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GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

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Book Review

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 18th edition of *The Bluebook*.

Selection takes place on a per-volume basis; thus, a piece is selected for a particular volume, but not necessarily a particular edition. Submissions are reviewed on a rolling basis, beginning in February and concluding when the volume is filled, typically around mid-October.

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*The views expressed within these articles are those of the authors and do not necessarily reflect the policies or opinions of the *Journal*, its editors and staff, or Grove City College and its administration.

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable value. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its conception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden ’12, Kevin Hoffman ’11, and Steven Irwin ’12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College’s community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Duquesne University, Pittsburgh University, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

The opening line in Plato's dialogue *Phaedrus* asks the question "from whence to wither?" As I prepare to step down from the role of Editor-in-Chief of the *Grove City College Journal of Law & Public Policy*, and as the *Journal* continues to improve, this question has particular relevance. In the same way that Plato framed philosophic discussion by looking to the past and projecting into the future, the following letter will provide both a review of the process of founding the *Journal* and a vision for its future.

From its inception, the *Journal* was intended to be a unique "voice" that contributed to public debate both at Grove City College and beyond. The fulfillment of the first aspect of this purpose statement is evidenced by the plethora of Grove City College students who have participated in the "discussion" prompted by our publication. Students have contributed by editing, writing and reading articles about significant issues—plumbing to depths that were previously unexplored. Professors and college officials have similarly contributed to this discussion by editing articles and sharing the *Journal* with co-workers and friends.

The *Journal* has also been successful in reaching beyond the College. By distributing copies to thousands of alumni around the country, and by publishing articles from "friends of the college" like this edition's featured piece by Dr. Michael Farris, we have advanced scholarship in a meaningful way and opened our discussion to other important voices. This approach is modeled by other legal publications that have similarly attempted to fill a niche in the great conversation. In an article entitled *The Founding of the Review*, John Woosley explains the purpose of the Columbia Law Review: "The Law School needs the *Law Review* in order to express itself. Without the *Review* the Law School would necessarily be somewhat inarticulate." Woosley continues, "It is pleasant to realize that the foundations of the *Law Review* were, apparently, well laid, and to see that the standard has improved from year to year."

With its voice established and foundation laid, the *Journal's* continued growth is dependent upon adherence to the principles that have brought it to this point. The collaboration between students and professors is unique and should be perpetuated. According to Garrard Glenn in his article *Twenty Five Years of the Review*, "It was better, therefore, to preserve, even at the cost of stopping publication, the balance between the contribution of the experienced observer and the editorial notes of the student." Publishing articles from both legal and policy perspectives is also important and provides a diverse range of content for readers. The *Journal* should continue to expand its readership by incorporating effective marketing strategies and cutting edge technology. Finally, the *Journal* should always remain an academic publication and should not be infected by partisan advocacy that all

too often poisons honest research and scholarship.

As I analyze the past, look to the future, and ask the question "from whence to wither?" I am overwhelmed with a sense of gratitude for the opportunity to work with so many gifted students, faculty, and alumni. I eagerly await the opportunity to return to my Alma Mater twenty years from now and pick up a newly-minted edition of the *Grove City College Journal of Law & Public Policy* and recall the many memories associated with it.

A Latin verse in chapter 1 of the Aeneid says, "*Forsan et haec olim meminisse juvabit* ("perhaps this too will be a pleasure to look back on one day"). It will be a pleasure, indeed.

Sincerely,

James R. R. Van Eerden
Editor-in-Chief

*This edition of the *Journal* would not have been possible without the contributions of the authors, the forty-two member student staff, the editorial board, and many other individuals. First and foremost, we wish to thank those of our readership who have graciously donated to the *Journal*. Your financial contributions and comments of support are a continual source of encouragement to us. Additionally, we wish to thank President Jewell for his continued approval and support. Along those lines, we are incredibly grateful to Dr. Sparks for serving as our faculty advisor and providing an unlimited amount of wisdom that is always helpful and encouraging. Though it would be impossible to thank each individual that makes an edition of the *Journal* possible, notable gratitude is extended to Dr. Anderson, Mr. Hardesty, and Dr. DiStasi. A great deal of particular acknowledgement from the *Journal* staff is extended to Jeff Prokovich, Vice President of Advancement, for his continued assistance in publishing the *Journal* and his cornerstone of financial support. Others within the Office of Advancement, namely Melissa MacLeod, Tricia Corey, and Jordan Chaney have worked diligently to finalize logistics and give marketing advice. Finally, among the *Journal* staff, Lisa Herman and Dorothy Williams have diligently exceeded each and every challenge and have worked tirelessly to ensure the completion of the editing process. Jared Smith has also proven to be an extremely valuable asset to the *Journal* with his strong organizational skills that are required to keep our staff on task and on time. Most of all, we wish to thank the Author of Truth, from whom all wisdom flows and in whose principles we find true justice.

FOREWORD

Dear Reader,

I am honored to present to you Volume 2, Edition 1 of the *Grove City College Journal of Law & Public Policy*. This issue seeks to build upon the precedent of our first volume and opens several scholarly debates that will undoubtedly produce countless hours of discussion. Thanks to the many hours of work and gracious counsel from student, faculty, and alumni editors, this edition not only details important legislation passed under the authority of the Constitution, but also closely scrutinizes the document itself, a rare practice in today's society. The themes of meticulous research, judicial interpretation, and detailed analysis run a winding course through the pages, and it is a journey I am sure you will enjoy.

In the feature article of this edition, Dr. Michael Farris, Chancellor of Patrick Henry College and Chairman of the Home School Legal Defense Association, analyzes the legitimacy of the Constitution's ratification in 1788. Senior Dayne Batten '11 follows, providing a brilliant exposé on the G.I. Bill, outlining how America sent "The Greatest Generation" to the classrooms of higher education after enduring the battlefields of the Second World War.

Kristie Eshelman '13 and Chris Wetzel '12, look at two opposing eras of the Supreme Court. Eshelman offers an inquiry into state reapportionment as she analyzes the Warren Court's decision in *Reynolds v. Sims*. While studying the Rehnquist Court's decision in *United States v. Lopez*, Wetzel examines the notion of a "federalism revolution."

Finally, in the *Journal*'s first book review, alumnus and College trustee, David Porter '88, provides insight into the recently published book, *Ourselves and Our Posterity: Essays in Constitutional Originalism*. The strength of his pen, combined with his valuable vision of the topic at hand, has produced a review that addresses a larger theme of judicial interpretation.

I encourage you to thoughtfully consider the content presented in this edition—an intriguing blend of scholarly research and stimulating insight.

Steven A. Irwin
Editor-in-Chief

ARTICLES

WAS THE CONSTITUTION ILLEGALLY ADOPTED?

*Michael P. Farris**

ABSTRACT: *This article analyzes the claim that the Constitution was illegally ratified in 1788. This claim is founded on the premise that the Constitutional Convention violated its mandate by adopting a wholly new document rather than simply altering the Articles of Confederation, and by allowing the proposed Constitution to be ratified without unanimous ratification by the states. The article concludes that the Constitution can truly be seen as both a series of amendments and a name change, which was subsequently unanimously accepted by the First Congress. Further, the ratification process was not illegal, as all thirteen state conventions accepted the change in ratification procedure, although only eleven state conventions approved of the document before its adoption.*

* Dr. Michael P. Farris is the founding President and current Chancellor of Patrick Henry College and Chairman of the Home School Legal Defense Association. Michael lives with his wife, Vickie, in Purcellville, Virginia with their 10 children and 12 grandchildren.

Introduction

From the time of the Constitutional Convention's conclusion until today, there has been a contentious allegation that it was a runaway convention and that the Constitution was illegally adopted. For example, historian Joseph Ellis, in his bestseller *Founding Brothers,* repeats the charges against the Constitutional Convention:

> Over the subsequent two centuries critics of the Constitutional Convention have called attention to several of its more unseemly features: the convention was extralegal, since its explicit mandate was to revise the Articles of Confederation, not replace them; . . . the machinery for ratification did not require the unanimous consent dictated by the Articles themselves. There is truth in each of these allegations.[1]

These two charges are serious because they suggest that under the law existing at the time, the Constitution was actually illegally adopted. The allegations can be summarized as follows: (1) a new document was proposed rather than mere changes to the Articles of Confederation as specified in the call of the Convention; and (2) the new Constitution allowed for ratification by only nine states whereas the Articles of Confederation required all thirteen states to approve any changes before they became effective.

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1 Joseph J. Ellis, Founding Brothers: The Revolutionary Generation 8 (2000).

On the surface, these two accusations are plausible. Indeed, historians agree, essentially unanimously, on the second charge's truthfulness. It should be noted, however, that most of these same historians believe that the end of saving the Republic justified the means of violating the Articles' rules concerning the amendment process. A fresh look at historical documents and clearly established legal principles shows that both of these attacks on the integrity of the Constitution are in error.

The New Document vs. Amendments Charge

At the request of Virginia, the Annapolis Convention convened with only five states in attendance. The Convention had been called solely for the purpose of considering changes to the Articles of Confederation regarding the regulation of commerce. The delegates quickly realized the need for a second convention with broader authority and with more states in attendance. On September 11, 1786, the delegates adopted this resolution:

> Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavors to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to

> devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.[2]

On February 21, 1787, Congress responded by voting to authorize a convention in Philadelphia under these terms:

> Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.[3]

The convention was authorized for the "sole and express purpose of revising the Articles of Confederation."[4] As is obvious, howev-

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2 Notes on the Debates in the Federal Convention, http://avalon.law.yale.edu/subject_menus/debcont.asp [hereinafter Federal Convention].

3 *Id*.

4 *See supra* text accompanying note 3.

er, the Constitutional Convention recommended an entirely new document—or did it?

The Constitutional Convention had recommended two or three modest changes to the text of the Articles and had also recommended that the name of the document be changed to 'The Constitution of the United States' so that no one would suggest that the Constitutional Convention had violated the scope of its authority. Thus, the name change alone does not make the work of the Convention illegal. In fact, it is normal legislative practice to change the name of an existing law when it is revised; moreover, it is a recognized legal principle that the title of a law is not part of the body of the law. Thus, changing its name is of no legal consequence.

Congress placed no limits on the authority of the Convention to make amendments, allowing it to recommend as many changes as it deemed necessary. Additionally, some matters of substance remained unchanged between the Articles of Confederation and the Constitution.

Article I of the Articles of Confederation named our nation the United States of America. This did not change under the Constitution.

Article II asserted that the states retained all power not specifically delegated to the federal branch. This did not change, as was made evident by numerous declarations to that effect by the various state ratification documents. Moreover, the Tenth Amendment was later added to the Constitution to clarify this further.

Article III said that the states formed a mutual defense compact. The operation of the military changed under the Constitution, but the duty of defense of the whole nation did not.

Article IV had a provision that people moving from one state to another had to be treated as citizens in the new state when they arrived—a provision that appears in Article IV, Section 2 of the Constitution with only modest changes in wording.

These examples are sufficient to demonstrate that the Constitution did indeed retain many elements of the Articles of Confederation and was ultimately constructed as a series of its recommended amendments. Many additional phrases and concepts, including the General Welfare Clause, were carried over from the Articles to the Constitution. Therefore, it is simply not true to assert that its content comprised "an entirely new document."

To be sure, the proposed amendments were presented as a package deal to be voted up or down rather than as a series of discrete amendments. But there was nothing in Congress' authorization of the Philadelphia Convention that prevented it from recommending that the proposed amendments be approved en masse. In fact, no credible politician would have thought it wise to propose that Congress consider twenty or thirty amendments on an individual basis, especially seeing as any recommended changes would require a series of political compromises to reach a balance. It simply made common political sense for the amendments to be submitted as a single package deal, and nothing in the call

for the Convention suggested any impropriety in that approach.

Recall now that the resolution from Congress charged the Constitutional Convention with making recommendations for amendments to the Articles and submitting them first to Congress, and then to the states. The Convention had no power to do anything more than this. So on September 17, 1787, the delegates officially transmitted the proposed Constitution to Congress, which was then meeting in New York. Until Congress and the state legislatures acted, no ratification for the "recommendation" was possible.

On September 28, 1787, eleven days after receiving the recommendation from the Philadelphia Convention, Congress voted to approve the submitted recommendation. The official language read as follows:

> Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.[5]

Note that Congress was the agency that called "for the sole and express purpose of revising the Articles of Confederation" and this same Congress *unanimously* approved the pro-

5 Federal Convention, http://avalon.law.yale.edu/subject_menus/debcont.asp.

posed Constitution, sending it on to the states.[6] If the Convention had indeed exceeded its authority, then Congress had the legal authority and the clear opportunity to reject the proposal. Thus, by examining the content of the document as well as the unanimous approval of Congress, it is clear that the Constitution was an appropriate, albeit substantial, amendment to the Articles of Confederation.

This brings us to the second charge levied by critics to prove that the Constitution was illegally adopted: the fact that the Constitution was to be ratified by just nine states instead of the unanimous vote of thirteen states required by the Articles of Confederation.

The Second Charge--Nine-State Ratification vs. Unanimity

Focusing solely on the number of states required for ratification is misleading, as there was an even more important change in the process. Under the Articles of Confederation, proposed amendments were to be ratified by the state *legislatures*. Under the Constitution, they were to be ratified by state *conventions*. Therefore, before we can even consider the switch from thirteen states to nine, we must ask: How was the switch made from ratification by legislatures to ratification by conventions?

If things were to properly proceed under the Articles of Confederation, then all thirteen states would have to approve of this *change in process* before the Constitution could be legal-

6 *See supra* text accompanying note 3.

ly adopted by the new method. Remember the new method of approval had two components: (1) ratification by conventions; and (2) ratification by nine states only.

Revisiting the language from Congress that approved the work of the Constitutional Convention, we see that Congress did not send the Constitution to the state conventions. Instead, the "report [was] transmitted to the several *legislatures.*"[7] It was then the legislatures' responsibility to authorize the election of delegates "in conformity to the resolves of the Convention."[8] This last clause meant that the states were being asked to approve this new process, authorizing the election of delegates to a ratification convention, and requiring only nine ratifications—both matters being clearly specified in the "resolves of the Convention."[9]

Thus, before any state could submit the proposed Constitution to a ratification convention, its state legislature had to approve the new process. If all thirteen state legislatures approved this process, then the Articles of Confederation would be fully satisfied.

This analysis looks at ratification as a two-step process:

1. The state *legislatures* had to approve the new process.

2. The state ratification *conventions* had to approve the new Constitution.

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7 *See supra* text accompanying note 5 (emphasis added).

8 *Id.*

9 *Id.*

As long as all thirteen state legislatures approved the change in process, then it would be perfectly legal under the Articles for nine state conventions to ratify the Constitution. It is very important to note, however, that without approval for the change in process by all thirteen legislatures, it would not be legal to submit the Constitution to state conventions no matter how many states were required to ratify for approval.

Eleven states held ratification conventions and approved the Constitution between December 17, 1787 and July 26, 1788, and the government under the Constitution went into effect on March 4, 1789. It is self-evident that the legislatures of each of these states voted to approve the new process since these conventions required prior legislative approval.

However, we must also consider North Carolina and Rhode Island, the only two states that did not ratify the Constitution before it was put in operation. If North Carolina and Rhode Island had failed to approve or had rejected this *change in process*, then the critics would be right – the Constitution would have been adopted contrary to the rules of the Articles of Confederation, which required unanimity among the states.

But the North Carolina *legislature* clearly approved the change in process and authorized the election of delegates for this express purpose. On August 2, 1788, the North Carolina Convention tabled any further consideration of the Constitution by a vote of 183 to 83. The Convention delegates attached a number of recommended amendments which they wanted to see adopted by

a second general convention before ratification. This was a tacit rejection of the Constitution as written, but this rejection by the *convention* has no bearing on the action of the *legislature* that had previously approved the change in the process.

An unconventional convention

This leaves Rhode Island. It is generally thought that Rhode Island simply ignored the entire process until after the new government, under the Constitution, had already begun operating. If this were true, then the second charge against the Constitution (that it did not properly follow the amendment process under the Articles of Confederation) would be true.

However, in February 1788, the legislature of Rhode Island adopted a resolution submitting the Constitution of the United States to a vote of all the people of the state.[10] In effect, this act appointed all the people of the entire state as delegates to the ratification convention. The people were to assemble on the fourth Monday of March in "conventions" in each town. These Rhode Island ratification conventions were different from those in any other state, but nothing in the text of the transmittal from Congress prohibited Rhode Island from adopting this format for a ratification convention. These town conventions were held on March 24, 1789, and the Constitution was overwhelmingly rejected (2,708 to 237). The defeat was more lopsided than it might have been,

10 The resolution adopted by the Rhode Island legislature is printed in the March 8, 1788, edition of the *Providence Gazette and Country Journal*, no. 1262, p. 2, col. 2–3.

though, since most federalists boycotted the meetings. However, this rejection by the Rhode Island *convention* does not detract from the fact that the Rhode Island *legislature* approved the process that had been suggested by the Philadelphia Convention and had been officially approved by Congress. Without this approval by the legislature, the town conventions could have never been held.

Therefore, the Articles of Confederation were fully satisfied. Before the Constitution was agreed to, Congress and all thirteen state legislatures approved a new process for changing the Articles of Confederation. By the unanimous action of thirteen state legislatures, ratification conventions were convened – an explicit approval of the new process that included the transfer of decision-making from legislatures to conventions and changed the required number of approvals from thirteen to nine.

Both of aforementioned accusations against the Constitution are therefore disproven by a careful examination of the multiple steps in the process. The Constitutional Convention did not, in fact, exceed its authority by incorporating all of its proposed amendments into a single document with a new name, as proven by the unanimous acceptance of the report by the very agency that called the Convention into session. Moreover, Congress and all thirteen state legislatures approved the new ratification process as required by the Articles. Therefore, we can safely conclude that the Constitution of the United States was legally adopted.

THE G.I. BILL, HIGHER EDUCATION AND AMERICAN SOCIETY

*Dayne D. Batten**

ABSTRACT: *This article examines the quantitative and qualitative effects of the Servicemen's Readjustment Act of 1944, better known as the G.I. Bill, on the American higher education system and American society at large. Though there is much disagreement over just how large an effect the bill had on the numbers of veterans entering the education system, the scholarly consensus seems to be that the legislation encouraged a significant number of veterans to pursue a college education. This influx of veterans into universities, in turn, transformed American perceptions about college, shifted the focus of post-secondary instruction from the liberal arts to vocational training and set a precedent for future government involvement in the American university system.*

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* Dayne Batten is a native of Cary, North Carolina who is studying sociology at Grove City College. He is an active participant on the Grove City debate team and a research fellow for a professor of economics. After graduation, Dayne plans to continue his education by pursuing a Masters in Public Administration from the University of North Carolina.

Introduction

The Servicemen's Readjustment Act of 1944, better known as the G.I. Bill, has proved itself a powerful force for social change in post-World War II America. In particular, Title II of the Bill, which created a program to pay for the continuing education of veterans returning from war, caused a massive spike in the numbers of Americans attending college. This increase led to a profound shift in American perceptions of higher education and government policy relating to those institutions. In light of this, many have credited the G.I. Bill with democratizing American higher education and creating the American middle class. Though such theories likely exaggerate the Bill's effects, a thorough examination of the legislation's history and a quantitative analysis of its aftermath show that the policy's implications for American society as a whole, and the higher education system in particular, are profound in terms of both scope and transformative power.

The Bill

Though it is currently popular to celebrate the success of the G.I. Bill in transforming the socioeconomic structure of American society, those passing the Bill scarcely considered the potential ramifications of the Bill for American class structure. Though the Bill came on the heels of the New Deal which was, for its time, radically progressive social policy, Congress' interest in passing social legislation had largely waned by the time the

G.I. Bill was passed.[1] Instead, as its name suggests, the Servicemen's Readjustment Act was intended primarily to help integrate waves of returning veterans back into American society. Only a little more than a decade earlier, the "Bonus Army" of World War I veterans, who camped out in Washington D.C. to demand government benefits, had created a political nightmare for the Hoover Administration after the President rejected their plea and ordered the United States Army to forcibly disperse the group.[2] With the possibility for veteran unemployment high and the "Bonus Army" incident still fresh on politicians' minds, Washington was beginning to fear a potential revolution generated by millions of idle veterans.[3] The primary purpose of the G.I. Bill, therefore, was to ensure that returning soldiers would have a smooth transition back into civilian life.

In particular, Title II of the legislation was intended not only to accomplish the broader goals of the Bill but also to reinvigorate the American economy which was suffering from a decline in its number of educated citizens. Studies conducted at the time estimated that 1,400,000 "man-years" of undergraduate training had been lost because of the war, due to the large number

1 Suzanne Mettler, *The Creation of the G.I. Bill of Rights of 1944: Melding Social and Participatory Citizenship Ideals*, 17 Journal of Policy History 345 (2005) [hereinafter *The Creation of the G.I. Bill*].

2 *Id.* at 348.

3 Milton Greenburg, *How the GI Bill Changed Higher Education*, 50 Chronicle of Higher Education, B9 (2004).

of young men unable to attend school. [4] Moreover, the decade of economic depression that preceded the war created a generation of workers who were not only lacking in education but also in any meaningful work experience.[5] Thus, Title II would "aid in replenishing the nation's human capital" which had been ravaged by years of depression and war. [6]

In pursuit of these goals, the G.I. Bill contained sweeping provisions that allowed veterans to receive unemployment benefits or to get loans and other government financing to build a house, start a business, or attend high school, college or vocational training. Title II of the Bill offered any veteran with at least ninety days of service the opportunity to pursue one year of education at government expense, with up to four years available to those who had served longer.[7] The government promised to pay a G.I.'s full tuition, up to $500, with an additional stipend available to cover living expenses. These benefits were distributed directly to the veterans (as opposed to being distributed to the colleges and vocational schools themselves) regardless of factors such as race, leading one author to describe it as a "remarkably egalitarian policy."[8]

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4 Roger Shaw, *The G.I. Challenge to the Colleges*, 18 The Journal of Higher Education 19 (1947).

5 Greenburg, *supra* note 3.

6 Robert Serow, *Policy as Symbol: Title II of the 1944 G.I. Bill*, 27 Review of Higher Education 481, 483 (2004).

7 Suzanne Mettler, Soldiers to Citizens 7 (2005) [hereinafter Soldiers to Citizens].

8 Serow, *supra* note 6, at 490.

Veterans took advantage of these benefits in overwhelming numbers, with over 2.2 million pursuing higher education and 5.6 million more attending high school or vocational school.[9] All told, during the post-war period, veterans accounted for as many as 49 percent of enrolled students at colleges and universities, and a total of 51 percent of veterans took advantage of the education benefits in some form.[10] These numbers greatly exceeded the Federal Government's projections, which had been calculated using survey data that showed that only 8 to 12 percent of veterans would want to pursue full-time education after the war.[11]

Numerical Effects

Despite the high number of veterans flooding colleges and universities around the nation, a number of factors make the results of the G.I. Bill itself (as opposed to the natural effects of returning veterans who may have gone to college anyway) difficult to discern. To start with, military recruitment offices were required to administer tests of literacy and intelligence to those seeking to enter the armed forces and to deny those who did not meet minimum requirements. Because of this policy, the average soldier under the age of twenty-five entered the military with 1.1 years of education more than the general population average.[12]

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9 Soldiers to Citizens, *supra* note 7, at 42.

10 *Id*.

11 *Id.* at 41.

12 Charles Nam, *Impact of the 'GI Bills' on the Educational Level of the Male Population*, 43 Social Forces 26, 27-28 (1964).

Veterans were not only uniquely intelligent (and therefore more likely to be able to handle collegiate work), but also more likely to have the educational background necessary to immediately begin a college career upon returning. Thus, it seems logical that they would have contributed significantly to a spike in enrollment rates even without the G.I. Bill.

Also contributing to the difficulty of studying the Bill's outcomes, a large portion of those who served in the military were precisely those who would have been in college had they not been called away to serve their country. As mentioned earlier, the federal government estimated that more than a million "man-years" of years of college training had been lost by young men who were called away to fight. Moreover, many soldiers had already enrolled in college before going into the service (about fourteen percent in the Army and six percent in the Navy).[13] Ultimately, any discussion of the impacts of the G.I. Bill will have to account for the "independent negative impact of WWII on education."[14]

Finally, the G.I. Bill came at a time when there was already a "sharply rising trend in the formal education composition of the male population" in America.[15] In fact, estimates from the National Center for Education Statistics show that the portion of the American population which had completed at least

13 Elizabeth Edmondson, *Without Comment or Controversy: The G.I. Bill and Catholic Colleges*. 71 Church History 820, 826 (2002).

14 Marcus Stanley, *College Education and the Midcentury GI Bills*, 118 The Quarterly Journal of Economics 673 (2003).

15 Nam, *supra* note 12, at 32.

four years of college education climbed from 2.7 percent in 1910 to 4.6 percent in 1940.[16] It is highly probable that even if World War II had never been fought and the G.I. Bill had never passed, American higher education would have continued to see increased enrollments from already existing social trends.

Due to the difficulties in assessing the extent of the effects of the G.I. Bill, the issue has become a source of ongoing debate and scholarship. As seen earlier, the percentage of veterans who pursued higher education under the Bill when they returned was significantly higher than the percentage who stated that they were considering pursuing college full time after the war. Yet, a controversial survey of veterans in higher education administered by the Educational Testing Service at sixteen colleges from 1946 to 1947 concluded that eighty percent of enrolled veterans would have pursued higher education even without the encouragement of G.I. Bill.[17] The wide gap in these figures has remained a point of fierce contention.

Several studies completed years after the law's passage have attempted to discern what, if anything, was the effect of the Title II provisions under the G.I. Bill. Several econometric studies have attempted to estimate the causal effects of the bill by drawing comparisons between postwar data and studies of the Veterans Adjustment Act of 1952, which provided similar educational

16 *Digest of Education Statistics 2001*, 17 National Center for Education Statistics (2001), *available at* http://nces.ed.gov/pbs2002/2002130.pdf.

17 Soldiers to Citizens, *supra* note 7, at 43.

benefits to veterans of the Korean War. One study, conducted by the National Bureau of Economic Research, found that the G.I. Bill likely increased college completion rates for veterans by somewhere between 4 percent and 10 percent, determining that veterans completed between .15 and .52 more years of schooling than they otherwise would have.[18] Given the low rates of college completion at the time, the study concluded that, because of the G.I. Bill, "war service increased college completion rates by close to 50%."[19] A similar study found that 7.5 percent of men who completed their first year of college during the years when G.I. benefits were available did so as a direct result of the G.I. Bill.[20] The World War II Veterans Survey of 1998 also asked questions related to the impact of the G.I. Bill on veterans' post-war career plans. That study eventually surmised that 54 percent of veterans who took advantage of the higher-education benefits believed that Title II provisions were what made college financially accessible to them.[21] Though academia may never agree on the exact numerical consequences of the G.I. Bill for colleges and universities, the Bill clearly led to increases in college attendance and completion.

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18 Sarah Turner & John Bound, *Going to War and Going to College* 20 Journal of Labor Economics 784, 806-807 (2002) [hereinafter *Going to War and Going to College*].

19 *Id.* at 786.

20 Nam, *supra* note 12, at 31.

21 Soldiers to Citizens, *supra* note 7, at 45.

Social Consequences

Unavoidably, this kind of shift in the educational attainment of American males naturally had a significant impact on society at large. The G.I. Bill radically adjusted the American University system and social perceptions regarding college and government accordingly. The estimation of the bill's social consequences should be tempered by two important factors. First, the massive flood of veterans returning from war would likely have created a large spike in college attendance with or without the G.I. Bill. Therefore, in most cases, the Bill had an effect of escalating rather than creating certain social phenomena. Second, the creation of the middle class and other social changes commonly attributed to the G.I. Bill were almost certainly a product of numerous cultural factors and should not be ascribed to a single piece of legislation.

The shift in Americans' perceptions about who should go to college was perhaps the largest and most obvious consequence of the massive influx of veterans into the educational system. Before the war, American colleges were "characteristically rural, private, small, elitist, white, and Protestant"[22] and, as such, were seen as catering to the upper crust, with little to offer the average American citizen.[23] G.I. Joe, on the other hand, was the quintessential hardworking American citizen, called away to serve his country in time of war. Even if most of the veterans who took

22 Greenburg, *supra* note 1, at 3.

23 Daniel Clark, *The Two Joes Meet--Joe College, Joe Veteran*, 98 History of Education Quarterly 165, 169-172 (1998).

advantage of Title II benefits would have attended college regardless, the massive influx of seemingly regular Americans into the ivory towers of American universities created the perception that college might prove useful to more than just the cultural elite.[24] Moreover, the egalitarian structure of the G.I. Bill began to challenge the traditional racial and ethnic divides of higher education. Though their access was certainly not equal to those of Protestant whites by any means, Blacks and Jews began to make greater inroads into colleges and universities.[25] Even Catholic colleges began admitting a wider variety of students to help accommodate the massive influx of veterans into the college system.[26] Because of these realities, Americans began to view college as the domain of "regular people," more than they ever had before.

As Americans began to see college as an institution with something to offer regular citizens, they also began to see themselves as members of the college class. One study examining the cultural depictions of college and college students both before and after the war commented specifically on this trend:

24 *Id.* at 174.

25 Greenburg, *supra* note 3.

26 Edmondson, *supra* note 13, at 822.

> The same media images and messages which celebrated the common, veteran-everyman and his influence in changing 'aristocratic' institutions could also be interpreted in the reverse direction, however. They also communicated, either directly or indirectly, how the veteran-everyman partook of and became identified with a higher social class.[27]

This likely gave rise to the perception that college was a vehicle for working class Americans to improve their social standing and pursue a level of economic comfort that would otherwise have been unavailable. This perceived potential for upward mobility strengthened the idea that college was an institution that could benefit more than just the elite and likely contributed to the drastic rise seen in college attendance between World War II and the present day. Indeed, it is these effects of the legislation, coupled with the results of its home loan program, which led one author to conclude that the G.I. Bill "transformed the nation from a steeply hierarchical society divided by wealth and class to one in which citizens aspired to and achieved middle class status."[28]

While veterans' increased college attendance transformed America's view of higher education, their very presence also caused a shift in the nature of the courses these institutions offered. A survey of soldiers at the end of the war found that eighty-two

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27 Clark, *supra* note 23, at 177.

28 Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation,* 98 Cal. L. Rev. 967, 978 (2008).

percent of them sought college courses with a high degree of practical applicability.[29] Recent scholarship has confirmed that colleges responded to this call for practical training by creating programs designed specifically to cater to the veterans' wishes. In summation, it seems that the G.I. Bill had a "profound effect" on the numbers of students taking specialized or commercial courses.[30]

The impact of the Bill on the perception of higher education was not limited only to American society at large, however. Recent scholarship has asserted that the G.I. Bill had a significant impact on the way veterans of World War II interacted with the government. Suzanne Mettler, alumni professor of political science at Syracuse University and an instrumental figure in the World War II Veterans Survey of 1998, argues that the G.I. Bill ultimately helped to foster a strong civic society by creating the perception among veterans that the government was both willing and able to take care of them.

Through the program's inclusive design, its fair manner of implementation, and its transformative socioeconomic effects, it communicated to beneficiaries that government was for and about people like them, and thus it incorporated them more fully as citizens. Beneficiaries responded by embracing the duties and obligations of active citizenship.[31]

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29 Shaw, *supra* note 4, at 18.

30 Nam, *supra* note 12, at 32.

31 Soldiers to Citizens, *supra* note 7, at 106.

Mettler argues that these perceptual influences caused veterans, who took advantage of Title II benefits, to participate in civic and political life at a far higher rate. In fact, her study found that those who used education benefits participated in fifty percent more civic organizations (such as fraternal organizations, parent-teacher associations, etc.) and engaged in thirty percent more political activity.[32] These findings even held when factors that traditionally influenced citizen engagement were controlled.

It is likely that many of these perceptual influences spilled over to the broader society as well. According to a survey conducted at the time, as much as ninety percent of the American population supported the extension of education benefits to veterans.[33] The widespread popularity of the law can be attributed, in part, to the egalitarian nature of the benefits extended.[34] By providing similar benefits to veterans regardless of socioeconomic standing, the bill was able to avoid the traditional critiques of redistributive social policies.[35] This, in turn, likely contributed to a broader perception of the effectiveness and responsiveness of government which would have increased the civic and political participation of the "greatest generation" even further.

Though the G.I. Bill was popular for its seemingly egalitarian principles, it was often less egalitarian in its application, particularly the distribution of benefits to black veterans. Before

32 *Id*. at 107.
33 *The Creation of the G.I. Bill*, *supra* note 1, at 356.
34 Serow, *supra* note 6, at 494.
35 *Id.* at 488.

the bill's passage, Mississippi congressman John Rankin worked to ensure that the actual distribution and application of G.I. Bill funds would be handled by individual states. He argued that the implementation of the bill was a states' rights issue.[36] Because *Plessy v. Ferguson* was still in effect during the G.I. Bill's implementation, these provisions allowed southern states to deny African American veterans access to the standard university system and to instead funnel them into supposedly "separate but equal" institutions of higher learning.[37] Unsurprisingly, these institutions were hardly equal in the opportunities they afforded to black veterans. To make matters worse, state governments were reluctant to increase their funding to accommodate more students. As a result, black institutions of higher learning often turned away as many as 55 percent of applicants, while white schools were expanding rapidly to satisfy the spike in demand.[38] Since the vast majority of African American veterans (over 75 percent[39]) were natives of southern states, only 12 percent of them were able to pursue a college education, as opposed to 28 percent of whites.[40]

The poor distribution of Title II benefits to black veterans likely resulted in two important yet seemingly contradictory social effects. First, the unequal distribution of educational ben-

36 Edward Humes, *How the GI Bill Shunted Blacks into Vocational Training*, 53 The Journal of Blacks in Higher Education 92, 95 (2006).

37 *Id*. at 97.

38 *How the GI Bill Widened the Racial Higher Education Gap*, 41 The Journal of Blacks in Higher Education 36, 36 (Fall 2003).

39 *Id.* 36-37.

40 Humes, *supra* note 36, at 94.

efits exacerbated the socioeconomic differences between whites and blacks in the South.[41] Yet, for those few African Americans who were actually able to take advantage of the bill, it may have had the same consequences for their confidence in government and civic participation as it did for whites. In fact, black veterans who took advantage of Title II benefits were even more likely to participate in civic and political life than their white counterparts and were especially likely to join or support groups fighting for racial equality.[42] In light of this, Mettler maintains that black soldiers' experiences with the G.I. Bill may have actually contributed to the mobilization of support for the Civil Rights movement.[43]

In addition to the numerous immediate consequences of the G.I. Bill on American society, the bill also left an enduring legacy of government involvement in the American higher education system. For instance, though scholarships existed before World War II, they were largely merit-based and financed without federal involvement.[44] Title II benefits set a precedent for federal funding of higher educational initiatives and transformed a system of merit-based aid into one that focused more on need-based assistance—a system that ultimately became a precursor to today's

41 Sarah Turner and John Bound, *Closing the Gap or Widening the Divide: The Effects of the G.I. Bill and World War II on the Educational Outcomes of Black Americans,* 63 Journal of Economic History 145, 172 (2003).

42 Soldiers to Citizens, *supra* note 7, at 37.

43 *Id.* at 136-143.

44 Jackson Toby, *How Scholarships Morphed into Financial Aid,* 23. Academic Questions (2010).

federal Pell grants and other initiatives.[45] Moreover, the distribution of G.I. Bill funds to Catholic and other religious schools set a precedent for the future application of federal funds to both secular and religious institutions.[46] Though entire volumes could be written on the G.I. Bill's legacy in the policy of the United States Federal Government and the social effects thereof, suffice it to say that Title II benefits opened the floodgate of government involvement in higher education.

Conclusion

The Servicemen's Readjustment Act of 1944 is notable, first and foremost, for accomplishing its goal of assisting veterans with their return to civilian life—no "Bonus Army" marches or record unemployment numbers followed the end of the Second World War. Though the precise consequences of the Bill on college attendance are a subject of debate, the Bill certainly contributed to the numbers of veterans—and therefore citizens—attending college. In turn, it also contributed to the social ramifications of the influx of hundreds of thousands of Americans into the higher education system. Therefore, though allegations that the G.I. Bill "created the middle class" are almost certainly exaggerated, the bill left an ongoing perception that college was both accessible to the average American and a useful tool for career advancement. Finally, the G.I. Bill set an ongoing precedent for future govern-

45 *Id.*

46 Edmondson, *supra* note 13, at 844.

ment involvement in higher education. In light of this, it seems clear that, just as Title II provisions made a significant difference in the lives of thousands of World War II veterans, they have ultimately left an enduring mark on the character of American society.

CONSTITUTIONAL REAPPORTIONMENT:
AN EXAMINATION OF *REYNOLDS V. SIMS*

*Kristie L. Eshelman**

ABSTRACT: *Known for its activism, the Warren Court ordered the reapportionment of the legislature in a number of different states, using the "one man, one vote" principle derived from the Fourteenth Amendment. Yet its actions proved extremely controversial given the seemingly reasonable and benign nature of "one man, one vote." In* Reynolds v. Sims*, Justice Harlan dissented to the reapportionment of the Georgia legislature, giving insight into why the Court was going beyond its bounds. His reasoning reveals that he took a conservative, strict approach to the Fourteenth Amendment as well as sought to limit the power of the Court in favor of the legislature and the people.*

Hailed as a champion of democracy and equal rights, the

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Warren Court faced some of its most difficult and important decisions with the reapportionment cases of the 1960s. In particular, *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964) proved extremely significant to the overall controversy. Not only did these decisions result in the reapportionment of the legislature in many states, they also expanded the power of the federal government and the judiciary, setting precedent in constitutional interpretation. As the Court adopted a broad interpretation of the Constitution to determine these cases, only Justice John Marshall Harlan dissented in every reapportionment case. In fact, he stood as the lone dissenter in *Reynolds* v. *Sims*, a case that required both houses of the Alabama legislature to reapportion their voting districts based entirely on population. Justice Harlan's eloquent, well-reasoned argument proved momentous to the study of law and the Constitution. Justice Harlan objected to the Court's interference in legislative affairs and criticized decisions which lacked judicial standards, reliance on precedent, or narrow interpretation of the Fourteenth Amendment. In doing so, Justice Harlan sought to preserve the Court's traditional functions.

Appointed to the Supreme Court by President Eisenhower in 1955, Justice Harlan immediately aligned himself with Justice Felix Frankfurter, an outspoken advocate of judicial restraint.[1] Indeed, Justice Harlan became known as the "great dissenter" of the Warren Court because of his opposition to the broad interpretation of the Constitution which allowed the Court to play a larger

1 John P. Frank, The Warren Court 111 (1964).

part in controversial policy disputes. Chief Justice Earl Warren's willingness to extend the Court's historical role irritated Justice Harlan, who had "clear notions of what the law ought to be but [he did] not regard himself as employed by the people of the United States for the purpose of making it."[2] Along with Justice Frankfurter, Justice Harlan adhered to the "Weschslerian ideal," which is the principle that the Court should only decide cases based on objective and neutral standards rather than on mere social utility developed by Herbert Wechsler, a Columbia University law professor.[3] Justice Harlan believed that even honest attempts to achieve justice without adherence to the principles set forth by precedent and the Constitution could result in judicial miscalculation and favoritism.

Baker v. Carr provided the precedent necessary to pave the way for the Warren Court's decision in *Reynolds v. Sims*. In fact, the situation in *Baker* was almost identical to that of *Reynolds:* In 1901, the Tennessee General Assembly enacted legislation which reapportioned the state's legislative districts according to population and promised reapportionment every ten years. Unfortunately, this reapportionment policy was never actually enforced, and by the 1960s "counties containing more than 60 percent of the population elected about a third of each house," a situation which led to a "loss of confidence in local government,

2 *Id.* at106.

3 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 5 (1959).

coupled with an ever growing tendency to bypass state capitals in favor of national solutions."[4] In such a case, the votes of those in districts with a higher population – usually urban districts – carried less weight than the ballots of those in areas with a lower population. Incensed by the seeming injustice of the status quo, Charles Baker, a resident of an urban district in Tennessee, sued Tennessee Secretary of State Joe Carr, demanding reapportionment by population. Baker claimed that the state was depriving him of equal protection of the law promised by the Guarantee Clause of the Fourteenth Amendment. The U.S. District Court for the Middle District of Tennessee dismissed the suit, holding that the issue was political and not judicial and so Congress, rather than the judiciary, should settle that problem. On direct appeal, the Supreme Court held that Baker's complaint was justifiable and formulated the "one man, one vote" standard.

Robert Dixon, a professor of law at George Washington University who has studied the apportionment cases extensively, writes that many believed only judicial action could bring true reform: "As was noted at the time, political avenues for change had become dead-end streets; some judicial intervention in the politics of the people seemed necessary to have an effective political system."[5] Justices Frankfurter and Harlan, however, disagreed with the majority, claiming that the Court would be encroaching

4 Archibald Cox, The Warren Court 115 (1968).

5 Robert G. Dixon, *The Warren Court Crusade for the Holy Grail of One Man, One Vote*, Sup. Ct. Rev. 219, 224, (1968) [hereinafter *The Warren Court Crusade]*.

on legislative affairs if it entangled itself in a political question, and that no definable standards existed by which the Court could make its judgment. The Justices had precedent on their sides. Historically, the Court refused to judge cases involving other branches of government unless they involved clear, objective constitutional principles.[6]

Abstaining from involvement in political questions legitimized the Court in the eyes of the public. In his dissent, Justice Frankfurter explained that "the Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment…from political entanglements and by abstention from injecting itself into the class of political forces in political settlements."[7] If the Court rejected its objectivity and respectability in order to involve itself in subjective political questions, it could lose its means of enforcement, the respect of the populace and the legislative branch, altogether.[8] Clearly, *Baker v. Carr* raised controversy over the role of the Court and broke precedent concerning political questions, clearing the path for the *Reynolds v. Sims* decision.

Alabama faced apportionment problems similar to those

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6 Stanley H. Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and its Implications for American Federalism*, 29 U. Chi. L. Rev. 677, 683 (1962).

7 Cox, *supra* note 3 at 117.

8 Robert G. Dixon, *Legislative Apportionment and the Federal Constitution*, 27 Law & Comtemp. Probs. 329, 334 (1969) [hereinafter *Legislative Apportionment*].

of Tennessee, spurring M.O. Sims, along with several other Alabama voters, to sue the state in 1961. Alabama's constitution promised reapportionment every ten years, allotting at least one legislator per legislative district and one senator per senatorial district, but, just like Tennessee, this had not been enforced. A federal district court ruled in favor of the disgruntled residents and, as a result, the Alabama legislature proceeded to form two reapportionment plans.

As an amendment to the state constitution, the 67-Senator Amendment sought to assign one senator to each of the state's sixty-seven counties. Similarly, each county would receive one of the state's 106 legislators while the rest would be apportioned by population. If the 67-Senator Amendment failed, the Crawford-Webb Act was to take effect in 1966, having already been signed into law by the governor of Alabama.[9] Under this law, each of the thirty-five senatorial districts would receive one senator as well as a legislative apportionment scheme identical to that of the 67-Senator Amendment. However, the district court ruled both plans unconstitutional and the case soon appeared in the Supreme Court after a direct appeal by Reynolds. Chief Justice Earl Warren delivered the opinion of the Court, which ruled in favor of the voters as well. This time, only Justice Harlan dissented.

The Court held that neither the Crawford-Webb Act nor the 67-Senator Amendment adhered to the Constitution because they were not based strictly on population. Observing that these

9 Reynolds v. Sims, No. 23, 1964 U.S. LEXIS 1002, at *552.

plans followed the pattern set out by the federal government – with legislators elected by population and senators elected by geographical region – the Supreme and district courts contested that the Alabama legislature had to base its plan entirely on population because "counties are merely involuntary political units of the State created by statute to aid in the administration of state government."[10] Thus, the Court reasoned that state and federal apportionment bore no similarity to each other.

Furthermore, the Warren Court established the "one man, one vote" standard based on the principle that equal representation produced a democratic government. In one of his most famous statements, Chief Justice Warren argued:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.[11]

Warren emphasized that weighing votes differently based upon where a person resided constituted discrimination comparable to that of discounting the votes of minorities or women. To justify his lack of historical precedent, the Chief Justice pointed to the decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), wherein he

10 *Id.* at *548.
11 *Id.* at *562.

had asserted that the principle of "one man, one vote" was derived from the Declaration of Independence, the Gettysburg Address, and the Fifteenth, Seventeenth, and Nineteenth Amendments to the Constitution.[12]

The single most important justification of the Court's insistence on apportionment by population alone lay in the Equal Protection Clause of the Fourteenth Amendment which reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[13]

The Court held that because the Equal Protection Clause required that all citizens receive equal treatment under the law, it must follow that attributing different weight to votes on the basis of geography violated constitutional principle. Mal-apportionment seemed unlawful because it undermined the right of equal protection to every citizen just as discriminating against a voter on the basis of his race or gender provided grounds for federal intervention.[14] Warren continued his defense of the Court's intervention by noting the words of the Guarantee Clause in Article Four,

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12 *The Warren Court Crusade, supra* note 4, at 221.

13 U.S. Const. amend. XIV, § 1.

14 *Reynolds*, 1964 U.S. LEXIS 1002, at *556.

Section Four: "The United States shall guarantee to every State in this Union a Republican Form of Government."[15] Thus, Warren reasoned, the Federal Government and the Supreme Court had a right and a duty to ensure that every state apportioned its districts so that each vote had the same weight. Though a connection between the "one man, one vote" principle and a "Republican Form of Government" failed to appear anywhere in the Constitution explicitly, the Court inferred that it required equal weight for votes because the principle seemed so logical.

Only Justice John Harlan stood against the rest of the Court. Along with many scholars and social scientists, Justice Harlan had practical reasons for disagreeing with the Court. Justice Harlan argued that pure per-capita representation oversimplified local politics, pointing out that this scheme always allowed the majority to smother the voice and representation of smaller groups.[16] Alexander Bickel, a respected constitutional scholar states:

> Government by consent requires that no seg-

15 U.S. Const. art. IV, § 4.

16 Robert G. Dixon, *Reapportionment and the Supreme Court in Congress: Constitutional Struggle for Fair Representation*, 63 Mich. L. Rev. 209, 220, (1963) [hereinafter *Reapportionment and the Supreme Court*].

> ment of society should feel alienated from the institutions that govern. This means that the institutions must not merely represent a numerical majority…but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics were brought to bear on the decision-making process.[17]

Justice Harlan also worried that the majority's ruling would permit gerrymandering, the act of adjusting political boundaries to affect the outcome of elections, and spent a great deal of his dissenting opinion on this topic. As Justice White observed, apportionment based solely on population could prove arbitrary: "If country and municipal boundaries are to be ignored, a computer can produce countless plans for absolute population equality, each differing very little from another, but each having its own very different political ramifications."[18] In fact, Congress in the late nineteenth century had decreed that national legislative reapportionment occur every ten years based on population, but the political consequences had proven so significant that it returned this power to the individual states.[19] Finally, Justice Harlan observed that by the Court's standards, most states in the Union would have to reapportion their districts because they had a geographically-based

17 Alexander Bickel, Politics and the Warren Court 184 (1965).

18 *The Warren Court Crusade, supra* note 4, at 221.

19 Michael R. Belknap, The Supreme Court Under Earl Warren: 1953-1969 110 (2005).

Senate and a population-based House of Representatives.

Justice Harlan opened his dissent by noting the case's lack of objective standards by which the Court could make its decision, reviving the political question that was so prominent in *Baker v. Carr*. He claimed that that the issues of the case rested on subjective whims and the self-interest of the parties involved rather than any law or constitutional principle. Urban residents, of course, desired reapportionment while residents of sparsely populated areas—such as farmers—preferred the status quo. No single standard existed that could mediate the desires of the parties in an impartial manner.[20] In such matters, Justice Harlan argued, the Court would be meddling with another branch of government based on a political opinion. Like Justice Harlan, Bickel noted that "the political arena is messier than the judicial, to be sure, but that is where all of us who feel under- or misrepresented should be exerting every ounce of power and influence."[21] Thus, the reapportionment issue warranted action from the state legislatures, a group that citizens could lobby and attempt to sway, rather than from the supposedly impartial judiciary.

Justice Harlan pointed to precedents which the United States had observed since the ratification of the Fourteenth Amendment. Citing the legislative history of the Fourteenth Amendment, Justice Harlan reasoned that since no judge had used the amendment to reapportion state districts, it was possible the original pro-

20 Craig L. Ducat, Constitutional Interpretation 60 (9th ed. 2009).

21 Bickel, *supra* note 13, at 189.

ponents of the Fourteenth Amendment never meant for the Court to do so.[22] That precedent, he cited, allowed for "the proposition that in a democratic system a 'population base' must be a dominant feature in apportionment-districting…but some sense of 'community' is relevant too. A maximum allowable deviation of 10 or 15 percent…would terminate egregious population disparities while leaving room for accommodation of such 'communities.'"[23] Based on these facts, he observed that the bicameral congresses historically allowed for representation both by geography and population, thereby presenting an excellent compromise.

Justice Harlan based his overall argument on strict interpretation of the Constitution. The interpretive method in which many justices on the Warren Court indulged bothered Justice Harlan, who cared only about the facts of the case and how they related to the words of the Constitution. He concluded that since the Fourteenth Amendment failed to address the issue of reapportionment, "it did not demand rigid equality; it required only that any asymmetry be rational. The…decision to retain an old allocation of Legislative seats in order to maintain governmental stability and promote geographic and demographic balance was within the area the Fourteenth Amendment left to its judgment."[24] Unlike Justices Brennan and Warren, who clearly held to an agenda of egalitarianism, Justice Harlan attempted to look at the case with

22 Reynolds v. Sims, No. 23, 1964 U.S. LEXIS 1002, at * 593.

23 *The Warren Court Crusade, supra* note 4, at 224.

24 Belknap, *supra* note 16, at 118.

impartial eyes.

As Justice Harlan predicted, the ruling in *Reynolds v. Sims* resulted in several significant consequences and generated many unanswered questions. First, it allowed for gerrymandering. While the Court and state legislature have found it more convenient to reapportion legislative districts than to revise already existing geographical and political boundaries, the decision in *Reynolds v. Sims* left this possibility open, much to Justice Harlan's concern.[25] Also, the Court's decision failed to define to what extent the state must adhere to the per capita rule. While Chief Justice Warren implied flexibility by stating that "mathematical exactness or precision is hardly a workable constitutional requirement" and "developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment," the exact meaning of these words remains vague and fails to provide an actual standard by which to judge future cases.[26] Justice White agreed that the terms held little real meaning and encouraged a broad interpretation.[27]

This broad language inevitably gave the Supreme Court more power and extended its role from that of impartial judgment to robust activism in an important area of public policy. In *Reynolds v. Sims,* the Court justified its questionable intervention by

25 Cox, *supra* note 3, at 127.

26 *Reynolds*, 1964 U.S. LEXIS 1002, at 577, 578.

27 *The Warren Court Crusade, supra* note, 4 at 221.

arguing that without judicial action, no reform would occur. However, *Reynolds* established a precedent for the Court to abandon all pretenses and openly push its agenda. For instance, the ruling in *Lucas v. Forty-Forth General Assembly of Colorado*, 377 U.S. 713 (1964) demonstrated the Court's increasing willingness to meddle in states where intervention hardly seemed necessary.[28] Though Colorado had apportioned its House of Representatives entirely on the basis of population, the Court ruled that the Senate – based on factors such as geography and historical districts – had to reapportion itself on a per capita basis as well, despite the fact that the majority of the people of Colorado desired to keep the status quo. Brent Bozell summarized the intentions of the Court:

> It was not the elimination of obstructions to popular government that moved the Court; it was determination to impose the ideology of equality on the American political system, notwithstanding the clear purposes of the architects of the system and irrespective even of the wishes of the people who now live under it.[29]

While the first reapportionment cases appeared innocent, they marked the Court's decision to abandon its impartial stance in favor of imposing political and philosophical ideals, a choice that rapidly changed the role of the Court and continues to profoundly impact its current judgments.

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28 Brent Bozell, The Warren Court in Historical and Political Perspective 110 (1989).

29 *Id.*

Ultimately, the rapidly expanding power of the Court based on decisions such as *Reynolds* v. *Sims* was derived from a broad interpretation of the Constitution. The Warren Court had, by this time, convinced itself that the end – social justice and egalitarianism – justified the means of deciding the case despite lack of precedent or explicit Constitutional wording. Even his most devoted proponents unwittingly admitted that Chief Justice Warren, when deciding most reapportionment cases, overlooked the Constitution's actual text. David Strauss, professor of law at the University of Chicago, observed, "It is true that the Warren Court's most important decisions cannot be easily justified on the basis of the text of the Constitution or original understandings."[30] As Justice Harlan feared, the use of the Constitution to justify the Court's agenda has nearly rendered the once-venerated document obsolete.

In evaluating the decision to mandate reapportionment despite the questions surrounding the Court's right to intervene in the state legislatures' affairs, Robert Dixon asserts, "In terms of involvement of the judiciary in the politics of the people, and in the great questions of democratic institutional arrangements, the decision is second only to *Marbury v. Madison*…for it involves… basic choices regarding conditions of political allegiance and expression of public will and opinion."[31] Indeed, the reapportion-

30 David A. Strauss, *The Common Law Genius of the Warren Court*, 49 Wm. & Mary L. Rev. 845, 845 (2007).

31 *Legislative Apportionment*, *supra* note 6, at 330.

ment cases set modern precedent for the Court's involvement in what it had once deemed 'political questions', allowing for the rapid expansion of its role in the United States Government. Despite the Warren Court's irresponsible constitutional interpretation to further the majority's political ideals, Justice Harlan stood firm in his reliance upon the exact wording of the equal protection clause in the Fourteenth Amendment. In his dissent to *Reynolds v. Sims,* Justice Harlan presented his arguments clearly and logically, making them imperative to understanding the role of the Fourteenth Amendment, precedent, judicial standards and political questions in the Warren Court, and the reapportionment controversy. In this controversy, Justice Harlan alone stood against a majority, understanding that failing to hold to strict constitutional principles in every case would forever change the dynamics of the American government.

THE UNFINISHED REVOLUTION:
THE REHNQUIST COURT AND DUAL FEDERALISM

*Christopher A. Wetzel**

ABSTRACT: *Academic treatments of the Rehnquist Court frequently refer to a "federalism revolution," asserting that Rehnquist and his fellow justices reinvigorated the doctrine of dual federalism. On the contrary, the Rehnquist Court ultimately affected very little change to Commerce Clause jurisprudence, the main battleground of federalism controversy. While the Court stemmed the tide of Congressional power in* U.S. v. Lopez*, any possibility of a true "revolution" was dashed in* Gonzales v. Raich*. With no previous precedents overturned and a clear lack of unity between the supposedly federalist justices, the "federalism revolution" was, in reality, nonexistent.*

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"Congress shall have the power . . . To regulate Commerce . . . among the several States . . ."

US Constitution, Article I, Section 8

Each chief justice's tenure becomes known for one particular theme expressed in one, or sometimes several, crucial decisions over which he presides. In the case of the Rehnquist Court (1986-2005), the supposed "federalism revolution" was the most discussed and debated subject, particularly in the case of *U.S. v. Lopez*, 514 U.S. 549 (1995). Rehnquist is frequently credited with—or accused of—spearheading the revival of dual federalism, a conservative interpretive framework that limits federal power and reserves more power for the states. Yet the Rehnquist Court never truly effected a lasting or pervasive change in judicial interpretation as was made clear in the case of *Gonzales v. Raich*, 545 U.S. 1 (2005). Despite the triumphalism of some conservatives and corresponding denunciations of liberals, the "federalism revolution" of the Rehnquist Court ultimately remained unfinished due to disunity within the Court's traditional voting blocs. The movement may have stemmed the tide of increasing federal power, but it did not reclaim any ground by clearly rejecting any of the existing precedents, particularly that of *Wickard v. Filburn*, 317 U.S. 111 (1942).

The clearest manifestations of conflict over federalism throughout the history of the Supreme Court have been cases dealing with the interpretation of the Commerce Clause, which

grants Congress the power "to regulate commerce among the several states." Beginning with several cases pertaining to New Deal legislation, interpretation of the Commerce Clause has steadily increased the scope of Federal power for more than half a century. The most notable of these was *Wickard v. Filburn*, where the Court maintained a farmer's choice to grow wheat on his own land within one state for his own consumption was subject to federal legislation under the Commerce Clause because it affected the interstate market by preventing the farmer from having to purchase from that market.[1] The Court later used the Commerce Clause to advance civil rights when it upheld anti-discrimination laws pertaining to private businesses on the grounds that the discriminatory policies of those businesses affected interstate commerce.[2] While further details and examples abound, after *Wickard* the Supreme Court rarely ruled that a piece of legislation exceeded the bounds of authority granted to Congress by the Commerce Clause.[3]

It therefore came as a shock when the Rehnquist Court did precisely that in *United States v. Lopez.* For the first time in the lifetime of many observers, the Supreme Court struck down federal legislation ostensibly grounded in the Commerce Clause as beyond the scope of that clause. When Alfonso Lopez, a high

1 Wickard v. Filburn, 317 U.S. 111, 111 (1942).

2 *See* Heart of Atlanta Motel v. United States, 379 U.S. 241(1964) *and* Katzenbach v. McClung, 379 U.S. 294 (1964).

3 While the Court did check the expansion of federal power in Hammer v. Dagenhart, 247 U.S. 251 (1918) *and* United States v. E.C. Knight Co., 156 U.S. 1, 11 (1895), both rulings were essentially overturned shortly thereafter.

school student in Texas, was charged under federal law with possessing a gun in a school zone, he challenged the constitutionality of the federal legislation—the Guns-Free School Zones Act or GFSZA. The Supreme Court struck down the Act in a 5–4 decision that upheld the ruling of a federal appeals court. This ruling began the alleged "federalism revolution" of the Rehnquist Court.

The Court's willingness to limit Congress' powers under the Commerce Clause was significant in and of itself. As one commentator aptly put it, "Congress certainly had reason to believe [the Commerce Clause] was unencumbered by any judicially-enforceable limit" prior to *Lopez*.[4] Even the Appeals Court that struck down the GFSZA stated that the courts must defer to Congress' determination with regard to whether a given issue affects interstate commerce so long as there is a "rational basis" for Congress' contention. What would become a "relatively stable" five-justice majority—Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Kennedy—set down the limits for the first time in *Lopez*.[5] Where previous rulings indicated that simply referencing the Commerce Clause in a piece of legislation would be sufficient for it to withstand judicial scrutiny, the *Lopez* decision examined the legitimacy of the alleged connection, applying the "rational basis" test more rigorously than Congress had expected or hoped.

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4 Lino A. Graglia, *Lopez, Morrison, and Raich: Federalism in the Rehnquist Court*, 31Harv. J.L. & Pub. Pol'y 761, 766 (2008).

5 Richard H. Fallon, Jr., *The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429, 430 (2002).

Congress neglected to claim in the GFSZA that the power for creating the act stemmed from the Commerce Clause. Lopez's lawyers took full advantage of this omission, noting,

> Congress made no effort to substantiate its action as a valid exercise of its Commerce Clause power. . . . Petitioner makes this argument [that the grounding in Commerce Clause power is implicit in the statute] without citing any case in which this Court has upheld a statute's constitutionality on the theory that findings [of a connection to commerce] were implicit in the statute itself.[6]

The Court indicated that it could still apply the rational basis test even when Congress failed to state an explicit connection to interstate commerce. Nevertheless, in *Lopez* the Court's application of the rational basis test was such that the GFSZA was overturned. Harkening back to the case of *Gibbons v. Ogden*, 22 U.S. 1 (1824), Rehnquist acknowledged in the majority opinion that the language of the Commerce Clause itself implies that there are limits on Congress' power.[7] By establishing limits and applying the rational basis test in a meaningful way, the Court circumvented the possibility of virtually unlimited Congressional power under the Commerce Clause.

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6 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 1994 Term Supplement 242,526 (Gerhard Casper & Kathleen M. Sullivan eds., 343University Publications of America, 1996) [hereinafter Landmark Briefs].

7 United States v. Lopez, 514 U.S. 549, 553 (1995).

Yet even in *Lopez*, the watershed case of the supposed "federalism revolution," the Court did not reject the decisions that had made a revolution necessary in the eyes of conservatives. As Richard Fallon pointedly observed, "Although its invalidation of the challenged statute was undeniably extraordinary, the Court purported not to overrule any previous decisions."[8] Rather, Chief Justice Rehnquist, allegedly the architect of the revolution, drew on the very cases abhorred by dual federalists to delineate three categories of legislation that were permissible under the Commerce Clause.

Rehnquist sketched at length the history of Commerce Clause jurisprudence, presenting it as a consistent pattern which can and should be upheld. He makes no criticism of the obliteration of distinctions between direct and indirect effects on commerce in *NLRB v. Jones and Laughlin Steel*, or of *Wickard v. Filburn*'s "aggregate effects" reasoning which the Court used to ignore the entirely non-commercial nature of Filburn's activities. Instead, Rehnquist attempts to find in these decisions hints of limitations similar to that being imposed in the Court's present ruling in *Lopez*.[9] Mostly these hints amounted to seemingly impotent warnings that in spite of the increasing scope granted by the decision, Congress' power was not unlimited.

Rehnquist then laid out three "broad categories" of legislation that fell within the authority granted by the Commerce

8 Fallon, *supra* note 5, at 453.

9 *Lopez*, 514 U.S. at 556-57.

Clause. Notably, the three categories are introduced as "consistent with this structure," i.e. the previous decisions of the Court, including *Wickard*. The new guidelines were delineated as follows:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. . . . First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities . . . . Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U.S. at 37, *i. e.*, those activities that substantially affect interstate commerce, *Wirtz, supra*, at 196, n. 27.[10]

This new three-category test replaced the "rational basis test" with a "substantial effect" test, which the Court applied directly and independently rather than evaluating an application of the test by Congress.[11]

The reasoning ultimately employed in striking down the GFSZA exemplifies the half-hearted nature of the erroneously named "federalism revolution." The statute was struck down,

10 *Id*. at 558-59.

11 Graglia, *supra* note 4, at 768.

not because non-commercial activities that affect commerce are beyond the reach of Congress' authority but because this particular activity did not have such an effect on commerce.[12] In fact, Lopez's lawyers explicitly contended that "[t]he Gun-Free School Zones Act is unconstitutional *because gun possession within 1000 feet of a school does not substantially affect interstate commerce*."[13] There was no effort to challenge the notion that non-commercial, intra-state activities may be regulated if they admittedly affect commerce. With such limited objectives, the "federalism revolution" never even attempted to retake ground; like containment foreign policy, the ruling sought only to prevent further expansion.

The flagship accomplishment of the decision was the implied requirement that an activity be economic in order to be subject to Commerce Clause regulation. Even this requirement, later loosely applied in *Gonzales v. Raich*, was based in part on *Wickard*, a case scorned by dual federalists. In fact, Rehnquist explicitly references it, writing, "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."[14] Furthermore, the *Lopez* decision revealed the seeds of disunity among the ostensibly conservative "federalist five." As Ann Althouse points out,

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12 Richard A. Brisbin, Jr., *The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations,1991-1997*, 28 Publius. 189, 197 (1998).

13 Landmark Briefs, *supra* note 6.

14 *Lopez*, 514 U.S. at 560.

> Chief Justice Rehnquist's opinion in *Lopez,* by contrast, with its cry for the preservation of "first principles" of constitutional structure, was not able to get a majority.'' So it was not a monolithic group of Justices who supported the judicial enforcement of federalism. There were some who looked at it one way and there was a middle group that had a more flexible, pragmatic interpretation.[15]

While in some ways a step in the federalist direction, *Lopez* revealed the twin problems of underwhelming goals and a lack of unified methodology in the movement to revive dual federalism.

Ten years later, *Gonzales v. Raich* would reveal the ultimate failure of *Lopez* to change the direction of the Court's Commerce Clause rulings. The *Gonzales* case involved two California residents who cultivated marijuana for medicinal purposes under a California law called the Compassionate Use Act; however, federal agents acting under the Controlled Substances Act ("CSA") seized and destroyed marijuana plants belonging to one of the residents, Angel Raich. A federal appeals court reversed the initial decision of a federal district court by issuing a preliminary injunction against enforcement of the CSA on the grounds that it overstepped Congress' authority pursuant to the Commerce Clause. The Supreme Court, however, vacated that ruling, holding that the CSA did indeed fall within Congress' reach.[16]

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15 Ann Althouse, *Chief Justice Rehnquist and the Search for Judicially Enforceable Federalism*, 10 Tex. Rev. L. & Pol. 275, 278 (2006).

16 Gonzales v. Raich, 545 U.S. 1 (2005).

The Court's decision in *Gonzales* represents the manifestation of the work that was left undone in *Lopez*. The continued use of *Wickard* is especially problematic for those claiming or hoping for the existence of a revolution; it remains the most far-reaching construction of the Commerce Clause and the one most irksome to conservatives. In many ways, the decision in *Gonzales* hinged on whether the case could be better tied to *Lopez* or to *Wickard*. In the majority opinion, Justice John Paul Stevens noted that *Wickard* was of "particular relevance" to the *Gonzales* case due to the "striking" resemblance between the two cases, while taking pains to distinguish the issues in *Gonzales* from those in *Lopez*.[17] It was this determination of applicable precedent, which resulted from the limited aims and accomplishments of *Lopez*, that would cause the Rehnquist Court to halt any revolution that might have otherwise developed.

The larger context of the law in question was a crucial issue in the determination that *Wickard* was the precedent applicable to *Gonzales*. As with the Agricultural Adjustment Act provision that was the subject of *Wickard*, the CSA was part of a larger regulatory scheme. Furthermore, the activity involved was ruled to be at least "economic" if not "commercial," since the production of goods constitutes economic activity even if those goods are not sold in commerce.[18] By deeming Raich's activity economic, the Court opened the door for the use of "aggregate effects" rea-

17 *Id.* at 17-23.

18 Graglia, *supra* note 4, at 782.

soning to establish a substantial impact on interstate commerce. Had the activity not been considered economic, the Court would have followed the *Lopez* and refused to consider the aggregate effects of non-economic activity. Once these distinctions were made and *Wickard*, not *Lopez*, was deemed the relevant case for consideration, the weight of the case naturally shifted in the government's favor.

The precedent of *Wickard* was not, however, the final word. In addition to arguing that the private growth of marijuana for personal, authorized, medical use was not economic activity, Raich and the other respondents contended that there was no proof that such private growth affected the interstate marijuana market. By making this assertion, they attempted to make the case relate to federalism and substantial effects rather than the economic or non-economic nature of the activities. To this end, Raich contended that a proper understanding of *Wickard* actually supported his own case. *Wickard* advocated concentration on the effect of an activity on commerce rather than the classification of that activity. Raich therefore argued that even if his activities were economic, their impact was not substantial enough to warrant Congressional regulation under the Commerce Clause that trumped the laws of the state of California.[19]

Raich and the other respondents had to rely on the argument that subtle differences did exist between their case and *Wickard* as opposed to launching an assault on its correctness. Their

19 Landmark Briefs, *supra* note 6, at 157-161.

recourse to this logic is instructive of just how limited the impact of *Lopez* was on Commerce Clause jurisprudence. If *Lopez* had explicitly disowned the precedent of *Wickard* or at least called it into serious question, the respondents could have focused their argument on the non-economic nature of Raich's marijuana-growing activities. Since the *Lopez* decision approved and even utilized *Wickard*, the respondents were reduced to analyzing the precise manner in which the farmer in *Wickard* had used the extra wheat he grew and comparing the impact of that use to the impact of Raich's use of marijuana.[20] If a true "revolution" had been initiated by the ruling in *Lopez,* with *Wickard* being dismissed as an overzealous extension of Congressional authority, no such painstaking distinction would have been necessary.

As the "federalism revolution" of the Rehnquist Court failed to achieve conservative hopes, one must consider why it never amounted to more than a prevalent myth. As has been established, the Court set its goals too low. While the *Lopez* case did "subject [*Wickard*] to powerful criticism," the Court contented itself with suggesting that "[a]t an appropriate juncture . . . we must modify our Commerce Clause jurisprudence" instead of tak-

20 *Id.* at 164. The respondents note that ("[T]he vast majority of the farm's wheat production [in *Wickard*] supported the farm's commercial operations, rather than feeding the farmer and his family," whereas "the cannabis at issue is not sold, bartered, exchanged . . . Angel Raich's caregivers cultivate enough cannabis for her own medical use, without any charge, for compassionate rather than economic reasons.")

ing the immediate opportunity presented in *Lopez*.[21] In this opportune moment for redefining its Commerce Clause jurisprudence, the Court was unwilling to renounce the precedent of *Wickard* and instead settled to limit the extent of its application.

The choice to aim low is symptomatic of a deeper problem—the "federalist five" lacked the unity necessary to accomplish a significant, lasting change in jurisprudential patterns. As Lino Graglia points out, one of the main reasons that Rehnquist did not reject the "rational basis test" explicitly in *Lopez* was that such a gesture might have cost him the vote of Justice Kennedy.[22] If Graglia's speculation is correct, it seems likely that fear of losing Kennedy's and perhaps even Scalia's vote could have forestalled a more ambitious decision to attack openly the precedent of *Wickard*.

The problem of disunity would further manifest itself in *Gonzales*. After failing to reduce federal power in *Lopez*, the supposedly revolutionary Rehnquist Court actually reasserted the pervasiveness of Congress' power to regulate under the Commerce Clause. This failure to at least toe the *Lopez* line was the result of the defection of Justices Scalia and Kennedy from the "federalist five." The disagreement within what had typically constituted the conservative majority is exemplified in Justice O'Connor's criticism of Justice Scalia in her dissent in *Gonzales*. Countering

21 Landmark Briefs, *supra* note 6, at 161. (citing United States v. Lopez, 514 U.S. 549, 602 (1995))

22 Graglia, *supra* note 4, at 781.

Scalia's contention that medical marijuana was "never more than an instant away from" the interstate market and therefore subject to regulation,[23] O'Connor stated:

> Indeed, if it were enough in 'substantial effects' cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are 'never more than an instant from the interstate market' in guns already subject to extensive federal regulation . . . .[24]

A disagreement significant enough to cause O'Connor to single-out Scalia for inconsistency with *Lopez* certainly represents a substantial divide in what is often casually treated as a firm alliance.

Furthermore, the majority in *Lopez* never attempted a clear movement toward originalism, thus precluding a methodological revolution that must necessarily precede a revolution of outcomes. A reader looks in vain through the pages of the *Lopez* opinion for an attempt to define "commerce" or "regulate" in terms of the Framers' understanding. None of the justices makes the original contention that the meaning of the word "regulate" would have been "make regular" or "standardize" in the minds of the framers. Under this definition, "substantial effects" reasoning becomes problematic. It is difficult to argue that prohibiting Raich from pri-

23 Gonzales v. Raich, 545 U.S. 1, 40 (2005) (Scalia, J., concurring).

24 *Id.* at 52 (O'Connor, J., dissenting).

vately growing marijuana for her own medicinal needs constitutes standardizing interstate commerce or making it regular. Without a move toward methodological agreement, the Court could hardly have effected a long-term change in Commerce Clause interpretation.

Finally, a variety of other concerns minimize the effectiveness of any of the changes, even small ones, that the Rehnquist Court did manage to implement. In showing a propensity for striking down federal statutes, the Court has focused on limiting federal power without simultaneously increasing state power. Furthermore, Congress may attempt to skirt even the modest rollback of power imposed by *Lopez* by leaning on the spending power rather than exclusively on the Commerce Clause. There are questions as to whether Congress has acknowledged the Court's ruling in any meaningful way since it has not appeared to scale back the scope of its legislation.[25] Without a judicial pattern consistent enough to give Congress second thoughts, it is unlikely that the stream of federal regulatory legislation will soon slow.

The federalism-related decisions of the Rehnquist Court leave observers—particularly conservatives sympathetic to the dual federalism cause—to contemplate what was and what might have been. In *Lopez*, the Court, for the first time in decades, struck down a federal law on the grounds that it exceeded the authority granted by the Commerce Clause, establishing that the Clause

25 J. Mitchell Pickerill, *Leveraging Federalism: The Real Meaning of the Rehnquist Court's Federalism Decisions for States*, 66 Alb. L. Rev. 823, 826 (2003).

was not a *carte blanche* for Congress. Yet the failure to execute a more ambitious attack on federal power by overturning *Wickard v. Filburn* prevented any real "revolution" from occurring under Rehnquist. Any remaining hope was crushed by *Gonzales v. Raich* when the federalist consensus of *Lopez* was sundered. Plagued by a lack of ideological unity that prevented more sweeping reform, the so-called "federalist five" failed to go beyond the stop-gap *Lopez* ruling. Barring a new, more aggressive federalist alliance under Chief Justice John Roberts, the "federalism revolution" of the Rehnquist Court will remain unfinished.

BOOK REVIEW

OURSELVES AND OUR POSTERITY:

ESSAYS IN CONSTITUTIONAL ORIGINALISM

BRADLEY C.S. WATSON, ED., LEXINGTON BOOKS, 2009

*David J. Porter**

ABSTRACT: Ourselves and Our Posterity: Essays in Constitutional Originalism *addresses the views of ten legal scholars and political scientists who assert that the influence of Originalism has become so far reaching that many judges have openly stated: "we're all originalists now." Analyzing some of the most salient Supreme Court cases like* District of Columbia v. Heller*,* Boumediene v. Bush*,* Roe v. Wade*, and* Marbury v. Madison*, this review describes instances when Originalism was properly employed and highlights instances when it was rejected in favor of judicial activism.*

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In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008),[1] the Supreme Court held that the Second Amendment confers an individual right to keep and bear arms. As interesting as the specific outcome was the interpretive method employed by Justice Scalia in the majority opinion (joined by Chief Justice Roberts and Justices Kennedy, Thomas and Alito) and by Justice Stevens in the principal dissenting opinion (joined by Justices Souter, Ginsburg and Breyer). Faced with a rare question of first impression concerning the meaning of the words employed by the Framers to establish a substantive constitutional right, all of the justices rooted their competing interpretations in the text itself, construed in light of founding-era sources. So striking were the justices' pure application of originalist methodology that at least two commentators proclaimed, "We're all originalists now."[2]

Similarly, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008),[3] the Court reviewed the history of the writ of *habeas corpus* from its origins in the Magna Carta to its American usage in 1789, concluding that the writ extends to enemy combatant detainees held outside of the United States. As in *Heller*, the four dissenting justices agreed that historical understanding and practice resolved

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1 District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (holding that the Second Amendment confers an individual right to keep and bear arms).

2 Dale Carpenter, Heller *On a First Read*, The Volokh Conspiracy (June 26, 2008), *available at* http://volokh.com/archives/archive_2008_06_22-2008_06_28.shtml#1214514180 *and* Dave Kopel, *Conservative Activists Key to DC Handgun Decision*, Human Events (June 27, 2008), *available at* http://www.humanevents .com/article.php?id=27229.

3 Boumediene v. Bush, 128 S. Ct. 2229 (2008).

the question, even though they personally would have reached a different conclusion.[4]

Even avowed non-originalists acknowledged that legal conservatives and progressives were in some sense "all originalists now" long before *Heller* and *Boumediene*.[5] Indeed, the originalism advocated in the 1970s and 1980s by Raoul Berger,[6] Robert Bork,[7] William H. Rehnquist,[8] Antonin Scalia[9] and Edwin Meese,[10] as subsequently refined by them and others, has been increasingly

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4 *Id.* at 2303-2307 (Scalia, J., dissenting); see also *id.* at 2279 (Roberts, C.J., dissenting).

5 *See*, e.g., Laurence H. Tribe, Comment, *in* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 67 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation] ("We are all originalists now….") *and* Michael J. Perry*, The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 Va. L. Rev. 669, 718 (1991) ("[W]e are all originalists now -- or should be.")

6 Raoul Berger, Congress v. the Supreme Court (1969); Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977).

7 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 San Diego L. Rev. 823 (1986).

8 William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976).

9 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter Scalia, *Originalism*].

10 Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), reprinted in Originalism: A Quarter Century of Debate 47 (Stephen G. Calabresi ed., 2007); Edwin Meese III, Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (November 15, 1985), reprinted in Originalism: A Quarter Century of Debate 71 (Stephen G. Calabresi ed., 2007).

ascendant,[11] though it continues to withstand sustained criticism[12] and non-originalist decisions still proliferate.

In *Ourselves and Our Posterity*,[13] ten distinguished legal scholars and political scientists explain and defend originalist interpretive methodology, apply originalist principles to current legal and political disputes, and consider the effects of non-originalist judicial activism on the nation's political and cultural environment. It is a valuable contribution to the ongoing debate over originalism. In the opening chapter, "Original Meaning and Responsible Citizenship," Edward Whelan argues that originalism is both common-sensical and necessary to discern constitutional meaning in most cases. Employing originalist principles, judges can usually discern, or at least significantly limit, the range of possible meanings of disputed texts, thus constraining their personal preferences. When the original meaning is not sufficiently clear, adherence to an ethic of judicial restraint preserves the democratic, majoritarian character of American political design. In the absence of a clear constitutional provision, the judiciary—the "least dangerous" branch of government[14] —should defer to

11 Rory K. Little, *Heller and Constitutional Interpretation: Originalism's Last Gasp*, 60 Hastings L. J. 1415, 1417 (2009).

12 *See*, e.g., Mitchell M. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1 (2009); Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 Duke L. J. 239 (2009); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. Ill. L. Rev. 1185 (2008).

13 Ourselves and Our Posterity: Essays in Constitutional Originalism (Bradley C. S. Watson ed., 2009) [hereinafter Ourselves and Our Posterity].

14 Federalist No. 78 (Hamilton).

legislative enactments.[15]

Whelan would probably challenge the suggestion that "we are all originalists now" as unduly optimistic. In the second part of his essay, Whelan surveys the "judicial abandonment of originalism" begun by the Warren Court (1953-69) and continued in *Roe v. Wade*, 410 U.S. 113 (1973)[16] and its coda, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).[17] In *Casey*, the Court rejected the goal of originalism (fidelity to the written constitution as understood at the time that it was adopted) in favor of a strong theory of *stare decisis* rooted in what Whelan calls a "grandiose misunderstanding of the Supreme Court's role."[18] Thus liberated from the original understanding of the Due Process Clause, the Court adduced an expansive conception of constitutional liberty to gird up *Roe's* shaky theoretical foundation: "At the heart of liberty is the right to determine one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[19] That this passage continues to echo through substantive due process[20] and equal protection[21] cases is sufficient evidence that originalism has not finally carried the day.

Finally, Whelan considers the harmful effect that judicial

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15 OURSELVES AND OUR POSTERITY, *supra* note 13 at 7.

16 Roe v. Wade, 410 U.S. 113 (1973).

17 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

18 OURSELVES AND OUR POSTERITY, *supra* note 13 at 15.

19 *Planned Parenthood*, 505 U.S. at 851.

20 *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003).

21 *See* Kerrigan v. Comm'r of Public Health, 289 Conn. 135, 235, 957 A.2d 407, 466 (Conn. 2008).

activism has had on the judicial confirmation process. The transfer of a broad range of substantive policy issues from elected officials to courts has spawned new constituencies who jealously guard the judicial victories that they could not achieve through the democratic process.[22] To these constituencies, the appointment of judges who are committed to the principles of originalism and judicial restraint are a threat the creation of public policy-by-litigation. The judicial confirmation process, particularly for Supreme Court justices, has therefore become a heavily contested battlefield.[23]

Hadley Arkes' chapter, "Confirmation to the Court in Times Turned Mean: A Strategy for the Hearings," extends Whelan's criticism of judicial confirmations. Arkes begins with an historical survey of confirmation hearings from the early twentieth century (when some nominees were confirmed without hearings, and when hearings were held, the nominees often did not even appear) through the tumultuous Bork and Thomas hearings of 1987 and 1991. Arkes persuasively argues that the confirmation process devolved to its current state because of the Supreme Court's federalization of the abortion issue in *Roe v. Wade*. Now that the Court has arguably taken ownership of abortion policy and other controversial issues, judicial confirmation hearings are the last opportunity for the people, acting through their elected representatives, to vet "the persons who truly will govern us."[24]

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22 Ourselves and Our Posterity, *supra* note 13 at 17.

23 *Id.* at 17-21.

24 *Id.* at 132.

Confirmation hearings, particularly for Supreme Court nominees, now carry a tinge of partisan desperation because the president is "choosing the true, supreme Legislators whose decisions cannot be vetoed by the Executive, and cannot be overturned with anything less than a constitutional amendment."[25]

Arkes argues that embattled nominees should adopt a new strategy for judicial confirmation hearings. Particularly when questioned about one's fidelity to *Roe* and its progeny, nominees should answer senators' questions with more queries designed to clarify and reveal the full sweep of the Court's abortion jurisprudence.[26] Arkes speculates that this maneuver would move the exchange in a direction that hostile senators would prefer to avoid and transform hearings from spectacles into serious public "seminars" on constitutional law.[27]

While interesting to ponder, Arkes's proposed strategy would be highly risky. As Arkes acknowledges, some of his politically experienced friends express a dim view of the plan because it places nominees in a no-win situation.[28] If the nominee is insufficiently deft, he may fail to control the discussion in the manner that Arkes suggests.

But even if the nominee is able to turn the questioning so as to discomfit hostile senators, what has he accomplished *toward the end for which the judicial confirmation hearing is designed*?

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25 *Id.*
26 *Id.* at 133-134.
27 *Id*. at 135.
28 *Id.* at 135-136.

The procedures associated with the Senate's constitutional power to advise and consent with respect to judicial nominations are not, ultimately, educational or aspirational, but purely instrumental: shall the president's nominee become a life-tenured judge, or not?[29]

Professor Arkes's desire to transform hearings into urbane public teaching sessions is salutary, and if sincerely engaged by their interlocutors many judicial nominees would undoubtedly be up to the task, but his proposal asks too much of nominees under the circumstances. Once nominated by the president, their calling is to win confirmation so that they may exercise the judicial power conferred by Article III of the Constitution. That considerable responsibility is sufficient unto the day. Asking nominees to simultaneously play the role of public intellectual while securing Senate confirmation adds an objective that detracts from, and could unnecessarily frustrate, their (and the president's) primary purpose.

In "Judicial Usurpation: Perennial Temptation, Contemporary Challenge," Robert P. George asserts that once the judicial nominee has successfully run the confirmation gauntlet, his "perennial temptation" is to exercise judicial power lawlessly, that is, to illegitimately "displace legislative judgments."[30] In the bal-

29 U.S. CONST. art. III, § 2, cl. 2.

30 OURSELVES AND OUR POSTERITY, *supra* note 13 at 49. *Cf.* The Federalist No. 78 (Alexander Hamilton) ("For I agree, that there is no liberty, if the power of judging be not separated from the legislative and executive powers.") (citing MONTESQUIEU, SPIRIT OF THE LAWS 181 (1752)).

ance of his essay, George offers examples of such judicial usurpation that laid the groundwork for the current controversy over the constitutionality of same-sex marriage. George's list of rogue decisions includes *Dred Scott v. Sandford*, 60 U.S. 393 (1856),[31] *Plessy v. Ferguson*, 163 U.S. 537 (1896),[32] *Lochner v. New York*, 198 U.S. 45 (1905),[33] *Griswold v. Connecticut*, 381 U.S. 479 (1965),[34] *Roe v. Wade*,[35] *Lawrence v. Texas*,[36] and several state court cases finding unconstitutional the restriction of marriage to opposite-sex unions.[37]

Given the trajectory of recent Supreme Court decisions, George believes that it is only a matter of time before the federal Defense of Marriage Act is invalidated by the Supreme Court of the United States, which would force all states to give full faith and credit to out-of-state same-sex marriages.[38] He therefore advocates a constitutional amendment that

> Defines marriage in the United States as the union of a man and a woman; preserves the principle of democratic self-government on the issue of civil unions, domestic partnerships, and other schemes under which some of the incidents of marriage

31 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
32 Plessy v. Ferguson, 163 U.S. 537 (1896).
33 Lochner v. New York, 198 U.S. 45 (1905).
34 Griswold v. Connecticut, 381 U.S. 479 (1965).
35 Roe v. Wade, 410 U.S. 113 (1973).
36 Lawrence v. Texas, 123 S.Ct. 2472 (2003).
37 OURSELVES AND OUR POSTERITY, *supra* note 13 at 55.
38 *Id.* at 57.

> may be allocated to non-married persons; and respects principles of federalism under which family law is primarily the province of the states rather than the national government.[39]

In a sense, Ralph A. Rossum's chapter, "'Common-Sense Constitutionalism': Why Constitutional Structure Matters for Justice Scalia," is the anti-type of Robert George's list of "judicial usurpations." Following Justice Antonin Scalia's critique in *A Matter of Interpretation*,[40] Rossum seeks to avoid the dangers of evolutionary, "common-law constitutionalism" by championing what he calls Justice Scalia's "common sense constitutionalism." By "common sense," Rossum does not refer colloquially to a community's shared agreement and natural understanding. Rather, according to Rossum, Justice Scalia's "common sense understanding" places "emphasis on giving primacy to the constitutional text and on expounding its words based on their 'plain, obvious and common sense.'"[41] It is a rule, or set of rules, for interpreting constitutional text, beginning with

> Giving primacy to constitutional structure -- in particular, to understanding, through the words they used, the original meaning of those who wrote and ratified the Constitution regarding how power was to be allocated among the branches

39 *Id.*

40 Scalia, A Matter of Interpretation, *supra* note 5.

41 Ourselves and Our Posterity, *supra* note 13 at 26 (quoting *Harmelin v. Michigan*, 501 U.S. 957 (1991)).

> of the federal government (separation of powers) and, equally importantly, regarding how, over time, that allocation was to be preserved in practice.[42]

Rossum illustrates Justice Scalia's "common sense constitutionalism" and its emphasis on constitutional structure by reviewing Scalia's opinions in cases dealing with federalism,[43] separation of powers,[44] and constitutional standing.[45] In contrast to Professor George's litany of substantive due process and right of privacy cases, Rossum's survey is a helpful reminder that originalism has made real and lasting gains in recent decades.

What is the relationship between pure originalism and the doctrine of *stare decisis*? Setting aside arguments about whether the American constitutional tradition is, in fact, textualist rather than precedent-based,[46] many believe that the extent to which one is willing to abandon text, history and structure for the sake of continuity (or, perhaps, in order to safeguard the public's alleged perception of the judiciary)[47] is in practice the most significant

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42 *Id.* at 29.

43 Printz v. United States, 521 U.S. 898 (1997).

44 Morrison v. Olson, 487 U.S. 654 (1988); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987).

45 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

46 *See* Steven G. Calabresi*, Text vs. Precedent in Constitutional Law*, 31 Harv. J. L. & Pub. Pol'y 947 (2008); Gary Lawson*, The Constitutional Case Against Precedent*, 17 Harv. J. L. & Pub. Pol'y 23 (1994).

47 *See Planned Parenthood*, 505 U.S. at 864-69.

challenge for those who are sympathetic to originalist arguments.[48]

In "Authority Doctrines and the Proper Judicial Role: Judicial Supremacy, Stare Decisis, and the Concept of Judicial Constitutional Violations," Jack Wade Nowlin balances the claims of *stare decisis* against originalist ideals, landing squarely in the middle.[49] Essentially, Nowlin argues that activist, results-oriented unconstitutional decisions are not entitled to respect as binding precedent.[50] However, even Court decisions that conflict with the Constitution may for prudential reasons continue to command deference, although ideally they would be limited and incrementally eroded by subsequent judicial opinions.[51] In short, Nowlin appears to fall comfortably into the camp that Justice Scalia memorably labeled "faint-hearted originalists."[52]

In his essay, "Freedom Questions, Political Questions: Republicanism and the Myth of a 'Bill of Rights,'" the intrepid Matthew J. Frank shows himself to be no faint-hearted originalist. Beginning with *Marbury v. Madison* and the entire first cen-

48 *See, e.g.,* Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 Harv. J. L. & Pub. Pol'y 5, 13-14 (2011) ("It could almost go without saying that the proper resolution of many important constitutional issues could hinge on the conditions, if any, under which various versions of originalism would authorize courts to deviate from the original constitutional meaning based on considerations of precedent and prudence"). *But see*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW U. L. Rev. 803 (2009) (arguing that precedent is a legitimate and coherent doctrine that is compatible with originalism).

49 Ourselves and Our Posterity, *supra* note 13 at 84.

50 *Id.* at 79.

51 *Id.* at 80.

52 Scalia, Originalism, *supra* note 9, at 861-62.

tury of American jurisprudence, Franck argues that what we have come to call "judicial review" was originally (and still should be) extremely limited, addressing only particular individual rights[53] but not questions relating, for example, to the "freedoms" and other "community-defining declarations" (which are not judicially enforceable "rights") enumerated in what we have come to call, "the Bill of Rights" (as opposed to a bill of rights).[54] He concludes that the free speech "rights" that the Supreme Court has defined and regularly enforced since 1925[55] are actually non-justiciable political questions that should be left to the legislative and executive branches.[56]

Franck's essay is provocative, especially its premise that as an original matter, the first ten amendments to the Constitution are exclusively political in nature and purpose, but Frank's argument is more interesting than it is likely to persuade. In the Supreme Court's two most recent Terms, all of the currently sitting justices who have shown any affinity for originalism, including Justice Clarence Thomas, the Court's most stout-hearted originalist, affirmed without reservation the conventional understanding that the Framers constitutionalized judicially enforceable free speech

53 Ourselves and Our Posterity, *supra* note 13 at 99-104.

54 *Id* at 110-15.

55 *See* Gitlow v. New York, 268 U.S. 652 (1925) (declaring First Amendment free speech rights among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment).

56 Ourselves and Our Posterity at 115-18.

rights in the First Amendment.[57]

As faint-hearted originalists acknowledge, for prudential and other reasons relating to the doctrine of *stare decisis*, it may be preferable in some instances to suffer the continued viability of an unconstitutional decision. Yet such decisions do not necessarily mellow with age; rather, they may continue to deform constitutional jurisprudence and, as Christopher Wolfe argues, transform attitudes and behavior.[58] Wolfe's chapter, "The Supreme Court and Changing Social Mores," considers the sociological impact of Supreme Court decisions regarding democratically enacted laws regulating the sale and use of contraceptives, obscenity, abortion, and homosexual activity—the primary fodder of today's "culture wars."[59] Wolfe's analysis is purely descriptive, not prescriptive, but it is an insightful meditation on the scope of judicial power, which can far exceed the narrow remedy fashioned in a particular case or controversy.

The final three chapters in *Ourselves and Our Posterity* are interesting and thought-provoking, although their relationship to constitutional originalism is less apparent. In his essay titled "The Devil's Pitchfork," Robert Lowry Clinton traces the influence of scientific materialism and Auguste Comte's positivism on modern social science. According to Clinton, philosophical materialism and legal positivism necessarily refuse to acknowledge "the exis-

57 *See* Snyder v. Phelps, 562 U.S. ___ (2011) *and* Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876 (2010).

58 Ourselves and Our Posterity, *supra* note 13 at 153.

59 *Id.* at 153-68.

tence of a social order rooted in human nature."[60] That denial robs the law of an internal reality or rationality and "leads straightforwardly to judicial supremacy" based ultimately upon raw power.[61]

In "A Constitution to Die For?" Stanley C. Brubaker briefly considers the origin of Congress's power "to raise and support armies"[62] before launching into a defense of what he calls "Real Meaning Originalism." Under this theory, judges should attempt to divine "a constitutional reality" or "constitutional personality" that is independent of the constitutional text and its objective, semantic meaning.[63] Brubaker considers and rejects Locke's concept of natural rights, Rousseau's Social Contract, and (anachronistically) John Rawls's neo-Kantian theory of justice, before asserting that Aristotelian ethics provides the best theoretical foundation for a "constitutional personality" that justifies Congress's Article I power to raise armies.[64] It is an interesting philosophical tour, but lacks connection to anything ever uttered by a Framer or member of the State ratifying conventions. As the late M.E. Bradford continually emphasized, the Framers were not inclined to "metaphysical speech concerning abstract moral principles and ideal regimes,"[65] and did not think or speak about "natural rights apart from their incarnation in historic rights, as logically prior to

60 *Id.* at 206.

61 *Id.*

62 U.S. Const., art. I, § 8, cl. 12.

63 Ourselves and Our Posterity, *supra* note 13 at 224-27.

64 *Id.* at 227-38.

65 M.E. Bradford, Original Intentions: On the Making and Ratification of the United States Constitution 33 (1993).

the social matrix where they took root."[66]

The volume concludes with Ken I. Kirsch's chapter, "Neoconservatives and the Courts: The Public Interest, 1965-1980." According to Kirsch, early neoconservatives did not engage in debates about judicial philosophy or constitutional interpretation, but indirectly touched upon legal matters through their criticisms of domestic policy programs. In the pages of *The Public Interest*, neoconservatives such as Martin Mayer and Nathan Glazer decried the legalization of public policy and the aggrandizement of judicial power,[67] and Daniel Patrick Moynihan criticized judges' misuse of social science.[68] By 1975, Martin Diamond specifically examined liberal and conservative judicial philosophies in relation to the Framers' original constitutional order, previewing arguments that would become familiar when debates over theories of constitutional interpretation erupted during the Reagan administration.[69]

In *Ourselves and Our Posterity*, Bradley C.S. Watson has assembled a delightful collection of papers on the theory and practice of constitutional interpretation. Given the scope of material covered in the ten chapters, it could serve both as an introduction and as a valuable contribution to the ongoing discussion about originalism.

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66 M.E. Bradford, A Better Guide Than Reason: Federalists and Anti-Federalists 91 (1994).

67 Ourselves and Our Posterity, *supra* note 13 at 251-52, 263-68.

68 *Id*. at 270-77.

69 *Id.* at 285-89.