8
INTRODUCTION
PAUL G. MAHONEY

10
DRILLING DOWN
ON DISCRIMINATION AND EQUALITY
DEBORAH HELLMAN

32
CONSTITUTIONAL SCHOLAR:
IDEAS AND INITIATIVES
A. E. DICK HOWARD

70
ORIGINALISM AND
THE SEPARATION OF POWERS
SAIKRISHNA PRAKASH
INTRODUCTION

When I joined the Virginia faculty in 1990, I was amazed that scholars ranging so widely in methodology, subject matter, and age took such a collective and mutually supportive approach to their work. My colleague and predecessor John Jeffries, the driving force behind the Virginia Journal, saw this publication as a way to present the scholarship of the Virginia faculty as opposed to particular individuals. That approach remains true today, as this issue illustrates. The three members of our faculty profiled here all write on constitutional law, but have different scholarly approaches and begin from different priors. Dick Howard began teaching at the Law School in 1964; the most recent addition of the three, Debbie Hellman, joined in 2012. All three are prolific scholars, but more important, all three are deeply engaged with their colleagues. These pages, then, highlight the accomplishments of a community of scholars while profiling three of its members.

DEBORAH HELLMAN focuses on the philosophical underpinnings of foundational constitutional issues. She has written extensively on antidiscrimination law, asking what is morally wrong about discrimination and what positive and normative implications follow from our answer. Her own answer, provided in her closely reasoned book *When Is Discrimination Wrong?*, is that discrimination is morally wrong—and should be legally wrong—when it demeans in the process of distinguishing. She has also used the debate over campaign finance regulation as a starting point for a deep exploration of when having a constitutional right implies the right to spend money in its pursuit. Debbie is one of several members of the Virginia faculty, along with Charles Barzun, Fred Schauer, Micah Schwartzman, and Steve Walt, whose work is informed by insights from philosophy.

DICK HOWARD is one of the legends of Virginia’s faculty. He made his name not merely as a constitutional scholar but as a constitutional draftsman, having contributed to more than a dozen of the world’s current constitutions. His scholarship addresses governmental structure and fundamental rights from Magna Carta to the present, and judicial review from Coke to the Roberts Court. His reach is as deep as it is broad; he has successfully communicated his ideas in every medium from scholarly
journals to television, and is an indefatigable speaker. As he approaches his 50th year on the Virginia faculty, Dick remains a remarkably active and engaged scholar.

SAI PRAKASH is one of the nation’s leading theorists of presidential powers and a proponent of the “unitary executive,” or the view that the President has the constitutional authority to direct the execution of the laws by executive branch officers. He has also written extensively about the President’s foreign affairs powers, arguing that the President’s power to conduct foreign policy comes from the Constitution’s grant of “executive power.” His primary methodology is originalism, but he is a careful and subtle reader of the Constitution’s text and of case law. Together with John Harrison and Caleb Nelson, Sai is part of Virginia’s outstanding group of scholars writing on structural constitutional law.

Paul G. Mahoney
Dean
DEBORAH HELLMAN is one of the nation’s leading scholars on the philosophical foundations of discrimination law. Her work explores moral and philosophical questions that arise in law, especially constitutional law. So it is perhaps ironic that she launched her academic career by dropping out of graduate school in philosophy. While she enjoyed her graduate work, Hellman worried that some of the subjects were too far removed from real-world concerns. And the job market for professional philosophers was, as usual, dismal. (As her grandmother pointed out, “What are you going to do with a degree in philosophy, open a philosophy store?”) Hellman decided to set aside her plans for a Ph.D. in order to attend law school.

As it turned out, she never left philosophy behind. Instead, Hellman began to explore the law’s treatment of salient philosophical questions, typically in the realm of constitutional rights. During her nineteen years of teaching law—first at the University of Maryland and more recently at the University of Virginia—Hellman has sought to understand and evaluate the law’s resolution of complex moral and philosophical issues. This led her to concentrate on three main questions: First, what is discrimination and what makes it wrong? Second, what is the relationship between money and rights, and when should we understand legally protected rights to include the right to spend money to effectuate them? Third, what does it mean to be a professional, and what obligations does the role of a professional impose?

The law provides its own “answer” to these questions, and Hellman approaches each of the topics by seeking to understand the theory that underlies the answer. In the process, she also begins to identify what she believes is correct or mistaken about how our law approaches each issue. Finally, she offers her own analysis of the issue, and uses that analysis to demonstrate where the law should be amended or changed.
For example, Hellman has concentrated on the law’s conception and treatment of discrimination. This inquiry led her to the Supreme Court’s Equal Protection Clause jurisprudence. In “Two Types of Discrimination: The Familiar and the Forgotten,” she explores the idea that discrimination occurs in two distinct ways—whereas the Court’s treatment is limited to one. Sometimes a trait like race or sex is used as a proxy for another trait—male for a higher probability of drinking and driving, to use an example drawn from one of the Court’s early sex discrimination cases. At other times a trait is not used as a proxy. A single-sex school might admit only women, for example, not because it uses female sex as a proxy for other traits, but simply because it seeks a single-sex environment. The Court’s equal protection doctrine is ill-equipped to handle these “non-proxy cases,” as Hellman calls them, because the doctrine is built to address proxy cases. As a result, a court addressing a non-proxy case is likely to consider issues that aren’t morally relevant and will fail to address those that are.

For example, if we see a military academy that admits only men as using the trait “male” not as a proxy for other traits (like having the capacity to succeed at the school or benefit from its training method), but instead as a way to produce a single-sex environment, we will ask different questions about this policy. Rather than ask is “male” a good proxy for “likely to succeed” at the Virginia Military Institute, for example, we ask instead, “Does state support of a unique and coveted educational opportunity for men, with nothing comparable for women, treat young men and women in Virginia as people who matter equally to their government?”

While “Two Types of Discrimination” took a critical approach to the existing constitutional treatment of discrimination, Hellman’s next project developed her own alternative theory of when discrimination violates the Constitution. In “The Expressive Dimension of Equal Protection,” she argued that we should not judge whether state action violates equal protection by either of the two dominant approaches: looking at the intent of those who enacted the law, or looking at the practical effect of the law. Rather, we ought to judge whether laws violate equal protection by looking at the meaning or expressive content of the law or policy at issue. According to Hellman, state action violates equal protection if its meaning conflicts with the government’s obligation to treat each person with equal concern. In other words, she argues that the constitutional wrong inheres in what the law expresses.

2 85 Minn. L. Rev. 1 (2000).
This view developed from exploring the moral significance of appearances more generally, and from exploring discrimination in a context quite different from constitutional law and equal protection. She wrote two articles that in different ways explored the moral significance of appearance and expression (“The Importance of Appearing Principled”3 and “Judging by Appearances: Professional Ethics, Expressive Government and the Moral Significance of How Things Seem”4). Taken together, these articles led Hellman to the view that what actions express—how they appear and how they seem—all matter morally, and that this is especially true for state actors or professionals.

Hellman has also wrestled with the issue of discrimination, and what makes it wrong, in the context of insurance. She was attracted to examining the insurance industry because the law requires insurers to distinguish—discriminate, if you will—among insurance purchasers. State law insists upon actuarially accurate pricing, which means that insurance purchasers who are good risks should be charged less than purchasers who are bad risks. In other words, while discrimination is bad in some contexts (refusing to hire someone based on race or sex, for example), it is required in others (charging a person in poor health more for life insurance than someone in good health). What theory of discrimination could accommodate and explain these two results?

Hellman chose to look at two contexts that seemed to depart from the norm that actuarially accurate pricing is fair, and see if these outlier cases would help her better understand what makes wrongful discrimination wrong. In the first, “Is Actuarially Fair Insurance Pricing Actually Fair: A Case Study in Insuring Battered Women,”5 she looked at state laws that prohibited charging battered women more for health and life insurance than women who are not battered. In the second, “What Makes Genetic Discrimination Exceptional?,”6 she examined laws forbidding insurers from charging higher rates or denying coverage on the basis of genetic factors. In both contexts, she found that widely shared intuitions that these practices were wrong were correct and that the reason they were correct related to the history of unfair treatment of women and people with genetic diseases. Charging these groups more for insurance, even if actuarially supported, demeaned battered women and people with genetic abnormalities because the history of mistreatment was in part the reason they needed more health care or the reason that their need was stigmatizing.

Together, these inquiries into discrimination, in the context of insurance and in the context of constitutional equal protection doctrine, led Hellman to conclude that she wanted to think more deeply about discrimination and about what makes discrimination wrong. Despite the many fascinating questions to explore, until recently there has been surprisingly little in-depth philosophical work on the general nature of discrimination. While there is a plethora of philosophical work on equality and distributive justice—and also a similarly extensive amount of legal scholarship on particular forms of discrimination like race discrimination, sex discrimination, and disability discrimination—scholars rarely explore the foundational question, What is discrimination and what makes it wrong?

The result of Hellman’s effort was her book, *When Is Discrimination Wrong?* 7 In addition to the preliminary work that generated the articles described above, Hellman devoted two years to the research and writing of the book, time that was generously supported by the Edmond J. Safra Foundation Center for Ethics at Harvard University, where she was the Eugene P. Beard Faculty Fellow in Ethics, and by the Woodrow Wilson International Center for Scholars at the Smithsonian Institution, where she was a fellow. The book, which has been read widely both inside and outside the United States, has been translated into Korean as well.

In her book, Hellman observes that we routinely draw distinctions among people on the basis of characteristics that they possess or lack. While some distinctions are benign, many are morally troubling. How do we determine which are which? Hellman answers this by developing a much-needed general theory of discrimination. She demonstrates that many familiar ideas about when discrimination is wrong—when it is motivated by prejudice, grounded in stereotypes, or simply departs from merit-based decision-making—don’t adequately explain our widely shared intuitions. In the end, Hellman argues, distinguishing among people on the basis of traits is wrong when it demeans any of the people affected and is not wrong when it does not. *When Is Discrimination Wrong?* explores what it means to treat people as equals, and thus takes up a central problem of democracy.

The philosophical study of discrimination and discrimination law is still a fairly young field. While a few countries, such as the U.S., have had longstanding constitutionalized equality rights, it is arguably only since after World War II that these constitutional rights have been interpreted

---

7 (Harvard University Press, 2008).
in a broad way to recognize that all citizens have certain rights to non-discrimination. Likewise, most countries have only enacted domestic civil rights codes protecting individuals from private-sector discrimination in the relatively recent past. It is not surprising, then, that work theorizing about discrimination law is also at an early stage.

In order to take a more comprehensive look at these problems, Hellman’s recent efforts have been spent organizing and editing (with her colleague Sophia Moreau of the University of Toronto) *The Philosophical Foundations of Discrimination Law*, to be published by Oxford University Press in the fall of 2013. This volume brings together a series of essays addressing how we are to understand and justify laws prohibiting discrimination. Such laws raise daunting philosophical questions. Indeed, Hellman says, part of what makes this area of law such a difficult one is that there is no initial consensus among scholars as to what the important questions are.

Hellman’s interest in moral and philosophical questions that are addressed by law does not stop at the problem of discrimination. She has also written about the relationship between money and rights, particularly in the Supreme Court’s jurisprudence on campaign finance laws. Since 1976, when the Court decided *Buckley v. Valeo*, the law has treated the giving and spending of money in connection with election campaigns as “speech” that is governed by the First Amendment. Hellman’s first article in this area, “Money Talks but It Isn’t Speech,” challenges this central premise of our campaign finance laws, namely that restrictions on giving and spending money constitute restrictions on speech, and so can only be justified by compelling governmental interests. The claim is often defended on the grounds that money is important or necessary for speech. Without money, how could one publish flyers or buy advertising time? While it is surely true that money facilitates speech, money also facilitates the exercise of other constitutionally protected rights. For some of these rights, such as abortion, spending money is protected as part of the right. The right to abort a fetus includes the right to pay a doctor for this service. But for other rights, spending money is not protected. The right of sexual intimacy does not include the right to pay for sex. The right to procreative liberty does not include the right to simply buy a baby.

Hellman thus observes that the fact that money facilitates the exercise of a constitutional right (speech or any other right) is insufficient to establish that one has a right to spend money to effectuate that right. Some

---

8 95 Minn. L. Rev. 953 (2011).
rights generate a right to spend money and some do not. What explains this? Hellman contends that a right that depends on a market good or service for its exercise generates a related right to give or spend money. Conversely, when a right does not depend on a market good or service for its exercise, the right does not include a right to spend money. So, for example, because abortion services are traded in the market, one must have the right to pay an abortion provider if the right to choose an abortion is to be meaningful. On the other hand, sex and babies are (for the most part) not distributed using the market. As a result, the rights to sexual intimacy and to procreative liberty need not include the rights to pay for sex or to buy babies. Using this rationale, Hellman argues that the right to give and spend money in connection with elections need not be protected as speech under the First Amendment.

A second article, “Money and Rights,”\(^9\) continues the project of exploring the connection between money and rights. The overarching question is the same: When do constitutionally protected rights include an accompanying right to spend or give money to effectuate them? In “Money Talks,” Hellman drew on shared intuitions about how hypothetical cases might be resolved by courts. In “Money and Rights,” she turned from the normative to the descriptive, looking at how the Supreme Court and some lower courts have begun to answer the question. The goal of this project was to deepen what she sees as an overly narrow approach to campaign finance issues by embedding questions concerning the constitutionality of campaign finance regulations within the broader discussion of the relationship between money and rights.

Most recently, Hellman wrote a third article relating to campaign finance. In this piece, she accepts, for the sake of argument, that restrictions on giving and spending money on campaigns are restrictions on speech and examines when and why such restrictions are nonetheless constitutionally permissible. To date, the only interest that the Court has found compelling enough to justify restrictions on campaign giving or spending is the need to avoid corruption (or its appearance). Thus, the heart of the issue, from a constitutional perspective, has been and will continue to be the definition of “corruption.” Over the years, campaign finance cases have defined corruption in different ways, sometimes broadly and other times narrowly, with the most recent cases defining it especially narrowly. While supporters and critics of campaign finance laws have argued for and against each of these views, both sides have missed

the more foundational issue: Is this a question the Court should answer at all?

In “Defining Corruption and Constitutionalizing Democracy,”¹⁰ Hellman argues that there are important reasons to think not. Corruption is a derivative concept, which means that it depends on a theory of the institution involved. As a result, defining legislative corruption implicates the Court in defining the proper role of a legislator in a well-functioning democracy. In other areas of constitutional law—apportionment and gerrymandering, for example—the Court is cautious about constitutionalizing a particular contested conception of democracy. But if the Court necessarily defines good government when it defines corruption of that ideal, there is an important and overlooked tension between the Court’s campaign finance cases—which are eager to define corruption—and other areas of constitutional law, where the Court is reluctant to define the proper role of a legislator in a well-functioning democracy. Hellman’s latest article develops the implications of this insight and argues that there are important reasons for judicial deference to a legislature’s own conception of corruption of its members. Ultimately, “Defining Corruption” asks who gets to decide what role money should play in politics—legislatures or courts.

Hellman continues to think, write and teach about discrimination and campaign finance law. She is currently working on an article demonstrating that equal protection doctrine is animated by two quite different accounts of what makes discrimination wrong. In one view, a law or policy wrongfully discriminates when it fails to treat people as moral equals. This understanding sees discrimination as inherently a comparative wrong. In the competing view, a law wrongfully discriminates not because person X is treated worse than person Y, but instead because X is denied something she is entitled to have. We may notice that X is denied something she is entitled to have because Y has it, but it isn’t the comparison between how the law treats X and how it treats Y that makes the law problematic. By sorting equal protection cases into those that ground what is wrong in comparative terms and those that do not, Hellman hopes to show that an important conceptual disagreement animates the doctrine.

Taken together, Hellman’s work is marked by a combination of creativity, clarity, and analytical rigor that allows her to reframe familiar issues in new ways. Her work eschews hot new topics. Rather, it revisits important and enduring ones—discrimination, equal protection, and campaign

finance—and manages to uncover overlooked assumptions or missed questions that are embedded in the way that our laws address these foundational matters. In doing so, Hellman offers fresh, insightful, and provocative answers to central questions facing our society.
MONEY TALKS BUT IT ISN’T SPEECH
95 Minn. L. Rev. 953 (2011)

INTRODUCTION

Buckley v. Valeo rests on the claim that restrictions on both giving and spending money are tantamount to restrictions on speech, and thus can only be sustained in the service of important or compelling governmental interests. The justification for this claim offered by the Supreme Court in Buckley and in related cases that came after it is this: money facilitates speech; money incentivizes speech; and giving and spending money are themselves expressive activities. Therefore, restrictions on giving and spending constitute restrictions on speech. Missing from this analysis is the recognition that money facilitates and incentivizes the exercise of many other constitutionally protected rights. It does so because money is useful. Moreover, it is not at all obvious that restrictions on the ability to give or spend money to exercise these other rights are constitutionally impermissible. One has the right to vote, but not to buy or sell votes. One has the right to private sexual intimacy, but not to spend money to facilitate the exercise of that right—outlawing prostitution is constitutionally permissible. In order to determine if giving or spending money in connection with a right ought to be protected as a part of that right (within its penumbra, if you will), one needs a theory. Buckley provided only an inadequate one, resting its account on the claim that money facilitates speech. This Article urges the Court to broaden the lens through which it approaches this issue. Rather than focus on the connection between money and speech, we ought instead to focus on the connection between money and rights more generally. The question we should ask is this: When do constitutionally protected rights include a right to give or spend money to effectuate them? The answer we give to this question will have implications for campaign finance law but will be grounded in a deeper understanding of the connection between money and rights.

A reexamination of Buckley’s central premise is important in light of the Supreme Court’s recent holding in Citizens United V. FEC. In that case, the Court invalidated a federal law that prohibited corporations and unions from “using their general treasury funds to make independent
expenditures” for speech in connection with elections. There is much in this opinion to lament. Some critics will focus on the likely effects on the political process. Others will address the Court’s rejection of the view that the reasons to respect the freedom of speech of real persons are not consonant with the reasons to protect the speech of corporations and unions. Also disturbing, however, is the way the Court handles the central Buckley claim—the Court considered it so obvious that restrictions on spending money amount to restrictions on speech that it needed no discussion at all, not even a citation to Buckley.

Money is clearly important to speaking. Without money, how would one publish a newspaper, buy a television advertisement, or pay campaign workers? Sometimes giving money is also itself expressive of one’s support for a political candidate. Indeed, giving a lot of money may be a way of expressing very strong support for a candidate or a position. So, spending money facilitates speaking and giving money can be expressive itself. This Article explores whether either of these ways that money is connected to speaking support the claim that limitations on the giving and spending of money ought to be treated as restrictions on speech under the First Amendment.

In order to develop an account of when spending money to speak ought to be protected as a part of the right to free speech, it is helpful to look at when and why other constitutionally protected rights include the right to spend money to effectuate them. In so doing, this Article develops an account of when spending money in connection with rights should be conceived as within the penumbra of the right and when it should not. Using this account, I conclude that spending money in connection with elections need not always be considered a part of the freedom of speech protected by the First Amendment.

B. MONEY AS FACILITATOR OF SPEECH

Meyer addresses how restrictions on money can affect speech because spending money facilitates speaking. In this case, the Supreme Court struck down a Colorado statute that criminalized paying money to people to circulate petitions in the context of ballot initiatives. Although the law forbade paying money to petition circulators and not the circulating of petitions itself, Justice Stevens, writing for the Court, concluded that “this case involves a limitation on political expression subject to exacting scrutiny.” He offered two reasons for this conclusion: “[f]irst, it limits
the number of voices who will convey appellees’ message and the hours they can speak and, therefore, limits the size of the audience they can reach”; and “[s]econd, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.” What do these arguments prove?

If one is not able to pay petition circulators, one will be left only with volunteers. As the Court notes, this law will thus likely “limit the number of voices who will convey appellees’ message.” While the Court is surely correct that fewer people will do this work for free than would do so if paid, this fact does not show that the right of free speech is itself implicated.

Laws that set minimum wages or forbid child labor are also likely to affect the ability of the Meyer appellee to get his message out. If he could pay less than the minimum wage or employ child labor, his money would go farther, thereby allowing him to have more people to circulate the petitions. Yet, we are unlikely to conclude, based on this fact alone, that these laws raise First Amendment issues. While there might be important or even compelling governmental interests at stake in the case of minimum wage or child labor laws, demonstration of such is not necessary. It seems almost crazy to suggest that such laws limit speech and thus must pass exacting judicial review. Rather, these laws simply do not limit speech at all, despite the fact that they are likely to have a predictable effect on the number of people willing to convey a person’s message. These are only representative examples. It is incredibly easy to come up with examples of laws which would have negative consequences for expression. The fact that a law makes it more difficult to exercise First Amendment rights does not on its own demonstrate that the law restricts speech.
WHEN IS DISCRIMINATION WRONG?
(Harvard University Press, 2008)

INTRODUCTION: THE DISCRIMINATION PUZZLE

A law requires black bus passengers to sit in the back of the bus and white passengers to sit in the front.

A school principal asks the students with last names beginning with A-M to sit on the left side of the auditorium and those with last names beginning with N-Z to sit on the right side.

An employer at a casino requires female employees to wear makeup and prohibits male employees from wearing makeup.

A nursing home with a predominantly female clientele refuses to hire a male nurse’s aide for a job requiring assisting residents with bathing and toilet needs.

A personal advertisement under “Men Seeking Women” in a local paper reads: “Looking for a single woman, age 30-40, for a long-term relationship or marriage. Seeking a woman who is not afraid to be feminine. Prefer someone slim, who wears makeup and likes to dress fashionably.”

A worker who is biologically male but dresses and lives as a female requests that her employer designate some bathrooms as unisex or alternatively allow her to use the women’s bathroom. The employer refuses and instructs the employee to use the men’s bathroom. The employee refuses and is fired as a result.

The U.S. Food and Drug Administration approves a drug specifically for use by African American heart failure patients.

A public school’s “gifted and talented program” and a selective private school screen kindergarten admissions according to children’s IQ test scores.

A university in Iran uses political affiliation as a criterion for selecting students and faculty.

A business prefers to hire job applicants from the local community.

An airline refuses to continue to employ pilots older than 62.

A state refuses to license drivers under age 16.

A company prefers not to hire women between the ages of 20 and 40.
EACH EXAMPLE ABOVE draws a distinction between people on the basis of a certain trait: race, the first letter of the person's last name, sex, appearance, ability, age, or another attribute. Our intuition suggests that while some of these laws, policies, or practices are morally wrong, some are benign, and the nature of still others is unclear. The aim of this book is to examine why it is sometimes permissible and sometimes impermissible to draw such distinctions among people. In other words, the aim here is to present a general theory of discrimination.

The term *discrimination* has come to have a negative connotation. To call something “discrimination” is to criticize it, to assert that it is wrong. But of course the term has positive associations as well. One can be complimented for discriminating taste (in art, wine, literature, etc.). Someone who is astute and has a subtle mastery of his subject is often described as “discriminating,” as in “the manager of the mutual fund is very discriminating in his investments.” This positive use of the term is more marginal, however, overwhelmed by its negative associations with wrongful discrimination. By resurrecting it here, I do not mean to downplay the harms of wrongful discrimination. Rather, I want to emphasize the positive as well as the negative aspects of discrimination in order to unsettle our certainty about which instances of discrimination are wrong and especially about whether we know why they are wrong.

Discrimination—used in this way that captures both its negative and its positive connotations—is both ubiquitous and necessary. We routinely draw distinctions among people in public policy and law as well as in business, school settings, and private life. Laws require that drivers must be a certain age (16 is common) and must pass a test to be licensed to drive in all states. These laws distinguish (i.e., discriminate) between people on the basis of age and their ability to pass a test; they treat those 16 and over who have passed the driving test more favorably (they are allowed to drive) than the group of people who are either under 16 or have failed the driving test. Employers and school admissions officials draw distinctions among applicants on the basis of grades, test scores, and myriad other, sometimes quite controversial, traits. Some firms are in the very business of discrimination: Insurers draw distinctions among people on the basis of traits that reflect the likelihood that the insured will file a claim during the policy period. For example, health and life insurers distinguish among people on the basis of health status—people with high blood pressure, who are overweight, and who smoke will pay more for health and life insurance (if they can get insurance at all) than
non-smokers with low blood pressure and average weight. Private and family life calls for discrimination as well. A mother who puts her 2-year-old daughter in her crib for an afternoon nap but allows her 4-year-old to continue playing is drawing a distinction between her children on the basis of age—and is limiting the freedom of the 2-year-old in a way that she is not limiting that of the 4-year-old.

Much of this distinction drawing is important or even unavoidable. While we could treat everyone the same in some of the instances described above, there would be a significant cost in doing so.

[...]

In the case of laws and public policies that distinguish among people, the stakes are much higher. I doubt that we would be willing to either license all drivers regardless of age or to bar everyone from driving—the two options that would treat everyone the same. Nor would we be willing, I imagine, to license anyone who wanted to practice law or medicine regardless of whether the person had passed the tests demonstrating the requisite knowledge and skill.

Finally, where there are limited openings, for jobs or places at school, for example, it is simply not possible to treat one and all the same. Not everyone can be hired or admitted. Thus, we must draw distinctions among the applicants on some basis. The question then becomes, when is such distinction-drawing morally problematic and when is it not?

This book will address the moral question posed by the fact that it is often desirable and sometimes necessary to treat people differently. Laws govern when it is legally permissible to do so, either in the form of local, state-wide, or national statutory prohibitions on discrimination of various types or, in the United States, in the form of judicial interpretation of the constitutional guarantee of Equal Protection. While in some ways one could view this statutory and constitutional law as itself providing an answer to the question of when it is morally permissible to draw distinctions among people, there are other important issues that play a role in determining when something ought to be legally prohibited. Some things that are morally wrong are not legally prohibited, and for good reason (being mean to others, for example). And some things are legally prohibited that are not morally wrong, except to the extent that it is wrong to break the law (driving without a license, for example). And yet, perhaps because the U.S. constitutional guarantee of equal protection is itself vague and open to interpretation, much of the legal debate—in this country and elsewhere—has a moral cast. For that reason, the legal liter-
ature provides an important starting point for wrestling with what I call the discrimination puzzle.

The fact that we often need to distinguish among people forces us to ask when discrimination is morally permissible and when it is not. This puzzle has no easy answer. While people may have a fairly settled sense that certain instances of drawing distinctions among people on the basis of particular traits in particular contexts are wrong, it is harder than one might expect to explain what makes these cases wrong in a way that also works to explain other cases of wrongful and permissible discrimination.

One might think that drawing distinctions on the basis of certain traits is always forbidden—race and sex, in particular. But if so, does that mean that the U.S. Food and Drug Administration (FDA) necessarily acts wrongly in approving a particular drug for use by African American patients? And does it mean that single-sex bathrooms are clearly impermissible? While there may be problems with each of these practices, which we will discuss in later chapters, I don’t think either one could be easily written off as impermissible based solely on the fact that it discriminates on the basis of race or sex respectively.

Another facet of the discrimination puzzle that makes it difficult to untangle is that wrongful discrimination sometimes occurs in contexts where the difference in treatment seems unimportant. Nelson Mandela reports in his autobiography that the apartheid regime in South Africa required black prisoners to wear shorts while white and colored prisoners were required to wear pants. In the heat of southern Africa, shorts might be the more comfortable option. Nonetheless, the symbolism of being required to wear shorts, which were commonly seen as infantilizing in this postcolonial regime, was a means of demeaning black prisoners. On the other hand, distinguishing among and treating people differently may deny some an important benefit or opportunity, and yet seem perfectly permissible. An employer might choose the person who types the fastest with the fewest errors for a word-processing job, for example. This policy distinguishes among job applicants on the basis of typing speed and skill and as a result treats one group (the slower typists) far less favorably (they lose out on a well-paid job) than the other (faster typists). So the fact that someone or some group is denied something important, like a good job, doesn’t provide a clue as to whether the discrimination is wrongful or permissible.

One might think that one could easily explain why the first of these two cases is impermissible and the second permissible (conclusions I
share) by looking at some obvious differences between them. First, in the case of the South African prison garb, the policy was likely imposed to stigmatize black prisoners, while the typing requirements were set for the benign purpose of increasing the productivity of the employer’s business. Second, skin color is irrelevant to what uniform prisoners ought to wear, while typing speed and accuracy are relevant to the job of a typist.

Do these differences matter morally? Sometimes morally troubling policies are enacted with the same intention as that of the employer who selects the best typist—that is, to enhance business productivity. Suppose an employer refuses to hire women between the ages of 20 and 40 on the grounds that they are likely to take time off to have children, which would disrupt work schedules and raise the business’s medical costs. The employer might adopt this policy merely to enhance business productivity, but does this benign intention insulate the policy from moral criticism?

The fact that a trait is “relevant” or “irrelevant” also fails to distinguish permissible from impermissible discrimination. In the previous example, sex is a relevant job qualification if by “relevant” we simply mean that it is positively correlated with something important. Here sex is likely correlated with work schedules and the costs of childbearing, as the employer supposes. If relevance is merely a matter of the fit between a distinguishing trait and a target, like efficiency, and such relevance is what matters morally, then many practices that our intuitions suggest are morally problematic would be deemed legitimate—like employers refusing to hire women of child-bearing age.

Perhaps the concept of relevance can be refined. The prison-garb case and the typist case differ in that the typist merits the job whereas the white prisoners do not merit long pants. Doesn’t the idea of merit then provide an answer to at least some discrimination puzzles? I think not. Consider the employer who gives a preference to local job candidates in order to support the local community in which she is based. Do the locals thereby merit the jobs? The concept of merit is itself contested such that it will be unlikely to resolve questions regarding what is wrongful discrimination.

In attempting to answer the question posed by the discrimination puzzle, I begin with what I consider a bedrock moral principle—the equal moral worth of all persons. I take it that this bedrock principle is comprised of two sub-principles: First, there is a worth or inherent dignity of persons that requires that we treat each other with respect. What
violates this principle may be contested (and is something that the argument of this book will address), but I will assume that the inherent worth of a person sets moral limits on how others may treat her. Second, this inherent dignity and worth of all persons does not vary according to their other traits. While some people are smarter, faster, and more talented at tasks that benefit others, or even kinder and more gentle, these and other differences do not affect how important each of us is from a moral perspective. The inherent worth of persons is not something that comes in degrees. Rather, all people are equally important from the moral point of view and so are equally worthy of concern and respect.

I begin with this bedrock principle because I suspect the moral concern that fuels our worries about drawing distinctions among people is that in doing so we may act in ways that fail to treat others as equally worthy. The discrimination puzzle asks when it is morally permissible to draw distinctions among people on the basis of some trait that they have or lack. We can further refine that question, in recognition of the fact that our concern springs from our commitment to the principle of equal moral worth, and ask, when does drawing distinctions among people fail to treat those affected as persons of equal moral worth? It is this question that this book will address.

It is important to emphasize here the conventional and social nature of wrongful discrimination. We all have many traits: race, age, sex, appearance, abilities, height, weight, voice tone, our names, religion, and so on. As simply traits, they are inert. What matters about them is their social significance in particular contexts. Drawing distinctions on the basis of certain traits in certain contexts has meaning that distinguishing on the basis of other traits would not. Separating students by last name feels quite different than separating students by race, for example—though each can be done for good or bad reasons and each may be related or unrelated to some legitimate purpose. In addition, drawing distinctions among people on the basis of the same trait in different contexts feels different as well. As Justice Marshall once observed: “A sign that says "men only" looks very different on a bathroom door than on a courthouse door.” It “looks very different” not because women can practice law as well as men. After all, women can also use men’s bathrooms as well as men, too. Nor does the fault lie in the fact that the law prohibiting women from practicing law was enacted in order to keep women out or was grounded in stereotypes about men and women. The prohibition of women from the men’s bathroom was also enacted to keep women out
and is based on stereotypes about men and women (and privacy norms concerning certain bodily functions). Rather, the problem with the courthouse prohibition is that it distinguishes between men and women in a way that demeans women whereas the bathroom prohibition does not.

Part I builds the argument that it is morally wrong to distinguish among people on the basis of a given attribute when doing so demeans any of the people affected. Chapter 1 lays out the argument for this account of wrongful discrimination. Whether a particular distinction does demean is determined by the meaning of drawing such a distinction in that context, in our culture, at this time. In focusing on whether a distinction demeans, this account does not rest on the consequences or the effects of a classification. Rather, some classifications demean—whether or not the person affected feels demeaned, stigmatized, or harmed. As such, this account of wrongful discrimination grounds moral impermissibility in the wrong rather than the harm of discrimination.

Chapter 2 develops the argument by exploring in more detail what “demeaning” is and why it is important. It begins by explaining why actions that distinguish among people in a way that demeans are thereby wrongful. The chapter argues that because to demean is to treat another in a way that denies her equal moral worth, it picks out a wrong that is intimately tied to the value that underlies our moral concern with differentiation in the first place. The chapter then provides a more detailed account of “demeaning”: to demean is both to express denigration and to do so in a way that has the power or capacity to put the other down.

Chapter 3 explores the important questions of how we determine whether drawing a particular distinction in a particular context does demean and whether the fact that people will likely disagree about whether particular distinctions demean is problematic for the theory I advance.

Part II explores some common answers to the discrimination puzzle and argues that each is ultimately unsatisfactory. Chapter 4 considers the concept of merit and argues that it cannot separate permissible from impermissible discrimination. The concept of merit is unable to help because any discussion about whether drawing a particular distinction in a particular context is permissible can simply be recast as a debate about what constitutes merit in that context. For example, universities in Iran use political affiliation as a criterion in selecting students and professors. One might think that this practice constitutes wrongful discrimination because these students and professors don’t merit their positions. But
why not? The university administrators surely believe that the best students and teachers are those with the best moral values—as they define them. In other words, critics and supporters of this policy can best be understood as arguing about what constitutes merit in a university context. If so, the concept of merit itself will not be useful in sorting out permissible from impermissible discrimination.

Chapter 5 argues against the moral relevance of the accuracy of classification. One might think that if one distinguishes among people on the basis of, say, age, in determining who is able to apply for a driving license, that it should matter morally whether age is indeed a good predictor of driving ability. If it is not, then perhaps there is something problematic about using it. There is surely something problematic about using age if it is unrelated to driving ability, but the relevant question is whether that something is a moral concern or merely a pragmatic one. Chapter 5 contends that the use of inaccurate classification is inefficient and stupid but not a moral wrong.

Finally, Chapter 6 argues against the view that it is the intention of the person who draws a distinction that is important. This chapter considers two arguments for the relevance of intentions: First, one might think that the actor’s intention determines whether an actor in fact distinguishes on the basis of a particular trait or not. Second, one might think that distinguishing among people for a bad purpose renders the action morally suspect. In this chapter I argue against each of these claims, concluding that as far as discrimination goes, it’s not the thought that counts.

The book concludes by exploring the ways in which the conception of wrongful discrimination I advance has affinities with the recent emphasis of moral philosophers on the importance of equality of respect when considering what the equal moral worth of persons requires.

**BIBLIOGRAPHY**

**BOOKS**

**ARTICLES AND BOOK CHAPTERS**


“Comments on Michel Rosenfeld’s The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community,” 33 Cardozo L. Rev. 1839 (2012).


“Money Talks but It Isn’t Speech,” 95 Minn. L. Rev. 953 (2011).


CONSTITUTIONAL SCHOLAR: IDEAS AND INITIATIVES

“FROM DRAFTING to teaching them, constitutions frame his world.” That’s how a Virginia newspaper headlined a profile of A. E. Dick Howard. Howard, the article went on to say, “has made a career of thinking about constitutions, how they work, and how they affect the day-to-day lives of the people who live under them. He has passed his ideas to others—teaching constitutional law to thousands of students at the University of Virginia, helping to draft Virginia’s 1971 Constitution, and consulting in the drafting of more than a dozen constitutions worldwide.”

When he is asked which aspect of his work he especially enjoys, Howard is quick to say that he is never happier than when engaging with his students—in the classroom, in seminars, in consultation on independent research projects. But he also embraces opportunities outside the academy, believing that what he does in the world enlarges and informs his teaching and scholarship. Howard has made his mark not only by analyzing and commenting upon his principal interests—the Supreme Court of the United States, the Constitution of Virginia, Anglo-American constitutionalism and civic education, constitution-making in other countries, and comparative constitutionalism—but also by actively participating in them.

SUPREME COURT OF THE UNITED STATES

After graduating from the University of Virginia School of Law, Howard began his career in the law as an associate at a Washington, D.C., law firm, Covington & Burling. A close friend and Law School classmate, John Rhinelander, was clerking for Supreme Court Justice John Marshall Harlan. Inspired by his friend’s example, Howard decided to apply for a clerkship at the Court. That initiative paid handsome dividends when
Justice Hugo L. Black offered Howard a clerkship. History also intervened. Between the time Howard was offered the job and the date he began work, Felix Frankfurter left the Court, and Arthur Goldberg took his place. The balance on the Court tipped toward the liberal side, and the Warren Court came into full flower. After years of memorable dissents, Hugo Black was writing some of the Warren Court’s great opinions. Howard found himself at Black’s elbow when that Justice penned such important decisions as *Gideon v. Wainwright* and *Griffin v. School Board of Prince Edward County*.

Howard recalls that working with Justice Black left an indelible impression—on Howard’s passion for constitutional law, on his ongoing fascination with the Supreme Court and its processes, and even on his way of using the English language. The day Howard began work, Black admonished him, “When you are working on opinions in these chambers, write not in the language of Oxford, but in the language of your country’s forbears.” At Black’s invitation, Howard served a second year as his clerk, making a rich experience even more abiding. It was during his time at the Court that Howard, responding to a call from University of Virginia School of Law Dean Hardy Dillard, accepted a place on the school’s faculty.

A glance over a list of Howard’s publications will reveal how often he has turned his attention to the Supreme Court, its decisions, and its justices. Sometimes he has focused on individual justices. One of his early articles, in the *Virginia Law Review,*¹ used the direct action cases (such as those involving sit-ins) arising out of the 1960s civil rights movement as an occasion for exploring Hugo Black’s jurisprudence. Casting his eye back over Black’s decades on the Supreme Court, Howard offered a rebuttal to those who saw Black in his later years on the Court as drifting away from the liberalism of his earlier years. In Black’s opinions Howard found a core belief in the rule of law or, as Howard put it, in three “rules of law”—a rule of law guiding judges in deciding constitutional cases (as in Black’s famous dissent in *Adamson v. California*), a rule of law for the people at large (hence his opinions in the direct action cases), and a rule of law for the body politic—“an open, free society in which people speak their mind, vote their preferences, seek legislative reforms, and have access to the courts to air grievances.”

In a conversation with a *Washington Post* reporter, Black said that Howard’s article came as close to capturing the Justice’s beliefs as anything written to that time.

Subsequent articles have sought to cast light on other justices. Having gotten to know Lewis F. Powell, Jr., when he was a member of Virginia’s Commission on Constitutional Revision, Howard was well placed to predict what the country might expect of Powell when he was confirmed to the Supreme Court. Writing in the *Michigan Law Review,* Howard remarked that “Powell’s work habits and temperament—conscientiousness, thoroughness, craftsmanship, and sheer capacity for hard work” were strikingly like those of Justice Harlan, whom Powell admired. Howard predicted that it would be in supplying “reasoned and genuinely principled” opinions that Powell “may provide his best service to the Court.” Readers of Powell’s opinions during his years on the Court are indeed likely to find just such qualities.

Howard has been a close student of the Court through the tenures of successive Chief Justices—Warren, Burger, Rehnquist, and Roberts. *The MacNeil/Lehrer NewsHour* called upon Howard for gavel-to-gavel commentary on the memorable confirmation hearings on Robert Bork. The Court itself, on the initiative of Justice Sandra Day O’Connor, asked Howard to do extensive interviews with the justices for a film that was then put on view for visitors to the Supreme Court building.

In addition to his articles on individual justices, Howard has sought to interpret the Court as it has evolved from one era to another. Recalling one of Sir Edward Elgar’s most famous compositions, Howard chose a musical metaphor to characterize the Burger Court (1969-86) in *Law and Contemporary Problems:* “A Judicial Nonet Plays the Enigma Variations.” The Burger Court’s record, Howard thought, was essentially ad hoc and episodic. It was a Court “in which no one ideology or philosophy” held sway. Notwithstanding President Nixon’s hopes when he put four justices on the Court early in his presidency, the Burger Court’s fluid voting pattern emphasized “the competition between the voices of caution and the neo-Warren bent for action.” It was distinctly not a Court of “counter-revolution.”

For years, Howard has organized a review of the Supreme Court’s most recent term for the Fourth Circuit Judicial Conference, offering his own observations and moderating a panel of informed commentators such as Akhil Amar, Jan Crawford, Linda Greenhouse, and Ted Olson. C-SPAN regularly carries those discussions to a national audience. With the advent of the Roberts Court, Howard has written articles

---

3 43 Law & Contemp. Probs. 7 (1980).
in the online *Virginia Law Review* taking stock of the Court’s most recent term. At the conclusion of the Roberts Court’s sixth year, he recalled the days when presidents were often disappointed by their nominees to the bench (recalling President Eisenhower’s dismay at his “damn fool” mistake in putting Earl Warren on the Court). “Today,” Howard said, “justices’ positions are more in line with the politics of the appointing president’s party. In the Court’s conservative ranks, we are seeing the fruits of the agenda launched by the Reagan administration’s Justice Department and other critics of the Warren Court.” Commenting on the Roberts Court’s seventh year, he asked, “Can the Roberts Court be said to be pro-business? In the 2011-12 term, it certainly looked that way.” As one benchmark, Howard cited the U.S. Chamber of Commerce’s being on the winning side of every case in which the Court addressed issues on which the Chamber had taken a position.

In his recent commentary, Howard continues to pay close attention to the opinions and views of individual justices. Thus, in his reviews of the Roberts Court, he saw Chief Justice Roberts’ vote to uphold the Patient Protection and Affordable Care Act—a vote distressing to many conservatives—as a “considered move to protect the Court’s legitimacy and to enhance its capital in the country’s affairs.” Howard underscored Justice Kennedy’s replacing Justice O’Connor as the Court’s pivotal figure, regularly being in the majority more than any other justice (Howard pointed to a *Time* magazine cover declaring Kennedy to be “The Decider”). Believing that Justice Alito is emerging as “a distinctive voice on the Court,” Howard called attention to Alito’s interesting opinions (such as that in *Snyder v. Phelps*, the funeral protest case) balancing First Amendment claims against competing interests and giving more weight to legislative judgments than does the Court’s majority. As for President Obama’s appointees to the Court, Howard remarked that “it is in oral argument that one realizes the firepower the newest Justices, especially Sotomayor, bring to the Court.” And he asks, “With Sotomayor and Kagan’s brisk beginning, might in time they become the twenty-first century versions of Thurgood Marshall and William Brennan?”

Ultimately, Howard has a special interest in how political forces in the country at large intersect with the work of the Supreme Court. In 2012, the *Charleston Law Review* and Furman University’s Institute of Government organized a symposium on “The Role of Government.” They invited Howard to give the conference’s keynote address, which he then adapted into an article for the *Review*. In that article, Howard examined the ways in

---

which conservative critics of the Warren Court have sought to move the Court in particular and constitutional law more generally in a different direction. Those vehicles include heightened scrutiny of judicial nominees in Senate Judiciary Committee confirmation hearings, the rise of originalism as a mode of constitutional interpretation, the advent of conservative public interest law firms, and networking by such conservative groups as the Federalist Society. Looking to the larger context, Howard further observed how developments in American politics and society since the 1960s “have reinforced the efforts of conservatives to dismantle the legacy of the Warren Court era.” Those developments include the striking polarization of American politics, the outbreak of hyperpartisanship in Congress, the birth of the Tea Party, the return of anti-Federalism, and a surge in popular constitutionalism.

THE CONSTITUTION OF VIRGINIA

Thomas Jefferson believed that Virginia’s Constitution should be revised at intervals “so that it may be handed on, with periodical repairs, from generation to generation....” Good fortune presented Howard with the opportunity to be a key figure in the most recent revision of that constitution. Virginia Governor Mills E. Godwin, Jr., appointed the state’s Commission on Constitutional Revision. Its eleven members included some of that era’s most distinguished Virginians, among them future United States Supreme Court Justice Lewis F. Powell, Jr., UVA Law School Dean Hardy Cross Dillard, and Oliver W. Hill, Virginia’s leading civil rights lawyer. The commissioners, in turn, appointed Howard as their executive director. In that capacity, he was the commission’s draftsman, earning the title, accorded by The Washington Post, of “chief architect” of the Virginia Constitution. When the Commission submitted their recommendations to Virginia’s General Assembly, Howard served as that body’s general counsel. Godwin’s successor as governor, Linwood Holton, then tapped Howard to head the statewide campaign for the new constitution’s ratification. After a vigorous campaign, 72% of Virginians who voted said “yes” to the new constitution—a remarkable mandate considering proposed constitutions in some other states, such as New York and Maryland, were being defeated at the polls. In doing so, Virginians scrapped the notorious 1902 constitution—an unhappy relic of post-Reconstruction populism and racism—in favor of a new fundamental law putting education in the Bill of Rights, spurning the machinery of “massive resistance,” enabling a
modern judiciary, and adding a new article on the environment.

Howard saw his experience in helping shape the Constitution of Virginia as the opportunity to write extensively about that document, its history, and its meaning. He began by writing the revision commission’s 542-page report to the governor and General Assembly. The spirit of that report is reflected in its introduction. Howard wrote that Jefferson’s views on constitutional change “might well be taken as the text for the Commission’s proposals,” emphasizing the balance—essential in orderly constitutional development—between tradition and change. To preserve the best of Virginia’s constitutional heritage while responding to new problems is the twin thrust of Jefferson’s letter of 1816, and it is the twin objective of the Commission’s recommendations.” It is this notion, Howard added, that led the British statesman Macauley, during the debates on the Reform Bill of 1832, to say “Reform, that you may preserve.” And reaching back to the Commonwealth’s founding era, Howard characterized the Commission as seeking to be faithful to the injunction in Virginia’s original Declaration of Rights of 1776 (and still in Virginia’s Constitution): “That no free government, or the blessings of liberty, can be preserved to any people, but by ... frequent recurrence to fundamental principle.”

Once the new constitution had gone into force, Howard then turned his scholarly efforts to an even more ambitious project—a set of commentaries on Virginia’s Constitution. Commentaries are a familiar feature of the Anglo-American legal tradition. Sir Edward Coke’s *Institutes of the Laws of England* reinterpreted the ancient heritage of the British Constitution, William Blackstone’s commentaries were the cornerstone of legal reasoning on both sides of the Atlantic, and William Story’s commentaries on the United States Constitution are a landmark of constitutionalism in this country. Explaining his own intentions, Howard declared, “No document of American constitutionalism, save the Federal Constitution itself, draws so deeply on the great themes of American constitutional and legal development as does the Virginia Constitution.” The result was two volumes, 1,207 pages in all, in which Howard explored in depth the history of Virginia’s Constitution, its political setting, its judicial interpretation, comparative data from other states, and its intersection with federal constitutional law. Harvard Law School’s Paul Freund declared that, in his *Commentaries on the Constitution of Virginia,* 6 Howard’s subject had found “its ideal expositor,” one who brought to the study “the expertness of an active participant and the perspective of an honored scholar.” UCLA’s
Kenneth Karst said that “the history that Professor Howard recounts is background not merely for the Virginian experience, but for our whole national history of constitutional liberty. Accordingly, Professor Howard’s Commentaries deserve a national audience.”

**ANGLO-AMERICAN CONSTITUTIONALISM AND CIVIC EDUCATION**

Throughout his career, Howard has had a deep interest in the history and traditions of Anglo-American constitutionalism. In 1965, when Magna Carta marked its 750th anniversary, Howard persuaded Virginia Governor Albertis S. Harrison, Jr., to create the Magna Carta Commission of Virginia. (Magna Carta was not actually written in Virginia, but never mind.) Howard wrote a monograph, *Magna Carta: Text and Commentary*, still in print as the Great Charter approaches its 800th anniversary. Drawn into the subject, Howard then decided to write a book, *The Road from Runnymede*, tracing the influence of Magna Carta on constitutionalism in America. Harvard Law School Professor Arthur E. Sutherland called the book “a welcome contribution to the literature of constitutionalism.” He said that its author had given “the idea of Magna Carta a kind of personal history” and had perceived the charter’s “potential for great growth”—growth so drastic as to make its original version “an ancestor surprised to see what his progeny have become.”

Tracing the course of Anglo-American constitutionalism has drawn Howard into civic education—efforts to nurture a better understanding of constitutional government among citizens of this and other countries. In 1985, the General Assembly of Virginia created the Virginia Commission on the Bicentennial of the United States Constitution. Governor Charles S. Robb appointed Howard as the commission’s chairman. The commissioners found they had their work cut out for them. They conducted a public survey in which 57% of Virginians identified Jefferson as the “Father of the Constitution”—4% correctly named James Madison. Enabled by state appropriations and private funding, the commission undertook an ambitious program of public education. Initiatives included the public opening of Madison’s home at Montpelier, radio and television spots, programmatic content suggestions for schools and communities, publications, and the creation of more than seventy local bicentennial commissions.

---

7 (University Press of Virginia, 1964).
8 (University Press of Virginia, 1968).
In an address at the National Archives in Washington, D.C., Howard posed the question: “Why Celebrate the Constitution Today?” He saw the Constitution as being the vehicle for “a continuing seminar in government.” How do we accommodate values which, while complementary, sometimes seem to compete—liberty and equality, stability and change, government’s role and that of the private sector, “the tension between heritage and heresy”? The Constitution, he maintained, inspires a dialogue between the government and the people and among the people themselves. It is a dialogue “about the nature and ends of government institutions—a debate over the effective means of living together under conditions of ordered liberty.”

CONSTITUTION-MAKING IN OTHER COUNTRIES

In 1988, the year before the Berlin Wall came down, the U.S. Department of State asked Howard if he would receive a delegation of Hungarian parliamentarians charged with revising Hungary’s constitution. That country’s communist leaders, apparently sensing change in the air, proposed adopting constitutional reforms that might help those leaders ride out whatever upheavals might be coming. Howard spent two days with his Hungarian visitors, undertaking a series of discussions on the making of constitutions. Subsequently, Howard was invited to Budapest for further conversations about Hungary’s constitutional future.

In 1989, the Berlin Wall came down, and the communist era in Central and Eastern Europe came to an end. Howard was watching history unfold. He was invited to compare notes with constitution-makers in Prague, Warsaw, Tirana, Bucharest, and other capitals in the region. Sometimes, as in Czechoslovakia, his host was the president’s office. Other times, as in Poland and Romania, it was a chamber of the country’s parliament. He was, of course, not the only advisor invited to consult with makers of the region’s new constitutions; other Americans, as well as scholars from Western Europe, gave advice and counsel. His own role, he is quick to insist, was not that of a drafter. Instead he saw his best service as being simply to bring the insights of comparative constitutionalism to bear upon the local drafters’ projects. He thought it naive to suppose that drafters in the emerging democracies only needed to look to the American model. It is true, of course, that constitution-makers can profit from the experience of other countries, especially established constitutional democracies. And there are international norms, especially those
regarding human rights, which should be respected. But ultimately, Howard believes, a constitution must be grounded in the history, culture, and traditions of the country and people for which it is crafted.

The Office for Democratic Institutions and Human Rights (ODIHR) of the Conference for Security and Cooperation in Europe asked Howard to share his impressions of the process of achieving constitutionalism in Central and Eastern Europe. In the ODIHR Bulletin, Howard observed that the road to constitutionalism in the region “has proved a good deal more rutted and uneven than the initial enthusiasm had supposed…. Significant political and practical problems have strewn the path of drafters” in the post-communist world. Politics and the aspirations of political leaders (such as those that led to the dissolution of Czechoslovakia) inevitably were factors. Other factors infected the whole region. As Howard noted, “Some countries in Central and Eastern Europe had never had a full-blown democratic experience. Whatever their fortunes before World War II, the countries of the region were deprived, for half a century after that war, of the opportunities to develop the political practices and the civic culture in which constitutionalism flourishes.”

In 1991, the editors of Problems of Communism convened a fortieth anniversary conference in Washington. In his remarks, published in the conference’s proceedings, Howard offered his thoughts about the relation between constitutions and constitutionalism: “Drafting a constitution is but a first step in achieving constitutionalism. Other fundamental institutions must be developed—a multiparty system with free and fair elections, an independent judiciary, an independent bar…. Creating the institutions of democracy is not a weekend’s work. In many cases, it will be the work of a generation. Establishing a lasting democracy will require something our founders understood—civic virtue, civic education of a kind that brings people to understand both the rights and the obligations of citizenship.”

In 1996, the Union of Czech Lawyers, citing Howard’s “promotion of the idea of a civil society in Central Europe,” awarded him their Randa Medal—the first time this honor had been conferred upon anyone but a Czech citizen. In 2013, the Virginia Holocaust Museum and the Virginia Law Foundation bestowed on him their Legacy of Nuremberg Award, citing Howard’s “contribution to global standards for the rule of law and the prevention of crimes against humanity in the shaping and drafting of constitutions in many lands.”
COMPARATIVE CONSTITUTIONALISM

A major focus of Howard’s current teaching and writing is comparative constitutionalism. That interest has been fueled in good part by his hands-on experience comparing notes with constitution-makers in other countries, both in post-communist Central and Eastern Europe and in other parts of the world. As Howard puts it, he found himself meeting with Hungarian or Czech draftsmen, asking himself, “What am I doing here? What does an American constitutional law professor, with all his cultural baggage, bring to the table?” Given those questions, it has been natural for him to ponder the cultural and historical dimensions of constitutionalism as it has evolved in countries around the world. For years, Howard taught the Law School’s course in jurisprudence—a course he inherited from Hardy Dillard when the latter left the academy to become a judge of the World Court at The Hague. After Howard’s enlightening experiences in other countries, he decided to move in a direction combining his interests in constitutional law and in jurisprudence. So he embarked on teaching and writing about comparative constitutionalism—its historical roots, its major thinkers, its contemporary challenges.

One may fairly say that Howard’s early interest in state constitutions planted an instinct for comparisons. After Virginia’s adoption of its new constitution, Howard was invited to consult with legislators and others in states where constitutional revision was being contemplated—Alabama, Oklahoma, and New Jersey among them. Howard has written a number of articles exploring various aspects of American state constitutions. For example, in the Virginia Law Review, he examined ways in which state constitutions have been used to elevate the quest for environmental protection to constitutional status (Howard taught the first environmental law course offered at the Law School). Environmental quality was but one area in which, lacking a federal constitutional right, state constitutions became more important. Howard has been a vocal advocate for state courts’ developing a body of state constitutional law independent of the United States Constitution—a thesis also urged by Supreme Court Justice William J. Brennan, Jr.

In an article, “The Renaissance of State Constitutional Law,” Howard suggested that state constitutions define “a people’s aspirations and fundamental values.” He argued that the study of constitutionalism in the United States “is incomplete if one considers only the federal

Constitution.” Those who drafted that Constitution “understood that an enduring and viable federal system rested as well on the pillars of the state constitutions.... Pluralism and a dispersal of power are among the buttresses of our free society. Maintaining the state constitutions in good repair, and understanding their postulates, are important in carrying forward a system of government that has served us well for two centuries and gives hope and promise for the next century and beyond.”

Turning to comparative constitutionalism, Howard has helped nurture interest in that subject in the American academy. In 2009, the editors of the Virginia Journal of International Law invited Howard to contribute an essay to the journal’s fiftieth anniversary issue. In his article, “A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism,” Howard found that, in the years since World War II, “comparative constitutionalism has come into its own, both in the classroom and in the journals.” In an informal survey of fifty of the top American law schools, he found that at least forty had a course in some version of comparative constitutional law or comparative constitutionalism. He noted, as well, the enormous growth in scholarship in the field, in legal journals and elsewhere. Howard then went on to identify and discuss factors that, in the postwar period, have driven a heightened interest in comparative constitutionalism. Among these are the increase in the number of countries that are genuinely democratic (and thus bring the corollary of genuine constitutions), the surge in concern about protecting human rights (exemplified by the United Nations Charter and the Universal Declaration of Human Rights), the spread of judicial review, experiments in various versions of federalism and devolution, and the sharp debate in this country over whether Supreme Court opinions should cite foreign and comparative data.

Howard summed up his musings on the growth of interest in comparative constitutionalism in these words: “Comparativism in constitutional law serves many purposes. It enriches one’s study of American constitutional law by adding another dimension to our critique of what the Supreme Court does. It heightens our sense of the world beyond our national boundaries, useful to lawyers whose firms and clients operate on the international scene, but also to lawyers as world citizens. Ultimately, comparative studies can also nourish our search for principles of ordered liberty and for theories of a just society.”

Whether teaching, writing, or consulting, Howard sees his view of the
law as grounded in the liberal arts and humanities. As he told a convocation at his undergraduate alma mater, the University of Richmond, it was the liberal arts curriculum “that provided the foundation for a lifetime of studying democratic values. A liberal education teaches us to be skeptical of the claims of the authoritarian mind.” A newspaper profile observed, “Ideas matter to Dick Howard.” And the paper quoted him as declaring his personal belief: “One should always be an advocate for the best that has been thought and imagined in a civilized society.”
EXCERPTS

1. ON THE CONSTITUTION OF VIRGINIA.

THE CONSTITUTION OF VIRGINIA:
REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION
(Michie, 1969)

CONSTITUTION OF VIRGINIA

C. GENERAL PRINCIPLES AND OBJECTIVES WHICH HAVE GUIDED THE COMMISSION IN ITS WORK.

In 1816 Thomas Jefferson wrote to a friend on the subject of revising the Virginia Constitution:

"I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."

This might well be taken as the text for the Commission’s proposals, for it emphasizes the balance—essential in orderly constitutional development—between tradition and change. To preserve the best of Virginia’s constitutional heritage while responding to new problems is the twin thrust of Jefferson’s letter of 1816, and it is the twin objective of the Commission’s recommendations. The British statesman Macaulay once said, "Reform, that you may preserve.” It is in this spirit—of proposing constitutional revisions, the better to preserve the best traditions of Virginia’s constitutional history—that the Commission has come to the following views.

(1) The Commission has proceeded on the belief that the people of Virginia do not want sweeping, fundamental changes in the basic outline of government as created by the Virginia Constitution. In particular, the Commission believes that Virginians would oppose changes altering checks and balances among the three branches of government or sub-
stantially altering the Bill of Rights. But the Commission believes that the people would appreciate and welcome revisions which, while retaining the fundamental values and heritage of the Virginia Constitution, would strengthen that document by taking account of current problems and expectations.

(2) In keeping with the belief above, the Commission has neither created a new constitution unrelated to the old nor has it merely kept the old with a few minor changes. It is proposing a number of significant revisions designed to make the present Constitution more responsive to contemporary pressures and probable future needs.

(3) A constitution embodies fundamental law. It follows that a constitution is not a code of laws and that unnecessary detail, not touching on fundamental matters, ought to be left to the statute books. Above all, the Constitution should protect basic individual rights, create the frame of government, allocate powers and duties among the branches of government, and put essential limits on the exercise of such power. Once the fundamentals have been provided for, most other matters, especially those of detail, can safely be left to the political and legislative process.

(4) In saying that a constitution should not be a code of laws, one is also saying that a constitution should be brief and to the point. In 1776 Virginia’s Constitution was but 1500 words; today it is almost 35,000 words. Most of the verbiage crept in during the latter part of the nineteenth century, when detail which should have been left to general law became imbedded in the Constitution. The revised Constitution proposed by the Commission numbers about 18,000 words. The Commission believes that Virginia’s Constitution would be the better for being more concise. Nothing of substance would be lost in the process; much would be gained by way of clarity and intelligibility.

(5) The Constitution should be written in simple, intelligible language, so that a layman can read the document and have a basic grasp of the character of the government it creates. The fundamental law of Virginia should not be a mystery to those living under it simply because they are not lawyers. At the same time, the Commission is not proposing changes for the sake of style in instances where the present language, by usage or judicial decision, has come to have special meaning. This approach recalls that of Jefferson, who, sending his draft of a bill on criminal law to George Wythe, observed,

In its style I have aimed at accuracy, brevity and simplicity, preserving however the very words of the established law, wherever their mean-
ing had been sanctioned by the judicial decisions, or rendered technical by usage. The same matter if couched in the modern statutory language, with all its tautologies, redundancies and circumlocutions, would have spread itself over many pages, and been unintelligible to those whom it most concerns.

(6) The Constitution should be characterized by coherence and consistency. Therefore the Commission, in studying one part of the Constitution and recommending revisions, has reflected, on the relation of that part of the Constitution to other parts. Patchwork or piecemeal revision could easily, in the Commission’s judgment, be worse than no revision at all.

(7) A constitution should be, in the judgment of the Commission, more than simply a statement of law. Our Constitution, from the outset in 1776, has also contained statements of values which, technically speaking, are not legal rules. The Commission disagrees with those observers who would strip a constitution of all language which is not judicially enforceable. Since it believes that the Constitution should reflect, not only the present state of things, but also Virginia’s aspirations, the Commission would not tamper with the classic hortatory language of such parts of the Constitution as sections 1-4 of the Bill of Rights, even though some of that language might not be judicially enforceable.

(8) The Commission has proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as to the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government.

(9) In view of the pace of modern technological and other developments, and the impossibility of predicting what changes in society and government may take place in the coming decades, the Constitution should not attempt to envision every such development. Instead, the Commission believes that, to avoid rigidity and early obsolescence, the Constitution should, while protecting the rights of the people, create a government which can deal with unforeseen problems of the future as they arise.

(10) The Commission has kept in mind that it is recommending revisions for a constitution for the particular circumstances of Virginia. As Delegate Thomas R. Joynes said at the Constitutional Convention of 1829-30, “A constitution, to be of any value, must be adapted to the par-
ticular circumstances of the country for which it is intended. That Government which would be best for one country might be worst for another.” So that the Constitution might reflect the values of Virginia and her people, the Commission has taken care, through public hearings and the solicitation of written statements, to gather views from the people of Virginia to assist the Commission in its work.

(11) The Commission has not tried, through its proposals, to create an “ideal” new constitution. It has simply tried to propose a good revision of an existing constitution which has served Virginia well through the years. As Philip Barbour said at the 1829-30 Convention, “If I am right, we must discard mere theory, adopt nothing on the ground of mere speculation, but proceed to men and things as they are. In the language of Solon, we must establish not the best possible, but the best practicable Government.” In this spirit, the Commission, in weighing possible proposals, has sought to consider whether a proposal, whatever its theoretical merits, could not under any circumstances be expected to be adopted by the General Assembly and the people of Virginia. On the other hand, the Commission is not the place where the ultimate political judgments are to be made. The Commission has been charged with the duty of using its best judgment in making recommendations to the Governor and Assembly. Thus the Commission has by no means confined itself only to proposals which it thinks certain of adoption. The final word, after all, on what should be proposed to the electorate rests with the Governor and General Assembly, and the Commission sees its role as laying before the Governor, the Assembly, and the people the Commission’s best thinking and advice.

In general, the Commission has sought to make its study and shape its recommendations faithful to the injunction first included in Virginia’s Bill of Rights in 1776 and still to be found there: “That no free government, or the blessings of liberty can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.”
2. ON THE PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST CENTRAL AND EASTERN EUROPE.

CONSTITUTIONALISM AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE

THE LEGACY OF COMMUNISM
From a Western perspective, it is natural to assume that the 1989 revolutions represented a conscious effort to have the people of Poland, Hungary, Czechoslovakia, and other lands not simply join, but rather to rejoin, Europe. François Furet has characterized developments in Central and Eastern Europe since 1989 as marking the end of a long and tragic deviation which had begun in 1917. The notion that the post-communist countries are rejoining their western cousins in a family dedicated to democracy, the rule of law, and an open society is reinforced by the stated goals of the reformers of 1989 and by such documents as the new constitutions in the region. Indeed, Furet’s thesis may provide a founding premise for the new democracies.

Half a century of totalitarian rule and a command economy, however, has inevitably left a deep mark, both on individuals’ mentalities and on the potential for economic growth. Most people in the region, of course, did not consent to live under communism. But the habits and mentality inculcated by communist ideology and practices are part of social reality in Central and Eastern Europe. No effort to establish a liberal constitutional democracy can reckon without this residue of the communist era.

Among those legacies from the years of communist rule are (1) the weakness of civil society, (2) cynicism and a distrust of laws and institutions, (3) weakened economies, (4) the place in the new societies of those who were privileged under the old, and (5) corruption.

THE WEAKNESS OF CIVIL SOCIETY
When the communists took power, whether in Russia in 1918 or in Central and Eastern Europe after 1945, the new masters set out to
destroy those institutions associated with earlier regimes, especially those which might in any way contest the Party’s claim to unquestioned rule. Competing political parties were, of course, banned, and dissenters arrested or executed. But the communists sought more than this; they set out to eradicate the very fabric of non-communist life, like Romans salting the ruins of Carthage. Ideas, values, institutions, loyalties—anything competing with the communist vision had to go.

An important task confronting leaders and people in post-communist Europe, therefore, has been to construct a civil society out of the ruins of the communist era. Vaclav Havel has been especially astute in seeing the importance of civil society as creating an essential buffer between the individual and the state, a “social space” in which to cultivate a sense of community. It is interesting that efforts to restore civil society to the region have not been without their critics. Vaclav Klaus fears that proponents of civil society would create new layers of bureaucracy, thus slowing economic reform. This debate suggests a split between those who would identify civil society with NGOs and those who would redefine civil society as identified with a market economy.

Closely allied to the debate over civil society is the effort to create viable local governments in the post-communist countries. Under communism, local units were essentially organs of central administration and certainly not local governments as understood in western discourse. Real power at every level, local or central, was in the Party. As communism collapsed, the creation of local self-government became a central plank in the reformers’ platforms, for example, in the demands of Solidarity in Poland. Vaclav Havel sees an intimate connection between vigorous local government and the prospects for democracy, hoping to see the Czech Republic as a “highly decentralized state with confident local governments.” Resistance to devolution, however, is not unique to a communist perspective. National ministries, ever protective of their turf, still prefer centralized power to devolution, despite the arguments that nurturing democracy at the local level heightens a sense of civic participation.

**CYNICISM AND A DISTRUST OF LAWS AND INSTITUTIONS**

Life under communism bred a sense of loneliness, of distrust of one’s neighbors, leading to a Hobbesian disengagement from reliance upon laws and institutions. In the economic realm, shortages of goods and
services, made more offensive by favoritism to Party elite, led to the bypassing of institutions and official procedures. Who you knew, your ability to network, became a part of daily life. In the legal realm, ordinary people came to understand that laws and courts served the Party’s purposes. Everyone knew about “telephone justice”—the procurator’s picking up the telephone to tell a judge how to decide an important case. “Socialist legality”—law’s submission to Party dictates—reigned; one could not speak, save in irony, of a “rule of law.” Skepticism—of government, of parties, of courts, of institutions generally—has carried over into the post-communist era. Even those institutions meant to be representative—political parties, trade unions, parliament itself—are viewed with suspicion. Richard Rose, surveying attitudes in the region, reports that political parties command the trust of only 5% of those polled, and trade unions, 9%. Likewise, judges and courts must work hard to win the confidence of litigants and others. During the communist era, as in pre-revolutionary France, judges were seen to be spokesmen for the regime, hence discredited and, even after 1989, slow to stir trust and confidence.

The fashioning of new institutions—for example, parliaments and courts—can be accomplished in a relatively short time, as developments in Central and Eastern Europe confirm. But changing popular attitudes, deeply entrenched after decades of communist rule, is a far more daunting task. It is work requiring vigorous civic education and measured, not so much by years, as perhaps by a generation or two.

**ECONOMIC PROBLEMS**

In the years after World War II, the Soviet Union imposed its economic model on its satellite countries in Central and Eastern Europe. The result was a distortion of those countries’ economies. Industrialization was pursued, whether it made economic sense or not. Meanwhile, encouraged by the Marshall Plan, Western Europe prospered. Germany rose from defeat to become an economic giant.

As the years passed, the communist countries lagged further and further behind. In 1938 Czechoslovakia had been one of the world’s rich countries in per capita terms, ahead of its neighbor, Austria. Fifty years later, Austria was far more prosperous than Czechoslovakia. Similarly, comparing Spain and Poland, in the 1950s the two countries had fairly similar per capita incomes. By the late 1980s, just before the communist regime collapsed, Poland had a per capita income (around $1,900) only a
quarter of Spain’s ($7,700). The story in the communist world was one of lost opportunities—the failure to adjust economies to a changing world.

The new democracies have, of course, fallen heir to the enormous economic problems created by their communist predecessors. Early efforts at reform, especially when it took the form of “shock therapy,” often created as much misery as prosperity; certainly the benefits of those early years were spread quite unevenly, some individuals (including many of the former nomenklatura) doing very well, many others (especially pensioners or others living on limited means) finding life worse than before. Moreover, new regimes faced the task of weaning individuals from their dependence on the state and encouraging them to behave as autonomous economic entities.

Now that over a decade has passed since communism’s demise, economic transformation has begun to pay dividends in the region, although not uniformly. The Visegrad countries (Poland, Hungary, the Czech Republic, Slovakia, and Slovenia) lead the way, while other countries, including Bulgaria and Romania, lag behind. Domestic policies (such as radical market reform versus gradualism or the postponement of reform) explain part of the difference. Advantages of geography (especially proximity to Germany), the pace of foreign investment (Hungary has been a particular object of such investment), and other factors have also played their part.

It would be a crude form of determinism—an odd variation on a Marxist theme—to suppose that a country must be rich to be a successful constitutional democracy. But poverty and economic distress surely make the road to political and constitutional success rockier. As a Filipino peasant once commented to me, when I asked him about the proposed new constitution for his country, “Will it put food on my family’s table?”

THE ROLE OF COMMUNIST-ERA ELITES
In most of the first free elections in post-communist Central and Eastern Europe, new faces—democrats, nationalists, anti-communists—replaced the former communist rulers. (There were exceptions, such as Romania, where the old elites, without Ceaușescu, continued in power.)

Hard times, however, brought former communists (newly styled as social democrats or the like) back to office in subsequent rounds of elections in several countries in the region.
Whether in power or not, the former nomenklatura enjoyed enormous advantages. In government administration, especially at the middle and lower ranks, it was hard to replace managers and workers who often had a vested interest in the old order. In the emerging private sector, the nomenklatura had marked advantages; insiders became the new capitalists. To move out of the stultifying grasp of command economies, privatization of many state-owned enterprises was essential. But where, especially in the poorer countries, were the private savings which individuals might use to buy shares? Foreign investment might be forthcoming, but it aroused political fears of foreign ownership. The nomenklatura used this opportunity to put assets in their own hands, often in dubious ways that provoked cynics to speak of the emergence of a new social class—the “kleptoklatura.” Born of privilege, and nurtured in old ways of thinking, this new class would not be the best vehicle for encouraging creative thinking or competing effectively with western enterprises.

CORRUPTION

During the communist era, economic hardships, favoritism, and a cynical disregard of such rules as there were led to bargaining, barter, and layers of corruption. Preferring individual interest to the greater good became the norm. It is hardly surprising that such habits, deeply entrenched, have persisted to undermine efforts to establish a rule of law in the post-communist era. Building faith in the democratic process requires belief in the fairness of government agencies and officials, for example, in the providing of social services. Building a market economy similarly requires a level of trust in those with whom one is dealing. Foreign investors, in particular, are slow to go forward with projects if they cannot be confident that contracts will be honored and that their local counterparts are not simply lining their own pockets. Problems of corruption are made more troublesome when organized crime comes on the scene, as it has in some places in the region. The impact of corruption and crime varies, of course, from one country to another. But it is another reminder of the ways in which the legacy of the communist era can make the road to constitutionalism, democracy, and the rule of law more difficult.
3. ON COMPARATIVE CONSTITUTIONALISM.

A TRAVELER FROM AN ANTIQUE LAND: THE MODERN RENAISSANCE OF COMPARATIVE CONSTITUTIONALISM

EPILOGUE: BRATISLAVA

I was talking with some Czech and Slovak judges in Bratislava. The time was after the Velvet Revolution but before the divorce that saw Czechoslovakia split into two countries, the Czech Republic and Slovakia. Our conversation turned to judicial review. The local judges were curious about American practices—such things as the selection of judges, jurisdiction, certiorari review, political questions, and enforcement of a court’s mandate. I commented that I assumed that a constitutional court for Czechoslovakia would have jurisdiction to review and overturn decisions of the high courts of the two constituent regions—the Czech and Slovak lands. A Slovak judge, rather large and formidable, banged his fist on the table and said, “That would never do! That would violate our sovereignty!” I was startled for a moment. But reflection brought to mind the U.S. Supreme Court’s decision in Martin v. Hunter’s Lessee. Judges of Virginia’s Supreme Court of Appeals had declared that “the appellate power of the Supreme Court of the United States, does not extend to this court...” and that therefore the provision of the Judiciary Act of 1789 purporting to grant such jurisdiction was unconstitutional. In the Supreme Court’s opinion, Justice Story rejected Virginia’s argument and affirmed the Court’s authority to review the state court’s judgment. Having been born and raised in Richmond, the home town of Spencer Roane, the most prominent of the Virginia judges in the Martin case, I had reason to understand (even if not to agree with) the Slovak judge’s reasoning. I can imagine the conversation he and Roane might have had.

Johann Wolfgang von Goethe is quoted as having said, “A man who has no acquaintance with foreign languages knows nothing of his own.” I would make the same argument about constitutional law. A person who would suppose that, by knowing something about the American Constitution, he or she knows all one needs to know, misses the treasure trove that comparisons offer. One who cares nothing for the experience
4. ON THE RISE OF CONSERVATIVE PUBLIC INTEREST LAW FIRMS.

THE CONSTITUTION
AND THE ROLE OF GOVERNMENT
6 Charleston L. Rev. 449 (2012)

3. CONSERVATIVE PUBLIC INTEREST LAW FIRMS
Public interest law firms advancing progressive causes have existed since the early 1900s. The National Consumers’ League began using litigation to improve the working conditions of women and children, bringing test cases and employing the now familiar “Brandeis brief.” In 1920, the American Civil Liberties Union was formed. Having participated sporadically in litigation since 1915, the National Association for the Advancement of Colored People (NAACP), in 1940, formed its Legal Defense Fund. A principal objective of the Fund was to use litigation to end segregation in housing and public schools.

The 1960s, an era of activism on many fronts, saw public interest law gather force. A key figure was Ralph Nader, whose “Nader’s Raiders” went to court to seek social change, especially the reform of corporate practices. Environmentalists began to look to the courts, and in 1967 the...
Ford Foundation began channeling millions of dollars to various groups litigating in the public interest. By 1976, over ninety public interest law firms employed over 600 attorneys—many of them recruited from elite law schools.

Public interest litigation achieved substantial impact on public. Among these were welfare reform, a suspension (albeit temporary) of executions, prison reform, and, in Roe v. Wade, abortion rights. When the proposed Equal Rights Amendment faltered, groups such as the ACLU’s Women’s Rights Project were able to use the Equal Protection Clause to constitutionalize claims of sex discrimination. Public schools, whose administrators once exercised largely untrammelled discretion in such matters as student discipline and school newspapers, became the common target of litigation. Thus were vast areas of American life brought under the sway of the courts.

The successes of liberal public interest law firms alarmed business interests. In California, members of Governor Reagan’s administration were angry at the lack of conservative groups to counter liberal public interest firms, which were challenging welfare reforms in that state. On the other coast, Lewis F. Powell, Jr., former president of the American Bar Association (and soon to sit on the Supreme Court of the United States), in 1971 wrote a now-famous memorandum to the United States Chamber of Commerce proposing the creation of an activist conservative legal movement. The time had come, he said, “for the wisdom, ingenuity, and resources of American business to be marshaled against those who would destroy it.”

Conservatives soon responded to Powell’s call. In California, individuals and businesses associated with the Reagan administration and the Chamber of Commerce created the Pacific Legal Foundation. Similar firms soon appeared elsewhere, headed by prominent conservatives and usually based in the interests of a particular region. Perhaps the most conspicuous was the Mountain States Legal Foundation, funded by beer baron Joseph Coors. These new firms spoke mainly for business—framing their arguments in terms of free enterprise and property rights.

Religious conservatives also entered the fray. At first somewhat reluctant to involve themselves in secular legal disputes, they moved in the 1970s to create such groups as the Catholic League for Religious and Civil Rights, Americans United for Life, and the Christian Legal Society. The pace picked up as religious conservatives mobilized to fight abortion and to push for greater religious expression in the public sphere, espe-
cially in public schools.

The early conservative public interest law firms were largely reactive. They were more inclined to participate in the adversarial process through the medium of amicus briefs. Because of their regional base, conservative firms tended to be more geographically diffused than their liberal counterparts, which were more often based in Washington, D.C., and were less specialized. Conservative public interest law firms, again unlike the liberal firms, had weak relationships with law schools. The conservative firms were heavily dependent upon business interests for their funding, leading some critics to question their independence and their integrity. In 1980, Michael Horowitz, a conservative activist, wrote a scathing report for the Scaife Foundation, which funded conservative public interest law firms (just as the Rockefeller and Ford Foundations funded liberal groups). Horowitz declared that the conservative public interest movement “will make no substantial mark on the American legal profession or American life so long as it is seen as and in fact is the adjunct of a business community possessed of sufficient resources to afford its own legal representation.”

Conservative trends since the 1980s have nurtured a more favorable climate for conservative public interest law firms. At the level of theory, conservative developments in the intellectual realm, such as Robert Bork’s originalism and Richard Epstein’s libertarian constitutional theories, have provided conservative firms with what Jeffrey Rosen called a “sophisticated jurisprudential framework” within which to build their arguments. Republican victories at the polls have brought judges to the bench who are more receptive to conservative arguments. Those same victories have opened government jobs to ambitious young conservatives, who are able to acquire experience and credentials. This cadre creates a more “elite pool” of attorneys for conservative public interest law firms.

The newer conservative public interest law firms have learned lessons from the most successful liberal firms. Mimicking their opponents’ experience, conservative firms have fashioned long-term strategies, including detailed litigation campaigns. Moving beyond the agendas of their conservative predecessors, these firms wish to advance more plausible claims to represent underrepresented constituencies. Thus, rather than simply filing amicus briefs, conservative public interest law firms are now more likely to represent real clients. Moreover, they shape arguments grounded in a larger conservative ideology, not just in the inter-
ests of big business. As Clint Bolick, a cofounder of the Institute for Justice, one of the “second generation” conservative law firms, has said, he and his colleagues discovered that “there is a world of difference between an organization that is pro-business and an organization that is pro-free enterprise.”

For conservatives to use the courts to bring about social change, they had to abandon their adherence to “judicial restraint.” When the Justices of the Warren Court set about “doing the right thing”—reforming criminal justice, advancing civil rights, nurturing social justice—conservatives decried “judicial activism.” To those critics, judicial activism was inconsistent with democratic principles. But a philosophy of judicial restraint came to be less attractive, and conservatives rediscovered what their predecessors had understood in the early decades of the twentieth century—that courts could be seen as bulwarks against progressive legislation. Conservatives began to look to the courts to protect private property and individual enterprise and to contest centralized power.

One can see the new strategy at work in the activities of the Institute for Justice. Founded in 1991, the Institute focuses, above all, on litigation. Through lawsuits, the Institute seeks to influence not only what the courts do, but also politics and public opinion. A good example is the Institute’s invocation of the Fifth Amendment’s takings clause in the litigation that led to the Supreme Court’s decision in Kelo v. New London. Beset by the economic difficulties so common in older, declining industrial cities, New London sought to use its power of eminent domain to condemn private property, mostly residential, to make possible a research facility of the Pfizer Corporation. Thus, property would be taken from one private party for the ultimate use of another private party.

The Institute’s strategy—highlighting the plight of mostly modest homeowners—paid early dividends when groups hardly thought to be conservative, such as the NAACP and the Southern Christian Leadership Conference, filed amicus briefs in Kelo, as did the American Association of Retired Persons. In the technical legal sense, the Institute lost the case. By a five-to-four vote, the Supreme Court rejected the argument that the taking violated the Fifth Amendment. But Kelo proved to be the “sleeper” of the Court’s Term, provoking the kind of public outcry one usually associates with decisions concerning abortion or school prayer. The Institute launched a “Hands Off My Home” campaign, taking the fight to the state level. The Supreme Court’s decision does not preclude states from amending their constitutions or enacting statutes placing limits on
eminent domain beyond those flowing from the Fifth Amendment. And, indeed, a number of states have taken steps, mostly in the form of legislation, to give property owners greater protection against condemnations.

Thus do conservative lawsuits become part of public discourse. In bringing cases like *Kelo*, the Institute for Justice seeks to reach beyond the traditional conservative constituency—certainly beyond business interests (it was, after all, a corporation that was the city’s partner in the redevelopment effort in New London). The filing of amicus briefs by liberal groups in *Kelo* suggests bridge-building to groups outside the conservative world. By coming to the aid of “little people,” including racial minorities, a conservative public interest law firm can stake out a moral case. In doing so, as the Institute did in *Kelo*, the conservative firm can engage in political mobilization, attracting public attention and forging a political and legislative agenda.

5. ON CHIEF JUSTICE ROBERTS IN THE HEALTH CARE CASE.

OUT OF INFANCY: THE ROBERTS COURT AT SEVEN
98 VA. L. REV. IN BRIEF 76 (2012)

No case in the 2011-12 Term was more eagerly awaited than *National Federation of Independent Business v. Sebelius*, in which the Court reviewed challenges to the constitutionality of the Patient Protection and Affordable Care Act. Not only was it, by all odds, the Term’s most important case, but it bids fair to be the most historic decision to date from the Roberts Court—being to the Roberts Court what *Bush v. Gore* was to the Rehnquist Court. One recalls how, in 2000, the Court stepped directly into the hotly disputed presidential vote count and, in its decision, split in such a way that much of the country labeled the Court’s behavior as manifestly partisan.

With so much resting on the outcome of the health care case, much of the country was likely, no matter what the Court ruled, to view the decision through political lenses. That being so, Chief Justice Roberts’ vote in the case had an element of drama about it. Roberts joined the
Court’s more conservative justices, as well as Kennedy, in declaring that the individual mandate could not be justified by Congress’s commerce power. Like six other justices (all but Ginsburg, Sotomayor and Breyer), Roberts held that the Act’s Medicaid expansion exceeded Congress’s spending power by unduly coercing the states to accept new conditions for existing Medicaid funds. In neither vote was there much real surprise in Roberts’ position. The surprise came when Roberts joined the Court’s more liberal members in holding that the individual mandate could be upheld as resting on Congress’ taxing power. Roberts found it constitutionally irrelevant that the mandate was not labeled as a tax. (A lay person might find it mildly puzzling that, while treating the mandate as a tax for the purposes of the taxing power, the majority opinion held that the litigation in Sebelius was not precluded by the Anti-Injunction Act because the health care act labeled the mandate as a “penalty” and not as a “tax.”)

How should one interpret Roberts’ vote in the health care case? Prior to the 2011-12 Term, only once in his seven years on the Court had Roberts been in the majority in a five-to-four decision joined by the Court’s more liberal justices. When the Court has divided along ideological lines, we have become accustomed to Roberts being in the more conservative camp. Yet the 2011-12 Term gave us not only Sebelius, but also Arizona v. United States, in which Roberts joined the four more-liberal justices in finding federal preemption of most sections of Arizona’s controversial immigration law. Conservatives were quick to voice bitter disappointment with Roberts’ votes. Clint Bolick, writing in the Wall Street Journal, said that no longer was Roberts a “solid conservative” and he even wondered whether Roberts was now a “swing justice.”

There were reports, from within the Court, that conservative justices felt disappointment, even betrayal, by Roberts’ vote in Sebelius. Jan Crawford reported the discord within the Court to be “deep and personal” and likely to last for a long time. Lyle Denniston, a veteran Court-watcher, characterized the leaks from the Court as being more than a breach of confidentiality; they could be seen as a public rebuke and a challenge to Roberts’ leadership of the Court. Judge Richard Posner wondered if the episode could drive a wedge between Roberts and his conservative colleagues. “[W]hat do you do [when your friends turn against you]?” asked Posner. “[B]ecome more conservative? Or do you say, ‘What am I doing with this crowd of lunatics?’”

Such predictions of a lasting rift among the Court’s conservatives
are surely overblown. One recalls reports of angst within the Court after the decision in *Bush v. Gore*. Whatever bad feelings there might have been at the time of that decision, it was not long before the air cleared. It is difficult to suppose that *Sebelius* has created any sort of cloud over Roberts’ place at the Court. Those who follow royal courts, such as Buckingham Palace, find discord more interesting than harmony. Similarly, speculation about rifts at the Court often outstrips reality. Moreover, the notion that Roberts has morphed into a liberal lacks a credible basis. It is always risky to take one Term in isolation. That is as true of individual Justices as of the Court at large. John Roberts has been Chief Justice for seven years. He is, by the conventional yardsticks, a conservative jurist and likely to remain one.

How, then, to explain Roberts’ voting to uphold President Obama’s signature legislative achievement—a measure for which Roberts must surely have little sympathy? If Roberts had joined the Court’s conservatives in striking down the mandate altogether, one can imagine how quickly pundits, politicians, and much of the wider public would castigate the decision as being partisan. Like critics of *Bush v. Gore*, those anguished by the Court’s invalidating “Obamacare” would see the Court as thrusting itself into the heart of a highly politicized issue—and in a presidential election year, at that. Whatever Roberts’ own reasoning, the decision in *Sebelius* can be seen as a considered move to protect the Court’s legitimacy and to enhance its capital in the country’s affairs. Might it be that John Roberts was thinking about John Marshall, who carefully wrote *Marbury v. Madison* in such a way as to deny Marbury the writ he sought while at the same time establishing the Court’s power of judicial review?

Viewed through a conservative lens, might Roberts’ vote in the health care case embolden him to join conservative colleagues on the Court if they decide, in the new Term’s case involving affirmative action at the University of Texas, to curtail or end the use of race as a factor in government decisions such as in a state university’s admissions process? Might Roberts help move the Court toward overturning the Voting Rights Act?

What will his role be when the Court is asked to decide on same-sex marriage? Indeed, if *Sebelius* itself is considered, is it not more significant that Roberts joined the conservatives in uniting Congress’s commerce power (thereby requiring law professors and students to revisit widely held post-New Deal assumptions about the era of *Wickard v. Filburn* and
the reach of the Commerce Clause)? Moreover, what about the Court’s holding limiting Congress’s spending power? Conditional spending statutes are an important aspect of the modern regulatory state. Until Sebelius, the Court had been markedly deferential to Congress in the rare instances when the Court had even seen fit to review conditional spending. Should the Court in future cases give broad sweep to Sebelius’s coercion analysis, the result could be to unsettle a range of programs, such as those affecting education, social welfare, highways, energy, and the environment. One scholar argues that the Medicaid expansion at issue in Sebelius was sui generis and concludes that “the coercion inquiry is unlikely to jeopardize other major spending programs....” That may well be, but Sebelius’ discovery of limits on Congress’ spending power is bound to quicken the hopes of conservative critics of the regulatory state and to encourage litigation hoping to enlarge the reach of the coercion analysis.
BIBLIOGRAPHY

BOOKS AND MONOGRAPHS
Toward the Open Society in Central and Eastern Europe (Tanner Lectures on Human Values, 1995).
I’ll See You in Court: The States and the Supreme Court (National Governors’ Association Center for Policy Research, 1980).
State Aid to Private Higher Education (Michie, 1977).
Fair Trial and Free Expression: A Background Report Prepared for and Presented to the Subcommittee on Constitutional Rights (with Sanford A. Newman) (Committee on the Judiciary, U.S. Senate, Committee Print, 1976).
Commentaries on the Constitution of Virginia (University Press of Virginia, 1974).
Virginia Votes for a New Constitution (with Harry M. Bradley and Tim Finchem) (Virginia Western Community College, 1973).
Virginia’s Urban Corridor: A Preliminary Inquiry (with Leigh E. Grosenick, Dennis W. Barnes and Jerry L. Mashaw) (University of Virginia Center for the Study of Science, Technology, and Public Policy, 1970).
The Road from Runnymede: Magna Carta and Constitutionalism in America (University Press of Virginia, 1968).
Criminal Justice in Our Time (editor) (University Press of Virginia, 1965).

BOOK CHAPTERS


ARTICLES


“On Writing about the Supreme Court,” 22 Reading Guide 49 (1967).

Washington Post
Los Angeles Times
Richmond Times-Dispatch
Richmond News Leader
Norfolk Virginian-Pilot
Los Angeles Daily Law Journal
Leonard W. Levy & Kenneth L. Karst, eds., Encyclopedia of the American Constitution
Eric Foner & John A. Garraty, eds., Reader’s Companion to American History
SAIKRISHNA
PRAKASH
SAIKRISHNA PRAKASH joined the Virginia faculty in 2009, after many years at the University of San Diego School of Law. His scholarship concerns the federal separation of powers, with a particular emphasis on executive authority and the limits of presidential power. The past two decades have given Prakash plenty to talk about: foreign wars, an impeachment, and innumerable disputes about executive authority. By concentrating on these (and other) timely debates, Prakash has emerged as one of the leading advocates for the use of originalism as a methodology for interpreting the Constitution’s structural provisions.

Prakash became interested in the proper allocation of government power at an early age. “As a teen in San Diego, I had a newspaper route—an early morning route,” he recalls. “I had to fold and rubber-band all the papers at around 5:00 a.m. But because I would read the paper before biking my route, some customers complained that delivery was occasionally a bit tardy.” The articles that most caught Prakash’s attention (besides the ones on his beloved Chargers and Padres) concerned the tugs-of-war between Congress and the executive branch. “During the Ronald Reagan administration, there were so many disputes regarding Iran-Contra, executive privilege, war powers, and the use of an independent counsel. Each was engrossing.”

Prakash received a Bachelor of Arts in political science and economics from Stanford University, where he studied under acclaimed political scientists David Brady, John Ferejohn, and Keith Krehbiel. He then attended Yale Law School. “I was privileged to have some of the best professors—Akhil Amar, Harold Koh, Kate Stith—each of whom were deeply interested in the separation of powers.” While in law school, he wrote a paper about the Budget Enforcement Act, predicting that Congress could easily evade the act’s “spending caps.” He also published a Note on the Founders’ views regarding control of executive branch agencies, “Hail to
the Chief Administrator: The Framers and the President’s Administrative Powers.” In it, Prakash argues that the original Constitution granted the President the power to direct those who execute federal law. “The incredibly cheesy title—‘Hail to the Chief Administrator’—one that I have yet to top—kind of says it all. The President may execute all federal law and direct those who help execute it.”

Upon graduating, Prakash clerked for Judge Laurence Silberman of the United States Circuit Court for the District of Columbia. Though Prakash had taken administrative law in law school, he said much of his real education came from Judge Silberman. “The Judge knew so much about administrative law that by the time I clerked for him, he had forgotten more than I would ever know,” Prakash says. Judge Silberman “knew every intricacy of standing, mootness, ripeness, and political question doctrine because he had a stunning memory for case law.” Prakash also notes that Judge Silberman was extremely generous with his time, having a daily lunch with his clerks. “Judge Silberman was fond of putting us in our place,” recalls Prakash. “Because I was the only clerk from Yale, the Judge (who went to Harvard) liked to quip that by clerking for him, I was belatedly receiving a legal education. And he was right.”

Prakash then clerked for Justice Clarence Thomas on the Supreme Court of the United States. The Justice had a well-developed conception of the proper role of judges and a strong attachment to originalism as a means of constitutional interpretation. These approaches played out in a number of extremely memorable cases, including Adarand v. Peña (the constitutionality of affirmative action in federal construction contracts), U.S. Term Limits v. Thornton (the constitutionality of state-imposed term limits for federal office), and United States v. Lopez (whether the Commerce Clause authorizes the criminalization of gun possession within a thousand feet of a school). Prakash also fondly recalls the many discussions about the Dallas Cowboys, the mentoring, and the Justice’s booming and unforgettable laugh. “The Justice, the co-clerks, and the cases—each was incomparable.”

After practicing tax law for two years at Simpson, Thacher, and Bartlet in New York City, Prakash taught at the University of Illinois College of Law as a visiting professor before joining Boston University School of Law full time. He then went west to the University of San Diego School of Law, finding the faculty and the weather extremely congenial. “San Diego is a powerhouse, with a first-rate faculty and top-notch human beings.”

---

Prakash’s first law school conference was memorable both because of the intellectual firepower and the identity of one of the conferees:

“My friend Michael Paulsen had invited me to attend a University of Minnesota conference commemorating United States v. Nixon (the executive privilege/Nixon tapes case). When I got to the conference, I was amazed at how many people were in attendance. It was 1999 and executive privilege was in the news because of the Bill Clinton/Monica Lewinsky scandal. So I thought it made sense that there seemed to be a thousand attendees. Only later did I come to realize that while United States v. Nixon was a case largely forgotten, everyone had heard of a fellow named Kenneth Starr, and all were familiar with his investigation of Whitewater and the Clintons. A thousand people attended because they wanted to see the independent prosecutor, who at the time was the legal equivalent of Beyoncé.”

Prakash’s scholarship is animated by a deep interest in the founding of the United States. His work endorses the view that the Constitution can only be fully understood by recognizing the historical meaning and context of its words and phrases. Accordingly, Prakash has devoted much of his work to originalist inquiry and a defense of originalism as a constitutional methodology. He recognizes that some originalism seems wrong, even utterly mistaken. But he thinks that originalism serves at least as a starting point in discerning contemporary constitutional meaning. “Originalism may wax and wane. Yet because of its intuitive appeal, it will always be a part of constitutional discourse. Even those who oppose using original meanings to make sense of the Constitution occasionally make appeals to those meanings, at least when it suits.”

In his piece written for the Minnesota conference, “A Critical Comment on the Constitutionality of Executive Privilege,” 1 Prakash argues that the concept of executive privilege fits uneasily with the rest of the structure of Articles I and II. Executive privilege is the idea that the President enjoys a constitutional right to shield communications within his administration from the prying eyes of the courts and Congress. The claim typically rests on the sense that each branch should have some control over communications within its branch. Without the privilege, the President would lack candid advice that would be useful in the execution of his powers and duties. Prakash points out that while Congress has an express and narrow evidentiary privilege in the form of Article I’s Speech and Debate Clause, there is little in Article II suggesting an implicit and

---

1 83 Minn. L. Rev. 1143 (1999).
broader privilege to keep executive branch communications secret. He also argues that other matters far more important to the presidency are widely understood to be left to the discretion of Congress. Only Congress can decide if there will be a bureaucracy to enforce the laws and an army and navy to defend the country. Further, under its appropriations power, Congress also decides how much money executive officers will receive for their salaries and expenses. Because Congress controls these much more consequential means of implementing presidential powers, it makes little sense to infer a far less consequential constitutional authority to withhold communications from the courts or Congress. Prakash concludes that the Constitution leaves the question of executive privilege, like many other questions about the structure of the executive office, to the political branches. Congress may, by statute, grant the President an evidentiary privilege and decide its contours.

Another early piece (co-authored with Steven Calabresi), “The President’s Power to Execute the Law,”3 argues for the Constitution’s endorsement of a unitary executive. In the pages of the Columbia Law Review, two distinguished professors, Lawrence Lessig and Cass Sunstein, had just argued that the theory of the unitary executive was a “myth” with no solid grounding in the Constitution or the founding. Because they were responding in part to his law school Note—and because he felt that their argument was mistaken—Prakash wrote an article attempting to show why the unitary executive was indeed part of the Framers’ original design. Separately, Steven Calabresi of the Northwestern School of Law had decided to respond to Lessig and Sunstein as well. Eventually, Prakash and Calabresi combined their separate pieces. The resulting article described the principle meaning of executive power, how the Faithful Execution Clause confirmed the grant of a power to execute the law, and why the Opinions Clause assumed that the heads of departments were subordinate to the President. The article also explained that the Constitution was built on the presumption that there were only three powers of government and three types of officers. This meant that there could be no separate fourth branch of government. “The President’s Power to Execute the Law” has become a seminal article for the proposition that the Constitution empowered the President to personally execute federal law by directing others in their execution of it.

Another of Prakash’s articles considered the President’s powers over foreign affairs. The Constitution does not specifically list all foreign affairs

3 104 Yale L.J. 541 (1994).
powers. For instance, it never expressly allocates the power to withdraw from treaties or the power to direct U.S. diplomats. Some have argued that the Constitution simply does not allocate such powers. Others, such as Yale Law School’s Harold Koh, have contended that Congress enjoys such powers because it has so many consequential foreign relations powers (war, foreign commerce, etc.). Writing with Michael Ramsey, Prakash argues in “The Executive Power over Foreign Affairs,” that the grant of “executive power” included a grant of foreign affairs powers. The article argues that in the late eighteenth century the phrase “executive power” was known to have a foreign affairs component. Writers such as Montesquieu, Locke, and Blackstone had claimed as much, as had Americans. When the Constitution granted the President “the executive power,” it granted him all those powers deemed executive, subject to the Constitution’s numerous constraints. Because the Constitution expressly granted some foreign relations powers to Congress and required the Senate’s consent before using others, the Constitution did not grant the President a plenary foreign affairs power. Instead, he has all those foreign affairs powers considered executive and not allocated elsewhere. Using his executive power, the President may declare the foreign policy of the United States, instruct U.S. diplomats, and oust foreign diplomats and consuls. Hence, rather than being “laconic” in foreign affairs, as Louis Henkin once wrote, the Constitution grants the federal government full authority in foreign affairs, using a system of express grants coupled with a residual sweeping grant to the executive. This reading of the Constitution closely coheres with practices that date back to the Founding, ones in which the President exercises many foreign relations powers that are not traceable to the specific enumerations of Article II.

While Prakash has focused on presidential powers, he has also written about other horizontal aspects of federal power. One of his most provocative (and shortest) pieces is “Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity.” There Prakash asks whether the phrase “regulate commerce” has a different meaning as applied to the three branches of the Commerce Clause—interstate, foreign, and Indian commerce. The article argues that while judicial doctrine treats each branch of the Commerce Clause differently, with federal power varying across the three branches, the Constitution’s text suggests that the scope of the power ought to be identical. Prakash contends that the same

phrase—“regulate commerce”—ought to have the same meaning in all three contexts. More specifically, he claims that the Constitution ought to be read with a rather high presumption of “intrasentence uniformity.” He claims that it would be anomalous for a phrase in one clause to have multiple meanings in that clause.

In “How to Remove a Federal Judge” (with Steve Smith), Prakash argues that tenure of the sort enjoyed by federal judges was a common law tenure, one that could be terminated on a finding of misbehavior. The article notes that the concept of “misbehavior,” the opposite of the Constitution’s “good behavior,” had a broader meaning than “high crimes and misdemeanors.” It also highlights that some officers enjoyed good-behavior tenure in American regimes (state and continental) that lacked the machinery of impeachment. Finally, early Congresses provided that federal judges were to be ousted from their offices when convicted of bribery in ordinary courts. Over time, this article has elicited the most inquiries from the public. “Apparently quite a few folks feel that a federal judge has wronged them. I have to tell them that, despite the title, the article is purely academic and advances a theory that is not widely accepted, at least not yet.”

An article in the Virginia Law Review, “Removal and Tenure in Office,” discusses the removal of non-Article III officers. The article makes the standard unitary executive case for a presidential power to remove, claiming that the grant of executive power includes a power to remove executive officers. Contrary to conventional wisdom (and a Supreme Court case, United States v. Chadha), the article also maintains that Congress has constitutional authority to remove federal officers. Prakash points out that Congress can disestablish offices and that Congress has long provided that officers are automatically ousted from their offices upon being convicted for certain offenses in the ordinary courts. Relying on these established congressional means of removal, Prakash contends that Congress can pass laws providing that some named officer or officers shall be ousted from office. The President’s power of removal is not a power to protect officers from removal, and so there is no conflict between the President’s power to remove and a congressional power to do so outside of impeachment. Finally, Prakash discusses whether federal judges have constitutional authority to remove officers who help exercise judicial power. He argues that judges have constitutional power to remove indi-

---

individuals that help exercise their federal judicial power, just as the President has a constitutional right to remove officers who help implement federal executive power.

Taken together, Prakash’s work displays a knack for analyzing complex constitutional questions in a novel and convincing manner. His primary lens is originalism, and he focuses on the link between early historical practices and modern questions related to the division of governmental power. Prakash’s research often leads to surprising or controversial outcomes. But even those who resist originalist inquiry must contend with the creative and careful reasoning that drives him toward these conclusions. Only in the middle of his career, Prakash has become one of the leading scholars on executive power in the country—still inspired by current events, but now in a position to shape how to interpret them.
No foreign affairs scholar writes on a clean slate. Many eminent scholars and judges have labored to make sense of the Constitution’s allocation of foreign affairs powers. Although these attempts often have little in common, they share one trait: They have given up on the Constitution. The received wisdom would have us believe that the foreign affairs Constitution contains enormous gaps that must be filled by reference to extratextual sources: practice, convenience, necessity, national security, international relations law and theory, inherent rights of sovereignty, and so forth. Yet reaching for these extratextual sources casts doubt on the entire enterprise, for one would think that the Constitution’s text ought to play the preeminent role in discerning the Constitution’s allocation of foreign affairs powers.

Perhaps due to the array of extratextual sources brought to bear, modern scholarship remains without a coherent and complete theory of the constitutional division of foreign affairs powers. First, there is no adequate explanation of the source and scope of the foreign affairs powers of the President. It is conventional wisdom that the President is, at minimum, the “sole organ” of communication with foreign nations and is empowered to direct and recall U.S. diplomats. Many scholars would go further, asserting that the President is the primary locus of foreign affairs power. Yet the President’s enumerated powers do not seem to convey anything approaching even the minimum powers everyone assumes the President to enjoy. Second, there is no adequate explanation of the foreign affairs powers of Congress. Most scholars assume that Congress has a general power to legislate in foreign affairs matters, and many argue that Congress, rather than the President, should be the dominant decisionmaker. But the enumerated foreign affairs powers of Congress, while seemingly broader than the President’s, also do not apparently encompass the full extent of the foreign affairs powers Congress is thought properly to exercise. Third, and most importantly, modern scholarship has achieved no consensus on even the most basic framework for resolving disputes over the allocation of particular foreign
affairs powers not specifically mentioned in the Constitution’s text. To pick a few examples, the power to terminate treaties, to enter into executive agreements, and to establish and enforce U.S. foreign policy are heatedly and inconclusively debated with no apparent hope of converging upon a common approach.

We need to wipe the foreign affairs slate clean and start over. In our view, modern scholarship should stop assuming that the Constitution’s text says little about foreign affairs and stop treating foreign affairs powers as “up for grabs,” to be resolved by hasty resort to extratextual sources. Outside the foreign affairs field, constitutional scholars agree that the text is the appropriate starting point. That should be true of foreign affairs scholarship as well. In this Article, we hope to show that the Constitution’s text, properly construed, answers the supposedly perplexing foreign affairs questions posed above.

We argue that the text supplies four basic principles that provide a framework for resolving controversies over the source and allocation of foreign affairs powers. First, and most importantly, the President enjoys a “residual” foreign affairs power under Article II, Section 1’s grant of “the executive Power.” As we seek to establish in this Article, the ordinary eighteenth-century meaning of executive power—as reflected, for example, in the works of leading political writers known to the constitutional generation, such as Locke, Montesquieu, and Blackstone—included foreign affairs powers. By using a common phrase infused with that meaning, the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power.

Second, the President’s executive power over foreign affairs is limited by specific allocations of foreign affairs power to other entities—such as the allocation of the power to declare war to Congress. Thus, the President has a circumscribed version of the traditional executive power over foreign affairs. Notwithstanding the common understanding of executive power, the President cannot regulate international commerce or grant letters of marque and reprisal. Third, Congress, in addition to its specific foreign affairs powers, has a derivative power to legislate in support of the President’s executive power over foreign affairs and its own foreign affairs powers. But contrary to the conventional view, Congress does not have a general and independent authority over all foreign affairs matters. In particular, Congress cannot establish relations with a foreign country or establish foreign policy. Fourth, the President’s executive
power over foreign affairs does not extend to matters that were not part of the traditional executive power, even where they touch upon foreign affairs. In particular, the President cannot claim power over appropriations and lawmaking, even in the foreign affairs arena, by virtue of the executive power. That is to say, the President is not a lawmaker, even in foreign affairs.

Below we begin the task of wiping the foreign affairs slate clean and writing anew. Part I highlights the difficulties of modern foreign affairs scholarship, including its repeated denial that the Constitution’s text can provide much meaningful guidance in allocating foreign affairs powers. Part II details the four fundamental principles that we derive from the Constitution’s text and that provide a comprehensive framework for addressing foreign affairs disputes. This Part further illustrates how these principles are consistent with the Constitution’s text read as a whole and how they provide guidance in the resolution of key dilemmas of foreign affairs law. Part III begins the task of establishing the common eighteenth-century understanding of executive power by discussing the usage of that phrase in eighteenth-century political thought. In this Part we show that eighteenth-century political theory included foreign affairs powers as part of the executive power, thus providing a firm foundation for our reading of Article II, Section 1.

In Part IV we discuss foreign affairs powers under the Articles of Confederation, illustrating first that the Continental Congress’s exercise of foreign affairs powers was commonly called “executive” power, and second that serious practical problems arose from a multimember body’s exercise of the executive foreign affairs powers. In Part V we consider the Philadelphia Convention, in which delegates shifted portions of the executive power of the Continental Congress to a single President. We show how both background understandings of the phrase “executive power” and specific discussion by the delegates confirm a reading of executive power to include foreign affairs powers. We also show how dissatisfaction with the breadth of the traditional executive power over foreign affairs led the delegates to allocate certain foreign affairs powers elsewhere, laying the foundation for our interpretation of these allocations as exceptions carved out of the President’s executive power. Part VI addresses the ratifying conventions, and shows that their discussions of foreign affairs are consistent with our view of unallocated foreign affairs powers as presidential executive powers. Finally, Part VII examines the Washington Administration and finds a usage and practice that closely
conform to our theory of executive power over foreign affairs.

Our framework reveals that there are no gaps in the Constitution's allocation of foreign affairs powers. The Constitution's text supplies a sound, comprehensive framework of foreign affairs powers without appeal to amorphous and disputed extratextual sources. Moreover, there is substantial evidence that this textual framework is the correct interpretation of the Constitution, as it comports with usage and practice before, during, and after the Constitution's ratification. Finally, other theories or frameworks have a rather difficult time of accounting for the evidence supporting our framework. To slight the foreign affairs meaning of executive power is to downplay Locke, Montesquieu, Blackstone, Washington, Jay, Jefferson, Hamilton, and even Madison.

**REMOVAL AND TENURE IN OFFICE**

*92 Va. L. Rev. 1779 (2006)*

Removal is an under-theorized and relatively unexamined area of constitutional law. What little scholarship there is has its limitations. Existing works focus almost solely on the President's removal power. Scholars quietly assume that Congress cannot remove officers, except by impeachment. Most also say nothing about whether the judiciary may remove officers. Finally, scholars make few claims about the Constitution's original meaning. Constitutional text supposedly does not address removal, leading many to believe that any quest for original meaning will be fruitless. Hence claims about sound policy, prior practice, and judicial opinions dominate the undersized removal literature.

Given the history of famous removal clashes, the dearth of scholarship is somewhat remarkable. The first Congress debated whether the President had a right to remove. The Senate censured Andrew Jackson for his removal of the Treasury Secretary, the only such censure by a house of Congress. Andrew Johnson was impeached because he dismissed his War Secretary, and he came within one vote of being removed. Presidential removals also led to famed cases like the mammoth *Myers v. United States* and the stunted *Humphrey's Executor v. United States*. More recently, the quarrels over the Independent Counsel were, in no small measure, about whether Congress could create a prosecutor insulated from presidential removal.
A wag might say that a dearth of scholarship in an area of constitutional law makes it more likely that the area is basically sound. When it comes to removal, however, the wag would be wrong. In fact, methodical and comprehensive scholarship is sorely needed because in its absence, incompatible claims have flourished. On one hand, *Bowsher v. Synar* declares that Congress cannot have a power to remove officers by statute. On the other hand, the 1802 Repeal Act, which removed judges when it terminated their underlying offices, suggests otherwise. Or consider the intuition that because the President has a removal power, no one else may remove officers. No less than the Supreme Court has held that courts may remove officers they appoint, thereby ensuring that the President lacks a removal monopoly.

The want of a comprehensive analysis of removal has also left basic questions about the President's ability to remove unanswered. For instance, does his removal authority extend to all executive officers, to all those whom he actually appoints, or to all officers of the United States (save for federal judges)? Similarly, scholarship has inadequately addressed whether Congress may constrain the President's ability to remove, even though this very question has arisen in famous cases.

This Article seeks to fill the gaps in the literature, addressing questions long neglected. Consider Congress. Despite the prevailing intuition that Congress cannot remove officers, the case for a congressional removal power is a compelling one. Where offices and officers are concerned, Congress is not merely some bystander. Congress's powers over offices are extensive—it creates offices, specifies their duties, and sets their salaries. Indeed, it has long been understood that Congress can remove officers. Congress can terminate offices, thereby ousting incumbent officers; Congress can enact tenure limits, thereby decreeing the future removal of officers; and Congress can mandate the removal of officers who have been convicted of civil or criminal offenses. Although the Supreme Court and the executive branch have drawn the line when it comes to statutes that do nothing more than remove incumbent officers, nothing in the Constitution supports this artificial line drawing. Like other removal statutes, these "simple removal statutes" can be necessary and proper for carrying federal powers into execution.

Consider the President. In recent times, executive branch lawyers have claimed that the President's appointment power is the source of his removal power, the theory being that whoever appoints may remove. This seemingly reasonable argument is mistaken. First, it greatly overstates
presidential power because it supposes he may remove non-executive officers merely because he appointed them. Properly understood, any distinct removal power arises from the grant of executive power. Although one might argue that the President’s executive power enables him to remove all officers (other than judges), the Constitution is better read as granting him a power to remove executive officers only. It follows that the President has no constitutional right to remove presidentially appointed non-executive officers. Most importantly, the Constitution does not grant him the authority to remove the quasi-judicial and quasi-legislative officers who control the independent agencies. If the President’s removal power arises from the grant of executive power, the President has far less removal authority than is commonly supposed.

Second, in a different sense, the appointment argument may understate the President’s power over officers. If we look to England and her colonies as a guide, the President’s executive power may not grant a distinct “removal power” at all. Instead, the President might have the ability to set the tenure of executive officers. Rather than granting all executive officers tenure during pleasure, the President might use his discretion to grant some officers good behavior tenure. Much as English monarchs did, the President might constrain his future ability to remove in order to attract those who would shun an insecure appointment during pleasure. In other words, perhaps the President may impose an ex ante limit on his ability to remove in order to attract superior officers.

Finally, consider the federal judiciary. In *Ex parte Hennen*, the Supreme Court held that federal courts could remove clerks because the courts had appointed them. If this argument is to be believed, it means that the President could remove all presidentially-appointed inferior judicial officers, even though such officers perform vital judicial functions for Article III courts. Once again, the appointment argument is misguided. Inferior judicial officers, such as the clerks of the court, exist to help carry into execution the judicial power of federal courts. To perform that function, inferior judicial officers likely receive an implicit delegation of judicial power from an Article III court. A court may remove its inferior judicial officer by retracting its grant of judicial power. This conception of a judicial removal power makes the appointer irrelevant, as he or she should be.

Part I tackles the controversial topic of a congressional power to
remove. Part II considers a presidential power to remove. Somewhat predictably, Part III discusses a judicial power to remove.

BIBLIOGRAPHY

PUBLICATIONS

“Reverse Advisory Opinions” (with Neal Devins), 80 U. Chi. L. Rev. 859 (2013).
“The Indefensible Duty to Defend” (with Neal Devins), 112 Colum. L. Rev. 507 (2012).
“Missing Links in the President’s Evolution on Same-Sex Marriage,” 81 Fordham L. Rev. 553 (2012).
“Why the President Must Veto Unconstitutional Bills,” 16 Wm. & Mary Bill Rights J. 81 (2007).
“Removing Federal Judges Without Impeachment” (with Steven D. Smith), 116 Yale

“Reply: (Mis)Understanding ‘Good Behavior’ Tenure” (with Steven D. Smith), 116 Yale L.J. 139 (2006).


“Is that English You’re Speaking?: Why Intention-Free Interpretation is an Impossibility” (with Larry Alexander), 41 San Diego L. Rev. 967 (2004).


“Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated” (with Larry Alexander), 70 U. Chi. L. Rev. 1297 (2003).


“General United States Tax Considerations Pertaining to the Creation, Acquisition and Disposition of Trademarks” (with Peter F. Riley), in Advanced Seminar on Trademark Law, 1996, at 403 (Practising Law Institute, 1996).

“The President’s Power to Execute the Laws” (with Steven G. Calabresi), 104 Yale L.J. 541 (1994).


85
ABRAHAM, KENNETH S.

_The Forms and Functions of Tort Law_ (Foundation Press, 4th ed. 2012).


ABRAMS, KERRY


BARZUZA, MICHAL


BLOCK, ANDREW

_7,000 Children and Counting: An Analysis of Religious Exemptions from Compulsory School Attendance in Virginia_ (with Christine Tschiderer, Henry Sire, Allison Lansell, and Stephanie Moore) (Child Advocacy Clinic, University of Virginia School of Law, 2012).

BONNIE, RICHARD J.


“Use of Longer Periods of Temporary Detention to Reduce Mental Health Civil Commitments” (with Tanya Nicole Wanchek), 63 _Psychiatric Serv._ 643 (2012).

BOWERS, JOSH


“Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility” (with Paul H. Robinson), 47 Wake Forest L. Rev. 211 (2012).

BROWN, DARRYL K.


CHOI, ALBERT


COHEN, GEORGE M.


COLLINS, MICHAEL G.


COUGHLIN, ANNE M.

DEEKS, ASHLEY S.


GARRETT, BRANDON L.


GEIS, GEORGE S.


GILBERT, MICHAEL D.


HARMON, RACHEL A.


HAYASHI, ANDREW


HELLMAN, DEBORAH

“Comments on Michel Rosenfeld’s The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community,” 33 Cardozo L. Rev. 1839 (2012).

HEYTENS, TOBY J.


HOWARD, A. E. DICK


HYNES, RICHARD


JOHNSON, ALEX M., JR.

Understanding Modern Real Estate Transactions (LexisNexis, 3d ed. 2012).

JOHNSON, JASON S.


KENDRICK, LESLIE


LAYCOCK, DOUGLAS


LILLY, GRAHAM C.


MAHONEY, PAUL G.


MARTIN, DAVID A.


MASON, RUTH


MITCHELL, GREGORY

“Revisiting Truth or Triviality: The External Validity of Research in the Psychological Laboratory,” 7 Persp. on Psychol. Sci. 109 (2012).

MONAHAN, JOHN


MOORE, JOHN NORTON

NACHBAR, THOMAS B.

OLIAR, DOTAN

OLSON, KENT C.

O’NEIL, ROBERT M.

ORTIZ, DANIEL R.
“El Procedimiento Administrativo en los Estados Unidos de América: Una Introducción a la Administrative Procedure Act” (with Juan Cruz Azzarri), in Héctor Pozo Gowland et al., eds., 2 Procedimiento Administrativo 1413 (La Ley 2012).

PRAKASH, SAIKRISHNA B.
“The Indefensible Duty to Defend” (with Neal Devins), 112 Colum. L. Rev. 507 (2012).
“Missing Links in the President’s Evolution on Same-Sex Marriage,” 81 Fordham L. Rev. 553 (2012).

RILEY, MARGARET FOSTER


“In Plain Sight: A Solution to a Fundamental Challenge in Human Research” (with Lois Shepherd), 40 J.L. Med. & Ethics 970 (2012).

ROBINSON, GLEN O.

“Eliminating Racial Preferences in College Admissions” (with Dennis L. Weisman), Economist’s Voice, June 2012.

RUTHERGLEN, GEORGE


SCHAUER, FREDERICK


“Harm(s) and the First Amendment,” 2011 Sup. Ct. Rev. 81 (2012).


**SCHRAGGER, RICHARD C.**


**SCHWARTZMAN, MICAH**


**SHEPHERD, LOIS**


“In Plain Sight: A Solution to a Fundamental Challenge in Human Research” (with Margaret Foster Riley), 40 J.L. Med. & Ethics 970 (2012).

“Ready to Listen: Why Welcome Matters” (with Margaret E. Mohrmann), 43 J. Pain & Symptom Mgmt. 646 (2012).

**SIEGAL, GIL**


“Health Information Technology and Physicians’ Duty to Notify Patients of New Medical Developments” (with Mark A. Rothstein), 12 Hous. J. Health L. & Pol’y 93 (2012).


**SINCLAIR, KENT**


*Trial Handbook* (Practising Law Institute, 2012 ed.).

**SPELLMAN, BARBARA A.**


**STEPHAN, PAUL B.**


**TURNER, ROBERT F.**


VERDIER, PIERRE-HUGUES


VERKERKE, J. H.


VERSTEEG, MILA


WADLINGTON, WALTER


WHITE, G. EDWARD

Law in American History: Vol. 1, From the Colonial Years Through the Civil War (Oxford University Press, 2012).


“West Coast Hotel’s Place in American Constitutional History,” 122 Yale L.J. Online 69 (2012).
YIN, GEORGE K.
