT. REV. 13, 15 (2010).

Supreme Court denied a petition from General Electric (GE) on a similar issue. In *General Electric Co. v. Jackson*, GE, like the Sacketts, raised due process concerns over an EPA "unilateral administrative order" issued under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[50] But unlike the Sacketts, GE acknowledged that the statute in question foreclosed pre-enforcement review.[51] Thus, the Court's decision to take up the Sacketts' case is probably explained by the fact that *Sackett* gave the Court an opportunity to expand judicial review without having to hold enforcement provisions of environmental laws unconstitutional. Perhaps even more importantly, the Sacketts presented an attractive and sympathetic story. Presumably, the Sacketts' case was more attractive to the Court than GE's because the former concerned average people. Mike and Chantell Sackett could have been anyone—your neighbors, friends, or relatives. Indeed, the Court recognized that the EPA was advocating for a rule that would have allowed the Agency to issue draconian compliance orders against potentially any landowner in the country without any accountability.[52]

These facts may have made the Sacketts more sympathetic litigants than GE simply because multinational corporations are generally in a better position to protect their rights against regulatory overreach. The Sacketts were lucky enough to have pro bono counsel. Most individuals in their circumstances could not have afforded representation, and would have been forced into dire financial straits if they had fought for their rights. And even if private litigants have the financial resources to protect their rights, they are still at a disadvantage when contesting agency overreach.

Agencies, when interpreting statutes that they administer or enforce, routinely assert that they are entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council*.[53]

50. Gen. Electric Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 2959 (2011).

51. Brief of Plaintiff-Appellant, *Jackson*, 131 S. Ct. 2959 (No. 09-5092), 2009 WL 6178993, at *10.

52. *See* Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring) ("The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.").

53. 467 U.S. 837 (1984).

Setting aside the many apt criticisms that scholars have levied against the *Chevron* doctrine, there remain significant questions in the wake of *Mead Corp. v. United States*[54] as to whether agencies should be entitled to *Chevron* deference on jurisdictional questions.[55] Although some courts have held that agencies are not entitled to deference when interpreting the scope of their own authority, agencies still assert *Chevron* deference on jurisdictional questions.[56] Granting deference to the agency's view of its own jurisdiction only emboldens regulators to take more expansive positions on the scope of their powers because it significantly lowers the possibility that they will be rebuffed in court.[57]

B. The Cost of Vindicating Constitutional Rights

Agencies also have an inherent advantage over small businesses and ordinary individuals because they have substantial resources to prosecute their claims and defend their actions. For the average person, a battle with the federal government truly is a fight with Goliath. But without resources it is impossible to stand up for one's rights.

The solution does not lie in giving additional funding to legal aid programs, or in compelling attorneys to work pro bono hours. It is unfair to demand that an attorney's labor go uncompensated. Legal representation comes at a price like any other commodity or service, and the value of an attorney's work,

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54. 533 U.S. 218 (2001).

55. *See, e.g.*, ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 75 (2008) ("And by opening the door for unelected bureaucrats to improvise liberally when they construe federal statutes, *Chevron* exacerbated the problem. First the Court permitted agencies to exercise legislative power that the Constitution was designed to withhold. Then the Court stood aside when those same agencies abused their newly conferred power.")

56. *E.g.*, Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 659 (D.C. Cir. 1994); *In re* Sealed Case, 237 F.3d 657, 667 (D.C. Cir. 2001).

57. Sales & Adler, *supra* note 44, at 1549 ("A deference rule reduces the probability of judicial invalidation. That in turn increases the anticipated benefit to the agency of aggrandizement, thereby increasing the incidence of aggrandizement."). In its 2012 Term, the Supreme Court will address whether *Chevron* deference can apply to agency "jurisdictional" interpretations in *City of Arlington v. Federal Communications Commission*, 668 F.3d 229 (5th Cir. 2012), *petition for cert. filed*, No. 11-1545 (Jun. 27, 2012). The Court will review the Fifth Circuit's application of *Chevron* deference to the issue of whether the FCC has "jurisdiction" to interpret Section 322(c)(7) of the Communications Act of 1934, or instead whether the interpretation of that provision is reserved to the courts. *See id.* at 247–48. Accordingly, it is possible that the Court may provide through judicial decision the remedy for which we advocate in the text.

as with anything else, depends on market conditions.[58]

If an individual values legal services, he will be willing to pay the cost of representation.[59] This assertion, however, presumes that: (1) a competent attorney is willing to undertake legal services at a rate the individual can afford; and (2) the anticipated benefits of legal action outweigh the costs. Although the costs and benefits may be measurable in purely financial terms, the economic analysis often includes intangible considerations, such as the cost of stress associated with waging a legal battle or the value the individual places on vindication.[60]

In cases where constitutional rights are at issue, individuals typically place great value on their intangible idea of justice, but the cost of vindication is often excessive. In many cases, individuals would be forced into financial ruin if they were to press their rights with litigation, especially if they had to continue fighting all the way through appeal. For the typical small business owner struggling to keep the doors open, or the average homeowner living on a tight budget, the cost of litigation can be prohibitive.

By comparison, government agencies have mammoth budgets for enforcement and litigation efforts, which allow regulators to operate with shock-and-awe legal tactics.[61] Naturally, individuals are intimidated when they raise a federal agency's ire, regardless of the merit of any case they might have.

That was certainly true of the Sacketts. They had obtained all the necessary building permits from the local authorities when

58. George C. Harris and Derek F. Foran, *The Ethics of Middle-Class Access to Legal Services and What We Can Learn from the Medical Profession's Shift to a Corporate Paradigm*, 70 FORDHAM L. REV. 775, 799 (2001) ("The allocation of 'lawyers' efforts are thereby skewed to those who place high monetary value on legal services and are able to pay these large sums: generally, commercial clients.").

59. *Id.*

60. *See* Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 500 (1996) ("[L]awyers are familiar with clients who persist in litigation that is irrational in cost-benefit terms simply because of 'the principle of it.'").

61. The practice of imposing unconscionable fines to coerce compliance with an agency's regulatory program is nothing new. As with the Sacketts, this practice can be used to scare the regulated community into submission. *See, e.g.*, *Hobby Lobby Sues over HHS Mandate*, THE BECKET FUND FOR RELIGIOUS LIBERTY (Sept. 19, 2012, 6:18 PM), http://www.becketfund.org/hobbylobbysueshhs/ ("Today, Hobby Lobby Stores, Inc., a privately held retail chain with more than 500 arts and crafts stores in 41 states, filed a lawsuit in the US District Court for the Western District of Oklahoma, opposing the Health and Human Services mandate, which forces the Christian-owned-and-operated business to provide, without co-pay, the 'morning after pill' and 'week after pill' in their health insurance plan, or face crippling fines up to 1.3 million dollars per day.").

they began laying gravel for the foundation of their home.[62] They had also sought expert advice to be sure that their property was not a jurisdictional wetland once the EPA asserted that it was.[63] Yet, as confident as they were in their position, the Sacketts had no meaningful way of fighting back until the Supreme Court ruled in their favor.

The Sacketts were lucky. Only a very small percentage of petitions for certiorari are granted.[64] And it is unlikely that the Sacketts could have reached the Supreme Court without pro bono representation from a public interest firm dedicated to advancing individual rights and curbing regulatory abuse. Rather, most landowners in the Sacketts' position would have been coerced into submission, simply because it would have been less costly than fighting for their rights. Even assuming that a landowner has the resources to challenge an agency when it overreaches, the idea of taking on the federal government may be overwhelming for many. Moreover, individuals know that litigation is a gamble, no matter how strong their case is.[65] As such, many would rationally opt against litigating.

This is particularly true when the costs of litigation outweigh the benefits to be gained. Suppose for example that the Sacketts had sought and been denied a wetlands fill permit, as the EPA insisted they needed to do before challenging its assertion of jurisdiction.[66] This tack would have required the Sacketts to spend thousands of dollars on permit-processing fees and for numerous environmental studies. The average cost of an individual CWA permit exceeds $270,000.[67] And beyond

62. Daniel A. Himebaugh, *Supreme Court Takes On Important Wetlands Case,* BUILDING INSIGHT, July/Aug. 2011, at 15.

63. *See* Middleton, *supra* note 28.

64. Aaron Tang, *The Ethics of Opposing Certiorari Before the Supreme Court,* 35 HARV. J.L. & PUB. POL'Y 933, 936 (2012) ("[T]he odds of cert being granted in any given case are less than 1%.").

65. Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets,* 16 SUP. CT. ECON. REV. 1, 16 (2008) ("Pursuing litigation is a gamble, with high costs and uncertain payoffs.").

66. The Ninth Circuit appeared to labor under the misapprehension that the Sacketts could apply for a permit even while the compliance order was still outstanding. *See* Sackett v. EPA, 622 F.3d 1139, 1146 (9th Cir. 2010). But at oral argument in the Supreme Court, the EPA's attorney essentially conceded that such an "after-the-fact" permit would not be considered until the Sacketts had complied with the order. Transcript of Oral Argument, *supra* note 12, at 41.

67. David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process,* 42 NAT. RESOURCES J. 59, 74 (2002).

permitting costs, it might not make economic sense to commit to the additional costs of going to court. Jurisdictional disputes under the CWA are notoriously difficult, highly fact-intensive cases that often will require an appeal.

Regardless of whether in the Sacketts' case the expected economic benefits of establishing that their property is not a wetland might justify the costs of litigation, the calculus will be different for every landowner. Suppose a property was valued at $30,000 before the EPA asserted jurisdiction. In such a case, it might not make sense to proceed with litigation, even if the property would be rendered entirely valueless. Indeed, if the landowner has only modest development plans in mind, the economic benefit of litigation might well be less than the anticipated costs.[68] This rationale may well dissuade individuals from vindicating their rights when dealing with any regulatory regime—whether in the context of a labor dispute, an employment issue, a tax question or anything else.[69]

Economic calculations are inevitable, but there are potential free market solutions that may help lower the costs of vindicating one's rights, and that may also help deter regulatory abuse up front. The following are a few simple policy reforms that, if implemented, would discourage regulatory overreach by encouraging individuals to vindicate their rights. While we acknowledge that it would be inappropriate to attribute Machiavellian motives to government regulators in all cases, we suggest that we may better control the regulator's tendency to aggrandize its powers by lowering the costs associated with

68. Ironically, these sorts of environmental regulatory burdens may encourage more intensive land uses because the economic benefits of more modest plans might not exceed the high costs of overcoming the regulatory hurdles. It may not be economically feasible to challenge a jurisdictional determination for the right to build a modest and ecologically friendly cabin. A large home, however, may be justified, and a lavish hotel even more so.

69. For example, a land-use authority might seek to leverage its position of power to exact valuable concessions from a landowner seeking approval for a development permit. But if the permit condition has no connection—no "essential nexus"—to any adverse impact that the development might have, then it is an unconstitutional condition on the landowner's right to be free from uncompensated takings of private property. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). In the words of Justice Scalia, the imposition of such unrelated conditions would amount to an "out-and-out plan of extortion." *Id.*. And yet, the cost of challenging the condition may far surpass the cost of waiving one's constitutional rights in that instance. Although the government cannot constitutionally insist on a permit condition that lacks an essential nexus, a landowner may nevertheless rationally conclude that acceptance of the permit with the unconstitutional condition is tolerable because the value of the exaction is less than the cost of litigating.

vindicating one's rights in court and by raising the agency's risks in pursuing questionable legal positions. These proposed policies would both enable the vindication of our rights and provide a prophylactic against regulatory abuse.

IV. PRACTICAL ADMINISTRATIVE REFORMS TO LEVEL THE PLAYING FIELD

A. Amending the Administrative Procedure Act

We can directly take away certain institutional advantages over private litigants with amendments to the Administrative Procedure Act[70] that would ensure a fair fight on the legal issues and discourage unreasonable administrative actions. Many reforms may be appropriate; we suggest two.

1. Clarifying the Right to Challenge Jurisdictional Determinations

Sackett established that individuals have a right to challenge certain pre-enforcement actions, but federal agencies likely will argue that the opinion should be narrowly construed as applying only to compliance orders issued under the CWA. Thus, the EPA and the Army Corps of Engineers may continue to deny that individuals have any right to challenge jurisdictional determinations issued by the Corps, even though such a determination provides a formal statement on whether the agency has CWA authority over the property.[71] According to this position, a landowner has no meaningful right to challenge a jurisdictional determination with which he disagrees. Rather, the landowner can contest jurisdiction only after having gone through the permitting process.[72] These procedural hurdles discourage individuals from bringing claims against agencies, and therefore inhibit the free exercise of their right to build on their property. If the property in question is beyond the agency's

70. 5 U.S.C. §§ 500–596 (2006).

71. *See* Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2008) ("As a matter of first impression, we hold that the Corps' issuance of an approved jurisdictional determination finding that Fairbanks' property contained waters of the United States did not constitute final agency action under the APA for purposes of judicial review.").

72. As of 2002, the average CWA permit cost over $270,000. *See* Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion) (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation and licensing: An Assessment of Recent Changes to Wetland Permitting Process*, 42 NAT. RESOURCES J. 59, 74–76 (2002)).

jurisdictional reach, this procedural impediment would prejudice the owner's ability to vindicate and enjoy his or her common law—and constitutionally protected—right to make reasonable use of the property.

Whether the agencies can continue to deny individuals the right to bring pre-enforcement challenges to jurisdictional determinations is an open question after *Sackett*, which supports the conclusion that jurisdictional determinations are final agency actions subject to judicial review under the APA.[73] Indeed, a jurisdictional determination has all the hallmarks of a reviewable final decision. It is the culmination of the agency's decision-making process affecting an individual's right: by immediately—and severely—devaluing his property.[74] The land can no longer be put to any meaningful use once such an assessment has been made. A landowner would risk the same ruinous fines that threatened the Sacketts if he or she proceeded with any development plans; the only option would be to apply for a wetlands fill permit, the cost of which is prohibitive and could even exceed the value of the land. For an individual of modest means, it is usually impossible to proceed if one's options are limited to the permitting process. But, if the individual is certain that the agency is wrong in its jurisdictional assessment, should he really be required to expend these costs in applying for an unnecessary permit?

The owner may be able to afford legal representation in a challenge to the agency's jurisdiction, but the added costs of first applying for a wetlands fill permit may well deter the individual from trying to vindicate his or her right to make reasonable use of one's own property. The individual may rationally decide to cut his or her losses at that point and leave the property untouched, which is arguably why the agencies—all too often bent on a radical environmental crusade—insist on taking aggressive and unduly burdensome positions in the first place. But we may better protect landowners by clarifying that the APA allows individuals to seek judicial review of disputes over an agency's jurisdiction, even in the absence of an enforcement

73. Sackett v. EPA, 132 S. Ct. 1367, 1372 (2012) (A final decision is marked by "the 'consummation' of the agency's decisionmaking process.").

74. *See id.* ("The mere possibility that an agency might reconsider in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.").

action.

The normal requirements of "final agency action" should not apply in challenges to agency jurisdiction, such as Army Corps of Engineers jurisdictional determinations.[75] A landowner should be allowed to proceed in an action for declaratory relief, in order to clarify her rights, once the agency has expressed its view—even a tentative view—that it has regulatory authority over the landowner's property or activity. And to prevent agencies from playing new and ingenious forms of jurisdictional cat and mouse, landowners should be allowed to use the APA's existing petition process to compel an agency to state its position on jurisdiction,[76] and then to allow the landowner to seek judicial review of the agency's decision.

The agency should not be allowed to hold the individual in limbo indefinitely by hedging with a "we'll wait and see" answer, nor should the agency be able to avoid a legal challenge to its jurisdictional determination once it has asserted jurisdiction. Within a reasonable timeframe, the agency should be required to make an affirmative assertion of jurisdiction or issue a binding statement disavowing jurisdiction. Even if the disavowal of jurisdiction is erroneous, the agency should not be entitled thereafter to prosecute an individual after assuring a safe harbor. If the agency argues that it tentatively believes that it has jurisdiction to regulate the proposed actions, it can always back away from that position later, once it is presented with additional facts that change its view. But so long as the agency stands by its assertion of jurisdiction, a genuine controversy exists if the property owner disagrees.[77] Thus, the Case or Controversy requirement of Article III[78] would be satisfied and the individual would have standing to challenge the jurisdictional assessment.[79]

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75. *See Fairbanks N. Star Borough*, 543 F.3d at 591 (holding that a CWA jurisdictional determination cannot be challenged under the Administrative Procedure Act because "it did not 'impose an obligation, deny a right, or fix some legal relationship.'").

76. *See* 5 U.S.C. § 553(e) (2006) (requiring each agency to allow for persons to petition for amendments to or repeal of rules).

77. *See* Muskrat v. United States, 219 U.S. 346, 357 (1911) ("[Controversy] implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.").

78. U.S. CONST. art. III, § 2, cl. 1.

79. This is important. We acknowledge that Article III does not authorize federal courts to issue advisory opinions or opine on a landowner's legal obligations when there is no evidence that an agency even intends to initiate enforcement action. But assuming that a member of the regulated public can meet Article III's standing requirements, then there should be no constitutional obstacle to authorizing federal courts to review the

Although an agency could moot the action by conceding that it does not have jurisdiction, that fact should not preclude the regulated community from seeking immediate judicial review. This regime would ensure that individuals will be empowered to efficiently clarify their rights and the scope of agency authority.

2. Cabining Agency Discretion on Jurisdictional Questions

As discussed above, agencies currently hold an unfair advantage over private litigants when disputing statutory questions. Even though the extent of an agency's jurisdiction is a pure question of law, agencies generally argue that they are entitled to *Chevron* deference on the point.[80] If *Chevron* deference were allowed in these instances, agencies would essentially determine the extent and reach of their own powers—so long as some ambiguity existed, an agency could essentially regulate in any rational manner it likes.[81] But in Anglo–American law, a party constrained by law usually is not free to determine the meaning or extent of the constraint for the same reason that foxes should not guard henhouses.[82]

In 2001, the Supreme Court held in *United States v. Mead Corp.* that courts should apply the *Chevron* framework only if Congress intended to delegate the authority to "fill in" gaps in the statute.[83] This holding makes two things clear. First, *Chevron* is not a constitutional doctrine; Congress may choose to cabin an agency's discretion by refusing to delegate powers to the agency, or by expressly stating that agencies are not entitled to deference on certain questions. Second, deference should not be presumed.[84] *Mead* requires that the agency bear the burden to demonstrate that Congress intended to delegate "gap-filling"

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sorts of jurisdictional decisions that we advocate.

80. *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 93–94 (2007) (explaining that in step one of *Chevron's* two-part test, a court looks to the language of the statute to determine if Congress has definitively spoken to the issue and does not proceed to step two if congressional intent is clear); Christensen v. Harris Cnty., 529 U.S. 576, 586–87 (2000) (holding that if a court determines that congressional intent is unclear and that the statute is ambiguous, the court proceeds to step two of *Chevron*, and the court will uphold the agency's "reasonable" interpretation of the ambiguous text).

81. Sales & Adler, supra note 44, at 1548 ("In a system that extends Chevron deference to agency jurisdictional interpretations, agencies will have strong incentives to exercise powers Congress did not intend for them to wield, or to extend their powers beyond what Congress envisioned.").

82. *Id.* at 1551.

83. 533 U.S. 218, 229 (2001).

84. Sales & Adler, *supra* note 44, at 1526.

authority.[85] This burden should have the salutary effect of making it more difficult for agencies to obtain deference on the interpretation of their own jurisdiction. That outcome makes sense, given that it is unlikely that Congress would intend to delegate the power to an agency to define the scope of its own jurisdiction.[86] Indeed, a strong presumption against delegation is appropriate because jurisdictional language is—by its nature—a limitation on the agency.[87]

In fact, some courts have already held that statutory silence on an agency's jurisdiction cannot by itself trigger the application of the *Chevron* framework, given that all agencies are creatures of statute and possess only those powers authorized by statute.[88] Thus, when a statute is silent on agency jurisdiction, the presumption must be that the agency lacks the asserted power. To conclude otherwise would improperly invest agencies with plenary power and raise serious separation of powers questions.[89] Accordingly the presumption against deference on jurisdictional questions may also be viewed as a rule of constitutional avoidance.[90]

Nonetheless, agencies continue to assert jurisdictional deference and the federal courts of appeals are split on this issue.[91] And this term the Supreme Court will take up this

85. *Mead*, 533 U.S. at 227.

86. Sales & Adler, *supra* note 44, at 1551 (citing Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2099 (1990)) ("Professor Sunstein and others have argued [that] it is unreasonable to suppose that Congress meant to give agencies such authority: 'Congress would be unlikely to want agencies to have the authority to decide on the extent of their own powers.'").

87. Sales & Adler, *supra* note 44, at 1551.

88. *See generally* Am. Bar Ass'n v. FTC, 430 F.3d 457, 466–67 (D.C. Cir. 2005) ("We will defer to the agency's interpretation on that subject only if the statute 'is silent or ambiguous *with respect to the specific issue.*'") (emphasis added); Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 659 (D.C. Cir. 1994) (arguing that presuming a delegation of power from Congress absent an express withholding of such power "comes close to saying that the Board has the power to do whatever it pleases merely by virtue of its existence [is] a suggestion that we view to be incredible").

89. Sales & Adler, *supra* note 44, at 1539 ("If an ambiguity, let alone a statutory silence, is sufficient to trigger *Chevron* deference, an ambiguous statute may become license for an agency to control the scope of its own authority, and perhaps even the ability to create regulatory authority where no such authority legitimately existed.").

90. *Id.*

91. "In all, four courts of appeals have concluded that *Chevron* is fully applicable to jurisdictional interpretations: the Second, Third, Fourth, and Ninth Circuits. The Federal and Seventh Circuits have declined to extend *Chevron* deference. The D.C. and Eighth Circuits appear to have resolved the issue both ways." *Id.* at 1518 (citing Connecticut *ex rel.* Blumenthal v. U.S. Dep't of the Interior, 228 F.3d 82, 93 (2d Cir. 2000); Air Courier Conference of Am./Int'l Comm. v. U.S. Postal Serv., 959 F.2d 1213, 1223–25 (3d Cir. 1992); Transpacific Westbound Rate Agreement v. Fed. Mar. Comm'n, 951 F.2d 950, 952

deference question in *City of Arlington v. Federal Communications Commission.*[92] But regardless of how the Supreme Court resolves this issue, Congress could amend the APA so as to clarify that agencies are presumed to have only those powers expressly and unambiguously delegated. This would make clear that agencies do not have discretion in determining the scope of their own powers.

This legislative tweak would discourage agency self-aggrandizement. Moreover, it would encourage agencies to make reasoned analytical judgments as to their duties under the statute in the same manner that an individual must make judgments about how to proceed on any given legal matter. More fundamentally, it would properly relegate the agency's role to that of administrative executor, as opposed to the role of lawmaker and judge.

B. Amending the Equal Access to Justice Act

The Equal Access to Justice Act (EAJA) was enacted to help level the playing field between the individual and government when legal disputes arise.[93] Under the EAJA, qualifying private litigants may collect attorney's fees if they are the prevailing party in a legal action. But the government can avoid attorney's fees if its position was "substantially justified," even though unsuccessful.[94]

Yet, as we explained in Section III, individuals and small businesses are often deterred from defending their rights—even when they may have meritorious claims—because the costs of litigation are so great. Especially for individuals or businesses operating on tight budgets, the costs of litigation usually outweigh its benefits. Although the EAJA may help embolden private litigants in cases where the government insists on an unconscionably egregious position, we submit that the EAJA could be amended more effectively to promote the principle that every individual should have access to the justice system when his or her rights have been violated.

(9th Cir. 1991); Bd. of Governors of the Univ. of N.C. v. U.S. Dep't of Labor, 917 F.2d 812, 816 (4th Cir. 1990); Tafas v. Doll, 559 F.3d 1345, 1353 (Fed. Cir. 2009); N. Ill. Steel Supply Co. v. Sec'y of Labor, 294 F.3d 844, 846–47 (7th Cir. 2002); United Transp. Union–Ill. Legislative Bd. v. Surface Transp. Bd., 169 F.3d 474, 477 (7th Cir. 1999)).

92. *See supra* note 57.

93. 28 U.S.C. § 2412 (2012).

94. *Id.* at § 2412(d)(1)(A).

1. Expand Opportunities for Recovery of Attorney's Fees

a. Attorney Fee Awards as a Matter of Right

The law should encourage the vindication of individual rights.[95] When the prevailing party has vindicated a constitutionally protected right, an award of attorney's fees should be allowed as a matter of course.

Our government exists not for its own sake, but for the sake of the individuals over whom it governs. We must therefore adopt policies that deter government from neglecting its most fundamental obligations. If our constitutional rights mean anything, then we should empower individuals to defend them.[96] Accordingly, individuals should not be forced to bear the costs of successfully defending their rights, for the individual suffers enough when government breaks its fundamental constitutional commitments. Moreover, the government should not be shielded against liabilities for its failure to respect its most fundamental duties and commitments under this system.

Requiring agencies to pay attorney's fees in these cases may prove costly, but amending the EAJA in the manner we propose will encourage prudent decision-making. As a practical matter, agencies would likely err on the side of protecting our constitutional rights more frequently if the costs of losing a constitutional suit were to increase.

b. Lowered Standards in Cases of Dire Financial Need

Regulatory abuse could be further deterred by lowering the standard for collecting attorney's fees in any case in which a private litigant prevails against the federal government, if the costs of litigation have forced the individual into dire financial straits. It is unfair to expect an individual or business to suffer significant financial hardship—bankruptcy, poverty, or loss of a

95. Sandefur, *supra* note 49, at 302 ("The minimum conditions of legitimate rule, therefore, are that the state's coercive powers be used according to general principles and rationally promote the public good, respecting the equal rights of all. In short, the conditions are that all men are created equal, with certain inalienable rights, and that government, deriving its just powers from the consent of the governed, is instituted to secure those rights.").

96. James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 393 (2003) ("Ideally, awarding damages to individuals who are harmed by a federal or state official's violation of the Constitution compensates for some of the individual's past injury and deters future rights deprivations.").

homestead—in the pursuit of justice against its own government. Lawsuits will always cause economic strain, but the government should reimburse prevailing private litigants for their legal expenses to the extent that they have suffered severely.

Although the threshold for recovery is a matter of discretion, we suggest that prevailing individuals and businesses should be reimbursed to the extent that their litigation efforts have forced them to make expenditures lowering their net wealth below some established threshold—perhaps $250,000.[97] That figure is certainly negotiable, but the essential principle is that individuals should not be relegated to a life of poverty or the loss of a homestead as the cost of vindicating their rights. Furthermore, individuals with few financial resources should be as able as the affluent to litigate, taking solace in the assurance that with vindication they will be made whole again, dollar for dollar, if their net wealth is less than the established recovery threshold.[98]

2. Authorize Damages for Entirely Unfounded Positions

As we have emphasized throughout this article, society should promote policies that deter government overreach. Moreover, the deterrence should be proportional to the gravity of the government's transgression. In cases where the government's position is completely unfounded, the government should bear the additional risk of financial penalties.

Currently, attorney's fees under the EAJA are only granted to prevailing parties in those extreme cases in which the government's position was not "substantially justified." But, if we truly wish to deter the government from taking inappropriately aggressive and unfounded positions, we should raise the stakes by awarding damages to aggrieved individuals or businesses. For example, the EPA would certainly have thought twice about threatening the Sacketts with $75,000 per day fines if the Agency

97. Naturally, the statute must guard against manipulative accounting practices and strategic transfers of property aimed at lowering the individual's net wealth.

98. This is not to suggest that the wealthy should be discouraged from vindicating their rights, but it is a fair presumption that wealthy individuals are already in a better position to vindicate their rights. If necessary, the threshold for recovery could be raised higher to promote the goal of encouraging even more individuals to defend against regulatory abuse. The fundamental principles underpinning such a policy, however, would be the promotion of incentives for the prosecution of individual rights and deterrence against governmental abuse. Nevertheless, a blanket rule guaranteeing recovery of attorney's fees—where a constitutional right has been vindicated—is preferable because it would promote these goals across the board.

had been potentially on the hook for paying additional fines to the Sacketts in the event that its position were deemed substantially unjustified in court. The effect of such rules would simply be to discourage brazen regulatory abuse, and to encourage rationally prudent decision-making. The Agency could not afford to shoot first and ask questions later.

General budgetary concerns over the national debt and our nation's unfunded commitments should not deter imposition of monetary penalties against agencies when they have egregiously violated individual rights. But if a nod to such budgetary concerns is necessary, then a possible alternative approach would be to require the agency to pay penalties directly to the Department of the Treasury or to a fund established for the express purpose of paying down our national debt.[99] This approach would still deter regulatory overreach, and would do so without exacerbating the public debt.[100]

V. THE NEED FOR SUBSTANTIVE REFORMS

We offer the foregoing policy solutions to empower individuals to vindicate their rights, and to deter agencies from taking cavalier legal positions. But, the effect of these administrative reforms will be limited. If adopted, they would only discourage expansive views of regulatory authority. In the modern regulatory state, agencies are often well within their statutory bounds when they abrogate common law property rights.[101] Thus, we ultimately need substantive reforms if we want to truly safeguard property rights.

The Founding Fathers believed that private property rights—including the freedom of contract—were the foundation of a free society, the cornerstone of liberty's edifice.[102] Today,

99. But one potential problem with requiring the surrender of funds to the Department of the Treasury or another government agency would be the difficulty of establishing an appropriate and effective mechanism to enforce the required transfer. Hence, the preferred course is to allow the aggrieved party to directly enforce and collect these penalties against the agency. Alternatively, allowance could be made for private-attorneys-general provisions. *Cf.* Equal Access to Justice Act, 28 U.S.C. § 2412 (2012) (authorizing payments of attorney's fees to a party that prevails in an action against the United States).

100. Unfortunately, Congress can still reward abusive agencies with greater budgets. In assessing whether agencies should be allotted more funds, it would be appropriate to consider the agency's history and predilections toward regulatory overreach.

101. For that matter, under modern jurisprudence, agencies are often well within their bounds when they abridge our economic liberties as well.

102. TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-

however, the Founders' concept of natural rights has been largely dismissed, and the constitutional guarantees protecting private property rights have been dismantled.[103] With the shift in the modern zeitgeist, substantive constitutional protections were deemed inexpedient obstructions to the progressive movement's idea of public progress.[104] As such, our property rights have been left largely to the whims of the democratic process and bureaucratic regulators.[105] We are protected only by the vestiges of a political culture that once valued property rights; however, the predominant political forces are at best indifferent toward property rights, if not openly hostile. Accordingly, we have authorized government at all levels to regulate the use and enjoyment of private property such that the landowner may no longer exercise dominion over his property without first

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CENTURY AMERICA 51–61 (2006); Mitch L. Walter, Comment, *From Background Principles to Bright Lines: Justice Scalia and the Conservative Bloc of the U.S. Supreme Court Attempt to Change the Law of Property as We Know It*, 50 WASHBURN L.J. 799, 804–05 (2011) (noting that President James Madison understood that "a fundamental tension existed between private property rights and democratic processes.").

103. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395–97 (1926) (rejecting due process protections against land use restrictions, except to the extent they may be deemed irrational); Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (creating an amorphous and ad hoc balancing test to determine when a restriction amounts to a taking); Kelo v. City of New London, 545 U.S. 469, 494, (2005) (O'Connor, J., dissenting) (characterizing the majority holding as allowing private property to be taken and transferred to private parties); *see also* R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 ECOLOGY L.Q. 731, 735–48 (2011) (calling for the Supreme Court to revisit *Penn Central*, and noting that the *Penn Central* test has been nearly universally criticized as a standardless standard, offering no practical guidance, and which almost inevitably is resolved in the government's favor); Timothy Sandefur, *Mine and Thine Distinct: What* Kelo *Says About Our Path*, 10 CHAP. L. REV. 1, 34 (2006) ("Whenever government has power to redistribute benefits and burdens between constituents, interest groups will compete for control of that power in order to secure benefits for themselves or to impose burdens on their competitors. Modern economists refer to this contest as 'rent seeking,' and predict that when government begins to transfer property between private parties, those parties will start spending their time and energy trying to persuade the government to give them someone else's property."); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 543–46 (2005) (noting the influence of Jeremy Bentham's utilitarian thought, which rejected the natural-rights theory of property, and quoting Professor Thomas Grey's words that "[w]e have gone . . . in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution to one in which it is no longer a coherent or crucial category in our conceptual scheme . . . .").

104. *See* Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 216 (2004) ("The Progressives first developed the 'living Constitution' critique of constitutional property rights. Applying a Hegelian theory of the state to American politics, they insisted, as Columbia constitutional law professor Frank Goodnow did in 1911, that '[t]he basis of political society was . . . seen to be, as it probably always was, historical development . . . .'").

105. *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 367 (2009) (noting that almost any government-imposed restriction will pass rational basis review).

petitioning for permission from the authorities.[106]

The only effective way to protect the right to use and enjoy one's own private property is to restore substantive constitutional protections for property rights, and that is unlikely to happen in the near future. In the interim, property rights remain subject to the largely unchecked discretion of the legislative and executive branches. And it is unlikely that these branches will institute substantive reforms of the regulatory state any time soon either.

Yet, in the absence of substantive reforms, our proposed administrative proposals would at least help guard against *ultra vires* regulatory action. As Justice Alito observed in *Sackett*, "[a]llowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem."[107] Indeed, property rights will remain in troubled waters until we see real reform of the CWA and a whole host of other environmental and land-use regimes. Yet if we can at least adopt disincentives for the regulators, the regulated will be in a better position to defend their rights. To be sure, something *is* better than nothing.

VI. CONCLUSIONS

If we want a truly free society, we must institute substantive reforms to protect property rights. At the very least, we should empower individuals to defend their rights when they are under assault. Indeed, we want to encourage prudent and reasonable regulation, but this necessarily means both deterring regulatory abuse and emboldening individuals to stand up for their rights. After all, David should be able to look Goliath in the eye, when he knows he is in the right, and say—in the immortal words of Clint Eastwood—"Go ahead, make my day."[108]

106. *See, e.g.*, CCA Assocs. v. United States, 667 F.3d 1239, 1248 (Fed. Cir. 2011) (rejecting a takings claim despite the fact that the United States passed legislation specifically to void its contract with the property owner, therein forcing the owner to house low income families at below-market rates for a period of five years, and causing a loss of over eighty-one percent of the business's net income [totaling $700,000]).

107. Sackett v. EPA, 132 S. Ct. 1367, 1375–76 (2012) (Alito, J., concurring).

108. SUDDEN IMPACT (Warner Bros. 1983).

HOW THE CONSTITUTIONS OF THE THIRTY-SEVEN STATES IN EFFECT WHEN THE FOURTEENTH AMENDMENT WAS ADOPTED DEMONSTRATE THAT THE GOVERNMENTAL ENDORSEMENT TEST IN ESTABLISHMENT CLAUSE JURISPRUDENCE IS CONTRARY TO AMERICAN HISTORY AND TRADITION

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I. INTRODUCTION

"The Establishment Clause was first incorporated and applied to the states as a matter of substantive due process in *Everson v. Board of Education* in 1947."[1] Incorporation of the Establishment Clause gives rise to serious conceptual questions for textualists and originalists. First, the text "Congress shall make no law respecting an establishment of religion"[2] is expressly directed against Congress in a way, and to a degree, unique in the Bill of Rights. This is so because, as a matter of original intent, the Establishment Clause was supposed to protect states against disestablishment, among other things.[3] Professor Lash, in our estimation, has responded to those questions by noting that the "[i]ncorporation doctrine assumes that, at some point, the people changed their collective mind about the role of federalism in the protection of individual liberties; what was once left to state discretion is now restricted by the Fourteenth Amendment."[4]

The time and occasion for this collective change of mind is reasonably well established. As a matter of history, Justice Thomas had the better side of the argument in *McDonald v. City of Chicago* when he maintained that the Privileges and Immunities Clause of the Fourteenth Amendment was intended to protect fundamental rights against state infringement and that the rights deemed fundamental included the first eight amendments.[5] This would mean that Justice Black was also broadly correct in *Adamson v. California*,[6] and that Frankfurter,[7] and his supporter Professor Charles Fairman,[8] were wrong.[9]

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1. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 31 (2008) (citing Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947)).

2. U.S. CONST. amend. I.

3. Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088–89 (1995).

4. *Id.* at 1088.

5. 130 S. Ct. 3020, 3058–88 (2010) (Thomas, J., concurring in part and concurring in the judgment) (incorporating the Second Amendment to the states via the Fourteenth Amendment's Privileges and Immunities Clause).

6. 332 U.S. 46, 68–92 (1947) (Black, J., dissenting) (arguing for the incorporation of the Fifth Amendment to the states via the Fourteenth Amendment).

7. *Id.* at 59–68 (Frankfurter, J., concurring) (refusing to incorporate the Fifth Amendment to the states via the Fourteenth Amendment).

8. *See* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949) (conducting a historical analysis of the incorporation doctrine and arguing against historical support for incorporation via the Fourteenth Amendment).

However, the Court decided otherwise in the *Slaughter-House Cases*[10] and made it clear in *McDonald v. City of Chicago*[11] that it is not disposed to reconsider that decision. This means that incorporation of the Establishment Clause under Due Process Clause analysis was correct only if nonestablishment was a right fundamental to the nation's sense of ordered liberty[12] and was "deeply rooted in this Nation's history and tradition."[13]

No one doubts that free exercise is such a right. Some, however, have asserted that nonestablishment interests cannot be coherently regarded as a personal right.[14] This overlooks the crucial historical fact that certain sects, including the Baptists, regarded nonestablishment as an aspect of free exercise.[15] William Tennent, a South Carolina Presbyterian and advocate of equal rights on behalf of a coalition of dissenting groups, clearly articulated this thought, saying: "My first, and most capital reason, against all religious establishments is, that *they are an infringement of Religious Liberty*."[16] The principles of nonestablishment for which the evangelical dissenters pressed were freedom from religious coercion, equality of treatment, no public financial support of churches, and no jurisdiction over church governance.[17] For the Bill of Rights to exist in its current form, James Madison had to defeat James Monroe and be elected to the First Congress, and to do that he needed Baptist support.[18]

Because nonestablishment was historically regarded as an individual right in sectarian quarters,[19] it is perfectly coherent to follow the lead of Calabresi and Agudo and look to the state

9. *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (providing a comprehensive discussion of the subject).

10. 83 U.S. (16 Wall.) 36 (1872) (refusing to read the Thirteenth and Fourteenth Amendments as extending substantive due process to citizens' rights rooted in state citizenship, while allowing broad state police power over the regulation of slaughterhouses).

11. 130 S. Ct. at 3030–31 (declining to overturn the Slaughter-House Cases and noting that it is the Due Process Clause of the Fourteenth Amendment which prevents state infringement of certain rights rather than the Privileges and Immunities Clause).

12. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

13. Washington v. Glucksburg, 521 U.S. 702, 720–21 (1997) (internal quotation marks omitted) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977)).

14. Lash, *supra* note 3, at 1086 n.7 (quoting various commentators).

15. JAMES H. HUTSON, CHURCH AND STATE IN AMERICA 48–49 (2008).

16. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 95–96 (2002).

17. *Id.*; HUTSON, *supra* note 15, at 137–38.

18. HUTSON, *supra* note 15, at 148–49.

19. Calabresi & Agudo, *supra* note 1, at 32.

constitutions as they stood in 1868 to determine whether nonestablishment interests were also deeply rooted in American history and tradition by that time.[20] Because Calabresi and Agudo have already correctly answered that question in the affirmative,[21] the focus of this article is on two follow-up questions: (1) what were the nonestablishment principles that were understood as fundamental, and (2) what effect does that understanding have on the governmental endorsement test from an originalist viewpoint?

II. The Present Status of the Governmental Endorsement Test

The governmental endorsement test was first proposed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*[22] as "an analytical device" that supposedly "clarifies" the three-part test found in *Lemon v. Kurtzman*.[23] The proposed clarification was that "government endorsement or disapproval of religion" is one of "the principles enshrined in the Establishment Clause."[24] The basis for this conclusion is psychological. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[25] The only authority cited for these propositions was a "*See generally*" citation to *Abington School District v. Schempp*[26] with no pinpoint citations.[27]

The Court in *Wallace v. Jaffree* accepted that, when "applying the purpose test" of *Lemon*, "it is appropriate to ask 'whether government's actual purpose is to endorse or disapprove of religion,'" citing Justice O'Connor's concurrence in *Lynch*.[28] In a footnote, the Court quoted her concurrence for the proposition that governmental endorsement supplemented both the purpose

20. *Id.*, at 31.
21. *Id.*, at 32.
22. 465 U.S. 668, 687–89 (1984) (O'Connor, J., concurring).
23. 403 U.S. 602, 612–13 (1971) (internal citations omitted) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'").
24. *Lynch*, 465 U.S. at 688–89 (O'Connor, J., concurring).
25. *Id.* at 688.
26. 374 U.S. 203 (1963).
27. *Lynch*, 465 U.S. at 688.
28. 472 U.S. 38, 56 (1985) (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

and effects prongs of *Lemon*.[29] Then-Justice Rehnquist in his dissent called for an abandonment of *Lemon* altogether and rejected endorsement as a test.[30] Justice O'Connor in her concurrence in *Jaffree* argued that *Lemon*, as clarified by her endorsement test, was worth keeping.[31] Justice Powell wrote a separate concurrence in defense of *Lemon*,[32] while Chief Justice Burger stated in his dissent that the treatment of *Lemon* "suggests a naïve preoccupation with an easy, bright-line approach for addressing constitutional issues."[33] Justice White in dissent agreed with the Chief Justice and stated that he "would support a basic reconsideration of [the Court's] precedents."[34]

In *Estate of Thornton v. Caldor, Inc.*, the Court held that a Connecticut statute conferring a categorical right not to work on a person's Sabbath violates the Establishment Clause.[35] The majority employed *Lemon*, but not governmental endorsement, in its analysis. Justice O'Connor supplied the omission in a concurrence joined by Justice Marshall.[36]

A few days later, the Court decided *School District of Grand Rapids v. Ball* in which shared time and community education programs were held violative of the Establishment Clause under the effects prong of *Lemon*.[37] Even though the majority expressly relied upon Justice O'Connor's concurrence in *Lynch*,[38] Justice O'Connor dissented with respect to the shared time program.[39] Chief Justice Burger dissented[40] for the reasons stated in *Aguilar v. Felton*,[41] decided the same day as *Ball*. Justice Rehnquist dissented for the same reasons as he had stated in *Jaffree*.[42]

Felton involved a federal subsidy to parochial schools for remedial instruction. The Court struck it down under the *Lemon*

29. *Id.* at n.42.
30. *Id.* at 91, 112–14 (Rehnquist, J., dissenting).
31. *Id.* at 69–70 (O'Connor, J., concurring).
32. *Id.* at 63 (Powell, J., concurring).
33. *Id.* at 89 (Burger, J., dissenting).
34. Wallace v. Jaffree, 472 U.S. 38, 90–91 (White, J., dissenting).
35. 472 U.S. 703, 710–11 (1985).
36. *See id.* at 711–12 (O'Connor, J., concurring) (remarking that the Connecticut Sabbath law conveys an endorsement of the Sabbath observance).
37. 473 U.S. 373, 383–85 (1985).
38. *See id.* at 389 (citing Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).
39. *Id.* at 398–99 (O'Connor, J., concurring in part and dissenting in part).
40. *Id.* at 398 (Burger, J., concurring in part and dissenting in part).
41. 473 U.S. 402 (1985).
42. *Ball*, 473 U.S. at 400 (Rehnquist, J., dissenting).

entanglement prong.[43] Justice Powell concurred on the additional ground that the program violated the effects prong in *Lemon*.[44] Chief Justice Burger dissented, denouncing *Lemon*.[45] Justice O'Connor rejected the entanglement analysis in a dissent in which Justice Rehnquist joined in part.[46] Justice Rehnquist also dissented separately for the reasons stated in *Jaffree*.[47]

When the Court upheld financial vocational assistance to a blind ministerial student in *Witters v. Washington Department of Services for the Blind*, it did so employing *Lemon* as amplified by the governmental endorsement test.[48] When the Court struck down Louisiana's law with respect to the teaching of evolution in *Edwards v. Aguillard*, it did so based upon the first prong of *Lemon* as amplified by the governmental endorsement test.[49]

As the 1980s progressed, Chief Justice Rehnquist, writing for the Court, employed *Lemon* without the governmental endorsement test in deciding *Bowen v. Kendrick*.[50] The next year, the Court fractured in *Texas Monthly, Inc. v. Bullock*. Justice Brennan announced the judgment of the Court and relied on *Lemon* as well as Justice O'Connor's governmental endorsement test.[51] Justice Marshall and Justice Stevens joined his opinion.[52] Justice White based his analysis of the question of the unconstitutionality of a tax exemption for religious literature on freedom-of-the-press grounds.[53] Justice Blackmun, with whom Justice O'Connor joined in a concurrence, relied in part on Justice O'Connor's concurrence in *Jaffree*.[54] Justice Scalia in his dissent, with whom the Chief Justice and Justice Kennedy joined, questioned how a nation with

> the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every president since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with which sessions of our Court are opened, and come to think of it, the discriminatory protection

43. *Felton*, 473 U.S. at 409–14.
44. *Id.* at 414, 417 (Powell, J., concurring).
45. *Id.* at 419 (Burger, J., dissenting).
46. *Id.* at 421 (O'Connor, J., dissenting).
47. *Id.* at 420 (Rehnquist, J., dissenting).
48. Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 485, 489 (1986).
49. Edwards v. Aguillard, 482 U.S. 578, 585 (1987).
50. 487 U.S. 589, 602–04 (1988).
51. Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5, 9 & n.1 (1989).
52. *Id.* at 5.
53. *Id.* at 25–26 (White, J., concurring).
54. *Id.* at 26, 28–29 (Blackmun, J., concurring).

of freedom of religion in the Constitution

could be understood as having a government forbidden to "'convey a message of endorsement of religion.'"[55]

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, the Supreme Court found that the display of a menorah outside a city and county building was constitutional while a crèche in a county courthouse was not.[56] Justice Blackmun delivered the opinion of the Court in which Justices Brennan, Marshall, Stevens, and O'Connor joined, affirming *Lemon* and the governmental endorsement test.[57] Justice Kennedy, in a partial dissent, in which the Chief Justice, Justice White, and Justice Scalia joined, declared that "[t]he crèche display is constitutional, and for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well."[58] Although Justice Kennedy employed *Lemon*, he reserved judgment on its validity and utility.[59] Turning to the governmental endorsement test Justice Kennedy wrote:

> The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a "reasonable observer" may "fairly understand" government action to "sen[d] a message to nonadherents that they are outsiders, not full members of the political community," is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence.[60]

He also called it "flawed in its fundamentals and unworkable in practice."[61] This was because it would consistently produce results contrary to history and precedents.[62] As the 1990s opened, the Court upheld an "equal access" law in *Board of Education of Westside Community Schools v. Mergens*.[63] A plurality, consisting of Chief Justice Rehnquist, Justice O'Connor, Justice White, and Justice Blackmun, employed the governmental endorsement test.[64] Justices Kennedy and Scalia concurred in

55. *Id.* at 29–30 (Scalia, J., dissenting).
56. 492 U.S. 573, 621 (1989).
57. *Id.* at 592–602.
58. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part).
59. *Id.* at 655–56.
60. *Id.* at 668.
61. *Id.* at 669.
62. *Id.*
63. 496 U.S. 226 (1990).
64. *Id.* at 249 (plurality opinion).

part and in the judgment while rejecting that test.[65]

In *Lee v. Weisman*, Justice Kennedy, writing for a five-justice majority, rejected the invitation of petitioners and of the United States to reconsider *Lemon* because the question of school-sponsored invocations and benedictions at public school graduation exercises could be resolved without regard to *Lemon*.[66] Justice Scalia, joined by the Chief Justice and Justices White and Thomas, dissented, arguing for the abandonment of *Lemon*.[67] According to the dissenters, the existing Establishment Clause doctrine was marked "by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions."[68]

When Justice White wrote for a six-justice majority in *Lamb's Chapel v. Center Moriches Union Free School District*, he used free-speech doctrine to strike down content-based discrimination concerning the use of public school property.[69] However, he also cited *Lemon* and employed an endorsement analysis.[70] Justice Kennedy concurred in part and in the judgment, saying that citation of *Lemon* was "unsettling and unnecessary."[71] Once again he rejected the governmental endorsement test.[72] Justice Scalia, joined by Justice Thomas, concurred in the judgment. Writing on *Lemon*, he said:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks over Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.[73]

Justice Scalia acknowledged that *Lee v. Weisman* had not formally overruled *Lemon*. But he noted that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion

65. *Id.* at 258, 261 (Kennedy, J., concurring in part and concurring in the judgment).
66. Lee v. Weisman, 505 U.S. 577, 587 (1992).
67. *Id.* at 644 (Scalia, J., dissenting).
68. *Id.*
69. 508 U.S. 384, 397 (1993).
70. *Id.* at 395.
71. *Id.* at 397 (Kennedy, J., concurring).
72. *Id.*
73. *Id.* at 398 (Scalia, J., concurring).

doing so."[74]

In upholding private speech in the form of a cross placed by the Ku Klux Klan on the square of the Ohio capitol in *Capitol Square Review & Advisory Board v. Pinette*, Justice Scalia, in a plurality opinion joined by Chief Justice Rehnquist as well as Justices Kennedy and Thomas, rejected what he styled a "transferred endorsement" test.[75] Justice O'Connor, joined by Justices Souter and Breyer, thought that her "endorsement test asks the right question . . . ."[76]

Rosenberger v. Rector & Visitors of the University of Virginia was similar to *Lamb's Chapel* and was decided with substantial reliance on that case.[77] Justice Kennedy, writing for the Court, did not rely on *Lemon* or the governmental endorsement test. Justice O'Connor, in a concurrence, did.[78]

Twelve years after its initial decision, the Court overruled *Aguilar v. Felton* in *Agostini v. Felton*.[79] In doing so, a five-justice majority, consisting of Chief Justice Rehnquist, Justices O'Connor, Scalia, Kennedy, and Thomas, acknowledged that "we currently use" the *Lemon* criteria together with the governmental endorsement test.[80] At the end of the decade, in *Santa Fe Independent School District v. Doe*, only the Chief Justice and Justices Scalia and Thomas dissented when the Court struck down student-led prayer at football games on coercion and governmental endorsement grounds within the *Lemon* framework.[81] The Chief Justice complained that, in doing so, the majority "applie[d] the most rigid version of the oft-criticized" *Lemon* test.[82]

In *Mitchell v. Helms*, Justice Thomas wrote a plurality opinion in which the Chief Justice and Justices Scalia and Kennedy joined.[83] He wrote that *Agostini* had "modified *Lemon*" in school aid cases by making entanglement simply an aspect to the

74. *Id.*
75. 515 U.S. 753, 767–68 (1995) (plurality opinion).
76. *Id.* at 772 (O'Connor, J., concurring in part) (internal quotation marks and citations omitted) (quoting Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring in part)).
77. 515 U.S. 819, 830 (1995) (citing *Lamb's Chapel*, 508 U.S. 384, as "[t]he most recent and apposite case" applicable).
78. *Id.* at 846 (O'Connor, J., concurring).
79. 521 U.S. 203, 209 (1997).
80. *Id.* at 234.
81. 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).
82. *Id.* at 319.
83. 530 U.S. 793, 794 (2000) (plurality opinion).

primary effect inquiry.[84] Justice O'Connor, joined by Justice Breyer, concurred in the judgment.[85] She wrote, in part, to challenge what she considered to be a rule whereby neutrality and secular content control the primary effect analysis.[86] She also relied upon governmental endorsement analysis.[87]

Good News Club v. Milford Central School was another equal access case decided principally on free-speech grounds.[88] However, in Part IV of the opinion, a five-justice majority considered whether access would violate the Establishment Clause.[89] Presumably, both coercion and endorsement were analyzed because of Justice Kennedy's interest in the former and Justice O'Connor's commitment to the latter. As Justice Scalia observed in his concurrence, the majority's treatment of those issues was less than wholehearted. In his concurrence he stated:

> I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, and perceptions of endorsement, "to the extent" that the law makes such factors relevant, is consistent with the belief (which I hold) that in this case that extent is zero.[90]

When a five-justice majority upheld school vouchers in *Zelman v. Simmons-Harris*, the majority opinion did not directly rely on *Lemon* or governmental endorsement,[91] but Justice O'Connor did in her concurrence.[92] Justice Thomas also concurred, writing: "Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights."[93] He doubted, however, that the make-no-law formula should literally run against the states.[94]

The governmental endorsement test was only marginally in play when the Court upheld excluding theological instruction

84. *Id.* at 807–08.
85. *Id.* at 836 (O'Connor, J., concurring).
86. *Id.* at 837–38.
87. *Id.* at 842–43.
88. 533 U.S. 98, 98 (2001).
89. *Id.* at 112.
90. *Id.* at 120–21 (Scalia, J., concurring).
91. 536 U.S. 639 (2002).
92. *Id.* at 668–69 (O'Connor, J., concurring).
93. *Id.* at 679–80 (Thomas, J., concurring).
94. *Id.* at 679.

from a state scholarship program in *Locke v. Davey*.[95] Justices Scalia and Thomas, in dissent, denied that the state had a valid interest in excluding the benefit.[96] In the course of doing so, Justice Scalia noted that the exclusion was not needed to avoid governmental endorsement.[97]

When a unanimous Court upheld the Religious Land Use and Institutionalized Persons Act in *Cutter v. Wilkinson*,[98] it did not employ the *Lemon* analysis at all. This led Justice Thomas to write in his concurrence: "The Court properly declines to assess RLUIPA under the discredited test of *Lemon v. Kurtzman*, which the Court of Appeals applied below."[99]

Later in the term, in *McCreary County v. ACLU of Kentucky*, five justices employed *Lemon* and the governmental endorsement test to strike down a display of the Ten Commandments.[100] In dissent, Justice Scalia set out to demonstrate three propositions. In Part I, he discussed "why the Court's oft repeated assertion that the government cannot favor religious practice is false," also calling *Lemon* "discredited" and "brain-spun."[101] He was joined in this aspect of the dissent by Chief Justice Rehnquist and Justice Thomas.[102]

In Part II, Justice Scalia and Justice Kennedy attacked the majority opinion, saying it made the *Lemon* test even worse. Part II begins: "As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."[103] Now, the dissent continued, the majority "modifies *Lemon* to ratchet up the Court's hostility to religion."[104]

Finally, in Part III, in which Justice Kennedy also joined, the dissent asserted that the majority was wrong even using "*Lemon*-based premises."[105] Quoting Justice Kennedy in *Allegheny County*, the dissent emphasized that coercion was not present.[106]

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95. 540 U.S. 712, 718 (2004).
96. *Id.* at 729–30 (Scalia, J., dissenting).
97. *See id.* at 729, 730 n.2.
98. 544 U.S. 709, 713 (2005).
99. *Id.* at 727 n.1 (Thomas, J., concurring) (citations omitted).
100. 545 U.S. 844, 858 (2005).
101. *Id.* at 885, 890 (Scalia, J., dissenting).
102. *Id.* at 885.
103. *Id.* at 900.
104. *Id.*
105. *Id.* at 885, 903.
106. McCreary Cnty. v. ACLU, 545 U.S. 844, 909 (2005) (Scalia, J., dissenting).

The same day that *McCreary County* was decided, the Court in *Van Orden v. Perry* upheld the display of the Ten Commandments on the Capitol Square in Texas.[107] Chief Justice Rehnquist's plurality opinion, in which Justices Scalia, Kennedy, and Thomas joined, further undercut *Lemon.*[108] After collecting cases demonstrating various approaches to *Lemon*, the plurality stated: "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[109] Justice Scalia in his concurrence called for the adoption of

> Establishment Clause jurisprudence that is in accord with our Nation's past and present practices, and that can be consistently applied—the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgement, or, in a nonproselytizing manner, venerating the Ten Commandments.[110]

Justice Thomas repeated his view that the Establishment Clause's "text and history 'resis[t] incorporation' against the States" and "[e]ven if the Clause is incorporated, or if the Free Exercise Clause limits the power of States to establish religions, our task would be far simpler if we returned to the original meaning of the word 'establishment' than it is under the various approaches this Court now uses."[111] He also noted that there is no establishment as a matter of history without coercion.[112]

The decisive fifth vote in *Van Orden* was provided by Justice Breyer, who concurred in the judgment.[113] He expressly rejected "neutrality," *Lemon*, or the endorsement test as adequate and collected citations criticizing them.[114]

Salazar v. Buono involved a constitutional challenge to a federal statute transferring ownership of a commemorative cross on Federal land to a private party.[115] Justice Kennedy, joined by

107. 545 U.S. 677, 678 (2005) (plurality opinion).
108. *Id.*
109. *Id.* at 686.
110. *Id.* at 692 (Scalia, J., concurring).
111. *Id.* at 693, 692 (Thomas, J., concurring).
112. *Id.* at 693–94.
113. *Id.* at 698 (2005) (Breyer, J., concurring).
114. *Id.* at 698–700.
115. 130 S. Ct. 1803, 1811 (2010).

the Chief Justice, and Justice Alito, in relevant part, questioned whether the original injunction had been correctly entered under the governmental endorsement test.[116] Because that issue had not been appealed in an earlier phase of the case, it was not decided. Instead, the injunction was reversed on other grounds and the case remanded.[117]

Justice Alito also concurred in part and concurred in the judgment in *Salazar*.[118] In the course of his opinion, Justice Alito questioned the vitality of the governmental endorsement test, saying: "Assuming that it is appropriate to apply the so-called 'endorsement test,' this test would not be violated by the land exchange."[119]

Justice Scalia and Justice Thomas concurred in the judgment based upon lack of standing in this phase of the litigation.[120] Believing that the case turned on nonconstitutional issues concerning the law of injunctions, Justice Breyer would have dismissed the writ as improvidently granted.[121] Because the Court did not do so, he dissented saying that he would have upheld the Ninth Circuit's decision.[122]

Justice Stevens, joined by Justice Ginsburg and Justice Sotomayor, dissented on the ground that the transfer violated the governmental endorsement test— a test that had become the law of the case.[123]

The most recent word on *Lemon*/endorsement that we have from the Supreme Court is Justice Thomas's dissent from denial of certiorari in *Utah Highway Patrol Ass'n v. American Atheists, Inc.*[124] There Justice Thomas said: "Even if the Court does not share my view that the Establishment Clause restrains only the Federal Government, and that, even if incorporated, the Clause only prohibits 'actual legal coercion,' the Court should be deeply troubled by what its Establishment Clause jurisprudence has wrought."[125]

Because, as Justice Thomas noted, "five sitting Justices have

116. *Id.* at 1818–19.
117. *Id.* at 1820–21.
118. *Id.* at 1821 (Alito, J., concurring in part and concurring in the judgment).
119. *Id.* at 1824.
120. *Id.* (Scalia, J., concurring in the judgment).
121. Salazar v. Buono, 130 S. Ct. 1803, 1845 (2010) (Breyer, J., dissenting).
122. *Id.*
123. *Id.* at 1828–42 (Stevens, J., dissenting).
124. 132 S. Ct. 12 (2011).
125. *Id.* at 21 (citations omitted).

questioned or decried the *Lemon*/endorsement test's continued use,"[126] a demonstration that the endorsement concept is antihistorical would provide topical and consequential evidence for this debate. An examination of the thirty-seven state constitutions in effect in the summer of 1868 provides evidence that the nonestablishment principle recognized in the state constitutions of the day did not include a nonendorsement component.

III. THE RELEVANT STATE CONSTITUTIONS

When the Fourteenth Amendment was transmitted to the thirty-seven states for ratification, the constitutionally prescribed minimum for approval was twenty-eight states. Connecticut ratified the Fourteenth Amendment in late June 1866.[127] The constitution of 1818 declared in its preamble:

> The people of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government, do, in order more effectually to define, secure, and perpetuate the liberties, rights and privileges which they have derived from their ancestors, hereby, after a careful consideration and revision, ordain and establish the following constitution and form of civil government.[128]

Free exercise of religion and nonestablishment values were understood entirely in terms of nondiscrimination. Article I, section 3 provided:

> The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this state; provided that the right hereby declared and established shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.[129]

Article I, section 4 continued: "No preference shall be given by law to any Christian sect or mode of worship."[130] Not only was religion endorsed in the preamble but also in the official oath

126. *Id.*

127. Secretary of State Seward's proclamation of ratification says June 30. 15 Stat. 708, 710 (1868). June 27 according to HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 161 (1908).

128. CONN. CONST. of 1818, pmbl., *available at* http://www.ct.gov/sots/cwp/view.asp?A=3188&Q=392280 (last visited Dec. 15, 2012).

129. *Id.* art. I, § 3.

130. *Id.* art. I, § 4.

prescribed in article X, section 1.[131] Although the option of affirmation in lieu of an oath was accorded, the form for both concluded with "[s]o help you God."[132]

New Hampshire ratified the Fourteenth Amendment on July 6, 1866, followed by Tennessee on July 19.[133] The New Hampshire Constitution of 1851 understood free exercise as immunity from all civil consequences arising from personal choice in any mode or manner of worship. Article I, section 5 provided:

> Every individual has a natural and inalienable right to worship God according to the dictates of his own conscience and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious professions, sentiments, or persuasion, provided he does not disturb the public peace, or disturb others in their religious worship.[134]

Nonestablishment values were also understood in terms of sectarian equality and noncoercion. In setting forth these values, article I, section 6 explicitly endorsed religion, declaring:

> As morality and piety, rightly grounded on the principles of the Bible, will give the best and greatest security to government, and will lay in the hearts of men the strongest obligations to due subjection, and as the knowledge of these is most likely to be propagated through society by the institution of the public worship of the Deity, and of public instruction in morality and religion, therefore, to promote those important purposes, the People of this State have the right to empower, and do hereby fully empower, the several religious societies which may at any time exist within this State, to make adequate provision, at their own expense, for the support and maintenance of public teachers of piety, religion and morality: provided, that such religious societies shall at all times have the exclusive right of electing their own public teachers and of contracting with them for their support and maintenance; and no person of any one particular religious sect or denomination, shall ever be compelled to pay towards the support of the teacher, or

131. *Id.* art. X, § 1.
132. *Id.*
133. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 163, 165.
134. N.H. CONST. of 1851, art. I, § 5, *reprinted in* THE AMENDED CONSTITUTION OF THE STATE OF NEW HAMPSHIRE; WITH THE RESOLUTIONS FOR SUBMITTING THE AMENDMENTS TO THE PEOPLE 3 (Concord, Butterfield & Hill 1851).

> teachers, of another persuasion, sect or denomination; and every religious denomination, demeaning themselves quietly, and as good subjects of the State, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.[135]

The religious scruples of Quakers and Moravians were accommodated in article I, section 13, which provided: "No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent."[136] Although the principal form of the public oath was framed as both an oath and an affirmation, concluding "[s]o help me God," those "scrupulous of swearing," after declining to take the oath, were authorized to "omit[] the word 'swear,' and likewise the words, 'So help me God,' subjoining instead thereof 'This I do under the pains and penalties of perjury.'"[137]

The Tennessee Constitution of 1834 understood rights of conscience as consisting of both free exercise and nonestablishment values. Article I, section 3 provided:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can, of right, be compelled to attend, erect or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.[138]

It is clear that nonestablishment values did not include nonendorsement concepts, because article IX, section 2 provided: "No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."[139] And while the actual motivation underlying article IX, section 1 may have been anticlerical, the stated reasons for barring the clergy from the legislature amounted to an endorsement of religion:

> Whereas ministers of the gospel are by their profession, dedicated to God and the care of souls, and ought not to be

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135. *Id.* art. I, § 6.
136. *Id.* art. I, § 4.
137. *Id.* art. II, § 93.
138. TENN. CONST. of 1834, art. I, § 3, *reprinted in* THE OFFICIAL AND POLITICAL MANUAL OF THE STATE OF TENNESSEE 81 (1890).
139. *Id.* art. IX, § 2.

> diverted from the great duties of their functions; therefore, no Minister of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature.[140]

Article I, section 4 prohibited any religious test for holding office.[141] To avoid a conflict with article IX, section 2, "religious test" must be read as a term of art, as in England where such oaths were a denominational test.[142]

Conscientious objectors were accommodated in two provisions of the constitution. Article I, section 28 provided "[t]hat no citizen of this State shall be compelled to bear arms, provided he will pay an equivalent, to be ascertained by law."[143] Article VIII, section 3 required that "[t]he Legislature shall pass laws exempting citizens belonging to any sect or denomination of religion, the tenets of which are known to be opposed to the bearing of arms, from attending private and general musters" of the militia.[144] When the constitution of Tennessee was amended in 1865 to abolish slavery, the electors in the referendum were required to swear without option of affirmation that they were loyal "so help me God."[145]

New Jersey and Oregon ratified the Fourteenth Amendment in September of 1866, and both later attempted to rescind. Even though New Jersey rescinded prior to ratification by the requisite three quarters of the states, this act was not recognized by Congress or Secretary Seward but was rendered moot by the ratification of Alabama and Georgia.[146] Oregon's attempt came after the Secretary of State had proclaimed the amendment ratified and was clearly ineffectual.[147]

The Constitution of New Jersey of 1844 endorsed religion in its preamble in these words:

> We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavours to secure and transmit the same unimpaired to

140. *Id.* art. IX, § 1.
141. *Id.* art. I, § 4.
142. Torcaso v. Watkins, 367 U.S. 488, 490 (1961).
143. TENN. CONST. of 1834, art. I, § 28, *supra* note 138, at 83.
144. *Id.* art. VIII, § 3.
145. TENN. CONST. of 1834 (amended 1865), *supra* note 138, at 102–103.
146. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127 at 165–67.
147. FLACK, *supra* note 127, at 167–69.

> succeeding generations, do ordain and establish this constitution.[148]

Free exercise and nonestablishment guarantees were combined in article I, sections 3 and 4.[149] Nonestablishment values were understood in terms of noncompulsion and nondiscrimination.[150] Article I, section 3 provided:

> No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretence whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform.[151]

Article I, section 4 provided: "There shall be no establishment of one religious sect in preference to another: no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right merely on account of his religious principles."[152]

The Oregon Constitution of 1857 guaranteed free exercise in article I, section 2 and section 3. Section 2 provided: "All men shall be secured in the natural right to worship Almighty God according to the dictates of their own conscience."[153] Section 3 recited: "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."[154] Nonestablishment values were recognized through prohibitions of public expenditure for religion and through guarantees that civil status would not be affected by religion. Article I, section 5 provided: "No money

148. N.J. CONST. of 1844, pmbl., *reprinted in* THE JOURNAL OF THE PROCEEDINGS OF THE CONVENTION TO FORM A CONSTITUTION FOR THE GOVERNMENT OF THE STATE OF NEW JERSEY 269 (1844).

149. *Id.* art. I, §§ 3, 4.

150. *Id.*

151. *Id.* art. I, § 3.

152. *Id.* art. 1, § 4.

153. OR. CONST. of 1857, art. I, § 2, *reprinted in* THE CONSTITUTION OF OREGON, FRAMED BY THE CONSTITUTIONAL CONVENTION WHICH MET AT SALEM ON MONDAY, AUGUST 17TH, 1857, AND WHICH IS TO BE SUBMITTED TO THE PEOPLE ON THE SECOND MONDAY IN NOVEMBER, 1857, at 5 (1857). "Almighty God" is a Biblical term found in the Old Testament and Revelation.

154. *Id.* art. I, § 3.

shall be drawn from the Treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the Legislative Assembly."[155] Article I, section 4 stated: "No religious test shall be required as a qualification for any office of trust or profit."[156] Altering the common law, article I, section 6 provided: "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion; nor be questioned in any court of justice touching his religious belief, to affect the weight of his testimony."[157] Similarly, it was declared that "[t]he mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered."[158] On the other hand, Oregon was less solicitous of the rights of conscientious objectors than some other states, accommodating them only in time of peace. Article X, section 2 read: "Persons whose religious tenets, or conscientious scruples, forbid them to bear arms, shall not be compelled to do so in time of peace, but shall pay an equivalent for personal service."[159]

Vermont was the only other state to ratify the Fourteenth Amendment in 1866.[160] The Constitution of Vermont of 1777 had been repeatedly amended by the time the Fourteenth Amendment was ratified.[161] Article I, section 3 of that constitution as amended viewed the nonestablishment value in terms of nondiscrimination, noncompulsion, and freedom from civil consequences from religious views.[162] However, the Christian religion was explicitly endorsed. Article I, section 3 provided:

> That all men have a natural and inalienable right to worship Almighty God, according to the dictates of their own

155. *Id.* art. I, § 5.
156. *Id.* art. I, § 4.
157. *Id.* art. I, § 6.
158. *Id.* art. I, § 7.
159. *Id.* at art. X, § 2.
160. Seward declared that Vermont had ratified "on or previous to November 9th, 1866." 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 168.
161. *See* VT. CONST. of 1777, *reprinted in* THE GENERAL STATUTES OF THE STATE OF VERMONT: PASSED AT THE ANNUAL SESSION OF THE GENERAL ASSEMBLY, COMMENCING OCTOBER 9, 1862: TOGETHER WITH CERTAIN OF THE PUBLIC ACTS OF THE YEAR 1862: TO WHICH ARE PREFIXED THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF VERMONT SECOND EDITION NOTE 32 (1877).
162. *See id.* art. I, § 3.

> consciences and understandings, as in their opinion shall be regulated by the Word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiments, or peculiar mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control, the rights of conscience, in the free exercise of religious worship: nevertheless, every sect or denomination of christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.[163]

With respect to those unwilling to take up arms for religious reasons, it was declared in article I, section 9 that no man "who is conscientiously scrupulous of bearing arms, [may] be justly compelled thereto, if he will pay such equivalent."[164] Oaths were permitted by article II, section 12 and section 29 to be on affirmation with "so help you God" replaced with "under the pains and penalties of perjury."[165]

Ten states ratified the Fourteenth Amendment in January of 1867, beginning with New York.[166] The New York Constitution of 1846 endorsed religion in its preamble, declaring: "We the People of the State of New York, grateful to Almighty God for our Freedom: in order to secure its blessings, do establish this Constitution."[167] Free exercise and nonestablishment guarantees were combined in article I, section 3 and nonestablishment values were understood in terms of nondiscrimination.[168] The provision read:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference; *and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief*; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of

163. *Id.*
164. *Id.* art. I, § 9.
165. *Id.* art. II, §§ 12, 29.
166. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 168–69.
167. N.Y. CONST. of 1846, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF NEW YORK; ADOPTED NOVEMBER 3, 1846, TOGETHER WITH MARGINAL NOTES AND A COPIOUS INDEX 3 (Albany, Van Benthuysen 1848).
168. *See id.* art. I, § 3.

> licentiousness, or justify practices inconsistent with the peace or safety of this State.[169]

Ohio ratified the Amendment the day after New York.[170] It purported to rescind during the pendency of the ratification process, but this was rendered moot by the same circumstances affecting New Jersey's rescission.[171]

The Ohio Constitution of 1851 endorsed religion in its preamble with this statement: "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution."[172] Free exercise and nonestablishment guarantees were combined in article I, section 7, together with an express endorsement of religion.[173] Nonestablishment values were understood in terms of noncompulsion and nondiscrimination.[174] Article I, section 7 provided:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[175]

Any claim by Catholics for support of their schools was repelled by a provision of article VI, section 2, which declared that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of

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169. *Id.* art. I, § 3. The italicized portion was added in 1846.
170. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 168–70.
171. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 170.
172. OHIO CONST. of 1851, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF OHIO: ADOPTED MARCH 10, 1851, at 1 (Columbus, L. Myers & Bro. 1870).
173. *See id.* art. I, § 7.
174. *See id.*
175. *Id.*

this State."[176]

Kansas ratified the Amendment on the same day as Ohio.[177] The Kansas Constitution of 1859 endorsed religion in the preamble in these words: "We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish the Constitution of the State of Kansas . . . ."[178] Rights of free exercise and nonendorsement guarantees were combined in section 7 of the state's bill of rights.[179] Nonestablishment values were understood in terms of noncoercion, lack of civil effect for religious opinion, and nondiscrimination.[180] Section 7 provided:

> The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election.[181]

Article VI, section 8 stated: "No religious sect or sects shall ever control any part of the common-school or University funds of the State."[182] Conscientious objectors were accommodated by article VIII, section 1 which declared that "all citizens of any religious denomination whatever, who, from scruples of conscience, may be averse to bearing arms, shall be exempted therefrom, upon such conditions as may be prescribed by law."[183]

Illinois ratified the Fourteenth Amendment on January 15, 1867.[184] The Illinois Constitution of 1848 endorsed religion in this preamble:

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176. *Id.* art. VI, § 2.

177. FLACK, *supra* note 127, at 172. Secretary Seward's proclamation declared it ratified a week later. 15 Stat. 708, 710 (1868). The Government Printing Office gives the date January 17, a day earlier than Seward. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 30 n.6 (2004).

178. KAN. CONST. of 1859, pmbl., *available at* http://www.Kansasmemory.org/item/90272/text (last visited Aug. 23, 2012).

179. *See id.* Bill of Rights, § 7.

180. *See id.*

181. *Id.*

182. *Id.* art. VI, § 8.

183. *Id.* art. VIII, § 1.

184. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 171.

> We, the people of the state of Illinois—grateful to Almighty God for the civil, political and religious liberty, which [H]e has so long permitted us to enjoy, and looking to [H]im for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defence—promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the state of Illinois.[185]

Free exercise and nonestablishment guarantees were combined in article XIII, section 3.[186] The nonestablishment values were understood as comprehending noncoercion and nondiscrimination.[187] Article XIII, section 3 spoke in these terms:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious establishments or modes of worship.[188]

The theme of nondiscrimination was continued in article XIII, section 4, which prohibited religious test oaths.[189] Conscientious objectors were accommodated by article VIII, section 2, which recited that "[n]o person or persons, conscientiously scrupulous of bearing arms, shall be compelled to do militia duty in time of peace, provided such persons shall pay an equivalent for such exemption."[190] The oath required of officeholders by article XIII, section 26 concerning duels permitted the alternative of affirmation, but in either case ended with "[s]o help me God."[191]

Both Michigan and West Virginia ratified the Fourteenth Amendment on January 16, 1867.[192] The Michigan Constitution

185. ILL. CONST. of 1848, pmbl., *reprinted in* N.H. PURPLE, A COMPILATION OF THE GENERAL LAWS CONCERNING REAL ESTATE AND THE TITLE THERETO IN THE STATE OF ILLINOIS 63 (1849).

186. *See id.* art. XIII, § 3.

187. *See id.*

188. *Id.*

189. *Id.* art. XIII, § 4.

190. *Id.* art. VIII, § 2.

191. *Id.* art. XIII, § 26.

192. FLACK, *supra* note 127, at 172, 186. Seward agrees with respect to West Virginia

of 1850 combined free exercise and nonestablishment guarantees in article IV, section 39, which provided:

> The Legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect or support any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.[193]

The nonestablishment interest also extended to a prohibition of taxpayer funding contained in article IV, section 40.[194] That prohibition took this form: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes.[195] Although a prohibition of taxpayer funding of religion was extended to chaplains for the legislature by virtue of article IV, section 24, paid chaplains were authorized for the state prison.[196] The nonestablishment interest was also understood, in article IV, section 41, to extend to a prohibition of giving civil effect to religious opinion.[197] That prohibition took this form: "The Legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion."[198] This understanding was extended in article VI, section 34 in these terms: "No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief."[199] Conscientious objectors were accommodated in article XVII, section 1 in these terms: "but all such citizens of any religious denomination whatever, who, from scruples of conscience, may be averse to bearing arms, shall be excused therefrom, upon such conditions as may be prescribed by law."[200]

The Amended Constitution of West Virginia of 1863

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but assigns February 15, 1867 as the ratification date of Michigan. 15 Stat. 708, 710 (1868). U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.

193. MICH. CONST. of 1850, art. IV, § 39, *reprinted in* THE REVISED CONSTITUTION OF THE STATE OF MICHIGAN 10 (1850).

194. *Id.* art. IV, § 40.

195. *Id.*

196. *Id.* art. IV, § 24.

197. *Id.* art. IV, § 41.

198. *Id.*

199. *Id.* art. VI, § 34.

200. *Id.* art. XVII, § 1.

combined free exercise and nonestablishment guarantees in article II, section 9.[201] The nonestablishment interest was held to extend to noncoercion, nondiscrimination, and a prohibition of taxation for religion.[202] Article II, section 9 provided:

> No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened in his body or goods, but all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and the same shall in no wise affect, diminish or enlarge their civil capacities. And the Legislature shall not proscribe any religious test whatever; or confer any peculiar privileges or advantages on any sect or denomination; or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instruction, and to make for his support such private contract as he shall please.[203]

The first sentence of this provision consists of the enacting clause of the famous Virginia "act for establishing religious freedom" of 1785.[204] The balance is taken from the Virginia Constitution of 1830.[205]

The West Virginia Constitution of 1863 provided in article XI, section 2: "No charter or incorporation shall be granted to any church or religious denomination. Provision may be made by general laws for securing the title to church property, so that it shall be held and used for the purposes intended."[206] This likewise was derived from the Virginia Constitution of 1830.[207] It should be seen as an example of nonestablishment values being understood as encompassing a nondiscrimination component. When the General Assembly of Virginia incorporated the

201. W. VA. CONST. of 1863, art. II, § 9, *reprinted in* AMENDED CONSTITUTION OF WEST VIRGINIA: ADOPTED BY THE CONVENTION FEBRUARY 18, 1863, *available at* http://ia700508.us.archive.org/1/items/amendedconstitut00west/amendedconstitut00west.pdf (last visited Dec. 15, 2012).

202. *See id.*

203. *Id.*

204. 12 WILLIAM WALLER HENING, STATUTES AT LARGE 84–86 (Richmond 1823).

205. A.E. DICK HOWARD, I COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 292 (1974).

206. W. VA. CONST. of 1863, art. XI, § 2.

207. I HOWARD, *supra* note 205, at 292.

Protestant Episcopal Church in 1784,[208] the act was regarded as favoritism by other denominations, leading to its repeal in 1786.[209] Under the weight of modern free exercise doctrine, the Virginia nonincorporation provision was declared unconstitutional in 2002, despite the recognition of the district court that it had been enacted in the interest of religious equality.[210]

Minnesota ratified the Fourteenth Amendment in early 1867.[211] The Minnesota Constitution of 1858 endorsed religion in its preamble in these words: "We, the people of the State of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings, and secure the same to ourselves and our posterity, do ordain and establish this Constitution . . . ."[212] Free exercise and nonestablishment guarantees were combined in article I, section 16.[213] Nonestablishment values were held to comprehend noncoercion, nondiscrimination, and a prohibition of taxpayer support of religion.[214] Article I, section 16 provided:

> The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any places of worship, or to maintain any religious or ecclesiastical ministry against his consent, nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured, shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.[215]

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208. 11 WILLIAM WALLER HENING, STATUTES AT LARGE 532–37 (Richmond 1823).
209. 12 HENING, *supra* note 204, at 266–67.
210. Falwell v. Miller, 203 F. Supp. 2d 624, 630 (W.D. Va. 2002).
211. February 1 was the date according to Seward, 15 Stat. 708, 710 (1868); January 17 according to U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.; and January 16, 1867 according to FLACK, *supra* note 127, at 175.
212. MINN. CONST. of 1858, pmbl., *reprinted in* THE PUBLIC STATUTES OF THE STATE OF MINNESOTA xlv (1859).
213. *Id.* art. I, § 16.
214. *Id.*
215. *Id.*

Article I, section 17 prohibited religious tests for office holding or voting.[216]

Maine ratified the Fourteenth Amendment on January 19, 1867.[217] The Maine Constitution of 1820 endorsed religion in its preamble in these words:

> We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring his aid and direction in its accomplishment, do agree to form ourselves into a free and independent state, by the style and title of the State of Maine, and do ordain and establish the following constitution for the government of the same.[218]

Free exercise and nonestablishment guarantees were combined in article I, section 3.[219] Nonestablishment values were expressed in terms of noncoercion and nondiscrimination.[220] Article I, section 3 provides:

> All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship;—and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the

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216. *Id.* art. I, § 17.

217. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 172 n.43. Flack gives the date as January 15, but he relies on an unofficial source.

218. ME. CONST. of 1820, pmbl., *reprinted in* THE REVISED STATUTES OF THE STATE OF MAINE PASSED JANUARY 25, 1871, TO WHICH ARE PREFIXED THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MAINE WITH AN APPENDIX BY AUTHORITY OF THE LEGISLATURE 22–23 (1871).

219. *Id.* art. I, § 3.

220. *Id.*

> exclusive right of electing their public teachers, and contracting with them for their support and maintenance. [221]

Conscientious objectors were accommodated by article VII, section 5 in these terms:

> Persons of the denominations of quakers and shakers, justices of the Supreme Judicial Court and ministers of the gospel may be exempted from military duty, but no other person of the age of eighteen and under the age of forty-five years, excepting officers of the militia who have been honorably discharged, shall be so exempted, unless he shall pay an equivalent to be fixed by law.[222]

Article IX, section 1 provided a form of oath or affirmation which included the phrase "[s]o help me God."[223]

Nevada ratified the Fourteenth Amendment on January 22, 1867.[224] The Nevada Constitution of 1864 endorsed religion in its preamble in these terms: "We, the people of the State of Nevada, grateful to Almighty God for our freedom, in order to secure its blessings, insure domestic tranquility, and form a more perfect Government, do establish this Constitution."[225] Free exercise and nonestablishment guarantees were combined in article I, section 4.[226] Nonestablishment values were expressed in terms of nondiscrimination and lack of civil effect of religious opinion.[227] Article 1, section 4 provided:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall forever be allowed in this State; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[228]

The form of oath or affirmation found at article XVI, section 2

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221. *Id.*
222. *Id.* art. VII, § 5.
223. *Id.* art. IX, § 1.
224. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6. FLACK, *supra* note 127, at 172, states that the Nevada House ratified on January 21.
225. NEV. CONST. of 1864, pmbl., *reprinted in* THE CONSTITUTION OF THE STATE OF NEVADA TO BE SUBMITTED TO THE PEOPLE FOR RATIFICATION, TUESDAY, JANUARY 19TH, 1864 at 3 (1863).
226. *Id.* art. I, § 4.
227. *See id.*
228. *Id.*

contained the phrase "[s]o help me God."[229]

Article XII, section 2 required the legislature to provide a limited system of free and compulsory public education with the proviso that "no sectarian instruction shall be allowed at any public school established by them."[230] When called upon to construe a subsequent amendment stating that "[n]o public funds of any kind or character whatever, state, county, or municipal, shall be used for sectarian purposes," the Nevada Supreme Court had occasion to consider what the original prohibition of sectarian instruction meant.[231] Although the term "sectarian" was given a broad meaning, the court did not frame the purpose of the prohibition as advancing any individual interest in being free from sectarian instruction.[232] Instead, the court stated the underlying interest as one of preventing sectarian discrimination tending to build up one sect in preference to another.[233] "The word 'sectarian,' in the amendment, is evidently used in the same sense as in the original constitution. It was intended that public funds should not be used, directly or indirectly, for the building up of any sect."[234]

Indiana ratified the Fourteenth Amendment on January 29, 1867.[235] The Indiana Constitution of 1851 endorsed religion in its preamble in these terms: "To the end, that justice be established, public order maintained, and liberty perpetuated; We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution."[236] Rights of free exercise and guarantees of nonestablishment were set forth in sections 2 through 8 of article I.[237] Nonestablishment values were stated in terms of noncoercion, nondiscrimination, a lack of civil effect for religious opinion, and nonappropriation for religious

229. *Id.* art. XVI, § 2.
230. *Id.* art. XII, § 2.
231. State *ex rel.* Nev. Orphan Asylum v. Hallock, 16 Nev. 373, 377 (1882).
232. *Id.* at 386–87.
233. *Id.* at 387.
234. *Id.*
235. 15 Stat. 708, 710 (1868). The GPO and Flack both give the date as January 23. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 177.
236. IND. CONST. of 1851, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF INDIANA AND THE ADDRESS OF THE CONSTITUTIONAL CONVENTION 1 (New Albany, Kent & Norman 1851).
237. *Id.* art. I, §§ 2–8.

purposes.[238] These provisions recited:

> Section 2. All men shall be secured in the natural right to worship Almighty God, according to the dictates of their own consciences.
> Section 3. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.
> Section 4. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.
> Section 5. No religious test shall be required, as a qualification for any office of trust or profit.
> Section 6. No money shall be drawn from the treasury, for the benefit of any religious or theological institution.
> Section 7. No person shall be rendered incompetent as a witness, in consequence of his opinions on matters of religion.
> Section 8. The mode of administering an oath or affirmation, shall be such as may be most consistent with, and binding upon, the conscience of the person, to whom such oath or affirmation may be administered.[239]

Conscientious objectors were accommodated by article XII, section 6, which provided: "No person conscientiously opposed to bearing arms, shall be compelled to do militia duty; but such person shall pay an equivalent for exemption; the amount to be prescribed by law."[240]

The Missouri Legislature approved the Fourteenth Amendment "on or previous to January 26th, 1867."[241] The Constitution of Missouri of 1865 endorsed religion in its preamble in these terms:

> We, the People of the State of Missouri, grateful to Almighty God, the Sovereign Ruler of Nations, for our State Government, our liberties, and our connection with the American Union, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof, and for the better government of this State, ordain and establish this

238. *See id.*
239. *Id.*
240. *Id.* art. XII, § 6.
241. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 173.

Revised and Amended Constitution.[242]

Natural law rights were declared in article I, section 1 in these words: "That we hold it to be self-evident, that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."[243] Free exercise and nonestablishment guarantees were declared in article I, sections 9 through 11.[244] Nonestablishment values were expressed in terms of no civil effect for religious opinions, noncompulsion, and nondiscrimination.[245] Article I, section 9 provided:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no person can, on account of his religious opinions, be rendered ineligible to any office of trust or profit under this State, nor be disqualified from testifying, or from serving as a juror; that no human authority can control or interfere with the rights of conscience; and that no person ought, by any law, to be molested in his person or estate, on account of his religious persuasion or profession; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace, or safety of the State, or with the rights of others.[246]

Article I, section 10 recited:

> That no person can be compelled to erect, support, or attend any place of worship, or to maintain any minister of the Gospel or teacher of religion; but whatever contracts any person may enter into for any such object ought, in law, to be binding and capable of enforcement, as other contracts."[247]

Article I, section 11 stated: "That no preference can ever be given, by law, to any church, sect, or mode of worship.[248]

This constitution had two unusual restrictions on church property. Article I, section 12 provided:

> That no religious corporation can be established in this State;

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242. MO. CONST. of 1865, pmbl., *reprinted in* THE NEW CONSTITUTION OF THE STATE OF MISSOURI 5 (St. Louis, McKee, Fishback & Co. 1865).
243. *Id.* art. I, § 1.
244. *Id.* art. I, §§ 9–11.
245. *See id.*
246. *Id.* art. I, § 9.
247. *Id.* art. I, § 10.
248. MO. CONST. of 1865, art. I, § 11.

> except that by a general law, uniform throughout the State, any church, or religious society or congregation may become a body corporate, for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship, a chapel, a parsonage, and a burial ground, and managing the same, and contracting in relation to such land, and the buildings thereon, through a board of trustees, selected by themselves; but the quantity of land to be held by any such body corporate, in connection with a house of worship or a parsonage, shall not exceed five acres in the country, or one acre in a town or city.[249]

Article I, section 13 stated:

> That every gift, sale or devise of land to any minister, public teacher, or preacher of the Gospel, as such, or to any religious sect, order, or denomination; or to or for the support, use, or benefit of, or in trust for, any minister, public teacher, or preacher of the Gospel, as such, or any religious sect, order, or denomination; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use, or benefit; and also every devise of goods or chattels, to or for the support, use or benefit of any minister, public teacher, or preacher of the Gospel, as such, or any religious sect, order, or denomination, shall be void; except always any gift, sale or devise of land to a church, religious society or congregation, or to any person or persons in trust for the use of a church, religious society or congregation, whether incorporated or not, for the uses and purposes, and within the limitations of the next preceding clause of this Article.[250]

Article II, section 9 not only conditioned the practice of law upon the taking of an oath of loyalty but further provided that after the time specified for taking the oath no person shall "be competent as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, sect, or denomination, to teach, or preach, or solemnize marriages, unless such person shall have first taken, subscribed, and filed said oath."[251] Article II, section 12 permitted affirmation in lieu of an oath.[252]

Rhode Island ratified the Fourteenth Amendment February 7,

249. *Id.* art. I, § 12.
250. *Id.* art. I, § 13.
251. *Id.* art. II, § 9.
252. *Id.* art. II, § 12.

1867.[253] The Rhode Island Constitution of 1842, in a preface to its bill of rights, spoke of an intention "to secure the religious and political freedom established here by our venerated ancestors . . . ."[254] Free exercise and nonestablishment guarantees appear together in article I, section 20, following an express endorsement of religion. Article I, section 20 provides:

> Whereas Almighty God hath created the mind free; and all attempts to influence it, by temporal punishments or burthens, or by civil incapacitations, tend to beget habits of hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migrations to this country, and their settlement of this State, was, as they expressed it, to hold forth a lively experiment, that a flourishing civil state, may stand, and be best maintained, with full liberty in religious concernments; We therefore declare that no man shall be compelled to frequent or support any religious worship, place or ministry whatever; nor enforced, restrained, molested or burthened in his body or goods; nor disqualified from holding any office; nor otherwise suffer, on account of his religious belief. And that all men shall be free to profess, and by argument to maintain their opinion in matters of religion; and that the same shall in no wise diminish, enlarge or affect their civil capacities.[255]

Pennsylvania ratified the Fourteenth Amendment on February 13, 1867.[256] The Constitution of Pennsylvania of 1838 protected church schools through the guarantee of article VII, section 3.[257] That provision stated: "The rights, privileges, immunities, and estates of religious societies and corporate bodies shall remain as if the constitution of this State had not been altered or amended."[258] Free exercise and nonestablishment guarantees were combined in article IX, section 3 which provided:

> All men have a natural and indefeasible right to worship

253. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 176.

254. R.I. CONST. of 1842, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS AS ADOPTED BY THE CONVENTION, ASSEMBLED AT PROVIDENCE, NOVEMBER, 1841, at 3 (Providence, Knowles & Vose 1842).

255. *Id.* art. I, § 20.

256. 15 Stat. 708, 710 (1868); FLACK, *supra* note 127, at 178–79. According to the Government Printing Office, the date was February 12. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.

257. PA. CONST. of 1838, art. VII, § 3, *reprinted in* CONSTITUTIONS OF PENNSYLVANIA, ANALYTICALLY INDEXED AND WITH INDEX OF LEGISLATION PROHIBITED IN PENNSYLVANIA 148 (1916).

258. *Id.*

> Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any such case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship.[259]

By implication, officeholders were obligated through the operation of article IX, section 4 to believe in a future state of rewards and punishment.[260] That provision took this form: "No person who acknowledges the being of a God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth."[261]

The Fourteenth Amendment was ratified by Wisconsin on February 13, 1867.[262] The Wisconsin Constitution of 1848 endorsed religion in its preamble in these terms: "We the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility, and promote the general welfare, do establish this constitution."[263] Rights of free exercise and nonestablishment guarantees were set forth in article I, sections 18 and 19.[264] Nonestablishment values were viewed as involving noncoercion, nondiscrimination, no civil effect of religious opinion, and no taxpayer funding of religion.[265] Article I, section 18 read:

> The right of every man to worship Almighty God according to the dictates of his own conscience, shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent. Nor shall any control of, or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments, or mode of worship. Nor

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259. *Id.* art. IX, § 3.
260. *Id.* art. IX, § 4.
261. *Id.*
262. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6. It passed in the legislature on February 7. FLACK, *supra* note 127, at 178.
263. WIS. CONST. of 1848, pmbl., *reprinted in* THE REVISED STATUTES OF THE STATE OF WISCONSIN, PASSED AT THE SECOND SESSION OF THE LEGISLATURE, COMMENCING JANUARY 10, 1849: TO WHICH ARE PREFIXED THE DECLARATION OF INDEPENDENCE, AND THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF WISCONSIN 19 (1849).
264. *Id.* art. I, §§ 18–19.
265. *See id.*

> shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.[266]

Article I, section 19 provided: "No religious tests shall ever be required as a qualification for any office of public trust, under the state, and no person shall be rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion."[267]

Article X, sections 3 and 6 prohibited sectarian instruction in the public schools and at the state university, respectively.[268] When the Supreme Court of Wisconsin had occasion in *Wisconsin ex rel. Weiss v. District Board of School District No. 8 of Edgerton*, to construe the meaning of "sectarian" it struck down Bible reading in public schools on the ground that various denominations disagreed about which Bible to use.[269] Nevertheless, the court said that the Bible could be used for moral instruction because "[n]o more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the ten commandments" and "[c]oncerning the fundamental principles of moral ethics, the religious sects do not disagree."[270] This demonstrates that the prohibition did not strike against governmental endorsement of religion as such.

Massachusetts ratified the Fourteenth Amendment on March 20, 1867.[271] The Constitution of Massachusetts of 1780 endorsed religion in its preamble wherein "the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe . . . ."[272] Free exercise and nonestablishment guarantees were set forth in Part the First, article II in this form:

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be

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266. *Id.* art. I, § 18.
267. *Id.* art. I, § 19.
268. *Id.* art. X, §§ 3, 6.
269. 44 N.W. 967, 973–74 (Wis. 1890).
270. *Id.* at 974.
271. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 188.
272. MASS. CONST. of 1780, pmbl., *reprinted in* THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 13 (1860), *available at* http://ia600400.us.archive.org/34/items/generalstatutesо1860mass/generalstatutesо1860mass.pdf (last visited Dec. 15, 2012).

> hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[273]

Article III had originally provided for the support of religion through public taxation but had been altered in 1833 through the Eleventh Amendment to the Massachusetts Constitution.[274] That amendment recited:

> As the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people, and the security of a republican government; therefore, the several religious societies of this commonwealth, whether corporate or unincorporate, at any meeting legally warned and holden for that purpose, shall ever have the right to elect their pastors or religious teachers, to contract with them for their support, to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction, and for the payment of necessary expenses: and all persons belonging to any religious society shall be taken and held to be members, until they shall file with the clerk of such society, a written notice, declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract, which may be thereafter made, or entered into by such society: and all religious sects and denominations, demeaning themselves peaceably and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.[275]

Constitutionally required oaths originally included a declaration of belief in "the christian religion," but this requirement for a test oath was abolished in 1821 through the Seventh Amendment.[276] The oath of allegiance was also modified although it continued to take the form of an oath, without option for affirmation, and ending with "[s]o help me God."[277] The oath of office did give the option of affirmation but concluded as well with "[s]o help me God."[278]

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273. *Id.* pt. I, art. II.
274. *Id.* art. III (1833).
275. *Id.*
276. *Id.* pt. II, ch. II, § 1, art. III; *Id.* § 1, art. III (1821).
277. *Id.* ch. VI, art. I.
278. *Id.*

Nebraska ratified the Fourteenth Amendment on June 15, 1867.[279] The Nebraska Constitution of 1866 endorsed religion in its preamble in these terms: "We, the people of Nebraska, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility, and promote the general welfare, do establish this Constitution."[280] Free exercise and nonestablishment guarantees were combined in article I, section 16, together with an endorsement of the effects of religion on good government.[281] Nonestablishment values were understood as encompassing noncoercion, nondiscrimination, and no civil effect of religious opinion.[282] Article I, section 16 read:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.[283]

Article VII, section 1 provided that "no religious sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state.[284]

In less than a year from submission, twenty-two states had ratified, although two had purported to rescind.[285] During the course of that year, Kentucky, Delaware, and Maryland had

279. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.

280. NEB. CONST. of 1866, pmbl., *reprinted in* THE GENERAL STATUTES OF THE STATE OF NEBRASKA COMPRISING ALL LAWS OF A GENERAL NATURE IN FORCE, SEPTEMBER 1, 1873, at 51 (1873).

281. *Id.* art. I, § 16.

282. *See id.*

283. *Id.*

284. *Id.* art. VII, § 1.

285. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.

rejected it.[286]

Article VII of the Kentucky Constitution of 1850, regulating the militia, provided in section 1 that "those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled to do so, but shall pay an equivalent for personal services."[287] The form of the oath or affirmation appearing in article VIII, section 1 ended in either event with "[s]o help me God."[288] Free exercise and nonestablishment guarantees were contained in article XIII, sections 5 and 6.[289] Nonestablishment values were held to include noncoercion, nondiscrimination, and a prohibition on religious opinion having civil consequences; specifically, article XIII, section 5 provided:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies or modes of worship."[290]

Article XIII, section 6 stated: "That the civil rights, privileges, or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion."[291]

The Delaware Constitution of 1831 endorsed religion in its preamble in these terms:

> We, the People, hereby ordain and establish this constitution of government for the state of Delaware. Through divine goodness, all men have by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of attaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for the due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of

286. 15 Stat. 708, 710 (1868).
287. KY. CONST. of 1850, art. VII, § 1, *reprinted in* 1 THE REVISED STATUTES OF KENTUCKY 142–43 (1867).
288. *Id.* art. VIII, § 1.
289. *Id.* art. XIII, §§ 5, 6.
290. *Id.* art. XIII, § 5.
291. *Id.* art. XIII, § 6.

> political society is derived from the people, and established with their consent, to advance their happiness: and they may for this end, as circumstances require, from time to time alter their constitution of government.[292]

Free exercise and nonestablishment guarantees are found in article I, sections 1 and 2.[293] Nonestablishment values comprehended noncoercion and nondiscrimination.[294] Article I, section 1 provided:

> Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe; and piety and morality, on which the prosperity of communities depends, are thereby promoted; yet no man shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.[295]

Article I, § 2 stated: "No religious test shall be required as a qualification to any office, or public trust, under this State."[296]

The legislature that rejected the Fourteenth Amendment was the same one that called the Maryland Constitutional Convention of 1867. The Maryland Constitution of 1867 endorsed religion in its preamble in these terms: "We, the People of the State of Maryland, Grateful to Almighty God for our Civil and Religious Liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare . . . ."[297]

Articles 36, 37, 38 and 39 of the Declaration of Rights addressed religion.[298] Article 36 provided:

> That as it is the duty of every man to worship God in such

292. DEL. CONST. of 1831, pmbl., *reprinted in* REVISED STATUTES OF THE STATE OF DELAWARE xxiii (Wilmington, James & Web 1874).
293. *Id.* art. I, §§ 1, 2.
294. *See id.*
295. *Id.* art. I, § 1.
296. *Id.* art. I, § 2.
297. MD. CONST. of 1867, pmbl., *reprinted in* THE CONSTITUTION OF THE STATE OF MARYLAND 13 (John Muephy & Co. 1867).
298. *Id.* Declaration of Rights, art. 36–39.

> manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any Law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or the world to come.[299]

Article 37 stated:

> That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.[300]

Article 38 continued:

> That every gift, sale or devise of land, to any Minister, Public Teacher or Preacher of the gospel, as such, or to any Religious Sect, Order or Denomination, or to, or for the support, use or benefit of, or in trust for, any Minister, Public Teacher or Preacher of the gospel, as such, or any Religious Sect, Order or Denomination; and every gift or sale of goods, or chattels, to go in succession, or to take place after the death of the Seller or Donor, to or for such support, use or benefit; and also every devise of goods or chattels to or for the support, use, or benefit of any Minister, Public Teacher or Preacher of the gospel, as such, or any Religious Sect, Order, or Denomination, without the prior, or subsequent, sanction of the Legislature, shall be void; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres, for a church, meeting house, or other house of worship, or parsonage, or for a burying ground, which shall be improved, enjoyed, or used only for such purpose; or such sale, gift, lease, or devise shall be void.[301]

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299. *Id.* art. 36.
300. *Id.* art. 37.
301. *Id.* art. 38.

Article 39 read: "That the manner of administering an oath or affirmation to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being."[302] Article 3, section 11 of the Maryland Constitution provided that "[n]o Minister or Preacher of the Gospel, or of any religious creed, or denomination, and no person holding any civil office of profit, or trust, under this State, except Justices of the Peace, shall be eligible as Senator, or Delegate."[303] Although nonestablishment values appear in the form of prohibitions on coercion and discrimination, atheism was allowed to have civil effect.

With the ratification of the Fourteenth Amendment by Iowa in the spring of 1868,[304] the proponents of the Fourteenth Amendment had run out of available states outside of the defeated Confederacy because California had a divided legislature and found it futile to bring up the amendment.[305] The Iowa Constitution of 1857 endorsed religion in its preamble in these terms: "We, the People of the State of Iowa, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa . . . ."[306] Free exercise and nonestablishment guarantees were found at article I, sections 3 and 4.[307] Article I, section 3 provided:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry.[308]

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302. *Id.* art. 39.

303. *Id.* art. 3, § 11.

304. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 189. The legislature ratified on March 9, although Seward gave the date as April 3.

305. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 207. In an act of symbolism, California ratified in 1959, as did Maryland. Delaware had done so in 1901.

306. IOWA CONST. of 1857, pmbl., *reprinted in* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 3 (1857).

307. *Id.* art. I, §§ 3, 4.

308. *Id.* § 3.

Article I, section 4 stated:

> No religious test shall be required as a qualification for any office or public trust, and no person shall be deprived of any of his rights, privileges or capacities, or disqualified from the performance of any of his public or private duties, or rendered incompetent to give evidence in any court of law or equity, in consequence of his opinions on the subject of religion; and any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law.[309]

Article VI, section 2 accommodated conscientious objectors through this language: "No person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace: Provided, That such person or persons shall pay an equivalent for such exemption in the same manner as other citizens."[310]

The California Constitution of 1849 endorsed religion in its preamble in these terms: "We, the people of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution."[311] Free exercise and nonestablishment guarantees were set forth in article I, section 4.[312] Nonestablishment values were expressed in terms of nondiscrimination and lack of civil effect of religious opinion.[313] Article I, section 4 provided:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[314]

Article XI, section 3 prohibited test oaths.[315]

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309. *Id.* § 4.
310. *Id.* art. VI, § 2.
311. CAL. CONST. of 1849, pmbl., *reprinted in* THE GENERAL LAWS OF THE STATE OF CALIFORNIA FROM 1850 TO 1864, INCLUSIVE 26 (1872).
312. *Id.* art. I, § 4.
313. *See id.*
314. *Id.*
315. *Id.* art. XI, § 3.

Seward in his proclamation recognized that the former rebel states of Virginia, North Carolina, South Carolina, and Texas had rejected the Fourteenth Amendment during Presidential Reconstruction.[316] Under the Reconstruction Acts, southern states were to be readmitted only after adopting new constitutions and ratifying the Fourteenth Amendment.[317]

The first to do so was Arkansas in the spring of 1868.[318] The new Arkansas Constitution endorsed religion in its preamble in these terms: "We, the people of Arkansas, grateful to God for our civil and religious liberty and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution . . . ."[319] Religion was addressed in article I, sections 21 and 23.[320] Article I, section 21 provided:

> No religious test or amount of property shall ever be required as a qualification for any office of public trust under the State. No religious test or amount of property shall ever be required as a qualification of any voter at any election in this State; nor shall any person be rendered incompetent to give evidence in any court of law or equity in consequence of his opinion upon the subject of religion; and the mode of administering an oath or affirmation shall be such as shall be most consistent with, and binding upon the conscience of the person to whom such oath or affirmation may be administered.[321]

Article I, section 23 stated: "Religion, morality and knowledge being essential to good government, the General Assembly shall pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship; and to encourage schools and the means of instruction."[322]

Article IX, section 1 dictated that "no religious or other sect or sects shall ever have any exclusive right to, or control of any part of the school funds of this State."[323] Article XI, section 1 accommodated conscientious objectors by providing that "all

316. 15 Stat. 708, 710 (1868).
317. 15 Stat. 1, 14 (1867).
318. April 6 according to Secretary Seward and the Government Printing Office. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6. April 13 according to Flack. FLACK, *supra* note 127, at 190.
319. ARK. CONST. of 1868, pmbl., *reprinted in* THE CONSTITUTION OF THE STATE OF ARKANSAS 1 (1870).
320. *Id.* art. I, § 21, 23.
321. *Id.* § 21.
322. *Id.* art. I, § 23.
323. *Id.* art. IX, § 1.

citizens of any denomination whatever who from scruples of conscience may be adverse to bearing arms, shall be exempt [from militia service], upon such conditions as may be prescribed by law."[324]

Florida ratified on June 9, 1868.[325] The new constitution endorsed religion in its preamble in these terms: "We, the people of the State of Florida, grateful to Almighty God for our freedom, in order to secure its blessings and form a more perfect government, insuring domestic tranquility, maintaining public order, perpetuating liberty, and guaranteeing equal civil and political rights to all, do establish this Constitution."[326] Religious freedom was defined in this fashion in section 4 of the Declaration of Rights:

> The free exercise and enjoyment of religious profession and worship shall forever be allowed in this State, and no person shall be rendered incompetent as a witness on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to justify licentiousness or practices subversive of the peace and safety of the State.[327]

Nonestablishment guarantees were provided entirely in terms of nondiscrimination.[328] Section 23 stated: "No preference can be given by law to any church, sect, or mode of worship."[329] Accommodation of conscientious objectors was left by virtue of article XI, section 1 to the future grace of the legislature.[330] The oath prescribed for officials in article XVI, section 10 did not provide for affirmation and concluded "[s]o help me God."[331]

North Carolina ratified the Fourteenth Amendment on July 2, 1868.[332] The North Carolina Constitution of 1868 endorsed religion in its preamble in these terms:

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324. *Id.*

325. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 190.

326. FLA. CONST. of 1868, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF FLORIDA WITH NOTES OF THE DECISIONS AND OPINIONS OF THE SUPREME COURT UP TO AND INCLUDING JANUARY TERM, 1877 at 3 (1877).

327. *Id.* Declaration of Rights, § 4.

328. *See id.* § 23.

329. *Id.*

330. *Id.* art. XI, § 1 ("but no male citizen of whatever religious creed or opinion shall be exempt from military duty, except upon such conditions as may be prescribed by law.").

331. *Id.* art. XVI, § 10.

332. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 190.

> We, the people of the State of North-Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union, and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him, for the continuance of those blessings to us and our posterity, do, for the more certain security thereof, and for the better government of this State, ordain and establish this Constitution.[333]

The natural law origin of rights was declared in article I, section 1 in language that closely tracked the beginning words of the Declaration of Independence.[334]

Religious liberty was guaranteed in article I, section 26 in these words: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience."[335] In this formulation, free exercise and noncoercion subsume nonestablishment.[336] Article V, section 6 authorized the legislature to exempt from taxation "cemeteries, and property held for educational, scientific, literary, charitable, or religious purposes . . . ."[337] Although the official oath permitted the alternative of affirmation, the form ended with "[s]o help me God" in either case.[338] Article VI, section 5 disqualified "[a]ll persons who shall deny the being of Almighty God" from office.[339] Instead of prohibiting sectarian instruction, article XI, section 1 declared: "Religion, morality, and knowledge being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged."[340] Article XII, section 1 exempted from militia service "all persons who may be adverse to bearing arms, from religious scruples . . . ."[341]

South Carolina ratified the Fourteenth Amendment in early

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333. N.C. CONST. of 1868, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF NORTH CAROLINA TOGETHER WITH THE ORDINANCES AND RESOLUTIONS OF THE CONSTITUTIONAL CONVENTION 3 (1868).
334. *Id.* art. I, § 1.
335. *Id.* art. I, § 26.
336. *See id.*
337. *Id.* art. V, § 6.
338. *Id.* art. VI, § 4.
339. *Id.* art. V, § 5.
340. *Id.* art. XI, § 1.
341. *Id.* art. XII, § 1.

July.[342] The South Carolina Constitution of 1868 endorsed religion in its preamble in these terms:

> We, the People of the State of South Carolina, in Convention assembled, Grateful to Almighty God for this opportunity, deliberately and peaceably of entering into an explicit and solemn compact with each other, and forming a new Constitution of civil government for ourselves and posterity, recognizing the necessity of the protection of the people in all that pertains to their freedom, safety and tranquility, and imploring the direction of the Great Legislator of the Universe, do agree upon, ordain and establish the following . . . .[343]

Article I, section 1 declared the natural law origin of rights in words similar to those in the Declaration of Independence.[344] Article I, section 9 provided for freedom of conscience in these words: "No person shall be deprived of the right to worship God according to the dictates of his own conscience."[345] Article I, section 10 recited: "No form of religion shall be established by law; but it shall be the duty of the General Assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of worship."[346] Noncoercion and nondiscrimination represent the nonestablishment value to be protected.[347] The language suggests that nonestablishment is viewed as advancing free exercise by leaving the form of worship free. Article I, section 30 accommodated conscientious objectors by declaring: "No person who conscientiously scruples to bear arms shall be compelled to do so, but he shall pay an equivalent for personal service."[348] The official oath prescribed by article II, section 30 permitted the option of affirmation but concluded, in either event, "[s]o help me God."[349]

Article X, section 5 provided that "[n]o religious sect or sects

342. 15 Stat. 708, 710 (1868). July 8 according to the GPO. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6. July 9 according to Flack. FLACK, *supra* note 127, at 190.

343. S.C. CONST. of 1868, pmbl., *reprinted in* THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA, ADOPTED APRIL 16, 1868, AND THE ACTS AND JOINT RESOLUTIONS PASSED AT THE SPECIAL SESSION OF 1868 TOGETHER WITH THE MILITARY ORDERS THEREIN RE-ENACTED 3 (Charleston, Denny & Perry 1868).

344. *Id.* art. I, § 1.

345. *Id.* art. I, § 9.

346. *Id.* art. I, § 10.

347. *Id.*

348. *Id.* art. I, § 30.

349. *Id.* art. II, § 30.

shall have exclusive right to, or control of, any part of the school funds of the State, nor shall sectarian principles be taught in the public schools."[350] Whatever "sectarian principles" might include,[351] this provision was not concerned with endorsement of religion, as such, inasmuch as article XIV, section 6 provided: "No person who denies the existence of the Supreme Being shall hold any office under this Constitution."[352]

Louisiana ratified the Fourteenth Amendment on July 9, 1868.[353] The new Constitution devoted minimal attention to religion. Title I, article 12 stated: "Every person has the natural right to worship God according to the dictates of his conscience. No religious test shall be required as a qualification for office."[354] Title VI, article 100 prescribed an official oath that permitted affirmation as an alternative.[355] In either event, the form concluded "[s]o help me God."[356]

Alabama ratified the Fourteenth Amendment on July 13, 1868.[357] The Alabama Constitution of 1868 endorsed religion in its preamble in these terms:

> WE, The People of the State of Alabama, by our Representatives in Convention assembled, in order to establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure to ourselves and to our posterity the rights of life, liberty, and property, invoking the favor and guidance of Almighty God, do ordain and establish the following constitution and form of government for the State of Alabama.[358]

Article I, section 1 recited: "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of

350. *Id.* art. X, § 5.

351. *See* Busby v. Mitchell, 23 S.C. 472, 478 (1885) (describing a school operated on the property of a Lutheran church and taught by the Lutheran minister, one "exclusively owned and controlled by Lutherans," as "non-sectarian").

352. S.C. CONST. of 1868, art. XIV, § 6, *supra* note 343, at 26.

353. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 190–91.

354. LA. CONST. of 1868, tit. I, art. 12, *reprinted in* CONSTITUTION ADOPTED BY THE STATE CONSTITUTIONAL CONVENTION STATE OF LOUISIANA MARCH 7, 1868 at 4 (1868).

355. *Id.* tit. VI, art. 100.

356. *Id.*

357. 15 Stat. 708, 710 (1868); U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 191.

358. ALA. CONST. of 1868, pmbl., *available at* http://www.legislature.state.al.us./misc/history/constitutions/1868/1868.html (last visited Dec. 15, 2012).

happiness."[359] Article I, section 4 provided: "That no person shall be deprived of the right to worship-God according to the dictates of his own conscience."[360] Article I, section 5 declared: "That no religion shall be established by law."[361] Conscientious objection was accommodated by article I, section 29 which stated: "That no person who conscienciously scruples to bear arms shall be compelled to do so, but may pay an equivalent for personal service."[362] Curiously, the constitution returned to the same subject in article X, section 1, purporting to leave the matter to the legislature in these terms: "all citizens of any denomination whatever, who, from scruples of conscience, may be averse to bearing arms, shall be exempt therefrom upon such conditions as may be prescribed by law."[363] Article XV, section 1 prescribed an oath of office that permitted the alternative of affirmation, but in a form that ended, in either event, "[s]o help me God."[364]

Once Alabama ratified, Congress disregarded the two rescissions and declared, by joint resolution, on July 21, that the Fourteenth Amendment had been ratified.[365] Georgia, ratified the same day[366] thereby rendering the rescission issue moot.

The Georgia Constitution of 1868 endorsed religion in its preamble in these terms:

> We, the people of Georgia, in order to form a permanent Government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, acknowledging and invoking the guidance of Almighty God, the author of all good government, do ordain and establish this Constitution for the State of Georgia.[367]

Free exercise and nonestablishment guarantees were joined in article I, section 6.[368] Nonestablishment values included noncoercion and freedom from civil effects for religious opinion

359. *Id.* art. I, § 1.
360. *Id.* art. I, § 4.
361. *Id.* § 5.
362. *Id.* § 29.
363. *Id.* art. X, § 1.
364. *Id.* art. XV, § 1.
365. 15 Stat. 708, 710 (1868).
366. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 191.
367. GA. CONST. of 1868, pmbl., *reprinted in* JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PEOPLE OF GEORGIA 540 (1868).
368. *Id.* art. I, § 6.

but did not include nondiscrimination/sectarian equality.[369] Article I, section 6 provided:

> Perfect freedom of religious sentiment shall be and the same is hereby secured, and no inhabitant of this State shall ever be molested in person or property, or prohibited from holding any public office or trust on account of his religious opinion; but the liberty of conscience, hereby secured, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the people.[370]

Conscientious objection was accommodated in article VIII, section 3 in these words: "No person conscientiously opposed to bearing arms, shall be compelled to do militia duty, but such person shall pay an equivalent for exemption; the amount to be prescribed in law and appropriated to the Common School Fund."[371]

Under Congressional Reconstruction, the remaining southern states still had to adopt a new constitution and ratify to obtain readmission. What Congress was prepared to accept by way of new constitutions provides some additional evidence of the contemporaneous understanding of the values comprehended by nonestablishment.

Virginia ratified the Fourteenth Amendment October 8, 1869.[372] The Underwood Constitution was passed in convention on April 17, 1868.[373] It endorsed the Christian religion in article I, section 18 in these words:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.[374]

The oaths of office set forth in article III, sections 6 and 7 gave

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369. *See id.*
370. *Id.*
371. *Id.* art. VIII, § 3.
372. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6; FLACK, *supra* note 127, at 145.
373. VA. CONST. of 1868, *reprinted in* THE CONSTITUTION OF VIRGINIA FRAMED BY THE CONVENTION WHICH MET IN RICHMOND, VIRGINIA, ON TUESDAY, DECEMBER 3, 1867 (1868).
374. *Id.* art. I, § 18.

the option of affirmation but ended in any case "[s]o help me God."[375] Article V, section 17 provided: "The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law."[376]

Article IX, section 1 accommodated conscientious objectors by providing that "those who belong to religious societies, whose tenets forbid them to carry arms, shall not be compelled to do so, but shall pay an equivalent for personal service."[377] The legislature was authorized by article X, section 3 to exempt "all property used exclusively for State, county, municipal, benevolent, charitable, educational and religious purposes."[378]

Article XI guaranteed church property in these terms:

> The rights of ecclesiastical bodies in and to church property conveyed to them by regular deed of conveyance, shall not be affected by the late civil war, nor by any antecedent or subsequent event, nor by any act of the Legislature purporting to govern the same, but all such property shall pass to, and be held by, the parties set forth in the original deeds of conveyance, or the legal assignees of such original parties holding through or by conveyance, and any act or acts of the Legislature, in opposition thereto, shall be null and void.[379]

Mississippi ratified the Fourteenth Amendment on January 17, 1870.[380] Mississippi's new constitution endorsed religion in its preamble in these terms: "To the end that justice be established, public order maintained, and liberty perpetuated, we, the people of the State of Mississippi, grateful to Almighty God for the free exercise of the right to choose our own form of Government, do ordain this Constitution."[381] Free exercise and nonestablishment guarantees were combined in article I, section 23 in this form:

> No religious test as a qualification for office shall ever be required, and no preference shall ever be given by law to any religious sect or mode of worship, but the free enjoyment of all religious sentiments and the different modes of worship shall

375. *Id.* art. III, §§ 6, 7.
376. *Id.* art. V, § 17.
377. *Id.* art. IX, § 1.
378. *Id.* art. X, § 3.
379. *Id.* art. XI.
380. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.
381. MISS. CONST. of 1868, pmbl., *reprinted in* JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 1868, at 720 (1871).

> ever be held sacred; *Provided*, The rights hereby secured, shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the State.[382]

Nondiscrimination in education was provided for in section 21:

> No public money or moneys shall be appropriated for charitable or other public institution in this State, making any distinction among the citizens thereof; *Provided*, That nothing herein contained shall be so construed as to prevent the Legislature from appropriating the school fund in accordance with the article in this Constitution relating to public schools.[383]

Article VIII, section 9 also decreed: "No religious sect or sects shall ever control any part of the school or university funds of this State."[384] Article XII, section 3 barred atheists from office in these words: "No person who denies the existence of a Supreme Being shall hold any office in this State."[385] The form of the oath provided by article XII, section 26 permitted the option of affirmation but ended, in either event, with "[s]o help me God."[386]

Texas ratified the Fourteenth Amendment on February 18, 1870.[387] Religion was endorsed in the new constitution in its preamble in these terms: "We, the People of Texas, acknowledging with gratitude the grace of God, in permitting us to make a choice of our form of government, do hereby ordain and establish this Constitution."[388] Religious tests were prohibited by article I, section 3.[389] Free exercise and nonestablishment guarantees were combined in article I, section 4.[390] Nonestablishment values were understood in terms of noncoercion and nondiscrimination.[391] Article I, section 4 provided:

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382. *Id.* art. I, § 23.
383. *Id.* art. I, § 23.
384. *Id.* art. VIII, § 9.
385. *Id.* art. XII, § 3.
386. *Id.* § 26.
387. U.S. GOVERNMENT PRINTING OFFICE, *supra* note 177, at 30 n.6.
388. TEX. CONST. of 1869, pmbl., *reprinted in* CONSTITUTION OF THE STATE OF TEXAS, ADOPTED BY THE CONSTITUTIONAL CONVENTION CONVENED UNDER THE RECONSTRUCTION ACTS OF CONGRESS PASSED MARCH 2, 1867, AND THE ACTS SUPPLEMENTARY THERETO; TO BE SUBMITTED FOR RATIFICATION OR REJECTION AT AN ELECTION TO TAKE PLACE ON THE FIRST MONDAY OF JULY, 1869, at 3 (1869).
389. *Id.* art. I, § 3.
390. *Id.* § 4.
391. *Id.*

> All men have a natural and indefeasible right to worship God according to the dictates of their own consciences. No man shall be compelled to attend, erect, or support any place of worship; or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control, or interfere with the rights of conscience in matters of religion; and no preference shall ever be given, by law, to any religious societies or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect every religious denomination in the peaceable enjoyment of their own mode of public worship.[392]

Article XII, section 31 permitted priests and ministers to serve in the legislature on these terms: "No minister of the gospel, or priest of any denomination whatever, who accepts a seat in the Legislature, as Representative, shall, after such acceptance be allowed to claim exemption from military service, road duty, or serving on juries, by reason of said profession."[393]

IV. TABULATION OF REPRESENTATIVE CHARACTERISTICS

Twenty-six states gave thanks to God or otherwise invoked divine aid in the preambles to their constitutions, while eighteen employed the Biblical name "Almighty God."[394]

Connecticut[395]	New Jersey*[396]
New York*[397]	Ohio*[398]
Kansas*[399]	Illinois*[400]
Minnesota[401]	Maine[402]
Nevada*[403]	Indiana*[404]

392. *Id.*
393. *Id.* art. XII, § 31.
394. The states with preambles invoking God are listed in Table I in the order in which they are discussed in this article. States employing the name "Almighty God" are marked with an asterisk.
395. CONN. CONST. of 1818, pmbl.
396. N.J. CONST. of 1844, pmbl.
397. N.Y. CONST. of 1846, pmbl.
398. OHIO CONST. of 1851, pmbl.
399. KAN. CONST. of 1859, pmbl.
400. ILL. CONST. of 1848, pmbl.
401. MINN. CONST. of 1858, pmbl.
402. ME. CONST. of 1820, pmbl.
403. NEV. CONST. of 1864, pmbl.
404. IND. CONST. of 1851, pmbl.

Missouri*[405]	Wisconsin*[406]
Massachusetts[407]	Nebraska*[408]
Delaware[409]	Maryland*[410]
Iowa[411]	California*[412]
Arkansas[413]	Florida*[414]
North Carolina*[415]	South Carolina*[416]
Alabama*[417]	Georgia*[418]
Mississippi*[419]	Texas[420]

Table I

Ohio also declared religion to be essential to good government in the body of its constitution.[421] The Massachusetts constitution also endorsed religion in its Eleventh Amendment.[422] Nebraska,[423] Maryland,[424] Arkansas[425] and North Carolina[426] invoked God or endorsed religion in text outside of the preamble.

An additional five states—New Hampshire,[427] Tennessee,[428] Vermont,[429] Rhode Island,[430] and Virginia[431]—endorsed religion in the text of their constitutions outside of any preamble, raising

405. MO. CONST. of 1865, pmbl.
406. WIS. CONST. of 1848, pmbl.
407. MASS. CONST. of 1780, pmbl.
408. NEB. CONST. of 1866, pmbl.
409. DEL. CONST. of 1831, pmbl.
410. MD. CONST. of 1867, pmbl.
411. IOWA CONST. of 1857, pmbl.
412. CAL. CONST. of 1849, pmbl.
413. ARK. CONST. of 1868, pmbl.
414. FLA. CONST. of 1868, pmbl.
415. N.C. CONST. of 1868, pmbl.
416. S.C. CONST. of 1868, pmbl.
417. ALA. CONST. of 1868, pmbl.
418. GA. CONST. of 1868, pmbl.
419. MISS. CONST. of 1868, pmbl.
420. TEX. CONST. of 1869, pmbl.
421. OHIO CONST. of 1851, art. I, § 7.
422. MASS. CONST. of 1780, pt. I, art. III (1833).
423. NEB. CONST. of 1866, art. I, § 16.
424. MD. CONST. of 1867, Declaration of Rights, art. 36–39.
425. ARK. CONST. of 1868, art. I, § 23.
426. N.C. CONST. of 1868, art. I, § 26.
427. N.H. CONST. of 1851, art. I, § 6.
428. TENN. CONST. of 1834, art. I, § 3.
429. VT. CONST. of 1777, art I, § 3.
430. R.I. CONST. of 1842, art. I, § 20.
431. VA. CONST. of 1868, art. V, § 17.

the tally of states expressly endorsing religion to thirty-one. Virginia spoke of "the mutual duty of all to practice Christian forbearance, love and charity towards each other."[432]

Six states—Tennessee,[433] Pennsylvania,[434] Maryland,[435] North Carolina,[436] South Carolina,[437] and Mississippi[438]—permitted or required civil disabilities for atheists.

Fourteen states had a form of oath or oath/affirmation that contained a mandatory "[s]o help me God."[439] This perhaps should add Louisiana and Kentucky to the tally, bringing the number of states expressly endorsing religion to thirty-four.[440]

Because Oregon brought God into its constitution by declaring free exercise a natural right,[441] and both Michigan[442] and Kentucky[443] referred to Almighty God in their free exercise guarantees, perhaps they should be regarded as tacit endorsers. If so, that brings the tally to thirty-six and leaves West Virginia as the outlier state.

With respect to the protection of nonestablishment values, only Louisiana failed to make a clear guarantee beyond a prohibition of a religious test oath.[444] At least twenty-two states

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432. *Id.*

433. TENN. CONST. of 1834, art. IX, § 2.

434. PA. CONST. of 1838, art. IX, § 4.

435. MD. CONST. of 1867, Declaration of Rights, art. 37.

436. N.C. CONST. of 1868, art. V, § 5.

437. S.C. CONST. of 1868, art. XIV, § 6.

438. MISS. CONST. of 1868, art. XII, § 3.

439. ALA. CONST. of 1868, art. XV, § 1; FLA. CONST. of 1868, art. XVI, § 10; ILL. CONST. of 1848, art. XIII, § 26; KY. CONST. of 1850, art. VIII, § 1; LA. CONST. of 1868, tit. VI, art. 100; ME. CONST. of 1820, art. IX, § 1; MASS. CONST. of 1780, pt. II, ch. VI, art. I; MISS. CONST. of 1868, art. XII, § 26; NEV. CONST. of 1864, art. XVI, § 2; N.H. CONST. of 1851, art. II, § 93; N.C. CONST. of 1868, art. VI, § 4; S.C. CONST. of 1868, art. II, § 30; VA. CONST. of 1868, art. III, §§ 6, 7.

440. ALA. CONST. of 1868, pmbl.; ARK. CONST. of 1868, pmbl.; CAL. CONST. of 1849, pmbl.; CONN. CONST. of 1818, pmbl.; DEL. CONST. of 1831, pmbl.; FLA. CONST. of 1868, pmbl.; GA. CONST. of 1868, pmbl.; ILL. CONST. of 1848, pmbl.; IND. CONST. of 1851, pmbl.; IOWA CONST. of 1857, pmbl.; KAN. CONST. of 1859, pmbl.; KY. CONST. of 1850, art. VIII, § 1; LA. CONST. of 1868, tit. VI, art. 100; ME. CONST. of 1820, pmbl.; MD. CONST. of 1867, pmbl.; MASS. CONST. of 1780, pmbl.; MINN. CONST. of 1858, pmbl.; MISS. CONST. of 1868, pmbl.; MO. CONST. of 1865, pmbl.; NEB. CONST. of 1866, pmbl.; NEV. CONST. of 1864, pmbl.; N.H. CONST. of 1851, art. I, § 6; N.J. CONST. of 1844, pmbl.; N.Y. CONST. of 1846, pmbl.; N.C. CONST. of 1868, pmbl.; OHIO CONST. of 1851, pmbl.; R.I. CONST. of 1842, art. I, § 20; S.C. CONST. of 1868, pmbl.; TENN. CONST. of 1834, art. I, § 3; TEX. CONST. of 1869, pmbl.; VT. CONST. of 1777, art I, § 3; VA. CONST. of 1868, pmbl.; WIS. CONST. of 1848, pmbl.

441. OR. CONST. of 1857, art. I, § 2.

442. MICH. CONST. of 1850, art. IV, § 39.

443. KY. CONST. of 1850, art. XIII, § 5.

444. LA. CONST. of 1868, tit. I, art. 12.

combined free exercise and nonestablishment guarantees in a way that suggests that those guarantees were regarded as complementary aspects of a unitary right of conscience:

Connecticut[445]	Tennessee[446]
New Jersey[447]	Vermont[448]
New York[449]	Ohio[450]
Kansas[451]	Illinois[452]
Michigan[453]	West Virginia[454]
Minnesota[455]	Maine[456]
Nevada[457]	Rhode Island[458]
Pennsylvania[459]	Massachusetts[460]
Nebraska[461]	California[462]
Georgia[463]	Virginia[464]
Mississippi[465]	Texas[466]

Table II

Twenty-seven states understood nonestablishment values to comprehend nondiscrimination:

Connecticut[467]	New Hampshire[468]

445. CONN. CONST. of 1818, art. I, § 3.
446. TENN. CONST. of 1834, art. I, § 3.
447. N.J. CONST. of 1844, pmbl.
448. VT. CONST. of 1777 art. I, § 3.
449. N.Y. CONST. of 1846, art. I, § 3.
450. OHIO CONST. of 1851, art. I, § 7.
451. KAN. CONST. of 1859, Bill of Rights, § 7.
452. ILL. CONST. of 1848, art. XIII, § 3.
453. MICH. CONST. of 1850, art. IV, § 39.
454. W. VA. CONST. of 1863, art. II, § 9.
455. MINN. CONST. of 1858, art. I, § 16.
456. ME. CONST. of 1820, art. I, § 3.
457. NEV. CONST. of 1864, art. I, § 4.
458. R.I. CONST. of 1842, art. I, § 20.
459. PA. CONST. of 1838, art. IX, § 3.
460. MASS. CONST. of 1780, pt. I, art. II.
461. NEB. CONST. of 1866, art. I, § 16.
462. CAL. CONST. of 1849, art. I, § 4.
463. GA. CONST. of 1868, art. I, § 6.
464. VA. CONST. of 1868, art. I, § 18.
465. MISS. CONST. of 1868, art. I, § 23.
466. TEX. CONST. of 1869, art. I, § 4.

Tennessee[469]	Vermont[470]
New York[471]	Ohio[472]
Kansas[473]	Illinois[474]
West Virginia[475]	Minnesota[476]
Maine[477]	Nevada[478]
Indiana[479]	Delaware[480]
Maryland[481]	California[482]
Arkansas[483]	Florida[484]
South Carolina[485]	Virginia[486]
Mississippi[487]	Texas[488]
New Jersey[489]	Missouri[490]
Wisconsin[491]	Nebraska[492]
Kentucky[493]	

Table III

Twenty-six states expressed nonestablishment values in terms that guaranteed noncoercion:

467. CONN. CONST. of 1818, art. I, § 3.
468. N.H. CONST. of 1851, art. I, § 5.
469. TENN. CONST. of 1834, art. I, § 3.
470. VT. CONST. of 1777, art. I, § 3.
471. N.Y. CONST. of 1846, art. I, § 3.
472. OHIO CONST. of 1851, art. I, § 7.
473. KAN. CONST. of 1859, Bill of Rights, § 7.
474. ILL. CONST. of 1848, art. XIII, § 3.
475. W. VA. CONST. of 1863, art. II, § 9.
476. MINN. CONST. of 1858, art. I, § 16.
477. ME. CONST. of 1820, art. I, § 3.
478. NEV. CONST. of 1864, art. I, § 4.
479. IND. CONST. of 1851, art. I, §§ 2–8.
480. DEL. CONST. of 1831, art. I, §§ 1, 2.
481. MD. CONST. of 1867, Declaration of Rights, art. 36.
482. CAL. CONST. of 1849, art. I, § 4.
483. ARK. CONST. of 1868, I, § 23.
484. FLA. CONST. of 1868, Declaration of Rights, § 23.
485. S.C. CONST. of 1868, art. I, § 10.
486. VA. CONST. of 1868, art. I, § 18.
487. MISS. CONST. of 1868, art. I, § 23.
488. TEX. CONST. of 1869, art. I, § 4.
489. N.J. CONST. of 1844, art. I, §§ 3, 4.
490. MO. CONST. of 1865, art. I, §§ 9–11.
491. WIS. CONST. of 1848, art. I, §§ 18–19.
492. NEB. CONST. of 1866, art. I, § 16.
493. KY. CONST. of 1850, art. XIII, § 5.

New Hampshire[494]	Vermont[495]
New Jersey[496]	Missouri[497]
Ohio[498]	Kansas[499]
Illinois[500]	Michigan[501]
West Virginia[502]	Minnesota[503]
Maine[504]	Indiana[505]
Rhode Island[506]	Pennsylvania[507]
Wisconsin[508]	Massachusetts[509]
Nebraska[510]	Kentucky[511]
Delaware[512]	Maryland[513]
Iowa[514]	North Carolina[515]
South Carolina[516]	Georgia[517]
Virginia[518]	Texas[519]

Table IV

Eighteen states had somewhat broad or complete guarantees that religious opinion would not have civil affects:

494. N.H. CONST. of 1851, art. I, § 6.
495. VT. CONST. of 1777, art. I, § 3.
496. N.J. CONST. of 1844, art. I, § 4.
497. MO. CONST. of 1865, art. I, § 9.
498. OHIO CONST. of 1851, art. I, § 7.
499. KAN. CONST. of 1859, Bill of Rights, § 7.
500. ILL. CONST. of 1848, art. XIII, § 3.
501. MICH. CONST. of 1850, art. XVII, § 1.
502. W. VA. CONST. of 1863, art. II, § 9.
503. MINN. CONST. of 1858, art. I, § 16.
504. ME. CONST. of 1820, art. I, § 3.
505. IND. CONST. of 1851, art. I, §§ 2–8.
506. R.I. CONST. of 1842, art. I, § 20.
507. PA. CONST. of 1838, art. IX, § 3.
508. WIS. CONST. of 1848, art. I, §§ 18–19.
509. MASS. CONST. of 1780, pt. I, art. III (1833).
510. NEB. CONST. of 1866, art. I, § 16.
511. KY. CONST. of 1850, art. XIII, § 5.
512. DEL. CONST. of 1831, art. I, §§ 1, 2.
513. MD. CONST. of 1867, Declaration of Rights, art. 36.
514. IOWA CONST. of 1857, art. VI, § 2.
515. N.C. CONST. of 1868, art. I, § 26.
516. S.C. CONST. of 1868, art. I, § 10.
517. GA. CONST. of 1868, art. I, § 6.
518. VA. CONST. of 1868, art. IX, § 1.
519. TEX. CONST. of 1869, art. I, § 4.

New Hampshire[520]	New Jersey[521]
Oregon[522]	Vermont[523]
Michigan[524]	West Virginia[525]
Maine[526]	Nevada [527]
Indiana[528]	Missouri[529]
Rhode Island[530]	Wisconsin[531]
Massachusetts[532]	Kentucky[533]
Maryland[534]	Iowa[535]
Arkansas[536]	Georgia[537]

Table V

However, Tennessee prohibited test oaths,[538] New York,[539] California,[540] and Florida[541] removed witness incompetency based on religious views, Ohio did both,[542] and Kansas[543] prohibited test oaths, as did Illinois,[544] Minnesota,[545] Delaware,[546] Arkansas,[547] Louisiana,[548] Mississippi,[549] and Texas.[550] As a

520. N.H. CONST. of 1851, art. I, § 6.
521. N.J. CONST. of 1844, art. 1, § 4.
522. OR. CONST. of 1857, art. I, § 5.
523. VT. CONST. of 1777, art. I, § 3.
524. MICH. CONST. of 1850, art. IV, § 41.
525. W. VA. CONST. of 1863, art. II, § 9.
526. ME. CONST. of 1820, art. I, § 3.
527. NEV. CONST. of 1864, art. I, § 4.
528. IND. CONST. of 1851, art. I, §§ 2–8.
529. MO. CONST. of 1865, art. I, §§ 9–11.
530. R.I. CONST. of 1842, art. I, § 20.
531. WIS. CONST. of 1848, art. I, §§ 18–19.
532. MASS. CONST. of 1780, pt. I, art. III (1833).
533. KY. CONST. of 1850, art. XIII, § 5.
534. MD. CONST. of 1867, Declaration of Rights, art. 36.
535. IOWA CONST. of 1857, art. I, § 4.
536. ARK. CONST. of 1868, art. I, § 21.
537. GA. CONST. of 1868, art. I, § 6.
538. TENN. CONST. of 1834, art. I, § 4.
539. N.Y. CONST. of 1846, art. I, § 3.
540. CAL. CONST. of 1849, art. I, § 4.
541. FLA. CONST. of 1868, Declaration of Rights, § 4.
542. OHIO CONST. of 1851, art. I, § 7.
543. KAN. CONST. of 1859, Bill of Rights, § 7.
544. ILL. CONST. of 1848, art. XII, § 4.
545. MINN. CONST. of 1858, art. I, § 17.
546. DEL. CONST. of 1831, art. I, § 2.
547. ARK. CONST. of 1868, art. I, § 21.
548. LA. CONST. of 1868, tit. I, art. 12.
549. MISS. CONST. of 1868, art. I, § 23.
550. TEX. CONST. of 1869, art. I, § 3.

consequence, thirty-one states recognized that nonestablishment values constrained giving civil significance to religious opinion at least to some extent.

Rounding out the analysis, five states—Oregon,[551] Michigan,[552] Minnesota,[553] Indiana,[554] and Wisconsin[555]—prohibited appropriations for religious uses, and four—New Jersey,[556] Michigan,[557] West Virginia[558] and Iowa[559]—prohibited taxation for such purposes. Alabama prohibited establishment of religion without further explanation.[560]

With respect to accommodation of religion, seventeen states made provisions for conscientious objectors:

New Hampshire[561]	Tennessee[562]
Oregon[563]	Vermont[564]
Kansas[565]	Illinois[566]
Michigan[567]	Maine[568]
Indiana[569]	Kentucky[570]
Arkansas[571]	North Carolina[572]
South Carolina[573]	Alabama[574]
Georgia[575]	Virginia[576]

551. OR. CONST. of 1857, art. I, § 5.
552. MICH. CONST. of 1850, art. IV, § 40.
553. MINN. CONST. of 1858, art. I, § 16.
554. IND. CONST. of 1851, art. I, §§ 2–8.
555. WIS. CONST. of 1848, art. I, §§ 18–19.
556. N.J. CONST. of 1844, art. I, § 3.
557. MICH. CONST. of 1850, art. IV, § 39.
558. W. VA. CONST. of 1863, art. II, § 9.
559. IOWA CONST. of 1857, art. I, § 3.
560. ALA. CONST. of 1868, art. I, § 5.
561. N.H. CONST. of 1851, art. I, § 4.
562. TENN. CONST. of 1834, art. I, § 28.
563. OR. CONST. of 1857, art. X, § 2.
564. VT. CONST. of 1777, art. I, § 9.
565. KAN. CONST. of 1859, art. VIII, § 1.
566. ILL. CONST. of 1848, art. VIII, § 2.
567. MICH. CONST. of 1850, art. XVII, § 1.
568. ME. CONST. of 1820, art. VII, § 5.
569. IND. CONST. of 1851, art. XII, § 6.
570. KY. CONST. of 1850, art. VII, § 1.
571. ARK. CONST. of 1868, art. XI, § 1.
572. N.C. CONST. of 1868, art. XII, § 1.
573. S.C. CONST. of 1868, art. I, § 30.
574. ALA. CONST. of 1868, art. I, § 29.
575. GA. CONST. of 1868, art. VIII, § 3.
576. VA. CONST. of 1868, art. IX, § 1.

Iowa[577]	

Table VI

Collectively, these provisions repel any notion that in 1868 nonestablishment values included a psychological component of preventing offense caused by the endorsement or accommodation of religion.

V. CONCLUSION

Judged from the state constitutions in effect on July 28, 1868, when the Fourteenth Amendment took effect, nonestablishment principles and values included no concern about governmental endorsement. On this historical record, the governmental endorsement test must be regarded not merely as ahistorical but as antihistorical.

577. IOWA CONST. of 1857, art. I, § 4.

WHAT WERE THEY THINKING? EXAMINING THE INTELLECTUAL INSPIRATIONS OF THE FRAMERS AND OPPONENTS OF THE UNITED STATES CONSTITUTION

NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION. Forrest McDonald. Lawrence, Kansas: University of Kansas Press, 1985. 376 pages. $13.00.

WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION. Herbert J. Storing. Chicago: The University of Chicago Press, 1981. 120 pages. $14.00.

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I. INTRODUCTION

To study the intellectual genesis of the United States Constitution is to study attempts at reconciling inconsistencies and contradictions. These inconsistencies and contradictions abounded not only between those in favor of the Constitution and those opposed to it, but also among members of each camp, and even within the minds of the individuals themselves. The 1770s and 1780s were a remarkable time for discourse on legal and political thought. Recent political, legal, and economic theories were emerging from such thinkers as Hume, Montesquieu, Blackstone, Smith, and Vattel.[1] These added to the already rich literature of theorists such as Locke, Hobbes, and Pufendorf and the classical thinkers such as Aristotle, Plato, Plutarch, and Cicero. Theory was in no short supply, and the newly independent United States of America were to be the perfect laboratory in which to test the most promising theories. Inspired in their quest for independence by such works as Addison's *Cato*,[2] which exemplified the ideal of republican virtue and liberty, the Patriots of the Revolution demonstrated outstanding unity of purpose and vision. They would win the war and establish just such a republic. Unfortunately, such unity was much more difficult to achieve once the fighting was over and the time came to actually institute that republic. This was when the inconsistencies and contradictions became evident—not just contradictions between the myriad theories, which were to be expected, but contradictions between the new republic's objectives, aspirations, and guiding principles themselves.

Forrest McDonald's *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* and Herbert Storing's *What the Anti-Federalists Were For*[3] provide a remarkably well-articulated analysis of the political, legal, and economic ideas that inspired the American polity throughout the Framing period. In so doing, the books address many of the contradictions with which the Framers had to grapple before ultimately implementing the republic they so ardently desired.

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1. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION ix–x, 7, 97 (1985).
2. *See id.* at 10, 69.
3. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

II. NOVUS ORDO SECLORUM

McDonald begins by posing the problem the Framers faced as one of striking the proper balance between despotism and anarchy.[4] In the Patriots' zeal to cast off the oppression of England, they had failed to recognize that they had as much to fear from too little government as too much.[5] The subsequent failure of the Articles of Confederation illustrated this principle. Therefore, with this lesson in mind, the delegates to the Philadelphia Convention began again. They were motivated by four "limiting" and "guiding" considerations.[6] First was that the purpose of government was to protect the lives, liberty, and property of the citizens.[7] Second was a commitment to republicanism.[8] Third was the importance of history—that is, history as a teacher, history as the legacy they inherited from England, and, perhaps most importantly, consciousness of their own place in history.[9] The final guiding consideration was the "large body of political theory at their disposal."[10] With these common goals and materials at their disposal, McDonald muses, the outcome ought to have been a foregone conclusion.[11] Unfortunately, they were unaware of one catch: the incompatibility of the ingredients.[12]

McDonald analyzes the incompatibility through expositions on the Rights of Englishmen,[13] Systems of Political Theory,[14] and Systems of Political Economy.[15] In the Rights of Englishmen, McDonald points out several contradictions inherent in most Americans' conceptions of "liberty"[16] and "property."[17] These were not singular ideas, but each was a collection of ideas and rights. Conceptually, liberty had its origin in natural law, and the state of nature was a state of freedom. In practice, however, liberty for an Englishman was a combination of several specific

4. *See generally* MCDONALD, *supra* note 1, at 1–8 (ch. I, "The Problem").
5. *See id.* at 3.
6. *Id.* at 3–6.
7. *Id.* at 3.
8. *Id.* at 4.
9. *Id.* at 5–6.
10. *Id.* at 7.
11. *Id.* at 7–8.
12. *Id.* at 8.
13. *Id.* at 9–56 (ch. II, "The Rights of Englishmen").
14. *Id.* at 57–96 (ch. III, "Systems of Political Theory").
15. *Id.* at 97–142 (ch. IV, "Systems of Political Economy").
16. *See id.* at 36–55.
17. *See id.* at 13–36.

rights, or guarantees, like the right to a jury trial, which they had wrestled from the Crown through acts such as Magna Carta and the Bill of Rights of 1689.[18] Independence brought a new contradiction to the American conception of liberty. Americans ceased to be Englishmen and could therefore no longer claim these guarantees as their rights. McDonald also notes some interesting contradictions between rhetoric and practice with respect to liberty, specifically the tight censorship during the struggle for independence of any public discourse opposing the cause of independence and even more egregious, the contradiction between the proclamation that "all men are created equal" in the Declaration of Independence and the continued toleration of slavery throughout the Framing period and beyond.[19] The concept of property was equally contradictory. While the Framers asserted that a primary role of government was to protect private property,[20] there was widespread support for usury and sumptuary laws,[21] and fines exacting total forfeiture from felons were imposed in all American colonies.[22] The American conception of property rights also suffered from the same contradiction that independence from Britain brought to their conception of liberty. As property was an interrelated web of rights and grants from the British Crown, independence from the Crown cast these rights into doubt.[23] As Americans sought to articulate a broader legitimating principle upon which their rights were founded, some advocated a "fourfold foundation" of natural law, the British Constitution, the charters of the colonies, and immemorial usage.[24] Natural law, as articulated by Locke, provided a basis for their rights, independent of the Crown, and helped mitigate some of the contradictions that independence brought.[25]

But Locke only helped them so much. Having won their independence, early Americans were not at all unified in their understanding of their political society's new state of being.[26]

18. *Id.* at 37.
19. *See id.* at 45–55.
20. *Id.* at 10.
21. *See id.* at 16.
22. *Id.* at 21.
23. *Id.* at 58–59.
24. *Id.* at 57.
25. *See id.* at 60.
26. *See id.* at 59.

Said differently, where did sovereignty go? Locke was clear on the conditions that justified revolution, but his explanation of what followed dissolution of government was remarkably ambiguous.[27] As a result, four different and inconsistent theories emerged: Rhode Island and Connecticut, who had been self-governing since 1663, simply carried on with business as usual, just sans allegiance to the Crown.[28] Massachusetts and New Hampshire tried this, only to be stymied by armed bands proclaiming that they had reverted to a state of nature and thus refused to be governed without their consent.[29] Ultimately, Massachusetts drafted and ratified an entirely new constitution.[30] A third theory, which gained little overall support, was that sovereignty passed directly from the crown to the Continental Congress.[31] Finally, the theory that led to the adoption of the Articles of Confederation was that sovereignty passed to the states: that the states were in a state of nature with respect to one another, but that they retained sovereignty over their own citizens.[32] The Articles would clarify the states' relationship toward one another, but would leave each state's relationship with its citizens unfettered.

Independence brought a commitment to republicanism.[33] The problem was that there was no single conception of republicanism, and the conceptions that existed had contradictory elements.[34] McDonald draws one distinction between "Puritan" and "Agrarian" forms of republicanism.[35] The most crucial commonality between the two was a focus on morality and "public virtue" as the driving force behind republics.[36] Public virtue was equated with "manliness," and the accepted life cycle of republics was that when manliness gave way to effeminacy, republican liberty gave way to licentiousness and the republic died.[37] But this crucial commonality was also, ironically, a considerable point of division, for the two groups

27. *Id.* at 145.
28. *Id.* at 147.
29. *Id.* at 148–49.
30. *Id.* at 149.
31. *Id.*
32. *Id.* at 150.
33. *Id.* at 66.
34. *See id.* at 67–70.
35. *Id.* at 70.
36. *Id.*
37. *Id.* at 70–71.

defined public virtue in very different—and seemingly inconsistent—ways. For the Puritan republicans, public virtue (manliness) meant industry, frugality, thrift, strength, and moral solutions to the issues of republican morality.[38] Consequently, any behavior that did not contribute to the good of the republic was open to government regulation.[39] Agrarian republicans, on the other hand, saw public virtue (manliness) as economic well-being and saw socioeconomic solutions to the issues of republican morality.[40] Said a different way, public virtue required having the economic resources to be independent and not beholden to another. Land ownership "begat independence, independence begat virtue, and virtue begat republican liberty."[41] For agrarian republicans, a life of leisure was the measure of manliness and public virtue.[42] Also, they would tolerate far less regulation.[43]

Another contradiction the Framers grappled with was the economy. At the time of the Framing, the word essentially meant frugality, and the mercantilist belief that wealth in the world was a zero-sum game was accepted as axiomatic.[44] Adam Smith's proclamations that wealth was about *consumption* and not about total amount of gold saved and that wealth could actually be *created* through specialization and trade were revolutionary.[45] This led to new preoccupations with "political economy." That is, how ought government to behave in regulating commerce? The first well-articulated vision of a political economy for America was that of Alexander Hamilton. This vision contained what, superficially at least, seemed to be an enormous contradiction: the use of debt to create wealth.[46] The national government would borrow vast sums of money and create a dedicated fund for paying the interest on that debt. Because the interest payments were guaranteed, more credit would issue, and as more credit issued, the government could spend more. This would allow far more resources to be put to work in the national "economy." Ultimately, the term economy shifted from meaning

38. *See id.* at 70, 71.
39. *Id.* at 71.
40. *Id.*
41. *Id.* at 74–75.
42. *See id.* at 74.
43. *See id.* at 75–76.
44. *See id.* at 97–98.
45. *See id.* at 98.
46. *See id.* at 138–39.

frugality to something quite nearly the opposite.

McDonald exhaustively traces these and many more inconsistencies, contradictions, and incongruities through the Philadelphia Convention and into the ratifying debates, illustrating how they affected the debates and what became of them.[47] What ultimately came out of the Philadelphia Convention was a remarkable synthesis of old ideals and new innovations, aimed at reconciling these inconsistencies and contradictions. Montesquieu's strict separation of powers gave way to an innovative system of checks and balances.[48] English mixed-regime theory, appealing to the Framers but entirely unworkable in America due to the lack of hereditary nobility and a morbid distrust of monarchs, gave way to a bicameral legislature[49] and single executive.[50] A strict confederation of coequal, sovereign states gave way to a completely new system of dual national-state sovereignty.[51] The Confederation's requirement of complete consensus gave way to a nine-state ratification provision for the new Constitution.[52] These and many more innovations reveal the vast amount of discourse, debate, and compromise on competing theories of law, politics, and economics. As one commentator put it:

> [A]lthough the Framers were experienced practical politicians, they were also steeped in history, political and economic theory, and the common law. They often had clashing views of these bodies of theory and data, and irreconcilable understandings of their respective importance and consequences. They may have read the same books, but they read them in different ways and for different reasons. Ideas or bodies of ideas such as economy, virtue, republicanism and so forth did not have common meanings.[53]

Indeed, McDonald concludes that:

> It should be obvious from this survey that it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many

47. *See generally id.* at 185–224 (ch. VI, "The Framers: Principles and Interests"); *see generally id.* at 225–60 (ch. VII, "The Convention: Constituting A Government").

48. *See id.* at 258–59.

49. *See id.* at 228–37.

50. *See id.* at 240–53.

51. *See id.* at 276.

52. *Id.* at 279.

53. Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1584 (1987).

> particulars, incompatible. Some had firm, well-rounded plans, some had strong convictions on only a few points, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromises; others were not.[54]

McDonald's exhaustive analysis of the "intellectual origins" of the Constitution is dizzying and exciting. But this strength might also be seen as one of the book's weaknesses (yes, another contradiction). McDonald notes that while some of the Framers clearly had studied the theorists, many likely had *not*, and were probably unaware that their thinking aligned with Hume, Montesquieu, or others.[55] McDonald even notes the frequency with which Hume's ideas were expressed in the Philadelphia Convention without any reference whatsoever to Hume.[56] The delegates simply knew what they believed and advocated for those beliefs. McDonald's tendency to cast them somewhat rigidly as, for example, Humean, Montesquieuean, or Bolingbrokean takes away that valuable personal dimension and makes the Convention seem a bit more like a political theory colloquium. McDonald also seems to give short shrift to the Anti-Federalists, to some extent minimizing their contribution to the discourse and final product. McDonald does not adequately convey that the Anti-Federalists contributed greatly, not only by advocating a bill of rights, but also by forcing the Federalists to present a coherent defense of their position and a compelling explanation of why the Constitution was necessary.

III. WHAT THE ANTI-FEDERALISTS WERE FOR

Fortunately, Herbert Storing does precisely that in *What the Anti-Federalists Were For.* This is another story of attempts to reconcile contradictions and inconsistencies. *What the Anti-Federalists Were For* is part of a much larger work, *The Complete Anti-Federalist,*[57] the first comprehensive, and *the* authoritative compilation of, Anti-Federalist writing. Storing begins by lamenting the marginalization of the Anti-Federalists, given their indispensable contribution to the American republic.[58] Several

54. MCDONALD, *supra* note 1, at 224.
55. *Id.* at 7.
56. *Id.*
57. HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST (1981).
58. STORING, *supra* note 3, at 3.

reasons likely account for their occupying only a "cramped place in the shadow of the great constitutional accomplishment."[59]

First, the Anti-Federalists lost the debate.[60] Second, their focus on the states as the proper sovereigns led to their association with the "states rights" political theme and its accompanying toleration of racial discrimination. Third, they were not nearly as successful as the Federalists were at reconciling contradictions.[61] Where the Federalists developed innovative solutions to deal with contradictions and inconsistencies, the Anti-Federalists' refusal to make the necessary compromises and sacrifices to reconcile their contradictions doomed their position.[62] Finally, their opponents successfully painted them as merely being *against the Constitution*, and not actually *for* anything.[63] Storing proposes that, although their futile attempts to reconcile contradictions doomed them, the Anti-Federalists did have a unified set of fundamental affirmative principles that they were *for*.[64] The rest of the book deals with these principles, the contradictions that these principles begat, and the generally successful Federalist responses.

Anti-Federalists were generally conservative defenders of the status quo.[65] They agreed that the Articles of Confederation required alterations, but were shocked by what came out of the Philadelphia Convention.[66] They argued persuasively that the Constitution was an illegal act completely unauthorized by the Convention, which had been convened "for the sole and express purpose of revising the Articles of Confederation."[67] The Anti-Federalists also warned Federalists that their cavalier disregard for legality may be self-defeating: "the same reasons which you *now* urge for destroying our *present* federal government, may be urged for *abolishing the system* which you now propose to adopt . . . ."[68]

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59. *Id.*
60. *Id.* at vii.
61. *See id.* at 6, 71.
62. *See id.* at 71.
63. *See id.* at 9.
64. *See id.* at 5.
65. *Id.* at 7.
66. *See id.* at 7–8.
67. *Id.* at 7 (quoting JACKSON TURNER MAIN, THE ANTI-FEDERALISTS: CRITICS OF THE CONSTITUTION 280–81 (1960)).
68. *Id.* at 7–8 (quoting 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 189 (Max Farrand ed., 1911), *available at* memory.loc.gov) (internal quotation marks omitted).

The Anti-Federalists believed strongly that the existing "federal" government was the best protector of liberty.[69] In fact, the Anti-Federalists were the real "Federalists." Federalism, or "foederalism," meant a league or confederation of sovereign and independent states.[70] The success with which the defenders of the Constitution co-opted the name Federalists and branded those who opposed the Constitution as Anti-Federalists was one of the major coups of the ratification period.[71] Realizing the importance of capturing rhetorical ground and that Americans predominantly believed in federalism, the Framers labeled the new government a federal government.[72] They were able to do this because, in one sense, the term was apt—the new government gave more authority to the federal component of the government.[73] But it was more fundamentally a complete contradiction of the federal principle to which most Americans, and especially the newly misnamed Anti-Federalists, adhered.[74] Unfortunately for the Anti-Federalists, the debate had now been framed and they never regained the rhetorical advantage on this crucial point.[75] Over the course of the debate, the connotation of the term federalism itself changed.[76] Where the Anti-Federalists saw an irreconcilable contradiction between federalism and national government, the Federalists successfully offered a partly-national, partly-federal government as a reconciling middle ground.[77] This middle ground became the "new federalism."[78]

Anti-Federalists' devotion to federalism was a product of their conviction that small republics were the best defenders of liberty.[79] This conviction rested on three fundamental considerations.[80] First, only a small republic can create the voluntary attachment of the people to their government that prompts voluntary obedience to the laws.[81] This voluntary attachment comes from personal acquaintance with the leaders,

69. *Id.* at 8–9.
70. *Id.* at 9.
71. *See id.* at 9–10.
72. *See id.* at 9.
73. *Id.* at 9–10.
74. *See id.*
75. *Id.*
76. *Id.* at 32.
77. *Id.*
78. *Id.*
79. *Id.* at 15.
80. *Id.* at 16.
81. *Id.*

which is only possible in a small locale.[82] Second, only a small republic can create true accountability of the government to the people.[83] Accountability to the people requires that leaders know and understand the preferences of their constituents.[84] Accountability in representation means *exactly mirroring* constituents' sentiments in government and such "mirror representation" is only possible in small, homogeneous areas.[85] Finally, only a small republic can instill the public virtue in citizens that is required to perpetuate republican liberty.[86] Public virtue is inculcated through activity in the local community—for example, service in the militia, fire department, juries, local churches, etc.[87] Such local activity and consequent inculcation of requisite public virtue is not possible when the government is a large, bloated, bureaucratic entity.[88] The government proposed by the Constitution was neither a small republic nor a confederation of small republics and consequently would fail under each of these three maxims to protect the liberty of its citizens.[89]

The Federalists attempted to reconcile the contradiction between a large republic and protection of liberty by proposing alternate answers to each of the three requirements—answers that did not depend upon size but upon other factors.[90] First, the Federalists answered the "voluntary attachment" requirement with "sound administration."[91] The leaders in the new republic would be far better administrators of government than those in the states had been, and this improvement in administration would lead to increased public confidence and an accompanying attachment of people to the new government.[92] Federalists met the second maxim, "accountability of the government," somewhat differently—in fact, taking issue with the very premise.[93] Federalists did not believe that representatives ought

82. *Id.*
83. *Id.* at 17.
84. *Id.*
85. *Id.*
86. *Id.* at 19.
87. *See generally id.* at 20–22 (discussing the importance of civic duties and community).
88. *Id.* at 20–21.
89. *See id.* at 15–16.
90. *Id.* at 41.
91. *Id.*
92. *Id.* at 41–42.
93. *Id.* at 43.

to be mirrors of their constituents, but rather that the representation process was a natural filtering method where communities would select their best and brightest to represent and govern them.[94] These best and brightest would then use their independent judgment in governing.[95] Finally, the Federalists answered the "public virtue" requisite with Hume's "politics as a science."[96] In other words, the new government was constructed to be *not* wholly dependent upon public virtue.[97] Instead of relying on self-sacrificing interest in furtherance of the public good, government would rely on institutions that would appropriately channel enlightened self-interest toward the public good.[98] Ambition would counter ambition, creating equilibrium of interests. And expansion of the governmental sphere, i.e., a bigger polity, not a smaller one, would cure such scourges as factions.[99] Though perhaps not entirely satisfying, the Federalists were more successful than the Anti-Federalists at reconciling the contradictory desires Americans had for effective government and protection of liberty.[100]

But the Anti-Federalists remained unsatisfied. Concepts like the national city, a standing army, and even commerce were antithetical to a free republic.[101] They eroded civic virtue, which, Anti-Federalists remained convinced, would undermine liberty.[102] Commerce especially led to luxury and vice.[103] The Anti-Federalists wanted an affirmative program of civic education, which would likely include—or depend upon—official religious inculcation.[104] The Federalist response to such complaints was essentially that the Anti-Federalists were stuck in the past: they saw the need for the modern world but simultaneously resisted it with half-hearted appeals to civic virtue.[105] For Federalists, civil society was not a molder of character but rather a regulator of conduct, and "little

94. *Id.* at 44–45.
95. *Id.* at 45.
96. *Id.* at 45–46; *see also id.* at 92 n.49.
97. *Id.* at 47.
98. *Id.*
99. *Id.* at 46–47.
100. *See generally id.* at 38–47 (ch. VIII, "The Federalist Reply").
101. *Id.* at 20.
102. *Id.*
103. *Id.* at 20–21.
104. *See id.* at 21–23.
105. *Id.* at 46.

democracies can no more be ruled by prayer than large ones."[106]

Storing clarifies the insurmountable contradiction that Anti-Federalists faced in their adherence to "federalism" by explaining the different ways Federalists and Anti-Federalists drew the lines of sovereignty in the federal system.[107] The Anti-Federalists would give the national government power over issues of common interest between the states, and leave the states with sufficient power to "exist alone" if needed.[108] Federalists, on the other hand, drew the national-state sovereignty line simply between those concerns of general and local nature.[109] The Anti-Federalists saw this as an insufficient protector of state sovereignty, which would inevitably lead to total consolidation, because "while it can be plausibly held that conflicts between local interests and general interests are in principle reconcilable, the localities being parts of one whole, the conflict between the general interest and the capacity of the states to exist alone may be utterly irreconcilable."[110] The Anti-Federalists were thus unwilling or unable to accept the "new federalism" because they were certain it was a mere stepping stone to complete national consolidation.[111]

This inertial drift would not be limited to the shift of power from the states to the national government. Anti-Federalists also feared the Constitution's "aristocratic tendencies."[112] Six-year terms for senators, the elimination of "rotation" (i.e., term limits), the ratio of representation in the House of Representatives, the unitary executive, and the life tenure and ability of the federal judicial branch to "construe its own power[]"[113] portended the inevitable birth of a new aristocracy in America.[114] This would be exacerbated by the national city, where senators and representatives would live in a bubble and forget their constituents. In the Federalist response, one finds perhaps the most amusing contradiction yet. Having assiduously disavowed the need for civic virtue in all other contexts, the

106. *Id.* at 47.
107. *See generally id.* at 24–37 (ch. IV, "Union").
108. *Id.* at 36–37.
109. *See id.*
110. *Id.*
111. *Id.* at 37.
112. *Id.* at 48–49.
113. *Id.* at 50.
114. *See generally id.* at 48–52 (ch. VI, "The Aristocratic Tendency of the Constitution").

Federalists sought to assuage the Anti-Federalists' concerns over the aristocratic tendency with an assurance that those in power would possess this very civic virtue.[115] As Hamilton put it, "there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence."[116] This was not convincing to the Anti-Federalists, who noted the irony that "whereas the primary object of government is to check and controul the ambitious and designing, government tends to become itself the tool of these very men."[117]

Inertia would also drive government to ever more complexity. Anti-Federalists professed allegiance to the notion of simple government and expressly rejected John Adams's articulation of complex government with its equilibrium of competing interests, properly aligned so as to repel one another.[118] But as they repudiated complex government, with its checks and balances and separation of powers, they bemoaned the Constitution's mere "paper checks" and derided the "partitions between . . . branches" as "merely those of the building in which they sit."[119] The Anti-Federalists did not want complex government, with its checks and balances and separation of powers.[120] But neither could they tolerate a simple government, which lacked these complexities.[121] They would argue that what they really wanted was *real* checks and *legitimate* separation of powers.[122] The problem was that they could come up with no better answer than the Federalists had. And while the Federalists were willing to give the new mixed government a try, Anti-Federalists "doubted the theoretical soundness, the practical feasibility, and even the good intentions of this new kind of balanced government."[123]

Finally, no discussion of the Anti-Federalists would be complete without a discussion of the Bill of Rights. Conventional wisdom holds that the Bill of Rights is the Anti-Federalists' gift to the American republic.[124] Storing sees more complexity. While

115. *Id.* at 50–51.
116. *Id.* at 51 (quoting THE FEDERALIST NO. 76, at 387 (Alexander Hamilton) (Garry Wills ed., 1982)).
117. STORING, *supra* note 3, at 52 (internal citations omitted).
118. *Id.* at 55–56.
119. *Id.* at 58.
120. *Id.* at 62–63.
121. *Id.* at 58.
122. *Id.*
123. *Id.* at 62.
124. *See id.* at 64.

we would undoubtedly not have a bill of rights without the Anti-Federalists, it is less clear that they were entirely sold on the idea.[125] In fact, the Bill of Rights might be seen as the last humiliation of the Anti-Federalists[126]—a pale, second-best substitute for what they really wanted: a scuttling of the Constitution and a new convention, where their real grievances could be addressed.[127] In accepting the Bill of Rights, the Anti-Federalists were forced to abandon the old federalism, because "[a] truly federal government needs no bill of rights."[128] Such a government has no power except what it is expressly granted, so an enumeration of rights is unnecessary.[129] In arguing against a bill of rights, Federalists questioned both the necessity and the wisdom.[130] They argued that this "new federal" government was also one of enumerated powers, so enumerating rights was unnecessary.[131] Moreover, a bill of rights was potentially dangerous to liberty. Because it is impossible to list everything, enumerating some rights necessarily means *not* enumerating others.[132] And *expressio unius est exclusio alterius*—those rights not enumerated may thus be presumed not to exist.[133] In fact, this was precisely one of the Anti-Federalist fears.[134] Ultimately, however, they continued to press for a bill of rights, both because they held out hope that it might result in a new convention and because they saw its instructive value—that is, "it can be a prime agency of that political and moral education of the people on which free republican government depends."[135] The Bill of Rights did not actually grant any rights. It merely reminded people of the rights they inherently possessed.[136]

The Anti-Federalists, Storing concludes, lost the debate not because they were less skilled orators or less clever debaters; they lost because their argument was weaker.[137] They were attempting to reconcile contradictions and were unsuccessful. They saw

125. *Id.* at 67.
126. *See id.* at 65.
127. *See id.*
128. *Id.*
129. *Id.*
130. *See id.*
131. *Id.*
132. *Id.* at 67.
133. *Id.*
134. *See id.*
135. *Id.* at 70.
136. *See id.* at 67.
137. *Id.* at 71.

Americans' unity during the Revolution and closed their eyes to the truth that it is unrealistic to expect people to govern themselves voluntarily.[138] Their affection for the small republic and devotion to inculcation of public virtue was essentially an attempt to close their eyes to this reality.[139] But, as Storing notes, they at least succeeded in showing that "the Constitution did not escape reliance on republican virtue."[140] Where the Federalists saw a peripheral problem, the Anti-Federalists saw a fundamental flaw—and they at least got the Federalists to admit the need for public virtue.[141] In fact, Anti-Federalist arguments have, in many respects, proven quite prescient. As the nation and its government have grown larger and more complex, as "Potomac Fever" continues to grip generations of our leaders, as career politicians forget those whom they represent, and as the federal judiciary expands its reach, the Anti-Federalists' arguments have grown in salience and wisdom. Where the Federalists saw the passage of time resolving Anti-Federalist worries, one cannot help but wonder whether the opposite has in fact occurred.

IV. CONCLUSION

McDonald's book and Storing's book complement one another wonderfully. Together they tell a story of a people with a fantastic opportunity to make history, a noble aspiration to enshrine liberty for generations, a monumental task of developing something that resembled consensus, and more than enough raw material to achieve their goals. The difficulty came when, in attempting to effectuate their aspirations, they were greeted by the multitude of incompatibilities and contradictions between theory and practice, belief and experience, and aspiration and reality. The Constitution and Bill of Rights that the nation ultimately ratified were the people's best attempt at confronting those contradictions and inconsistencies and reconciling them. Reading the two books, one cannot help but admire those on all sides and wonder if Benjamin Franklin was not exactly right when he endorsed the Constitution at the conclusion of the Convention by saying, "Thus I consent, Sir, to this Constitution, because I expect no better, and because I am

138. *Id.*
139. *Id.*
140. *Id.* at 72.
141. *See id.* at 73.

not sure that it is not the best."[142]

142. Benjamin Franklin, Speech to the Constitutional Convention (Sept. 17, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 643 (Max Farrand ed., 1911), *available at* memory.loc.gov.


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