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# The Perils of Over-Constitutionalizing the Law: A Reply to Professor Epstein

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# The Perils of Over-Constitutionalizing the Law:

A Reply to Professor Epstein

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The Supreme Court deems itself powerless to reverse a state supreme court solely on state-law grounds. As a result, whenever anyone asks the Supreme Court to review a state court's ruling, the litigants and justices proceed as though the only options are to reverse on federal constitutional grounds or allow the state-court ruling to stand. The intermediate option of reversing the state-court ruling on *state-law* grounds, while avoiding the disputed constitutional issue, is off the table. This has caused the justices to issue numerous constitutional pronouncements that are as unnecessary as they are controversial, entrenching constitutional constraints that cannot be undone absent a constitutional amendment or new Supreme Court appointments. Prominent examples include *Boy Scouts v Dale*,[1] *Bouie v City of Columbia*,[2] *Bush v Gore*,[3] and *BMW of North America, Inc v Gore*.[4]

In *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*,[5] I advance two primary claims. First, the Supreme Court's categorical unwillingness to consider state-law reversals is nothing more than a self-imposed constraint from its 1874 decision in *Murdock v City of Memphis*;[6] this rule cannot be found in any of the external constitutional or

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1 530 US 640 (2000).

2 378 US 347 (1964).

3 531 US 98 (2000).

4 517 US 559 (1996).

5 Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals as Constitutional Avoidance*, 77 U Chi L Rev 1335 (2010).

6 87 US (20 Wall) 590 (1874).

statutory commands that limit the Supreme Court's authority. Article III and 28 USC § 1257 give the Supreme Court appellate jurisdiction over state-court *cases* presenting colorable federal-law claims; they do not preclude the justices from reviewing the ancillary factual or state-law issues in those cases. Second, the status quo *Murdock* regime has induced the justices to issue questionable federal constitutional rulings in cases that they could have resolved more easily on state-law grounds. Allowing a role for state-law reversals in these types of cases offers a means of reducing the decision costs and error costs associated with the Supreme Court's review of state-court decisions.

In a generous and spirited response, Professor Richard A. Epstein defends the *Murdock* regime and attacks "the constitutional trope of 'avoidance'" on which my claims largely rest.[7] Better, in his view, to preserve *Murdock* to the extent it prods the Supreme Court into resolving contentious federal constitutional issues. As Professor Epstein sees matters, offering the justices an escape valve when state law can provide a plausible basis for reversal will only prolong constitutional uncertainty, without any offsetting benefits.[8] But Professor Epstein's analysis overlooks some important categories of costs associated with the *Murdock* regime. And most of his fears of vertical forum-shopping and the erosion of federalism in a world without *Murdock* are illusory.

Whether one should embrace a move away from *Murdock* depends on how the decision costs and error costs of judicial decisionmaking without *Murdock* compare with those of the current regime. As for that comparative question, the assessments turn largely on two considerations. The first involves one's views on the proper scope of federal constitutional law. I am skeptical that constitutional law can bear the weight that Professor Epstein wants it to carry—especially in the cases discussed in *Reconsidering* Murdock. But, more importantly, many prominent theories of constitutional interpretation should share this suspicion of the federal constitutional constraints spawned by the Supreme Court's adherence to *Murdock*. Any constitutional theorist that seeks to deter the Supreme Court from constitutionalizing new areas of law should welcome a regime that permits state-law reversals in at least *some* cases, which holds promise of reducing not only the Court's incentives to impose new constitutional constraints, but also the costs of constitutional theories that would otherwise require the Supreme Court to swallow unpalatable state supreme court decisions that rest on biased or erroneous applications of state law.

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[7] See Richard A. Epstein, *Bring on the Heavy Constitutional Artillery: A Brief Response to Professor Mitchell's Reconsidering* Murdock, (Legal Workshop 2011), online at http://legalworkshop.org/2011/03/02/epstein (visited Aug 21, 2011).

[8] Id.

Second, even for those who embrace expansive and ambitious visions of federal constitutional law, Professor Epstein's defense of *Murdock* will resonate only with those who expect a majority of the Supreme Court to share their interpretive commitments. Any device that increases the Supreme Court's propensity to entrench one-size-fits-all constitutional constraints on the political branches will produce both favorable and unfavorable rulings, and there is no mechanism to ensure that the Supreme Court's constitutional pronouncements will align with anyone's particular normative values. From the standpoint of those who embrace the classical-liberal framework that Professor Epstein has so famously defended throughout his career, the *Murdock* regime has contributed to both "good" and "bad" federal constitutional constraints,[9] and there is no way to know whether a future Supreme Court's *Murdock*-induced constitutional strictures will vindicate or sabotage classical-liberal values (or any other value system). Given this inability to predict the future path of the Supreme Court, simple risk aversion should counsel against retaining *Murdock*'s absolute prohibition on state-law reversals—even for those who largely approve of the unnecessary constitutional pronouncements and doctrines that *Murdock* has produced until now.

The next two Parts will compare the costs of my proposal with the costs of *Murdock*, in light of the concerns raised in Professor Epstein's response.

## I. DECISION COSTS.

Decision costs represent the costs incurred by the process of resolving cases. They include not only the resources that parties and judges expend in the process of resolving one particular case, but also the costs that the court's ruling will impose on future litigants and courts—either by complicating legal doctrines or by recognizing new constitutional theories for litigants to invoke.

Professor Epstein seems to believe that constitutional pronouncements from the Supreme Court serve only to reduce decision costs going forward. He writes: "It is hard to see why anyone would want to champion some general doctrine of avoidance, which lets constitutional disputes simmer, when some degree of legal certainty should provide benefits to all actors."[10] The problem with this statement is that many of the Supreme Court's federal constitutional rulings aggravate rather than alleviate legal

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[9] Compare id (praising the expressive-association right recognized in *Boy Scouts v Dale*) with id (criticizing the actual-malice test that *New York Times v Sullivan*, 376 US 254 (1964), imposed for defamation of public figures).

[10] Id.

uncertainty,[11] and this has been especially true in cases where *Murdock* has led the justices to create novel constitutional doctrines that promise to increase confusion and litigation costs into the future.

*Bush v Gore* is but one example of this phenomenon. Prior to the Court's constitutional ruling in that case, there was no authority suggesting that methods of ballot counting could implicate the equal-protection clause. Since that decision, equal-protection claims have figured prominently in routine election disputes.[12] The justices (and then-Governor Bush's supporters) may have felt that a federal constitutional pronouncement was necessary to settle the disputed election, but it assuredly was not necessary to settle any pre-2000 uncertainty surrounding the relevance of the equal-protection clause to ballot counting. The upshot is that *Bush v Gore*'s "main legacy has been to increase the amount of election-related litigation."[13]

The Supreme Court's ruling in *Caperton v A.T. Massey Coal Co*[14] also opened new cans of worms in the course of "resolving" a constitutional disagreement. *Caperton* established, for the first time, that the Fourteenth Amendment's due-process clause requires elected judges to recuse themselves in cases affecting campaign contributors.[15] But in the course of establishing this new constitutional holding, the Court's ruling raised far more questions than it answered. Chief Justice John Roberts's dissenting opinion presented no fewer than forty questions that courts will be compelled to resolve as a matter of federal constitutional law, such as determining the size of campaign contributions needed to trigger the constitutional obligation to recuse and deciding how long the "probability of bias" lasts after an election.[16] Here, too, a decision reversing the West Virginia court solely on state-law grounds, while avoiding the constitutional due-process issue, would serve to advance rather than undermine the cause of legal certainty.[17]

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[11] See generally Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* (Yale 2001) (defending the role of judicial review in unsettling issues that would otherwise remain settled in the political system).

[12] See Mitchell, 77 U Chi L Rev at 1381 n 180 (cited in note 5) (cataloging post-2000 cases in which litigants have invoked *Bush v Gore*'s equal-protection holding).

[13] See Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 Stan L Rev 1, 5 (2007).

[14] 129 S Ct 2252 (2009).

[15] See id at 2256–57.

[16] See id at 2269–72 (Roberts dissenting) (listing unresolved questions that courts will have to determine if they wish to apply the majority's decision in future cases). See also id at 2274 (Scalia dissenting):

> [T]he principal consequence of today's decision is to create vast uncertainty with respect to a point of law that can be raised in all litigated cases in (at least) those 39 States that elect their judges. . . . Many billable hours will be spent in poring through volumes of campaign finance reports, and many more in contesting nonrecusal decisions through every available means.

[17] The West Virginia Code of Judicial Conduct requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." W Va Code of

It is therefore too hasty to assume, as Professor Epstein appears to do, that the Supreme Court will prolong legal uncertainty whenever it might use state-law reversals as a constitutional-avoidance device. It all depends on the type of constitutional pronouncement that a state-law reversal seeks to avoid. If a federal constitutional resolution would establish clear, easy-to-apply rules and doctrines, then a state-law reversal would have less to recommend it. Constitutional avoidance is not an end in itself; the goal is to avoid the subset of constitutional pronouncements that are likely to produce error costs (by misconstruing the Constitution) or decision costs (by complicating doctrine for future courts and litigants).

*Murdock*'s "jurisdictional" fiction, by keeping the justices from even considering the possibility of state-law reversals, has undeniably closed off a useful constitutional-avoidance device in cases, such as *Caperton* and *Bush v Gore*, where the Court's eventual federal constitutional pronouncement promises to increase legal uncertainty and impose new decision costs on future courts and litigants. Whether we can improve this situation depends on whether opening the door to state-law reversals triggers new decision costs that offset the benefits from avoiding these unnecessary constitutional pronouncements. That seems unlikely. For one thing, a rejection of *Murdock* would give only the Supreme Court of the United States—and no other federal court—the power to review directly a state court's interpretation of state law. For another, the writ of certiorari gives the Supreme Court near-total control over the cases and issues it decides to hear. There is no threat that a decision to abandon *Murdock* will suddenly flood the Supreme Court, or any other court, with new oversight responsibilities over state law. The justices need only review the state-law issues that they wish to review.

Professor Epstein fears that a rejection of *Murdock* will impose other collateral decision costs on the judiciary. First, he suggests that my proposal will eventually cause inferior federal courts to resolve state-law issues de novo, abandoning their current practice that extends absolute deference to a state supreme court's construction of state law.[18] But this objection fails to keep *Erie* distinct from *Murdock*. The *Murdock* issues involve only the power of the Supreme Court of the United States to review a state supreme court's interpretations of state law on direct appeal. *Erie*, not *Murdock*, is what binds the inferior federal courts to a state supreme court's past

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Judicial Conduct, Canon 3E(1) (1994). This could have provided a state-law basis for reversal without shoveling a new "probability of bias" standard into the Constitution's Due-Process Clause.

[18] See Epstein, *Bring on the Heavy Constitutional Artillery* (cited in note 7):

> [*Murdock*'s] rule of strict separation is an important cog in making sure that the jurisdictions of both the federal and the state courts are confined to their respective spheres in dealing with delicate matters of constitutional interpretation. After all, if this power could be granted to the United States Supreme Court by statute, why not grant the same power to lower courts as incidental to their general jurisdiction over federal matters?

pronouncements in collateral diversity litigation, and the *Erie* regime rests largely on the consequentialist goals of promoting uniform treatment of litigants and discouraging vertical forum-shopping between state and federal courts.[19] Perhaps Professor Epstein is concerned that a repudiation of *Murdock* will erode the philosophical foundations of *Erie*. After all, if one rejects the notion that state supreme court rulings "are" the law of the state and treats them as mere interpretations subject to review and reversal by the Supreme Court of the United States, then it becomes harder to justify a regime forbidding inferior federal courts to second-guess a state supreme court's interpretation of state law. But *Erie*'s absolute-deference rule need not depend on the state-court judicial supremacy that undergirds the *Murdock* regime; it can stand entirely on the consequentialist grounds spelled out in the *Erie* opinion. And in all events, there is nothing anomalous about the Supreme Court withholding from the lower federal courts a power that it reserves exclusively to itself. The Supreme Court holds a prerogative to overrule its previously decided cases, yet it strictly forbids the inferior federal courts to declare a Supreme Court precedent discredited or obsolete.[20] That same idea can be extended to the rulings of state supreme courts, especially when Congress's jurisdictional statutes give the Supreme Court of the United States exclusive power to review state supreme court rulings on direct appeal.

Professor Epstein's second concern is that my proposal will generate confusion over the precedential status of state-law rulings issued by the Supreme Court of the United States. Suppose, for example, that *Boy Scouts v Dale* had reversed the New Jersey Supreme Court solely on state-law grounds, holding that the Boy Scouts failed to qualify as a "place of public accommodations" under New Jersey's Law Against Discrimination.[21] Professor Epstein wonders whether this ruling could "bind" future state courts in New Jersey—or whether it would instead bind only the lower federal courts, thereby triggering incentives for vertical forum-shopping. But esoteric debates over the binding nature of Supreme Court precedent are unimportant when the Supreme Court retains appellate jurisdiction over the state and federal courts. So long as the justices hold the *power* to reverse state and federal judges who defy their earlier pronouncements, then their pronouncements will bind other courts in the legal-realist sense. The threat of reversal will induce compliance without regard to whether the Supreme Court's earlier state-law ruling "binds" the court as a matter of moral obligation.

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[19] See Mitchell, 77 U Chi L Rev at 1359–62 (cited in note 5).

[20] See, for example, *State Oil Company v Khan*, 522 US 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

[21] Law Against Discrimination, NJ Stat Ann § 10:5 (West).

Consider the Supreme Court's federal-law pronouncements. Some commentators maintain that the Constitution liberates state courts and inferior federal courts to pursue their own first-best interpretations of federal law, even in the teeth of Supreme Court rulings to the contrary.[22] Yet any federal judge who entertains the ideas expressed in these provocative law-review articles will quickly discover that resistance is futile; noncompliant courts will face a swift reversal from the justices. The Supreme Court has managed to effectively police both the state courts and inferior federal courts when it comes to enforcing its multitudinous pronouncements of federal law; there is no reason to think matters will be different once a few state-law rulings are added to the mix. Professor Epstein's predictions of nonacquiescence from the state courts would seem more plausible if state-law issues could repeat themselves in cases falling outside the Supreme Court's appellate jurisdiction, but the state-law issues discussed in *Reconsidering* Murdock will *always* give rise to a constitutional claim sufficiently colorable to trigger the Supreme Court's jurisdiction under Article III and 28 USC § 1257. There is no fear of vertical forum shopping when the Supreme Court sits at the apex of both the federal- and state-court systems and retains the jurisdiction to review those courts' applications of its state-law pronouncements.

## II. ERROR COSTS

It is inevitable that disagreements will arise over the extent of damage caused by the Supreme Court's *Murdock*-induced constitutional pronouncements. Some regard the holdings in *Boy Scouts v Dale* and *Bush v Gore* as constitutional travesties;[23] others find the rulings in those cases flawed but defensible;[24] others still wholeheartedly embrace these decisions as paragons of judicial review.[25] Assessing the error costs of these rulings presupposes an interpretive theory of the Constitution and a normative framework from which to proceed.[26] In *Reconsidering* Murdock I avoided

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[22] See, for example, Gary Lawson, *The Constitutional Case against Precedent*, 17 Harv J L & Pub Pol 23, 24 (1994); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 Conn L Rev 843, 851–42 (1993).

[23] See, for example, Andrew Koppleman, *Sign of the Times:* Dale v. Boy Scouts of America *and the Changing Meaning of Nondiscrimination*, 23 Cardozo L Rev 1819, 1834 (2002); Laurence H. Tribe, *The Unbearable Wrongness of* Bush v Gore, 19 Const Commen 571, 573 (2002).

[24] See, for example, Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 Pepperdine L Rev 641, 650–51 (2001); Michael W. McConnell, *Two-and-a-Half Cheers for* Bush v Gore, 68 U Chi L Rev 657, 659–60 (2001).

[25] See, for example, Nelson Lund, *The Unbearable Rightness of* Bush v. Gore, 23 Cardozo L Rev 1219, 1224 (2001); Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S Cal L Rev 119, 120 (2000).

[26] See, for example, Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 223 (Oxford 2007) ("Any reference to constitutional 'error' presupposes substantive criteria of

taking sides among competing theories of constitutional interpretation, content to observe only that the Supreme Court's *Murdock*-induced constitutional pronouncements have generated controversy and have rested on questionable legal rationales. Professor Epstein, although critical of the reasoning in *New York Times v Sullivan* and *Bush v Gore*, defends most of the Supreme Court's unnecessary constitutional holdings in those cases where it could have deployed state-law reversals as a constitutional-avoidance device.[27]

Professor Epstein admits that his analysis of the cases "rests on [his] own constitutional orientation."[28] But many readers will embrace theories of constitutional interpretation that differ from Professor Epstein's, and many prominent approaches to constitutional interpretation should question or oppose the unnecessary constitutional pronouncements that *Murdock* has produced. Let us consider the error costs of the *Murdock* regime through the lenses of four leading interpretive theories.

### A. Originalism.

Originalists should be among the most skeptical of the Supreme Court's *Murdock*-induced constitutional pronouncements. The equal-protection holding in *Bush v Gore* is indefensible on original-meaning grounds, as voting rights were excluded from the original understanding of equal protection.[29] *BMW v Gore* relies upon and expands the doctrine of "substantive due process," a doctrine long reviled by originalists for allowing courts to override democratically enacted legislation on issues ranging from maximum-hours legislation to abortion regulations. And it is far from clear how anything in the original meaning of the Fourteenth Amendment's Due Process Clause could license judges to impose modern personal-jurisdiction rules on the states, or create judicial-recusal rules for elected state-court judges—even if the Court's doctrinal innovations in these areas produce desirable policy outcomes.

Even the *Murdock*-induced constitutional rulings that conservatives like, such as *Boy Scouts v Dale*, are hard to defend on originalist grounds. The original understanding of "freedom of speech" is narrower than the robust protections afforded by modern doctrine. And the historical evidence is unclear whether the original meaning of the Fourteenth Amendment

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right and wrong, or good and bad, in constitutional interpretation."); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U Chi L Rev 636, 666–69 (1999).

[27] See Epstein, *Bring on the Heavy Constitutional Artillery* (cited in note 7).

[28] Id.

[29] See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv J L & Pub Pol 103, 110 (2000) ("[I]t is clear—a word that can rarely be used in this field of law—that the Equal Protection Clause was not originally understood by its framers to encompass voting rights.").

incorporates the right to free speech against the states. Any originalist that approves of the constitutional holding in *Boy Scouts* must necessarily embrace a "faint-hearted" variant of originalism that exalts stare decisis and modern doctrinal understandings over original understandings in at least some situations.[30] And he would have to justify a ruling that not only accepts nonoriginalist precedents as binding authority but also expands them into new situations. State-law reversals in all these cases will enable originalists to reverse a state supreme court's questionable interpretations of state law without compromising their interpretive commitments by relying on or perpetuating nonoriginalist constitutional rationales.

### B. Thayerianism.

Thayerians want courts to refrain from nullifying legislation on constitutional grounds unless it contradicts a clear and specific constitutional provision.[31] Reasonable disagreements over the Constitution's meaning are to be resolved in favor of the challenged statute and against judicial intervention. This deferential posture is hard to reconcile with any of the constitutional holdings discussed in *Reconsidering* Murdock, at least to the extent that those rulings foreclose Congress and state legislatures from adopting other reasonable interpretations of the Constitution. Thayerians should welcome any device that encourages the Supreme Court to avoid shackling legislatures with disputed constitutional pronouncements—"disputed" constitutional holdings are the very definition of error costs in a Thayerian world.

### C. Minimalism.

Judicial minimalists eschew broad and ambitious judicial rulings, opting instead for narrow and shallow pronouncements capable of generating an overlapping consensus among adherents of differing interpretive theories.[32] Minimalist judges also seek to avoid striking down statutes when possible, preferring nonconstitutional dispositions over outcomes that nullify democratically enacted legislation. Chief Justice

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30 For my own efforts to reconcile constitutional stare decisis with textualist and originalist interpretive commitments, see Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 Mich L Rev 1 (2011).

31 See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 140 (1893). See also generally Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard 2006) (defending Thayerianism); Learned Hand, *The Bill of Rights* (Harvard 1958).

32 See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 2001).

Roberts endorsed minimalism during his confirmation hearings,[33] and several of the Court's opinions during his tenure have reflected this philosophy.[34]

State-law reversals are almost invariably more minimalist than federal constitutional reversals, and this is especially true when a federal constitutional pronouncement entrenches new restrictions on the political branches. Minimalists of all stripes should bemoan the cases in which *Murdock* induced the Supreme Court to establish unnecessary federal constitutional constraints and precluded the justices from even considering a more consensus-building state-law reversal. Although Professor Epstein does not embrace judicial minimalism wholesale, he did call for a minimalist approach in *New York Times v Sullivan*, arguing that "[t]he right Supreme Court strategy should have been to colonize as little as possible of the common law turf in its initial foray."[35] That would have been best accomplished with a ruling reversing the Alabama Supreme Court for misapplying the "of and concerning" requirement of state defamation law, or perhaps a reversal resting on the plaintiffs' failure to show actual damages. Absent *Murdock*, those would have been the obvious grounds for reversing the Alabama Supreme Court's indefensible ruling. *Murdock*, however, forced all of these issues (and more) into the First Amendment, leading the Court to needlessly constitutionalize the law of defamation and entrench an actual-malice standard that Professor Epstein (and others) deem inadequate to protect the reputational interests of public figures.[36]

### D. Common-law constitutionalism.

Common-law constitutional interpretation assigns great weight to judicial precedents and past practices, and often elevates these sources above the original meaning of constitutional text.[37] It is rooted in epistemic humility and embraces a Burkean regard for custom and tradition as representing an accumulated stock of wisdom. Common-law

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33 Confirmation Hearings on the Nomination of John G. Roberts Jr to Be Chief Justice of the United States, Hearing before the Committee on the Judiciary, United States Senate, 109th Cong, 1st Sess 55 (Sept 2005) (statement of John G. Roberts Jr).

34 See, for example, *Northwest Austin Municipal Utility District Number One v Holder*, 129 S Ct 2504, 2513–17 (2009) (construing the Voting Rights Act narrowly to avoid resolving a constitutional challenge to § 5); *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 330–32 (2006) (issuing the narrowest ruling possible in the course of vacating a lower-court's decision invalidating a state abortion regulation).

35 See Richard A. Epstein, *Was* New York Times v Sullivan *Wrong?*, 53 U Chi L Rev 782, 792 (1986) (arguing for two narrower grounds for intervention that were available to the Court).

36 See id at 801 (criticizing the Supreme Court for "miscalculat[ing] both the costs and benefits of its own actual malice rule").

37 See David A. Strauss, *Common-Law Constitutional Interpretation*, 63 U Chi L Rev 877, 877 (1996).

constitutionalism shares judicial minimalism's distrust of ambitious theorizing, preferring instead to develop constitutional doctrines in incremental, common-law fashion.

Many of the Supreme Court's *Murdock*-induced constitutional pronouncements fly in the face of the cautious empiricism and respect for the past that common-law constitutionalism demands. Rulings such as *Bush v Gore* and *New York Times v Sullivan*, for example, created new constitutional doctrines out of whole cloth. And *Caperton v Massey* represents a sudden departure from the traditional and longstanding due-process doctrines governing judicial recusal, which required recusal only when a judge holds a "direct, personal, substantial pecuniary interest" in a case,[38] or when a judge presides over criminal contempt proceedings spawned by the defendant's hostility toward the judge.[39] In all three cases, state-law reversals could have produced the same result without the need for sudden departures from settled doctrine. There is no need for "hard cases" to put this type of pressure on traditional constitutional understandings when state-law reversals would enable the Court to reach the same desired judgment on more conventional interpretive grounds.

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This is enough to show that many prominent theories of constitutional interpretation will overlap in concluding that the *Murdock* regime has contributed to erroneous constitutional pronouncements. Yet even if one agrees with Professor Epstein's largely favorable analysis of the constitutional rulings in those cases, his assessment of the error costs produced by the *Murdock* regime is still too sanguine.

First, the *Murdock* regime can produce costs even when one agrees with the Supreme Court's federal constitutional rulings. One must consider the Supreme Court's ability not only to correctly decide a constitutional question but also to persuade those who dislike its holding to nevertheless accept it as rooted in law. Professor Epstein largely approves of the Supreme Court's *Murdock*-induced constitutional pronouncements because they comport (for the most part) with his normative and interpretive commitments. But many progressives detest the outcomes that Supreme Court reached in cases such as *Boy Scouts* and *Bush v Gore*, and when resolving contentious issues such as gay rights and presidential elections it becomes paramount to build an overlapping consensus and supply a legal rationale capable of persuading the losing side.[40] The opinions in *Boy*

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[38] See *Tumey v Ohio*, 273 US 510, 523 (1927).

[39] See *Mayberry v Pennsylvania*, 400 US 455, 466 (1971).

[40] The Supreme Court has no power over the sword or the purse, so public obedience to the Court ultimately depends on its ability to persuade losing litigants (as well as political actors) that its rulings

*Scouts* and *Bush v Gore* failed to do this, and this remains true even if one approves of their constitutional holdings. State-law reversals would have held greater persuasive power in each of those cases and would have avoided rulings that some regard to this day as symbols of judicial overreaching or arrogance.

Second, even if one approves of most or all of the Supreme Court's *Murdock*-induced constitutional holdings, there is no guarantee that this harmonious coexistence will continue into the future. The Supreme Court's constitutional jurisprudence changes over time and depends on variables that no one can predict: the timing of retirements, the outcomes of elections, and the influence of competing interest groups over the nomination and confirmation processes. Could anyone have foreseen in 1968, at the high-water mark of the Warren Court, that Republican presidents would make eleven consecutive appointments to the Supreme Court? Those who want to retain *Murdock* into the future have no mechanism to ensure that it will produce agreeable constitutional holdings and must recognize that they may find themselves on the losing end of constitutional pronouncements that will be almost impossible to overturn.

The attraction of constitutional-avoidance mechanisms rests on the recognition that much of federal constitutional law rests on highly contested foundations and intractable and irresolvable disagreements. Even those who feel assured of their approach to constitutional interpretation have no guarantee that future Supreme Courts will share those views. *Reconsidering* Murdock aims to mitigate the downside risk of judicial review by recognizing a role for state-law reversals in the pantheon of the constitutional-avoidance devices. And given the questionable legitimacy of other avoidance tactics that the Court has deployed throughout its history,[41] it is encouraging that the text of Article III and 28 USC § 1257 can comfortably support state-law reversals in cases that present colorable federal-law claims.

## CONCLUSION

*Reconsidering* Murdock offers a way to shrink the scope of federal constitutional law without having to tolerate the occasionally far-fetched decisions of state tribunals. It reduces the costs of constitutional theories such as originalism, Thayerianism, minimalism, and common-law constitutionalism—theories that might otherwise be regarded as imposing

are rooted in law and not judicial preference. See Frank H. Easterbrook, *Abstraction and Authority*, 59 U Chi L Rev 349, 373 (1992).

[41] See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum L Rev 1, 1 (1964); *Naim v Naim*, 350 US 985, 985 (1956) (concocting a jurisdictional defect to avoid deciding a constitutional challenge to state anti-miscegenation laws).

suboptimal constraints on the Supreme Court's ability to correct biased or mistaken state-court rulings. It also provides a means for the justices to broaden the overlapping consensus for their rulings and accommodate pushback and correction from the political branches. Finally, by enabling the justices to avoid novel and contentious constitutional pronouncements, it allows the justices to reduce the decision costs and error costs associated with their rulings.

Professor Epstein's defense of the status quo rests on a sunny assessment of the Supreme Court's *Murdock*-induced constitutional pronouncements. It must also rest on an unstated belief that *Murdock* will lead future Supreme Courts to issue constitutional rulings that he will find agreeable. But it is much harder for others to share Professor Epstein's warm embrace of these controversial constitutional rulings—especially the adherents of originalism, Thayerism, minimalism, or common-law constitutionalism. And no one should believe that channeling *future* Supreme Court rulings into federal constitutional law is likely to produce happy endings. There is simply no way to know whether the Supreme Court in 2020 will resemble the Warren Court, the Roberts Court, or something else. Behind this veil of ignorance, a move away from *Murdock* represents a prudent risk-management strategy, a means of reducing the likelihood of bad constitutional entrenchments from a future Court whose composition cannot be known or controlled.