TEXAS REVIEW of LAW & POLITICS

VOL. 22, NO. 1 FALL 2017 PAGES 1–225

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of
LAW & POLITICS

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Founded by Adam B. Ross & Dennis W. Donley, Jr., in 1996

SUBMISSIONS

Authors may submit articles, book reviews, or notes to TROLP via submissions@trolp.org, ExpressO, or Scholastica.

Citations should conform to the 20th edition of The Bluebook.

Publication decisions for our fall issue are made in February through May. Publication decisions for our spring issue are made in August through November.

For inquiries regarding submissions, please contact us at submissions@trolp.org.

PREFACE

Now more than ever, our country needs robust discussions on matters implicating Conservative and Libertarian principles. If we long to remain a more perfect Union—one capable of establishing Justice, insuring domestic Tranquility, and securing the Blessings of Liberty—our country's courts, Capitol, statehouses, and universities, must heed the same principles that united colonies into a country. The *Texas Review of Law & Politics*, upholding our duty to our country, provides a forum for advocates of those principles.

In this issue, Eleventh Circuit Judge William H. Pryor Jr. highlights the importance of honoring jurists who uphold the Rule of Law, while also encouraging us to criticize those that fail to do so. Sean Radomski presents a method for voter identification, which reduces both the fear of voter fraud and disenfranchisement. Professor Tara Smith considers how the misuse of key free speech terminology impairs our legal system's understanding of the First Amendment. Donald Stirling and Corey Lavato survey the role of federalism in the National Guard, and demonstrate why a state National Guard may decide which rules it will follow. Finally, Professor Joseph D'Agostino develops the philosophical argument that positive law requires force, threat, and violence to exist.

My thanks must go to the *Review*'s Articles Editors—Stephen Barron, Jake Beach, Michael Cotton, Dylan French, Maggie Fox, Ralph Molina, Amanda Salz, and Katie Rose Talley—for their leadership in preparing these articles for publication. I am also grateful for the work of the Editorial Board: Rebecca Kadosh (who deserves special recognition for her outstanding work as Managing Editor), Trevor Martin, Daniel Pope, Thomas Sekula, Joshua Windsor, and James Barnett. Furthermore, this Issue would not be possible without the *Review*'s dedicated Staff Editors. Our Staff Editors' diligence and service are without comparison. Finally, I thank Dean Ward Farnsworth, Adam Ross, and Brantley Starr for their constant support and encouragement as I lead the *Review*.

Dylan William Benac
Editor in Chief

HONORING GOOD JURISTS AND OPPOSING BAD RULINGS

WILLIAM H. PRYOR JR.*

Thank you for honoring me with this award and for inviting me to speak tonight. And most of all thank you for honoring, over the last twenty years, so many other lawyers and judges who have dedicated their careers to defending the Constitution and the rule of law.[1] To be honest, when I look at the names of your previous honorees, I wonder what made me worthy of being in their company.

Many of your previous honorees are my heroes. I first met one of those heroes, Attorney General Ed Meese, when I was in law school at Tulane, where he delivered a speech about the Constitution in celebration of its bicentennial.[2] I served as editor in chief of the law review when General Meese visited Tulane and secured his permission to publish his speech.[3] In that and a few other speeches in the 1980s, General Meese launched a national conversation about the necessity of interpreting the Constitution based on its original understanding. I met your first honoree, Judge Edith Jones, thirty years ago when I served as a law clerk to Judge John Minor Wisdom on the Fifth Circuit. Back then, the law clerks would take the judges' bench books to the courtroom on the mornings of oral argument. Judge Jones always had the thickest bench book of all, filled with tabs, highlights, copies of opinions, and Post-it notes. She had been a judge for only two years, but no member of the court was more active in questioning at oral argument. She taught me a lot about being a well-prepared judge. Justice Scalia became one of my

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* Judge William H. Pryor Jr. was honored as the Jurist of the Year at the 2017 Texas Review of Law & Politics Banquet and delivered this speech as the Tex Lezar Memorial Lecture.

1. *See Jurist of the Year*, TEX. REV. L. & POL., http://www.trolp.org/jurist-of-the-year [https://perma.cc/NKH9-U2MT].

2. Edwin Meese III, Att'y Gen. of the United States, Address at Tulane University: The Law of the Constitution (Oct. 21, 1986) (transcript available at https://www.justice.gov/ag/aghistory/meese/1986/10-21-1986.pdf [https://perma.cc/TVT3-TS6R]).

3. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

heroes when I heard him in 1986 deliver a withering critique of the use of legislative history in a lecture at Tulane while he then served as a judge on the District of Columbia Circuit. For the last few years, I have taught a seminar on textualism, and I have used Justice Scalia's book, *Reading Law*,[4] as the main reading material for my students. We owe Justice Scalia our eternal gratitude for almost single-handedly resurrecting the neutral methodology of textualism. Last year's honoree, Justice Clarence Thomas, serves as the Circuit Justice for my court.[5] By his example over the last quarter of a century, he has taught us how to defend the rule of law with courage, grace, and conviction.

I hope that this annual event endures and that your honoree tonight does not spoil its future. To borrow a phrase from Article I, it is "necessary and proper" for the legal community to honor those who uphold the Constitution and the rule of law.[6] Although it should be the expected and minimum duty of all jurists, a true devotion to the rule of law, history shows, is extraordinary. Too often, our legal culture and news media judge our legal system based on the results it produces instead of its adherence to the rule of law and the integrity of its processes. News reports will frequently say that a court rules for or against someone without saying why. That is, our news media rarely evaluates the legal merits of a judicial ruling and instead focuses on whether the ruling produces a popular result. Lost in the reporting is that when a court rules for or against an argument or litigant, the court should be doing so based on the law, not based on what the court would like for the law to be.[7]

I do not mean to suggest that the judiciary always reaches correct results. Nor do I mean to suggest that the judiciary always succeeds in adhering to the law. I admit that, at critical junctures, our judiciary, including our Supreme Court, has failed in its duty. And it has done so often while reaching results that

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4. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

5. *Circuit Assignments*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/circuitAssignments.aspx [https://perma.cc/FVJ5-SJBZ].

6. U.S. CONST. art. I, § 8, cl. 18.

7. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting) ("[T]his Court is not a legislature. . . . Under the Constitution, judges have power to say what the law is, not what it should be."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

were approved by what were then influential elites. Consider the rulings in *Dred Scott v. Sanford*,[8] *Plessy v. Ferguson*,[9] *Buck v. Bell*,[10] and *Korematsu v. United States*.[11] These rulings illustrate that our courts sometimes fail to avoid the temptation of ruling based on politics instead of the law.

That fact brings me to my main message for all of you: as important as it is for the legal community to honor jurists who adhere to the rule of law, it is also important that the legal community critique the courts when we fail in our duty. There has been a lot of talk about criticizing judges this year. Criticism has come from both ends of the political spectrum and from high officials. My message to you is that when you honor good jurists, do not lose sight of the need to challenge and oppose bad judicial rulings or bad judicial conduct. Treat judges as persons of "fortitude, able to thrive in a hardy climate," borrowing a phrase from Justice William Brennan in *New York Times v. Sullivan*.[12] When a judicial ruling deserves opprobrium, say so.

American history shows that criticism of bad judicial rulings is essential to the progress of our constitutional republic. We honor the Constitution and the rule of law when we oppose judicial decisions that disrespect the law. And some of our greatest leaders have offered excellent examples of when and how to criticize awful judicial rulings.

Consider the example of the Great Emancipator, President Abraham Lincoln, who opposed the notorious ruling in *Dred Scott*.[13] President Lincoln never advocated defiance of that ruling.[14] As he put it, in one of his famous debates with Stephen

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8. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

9. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, Shawnee City., Kan., 347 U.S. 483 (1954).

10. 274 U.S. 200 (1927).

11. 323 U.S. 214 (1944).

12. 376 U.S. 254, 273 (1964) (citing Craig v. Harney, 331 U.S. 367, 376 (1947)).

13. Abraham Lincoln, Speech at Springfield, Illinois (June 26, 1857), *in* ABRAHAM LINCOLN, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 398–410 (Roy P. Basler et al. eds., 1953), https://quod.lib.umich.edu/l/lincoln/lincoln2/1:438.1?rgn=div2;view=fulltext [https://perma.cc/XQH6-SMMN].

14. *Id.* at 401. Lincoln said:

> We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred

Douglas, "[w]e do not propose that when Dred Scott has been decided to be a slave by the court, we, as a mob, will decide him to be free."[15] But President Lincoln made clear that he would never treat *Dred Scott* as a legitimate or correct interpretation of the law. He vowed, "[W]e nevertheless do oppose that decision as a political rule which shall be binding on the voter to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. . . . We propose so resisting it as to have it reversed if we can, and a new judicial rule established upon this subject."[16] President Lincoln spoke often of his opposition to *Dred Scott.* And despite his respect for the Supreme Court, he explained in his first inaugural address, "the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[17]

President Lincoln's criticisms of *Dred Scott* were, if anything, tame and respectful for his day. For example, after the Supreme Court decided the *Dred Scott* case, Senator Charles Sumner of Massachusetts, who later helped secure passage of the Fourteenth Amendment,[18] declared that Chief Justice Roger Taney, who wrote the opinion, had "degraded the Judiciary of the country and [had] degraded the Age."[19] A pamphlet entitled,

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> Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no *resistance* to it.

Id.

15. Abraham Lincoln, Speech in the Sixth Joint Debate (Oct. 13, 1858), *in* THE LINCOLN-DOUGLAS DEBATES 112 (Edwin Erle Sparks ed., 1918).

16. *Id.* at 112–13.

17. President Abraham Lincoln, *First Inaugural Address (Mar. 4, 1861)*, ABRAHAM LINCOLN ONLINE, http://www.abrahamlincolnonline.org/lincoln/speeches/linaug.htm [https://perma.cc/7F22-N7XE].

18. *See generally* DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN (1970). *See also* Charles Sumner, *The Fourteenth Amendment: Withdrawal of Assent by a State*, *in* 12 WORKS OF CHARLES SUMNER 253, 253–56 (1877) (advocating for passage of the Fourteenth Amendment after Ohio attempted to withdraw its assent); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 986–89 (1995) (discussing Sumner's attempts to pass desegregation legislation).

19. JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 270 (2007).

The Unjust Judge, published after Taney's death charged that "he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment among men."[20]

The Jurist of the Year in 1999, Attorney General Meese,[21] made a lasting contribution to our legal culture by criticizing a host of decisions of the Supreme Court for failing to adhere to the original meaning of the Constitution.[22] In a speech to the American Bar Association in 1985, General Meese argued that "[t]hose who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what the meaning was."[23] His criticisms of several rulings of the Supreme Court launched a revolution in law that continues to this day where judges, lawyers, scholars, political leaders, and ordinary citizens debate the original understanding of the Constitution and its importance.[24]

And not all esteemed critics of the judiciary hold political office. Some of the best critics are judges. And many of the best criticisms of judicial opinions can be found in their dissenting opinions.

Consider the example of the first Justice Harlan whose prophetic dissent in *Plessy v. Ferguson*[25] stated, "[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case."[26] In that dissent, Justice Harlan explained the proper judicial role as follows: "[T]he courts best discharge their duty by executing the

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20. THE UNJUST JUDGE: A MEMORIAL OF ROGER BROOKE TANEY, LATE CHIEF JUSTICE OF THE UNITED STATES 65 (Baker & Godwin 1865).

21. TEX. REV. L. & POL., *supra* note 2.

22. *See, e.g.*, Stuart Taylor Jr., *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. TIMES (Oct. 23, 1986), http://www.nytimes.com/1986/10/23/us/meese-says-rulings-by-us-high-court-don-t-establish-law.html [https://perma.cc/Q4EP-V99S?type=image] (noting that, in several speeches, "Mr. Meese has criticized both particular decisions of the Court . . . and what he calls the majority's overall approach of reading its own policy preferences into the Constitution rather than following the 'original intentions' of the framers").

23. Edwin Meese III, Att'y Gen. of the United States, Address to the American Bar Association (July 9, 1985), https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/07-09-1985.pdf [https://perma.cc/LXY4-KS4J].

24. *See* Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, *in* ORIGINALISM: A QUARTER CENTURY OF DEBATE 1–3 (Steven G. Calabresi, ed. 2007). *See generally* Peter Hannaford, *Meese Family Legacy*, WASH. TIMES (June 6, 2005), http://www.washingtontimes.com/news/2005/jun/6/20050606-101054-6926r/ [https://perma.cc/6E9S-4UTX] (describing Meese's impact on legal culture).

25. 163 U.S. 537 (1896).

26. *Id.* at 559 (Harlan, J., dissenting).

will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives."[27]

Consider too the most famous, harshest, and wittiest critic of judicial opinions of all time: Justice Scalia (your 2007 Jurist of the Year).[28] We will long remember his dissent in *King v. Burwell*,[29] mocking the majority opinion, which preserved regulations for the Affordable Care Act, as "interpretive jiggery-pokery"[30] and "[p]ure applesauce."[31] He quipped, "We should start calling this law SCOTUScare."[32] In *Obergefell*,[33] he said that he "would hide [his] head in a bag" if he ever joined an opinion that began like the majority opinion.[34] And he lamented that the Supreme Court had "descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[35] In *Morrison v. Olson*,[36] when referring to the independent counsel law and contrasting it with issues dressed "in sheep's clothing," Justice Scalia wrote, "this wolf comes as a wolf."[37] In *Lamb's Chapel*,[38] when he decried a judicial test for violations of the Establishment Clause of the First Amendment, Justice Scalia wrote, "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys."[39] In *United States v. Virginia*,[40] which involved the exclusion of women from the Virginia Military Institute, Justice Scalia criticized "this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and

27. *Id.* at 558.
28. TEX. REV. L. & POL., *supra* note 2.
29. 135 S. Ct. 2480 (2015).
30. *Id.* at 2500 (Scalia, J., dissenting).
31. *Id.* at 2501.
32. *Id.* at 2507.
33. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
34. *Id.* at 2630 n.22 (Scalia, J., dissenting).
35. *Id.*
36. 487 U.S. 654 (1988).
37. *Id.* at 699 (Scalia, J., dissenting).
38. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).
39. *Id.* at 398 (Scalia, J., concurring in the judgment) (referencing Lemon v. Kurtzman, 403 U.S. 602 (1971), in which the Court created the oft-questioned "Lemon test" for determining when government actions are unconstitutional under the Establishment Clause).
40. 518 U.S. 515 (1996).

in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."[41] In *Atkins v. Virginia*,[42] when the Court ruled that the execution of the mentally retarded violates the Eighth Amendment, Justice Scalia wrote, "Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."[43] He charged, "The arrogance of this assumption of power takes one's breath away."[44]

What made many of Justice Scalia's dissents so entertaining and memorable was how he used barbs and humor to finish trenchant criticisms of majority opinions. Justice Scalia would dismantle the reasoning of majority opinions and expose sophistry for what it is. He would then end his deconstruction of a bad ruling with a witty line that left us laughing when we might otherwise want to weep about the ruling he attacked.

As law students, you are no doubt aware too that some of the most frequent critics of the judiciary are law professors. Professor John McGinnis of Northwestern said once at a roundtable for the American Bar Association that "the greatest threat to judicial independence may be the actions of the judiciary itself. Beginning with the Warren court, the judiciary has, at least in some decisions, erased the difference between legislation and interpretation."[45] And although we might disagree about when and how, I agree with Dean Erwin Chemerinsky's assessment that "[t]he court has frequently failed, throughout American history, at its most important tasks, at its most important moments."[46]

To be sure, history shows that there is a right way and wrong way to critique the judiciary. Ad hominem attacks do not help us identify or correct bad rulings. I cannot commend the example of President Teddy Roosevelt who complained, after Justice Oliver Wendell Holmes dissented in the *Northern Securities*[47] antitrust case, that the President could "carve out of a banana a judge with more backbone than that."[48] As the author of the

41. *Id.* at 567 (Scalia, J., dissenting).
42. 536 U.S. 304 (2002).
43. *Id.* at 338 (Scalia, J., dissenting).
44. *Id.* at 348.
45. Erwin Chemerinsky et al., *Judges in the Culture Wars Crossfire: The 'Least Dangerous Branch' Is Becoming the Most Vilified Branch. A High-Profile Panel Debates Whether the Criticism Threatens Judicial Independence*, 91 A.B.A. J. 44, 46 (2005).
46. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 5 (2014).
47. N. Sec. Co. v. United States, 193 U.S. 197, 400–11 (1904) (Holmes, J., dissenting).
48. Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES (July 5,

notorious opinion in *Buck v. Bell*,[49] Justice Holmes merited criticism occasionally, but President Roosevelt failed to offer the kind that would show how Holmes erred. In contrast, President Lincoln, Attorney General Meese, Justice Harlan, and Justice Scalia proved that the productive way to criticize judges is to measure their erroneous rulings against what the law actually says. Entertaining criticism, of the kind that Justice Scalia often provided, makes it memorable, but what matters most is the substance of the criticism. Humor works best when rooted in logic and reason.

Do not feel sorry for judges when we have to endure criticism of our rulings with silence. Although we must let our decisions speak on their own terms, we have the luxury of spending countless hours drafting our opinions, checking the cited authorities, and persuading our colleagues about our reasoning. Unlike politicians, we don't have to depend on sound bites to communicate important decisions. Judicial opinions should persuade citizens that the courts have considered the parties' arguments with care and ruled according to the law. Federal judges, of course, have the least cause to complain because we have talented law clerks and enjoy life tenure and a constitutional guarantee of no reduction in salary.[50] Judges should ask only that their written opinions receive a fair reading.

When judges follow the law and explain their decisions with precision, the legal community should defend and honor them. Lawyers have a special obligation to educate the public about the law and its process.[51] But that duty of the Bar depends on the Bench adhering to its judicial duty first.

The real problem that judges face is not criticism of judicial rulings; it is the myopic focus on only the results of our

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2005), http://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html [https://perma.cc/4CKR-EUHJ].

49. 247 U.S. 200 (1927).

50. U.S. CONST. art. III, § 1 (stating that federal judges "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

51. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 6 (AM. BAR. ASS'N 2016), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html [https://perma.cc/BN6M-45J2] ("[A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.").

decisions. That focus implies that judges are our rulers and that whatever judges say the law is it must be. But judges were never meant to rule our country. "We the People" are the rulers.[52] When judges do their duty by following the law, they leave to the people and their elected representatives the responsibility of changing the law to reflect popular will.

I urge you to keep honoring jurists who understand that the people govern our constitutional republic and that judges must respect their will as expressed in our laws. But never lose sight of the need to expose—with logic, wit, and respect—judges who fail in that duty. You owe it to our Constitution and to the rule of law.

52. U.S. CONST. pmbl.

A COMMON-SENSE VOTER IDENTIFICATION PROPOSAL

SEAN RADOMSKI*

INTRODUCTION

In rapid succession during the summer of 2016, five federal courts invalidated, in whole or in part, photo-voter ID laws from North Carolina,[1] Texas,[2] Wisconsin,[3] and North Dakota.[4] These rulings were just the most recent judicial and political skirmishes in what has become the most heated voting rights issue of our time. In the past decade, proponents of voter ID laws have argued that these laws are necessary to prevent voter fraud and increase confidence in the voting system.[5] Opponents of these laws have countered that they are merely a political ploy aimed at disenfranchising minority and elderly voters.[6] In almost every instance, this debate has led to a party-line vote in the state legislature, followed by lengthy, costly litigation that seeks to block the law's enforcement. After courts, for the most part, upheld photo-voter ID laws against facial challenges,[7] litigation is now centered on as-applied challenges, which seek a safety net for voters who cannot procure photo IDs through "reasonable effort."[8] After exploring these

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* J.D., William & Mary Law School; B.A., Fordham University. I am grateful to Danica Sterud Miller and Laura Brymer, the two people who deserve the most credit for my writing abilities, legal and otherwise. Special thanks also goes out to my friends who did not hesitate when I needed a favor on this and other works, including Cassandra Roeder, Aaron Gold, and Logan Lewis. Professors Timothy Zick, Nancy Combs, and Chris Griffin also provided valuable feedback and guidance on this article. Finally, I must thank Professor Adam Gershowitz, mainly for his support regarding my last work, but also for being a good sport at graduation, notwithstanding the fact that he still refuses to admit who was right about what it means to "pay the iron price."

1. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

2. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 242, 256 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017). This Fifth Circuit opinion was the first of three important holdings related to voter ID laws in Texas. All three decisions arose from a lawsuit brought by Congressman Marc Veasey against the Texas governor. *See infra* Part III for a detailed discussion.

3. One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 905 (W.D. Wis. 2016); Frank v. Walker, 196 F. Supp. 3d 893, 898 (E.D. Wis. 2016).

4. Brakebill v. Jaeger, No. 1:16–CV–008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

5. *See, e.g.*, Alex Swoyer, *More Democrats See Voter Fraud as a Problem and ID Laws as a Solution*, WASH. TIMES (May 28, 2017), http://www.washingtontimes.com/news/2017/may/28/voter-id-laws-popular-as-fraud-fears-rise [https://perma.cc/YU3W-F353]; Justin McCarthy, *Four in Five Americans Support Voter ID Laws, Early Voting*, GALLUP NEWS (Aug. 22, 2016), http://news.gallup.com/poll/194741/four-five-americans-support-voter-laws-early-voting.aspx [https://perma.cc/V7AC-ZRZ5]; Matthew Rousu, *Voter ID Would Protect Voters Rights, Not Inhibit Them*, FORBES (Sept. 3, 2014), https://www.forbes.com/sites/realspin/2014/09/03/voter-id-would-protect-voters-rights-not-inhibit-them [https://perma.cc/J3K8-RNTN].

6. *See, e.g.*, *Oppose Voter ID Legislation-Fact Sheet*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet [https://perma.cc/CV6N-8EZB]; Vann R. Newkirk II, *How Voter ID Laws Discriminate*, THE ATLANTIC (Feb. 18, 2017), https://www.theatlantic.com/politics/archive/2017/02/how-voter-id-laws-discriminate-study/517218/ [https://perma.cc/66G7-C4TN].

7. *E.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203–04 (2008).

8. *Thomsen*, 198 F. Supp. 3d at 903.

recent state and federal cases, this Article will put forth a voter ID proposal aimed at establishing an adequate safety net that can prevent both voter fraud and disenfranchisement, while also surviving judicial scrutiny.

Namely, this Article proposes that rather than placing the burden on voters to procure a voter ID, states should prescribe an acceptable form of non-photo ID, bear the costs of producing those IDs, and then distribute them to all registered voters. As all registered voters would then have an acceptable ID, fears over both voter fraud and disenfranchisement would be reduced. Thus, this Article's proposal would establish an adequate safety net for voters, the lack of which has proved fatal for some laws. This proposal is also desirable from a policy perspective because it would greatly reduce litigation costs surrounding photo ID enactments.

* * *

Over the past two decades, voter identification laws have become a heated, partisan issue. Since 2001, over 1,000 bills have been introduced in state legislatures, with 34 states having voter ID laws in place in 2017.[9] Although some states allow voters to present multiple forms of ID such as utility bills,[10] Medicaid or Medicare cards,[11] and paychecks,[12] other states have stricter requirements and accept only photo IDs.[13] These photo ID laws have caused the most controversy, leading to lengthy and costly litigation at both the state and federal level.[14]

Although different courts have reached different results regarding the constitutionality of these laws,[15] the justifications for and arguments against them have stayed the same. Proponents of voter ID laws believe that the laws are needed to prevent voter fraud.[16] Additionally, supporters argue that the laws are needed to prevent the appearance of fraud and thereby increase confidence in the electoral process.[17] Indeed, the Supreme Court has recognized that these are compelling

9. *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. OF ST. LEGIS. (June 5, 2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx [https://perma.cc/ED83-QKKQ]. West Virginia's and Iowa's laws were enacted on April 1, 2016, and May 5, 2017, respectively, but will not go into effect until 2018. *Id.*

10. OHIO REV. CODE ANN. § 3503.16(B)(1)(a) (West 2016).

11. COLO. REV. STAT. ANN. §§ 1-1-104(19.5)(a)(VIII), 1-7-110(1) (West 2012).

12. ALASKA STAT. ANN. § 15.15.225 (West 2012).

13. *See Voter Identification Requirements*, *supra* note 9 (listing Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, and Wisconsin).

14. *See infra* Part III.

15. *See infra* Part III.

16. *See, e.g.*, Greg Abbott, *Opposing View: In Texas, Evidence of Voter Fraud Abounds*, USA TODAY (Mar. 19, 2012), http://usatoday30.usatoday.com/news/opinion/story/2012-03-19/voter-ID-Texas-fraud/53658158/1 [https://perma.cc/DY2C-BMVQ].

17. *See, e.g.*, Andrew N. DeLaney, Note, *Appearance Matters: Why the State has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847, 848 (2008).

state interests.[18] On the other hand, opponents contend that fraud does not exist and that these laws are merely a partisan tactic to prevent the poor, minorities, and elderly from voting.[19]

Contrary to these opponents' assertions, this Article will examine instances of voter fraud and argue that voter fraud is a real problem that can impact close elections. Due to costly litigation, however, this Article will also argue that the current system of strictly requiring photo IDs is not desirable. Although many laws provide a mechanism by which voters can get the necessary photo ID free of charge,[20] the laws still place the onus on voters to procure the ID.[21] Opponents of these laws have argued, and some federal and state courts have agreed, that this requirement imposes an unlawful impediment on the right to vote.[22]

This Article offers a proposal that can help states eliminate voter fraud, while at the same time remove the need for this costly litigation. Instead of making voters incur the costs and time it takes to procure an acceptable ID, this Article will argue that states should shoulder the burden. If states prescribe acceptable forms of ID, incur the costs of producing those IDs, and then distribute them to all registered voters, there will be less litigation over whether these laws disenfranchise voters. This proposal is similar to the system Virginia enacted prior to the 2012 election.[23]

The argument put forth in this Article differs from past scholarship in that it calls for states to send voter ID cards to all registered voters. Past authors have suggested that states make voters travel to state offices[24] and go through an application procedure in order to get a

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18. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 196 (2008); Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

19. *See, e.g.*, Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 189 (2009).

20. *See, e.g.*, WIS. STAT. ANN. § 343.50(5)(a)(3) (West 2016). The statute reads:

> The department may not charge a fee to an applicant for the initial issuance, renewal, or reinstatement of an identification card if the applicant is a U.S. citizen who will be at least 18 years of age on the date of the next election and the applicant requests that the identification card be provided without charge for purposes of voting.

Id.

21. *See id.* § 343.50(2) ("Any resident of this state who does not possess a valid operator's license issued under this chapter *may apply* to the department for an identification card pursuant to this section." (emphasis added)).

22. *See infra* Part III.

23. *See infra* subpart IV.B.1.

24. *See* Samuel P. Langholz, Note, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 789 n.337 (2008) ("The most common approach—and likely the easiest—would be for the state to provide a non-driver's license identification card through its driver's license stations.").

voter ID card.[25] Additionally, others have suggested that most voters should pay a fee to obtain a birth certificate necessary for the application procedure.[26] Although these recommendations may be enough to pass a facial challenge contending that photo-voter ID laws violate the U.S. Constitution's right to vote,[27] a number of federal and state courts have found that laws with these provisions violate section 2 of the Voting Rights Act (VRA) or are unconstitutional under state constitutions.[28] This Article will argue that by mailing voter ID cards directly to all registered voters, states can satisfy the VRA's and various state courts' heightened standards. This Article will also demonstrate that although states will incur costs in producing and mailing these cards, the costs will be offset elsewhere due to less litigation surrounding the laws.

Part I of this Article will address the background and developments that led to state enactments of voter ID laws. This Part will discuss the legislative fallout from the 2000 Presidential Election and recommendations made by the Carter–Baker Commission on Federal Election Reform. Subpart II.A will address the case for voter ID laws, while supbart II.B will discuss arguments against the laws. In Part III, this Article will examine litigation in both federal and state courts that has occurred as a result of the partisan battle over voter ID laws. This Part will use *Milwaukee Branch of the NAACP v. Walker*[29] and *Applewhite v. Commonwealth*,[30] cases that examined similar laws but reached different results, as case studies for claims brought under state constitutions. Furthermore, this Part will explore Fourth and Fifth Circuit cases concerning photo ID laws from Texas,[31] North Carolina,[32] and

25. *See* Adam Gregg, Note, *Let's See Some I.D.—A New Proposal for Voter Identification in Iowa*, 57 DRAKE L. REV. 783, 826 (2009) ("The department shall, upon application and payment of the required fee, issue to an applicant a nonoperator's identification card.").

26. *See id.* at 827 (waiving the fee for only indignant voters and those who cannot afford to pay the fee).

27. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 201 (2008) (upholding Indiana's voter ID law despite evidence that an elderly woman had to "pay the birth certificate fee").

28. *See, e.g.*, Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 242, 256 (5th Cir. 2016) (en banc) (finding that Texas's voter ID law violated the VRA as applied to voters unable to reasonably obtain a photo ID); Weinschenk v. State, 203 S.W.3d 201, 208–09 (Mo. 2006) (finding that the Missouri photo-voter ID law "impose[d] additional practical costs, including navigating state and/or federal bureaucracies, . . . travel to and from the Department of Revenue and other government agencies[,] . . . [and] the time it takes to receive the appropriate documentation").

29. 851 N.W.2d 262 (Wis. 2014); *see id.* at 265 (lifting an injunction issued by the circuit court that blocked the state's voter ID law).

30. No. 330-MD-2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).

31. *Veasey I*, 830 F.3d at 242, 256.

32. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

Virginia[33] that reached three different results regarding claims brought under the VRA.

After reviewing these decisions, Part IV will offer a proposal that can prevent voter fraud while ensuring that no voters are disenfranchised. Namely, this Article will argue that by paying for and distributing voter ID cards, states can satisfy the VRA and state constitutional concerns that have led to the invalidation of previous laws. This proposal is also desirable because it will reduce litigation over voter ID laws, thereby lowering litigation costs and preserving state resources.

I. BACKGROUND

Most voter ID laws in America are recent developments, with the vast majority of laws having been enacted during the past two decades.[34] As these laws are relatively new, any discussion of them must begin with a background study of the events providing their impetus. Namely, voter ID laws are a response to events that shook voter confidence in the 2000 Presidential Election.

A. The Congressional Response to the 2000 Presidential Election

Although voter ID laws come from state legislatures and the administration of elections is a state function,[35] the impetus behind voter ID laws came from Congress. The 2000 Presidential Election between George W. Bush and Al Gore was ultimately decided by a margin of 537 votes in the state of Florida,[36] when a controversial recount and the Supreme Court's decision in *Bush v. Gore*[37] shook voters' confidence in the electoral system.[38] Florida election officials were unsure how to count certain paper ballots,[39] therefore delaying the results for nearly two months after Election Day.[40] As voters'

33. Lee v. Va. State Bd. of Elections, 843 F.3d 592, 594 (4th Cir. 2016).

34. *See Voter ID History*, NAT'L. CONF. OF ST. LEGIS. (May 31, 2017), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx [https://perma.cc/C6XV-JYXJ] (showing the increasing frequency with which states passed voter ID laws in the 2000s).

35. *See* Michael M. Uhlmann, *Federalism and Election Reform*, 6 TEX. REV. L. & POL. 491, 502 (2002) (describing how state and local control of elections is an important feature of decentralized government).

36. *See* Padmananda Rama, *Obama Campaign Invokes '537' to Get Out the Vote*, NPR (Oct. 24, 2012), http://www.npr.org/blogs/itsallpolitics/2012/10/24/163555295/obama-campaign-invokes-537-to-get-out-the-vote [https://perma.cc/AM4U-VCUA].

37. 531 U.S. 98, 111 (2000).

38. *See* Sara Sanchez, *Voter Photo Identification and Section 5 Reauthorization: An Exposition of Two Carter–Baker Commission Proposals and Their Current Status*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 261, 262 (2006).

39. *See Bush*, 531 U.S. at 105 (explaining that the controversy involved uncertainty concerning how to count ballot cards that were either not "perforated with sufficient precision" or not perforated at all).

40. Sanchez, *supra* note 38, at 261.

concerns regarding election integrity grew, Congress reacted by passing the Help America Vote Act of 2002 (HAVA)[41] in order to increase confidence in the electoral system.[42]

HAVA provided federal funds to states and localities to help them with "updating antiquated voting machines, creating and maintaining statewide voter registration lists (as opposed to separate local lists), [and] making polling places accessible to people with disabilities."[43] Importantly, HAVA required new voters registering by mail to establish their identity by providing identification.[44] Seeing this HAVA requirement as a means to ensure confidence in the voting process, many states used it to justify requiring *all* voters to present identification when casting a ballot in person.[45]

B. Different Forms of State Voter ID Laws

The National Conference for State Legislatures categorizes voter ID laws into four types. The most stringent are "strict photo ID" laws, which require voters to present a photo ID at the polls.[46] Voters who do not have the requisite ID can still cast a provisional ballot and present the proper ID at a later time in order to have their vote counted.[47] The second most demanding standard is a "strict non-photo ID" law, which allows voters to present either a photo ID or forms of non-photo identification such as utility bills, bank statements, or government paychecks.[48] These laws are "strict" because voters who do not bring the ID on Election Day must vote by provisional ballot and produce the ID at the county election office within a designated time period.[49]

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41. Help America Vote Act, 52 U.S.C. §§ 20901–21145 (2006).

42. Sanchez, *supra* note 38, at 263.

43. *Id.* at 263–64.

44. *See* Frederic Charles Schaffer & Tova Andrea Wang, *Is Everyone Else Doing It? Indiana's Voter Identification Law in International Perspective*, 3 HARV. L. & POL'Y REV. 397, 397 (2009). Voters registering by mail could establish their identity by enclosing their driver's license number, last four digits of their social security number, or one of several other forms of identification. *See* Help America Vote Act, 52 U.S.C. §§ 20901–21145 (2006).

45. Schaffer & Wang, *supra* note 44, at 397. HAVA, moreover, made clear that this requirement for new voters was a floor, not a ceiling. *See* 52 U.S.C. § 21084 (clarifying that "[t]he requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election . . . administration requirements that are more strict than the requirements established").

46. *Voter Identification Requirements*, *supra* note 9. In 2017, Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, and Wisconsin had these laws in effect. *Id.*

47. *Id.*

48. *See id.*; *see, e.g.*, OHIO REV. CODE ANN. § 3505.18(A)(1) (West 2016). In 2017, Arizona, North Dakota, and Ohio had these laws in effect. *Voter Identification Requirements*, *supra* note 9.

49. *See Voter Identification Requirements*, *supra* note 9.

The two least stringent categories do not require voters who forget their ID to go through the provisional ballot process. "Non-strict photo ID" laws request that voters present a photo ID, but those lacking an ID can still vote without having to go through the provisional ballot process.[50] Instead of having to present their IDs at county offices post-election, these voters can sign an affidavit, also referred to as a "declaration of reasonable impediment," at the polling place or have an election official vouch for their identity.[51] Finally, states with "non-strict non-photo ID" laws allow voters who forget their ID to sign an affidavit and vote at the polling place.[52] These laws were one of the many election topics Congress sought to address in 2005.

C. The Carter–Baker Commission on Federal Election Reform

In response to these new identification requirements and states' struggles implementing HAVA,[53] Congress created the bipartisan Carter–Baker Commission on Federal Election Reform to restore Americans' confidence in elections.[54] Although the Commission made numerous recommendations on the administration of elections,[55] their proposal for voter identification is particularly relevant to this Article.

The Commission noted that our "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[56] Although the Commission disagreed on the extent of voter fraud, the members acknowledged the fact that fraud "could affect the outcome of a close election."[57] To safeguard the integrity of these potential close elections, the Commission recommended that states require voters to produce a photo ID at polling places.[58] Additionally, the Commission recommended a safeguard for voters who forget their ID, suggesting that voters be allowed to cast provisional ballots and then have forty-eight hours to

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50. *Id.* In 2017, Arkansas, Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, South Dakota, and Texas had these laws in effect. *Id.*

51. *Id.* For example, Idaho requires those without photo IDs to place their name, address, and signature on an affidavit under penalty of felony charges. IDAHO CODE ANN. § 34-1114 (West 2012).

52. *Voter Identification Requirements*, *supra* note 9. In 2017, Alaska, Colorado, Connecticut, Delaware, Kentucky, Missouri, Montana, New Hampshire, Oklahoma, South Carolina, Utah, and Washington had these laws in effect. *Id.*

53. *See* Sanchez, *supra* note 38, at 264.

54. *See* CARTER–BAKER COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 7 (SEPT. 2005) [hereinafter CARTER–BAKER REPORT]. The Commission was co-chaired by former President Jimmy Carter and former Secretary of State James Baker III and included "academics and politicians from across the political spectrum." *See* Sanchez, *supra* note 38, at 264–65.

55. *See* CARTER–BAKER REPORT, *supra* note 54, at 53, 55, 57–59.

56. *Id.* at 18.

57. *Id.*

58. *Id.* at 21.

produce their photo IDs at the appropriate election office.[59] For voters who lack photo IDs, such as driver's licenses, it recommended that states make the IDs "easily available" and issued free of charge.[60] To this day over twelve years later, courts that have both upheld and invalidated voter ID laws still favorably cite the Commission's recommendations.[61]

Despite the consensus reached by this bipartisan Commission, photo-voter ID laws remain a divisive issue, as most legislatures enacting the laws have done so along party-line votes.[62] These party-line votes present a problem because dissenters seem unwilling to accept even the safeguards recommended by the Commission.[63] This partisan gridlock has resulted in litigation over voter ID laws, with some courts striking laws down or delaying their enforcement. To fully understand the results of this litigation, however, it is necessary to have a grasp on the arguments for and against voter ID laws.

II. ARGUMENTS FOR AND AGAINST VOTER ID LAWS

This Part will argue that fears of both in-person fraud and absentee fraud are real and demonstrate that they have impacted close elections. This Part will then examine why, despite the evidence and history of voter fraud in America, opponents of the laws still oppose their passage and sue to block their implementation.

A. Arguments for Voter ID Laws

1. Voter ID Laws Are Needed to Prevent and Deter In-Person Voter Fraud

Supporters of voter ID laws believe that these laws are necessary to prevent in-person voter fraud that occurs at the polls on Election Day. This type of fraud can take many forms, such as people casting ballots in the name of dead voters, voters casting multiple ballots, and people voting where they are not registered. In recent years, the Texas Attorney General's office has secured over fifty voter fraud convictions including a woman who voted in place of her dead mother and a political operative who cast ballots for two people.[64] Additionally, in the

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59. *Id.*

60. *Id.* at 19.

61. *See, e.g.*, Lee v. Va. State Bd. of Elections, 843 F.3d 592, 602 (4th Cir. 2016); One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 921 (W.D. Wis. 2016).

62. *See infra* notes 119–24 and accompanying text.

63. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 186 (2008) (discussing the fact that Indiana provides free photo IDs to citizens and allows those who forget them to cast a provisional ballot, which will be counted if they can produce their ID within ten days).

64. *See* Abbott, *supra* note 16.

2004 Washington gubernatorial election, the closest gubernatorial election in the nation's history,[65] a judge identified six instances of double voting and nineteen ballots cast in the name of dead people.[66] Even elected officials have been so brazen as to attempt voter fraud. In 2012, Charlie White, then-Indiana Secretary of State, was convicted of voting in the wrong precinct and submitting a false ballot.[67] Perhaps the most notorious case comes from Wisconsin, where a Milwaukee man was convicted of voter fraud for voting *fourteen times* in an effort to reelect Governor Scott Walker.[68]

Despite these examples of voter fraud, opponents argue that these are such small numbers that they do not justify laws with the potential to disenfranchise thousands of voters.[69] This argument, however, overlooks many explanations for the low number of in-person voter fraud convictions. First, because in-person voter fraud is, by its very nature, covert, it is nearly impossible to detect it without a personal identification requirement.[70] Because it is nearly impossible to detect without a voter ID law, many undetected fraudulent votes may have been cast prior to these laws' enactment or in states that have no such laws. Second, as the Seventh Circuit has noted, a photo ID requirement deters fraud so that its low frequency stays low.[71] In this way, voter ID requirements outlaw criminal activity before it occurs, which "is not only a wise deterrent, but also sound public policy."[72]

Third, some states and localities decline to prosecute cases of voter fraud. In some cases, there is not enough manpower and resources to deal with violations. For instance, although police in Virginia uncovered 194 cases where a violation likely occurred in 2012, the Commonwealth's Attorneys in those localities declined to prosecute because they could "not justify the manpower and resources" to the cases.[73] At other times, attorneys refuse to prosecute offenders because

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65. *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1155 (2006).

66. Gregory Roberts, *After Spending Millions, Challenger Loses 4 Votes*, SEATTLE POST-INTELLIGENCER (June 6, 2005), http://www.seattlepi.com/local/article/After-spending-millions-challenger-loses-4-votes-1175317.php [https://perma.cc/45U4-FR38].

67. Ricardo Lopez, *Indiana Secretary of State Convicted of Voter Fraud*, L.A. TIMES (Feb. 4, 2012), http://latimesblogs.latimes.com/nationnow/2012/02/indiana-secretary-of-state-convicted-of-6-voter-fraud-charges.html [https://perma.cc/6PL4-UEVX].

68. One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 912 (W.D. Wis. 2016).

69. *See* David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 485 (2008).

70. *See In re* Request for Advisory Opinion Regarding the Constitutionality of 2005 PA 71, 740 N.W.2d 440, 457–58 (Mich. 2007).

71. Frank v. Walker, 768 F.3d 744, 749–50 (7th Cir. 2014).

72. Lee v. Va. State Bd. of Elections, 188 F. Supp. 3d 577, 609 (E.D. Va. 2016), *aff'd*, 843 F.3d 592 (4th Cir. 2016).

73. *See* Mark Bowes, *Va. Investigates Voter Fraud*, RICHMOND TIMES DISPATCH (Apr. 22, 2012), http://www.richmond.com/archive/va-investigates-voter-fraud/article_ee37a690-d54b-5151-b261-63676b815251.html [https://perma.cc/R9YE-DYJ6]. According to the

they believe they have made innocent mistakes. In Linn County, Iowa, the county attorney refused to prosecute voters who voted by both absentee and in-person ballot because he believed that they "lacked criminal intent."[74] In these instances, the *mens rea* requirement makes voter fraud cases hard to prove, therefore lowering the conviction rate.[75] For example, the Iowa law requires the fraudulent action to be "willful" to convict a voter.[76] Likewise, in Minnesota, prosecutors must prove that a voter "knowingly" committed fraud in order to obtain a conviction.[77] For this reason, when a voter pleads ignorance, prosecutors sometimes decline to try the case because they believe they do not have enough evidence to get a jury to convict the voter.[78] Although numbers of convictions for in-person voter fraud may appear low, these examples show that a voter ID law could prevent many unprosecuted instances.

2. Voter ID Laws Are Needed to Prevent Absentee Voter Fraud

Proponents of voter ID laws also claim that they are necessary to deter and prevent absentee ballot fraud. This type of fraud is much more prevalent than in-person fraud because perpetrators "stand a higher chance of success and lower chance of prosecution."[79] Fraudulent in-person voters can be easily caught if the poll workers know the person they are impersonating or the person they are impersonating has already shown up to vote.[80] Those committing fraud by absentee ballot do not run these in-person detection risks.

These fraud risks are not merely hypothetical *but have in fact decided close elections.* Absentee ballot voter fraud was so prevalent in the 2003 primary election for the Democratic nomination for the mayor of East Chicago, Indiana, that the Indiana Supreme Court threw out the results of the election.[81] The court determined that "one of the candidates paid supporters to stand near polling places and encourage

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secretary of the Virginia Board of Elections, these cases ran "the gamut from voter registration fraud issues through potential fraud at the polling place on Election Day." *Id.*

74. Ryan J. Foley, *Iowa Voter Fraud Cases May Hit Roadblock of Intent,* S.F. CHRON. (Sept. 23, 2012), http://wcfcourier.com/news/local/govt-and-politics/iowa-voter-fraud-cases-may-hit-roadblock-of-intent/article_3ab7e846-05d7-11e2-9702-001a4bcf887a.html [https://perma.cc/BQ92-BF36].

75. *Id.*

76. *See* IOWA CODE ANN. § 39A.2 (West 2012) ("A person commits the crime of election misconduct in the first degree if the person *willfully* commits any of the following acts." (emphasis added)); *see also* Foley, *supra* note 74.

77. *See* MINN. STAT. ANN. § 201.014 (West 2012) ("Any individual who votes who *knowingly* is not eligible to vote is guilty of a felony." (emphasis added)).

78. *See* Foley, *supra* note 74.

79. *See* Schaffer & Wang, *supra* note 44, at 407–08 (examining absentee ballot fraud in Indiana).

80. *See id.* at 407.

81. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188–89 (2008).

voters . . . to vote absentee. The supporters asked the voters to contact them when they received their ballots; the supporters then 'assisted' the voter in filling out the ballot."[82] Additionally, in Pennsylvania, a federal judge found that absentee fraud changed the outcome of a special state Senate election in 1993.[83]

Perhaps the greatest indication that absentee voter fraud is a critical problem is the fact that even courts that have struck down in-person voter ID laws have acknowledged absentee fraud is a "significant threat."[84] For instance, in *Veasey v. Abbott* (*Veasey I*),[85] the Fifth Circuit heavily credited the district court's absentee-fraud findings.[86] There, the district court heard testimony regarding instances where "campaign workers are known to harvest mail-in ballots through several different methods, including raiding mailboxes."[87] The district court also noted that there was general "agreement that voter fraud actually takes place in abundance in connection with absentee balloting."[88] In addition to the Fifth Circuit, the Fourth Circuit has also chastised North Carolina's legislature for failing to apply its voter ID law to absentee ballots, even though the legislature had evidence of absentee fraud but ignored such evidence.[89]

Despite this undisputed evidence that absentee fraud has in fact changed election results, opponents of ID laws still object because some laws do not cover absentee ballots.[90] Although this argument has merit, legislatures can still amend existing laws or pass new laws in states without ID laws to remedy this oversight. Moreover, Wisconsin's photo-voter ID law from 2011 covers absentee ballots.[91]

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82. *Id.* at 195 n.13.

83. Hans A. von Spakovsky, *Voter ID Objections Miss the Real Need*, THE HERITAGE FOUNDATION (Aug. 19, 2012), http://www.heritage.org/election-integrity/commentary/voter-id-objections-miss-the-real-need [https://perma.cc/4JDM-JCFX].

84. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 242, 256 (5th Cir. 2016) (en banc).

85. 830 F.3d 216, 242, 256 (5th Cir. 2016) (en banc).

86. *Id.* at 255–56.

87. Veasey v. Perry, 71 F. Supp. 3d 627, 676 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016).

88. *Id.* at 641.

89. *See* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017). The Seventh Circuit has likewise noted instances of absentee voter fraud. *See* Frank v. Walker, 768 F.3d 744, 749 (7th Cir. 2014) (noting that "a man cast an absentee ballot for his deceased wife").

90. *See* Schaffer & Wang, *supra* note 44, at 407.

91. *Frank*, 768 F.3d at 746. Although it was permanently enjoined before the 2012 election, Pennsylvania's 2012 enactment also would have required a photo ID for absentee voting. *See* von Spakovsky, *supra* note 83.

3. Voter ID Laws Are Needed to Increase Confidence in the Voting System by Preventing the Appearance of Voter Fraud

Finally, proponents argue that voter ID laws are needed to instill confidence in the voting system.[92] One recent study showed that about 40 percent of Americans do not believe, or are not sure, votes are "accurately cast and counted,"[93] while another poll found that 54 percent of voters say voter fraud is a somewhat serious or very serious problem.[94] In addition to proponents of voter ID laws, on numerous occasions the Supreme Court has acknowledged that states have a compelling interest in preventing the appearance of voter fraud.[95] In *Purcell v. Gonzalez*,[96] the Court wrote that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."[97] More recently, in *Crawford v. Marion County Election Board*,[98] the Court noted that "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."[99]

Although some may argue that this benefit does not justify the lower turnout numbers that will result from voter disenfranchisement, statistics have shown the opposite actually occurs, because in states that have enacted voter ID laws, turnout has increased.[100] For instance, following North Carolina's 2013 photo ID enactment, "African American aggregate turnout increased by 1.8 percent in the 2014 midterm election as compared to the 2010 midterm election."[101] One study, after controlling for the influence of other factors on voter

92. *See* DeLaney, *supra* note 17, at 847–48.

93. *About Six in 10 Confident in Accuracy of U.S. Vote Count*, GALLUP NEWS (Sept. 9, 2016), http://news.gallup.com/poll/195371/six-confident-accuracy-vote-count.aspx [https://perma.cc/BS3B-82G6] (reporting that, since 2008, this number has consistently ranged between 38 and 41 percent).

94. *Most Still See Voter Fraud as Serious Problem*, RASMUSSEN REPORTS (Aug. 10, 2017), http://www.rasmussenreports.com/public_content/politics/general_politics/august_2017/most_still_see_voter_fraud_as_serious_problem [https://perma.cc/35QM-8U4H] (reporting that, in October 2016, this number polled at 58 percent).

95. *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989) (asserting that a state "indisputably has a compelling interest in preserving the integrity of its election process").

96. 549 U.S. 1 (2006).

97. *Id.* at 4.

98. 553 U.S. 181 (2008).

99. *Id.* at 197.

100. *See* Abbott, *supra* note 16.

101. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 232 (4th Cir. 2016) (citing N.C. State Conference of NAACP v. McCrory, 182 F. Supp. 3d 320, 350 (M.D.N.C. 2016)), *cert. denied*, 137 S. Ct. 1399 (2017).

turnout, concluded that "voter turnout in Indiana increased about two percentage points from 2002 to 2006; however, in counties with greater percentages of minority or poor voters, *turnout increased by even more.*"[102] Another study found that in voter fraud "hot spots," voter ID requirements increased voting participation, supporting the hypothesis that "[g]reater confidence that the election is fair and that votes will be counted accurately encourages additional voter participation."[103] Despite the fact that voter ID laws can increase both voter confidence and turnout, however, the next subpart will show that opponents still oppose them out of fear of voter disenfranchisement.

B. Arguments Against Voter ID Laws

1. Voter ID Laws Could Cause the Disenfranchisement of Minority and Elderly Voters

In addition to the objections raised above, opponents of voter ID laws argue that these laws will cause the "second great disenfranchisement" in America.[104] Whenever barriers, such as voter ID laws, are placed in front of potential voters, opponents argue they are less likely to vote.[105] Specifically, these laws will hit the poor, minorities, elderly, and urban voters the hardest.[106]

Although one study shows that as high as 11 percent of voting-age Americans do not possess photo IDs, these numbers are highest amongst seniors (18 percent), African Americans (25 percent), and low-income Americans (15 percent).[107] In an attempt to alleviate the

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102. JEFFREY MILYO, THE EFFECTS OF PHOTOGRAPHIC IDENTIFICATION ON VOTER TURNOUT IN INDIANA: A COUNTY-LEVEL ANALYSIS 1 (2007) (emphasis added), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Milyo%20IPP%20Report%20Corrected.pdf [https://perma.cc/8MTF-YC5L].

103. John R. Lott, Jr., *Evidence of Voter Fraud and the Impact that Regulations to Reduce Fraud Have on Voter Participation Rates* 4, 10 (Aug. 18, 2006), http://www.brennancenter.org/sites/default/files/ legacy/d/download_file_50898.pdf [https://perma.cc/J6WE-A42K]. The voter fraud "hot spots" are Cuyahoga County, Ohio; St. Clair County, Illinois; St. Louis County, Missouri; Philadelphia County, Pennsylvania; King County, Washington; and Milwaukee County, Wisconsin. *Id.* at 10.

104. *See* Schultz, *supra* note 69, at 485 (explaining that the first great disenfranchisement occurred in the late nineteenth and early twentieth centuries when "bans on fusion tickets, instant runoff voting, proportional voting, and other so-called reforms were instituted to discourage immigrants and urban poor from voting").

105. *See* RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 61–62 (1980) (discussing how "turnout will be lower where the obstacles to voting are greater").

106. *See* de Alth, *supra* note 19, at 189 ("Voter ID laws are more likely to affect Democratic segments of the electorate, including the poor, minorities, elderly, highly-mobile, and urban voters.").

107. *See* BRENNAN CENTER FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (NOV. 2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [https://perma.cc/SV6S-R74U]; *see also* de Alth, *supra* note 19, at 189 (explaining that these potential voters are also less likely to drive,

burden on these groups, legislatures have provided mechanisms by which voters may obtain the necessary photo IDs free of charge. For example, the laws in Indiana,[108] Wisconsin,[109] and Texas[110]—some of the most controversial—all allow voters lacking photo IDs to obtain them for free.

For some, however, this safety net is not enough because, although voters can obtain the IDs for free, they still have to present the requisite proof of identification in order to obtain them.[111] Unlike the photo IDs, opponents argue these documents, such as birth certificates, are not free and impose an unconstitutional indirect opportunity cost on potential voters.[112] Indeed one study shows that 7 percent of voting-age citizens do not have ready access to the citizenship documents necessary to obtain a photo ID.[113] For some, these monetary costs are similar to direct poll taxes,[114] which were specifically prohibited by the Twenty-Fourth Amendment.[115] In addition to the fact that these laws could disenfranchise minority and elderly voters, critics oppose these laws because of the possible effect this disenfranchisement could have on elections.

2. Voter ID Laws Are a Partisan Ploy by Republicans to Gain Election Victories

Poor, minority, and elderly voters traditionally cast their ballots for candidates nominated by the Democratic Party.[116] If photo ID laws disenfranchise these voters, the Democratic Party will, therefore, be disproportionately affected. Although the Supreme Court has ruled photo ID laws pass a facial challenge even though potential partisan

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thereby making it more difficult for them to obtain the photo IDs).

108. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 205 (2008) (Scalia, J., concurring) ("To vote in person in Indiana, *everyone* must have and present a photo identification that can be obtained for free.").

109. *See* WIS. STAT. § 343.50(5)(a)(3) (stating that a U.S. citizen who is at least 18 years of age may not be charged a voter identification fee).

110. *See* Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 228 (5th Cir. 2016) (en banc) (discussing the elimination of a fee associated with a voter identification requirement).

111. *See, e.g.*, Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 267 (Wis. 2014) (discussing the Wisconsin requirement that voters prove their identification with a birth certificate before obtaining a photo ID).

112. *See infra* subpart III.A.

113. BRENNAN CENTER FOR JUSTICE, *supra* note 107, at 2.

114. *See* Sari Horwitz, *Eric Holder Vows to Aggressively Challenge Voter ID Laws*, WASH. POST (July 10, 2012), https://www.washingtonpost.com/world/national-security/eric-holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW_story.html?utm_term=.3002e13cd446 [https://perma.cc/SL69-RKU4].

115. U.S. CONST. amend. XXIV § 1; *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) (extending the Twenty-Fourth Amendment's proscription of poll taxes in federal elections by banning poll taxes in state elections based on the Equal Protection Clause).

116. *See* de Alth, *supra* note 19, at 189.

interests may have influenced some individual legislators' votes,[117] opponents still see these interests as anathema to our democratic system.[118]

Whether out of principle or political interest, members of the Republican and Democratic Parties consistently vote along party lines when a voter ID bill comes before them in legislatures. The twelve states that strengthened their voting laws between 2002 and 2006 created a highly partisan controversy, with Republicans supporting the laws and Democrats opposing them.[119] More recently, voter ID laws in Wisconsin (2011),[120] Texas (2011),[121] Pennsylvania (2012),[122] and Virginia (2013)[123] all passed along party lines.[124]

The recent partisan struggles over these laws show that neither side is likely to budge on strict photo-voter ID laws. Although these battles in legislatures have been heated,[125] the effects of some court decisions

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117. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

118. *See* Horwitz, *supra* note 114 (quoting Attorney General Eric Holder: "Let me be clear: We will not allow political pretexts to disenfranchise American citizens of their most precious right").

119. de Alth, *supra* note 19, at 185 n.3 (listing the twelve states that strengthened their voting laws, comprising Alabama, Arizona, Colorado, Georgia, Indiana, Missouri, Montana, New Mexico, North Dakota, Ohio, South Dakota, and Washington).

120. *See* Patrick Marley, *Senate Passes Photo ID Bill; Some Democrats Refuse to Vote*, MILWAUKEE J. SENTINEL (May 19, 2011), http://www.jsonline.com/news/statepolitics/122231394.html [https://perma.cc/QH76-BLF6] (explaining that no Democrats in the Wisconsin Senate supported the bill, while all nineteen Republicans voted for it and all fifty-eight Republicans and only two Democrats in the Wisconsin Assembly voted for the bill).

121. *See* Gary Martin, *Texas Officials Argue Voter ID Law Is Necessary*, HOUSTON CHRON. (July 10, 2012), http://www.chron.com/news/houston-texas/article/Texas-officials-argue-voter-ID-law-is-necessary-3694337.php [https://perma.cc/3SHU-E8WZ] ("The [voter ID] law passed the Texas Legislature along party-line votes in the Senate and House . . . .").

122. *See* Aaron Blake, *Everything You Need to Know About the Pennsylvania Voter ID Fight*, WASH. POST (Oct. 2, 2012), http://www.washingtonpost.com/blogs/the-fix/wp/2012/10/02/the-pennsylvania-voter-id-fight-explained/ [https://perma.cc/4GCP-2TZG] (reporting that the voter ID law was passed "on a party-line vote in the newly Republican state legislature").

123. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 603 (4th Cir. 2016) (noting that only one Democrat and one Independent voted for the voter ID law); *see also Gov. Bob McDonnell Orders New Voter Cards to Every Virginia Voter*, CBS (Mar. 18, 2012, http://washington.cbslocal.com/2012/05/18/gov-bob-mcdonnell-orders-new-voter-id-cards-to-every-virginia-voter/ [https://perma.cc/3HLE-4UQN] (reporting that in addition to Virginia's 2013 enactment, its 2012 voter ID law also passed along party lines).

124. *But see* Simon Van Zuylen-Wood, *Why Did Liberal African Americans in Rhode Island Help Pass a Voter ID Law?*, THE NEW REPUBLIC (Feb. 6, 2012), http://www.newrepublic.com/article/politics/100429/rhode-island-voter-id-laws-hispanic [https://perma.cc/2APB-6CC9] (explaining that the 2011 Rhode Island photo-voter ID law was passed by "a fully Democratic legislature and a liberal governor").

125. *See* Mackenzie Weinger, *Mike Turzai: Voter ID Helps GOP Win State*, POLITICO (June 25, 2012), http://www.politico.com/news/stories/0612/77811.html [https://perma.cc/8WLT-FCRU] (discussing tensions caused by Pennsylvania House Republican leader Mike Turzai's statement that Pennsylvania's photo-voter ID law would help Republican Presidential Candidate Mitt Romney win the state).

have been worse. For the most part, federal and state courts have upheld voter ID laws.[126] However, some federal courts have ruled that these laws violate the VRA, while other state courts have declared the laws unconstitutional.[127] These rulings, the next Part will show, have left states with no voter ID laws in effect, caused voters uncertainty, and imposed expensive litigation costs on states. After dissecting the reasoning of Wisconsin and Pennsylvania state courts and the Fourth and Fifth Circuits in Part III, this Article will then seek to fashion a voter ID law that could pass their heightened standards and avoid costly litigation in Part IV.

III. LITIGATION OVER VOTER ID LAWS

Although the arguments above are raised during debates in the legislatures, the fight over voter ID laws does not stop in the statehouses. Those fearing voter disenfranchisement, such as Democrats, civil liberties groups, or minority groups, often bring suits in federal or state court seeking an injunction to halt the law's enforcement. Early challenges to these laws usually took on three forms.

The first was that voter ID laws constitute an unconstitutional burden on the right to vote under the Equal Protection Clause of the Fourteenth Amendment.[128] Claims contending that laws are facially invalid have largely failed ever since a 6-3 Supreme Court upheld Indiana's photo-voter ID law in *Crawford v. Marion County Election Board*.[129] Writing for the Court, Justice Stevens noted that "the inconvenience of making a trip to [a state motor vehicle office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burden of voting."[130] In doing so, the Supreme Court blessed the ideas that under the U.S. Constitution, photo ID laws do not substantially burden the right to vote and states can overcome facial challenges to voter ID laws.

Secondly, plaintiffs claimed the laws were unconstitutional poll taxes under the Twenty-Fourth Amendment.[131] Finally, plaintiffs brought

126. *See Voter ID in the Courts*, NAT'L CONF. OF ST. LEGIS. (May 31, 2014), http://www.ncsl.org/documents/legismgt/elect/Voter_ID_Courts_May2014.pdf [https://perma.cc/DNJ6-WEBM] (noting that federal and state courts have followed the United States Supreme Court's lead on rejecting facial challenges to voter ID laws).

127. *See infra* Part III.

128. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008).

129. *Id.* at 188–89.

130. *Id.* at 198.

131. *See, e.g.*, Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1367 (N.D. Ga. 2005) (preliminarily enjoining Georgia's 2005 photo ID law because, inter alia, the plaintiffs had "a substantial likelihood of success on their poll tax claim"); *see also* Common Cause/Georgia v. Billups, 554 F.3d 1340, 1355 (11th Cir. 2009) (upholding

challenges under their state constitutions, which sometimes provide stronger protection to the right to vote than the U.S. Constitution.[132] After experiencing mostly defeat under these theories, opponents of voter ID laws recently have had more success bringing discriminatory intent and as-applied statutory claims under the VRA.

The remainder of this Part will explore (1) two state court decisions from Wisconsin and Pennsylvania; and (2) recent Fourth and Fifth Circuit rulings regarding challenges under the VRA. Although one could see these decisions as blueprints for successfully challenging voter ID laws, they are also guides to legislatures about how to ensure that subsequent laws are upheld. These decisions show that although the laws came from states as diverse as Wisconsin, Pennsylvania, Texas, North Carolina, and Virginia, whether these laws were judged to have an impermissible discriminatory effect turned on at least one of three things: (1) the availability and accessibility of IDs; (2) costs associated with procuring an ID; and (3) whether there was an adequate safety net in place for those who could not reasonably procure an ID.

A. State Court Litigation over Voter ID Laws

Prior to the 2012 election, in *Milwaukee Branch of the NAACP v. Walker*,[133] plaintiffs brought a facial challenge to Wisconsin's photo-voter ID law (commonly known as "Act 23") under the Wisconsin Constitution, which explicitly and broadly guarantees the right to vote.[134] Ultimately, the court granted the injunction due to the lack of availability and cost of obtaining the necessary photo IDs.[135]

Granting the plaintiffs' motion for a temporary injunction in March 2012, the court first accepted an expert's testimony that 221,975 constitutionally qualified voters in Wisconsin did not possess a photo ID.[136] The court also noted that the law disproportionately burdened minority and elderly voters.[137] Finally, although these voters could

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Georgia's law that required counties to issue free photo ID cards, which replaced the previous law that required voters to pay $20 to $35 to obtain a photo ID card).

132. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 204 (Mo. 2006) ("[Voting rights] are at the core of Missouri's constitution and, hence, receive state constitutional protections even more extensive than those provided by the federal constitution."); Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 264–65 (Wis. 2014) ("Plaintiffs challenge Act 23 under Article III, Section 1 of the Wisconsin Constitution.").

133. Milwaukee Branch of the NAACP v. Walker, No. 11-CV-5492, 2012 WL 739553, at *1 (Wis. Cir. Mar. 6, 2012), *rev'd*, 851 N.W.2d 262 (Wis. 2014).

134. *Id.* at *2.

135. *Id.* at *10 ("It remains true and, for this court, dispositive that the new voter identification requirements . . . will likely exclude from the election process a significant portion of Wisconsin voters who are qualified under our constitution to participate in this process.").

136. *Id.* at *4 (finding the testimony of Professor Kenneth Mayer "both a reliable measure and . . . legally significant").

137. *Id.* at *6 (finding that although over 80 percent of Wisconsin men and women

obtain the IDs for free, the court still likened the law to an unconstitutional poll tax because the plaintiffs introduced forty affidavits from voters who explained the costs involved in procuring the IDs.[138] The court found that even though the Legislature allowed voters to get photo IDs for free, it still required them to pay between $14 and $39.50 to obtain a certified birth certificate from the State.[139] For these reasons, the court granted the plaintiffs' motion for a temporary injunction and enjoined enforcement of the law.[140]

After granting temporary relief, the trial court then held a bench trial from April to May 2012.[141] On July 17, 2012, it permanently enjoined enforcement of Act 23, ruling that it significantly burdened the right to vote, due to costs and the difficulty of obtaining documents necessary to apply for an ID.[142] Rather than waiting for the case to work its way through the intermediate appellate court, on November 20, 2013, the Wisconsin Supreme Court took jurisdiction of the appeal on its own motion.[143]

On appeal, a divided 4-3 Wisconsin Supreme Court reversed the trial court and ruled that Act 23 did not unconstitutionally burden the right to vote. Applying the U.S. Supreme Court's *Anderson-Burdick* balancing test, which balances the alleged burden on the right to vote against the government's interests,[144] the court began by considering "'the character and magnitude of the asserted injury to the rights protected . . . that the plaintiff [sought] to vindicate.'" In doing so, the court identified two potential burdens on the right to vote.

First, the court considered "the time and inconvenience of going to DMV offices to obtain" a photo ID and found that such time and inconvenience were "not severe burdens on the right to vote."[145] In so ruling, the court looked to *Crawford* for guidance, where the U.S. Supreme Court similarly ruled that gathering appropriate documents, making a trip to the DMV, and posing for a photograph do "'not qualify as a substantial burden on the right to vote, or even represent a

possessed driver's licenses, only 45 percent of African-American males, 51 percent of African-American females, 54 percent of Hispanic males, 41 percent of Hispanic females, and 77 percent of residents age 65 and older possessed driver's licenses).

138. *Id.* at *4.

139. *Id.*

140. *Id.* at *1.

141. Milwaukee Branch of the NAACP v. Walker, 851 N.W.2d 262, 267–68 (Wis. 2014).

142. *Id.* at 268.

143. *Id.*

144. This test is named after two Supreme Court cases that examined facial challenges alleging violations of the right to vote under the First and Fourteenth Amendments: *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). This test has been adopted by the Wisconsin Supreme Court. *Milwaukee Branch*, 851 N.W.2d at 272.

145. *Milwaukee Branch*, 851 N.W.2d at 267, 274.

significant increase over the usual burdens of voting.'"[146] The court also noted that photo IDs are "a fact of life to which we all have to adjust," and that they are needed for activities as varied as driving a car, buying a firearm, boarding an airplane, entering a federal building, purchasing alcohol, cashing a check, obtaining a library book, and entering a hospital.[147]

Second, the court considered whether payments for documents that were required to obtain a photo ID constituted a severe burden on the right to vote.[148] Although Act 23 specifically forbids the Wisconsin Department of Transportation from requiring a fee for a photo ID used for voting,[149] a potential constitutional conflict arose because government agency regulations imposed fees to obtain birth certificates and similar documents, which were required to obtain a photo ID.[150] Noting that under *Harper v. Virginia Board of Elections*,[151] the U.S. Supreme Court's seminal poll tax decision, "'payment of any fee [may not be] an electoral standard,'" the court reasoned that such ancillary fees would normally amount to a de facto poll tax, and thus, severely burden the right to vote.[152]

Rather than striking the statute down, however, the court employed a savings construction that reconciled the problematic agency regulations with Act 23's prohibition on charging a fee for a photo ID.[153] Namely, it allowed those who lacked supporting documents and the monetary means to obtain them to receive a free birth certificate.[154] As such a construction meant that there were no longer any indirect costs associated with obtaining a photo ID, Act 23 did not place a severe burden on the right to vote.[155] For this reason, the court applied rational basis review and upheld Act 23 as a reasonable means of furthering the State's interests in preventing voter fraud and maintaining public confidence in election results.[156]

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146. *Id.* at 273 (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 198 (2008)).

147. *Id.* at 273–74.

148. *Id.* at 274.

149. WIS. STAT. § 343.50(5)(a)(3) (West 2016) ("The department may not charge a fee to an applicant for the initial issuance, renewal, or reinstatement of an identification card . . . [when the] applicant requests that the identification card be provided without charge for purposes of voting.").

150. *See Milwaukee Branch*, 851 N.W.2d at 275.

151. 383 U.S. 663 (1966).

152. *See Milwaukee Branch*, 851 N.W.2d at 277 (quoting *Harper*, 383 U.S. at 666).

153. *Id.* at 279.

154. *Id.*

155. *Id.*

156. *Id.* at 280. After *Milwaukee Branch*, Act 23's facial validity was confirmed when the U.S. Court of Appeals for the Seventh Circuit rejected a challenge brought under the U.S. Constitution. *See* Frank v. Walker, 768 F.3d 744, 744 (7th Cir. 2014). Since then, however, plaintiffs alleging that they were unable to obtain photo-voter IDs through reasonable efforts have had success bringing as-applied challenges. *See* One Wis. Inst.,

Shortly after the *Walker* trial court's ruling, in *Applewhite v. Commonwealth*,[157] a Pennsylvania state court granted a preliminary injunction to enjoin enforcement of the State's photo-voter ID law for the 2012 election.[158] Unlike the Wisconsin trial court, the Pennsylvania court rejected the plaintiffs' expert testimony concerning voters who lacked photo IDs.[159] Whereas the plaintiffs' expert testified that 9 percent of Pennsylvania voters lacked photo IDs, the court found that only somewhat more than 1 percent were without the IDs.[160] The court, however, still enjoined enforcement of the law because it did not believe enough free IDs could be distributed before the election.[161]

Following the 2012 election, the court held a trial on the merits during which it considered additional expert testimony regarding the number of Pennsylvania voters who lacked photo IDs.[162] The data showed that for the 2012 general election, 511,415 registered voters lacked an ID.[163] Although the government had attempted to bridge this gap with an advertising campaign, further studies showed that the campaign was largely ineffective, as only 17 percent of those who saw the ads understood them and obtained IDs.[164] With these numbers in hand, the court then turned to the merits to address plaintiffs' facial challenge under the right to vote guaranteed by the Pennsylvania Constitution.

Noting that the right to vote under the Pennsylvania Constitution was stronger than the right guaranteed by the federal constitution, the court struck down the entire voter ID law because "a 'substantial number' of its applications [were] unconstitutional, judged in relation to the statute's plainly legitimate sweep."[165] Specifically, the court found

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Inc. v. Thomsen, 198 F. Supp. 3d 896, 948–49 (W.D. Wis. 2016) (finding that Act 23's ID Petition Process severely burdened the right to vote of those who could not obtain an ID through reasonable effort); *see also* Frank v. Walker, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016) (allowing those who could not obtain an ID "with reasonable effort" to affirm their identity through an affidavit), *stayed by*, 2016 WL 4224616 (7th Cir. Aug. 10, 2016) (stating that "the district court's decision is likely to be reversed on appeal"). Because *Thomsen* and *Frank* were still on appeal at the time this Article was published, these cases are not discussed at length.

157. No. 330-MD-2012, 2012 WL 4497211 (Pa. Commw. Ct. Oct. 2, 2012).

158. *Id.* at *8. Although the trial court originally denied the request for a preliminary injunction, the state supreme court vacated and remanded for an assessment of the actual availability of photo IDs. *Id.* at *1.

159. *Id.* at *3.

160. *Id.*

161. *Id.* at *3–4 (finding that the State's numerous improvements in the system for distributing IDs still would not prevent voter disenfranchisement given the limited time remaining until the election).

162. Applewhite v. Commonwealth, No. 330-MD-2012, 2014 WL 184988, at *2 (Pa. Commw. Ct. Jan. 17, 2014).

163. *Id.* at *4.

164. *Id.* at *5.

165. *Id.* at *17 (quoting Clifton v. Allegheny Cnty., 969 A.2d 1197, 1222 n.35 (2009)) (internal quotation marks omitted). The court also rejected an equal protection

that IDs offered by the State were not reasonably accessible due to burdensome travel requirements and that "[r]igorous supporting documentation requirements deny a minority of electors the means (photo ID) to vote."[166] Furthermore, the court distinguished other states' laws, noting that Pennsylvania's lacked an adequate safety net because there was no fail safe provision, such as an affidavit option, for voters who could not procure an ID.[167] Although *Applewhite* was merely a state trial court decision, Pennsylvania's governor decided not to appeal the ruling, therefore leaving in place the court's decision to strike down the law in its entirety.[168]

B. Federal Litigation Brought Under the Voting Rights Act

Following mixed results with facial challenges in state courts, plaintiffs have recently turned to as-applied challenges under the Voting Rights Act as their weapon of choice. As originally enacted in 1965, the VRA contained three main provisions. Section 2 allowed individuals and the federal government to sue any states and other political subdivisions to forbid any "standard, practice, or procedure [that] results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[169] Section 5 required states and other "covered jurisdictions" with a history of racial discrimination to obtain federal "preclearance" permission before enacting any law related to voting.[170] Finally, section 4 contained a "coverage formula" that determined which states and political subdivisions were considered "covered jurisdictions" within the meaning of section 5.[171] Prior to June 2013, many section 2 challenges were unnecessary because states with a history of racial discrimination, predominantly southern states, were barred from enforcing voter ID laws absent preclearance. Then, on June 25, 2013, the voting rights landscape dramatically shifted with the Supreme Court's issuance of *Shelby County v. Holder*.[172]

In *Shelby County*, the Supreme Court struck down Congress's 2006 reenactment of section 4 of the VRA.[173] By striking down section 4, the

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challenge to the law. *Id.* at *26.

166. *Id.* at *19 (citations omitted).

167. *Id.* at *23 (discussing laws from Tennessee, Georgia, Kansas, Alabama, Florida, Idaho, Michigan, Rhode Island, South Dakota, and Wisconsin).

168. *See* Abby Ohlheiser, *Pennsylvania Won't Appeal a Ruling Striking Down Its Voter ID Law*, THE ATLANTIC (May 8, 2014), https://www.theatlantic.com/politics/archive/2014/05/pennsylvania-wont-appeal-a-ruling-striking-down-its-voter-id-law/361963/ [https://perma.cc/AP4D-428E].

169. 42 U.S.C. § 1973(a) (2012).

170. *Id.* § 1973(c).

171. *Id.* § 1973(b).

172. 133 S. Ct. 2612 (2013).

173. *Id.* at 2630–31 ("[I]n 2009, we took care to avoid ruling on the constitutionality

Court also effectively nullified section 5's preclearance requirement because there was no longer any formula to determine which states were covered jurisdictions. The effect was immediate, as states such as Texas and Virginia, both covered jurisdictions that were previously required to obtain preclearance, were instantly allowed to enforce their laws. Other previously covered jurisdictions, such as North Carolina, seized upon the opportunity to adopt comprehensive voting rights litigation. The fates of these three states' photo-voter ID laws are discussed below.

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Although enacted in 2011, Texas's photo-voter ID law (SB 14) was unenforceable until *Shelby County* due to section 5 preclearance litigation.[174] Shortly thereafter, plaintiffs brought suit alleging that SB 14 violated section 2 of the VRA and the U.S. Constitution because it was enacted with a discriminatory purpose and had a discriminatory effect.[175] Before the 2014 midterm elections, the U.S. District Court for the Southern District of Texas held a nine-day bench trial, after which it permanently enjoined SB 14, agreeing with the plaintiffs that it was enacted with a discriminatory purpose and had a discriminatory effect.[176] Fearing that the State would not be able to abide by the injunction and return voting procedures to their pre-SB 14 form before the election, the Fifth Circuit granted an emergency stay, which remained in effect during the pendency of appeal.[177]

On appeal in *Veasey I*, the en banc Fifth Circuit reversed and remanded on the discriminatory purpose holding, finding that the district court placed undue emphasis on certain evidence that was not probative of discriminatory intent, but affirmed that SB 14 had an impermissible discriminatory effect.[178] Key to the Fifth Circuit's disparate impact finding was the district court's determination that 608,470 Texans, or 4.5 percent of registered voters, lacked a photo ID.[179] The court further noted that this 4.5 percent was predominantly composed of blacks and Hispanics, who were 305 percent and 195 percent "more likely than their Anglo peers to lack SB 14 ID."[180]

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of the Voting Rights Act when asked to do so . . . . Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.").

174. *See* Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 227 n.7 (5th Cir. 2016) (en banc). *See generally* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013).

175. *Veasey I*, 830 F.3d at 227 (outlining the prior procedural history of the case).

176. *Id.* at 227–28.

177. *Id.*

178. *See id.* at 242–43 (reversing discriminatory purpose holding); *id.* at 256–57 (affirming disparate impact holding).

179. *Id.* at 250 (citing Veasey v. Perry, 71 F. Supp. 3d 627, 659 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016)).

180. *Id.* at 250.

In addition to statistical evidence, the court also credited the actual plaintiffs' testimony, some of whom allegedly were prevented from voting due to cost concerns or ID offices' lack of accessibility. For instance, Sammie Louise Bates claimed she was prevented from voting because "she could not afford to purchase her Mississippi birth certificate [needed to prove her identity for a Texas ID] at its $42 cost on her $321 fixed monthly income."[181] Other plaintiffs faced the additional obstacle of having to face an hour-long, one way trip to the nearest ID office.[182] Faced with this evidence, the court concluded that SB 14 lacked an adequate safety net for these black and Hispanic voters who were "unable to reasonably obtain" a photo ID.[183] Although it left SB 14 in place for the 95 percent of the population that had a photo ID, the case was remanded for determination of an interim remedy to ensure that those without an ID would still be entitled to vote in the 2016 election.[184]

Following that election,[185] during which voters lacking an SB 14-compliant ID were allowed to vote if they executed a Declaration of Reasonable Impediment (DRI),[186] the district court was tasked with reexamining the evidence pursuant to the Fifth Circuit's guidance regarding discriminatory intent in *Veasey v. Abbott* (*Veasey II*).[187] Ultimately, after applying the factors outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[188] the district court's

181. *Id.* at 255.

182. *Id.*

183. *Id.* at 265.

184. *Id.* at 271. Twelve days after *Veasey I* was decided, the U.S. District Court for the District of North Dakota preliminarily enjoined enforcement of North Dakota's voter ID law due to its disproportionate impact on Native American voters. *See* Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *13 (D.N.D. Aug. 1, 2016). Just as in *Veasey I*, the court found to be dispositive the fact that North Dakota's law lacked a "fail-safe" for those voters who were not able to obtain an ID. *Id.* at *1. As an interim measure for the 2016 election, the court ordered the State to implement an affidavit option for these voters. *Id.* at *12–13. Following the election, in 2017, the North Dakota Legislature enacted HB 1369, which allows a voter who does not bring his ID to the polls to cast a provisional ballot, which is set aside until the voter presents valid identification. *See Voter Identification Requirements*, *supra* note 9.

185. During the Obama Administration, the United States also was a plaintiff against Texas. After the election, but before the district court made its renewed findings regarding discriminatory purpose, however, the new administration directed the Justice Department to withdraw the government's discriminatory purpose claim. On April 3, 2017, the district court granted this motion for voluntary dismissal. *See* Veasey v. Abbott, 248 F. Supp. 3d 833, 833 (S.D. Tex. 2017).

186. Veasey v. Abbott (*Veasey III*), No. 2:13-CV-193, 2017 WL 3620639, at *1 (S.D. Tex. Aug. 23, 2017).

187. 249 F. Supp. 3d 868, 871 (S.D. Tex. 2017).

188. 429 U.S. 252, 253 (1977) (stating that plaintiffs must demonstrate "racially discriminatory intent, as evidenced by such factors as disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers [sic]").

determination remained the same, as it placed heavy emphasis on the facts that (1) the Texas Legislature rejected a number of alternatives "that would have softened the racial impact of SB 14;" and (2) "extraordinary procedural tactics [were] used to rush SB 14 through the legislative process without the usual committee analysis, debate, and substantive consideration of amendments."[189] For these reasons, the court found that "discriminatory purpose was at least one of the substantial or motivating factors behind passage of SB 14" and that the State did not meet its burden of demonstrating "that the law would have been enacted without its discriminatory purpose."[190]

Following *Veasey II*, in June 2017, the Texas Legislature enacted remedial legislation (SB 5), which was intended to cure SB 14's alleged discriminatory effects.[191] SB 5 sought to accomplish this by, *inter alia*, creating a DRI procedure that allowed voters to explain why they did not and could not obtain a photo ID.[192] Because those executing the DRI lacked a qualifying photo ID, they would be allowed to prove their identity by showing a non-photo voter registration card.[193] Although, in light of SB 5, the *Veasey v. Abbott* (*Veasey III*)[194] district court allowed additional briefing regarding its remedy selection, on August 23, 2017 it not only permanently enjoined SB 14's photo ID requirements but also enjoined enforcement of SB 5.[195]

In that decision, the district court ruled that SB 5 was "an improvement over SB 14" but could not be used to "turn[] back the clock" and "purge[]" SB 14 of its discriminatory intent because SB 5 itself violated the VRA.[196] This holding that SB 5 "perpetuate[d] SB 14's discriminatory features" in violation of the VRA and U.S. Constitution was principally based on two grounds.[197] First, the court found that SB 5 did "not meaningfully expand the types of photo IDs that can qualify," even though it added United States passport cards in addition to passport books and enlarged the amount of time a qualifying ID may be expired from sixty days *to four years*.[198] Although SB 5 also permitted the use of free voter registration cards mailed to all registered voters, the court found that the mere fact that individuals using them were subject to a different procedure imposed an impermissible

189. *Veasey II*, 249 F. Supp. 3d at 873–74. Regarding the other *Arlington Heights* factors, the court found that SB 14's disparate impact, historical background, and legislative drafting history also were indicative of discriminatory intent. *Id.* at 873.
190. *Id.* at 872, 875–76.
191. *See Veasey III*, 2017 WL 3620639, at *2.
192. *Id.* at *7.
193. *Id.* at *6.
194. No. 2:13-CV-193, 2017 WL 3620639 (S.D. Tex. Aug. 23, 2017).
195. *Id.* at *12.
196. *Id.* at *2.
197. *Id.* at *12.
198. *Id.* at *6.

"disproportionate burden," *even though use of these cards would allow individuals to vote.*[199] Interestingly, the court also found that SB 5 discriminated against blacks and Latinos because for voters over seventy, it removed the limit on the amount of time their IDs may be expired. Although this provision was facially neutral and expanded the use of expired IDs, the court found it discriminatory because voters over seventy are "disproportionately white."[200]

Second, the court took issue with SB 5's DRI provision, which would have allowed individuals to vote upon showing the free voter registration card, if they did not have and could not reasonably obtain an SB 14 photo ID for one or more of seven reasons.[201] Even though Texas did not have a procedure for rejecting votes tendered via the DRI, this provision was problematic because it lacked a catch-all "other" category, which would have allowed voters to write in an alternative explanation as to why they did not have a qualifying ID.[202] Additionally, the district court did not believe the State needed to know the voters' reasons for failing to obtain a qualifying ID and likened this requirement to "voter intimidation."[203] For these reasons, the court permanently enjoined Texas's enforcement of SB 14 and SB 5 and even scheduled additional briefing on the question of whether Texas should be placed into preclearance under section 3 of the VRA.[204] The effect of this ruling, however, was short-lived, as less than two weeks later, the Fifth Circuit stayed *Veasey III*'s permanent injunction of SB 14 and SB 5 pending appeal.[205]

Nine days after the Fifth Circuit decided *Veasey I*, the Fourth Circuit permanently enjoined North Carolina's photo-voter ID law.[206] On the day after the Supreme Court decided *Shelby County*, North Carolina's Senate Rules Committee Chairman announced that the Senate would

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199. *Id.* at *10, *13. SB 5's provision for the use of free ID cards that are mailed to all voters is similar to this Article's proposal. *See infra* subpart IV.A. Although *Veasey III* found Texas's version to violate the VRA, for the reasons discussed below, this Article will argue why *Veasey III* was wrongfully decided and is likely to be overturned on appeal. *See infra* subpart IV.B.

200. *Id.* at *7.

201. *Id.* These seven reasons were (1) lack of transportation; (2) lack of birth certificate or other documents needed to obtain the prescribed identification; (3) work schedule; (4) lost or stolen ID; (5) disability or illness; (6) family responsibilities; and (7) the ID has been applied for but not received. *Id.*

202. *Id.* at *8–9. Unlike SB 5, the interim DRI approved by the district court prior to the 2016 election did contain this catch-all "other" category. *Id.* at *8.

203. *Id.* at *10. As discussed below, this Article argues that *Veasey III*'s finding that Texas's DRI is discriminatory also was likely incorrectly decided and will be overturned on appeal. *See infra* subpart IV.B.4.

204. *Id.* at *2, *13.

205. Veasey v. Abbott, 870 F.3d 387, 392 (5th Cir. 2017).

206. N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

be coming out with an "omnibus" voting rights bill.[207] In addition to shortening early voting and eliminating same-day registration, the omnibus bill also included a new photo-voter ID requirement, which passed along strict party lines.[208] Reversing the district court, the Fourth Circuit ruled that North Carolina's law targeted blacks "with almost surgical precision."[209] A critical part of the court's holding was the fact that, after the legislature requested data on the use, by race, of certain types of IDs, the law "retained only those types of photo ID disproportionately held by whites and excluded those disproportionately held by African Americans."[210] Furthermore, the Fourth Circuit faulted the legislature for having "rushed" the bill through the legislative process in just three days by not sending it to committee or allowing amendments.[211] For these reasons, in *North Carolina State Conference of NAACP v. McCrory*, the Fourth Circuit found that North Carolina passed the voter ID law with an impermissible discriminatory purpose and struck it down in its entirety as a violation of section 2 of the VRA.[212] Less than five months later, however, a separate Fourth Circuit panel made clear that *McCrory* was based on the unique background surrounding North Carolina's enactment, as well as the State's acceptance of only a limited class of photo IDs.[213]

In that case, *Lee v. Virginia State Board of Elections*, the Fourth Circuit affirmed a district court ruling upholding Virginia's voter ID law against VRA and constitutional challenges.[214] Enacted in 2013, Virginia's law (SB 1256) provides that all voters must present a photo ID at the polling place.[215] Those lacking a photo ID can vote by provisional ballot, which is subject to "cure" within three days after the election.[216] SB 1256 has a critical safe harbor provision that allows those lacking an acceptable photo ID to obtain one free of charge without any requirement that the voter present documentation.[217] With this framework in mind, the Fourth Circuit ruled that a complex § 2 discriminatory effects analysis was not necessary because there was no evidence any member of a protected class would not have an equal opportunity to participate in the political process.[218] Importantly, the court noted that just because certain voters face "disparate

207. *Id.* at 216.
208. *Id.* at 218.
209. *Id.* at 214.
210. *Id.* at 227.
211. *Id.* at 228.
212. *Id.* at 242.
213. Lee v. Va. State Board of Elections, 843 F.3d 592, 603–04 (4th Cir. 2016).
214. *Id.* at 594.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* at 600.

inconveniences" does not automatically mean there has been a denial or abridgment of the right to vote.[219] Applying this principle, the Fourth Circuit found that there was no evidence of any voters being denied their right to vote, noting that of the fourteen voter-witnesses who testified for the plaintiffs, five did in-fact vote, five others had the requisite IDs but failed to cure, and the remaining four could have obtained photo IDs but, for various reasons, failed to procure them.[220]

Regarding the discriminatory intent claim, the panel distinguished *McCrory*, highlighting the stark differences between the procedures employed by the Virginia and North Carolina legislatures. For instance, there was "robust debate" and no departure from normal legislative procedures,[221] a "complete dearth of statements by legislators indicating any sort of discriminatory intent,[222] and the Virginia General Assembly did not request data on the use, by race, of certain types of IDs.[223] Furthermore, SB 1256 attracted some support from across the aisle,[224] and the General Assembly "went out of its way to make its impact as burden-free as possible," allowing use of photo IDs disproportionately possessed by young people and blacks and even free photo IDs without the requirement of presenting documentation.[225] Finally, the record showed that there was some evidence of voter fraud[226] and that, following the bill's enactment, the Board of Elections launched a state-wide pre-election campaign to inform voters of SB 1256's requirements, which included public posting of some 500,000 posters and the mailing of 86,000 postcards to individuals identified as likely to lack a conforming ID.[227] For these reasons, the court found that the facts were "in no way" like those in *McCrory* and upheld Virginia's photo ID law.[228]

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As a result of these decisions, some states were left without any voter ID laws in effect to deter and prevent voter fraud for the 2012 and 2016 elections. These lawsuits also brought steep litigation costs, even for states that ultimately prevailed. For instance, prior to *Shelby County*,

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219. *Id.* at 600–01.
220. *Id.* at 596–97.
221. *Id.* at 602.
222. *Id.*
223. *Id.* at 604.
224. *Id.* at 603 (noting that one Democrat and one Independent voted for the measure).
225. *Id.* at 603–04.
226. *Id.* at 602.
227. *Id.* at 596.
228. *Id.* at 604, 608. Because Virginia's enactment imposed a lighter burden than Indiana's photo ID law, and the justifications advanced by the two states were the same, the Fourth Circuit held that, *a fortiori*, SB 1256 passed muster under *Crawford*. *Id.* at 606–07. The court also rejected plaintiffs' claim that the law discriminated against "young people" in violation of the Twenty-Sixth Amendment. *Id.* at 607.

South Carolina incurred $3.5 million in costs successfully obtaining preclearance[229] and Texas $2 million in unsuccessful preclearance litigation.[230] These results beg the question as to whether a more acceptable solution can be fashioned. The final Part of this Article, Part IV, will introduce a voter ID proposal that prevents both voter fraud and voter disenfranchisement by establishing an adequate safety net, the lack of which has proved fatal for some laws. After explaining why this solution is preferable, Part IV will then address counterarguments to the proposal.

IV. A PROPOSAL THAT SATISFIES BOTH SIDES' CONCERNS OVER VOTER ID LAWS

A. The Voter ID Proposal

Although photo IDs may be the best deterrent of voter fraud and are the preferred form of identification in many realms outside of the voting context,[231] costly litigation and the chance that courts may strike down these laws makes another solution more desirable. Indeed, courts have routinely held that laws need an adequate safety net to account for lack of availability of IDs, costs incurred when obtaining the IDs, or inability to procure underlying documents needed to obtain a photo ID.[232] This Article concludes by arguing that if states pay for and directly mail all registered voters a non-photo ID card, their laws should pass muster under the deferential *Crawford* standard, heightened state court standards, or the VRA. Under this Article's proposal (the "Proposal"), opponents' arguments against the laws should lose much of their force because voters would no longer have to travel,[233] navigate bureaucracies,[234] pay fees to obtain an ID,[235] or assemble underlying documents.[236] This Proposal would, therefore, provide an adequate

229. Adam Beam, *SC's Voter ID Lawsuit Cost $3.5 Million*, 12WRDW.COM (Jan. 8, 2013), http://www.wrdw.com/home/ headlines/SC-voter-ID-lawsuit-cost-state-more-than-35M-186081862.html [https://perma.cc/W3LN-THUR].

230. Victoria Pelham, *Cost of Legal Fight Over Voter ID, Redistricting Tops $2 Million*, DALLAS MORNING NEWS (Sept. 2012), http://www.dallasnews.com/news/state/headlines/20120905-cost-of-legal-fight-over-voter-id-redistricting-tops-2-million.ece [https://perma.cc/3723-WN5S].

231. *See* CARTER–BAKER REPORT, *supra* note 54, at 18 (discussing the fact that photo IDs "currently are needed to board a plane, enter federal buildings, and cash a check").

232. *See supra* Part III.

233. *See* Weinschenk v. State, 203 S.W.3d 201, 209 (Mo. 2006); Applewhite v. Commonwealth, No. 330-MD-2012, 2012 WL 4497211, at *14 (Pa. Commw. Ct. Oct. 2, 2012).

234. One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016); *Weinschenk*, 203 S.W.3d at 209.

235. Milwaukee Branch of the NAACP v. Walker, No. 11-CV-5492, 2012 WL 739553, at *4 (Wis. Cir. Mar. 6, 2012), *rev'd*, 851 N.W.2d 262 (Wis. 2014).

236. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 255 (5th Cir. 2016) (en banc).

safety net for those voters who are unable to obtain a photo ID through reasonable efforts. In addition to allaying critics' fears about disenfranchisement, this Proposal will adequately combat both in-person and absentee ballot fraud and increase voter confidence. After detailing the provisions of this Proposal below, this Article will then apply the provisions to each side's arguments to show how this common-sense compromise can satisfy their concerns.

1. Specifics of the Voter ID Proposal

Thirty days before the election, the State should mail to all registered voters a non-photo voter ID card.[237] Each card should list the voter's address and have a unique voter ID number, which will only be used for voting purposes. The card should also be accompanied by an informational pamphlet which explains electoral ID policies. Any voters who register outside of this window should be provided with their voter ID card at the time that they register. Voters showing up to the polls on Election Day would then be given three ways to prove their identification.

First, those voters with a valid photo ID can use that ID to establish their identity at the polls.[238] Second, those voters who lack a photo ID could prove their identity by showing their state-issued, non-photo voter ID card along with another corroborating document.[239] The second document could be a utility bill, bank statement, paycheck, or Medicare or Medicaid card.[240] Finally, those voters who forget their photo ID or two forms of non-photo ID will be allowed to vote by provisional ballot. In order to have their ballot counted, however, they must return to an election office within ten days and present the proper proof of identification.

In addition to applying to in-person voting, the Proposal would apply to absentee voting. Voters casting absentee ballots could prove

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237. Although this Article acknowledges that photo IDs are a better deterrent of fraud, states cannot mail voters a photo ID card unless the states have their photographs. Due to this practical concern, and because some courts discussed above have found the process of applying for a photo ID to be unduly burdensome on voters, this Article argues for a non-photo ID card.

238. As discussed above, close to 90 percent of the voting age population has a photo ID and will likely choose this option. *See* BRENNAN CENTER FOR JUSTICE, *supra* note 107, at 3.

239. The Ninth Circuit, sitting en banc, has confirmed that requiring voters to produce a second corroborating non-photo ID does not violate the VRA. That court upheld Arizona's voter ID law, which, as a safety net, allowed voters to prove their identity by showing two non-photo IDs. *See* Gonzalez v. Arizona, 677 F.3d 383, 404-07 (9th Cir. 2012) (en banc) (finding that the Arizona voter ID law, ARIZ. REV. STAT. ANN. § 16-579(A) (2005), did not have a disparate impact on Latinos).

240. The requirement that voters show an additional form of non-photo ID along with the state-issued card is an additional safeguard against fraud. The reasons for this requirement will be expanded below. *See infra* subpart IV.A.2.

their identities through one of two options. Those with a photo ID could simply make a photocopy of their ID and mail in the copy with their absentee ballot. Those lacking a photo ID or means of making a copy could follow a similar two-step process in order to prove their identification with their state-issued, non-photo IDs. First, absentee ballots would have a line on which to write the unique voter ID number found on the state-issued card. After filling in their unique ID number, voters would also be required to mail in an old utility bill, bank statement, or paystub. This second document would be a way to corroborate identity. Application of the Proposal to absentee balloting is critical because, as discussed above, even courts that have struck down photo ID laws acknowledge that absentee fraud is a "significant threat."[241]

2. This Proposal Adequately Addresses the Three Interests Advanced by Proponents of Voter ID Laws

This Proposal can gain the support of voter ID proponents because it can detect and deter in-person voter fraud. As discussed above in subpart II.A.1, this type of fraud can take on many forms, such as people casting ballots in the name of dead voters who remain on voter rolls, people impersonating living voters by casting multiple ballots, and people voting where they are not registered.[242] Because voters would be required to show ID at the polls, this Proposal can prevent these instances of voter fraud.

The unique voter ID number, which must match the number listed on the poll worker's registry, is critical to preventing fraud because it prevents impersonators from forging fake cards. If the cards had only voters' names and addresses on them, one could easily replicate the cards and use them on Election Day. Additionally, the requirement that these voters present a second corroborating document serves as an additional safeguard against fraud. If only a state-issued, non-photo ID card were required at the polls, someone could steal this card and impersonate a voter. By requiring a second form of ID, however, the Proposal makes it more difficult to steal a voter's identity, as it is harder to steal two forms of ID rather than just one.

Despite the fact that absentee fraud is more prevalent than in-person fraud,[243] many current voter ID laws do not apply to absentee voters.[244] By covering absentee voting, the Proposal therefore is a better deterrent than many presently enacted laws. Finally, because this Proposal can adequately prevent both in-person and absentee fraud, it

241. *E.g.*, *Veasey I*, 830 F.3d at 256.
242. *See supra* notes 64–68 and accompanying text.
243. *See* Schaffer & Wang, *supra* note 44, at 407.
244. *See id.*

can also increase the confidence of both the 40 percent of Americans who do not believe votes are "accurately cast and counted" and the 54 percent of voters who believe there is fraud in American elections.[245] Due to this newly instilled confidence in the electoral process, honest voters previously driven out of the democratic process will have reason to return and be encouraged to participate.[246]

3. This Proposal Adequately Addresses the Concerns Raised by Opponents of Voter ID Laws

As discussed earlier, opponents of voter ID laws have argued, and some federal circuits and state courts have agreed, that voter ID laws will cause the disenfranchisement of poor, elderly, and minority voters.[247] The Proposal, however, can adequately address their worries about disenfranchisement. Their first principle objection is that the laws impose an unconstitutional poll tax on voters.[248] Under the Proposal, however, voters do not have to pay for IDs or other supporting documents, such as birth certificates.[249] Because individual states will incur the costs associated with this Proposal, voters will not be hit with the indirect poll tax to which some state courts have likened other laws.[250]

Secondly, opponents have argued that the lack of availability of IDs and the struggle voters have in obtaining them imposes an unconstitutional burden on voters.[251] The Proposal, however, appropriately responds to their concerns because, as all registered voters will be mailed an ID, there will not be a lack of available IDs, such as with the Pennsylvania law in *Applewhite* and the North Dakota law in *Brakebill.*[252] Also, because all voters have to do is check their mail to get their ID,[253] they will not have to "navigat[e] state and/or federal

245. *See supra* notes 93–94 and accompanying text.

246. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."); Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) ("Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.").

247. *See supra* subpart II.B.1.

248. *See supra* notes 114–15 and accompanying text.

249. *See supra* subpart IV.A.1.

250. *See, e.g.*, Milwaukee Branch of the NAACP v. Walker, No. 11-CV-5492, 2012 WL 739553, at *4 (Wis. Cir. Mar. 6, 2012), *rev'd*, 851 N.W.2d 262 (Wis. 2014).

251. *See* Weinschenk v. State, 203 S.W.3d 201, 212–13 (Mo. 2006); Applewhite v. Commonwealth, No. 330-MD-2012, 2012 WL 4497211, at *2, *8 (Pa. Commw. Ct. Oct. 2, 2012).

252. Brakebill v. Jaeger, No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016); *Applewhite*, 2012 WL 4497211, at *2, *8.

253. Indeed, it is not unheard of for the government to prescribe an acceptable form of identification with a unique identification number, mail that ID to certain individuals, and then expect them to use it as part of a government-run program. For example, in

bureaucracies, and travel to and from . . . government agencies," such as Missouri voters in *Weinschenk v. State*.[254] Moreover, the Proposal's provisional ballot safe harbor provides an adequate safety net for those voters who forget to bring their IDs to the polls.[255]

Because this Proposal addresses opponents' disenfranchisement concerns, it also will blunt their criticism that this Proposal could be used as a partisan Republican ploy. As all registered voters, whether Democrat, Republican, or Independent, would receive IDs free of charge,[256] this Proposal should allay critics' fears that Democrats will be disproportionately affected. In this way, just as the Proposal satisfies proponents' concerns about fraud,[257] it also satisfies opponents' disenfranchisement concerns. With their issues addressed, this Article concludes by parrying counterarguments and explaining why this Proposal is superior.

B. Counterarguments to this Article's Voter ID Proposal

1. The Costs of Producing and Mailing Voter ID Cards Are Too High for States

One potential critique that both sides could raise is that this Proposal is too costly for states battling with budget problems. This critique is undermined by the fact that when Virginia opted to mail voters a voter ID card in 2012, it cost only $1.3 million.[258] This cost paled in comparison to Virginia's two-year budget of $85 billion.[259] This

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2015, Congress enacted a law that directs the Centers for Medicare & Medicaid Services to establish new Medicare identification numbers and cards for all Medicare enrollees. These new cards are to be mailed to all enrollees by April 2019. *See* Donald Kreis, *New Medicare Card Not to Contain Social Security Numbers*, MEDICARE.COM (May 15, 2017), https://medicare.com/administration/new-medicare-card-not-to-contain-social-security-numbers/ [https://perma.cc/3UZK-XSLX].

254. 203 S.W.3d 201, 208 (Mo. 2006). In *Weinschenk*, the Missouri Supreme Court found that Missouri's photo ID law, SB 1014, violated the Missouri Constitution, which "provides a specific provision that enshrines the right to vote among certain enumerated constitutional rights of its citizens." *Id.* at 221 (citing MO. CONST. art. I, § 25). Passed in 2006, SB 1014's photo ID requirements would have amended Missouri's less stringent "non-strict non-photo ID" law. *See id.* at 204–05; *Voter ID History*, *supra* note 34. To this day, Missouri has a "non-strict non-photo ID" law. *See Voter Identification Requirements*, *supra* note 9.

255. *See supra* subpart IV.A.1.

256. *See supra* subpart IV.A.1.

257. *See supra* subpart IV.A.2.

258. *See Gov. Bob McDonnell Orders New Voter Cards to Every Virginia Voter*, *supra* note 123. Ten months after enacting this legislation, which provided for the mailing of non-photo ID cards to all registered voters, Virginia adopted a new photo ID-only law, which has since been upheld by the Fourth Circuit. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 594 (4th Cir. 2016).

259. *See* Lisa Lambert, *Virginia Legislature Approves $85 Billion Budget*, REUTERS (Apr. 18, 2012), http://www.reuters.com/article/ 2012/04/18/us-virginia-budget-idUSBRE83H1HC20120418 [https://perma.cc/F5AS-WA32]. As Virginia's budget is for

argument, moreover, ignores the costs of litigation that result for the parties both challenging and defending the laws. The $1.3 million Virginia spent producing and mailing out IDs is much less than both the $3.5 million and $2 million in preclearance litigation fees that South Carolina and Texas respectively incurred.[260] As the Proposal reduces disenfranchisement fears, there will likely be less litigation costs associated with it. Additionally, states often have to incur outreach and education costs to inform voters that they need to get photo IDs if they do not already have them.[261] The Proposal, however, kills two birds with one stone because it recommends that informational pamphlets be mailed to voters with their non-photo voter ID card. This pamphlet should mitigate the need for other less direct, and costlier, methods of advertising.

2. Photo IDs Are Still a Better Deterrent of Voter Fraud

Some proponents of photo-voter ID laws may be hesitant to compromise because they believe that photo IDs better prevent and detect voter fraud. For instance, if someone steals another voter's driver's license, then the photo ID law still protects the integrity of the ballot box because the photo will not match the person now holding the license. On the other hand, if someone steals a voter's state issued, non-photo ID, fraud can still occur. This is because the number on the non-photo ID card will still match the number on file with election officials. Three responses limit this argument's force.

First, this Proposal still accepts photo IDs at the polls to prove identification.[262] Because close to 90 percent of the electorate already have a photo ID,[263] proponents of photo ID laws can be assured that the Proposal will still cover the vast majority of the electorate. Secondly, although a photo ID law may be better at catching fraud, the Proposal's requirement of a second corroborating document makes this Proposal stronger than a normal non-photo ID law.[264] The requirement of two forms of non-photo ID makes it less likely that someone can steal these IDs and use them for fraud. Finally, even if a state enacted a photo ID law instead of this Proposal, there is no guarantee courts would uphold the photo ID law. As discussed in Part III, a number of courts have

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two years, the exact percentage the $1.3 million comprises of the annual budget is unknown. Assuming $42.5 billion for both years, however, the cost of creating and mailing the voter IDs amounts to about only .0000306 percent of all yearly expenses.

260. *See supra* notes 229–30 and accompanying text.

261. *See* Applewhite v. Commonwealth, No. 330-MD-2012, 2012 WL 4497211, at *2, *8 (Pa. Commw. Ct. Oct. 2, 2012).

262. *See supra* subpart IV.A.1.

263. *See* BRENNAN CENTER FOR JUSTICE, *supra* note 107, at 3.

264. *Compare supra* subpart IV.A.2 (explaining why this Proposal requires a second corroborating document), *with Voter Identification Requirements*, *supra* note 9 (describing the usual requirements of non-photo ID laws).

recently voided photo ID laws on VRA or state constitutional grounds.[265] Having any system in place to prevent fraud is better than having no system.

3. There Should Be a Uniform, National Voter ID System

An additional critique is that instead of fifty different states mailing out fifty different ID cards, the federal government should control the voter ID system. Advocates of this position often cite Mexico's successfully implemented system.[266] Mexico created the national Federal Electoral Institute, which requires potential voters to come to local branches to register to vote.[267] Under this system, after the applicant establishes his identity and has his picture taken, he can return within twenty days to pick up his ID.[268] The main advantage of this system is that a national voter ID card, rather than a state ID card, "would end the confusion about what document is acceptable" for voting purposes.[269] Another advantage of a national voter ID card is that it would be applicable in different states if a voter moved.

Although the national solution has its advantages, it is simply not a practical, viable option in the United States. First, this has already been proposed and rejected in Congress.[270] Richard Hasen, a proponent of a national voter ID card, lobbied for this solution but was rejected by both sides of the aisle.[271] Secondly, although citizens in Mexico may be eager to obtain national voter ID cards,[272] such is not likely to be the case in the United States due to privacy concerns. As Debra Millberg notes, any time "national personally identifiable information is warehoused in matching database . . . the possibility for abuse and security breach grows exponentially."[273] Because of this fear, proposals to use social security and health care cards as national identification cards have been repeatedly rejected.[274] As this Proposal only involves storing information at the state level,[275] there will be fewer opportunities for privacy abuse. Moreover, because the unique voter ID

265. *See supra* Part III.

266. *See, e.g.*, George W. Grayson, *Registering and Identifying Voters: What the United States Can Learn from Mexico*, 3 ELECTION L.J. 513 (2004); Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584 (2004).

267. *See* Grayson, *supra* note 266, at 516.

268. *Id.*

269. *Id.* at 519.

270. *See* RICHARD HASEN, THE VOTING WARS 200 (2012).

271. *See id.* (explaining that Republicans oppose a national plan out of federalism concerns while Democrats oppose it out of general opposition to voter ID cards).

272. *See* Grayson, *supra* note 266, at 516.

273. Debra Millberg, *The National Identification Debate: "REAL ID" and Voter Identification*, 3 I/S: J. L. & POL'Y FOR INFO. SOC'Y 443, 443 (2008).

274. *Id.* at 446–48.

275. *See supra* subpart IV.A.1.

number will be used only for voting purposes, it cannot unlock important personal information should it fall into the wrong hands, unlike a social security number.

4. *Veasey III* Already Rejected a Law Similar to this Article's Proposal

A final counterargument against the Proposal arose with the U.S. District Court for the Southern District of Texas's *Veasey III* ruling permanently enjoining SB 5, the remedial legislation the Texas Legislature enacted in June 2017 to cure the discriminatory effects of SB 14. As discussed above, SB 5 sought to implement a procedure similar to the Proposal in that it permitted the use of a free non-photo voter registration card if a voter lacked a qualifying photo ID.[276] Because the court enjoined the law despite this safety net, critics of the Proposal can now argue that there is case law establishing that the Proposal would not stand muster under the VRA and U.S. Constitution. This argument must fail for a number of reasons. Although, to this point, this Article has employed a mainly descriptive approach to the cases it has discussed, to counter this final argument against the Proposal, this Article will argue why *Veasey III* was wrongfully decided, both procedurally and on the merits, and why it is likely to be overturned on appeal.

First, as a procedural matter, the district court lacked jurisdiction to enjoin SB 5, and any remedy it fashioned should have related solely to SB 14. As the Fifth Circuit made clear, on remand the district court was supposed to reexamine the evidence pertaining to discriminatory purpose, but the *scope* of its mandate on remand was limited to considering "the effect any interim legislative action taken with respect to SB 14 may have."[277] Indeed, the Fifth Circuit noted that "any new law would present a new circumstance not addressed here" and that any "concerns about a new bill would be the subject of a new appeal for another day."[278] Surprisingly, the district court acknowledged that it only should have considered SB 5 in relation to any remedial effect it had on SB 14 and that it "would be premature to try to evaluate SB 5 as the existing voter ID law in Texas *because there is no pending claim to that effect before the Court.*"[279] Despite this feigned judicial restraint, the district court then proceeded to enjoin SB 5. The court's likely lack of

276. Veasey v. Abbott (*Veasey III*), No. 2:13-CV-193, 2017 WL 3620639, at *6 (S.D. Tex. Aug. 23, 2017).

277. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 272 (5th Cir. 2016) (en banc).

278. *Id.* at 271.

279. *Veasey III*, 2017 WL 3620639, at *5 n.9 (emphasis added).

jurisdiction to do so has since been confirmed by the Fifth Circuit panel that stayed *Veasey III*'s injunction pending appeal.[280]

Putting aside the fact that the district court lacked jurisdiction to enjoin SB 5, *Veasey III*'s determination that SB 5 failed to fully remediate SB 14's discriminatory effects also was incorrect and will likely be overturned on appeal. Simply put, *Veasey III* not only overlooked persuasive case law from other circuits, but its holding also rests upon a logical flaw. This finding is flawed because it ignored the reason the legislature enacted SB 5 in the first place. Namely, SB 5 was enacted to establish a safety net for those voters who lacked a qualifying photo ID. As noted above, the Fifth Circuit credited the finding that 608,470 Texans, or 4.5 percent of registered voters, lacked a photo ID.[281] For this express reason, it invited the Texas Legislature to enact a "legislative fix" that would "ameliorate" SB 14's effects.[282] This fix took the form of SB 5, which the district court acknowledged allowed those who lack a photo ID to vote, after executing a DRI, by showing a free voter registration card that was mailed to them.[283]

Turning logic on its head, however, the district court found that this fail-safe procedure violated the VRA because it subjected "those who lack SB 14 photo ID . . . to separate voting obstacles and procedures," and therefore, its "methodology remains discriminatory because it imposes burdens disproportionately on Blacks and Latinos."[284] Properly distilled, the district court's reasoning can be explained as follows: (1) SB 14 requires voters to present a photo ID; (2) 4.5 percent of registered voters lack a photo ID; (3) SB 5 created a procedure that allowed this 4.5 percent to vote without a photo ID; and (4) *because* SB 5 creates a separate procedure *to allow this 4.5 percent to vote*, it is discriminatory. This cannot possibly be the standard under which to analyze VRA claims regarding photo ID laws and their safety net provisions. Were this the standard, and were it followed to its logical conclusion, this would mean that *no* photo ID law could ever be permissible because any time less than 100 percent of a jurisdiction's voters had a photo ID, *any* safety net would automatically be void because, *by its very definition*, it would subject voters to, as *Veasey III* framed it, "separate voting obstacles and procedures."[285]

Indeed, the U.S. Courts of Appeals for the Fourth and Seventh Circuits have already rejected *Veasey III*'s reasoning. The Fourth Circuit has noted that § 2 is not categorically violated anytime "there is disparity in the rates at which different groups possess acceptable

280. Veasey v. Abbott, 870 F.3d 387, 390 n.2 (5th Cir. 2017).
281. *Veasey I*, 830 F.3d at 250.
282. *Id.* at 271.
283. *Veasey III*, 2017 WL 3620639, at *6.
284. *Id.*
285. *Id.*

identification."[286] That court further characterized the type of reasoning employed in *Veasey III* as "an unjustified leap from *the disparate inconveniences* that voters face when voting to *the denial or abridgment of the right to vote.*"[287] Likewise, the Seventh Circuit noted in *Frank* that a "disparate outcome" does not show a "denial" of the right to vote.[288]

To be sure, *Lee* and *Frank* constitute only persuasive authority on the Southern District of Texas, but it bears noting that *Veasey III* appears to have been selective in its application of non-Fifth Circuit case law, as it heavily relied upon *McCrory* to support its holding.[289] Notably absent from *Veasey III* was any reference to, let alone any attempt to distinguish, *Lee* or *Frank*.[290] Had the district court considered these cases, it would have been apparent that its pronouncement that SB 5 was void merely because "it imposed burdens disproportionately on Blacks and Latinos" only gets it halfway there, as a disparate burden is not a categorical denial or abridgment of the right to vote.[291]

Veasey III also ignored persuasive case law regarding the propriety of Texas's affidavit safety net for voters lacking a photo ID: the Declaration of Reasonable Impediment. As discussed above, SB 5's DRI would have provided voters with an exhaustive list of seven reasons to explain why they were not able to procure a qualifying photo ID: (1) lack of transportation; (2) lack of birth certificate or other documents needed to obtain the prescribed identification; (3) work schedule; (4) lost or stolen ID; (5) disability or illness; (6) family responsibilities; and (7) the ID has been applied for but not received.[292] Despite the extensive nature of this list, the district court still found it to be discriminatory because it did not contain a catch-all "other" option, which would have allowed voters to write in any reason of their liking.[293] Requiring Texas to allow voters to use the DRI for any reason whatsoever, however, ignores persuasive case law from the U.S. Court of Appeals for the Seventh Circuit.[294]

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286. Lee v. Va. State Bd. of Elections, 843 F.3d 592, 600 (4th Cir. 2016).

287. *Id.* at 600–01.

288. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

289. *See Veasey III*, 2017 WL 3620639, at *5, *10, *12, *13 (citing six times to N.C. State Conference of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017)).

290. *See generally id.*

291. *See Lee*, 843 F.3d at 600–01; *Frank*, 768 F.3d at 753 ("Section 2(b) tells us that § 2(a) does not condemn a voting practice just because it has a disparate effect on minorities.").

292. *Veasey III*, 2017 WL 3620639, at *7.

293. *Id.* at *8.

294. *See* Frank v. Walker, 891 F.3d 384 (7th Cir. 2016) [hereinafter *Frank VII*] (remanding to district court to consider equal protection clause claim); Frank v. Walker, 196 F. Supp. 3d 893, 919–20 (E.D. Wisc. 2016) [hereinafter *Frank VIII*] (granting plaintiff's motion for preliminary injunction seeking an order requiring the state to offer

In *Frank v. Walker*, which like *Lee* went uncited by *Veasey III*, the Seventh Circuit ruled that any Wisconsin voter unable to obtain a photo ID through *reasonable efforts* was entitled to an accommodation.[295] On remand, however, the Eastern District of Wisconsin adopted an affidavit accommodation that would have allowed voters to write in *any* reason, which could not be challenged by the State.[296] Voters would have been permitted to use this option even if (1) they never tried to obtain a photo ID; (2) by objective standards the effort needed would be reasonable and would succeed; and (3) the voter thought spending a single minute to obtain a qualifying photo ID was not reasonable.[297] The Seventh Circuit stayed this holding, noting that it was "likely to be reversed on appeal" because the district court should have attempted to distinguish "genuine difficulties" faced by voters "from any given voter's unwillingness to make the effort" to obtain a photo ID.[298] *Frank*'s holding, thus, is in accord with *Lee*, which held that the VRA was not violated where voters did not vote because they either failed to make an effort to obtain a photo ID or failed to cure their provisional ballot.[299]

With *Frank* and *Lee*'s reasoning in mind, it is clear that *Veasey III*'s holding that SB 5 did not fully cure SB 14's discriminatory effects by failure to include an "other option" stands on shaky grounds. That is because the seven reasons provided by SB 5 can be objectively characterized as "genuine difficulties," whereas *Veasey III*'s allowance of the write-in option would permit voters to use the DRI for any subjective difficulty. Indeed, the *Veasey* record shows this much. Although SB 5 did not include the "other option," this option was present on the interim DRI used during the 2016 election, and nineteen voters abused it by writing in a protest against SB 14. But, as *Frank* noted, a "given voter's disagreement with this approach does not show that requiring [it] is unreasonable."[300]

To be sure, during the 2016 election, there were voters who did not abuse the "other option" as a protest vote but instead attempted to properly use this option. The district court listed these eight voters' reasons, which it classified as "reasonable excuses."[301] However, by finding that the "other option" was needed to allow these eight individuals to vote, the court again erred. That is because although the

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voters who do not possess an ID and who cannot obtain one with reasonable effort the option of receiving a ballot by executing an affidavit to that effect), *stayed by*, Frank v. Walker, 2016 WL 4224616 (7th Cir. Aug. 10, 2016) [hereinafter *Frank IX*].

295. *Frank VII*, 819 F.3d at 386.

296. *See Frank VIII*, 196 F. Supp. 3d at 919–20.

297. *Frank IX*, 2016 WL 4224616, at *1.

298. *Id.*

299. *See* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 596–97 (4th Cir. 2016).

300. *Frank IX*, 2016 WL 4224616, at *1.

301. Veasey v. Abbott (*Veasey III*), No. 2:13-CV-193, 2017 WL 3620639, at *8 n.14 (S.D. Tex. Aug. 23, 2017).

court viewed the eight explanations as "reasonable excuses," none of these excuses shows that the voters could not have procured SB 14-compliant IDs through "reasonable efforts" or otherwise would have been denied the ability to vote.

Four of these voters listed similar excuses: (1) "just moved to Texas;" (2) "just became a resident of Texas and don't drive in Texas;" (3) just moved to Texas, haven't gotten license yet;" and (4) "out of state college student."[302] These voters all apparently took the time to register to vote in Texas before the election,[303] but they simply choose not to take the time to procure an SB 14 ID. They, therefore, can be classified as those who were, in the words of *Frank*, "unwilling[] to make the effort."[304] Three voters listed other similar excuses: (1) "financial hardship;" (2) "unable to afford Texas Driver's License;" and (3) "lack of funds."[305] None of these excuses, however, shows that they could not have procured an SB 14-compliant ID through "reasonable efforts," because, in 2015, the Texas Legislature eliminated the "$2 or $3 fee for a certified copy of a birth certificate."[306] With a certified copy of a birth certificate, voters can obtain an Election Identification Certificate, which qualifies as an SB 14 ID.[307] Therefore, because voters face no fee in obtaining an SB 14-compliant ID, nothing shows that these three voters could not have obtained a qualifying ID through reasonable efforts.[308]

The excuse listed by the eighth voter also does not show an inability to vote: "attempted to get Texas EIC but they wanted a long form birth certificate."[309] There was simply no reason this voter needed to use the "other option," as Texas's DRI already provides the following option: "lack of birth certificate or other documents needed to obtain the prescribed identification."[310] As this review makes clear, seven of these voters whom the district court considered to have "reasonable excuses" could have obtained a qualifying ID had they used what *Frank* termed "reasonable efforts," and SB 5 would permit the eighth to vote.

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302. *Id.*

303. Texas does not allow same-day registration, so any claim that these voters may have registered at the polls, only to learn that they needed a photo ID, must be rejected. *See Same Day Voter Registration,* NAT'L CONF. OF ST. LEGIS. (Sept. 9, 2017), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx [https://perma.cc/BHD4-H6ZT].

304. *Frank IX*, 2016 WL 4224616, at *1.

305. *Veasey III*, 2017 WL 3620639, at *8 n.14.

306. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 226 (5th Cir. 2016) (en banc) (discussing Senate Bill 983).

307. *Id.* at 225–26.

308. This Article's reasoning on this point is bolstered by the Fifth Circuit's ruling that both before and after the passage of Senate Bill 983, SB 14 did not constitute a poll tax. *See id.* at 265–67.

309. *Veasey III*, 2017 WL 3620639, at *8 n.14.

310. *Id.* at *7.

Although *Frank*, like *Lee*, is not binding on the Southern District of Texas, *Veasey III* failed to acknowledge that the Fifth Circuit expressly relied on *Frank* for the proposition that the interim remedy for the 2016 election needed to accommodate only those voters who were "unable to *reasonably* obtain such identification."[311] If the *interim* remedy only required a safety net for those unable to obtain an SB 14 ID through reasonable efforts, there is no reason to believe the Fifth Circuit would require a different standard for the *permanent* remedy the legislature enacted through SB 5.[312] For this reason, there is no evidence that SB 5 would deny or abridge the right to vote on account of race or color. As SB 5 would allow all voters who cannot obtain a qualifying ID through reasonable efforts to vote, it fully remediates SB 14's discriminatory effects. Therefore, neither law should have been enjoined.

An additional infirmity is *Veasey III*'s broad ruling that, even if the State had included the "other option," the district court still would have invalidated SB 5 because there is "no legitimate reason" why voters needed to explain their impediments under penalty of perjury.[313] The district court even classified this requirement as an "effort[] at voter intimidation."[314] It is not surprising that the district court did not cite any case law for this proposition *because such a requirement is the norm in jurisdictions that have an affidavit safety net.*[315] Moreover, even a cursory attempt to think of "legitimate reasons" for this requirement shows why the State has an interest in this information. Namely, if the State knows exactly which voters lack a photo ID, *it can then reach out to them in an effort to provide them with photo IDs.* Furthermore, such information provides the State with data should it wish to amend procedures to make photo IDs more readily available. For instance, if many voters "lack transportation," the State can increase the number of free mobile units, which SB 5 already authorized but *Veasey III* found "were too few and far-between."[316] Likewise, if many voters list "work schedule" as their impediment, the State might be inclined to establish alternative hours of operation for facilities authorized to issue photo IDs. Finally, if many voters list "ID has been applied for, but not received," the State will know that there may be a problem with its procedures and then

311. *Veasey I*, 830 F.3d at 271 (emphasis added).

312. Indeed, in its opinion staying *Veasey III*'s permanent injunction of SB 14 and SB 5, the Fifth Circuit noted that SB 5 likely passes statutory and constitutional muster because it would have allowed each of the twenty-seven voters the plaintiffs identified to support their discriminatory effects claim to vote. *See* Veasey v. Abbott, 870 F.3d 387, 391–92 (5th Cir. 2017).

313. *Veasey III*, 2017 WL 3620639, at *9.

314. *Id.* at *10.

315. *See, e.g.*, South Carolina v. United States, 898 F. Supp. 2d 30, 40–41 (D.D.C. 2012).

316. *Veasey III*, 2017 WL 3620639, at *7.

attempt to fix that problem. Therefore, far from constituting an effort at voter intimidation, requiring voters to provide their impediment can go a long way to providing all Texans with a qualifying photo ID.

For these reasons, there are numerous flaws in *Veasey III*'s remedy decision to permanently enjoin both SB 14 and SB 5. As a procedural matter, the district court lacked jurisdiction to enjoin SB 5. Furthermore, its decision to permanently enjoin SB 14 is likely to be reversed because, by failing to consider persuasive case law from other circuits, it erroneously ruled that SB 5 did not fully remediate SB 14's discriminatory effects. For this reason, it cannot be said that SB 5 was passed with discriminatory intent or that it has discriminatory effects, so any future challenge to SB 5 will be futile. *Veasey III*, therefore, does not pose a convincing reason to reject the Proposal.

* * *

Veasey III was the only decision to directly address SB 5's provision for mailing all registered voters a free ID card. Thus, for this Article to counter the final argument against the Proposal, it need only demonstrate why *Veasey III* was wrongly decided. Be that as it may, it is also this Article's position that the district court's *Veasey II* decision that SB 14 was enacted with discriminatory intent was wrongly decided. Judge Clement has adequately explained why a proper review of the record shows that discriminatory purpose was not a substantial or motivating factor behind the Texas Legislature's passage of SB 14,[317] and this Article need not repeat that analysis here. However, even assuming, *arguendo*, that discriminatory purpose was a motivating factor, *Veasey II* was still wrongfully decided because the district court did not fully complete the *Arlington Heights* analysis.

The district court correctly acknowledged that after a plaintiff establishes "a discriminatory purpose was at least one of the substantial or motivating factors behind" a law's passage, then the burden shifts "to the State to demonstrate that the law would have been enacted without its discriminatory purpose."[318] The court, however, made no meaningful attempt to analyze Texas's justifications for SB 14, because, after citing the standard in its ten-page opinion, it devoted *literally seven words* to this analysis: "The State has not met its burden."[319] Such an "analysis" completely ignores the Fifth Circuit's acknowledgment that:

> *Clearly*, the Legislature wished to reduce the risk of in-person voter fraud by *strengthening* the forms of identification presented for voting. Simply reverting to the system in place before SB 14's passage would not

317. Veasey v. Abbott (*Veasey I*), 830 F.3d 216, 322–26 (5th Cir. 2016) (en banc) (Clement, J., dissenting).

318. *See* Veasey v. Abbott (*Veasey II*), 249 F. Supp. 3d 868, 875 (S.D. Tex. 2017) (citing Hunter v. Underwood, 471 U.S. 222, 228 (1985)).

319. *Id.*

> fully respect these policy choices—it would allow voters to cast ballots after presenting *less secure forms of identification* like utility bills, bank statements, or paychecks.[320]

This failure to even attempt to analyze Texas's proffer that it still would have enacted SB 14 regardless of the alleged discriminatory factor, especially in light of the Fifth Circuit's acknowledgement that SB 14 was making the voting process more secure, is enough to render the district court's discriminatory purpose holding susceptible to reversal on appeal. Should *Veasey II* be reversed, *Veasey III* would be vacated, and there would no longer be any case law suggesting that the Proposal would not pass muster under the VRA.

CONCLUSION

Voter ID laws have become and are likely to remain an important topic in legislatures and courts in the coming years. Despite little success in winning over Democrats to their cause and recent defeats in court, Republicans continue to believe that photo-voter IDs are needed to protect the integrity of our electoral system. They argue this requirement is needed to prevent and detect voter fraud both at the polls and in absentee ballots. Additionally, they claim voter ID laws are needed to restore voter confidence in our voting system. Although most citizens have photo IDs and many courts have upheld these laws, opponents still argue the laws are a partisan tactic to disenfranchise Democratic voters.

This debate has led to lengthy, costly litigation over the constitutionality of these laws. State courts in Pennsylvania and Wisconsin have reached opposite results when reviewing similar voter ID laws under their state constitutions. More recently, photo-voter ID laws from Texas, North Carolina, and Virginia experienced different fates in Fourth and Fifth Circuit litigation brought on Voting Rights Act grounds. The results of this litigation show that a better way forward is needed.

This Article's proposal directly takes on and solves these courts' availability and cost concerns. If states adopt this Article's proposal and directly mail, cost free, voter ID cards to all registered voters, all potential voters will then have the requisite ID for Election Day. Such a system could eliminate concerns about disenfranchisement while still preventing voter fraud. Furthermore, this Proposal would provide the adequate safety net that some courts have found lacking in voided laws. This common-sense, compromise solution could also save State resources by lessening reasons to litigate over the laws. This Article's

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320. *Veasey I*, 830 F.3d at 271 (emphasis added) (citing TEX. ELEC. CODE ANN. § 63.001(b) (West 2010)).

proposal would, therefore, give both sides what they want while making the process easier for citizens on Election Day.

THE FREE SPEECH VERNACULAR: CONCEPTUAL CONFUSIONS IN THE WAY WE SPEAK ABOUT SPEECH

TARA SMITH*

INTRODUCTION

In debates over the proper boundaries of freedom of speech, we are naturally alert to the meanings of pivotal concepts, such as "offensive"[1] speech or "hate"[2] speech. We argue over what constitutes "incitement"[3] or "group libel."[4] Alongside such contested concepts, however, stand peripheral terms whose misuse can be every bit as influential but whose ramifications go unnoticed. I have in mind such terms as "absolute"[5] and

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1. *See, e.g.*, *Offensive*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "offensive" as "causing displeasure, anger, or resentment; esp., repugnant to the prevailing sense of what is decent or moral"); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) ("The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight." (citation omitted)).

2. *See, e.g.*, *Speech*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "hate speech" as "[s]peech that carries no meaning other than the expression of hatred for some group, such as a particular race, esp. in circumstances in which the communication is likely to provoke violence"); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 380–81 (1992) (invalidating a "hate speech" ordinance that banned speech and actions "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as unconstitutionally overbroad(citation omitted)).

3. *See, e.g.*, *Incitement*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "incitement" as "[t]he act or instance of provoking, urging on, or stirring up . . . [or t]he act of persuading another person to commit a crime"); *see also* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (finding that Ohio's criminal syndicalism statute was unconstitutional because it criminally punished speech that was not "directed to inciting or producing imminent lawless action [nor] likely to incite or produce such action").

4. *See, e.g.*, *Libel*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "group libel" as "[l]ibel that defames a class of persons, esp. because of their race, sex, national origin, religious belief, or the like"); *see also* Beauharnais v. Illinois, 343 U.S. 250, 251 (1952) (finding that the Constitution does not prohibit a state from passing a group libel statute penalizing publication of any lithograph which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" or which exposes them to "contempt, derision, or obloquy, or which is productive of breach of the peace or riots").

5. *See, e.g.*, *Absolute*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "absolute" as: (1) "[f]ree from restriction, qualification, or condition"; (2) "[c]onclusive and not liable to revision"; or (3) "[u]nrestrained in the exercise of governmental power"); *see also In re* Liquidation of Integrity Ins. Co., 935 A.2d 1184, 1190–91 (N.J. 2007) (citations omitted) (examining various meanings of the term "absolute," including (1) "unconditional or non-contingent"; (2) "free from conditional limitation"; (3) "operating or existing in full under all circumstances without variation or exception"; (4) "free from doubt"; (5) "positive unquestionable"; (6) "independent of arbitrary standards of measurement"; (7) "free from qualification"; (8) "final and not liable to modification or termination"; (9) "perfect in nature or quality"; (10) "not limited by restrictions or exceptions"; (11) "unqualified in extent or degree"; and (12) "considered to be independent of and

"exception."[6] Because these terms are not associated with particular ideological positions (it is not that those who invoke "exceptions" systematically support more freedom for political speech, or less, for instance), we tend to assume that they are neutral tools, innocuous features of the debate's infrastructure. In fact, I shall argue, confusions concerning these seemingly incidental concepts impede clear thinking about how a legal system should treat speech.[7] Indeed, they often lend the cover of respectability to unjustified restrictions of speech.

In this paper, I will consider four such concepts: "absolute," "exception," "censorship," and "freedom." I will begin, in Parts I and II, by offering examples of each being misused and indicating the errors involved (treating the concepts in pairs because of their close relationships). Next, in Part III, I will consider the fallout. What harm do such confusions inflict? What does it matter if people aren't meticulous about terminology? In Part IV, I will turn to the roots of these errors. To correct a mistake, it can be helpful to understand its underlying sources. Thus, I will ask, what deeper premises might foster these four confusions about speech? While a handful of ideas contribute, I will focus primarily on the particularly influential role of utilitarian thinking.

As a preliminary, I should clarify the parameters of this discussion. In claiming that certain usages of terms reflect misconceptions, I am obviously relying on beliefs about the correct meanings of these four terms. A full defense of these meanings would require substantial examination in a separate paper of its own, however. My aim here is simply to indicate serious problems with the reigning conceptions. These should be visible even without a decisive vindication of the ultimately correct alternatives.

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unrelated to anything else").

6. *See, e.g.*, *Exception*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "exception" as: (1) "[a] formal objection to a court's ruling"; (2) "[s]omething that is excluded from a rule's operation;" (3) "[t]he retention of an existing right or interest, by and for the grantor" of real property; or (4) "[t]he exclusion from a legal description of part of real property"); *see also* Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 26 (Ill. 1978) (examining exceptions to the free speech clause and holding that "the display of the swastika cannot be enjoined under the fighting-words exception to free speech, nor can anticipation of a hostile audience justify the prior restraint").

7. Throughout, my subject is free speech in the legal context, that is, the freedom of one's speech from legal restriction. This subject correlatively includes determination of the speech that is properly protected by a legal system.

Further, I should be forthright about my own views (particularly given their minority status). I believe that the right to free speech is absolute and admits of no exceptions, that censorship consists of government restrictions on an individual's freedom of speech and that this freedom consists of the absence of others' forcibly restricting one's speech.[8] This is not the thesis of this paper, however; thus, I will not offer a direct case for it here. Rather, my present aim is the more modest one of conceptual clean-up: I seek to carve more accurately the conceptual categories that inform our thinking about free speech, so as to help us reach valid conclusions about its boundaries. One need not sympathize with my larger views to be able to appreciate that clean-up is needed, for the field of debate is strewn with confusions, as we will see. And while my aims are relatively modest, the stakes are large. For as long as we labor under blurred conceptual boundaries, we will reach misguided conclusions and, consequently, we will protect speech that should not be protected and we will restrict speech that should not be restricted.

I. "ABSOLUTE" AND "EXCEPTIONS"

First, let us consider some examples of how "absolute" and "exceptions" are commonly used. Typical is an editorial in *The Economist* which, after lauding freedom of speech as "the oxygen of democracy" without which "all other political freedoms are diminished," concludes "[s]o the right to free expression should be almost absolute. Bans on child pornography and the leaking of military secrets are reasonable. So, too, are bans on the deliberate incitement of violence."[9] These bans evidently show that the right is not absolute.

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8. More precisely, it is the absence of others' initiating the use of force. I offer a full account of the nature of this freedom (which is distinct from freedom of the will) in TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM 123–84 (1995) [hereinafter MORAL RIGHTS]; *see also* TARA SMITH, JUDICIAL REVIEW IN AN OBJECTIVE LEGAL SYSTEM 99–110 (2015) [hereinafter JUDICIAL REVIEW]; Tara Smith, *"Humanity's Darkest Evil": The Lethal Destructiveness of Non-Objective Law*, *in* ESSAYS ON AYN RAND'S *ATLAS SHRUGGED* 335, 337–40 (Robert Mayhew ed., 2009).

9. *The Trial of Geert Wilders: In Defense of Hate Speech*, THE ECONOMIST (Dec. 15, 2016), www.economist.com/news/leaders/21711914-criminalising-offensive-language-only-empowers-bigots-defence-hate-speech; *see also When Words Hurt: Defamation Laws are Necessary. But They Must Be Narrowly Drawn*, THE ECONOMIST (July 13, 2017), https://www.economist.com/news/leaders/21725002-too-many-countries-those-who-criticise-powerful-people-can-be-locked-up-simply-speaking [https://perma.cc/7JVT-68B2] ("Laws against defamation infringe the right to freedom of speech—a right this

Anthony Lewis, in his *Freedom for the Thought That We Hate*, claims that "the freedoms of speech and of the press have never been absolutes. The courts and society have repeatedly struggled to accommodate other interests along with those."[10] An example from the Court itself: In *Chaplinsky v. New Hampshire*,[11] in 1942, the Supreme Court held that "the right of free speech is not absolute at all times and under all circumstances. There are certain . . . classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[12]

Eric Heinze, a law professor at Queen Mary University of London, writes that opponents of hate speech bans often "misleadingly brand[] themselves 'free speech absolutists,' . . . [yet n]one of the serious opponents of hate speech bans . . . literally advocates . . . 'absolutism.' If free speech were 'absolute,' you could . . . lawfully kill someone, as long as you were doing it to make some statement."[13] Jeremy Waldron observes that "[t]here are very few First Amendment absolutists. . . . [M]ost people . . . accept that in some cases speech acts may be regulated or criminalized."[14] In the course of vigorously defending private parties' right to refuse to broadcast certain views, Emma Teitel nonetheless dismisses the idea that free speech is absolute as a "fallacy."[15] To think that it is, she believes, would be to claim that "freedom of expression" means "freedom to speak your mind without any interference at all."[16] We learn from the *Stanford Encyclopedia of Philosophy* that "appeals to an . . .

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newspaper champions. That right is not absolute.").

10. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT 169 (2007).

11. 315 U.S. 568 (1942).

12. *Id.* at 571–72.

13. Eric Heinze, *Nineteen Arguments for Hate Speech Bans—and Against Them*, FREE SPEECH DEBATE (Mar. 31, 2014), http://freespeechdebate.com/en/discuss/nineteen-arguments-for-hate-speech-bans-and-against-them/ [https://perma.cc/4A8T-AQ7P].

14. JEREMY WALDRON, THE HARM IN HATE SPEECH 144 (2012); *see also* Erwin Chemerinsky & Howard Gillman, *A Free-Speech To-Do List for College Administrators: Set Clear, Neutral Rules and Support the Rights of Controversial Speakers Before a Crisis Begins*, WALL ST. J. (Sept. 4, 2017), https://www.wsj.com/articles/a-free-speech-to-do-list-for-college-administrators-1504550276 [https://perma.cc/7PTZ-4L8W] ("But freedom of expression is never absolute. Some speech—such as true threats and harassment and interfering with the speech of others—is not protected.").

15. Emma Teitel, *Here's the Thing About Free Speech: It's Not Absolute*, MACLEAN'S (June 30, 2015), http://www.macleans.ca/society/heres-the-thing-about-free-speech-its-not-absolute/ [https://perma.cc/7B33-TUHY].

16. *Id.*

absolute right to free speech hinder rather than help the debate."[17]

In the same vein, people frequently refer to laws banning the incitement of violence or libel or fraudulent speech as "exceptions" to free speech.[18] One does not have the right to testify falsely in court, after all, or to leak classified national security information.[19] So, many infer, exceptions to free speech are commonplace.

This is not merely a sloppy, popular characterization. A report issued by the Congressional Research Service treats those types of speech that the Court has refused to protect as "exceptions."[20]

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17. David van Mill, *Freedom of Speech*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2017), https://plato.stanford.edu/archives/sum2017/entries/freedom-speech/ [https://perma.cc/XGK7-BT9G]; *see also* FLOYD ABRAMS, FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT 401–06 (2013) (where one of free speech's most ardent and uncompromising champions, Floyd Abrams, who has defended the *Citizens United* ruling, regards himself as merely a "near absolutist"); Svetlana Mintcheva, *Art Censorship Today*, *in* THE LIBRARY JUICE PRESS HANDBOOK OF INTELLECTUAL FREEDOM: CONCEPTS, CASES, AND THEORIES 334, 336 (Mark Alfino & Laura Koltusky eds., 2014) ("[T]he First Amendment does not protect all speech. There is, indeed, no country today where free speech is an absolute. Obscenity, child pornography, defamation and libel, incitement to violence, and threats are all refused the mantle of constitutional protection in the U.S."); Ulrich Baer, *What 'Snowflakes' Get Right About Free Speech*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/opinion/what-liberal-snowflakes-get-right-about-free-speech.html [https://perma.cc/Q8FZ-C7D2] (declaring that "[f]reedom of expression is not an unchanging absolute"); Sarah Brown, *In a Polarized Climate, Free Speech Warriors Seize the Spotlight*, CHRON. OF HIGHER EDUC., (Mar. 19, 2017), http://www.chronicle.com/article/In-a-Polarized-Climate/239530 [https://perma.cc/Q2T9-GS8Q] (quoting Wesleyan University President Michael Roth's statement following a dustup on his campus, during which he derided the "knee-jerk absolutist response that ignored the free-speech rights of the protesters"). A rare contemporary defender of free absolutism is William Deresiewicz. *See* William Deresiewicz, *On Political Correctness: Power, Class, and the New Campus Religion*, AM. SCHOLAR (Mar. 6, 2017), https://theamericanscholar.org/on-political-correctness/#.Wc_3_ciGPIU [https://perma.cc/CQ2V-RH5Z] ("Free expression is an absolute; to balance it is to destroy it.").

18. *See, e.g.*, KATHLEEN ANN RUANE, CONG. RESEARCH SERV., CRS95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1, 19 (2014), https://fas.org/sgp/crs/misc/95-815.pdf [https://perma.cc/A4B7-DJML] (discussing various "exceptions" to the First Amendment and permissible restrictions on speech, including "fighting words," defamation, and fraud).

19. *E.g.*, Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting) (stating that "even protected speech may be subject to reasonable limitation when important countervailing interests are involved," and "[c]itizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare"); Nat'l Fed'n of Fed. Emps. v. United States, 695 F. Supp. 1196, 1201 (D.D.C. 1988) ("governmental employees . . . with access to classified information must accept a different application of free speech protections").

20. RUANE, *supra* note 18, at 1 (prefacing that the Supreme Court has not held the First Amendment to be absolute. Rather, it can be limited in certain areas, i.e., "the First

Robert Richards, founding director of the Pennsylvania Center for the First Amendment at Penn State University, similarly dubs those categories of speech that fall beyond First Amendment protection "exceptions."[21] Harvard psychologist Steven Pinker, in a basically sound defense of free speech, concedes, "[i]t's true that free speech has limits. We carve out exceptions for fraud, libel, extortion, divulging military secrets, and incitement to imminent lawless action."[22] The implication? Such "limits" are exceptions. And, many believe, this recognition of things that you may not say shows that the right to free speech is not absolute.[23]

What's wrong with this picture? What are the confusions?

Philosophers could explore the basic nature of the absolute and of an exception in some depth; in certain contexts, "absolute" will have a specialized meaning (in regard to particular doctrines in metaphysics, for instance).[24] Colloquially, the "absolute" is most frequently distinguished from either the limited, the partial, the relative, or the conditional (e.g., "don't kill unless it is necessary in self-defense").[25] Our concern,

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Amendment provides no protection for obscenity, child pornography, or . . . 'fighting words'").

21. Melissa Beattie-Moss, *Probing Question: Are There Limits to Freedom of Speech?*, PENNSTATE NEWS (Jan. 27, 2015), http://news.psu.edu/story/341896/2015/01/27/research/probing-question-are-there-limits-freedom-speech [https://perma.cc/Q5FA-3GN9] (quoting Robert Richards as saying "[t]he categories of free speech that fall outside its protection are obscenity, child pornography, defamation, incitement to violence and true threats of violence. . . . Beyond that, we are free to speak.").

22. Steven Pinker, *Why Free Speech is Fundamental*, BOS. GLOBE (Jan. 27, 2015), https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html [https://perma.cc/VYL3-5GMN].

23. *See, e.g.*, Letter from Dr. Max Price, Vice-Chancellor, Univ. of Cape Town, to the Acad. Freedom Comm'n. (July 12, 2016), http://www.politicsweb.co.za/opinion/why-uct-has-decided-to-disinvite-flemming-rose—ma [https://perma.cc/AW5X-8BR7] (proclaiming in the same spirit, if not the same language, when the University of Cape Town withdrew its invitation to Flemming Rose—under whose Cultural Editorship the Danish newspaper, *Jyllands-Posten*, had published the controversial Prophet Mohammed cartoons in September 2005—to deliver the University's 2016 Davie Memorial lecture that "[n]o freedom . . . is unlimited. . . . [Rather,] every right is subject to limitation by law of general application which complies with a number of requirements.").

24. *See* WILLIAM LANE CRAIG, TIME AND METAPHYSICS OF RELATIVITY 1–2 (2001) (listing various definitions used by philosophers to define "absolute" in discussions of time and space).

25. The meanings most commonly attached to the term "absolute" include: a fixed matter of fact; inherently obligatory; uniform in its application; all-powerful; all-encompassing; subordinate to no other power. *See Absolute*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "absolute" as (1) "[f]reedom from restriction, qualification, or condition"; (2) "[c]onclusive and not liable to revision"; or (3) "[u]nrestrained in the exercise of governmental power").

however, is specifically with the legal restriction of speech and the right to free speech. And in this context, when discussing such prescriptive principles, the meaning of "absolute" is: holding paramount authority within its domain.[26] To say that a principle is absolute means that, within its domain, it is answerable to no higher sanction. If the President's power to pardon is absolute, for instance, then he has final say in the matter; his decision is beyond appeal.

To isolate the error in common usage of the term in free speech debates, consider a person's right to his life. Just about everyone would agree that this right is absolute.[27] We do not question that, however, if reminded that a person is not legally free to physically assault other people or to steal others' property. The right to life does not protect that, yet it *is* an absolute. For as long as a person respects others' rights, his right is sacred. Others are forbidden from abridging it. No exceptions.

The misuse of "absolute" in discussions of free speech frequently confuses strength of authority with scope of authority. Consider King Louis XIV, an absolute monarch *par excellence*, the textbook case from whom many of us learn that concept.[28] Despite his tremendous power, Louis was the king *of France*; he was not the king of Britain, Westphalia, Ethiopia, or the Andes.[29] His power was absolute, yet limited; it was held within a bounded domain. Does this mean that we misdescribe his power when we refer to it as absolute? No. In France, Louis' authority was subject to no other, second to none.[30] The point is, the strength of one's authority is distinct from its scope, from the range of issues over which it is valid. Thus, the fact that the right of free speech is not boundless does not entail that it is not absolute.[31]

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26. *See Absolute*, MERRIAM-WEBSTER (Nov. 24, 2017), https://www.merriam-webster.com/dictionary/absolute [https://perma.cc/JTL7-8Y7Z] (defining "absolute" as "being, governed by, or characteristic of a ruler or authority completely free from constitutional or other restraint").

27. Everyone who credits the concept of rights at all, that is.

28. *See* Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, 2015 MICH. ST. L. REV. 1, 137 (2015) ("King Louis's outlook that he possessed absolute sovereignty in France is well expressed by the apocryphal, though oft-quoted, remark '*L'État, c'est moi*'—'I am the State.'").

29. *Id.*

30. *See id.* (tracing Louis XIV's elevation of the "divine right of kings to the absolutist extreme" after stripping the French Parliaments of their political power and asserting independence from the Pope's authority).

31. Some might object that the scope of a person's authority is often part of what is in dispute in rights controversies, as when people debate whether fetuses have rights

What about the apparent exceptions to freedom of speech—restrictions on libel,[32] fraud,[33] incitement,[34] and so on? Shouldn't the legal system restrict a person engaged in those types of speech?

Yes, it should. The reason is not that they constitute exceptions, however. Rather, it should do so as the proper, context-sensitive application of the absolute principle of free speech.

It is crucial to recognize that a person's freedom of speech does not encompass speech that violates others' rights.[35] The so-

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(which would narrow the rights of the women who bear them) and that this distinction is therefore not as telling as I suggest. Yet while the premise here is true, the conclusion does not follow. For this objection itself fails to distinguish three different questions:
1) Who holds the relevant authority? (e.g., fetuses? Children? Mature adults?)
2) What is the scope of the authority held, i.e., the domain over which that authority obtains?
3) What is the degree of power that that authority carries, i.e., its strength? (e.g., is it the power to order a person's detention? To banish a person? To confiscate property?)
The fact that these three issues may be related, or even that answers to one, in a given dispute, may carry implications for the others, does not alter the subject matter of each or erase the essential differences between that subject matter. Who shall enjoy a certain power and how powerful that power is—as well as how extensive or limited its domain—remain distinct questions. That is my point in calling attention to the strength of authority/scope of authority distinction. The fetus example is thus a red herring.

32. *See, e.g.*, United States v. Alvarez, 567 U.S. 709, 717 (2012) (stating that content-based restrictions of speech have been traditionally permitted where that speech is libelous); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (allowing criticism of public officials to be regulated by civil libel statutes requiring proof of actual malice rather than presuming malice); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (noting that libel is not "within the area of constitutionally protected speech"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . the libelous . . . .").

33. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (noting that "there is no constitutional value in false statements of fact," and though such statements are inevitable in open debate, "the erroneous statement of fact is not worthy of constitutional protection").

34. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (recognizing state authority to "forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *Beauharnais*, 343 U.S. at 256 (recognizing that words which tend to "incite an immediate breach of the peace" likely fall outside of First Amendment protections).

35. *See* Breard v. City of Alexandria, 341 U.S. 622, 642 (1951), *abrogated on other grounds by* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) ("The First and Fourteenth Amendments have never been treated as absolutes. . . . Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."); *see also* KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 226 n.4 (1945) (describing the paradox of intolerance: "Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society

called "exceptional" case (to speak libelously,[36] for instance) was never within a person's legitimate authority to begin with (just as Louis XIV's domain did not extend to the Andes or Westphalia). Recall Pinker's characterization of legal limits for fraud and libel as "exceptions."[37] Ask yourself: what would these be exceptions *from*? From one's right to pillage and loot? To take from another what is his? These limitations would be "exceptions" only if one supposed a general principle under which a person was entitled to invade others' rights. But that would make no sense, since it would destroy the entire concept of rights. Rights that allowed a person to infringe on others' rights would kill the protection—the recognition of moral title—that the idea of rights affirms. If others may infringe on one's rights, then one's rights are tissue and the entire concept of rights is a fraud.

It might be helpful to think of it this way: An exception marks that which is not normally the case; it is an instance that does not conform to the relevant general rule.[38] Yet it is not normally the case that I may defraud other people or physically endanger other people. I do not have a right to infringe on others' rights. (Justice Frankfurter captured this truth when he observed for the majority in *Beauharnais v. Illinois*[39] that libelous utterances are not "within the area of constitutionally protected speech."[40])

The point is, it is not an exception to recognize the boundary of one's authority.[41] When the legal system delineates the extent of individuals' rights, it is not curtailing those rights, violating their "absolutism," or declaring "exceptions" to the obligation to respect them. My next-door neighbor's backyard is not an exception to my property. He may do as he likes in his yard, and I in mine. The fence between the two yards simply designates the extent of each of our authority.

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against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.").

36. *See supra* note 32.

37. Pinker, *supra* note 22.

38. An example: The general rule in a small town might be that residents' trash will be collected every Monday, except when a national holiday falls on a Monday, in which case the trash will be collected on Tuesday.

39. 343 U.S. 250 (1952).

40. *Id.* at 266. In favorably citing this statement, I do not mean to endorse the Court's complete reasoning or resolution of the case.

41. Throughout, I assume that all rights are bounded by the obligation to respect others' rights.

In short, some speech *should* be legally restricted, but not as an exception and not because the right of free speech is not absolute. Rather, it should be restricted on the grounds that that is what the absolute principle, properly understood, requires.

II. "CENSORSHIP" AND "FREEDOM"

Turning next to "censorship" and "freedom," my concern is that these terms have suffered concept creep, as their meanings have been extended to encompass an ever more disparate array of alleged transgressions and conditions. People increasingly complain of "market censorship," for instance.[42] When a person's employer demands that he not wear certain religiously expressive attire or certain political messages on his T-shirts while at the office, he complains that he is being censored.[43]

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42. Also sometimes known as "corporate censorship." *See* Mark Epstein, *Who's the Real Internet Censor: Comcast or Facebook?*, WALL ST. J. (Sept. 6, 2017), https://www.wsj.com/articles/whos-the-real-internet-censor-comcast-or-facebook-1504653147 [https://perma.cc/J9CD-3CUA] (criticizing social media companies' narrative, "which presents net neutrality as a bulwark against corporate censorship," while those same companies engage in political censorship); Chris Gay, *Speak No Evil: Many Americans Don't Know It, but Their Employers Can Censor Their Political Speech*, OCCUPY (May 31, 2017), http://www.occupy.com/article/speak-no-evil-many-americans-don-t-know-it-their-employers-can-censor-their-political-speech#sthash.5kuhXZ91.dpbs [https://perma.cc/6358-WFRS] (addressing limitations on employee speech rights); *'Ghost Banning' on Facebook and Twitter?: Dangers of Corporate Censorship*, 21ST CENTURY WIRE (Jan. 4, 2017), http://21stcenturywire.com/2017/01/04/ghost-banning-on-facebook-twitter-dangers-of-corporate-censorship/ [https://perma.cc/XD8H-QH3F] (warning of corporate censorship tactic "ghost banning," in which a website user is "present, though invisible in plain sight, and . . . completely unaware" that he or she is being censored); Salvador Rodriguez, *Edward Snowden Decries Corporate Censorship—and Twitter's 140-Character Rule*, INC. (Dec. 13, 2016), https://www.inc.com/salvador-rodriguez/snowden-dorsey-periscope.html [https://perma.cc/4YY3-APQC] ("Whistleblower Edward Snowden . . . warned that calls for corporate censorship of fake news could pose a threat to all free speech."); Mark McNaught, *Free-Market Censorship*, XI REVUE LISA (2013), https://lisa.revues.org/5246 [https://perma.cc/FT8F-MWJH] (arguing that market censorship is "a very blunt, weak instrument" when used to combat hate speech); Kate Millett, *Market Censorship: A Personal Account*, 31/32 AGNI 59–62 (1990) (writing about market censorship within the publishing industry).

43. The judiciary has sometimes considered whether clothing constitutes expression or "symbolic speech" and is thus protected by the First Amendment. *See, e.g.*, Tinker v. Des Moines Sch. Dist. 393 U.S. 503, 514 (1969) (upholding students' rights to wear arm bands in protest of the Vietnam War); Hardwick *ex rel.* Hardwick v. Heyward, 711 F.3d 426, 444 (4th Cir. 2013) (holding that a school did not violate student's rights by prohibiting her from wearing clothing displaying the Confederate flag); Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 331 (2d. Cir. 2006) (upholding student's right to wear shirt critical of then-President George W. Bush); *see also* Allison Brown Schafer & Janine Murphy, *Cases Pertinent to Student Speech on T-Shirts and Other Items of Apparel*, N.C. SCH. BOARDS ASS'N (Aug. 2015), http://azsba.org/wp-content/uploads/2015/09/Friday-BR1-T-shirt-Case-List-Sept-2015.pdf [https://perma.cc/7P78-E3JF] (providing an overview of key cases pertaining to student speech). My immediate point, however, concerns private parties' restrictive dress codes rather than the government's.

When private companies such as Facebook or Twitter bar certain users from their services because they post misogynistic or racist messages, critics howl "censorship!"[44]

Here again, it is not only rubes who use the terms in this pliable a way. When—out of fear of offending certain groups—Yale University Press refused to include photos of the infamous Danish cartoons depicting Mohammed in a 2009 book on the cartoon controversy, many academics accused Yale of censorship.[45] Timothy Garton Ash, in a recent manifesto defending freedom of speech, advises readers that "[w]hile 'censorship' generally refers to something done by a state . . . it's important to remember that it is also exercised by religious organisations, corporations, media owners, criminal gangs, [and] political parties . . . ."[46] Svetlana Mintcheva laments "new incarnations" and "subtler forms of censorship" that are

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44. *See* Marissa Lang, *Blocked and Banned by Social Media: When Is It Censorship?*, S.F. CHRON. (Aug. 30, 2016), http://www.sfchronicle.com/business/article/Blocked-and-banned-by-social-media-When-is-it-9193998.php [https://perma.cc/VEQ6-Z5LJ] (noting that Facebook, Twitter, and Reddit have been criticized for blocking user content and accounts); Jack Smith IV, *Facebook Is Not Here to Protect Your Freedom of Speech*, BUS. INSIDER (July 8, 2016), http://www.businessinsider.com/facebook-is-not-here-to-protect-your-freedom-of-speech-2016-7 [https://perma.cc/5PLX-VMEJ] ("Facebook's growing control over information, and its lack of transparency about how it deals with sensitive or political content, is attracting not only criticism from users, but government attention.").

45. *Yale University: Censorship of Mohammed Cartoons at Yale University Press*, FIRE: FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (last visited Nov. 26, 2017), https://www.thefire.org/cases/yale-university-censorship-of-mohammed-cartoons-at-yale-university-press/ [https://perma.cc/8P5T-HQPL]; *see also* Helen Epstein, *Culture Vulture: The Cartoons that Still Shake the World*, THE ARTS FUSE (Aug. 13, 2009), http://artsfuse.org/1768/culture-vulture-the-cartoons-that-still-shake-the-world/ [https://perma.cc/B6EG-8H]5] (citing Cary Nelson, former President of the American Association of University Professors, who issued a statement maintaining that the action has "the potential to encourage broader censorship of speech by faculty members"). Yale's move was also opposed by the National Coalition Against Censorship. Evan R. Goldstein, *The Book That Shook Yale*, CHRON. OF HIGHER EDUC. (Sept. 29, 2009), http://www.chronicle.com/article/The-Book-That-Shook-Yale/48634 [https://perma.cc/Q7MG-4G9P] ("'This misguided action established a dangerous precedent that threatens academic and intellectual freedom around the world,' warned the National Coalition Against Censorship."). Interestingly, the director of the press, John Donatich, rejected the characterization of the press' decision as censorship not on the grounds that it was a private action rather than government-imposed restriction. *Yale Draws Criticism for Nixing Muslim Cartoons*, NBC NEWS (Sept. 8, 2009), http://www.nbcnews.com/id/32732243/ns/world_news-world_faith/t/yale-draws-criticism-nixing-muslim-cartoons/#.WUvN-mjytPY [https://perma.cc/M3QX-RSUU] ("He said it was not a case of censorship because the university did not suppress original content that was not available in other places. 'I would never have agreed to censor original content,' Donatich said."). I shall say more about my own view of Yale's move a little later; the immediate issue is the meaning of "censorship."

46. TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD 184 (2016).

"ubiquitous."[47] A Federal Communications Commission Chairman, some years ago, blithely declared that "[t]here is censorship by ratings, by advertisers, by networks, by affiliates which reject programming offered to their areas."[48] What was an unusual view in the 1960's is now widely taken for granted. A *Wall Street Journal* columnist, recently writing about advertisers' complaints that their digital ads were being shown on sites with objectionable content, urges Google and Facebook to refrain from "excessively censoring their users."[49]

And since we tend to assume that censorship infringes on a person's freedom of speech, what that freedom *is* has correspondingly been bloated to assume novel dimensions.[50] Consider, for example, the common practice of measuring nations' freedom of speech by their quantity of speech.[51] That is, journalists will frequently report figures concerning the number of newspapers in a given country or the number of Facebook users as indicative of that nation's freedom of speech.[52] "A greater percentage of the British use Twitter than Brazilians; therefore, Britain has more robust freedom of speech" is the general style of reasoning. The assumption is that the amount of speech in a given place is an accurate index of its freedom of speech: a greater quantity (of readers, or writers, or speakers, or tweeters) equals greater freedom.[53]

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47. Mintcheva, *supra* note 17, at 335–36.

48. AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 375 (1967) (quoting former FCC Chair, Newton N. Minow); *see also* Gary McGath, *The Inverted Standard of Censorship*, FOUNDATION FOR ECONOMIC EDUCATION (Aug. 1, 1981), https://fee.org/articles/the-inverted-standard-of-censorship/ [https://perma.cc/RT6R-T8D7] (quoting Minow invoking "rating censorship" and "dollar censorship").

49. Holman W. Jenkins, Jr., *Google's Too-Darn-Bad Scandal*, WALL ST. J. (Mar. 28, 2017), https://www.wsj.com/articles/googles-too-darn-bad-scandal-1490740494 [https://perma.cc/8RR8-KTRC].

50. Here again, I refer to the bloating of the legal concept of freedom, not to be confused with other senses of the term (freedom of the will, a feeling of liberation or release, etc.).

51. Richard Wike & Katie Simmons, *Global Support for Principles of Free Expression, but Opposition to Some Forms of Speech*, PEW RESEARCH CTR., http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/ [https://perma.cc/VKC3-KF9K] (illustrating that countries with higher rates of internet usage are more likely to prioritize internet freedom and the freedom of speech).

52. *Id.*

53. *Compare Number of Twitter Users in the United Kingdom (UK) from 2012 to 2018 (in Million Users)*, STATISTA, https://www.statista.com/statistics/271350/twitter-users-in-the-united-kingdom-uk/ [https://perma.cc/KL4D-22FR] (showing that the number of Twitter users in the UK in 2016 was 15,800,000), *and Number of Twitter Users in Brazil from 2014 to 2016 (in Millions)*, STATISTA, https://www.statista.com/statistics/558311/number-

On the slightest reflection, however, it is apparent that that is not so. While a high volume of speech is frequently a byproduct of freedom of speech, it is not what it *is*. Notice, for example, that if we learned that a greater percentage of Turks use Twitter than the percentage of British, we would think twice before concluding that Turks enjoy greater freedom (given what we know about government repression of speech under Turkish President Recep Erdogan[54]). It may be that people in Turkey are simply more vocal, or bolder, or have more to complain about, or are more tech-savvy, or more commonly use that platform for a variety of purposes, beyond the political. The point is simply that there is no airtight, one-to-one correlation between how much people speak and how free they are to speak. (People may be reticent to speak for a variety of reasons that have nothing to do with their freedom or anticipated legal treatment.)[55]

Consider another example of confusion over "freedom": In early 2017, as many Americans feared for journalists' freedom of speech under the new Trump administration,[56] popular political

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of-twitter-users-in-brazil/ [https://perma.cc/MX6J-MVVE] (showing that the number of Twitter users in Brazil in 2016 was 17,970,000), *and Population, Total*, THE WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL [https://perma.cc/C7TQ-DPV5] (showing that the populations of the UK and of Brazil in 2016 were 65,637,240 and 207,652,860, respectively), *with 2017 World Press Freedom Index*, REPORTERS WITHOUT BORDERS, https://rsf.org/en/ranking [https://perma.cc/W3CS-FWRG] (showing that Brazil and the UK are ranked 103 and 40, respectively, in levels of press freedom, with a lower number indicating higher press freedom). These numbers show that, in 2016, 8.7% of Brazilians were using Twitter, as contrasted with the 24.1% of Britons using Twitter in the same year.

54. *See* Seyla Benhabib, *Turkey is About to Take Another Step Toward Dictatorship*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/03/16/turkey-is-about-to-take-another-step-toward-dictatorship/?utm_term=.1615f530990e [https://perma.cc/3NZ2-LUPV] (discussing "a sweeping program of constitutional changes that, if passed, will establish a new form of autocracy with Erdogan at its top"); Humeyra Pamuk & Jonny Hogg, *Turkey Tops Countries Demanding Content Removal: Twitter*, REUTERS (Feb. 9, 2015), https://www.reuters.com/article/us-turkey-twitter/turkey-tops-countries-demanding-content-removal-twitter-idUSKBN0LD1P620150209 [https://perma.cc/R7S7-FXBU] ("Turkey filed over five times more content removal requests to Twitter than any other country in the second half of 2014 . . . .").

55. E.g., from personal timidity, for fear of risking others' disapproval, or fear that one might not be able to defend one's view cogently. Accordingly, a person's silence does not entail that he has been forcibly silenced. *See* Haig Bosmajian, *The Freedom Not to Speak*, 18 LEGAL STUD. F. 425, 425–26 (1994) (discussing the right to refrain from speaking).

56. *See, e.g.*, Suzanne Nossel, *Can Freedom of the Press Survive Trump's Onslaught?*, FOREIGN POL'Y (May 3, 2017), http://foreignpolicy.com/2017/05/03/world-press-freedom-day-trump-journalists-fake-news/ [https://perma.cc/G982-NE6C] ("[A]s Trump's first 100 days recede and his frequent taunts toward the media risk seeming almost routine, the press and the public have to decide whether press freedom in the United States is truly under siege . . . ."); Joel Simon, *Trump is Damaging Press Freedom in*

personality Bill O'Reilly opined that, since the American media are biased toward the left, we do not have a free press anyway: "[W]hen the press aligns itself with a political movement—in this case, liberalism—then it is no longer objective or free."[57] Whatever one thinks of O'Reilly's charge of media bias, his statement treats the freedom of one's speech and the objectivity of one's speech as if they are same thing.

Or again, in a recent law review article, Brian Leiter argues that, because much of what people have to say is of little value, we should temper our adoration of free speech and rein in its protection.[58] In support, Leiter reasons that "[t]here is no free speech in the courtroom [where speakers must adhere to rules of admissible evidence and the like], and (almost) no one thinks there should be."[59] We also accept restrictions on speech in classrooms and scientific research; therefore, he concludes, we would be justified in placing legal restrictions on all speech.[60]

Unfortunately, this, too, relies on a flagrant equivocation—this time, between freedom of speech and standards of constructive speech. Freedom is not immunity from all standards of judgment (such as standards of logical strength, probative relevance, or pedagogical import). Rather, it is the absence of coercion; one's speech is free when it is not forcibly restricted by other people.[61]

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the U.S. and Abroad, N.Y. TIMES (Feb. 25, 2017), https://www.nytimes.com/2017/02/25/opinion/trump-is-damaging-press-freedom-in-the-us-and-abroad.html [https://perma.cc/5NXE-N9SG] (discussing how Trump's "unrelenting attacks on the news media" threaten journalists' freedom of speech in the United States and abroad); Callum Borchers, *On Freedom of the Press, Donald Trump Wants to Make America like England Again*, WASH. POST (Oct. 24, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/24/on-freedom-of-the-press-donald-trump-wants-to-make-america-like-england-again/?utm_term=.fa47d99b66dd [https://perma.cc/6WF4-BTGK] ("Donald Trump's presidential campaign is all about American greatness—unless the subject is freedom of the press.").

57. Ed Mazza, *Bill O'Reilly Says We Don't Have a Free Press Because It's Too Liberal*, HUFFPOST (Feb. 21, 2017), http://www.huffingtonpost.com/entry/bill-oreilly-free-press-too-liberal_us_58abad56e4b0a855d1d91778 [https://perma.cc/3VKE-L5W5].

58. *See* Brian Leiter, *The Case Against Free Speech*, 38 SYDNEY L. REV. 407, 409 (2016) ("[M]ost non-mundane speech people engage in is largely worthless, and the world be better off were it not expressed."). The thrust of his argument, however, is not merely that we would be better off without certain speech, but that it should not be permitted.

59. *Id.* at 413.

60. *Id.* at 409–13, 434.

61. More precisely, when others do not initiate the use of force against one. For further explanation, see MORAL RIGHTS, *supra* note 8, at 123–84 (providing an account of the nature of the freedom from physical force); Smith, *supra* note 8, at 338 ("This fact stands on the obvious difference between being persuaded to do something and being forced to do something. . . . If I claim the sought object by means of force . . . I render

A. Confusions Concerning the Referent of "Freedom" of Speech

The point is, people sling around the phrase "freedom of speech" to mean several different and often inaccurate things. An inventory (which is not necessarily exhaustive):

(a) People confuse the absence of external coercion of speech with the absence of normative standards' applicability to speech (such as in Leiter's reasoning).[62]

(b) People confuse freedom of speech with the quality of speech—with its objectivity or truth or wisdom, for instance (as in O'Reilly's remark about a free press).[63]

(c) People confuse freedom of speech with the value of speech or with the value of a particular thing that is said. Yet the fact that a particular person's speech makes no positive contribution to the advance of knowledge or to the resolution of a question tells us nothing about whether his speech is free. (Leiter's contention that we should rein in freedom of speech because much speech has little value reflects this confusion.)[64]

(d) Closely related, people confuse the value of speech with the value of freedom of speech. Yet in fact, the value of a particular exercise of the right to speak (e.g., of Jim's particular utterance at the meeting last Friday) does not dictate the value of his, or of anyone's, having the freedom to say what he likes. The value of particular instances of speaking is not identical with the value of freedom of speech—of that general condition.

(e) People often mistake freedom for license—for the prerogative to do as one pleases, subject to no boundaries whatsoever. This notion is implicit in Pinker,[65] Waldron,[66]

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your beliefs about the wisdom of giving it to me irrelevant.").

62. *See* Leiter, *supra* note 58, at 409. ("If speech were actually 'free' in the courts—that is, unrestricted by state power—then there would be almost no need for most rules of evidence.").

63. *See* Mazza, *supra* note 57 ("[W]hen the press aligns itself with a political movement . . . then it is no longer objective or free.").

64. *See* Leiter, *supra* note 58, at 408. Leiter writes:

> And since the only good reasons in favour of a legal regime of generally free expression pertain to the epistemic reliability of regulators of speech, we should focus on how to increase their reliability, rather than assume, as so much of popular and even some philosophical discourse does, that unfettered speech has inherent value. If much of what I will henceforth call 'non-mundane' speech were never expressed, little of *actual* value would be lost to the world—or so I will argue.

Id.

65. *See* Pinker, *supra* note 22 (referring to "carve[d] out exceptions").

66. *See* WALDRON, *supra* note 14, at 144 (claiming that "there are very few First

Heinze,[67] and Teitel,[68] for instance, each of whom viewed legal limits as exceptions to free speech that demonstrate its not being absolute.[69] In fact, these would be exceptions (abnormalities) only on the supposition that the governing norm should be utterly boundless, that respect for *true* freedom demands allowing individuals *carte blanche*. Yet as John Locke recognized, "[f]reedom is not, as we are told, *[a l]iberty for every [m]an to do as he lists:* (For who could be free, when every other [m]an's [h]umour might domineer over him?)."[70]

And this mistake is linked with yet another.

(f) People often overlook the fact that "speech" is a wider category than "freedom of speech." "Speech" does not mean "freedom of speech." Indeed, it is for this reason that the First Amendment decrees that "Congress shall make no law . . . abridging the freedom of speech"[71] rather than "no law abridging speech." "Freedom of speech" refers to a specific subset of speech: of all the speaking that a person is capable of engaging in, it is that portion that he may rightfully engage in (i.e., without infringing on others' rights). The Amendment's language respects the difference between that which a person can say and that which a person is entitled to say. Correspondingly, the fact that a person's speech is restricted does not entail that his freedom of speech is restricted. It might be or might not be, depending on whether the restricted speech falls within his rightful freedom of speech, that is, the speech that he is entitled to engage in.

And in light of this, we should be able to appreciate a final confusion:

(g) People sometimes treat the ability to do something

Amendment absolutists . . . [for] most people . . . accept that in some cases speech acts may be regulated or criminalized").

67. *See* Heinze, *supra* note 13 (asserting that none of those who "misleadingly brand[] themselves 'free speech absolutists' . . . literally advocate[] . . . 'absolutism.'").

68. *See* Teitel, *supra* note 15 (dismissing the idea that free speech is absolute as a "fallacy").

69. This notion is also supported by a number of other authors. *See generally*, GERARD CASEY, LIBERTARIAN ANARCHY: AGAINST THE STATE (2012); GARY CHARTIER, ANARCHY AND LEGAL ORDER: LAW AND POLITICS FOR A STATELESS SOCIETY (2013); MICHAEL HUEMER, THE PROBLEM OF POLITICAL AUTHORITY: AN EXAMINATION OF THE RIGHT TO COERCE AND THE DUTY TO OBEY (2013); AEON J. SKOBLE, DELETING THE STATE: AN ARGUMENT ABOUT GOVERNMENT (2008).

70. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Peter Laslett, ed., Cambridge Univ. Press, 2d ed. 1988) (1690).

71. U.S. CONST. amend. I.

interchangeably with the freedom to do that thing. This is reflected in the complaints that because a person can no longer use Facebook or broadcast his political views at work, his rights are violated.[72] On just a bit of reflection, it is easy to see that there are plenty of things that a person is unable to do that he remains free to do. I cannot speak Polish, as it happens, and I do not know how to juggle, yet no one has interfered with my freedom to do either. Had I wanted to learn, I have been free to do so. My inability results from factors other than others' coercion. Admittedly, other people play a more influential role in a person's inability to broadcast his beliefs through certain media (T-shirts at work, on Facebook, etc.). Yet those uncooperative people are not coercing him. His freedom is intact, although his desires may be frustrated. For freedom does not mean: "I get what I want." (Again, such a notion of freedom could only be fulfilled by trampling on others' freedom. It is thus not an internally coherent conception.) The larger point is simply that an inability does not entail a lack of freedom.

In short, this inventory makes plain that we often employ the term "freedom" of speech indiscriminately. We use it to refer to a range of phenomena that are actually distinct.

B. Censorship

We should also consider how "censorship" is used in the cases cited – by those lamenting "market censorship" or censorship by advertisers, employers, or Facebook. What does the term designate, in such cases?

Essentially, the imposition of unwelcome pressure. "Censorship" is used in these cases to refer to external pressure that inhibits a person's speech by attaching undesired consequences to it. To "censor," on this notion, is to seek to influence others' speech by means that one expects or intends to be uncongenial in some way.

Yet here again, this is too crude to be accurate. For starters, note that such "censorship" would encompass all forms of sanction and boycott, however just the reasons for engaging in

72. *See, e.g.*, Lang, *supra* note 44 (noting that Facebook, Twitter, and Reddit have been criticized for blocking user content and accounts); Smith, *supra* note 44 ("Facebook's growing control over information, and its lack of transparency about how it deals with sensitive or political content, is attracting not only criticism from users, but government attention.").

them. It is also worth bearing in mind that an attempt to suppress speech can be wrong without it constituting censorship (more on this, shortly).[73]

Properly, "censorship" means the government's forceful obstruction of a person's right to speak.[74] Historically, the term "censorship" referred to state restriction of thought.[75] A censor was a government employee who reviewed books, performances, correspondence, and the like in order to decide which speech would be legally permitted.[76] He could deny publication, confiscate a newspaper, shut down a theater, and put a man in jail for saying certain things.[77]

This usage is not simply historical accident. The reason that "censorship" refers exclusively to government restriction of speech is that the freedom to speak goes hand in hand with the freedom not to speak and not to support speech that one disagrees with. The fundamental principle that animates freedom of speech is the recognition that a person is entitled to form his own conclusions and to control what he does about them—which includes the decisions of whether to express them and whether to support others who share them, such as by giving or withholding his money.[78] If, however, private parties directing their resources according to their beliefs (in running their businesses and setting rules for employee conduct, for instance, or in setting criteria for publication in their pages) constituted

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73. *See* Lindy West, *Save Free Speech From Trolls*, N.Y. TIMES (July 1, 2017), https://www.nytimes.com/2017/07/01/opinion/sunday/save-free-speech-from-trolls.html [https://perma.cc/CF92-2Q69] (writing that criticism is not censorship).

74. I stress that censorship is the restriction of a person's rightful speech, rather than simply anything that the person is capable of saying. For a government to ban a person's libelous or fraudulent speech, for instance, is not to censor. Certain coercive restriction of speech is valid—indeed, it is necessary in order for the government to serve its function of protecting individual rights.

75. *See* ROBERT DARNTON, CENSORS AT WORK: HOW STATES SHAPED LITERATURE 229–30 (2014) (discussing historical methods of censorship, including the use of violence); ALBERTO MANGUEL, A HISTORY OF READING 283 (1996) (explaining that "books have been the bane of dictatorships" and dictators would therefore deliberately burn or otherwise destroy books in order to suppress thought).

76. MANGUEL, *supra* note 75, at 285–88.

77. *See, e.g.*, *id.* at 285 (discussing how Anthony Comstock, a U.S. government censor, would throw publishers in prison for publishing "lewd literature").

78. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010). Freedom of association is also clearly at play. Indeed, the several elements named in the First Amendment (speech, religion, press, assembly, and petition) are united as being specific dimensions of intellectual freedom, which is the more fundamental principle. Although freedom of association is not explicitly named in the Amendment, it is widely understood as another manifestation of intellectual freedom.

censorship and the government were thus justified in punishing them, then *their* freedom of speech would be erased. If a person is compelled to support ideas with which he disagrees (because his only alternative would be deemed impermissible "censorship"), then his right is neutered.[79]

A few clarifications are crucial. First, to say that an action is not censorship is not to exempt it from all criticism. Yale University Press was not censoring, by my account, when it refused to print the Danish cartoons; it has the right to publish what it chooses.[80] But the Press was cowardly. It betrayed the ideals of scholarly inquiry and showed itself unworthy of respect as an academic publisher. What is salient here, however, is that the moral way to exercise a right and the possession of that right are distinct questions. We need different conversations to address each. Yale has the right to refuse to publish certain things, and when it exercises that right, it is not censoring anyone, blameworthy though it may be on other grounds (and

79. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (explaining that the First Amendment gives Americans "the right to differ as to things that touch the heart of the existing order"). Confusion over the proper definition of censorship has spawned the proliferation of disparate alleged instances of censorship, bundled loosely by the sense that they *kinda feel wrong* and someone is being judgmental. Moreover, people's political sympathies increasingly determine whether the C-word is applied. That is, people tend to blast resistance to a person's speech as "censorship" when they sympathize with the person whose speech is being protested. When companies withdraw ads from Ellen DeGeneres's TV show because they disapprove of something that she has said, for example, many charge them with censorship. *See* Emily Peck, *The Megyn Kelly Outrage Has Gone Too Far*, HUFFPOST http://www.huffingtonpost.com/entry/megyn-kelly-alex-jones_us_594411dee4b01eab7a2d5de5 [https://perma.cc/QC78-2LYB] (last updated June 17, 2017) (saying that the left "picked up the mantle of outrage and censorship" when Chrysler pulled ads from Degneres's coming-out episode). When companies withdraw ads from Bill O'Reilly's TV show for something that he has said, some of the same people hail it as the "free market in action" or "social justice." *See* Jack Greiner, *Free-market fan Bill O'Reilly becomes its victim*, CINCINNATI.COM, http://www.cincinnati.com/story/money/2017/04/17/free-market-fan-bill-oreilly-may-victim/100576258/ [https://perma.cc/R82J-MLJD] (last updated April 20, 2017) (calling Fox's decision to fire O'Reilly after 33% of his advertisers defected "the free market working in all its majesty"). My point is not about the merits of either figure, either set of supporters, or either group's withdrawing ads. One could easily find the same inconsistencies among those on the political right. The point is that neither reaction constitutes censorship. For in both cases, private parties are exercising choices about how to employ their resources (who they want to contract with and on what terms). They are simply exercising their freedoms—of speech, of association, and of property. When the meaning of "censorship" is a moving target, however, double standards in its application are unavoidable.

80. *See generally* Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. TIMES (Aug. 12, 2009), http://www.nytimes.com/2009/08/13/books/13book.html [https://perma.cc/T9TU-WFAE].

important as it may be for people to convey that blameworthiness—including through such means as boycotts).

Second, the misuse of "censorship" often involves a failure to appreciate the different standards and stakes that are applicable in two different domains, public and private.[81] By the "public," I mean the domain that is properly ruled by law, by government coercion. In that context, the question of censorship concerns which kinds of restrictions the legal system is properly authorized to impose. By the "private," I mean the domain of individuals' choice and voluntary decisions. Here, the only question that should concern the government is whether anyone's actions infringe on the rights of others. As long as they do not, no government action or legal restriction is called for.[82]

In discussions of censorship, the conflation of these two contexts is understandable because kindred issues arise in both private and public settings—particularly concerning how inhibited a person will feel about expressing his thoughts. What we often refer to as the climate in a place of business, the culture at a company or on a university campus, or the atmosphere at an organization's meetings can all be more or less hospitable to people's candor and can thus either encourage or discourage the open airing of conflicting views and vigorous, probing discussion. For numerous reasons, it is wise for those who run an organization (be it public or private) to adopt policies designed to foster an opinion–welcoming environment.[83] We must not let these similarities mislead us into assuming that the two contexts fully mirror one another, however, or that all and only the very same issues arise in both.

When people misleadingly speak of "censorship" and "freedom" of speech in private, nongovernment contexts, what they are usually referring to are individuals' feelings of inhibition or their attitudes toward speaking in light of the anticipated

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81. *See What Is Censorship?*, ACLU, https://www.aclu.org/other/what-censorship [https://perma.cc/9X76-X26Q] (referring to all government, or public, censorship as unconstitutional, while censorship by private individuals is protected by the First Amendment).

82. This obviously rests on a view of the proper role of government. *See* AYN RAND, *The Nature of Government*, *in* THE VIRTUE OF SELFISHNESS 107, 109 (1964) (claiming that the proper role of government is to maintain order by using retaliatory force under objective control—i.e., under objectively defined laws). *See generally* JUDICIAL REVIEW, *supra* note 8, at 46–47, 107–11; Smith, *supra* note 8.

83. At least, when the people involved are appropriately educated, informed, or rational. More discussion from the ranks is not unconditionally valuable.

reception. "I feel as if I'll be shot down if I say the 'wrong' thing;" "I feel as if there will be recriminations—that my disagreeing will be held against me in later decisions." As genuine and justified such feelings may sometimes be, what is important is that negative repercussions in the private sphere, so long as they are not coercively imposed, are different in kind from government penalty.

Government laws take the general form: "Do this *or else*—we will make you."[84] Private pressure takes the form: "I offer an exchange (a job, a publication, use of my facilities, etc.) on these conditions; take it or leave it." By declining the offer, a person does not lose anything that is his. He becomes no worse off, objectively, than he had been prior to receiving the offer.[85] When a private party refuses to employ me on the terms that I would like, due to my beliefs or manner of expressing them, he is not depriving me of anything to which I have a moral entitlement. When a government, by contrast (or anyone else for that matter) seeks to restrict my speech by means of coercion (e.g., physically blocking my website or broadcasts, confining me to house arrest, making me pay a fine), it *is* taking from me that which is rightfully mine.[86]

Life is pressureful. One's options are always accompanied by a variety of potential consequences: "If I do X, he might not like me." "If I say Y, he might not hire me or publish me." Alas, I do not have a right that anyone does hire me or publish me. Other people are not obligated to maintain my comfort zone of preferred pressures—those that I regard as acceptable. Freedom of speech is not a feeling marked by the absence of "uncomfortables."

Again, what is similar in both the public and private settings is this. Being legally free to speak as you like and feeling free, thanks to the palpable culture of a particular private setting, are

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84. On first glance, this might seem mistaken since some laws take the conditional form, "If you want to effect a marriage (child adoption, will, contract, etc.), you must do thus and such." Beneath the permitted discretion, however, the threat remains: Unless you proceed in the mandated way, the legal system will not protect you in the action that you take (adopting Sophie, contracting with Henry, and so on). The deeper point is that the law, by its nature, is enforced by coercion. THE FEDERALIST NO. 15 (Alexander Hamilton); JUDICIAL REVIEW, *supra* note 8, at 46–47.

85. I say "objectively" to distinguish his actual position from his hoped-for position.

86. Premises concerning what is basically "mine and thine" obviously stand at the bottom of this. *See* MORAL RIGHTS, *supra* note 8, at 155–58 (concluding that each person's life is his own and that he is entitled to rule his own actions).

both conducive to creating the benefits made possible by means of frank discussion among rational individuals. Significant values are fostered by both. A compelling case can thus be made for encouraging "free-feeling" discussion in many private settings. Nonetheless, for the question of our concern—namely, the legal freedom of speech—the public and the private remain significantly different contexts. Private parties are within their rights to exert negative pressure on individuals' speech, foolish as that will sometimes be.

It is useful to remember, as the historian Robert Darnton observes, that over the centuries, "authors, printers, booksellers, and middlemen have had their noses sliced, their ears cut off, and their hands amputated; they have been exposed in stocks and branded with hot irons; they have been condemned to row for many years in galleys; they have been shot, hanged, beheaded, and burned at the stake."[87] This is not the same as losing a job.

The upshot is, properly, "freedom" of speech refers to the absence of others' forcibly restricting a person's rightful speech.[88] And "censorship" refers to the government's coercive obstruction of a person's rightful speech. Neither turns on the presence or absence of unpleasant social circumstances.[89]

Before concluding this segment, I should address a potentially disturbing implication of my account. My insistence that we confine the term "censorship" to government restriction of speech seems to suggest that "self-censorship" is not truly censorship. Yet self-censorship seems all-too-real a phenomenon; indeed, it is one of the most poisonous effects suffered in a society that restricts people's freedom of speech.

Two points are important, in response. First, while the phenomenon is real and I agree that it is deeply corrosive, the term has always been a metaphor. "Self-censorship" refers to an activity that is like censorship in important respects (with a

87. DARNTON, *supra* note 75, at 229.

88. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (finding an Ohio state law allowing forcible punishment of advocacy as invalid); *see also* Rex Armstrong, *Free Speech Fundamentalism—Justice Linde's Lasting Legacy*, 70 OR. L. REV. 855, 861–62 (1991) (stating that the First Amendment could be understood to prohibit lawmakers from enacting laws directed against the content of expression).

89. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 454 (2011) (protecting Westboro Baptist Church's right to protest military funerals); *Brandenburg*, 395 U.S. at 448–49 (protecting speech of a Kl Klux Klan member).

person editing himself) and carries many of the same deleterious effects (as well as additional psychological harms).[90] Yet insofar as a person quiets himself, he is not literally censored. (Observe that we would not be tempted to call a person who quiets himself when the political environment emphatically does not call for it, but from his own extreme timidity, a victim of censorship.)

At the same time (my second point), the reasons for a person's self-censorship are relevant to an accurate understanding of his overall situation. If the self-censorer is editing *so as to escape* the punishment that a freedom-stifling government would in fact inflict on him, were he to say certain things, then it occurs because of government restriction of speech. So in this case, we might say that such self-censorship is an extension or a form that literal censorship (government-imposed restrictions) can take. It is one of the means by which government censors achieve what they are after, namely, that certain ideas not be expressed. In other words, when self-censorship is a rational response to genuine (state) censorship, the ultimate responsibility falls on the government.

In sum, while the initial question is natural, it poses no problems for my account. Nothing in what I have said denies or diminishes either the reality of self-censorship, the severity of its harm, or the importance of explaining it as part of the corrosive fallout of censorship.[91] A metaphor can be powerful. It does not lose its power simply because it is a metaphor.

III. THE DAMAGE

Even if one accepts my diagnosis of these various forms of sloppy concept usage, it may seem that I am manufacturing much ado about relatively little. Aren't these merely word games? What is the harm in the misuse of these terms?

We have three principal grounds for concern. For starters, the intellectual shallowness of such careless conceptual deployment

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90. *See* J.M. COETZEE, GIVING OFFENSE: ESSAYS ON CENSORSHIP 36 (1996) (explaining that the battle against self-censorship leaves one lonely, humiliated, and ashamed of one's ideas); CZESLAW MILOSZ, THE CAPTIVE MIND 11–24 (1990) (discussing the deleterious effects of self-censorship on artists under Soviet occupation in East Germany); FLEMMING ROSE, THE TYRANNY OF SILENCE 35–45 (2014) (citing prominent examples of self-censorship of references to Islam by western institutions as undermining the fundamental tenets of democracy).

91. Indeed, it is difficult to imagine why, in a discussion of the phenomenon, it would be germane to point out that, strictly, it is not censorship.

discourages us from identifying exactly why certain speech should or should not be protected. When, instead, we lazily rely on the rote catch-alls, "Of course, there are always exceptions"; "nothing is absolute," we weaken our grasp of what the proper boundaries of free speech are and of why differential legal treatment of speech *is* sometimes warranted. Correlatively, we will police those boundaries in an all the more lax and error-prone way.

This feeds into a more direct reason why usage matters. If your right to "freedom" protects you from four or five *different* things (reactions that displease you, others' ill-informed speech or not terribly valuable speech, and so on), then we are going to have an awful lot of incursions on individuals' "freedom." It is going to be very easy to violate it—which will invite the government to step in to prevent these violations. In other words, careless categorizations will authorize unjustified government restriction. If we mis-classify private actions that respect others' freedom as cases of "censorship," for instance, the government will respond by preventing private parties from running their businesses or exercising their editorial judgment as they see fit—from exercising their rights. In the quest to protect misguided notions of freedom, in other words, it is freedom that will suffer.

Third and more generally, my concern is that misuses of these concepts give incursions on free speech a good name. When we condemn as "censorship" actions that are not censorship, equating private means of reaction with government coercion, we diminish the stigma of censorship and make it seem not so odious. After all, people will naturally think, *some* such pressures exerted by private parties seem perfectly reasonable. Why *should* Twitter be compelled to convey messages that it does not want to, any more than a philosophy journal should be compelled to publish my articles? Or a newspaper, to publish my letters to the Editor? If it's all "censorship," then some censorship seems fine.

The danger, in short, is the normalization of censorship. Whether or not that term is used, this is what takes place under a bloated conception of "freedom" of speech and under the latitude granted by the rejection of absolutes and the embrace of exceptions. Such normalization is not simply a far-off possibility. It occurs already. When an FCC Chair declares that, "there is censorship by ratings, by advertisers," conveniently excusing unwarranted government restrictions by effectively pleading,

"don't object to the government for censoring – we *all* censor, it's all the same," *this* is normalizing.[92] When a *Wall Street Journal* columnist criticizes Google and Facebook for "excessive censorship,"[93] implying that some censorship would be fine, *this* is normalizing.[94]

Basically, what is at issue is a "Crying Wolf" phenomenon. As Darnton observes, "If the concept of censorship is extended to everything, it means nothing."[95] And we cripple our ability to combat the real thing. When we indiscriminately call all unwanted reactions to speech "censorship," we miss the opportunity to explain more precisely and more instructively exactly what is objectionable about actual censorship.

In the end, far from representing innocuous linguistic quibbles, the misclassification of these four phenomena blurs important differences and emboldens the unjustified use of government power. The material damage is the suffocation of intellectual freedom.

IV. ROOTS OF THE CONFUSIONS

In order to correct mistakes, it is always helpful to understand their roots. Why are people confused about these concepts? What are the broader premises beneath the misconceptions?

Ultimately, a handful of philosophical ideas play a role, some more directly and others more circuitously. Moreover, confusion about freedom is itself a source of some of the other conceptual confusions, inasmuch as it fosters mistaken inferences about what constitutes censorship or an exception or an absolute. The root of these confusions, in short, is a substantial question in its own right. Here, I will confine my remarks to three sources, first commenting briefly on how skepticism and a particular notion of principles often contribute to these conceptual confusions. I will then elaborate, with a little further detail, on what I consider the

92. RAND, *supra* note 48.

93. Jenkins, Jr., *supra* note 49.

94. To be clear, the *Wall Street Journal* author's error is two-fold: to imply that a certain degree of censorship is acceptable and to attribute censorship to private companies.

95. DARNTON, *supra* note 75, at 235. I suspect that the term "censorship" is tossed around more loosely in those nations that are relatively more respectful of free speech, since there, people could afford the luxury. When speech is not free—when the government listens to what you say, reads your mail or digital communications, recruits co-workers to report on you, takes down websites—the difference between censorship and private pressure is more stark.

principal culprit, namely, the ascendancy of utilitarianism. Its instrumentalist defense of free speech, contending that it is the usefulness of speech for social benefit that legitimates freedom of speech, has directed our attention to considerations that cloud and crowd out the essentials. But first, a few thoughts on skepticism and principles.

A. Skepticism

One feeder of our confusions over speech vocabulary rests in skepticism. I refer not to the formal school of philosophical thought, systematically studied and endorsed after scholarly examination, but to the simple fact that many people do not believe that knowledge is genuine or that certainty is possible. At best, they think, knowledge might be possible on only a very select set of questions, such as in the hard sciences.

If one's base position is skepticism, however, disagreements can never be truly settled; it is always an open question as to who is right about an issue or what is true. Under such an outlook, who can insist that a right is absolute? Or deny that an exception must be made? On the skeptic's premises, freedom of speech is basically a truce, a pragmatic accommodation "given that we can't ever *know* what is true." Leiter's essay exemplifies this perspective. As he sees it, the only reason to allow free expression[96] is the epistemic unreliability of regulators of speech; they are not sufficiently skilled to control us perfectly.[97] In his words, "since the only good reasons in favour of a legal regime of generally free expression pertain to the epistemic reliability of regulators of speech, we should focus on how to increase their reliability, rather than assume, as so much of popular and even some philosophical discourse does, that unfettered speech has inherent value."[98] The clear implication is that if we could do a better job of restricting individuals' speech, we should restrict it. The ideal is not greater individual freedom, but better-trained Cognitive Paternalists. (We might think of this as the "Poor Regulators Argument": individuals should enjoy free speech only

96. Or what he might better label "somewhat free expression." *See* Leiter, *supra* note 58 (stating that, "western liberal democracies are rife with institutions that view massive restrictions on speech as essential to realising the ends of free societies"); *id.* (arguing that, "if speech were actually 'free' in the courts—that is, unrestricted by state power—then there would be almost no need for most rules of evidence").

97. *Id.* at 408.

98. *Id.*

because of the relative ineptitude of the would-be regulators. Were those regulators more skilled at their work, however, individuals' freedom of speech would be shrunk.)

The larger point is, the more skeptical one is about knowledge itself, the more natural it will be to resist concepts with definite meanings and propositions with hard edges. "Absolutes" and "exceptions," "censorship" and "freedom," are fluid, for the skeptic, their meanings, never certain. And so, correspondingly, are all claims about proper respect for an individual's speech.

B. Principles

A second source of these widespread conceptual confusions is a flawed understanding of the authority of principles. Particularly corrosive is the belief that principles' authority is self-contained and ultimately arbitrary.

Many people cannot articulate *why* a principle of honesty, for instance, is obligatory, or why many of the principles that they espouse are sound, yet they are sure that they are (principles concerning loyalty, justice, racism, or self-sacrifice, for instance). The authority of these principles is not, in their minds, the product of rational demonstration, but instead reflects an amalgam of faith, intuition, community consensus, feelings, anecdotal evidence, and reasons. The problem, however, is that an arbitrary conception of principles makes for arbitrary exceptions.[99] If a person's adoption of principles is itself not grounded on good reasons, he will not have a sensible basis for knowing how to apply the principle or whether it ever does not apply. He will not understand the difference between a "cheating" exception (a case when exempting a situation from the relevant principle would be wrong), and a case in which the principle does not apply or does not prescribe the exact same action that it usually does. For anyone who regards principles' claim on us as, at bottom, some sort of primitive, inexplicable duty, his attitude toward exceptions will be similarly ad hoc. Whether a principle is applied or an exception is granted will be governed by gut feel.[100]

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99. I do not mean that these people necessarily consciously identify their principles as arbitrary. Rather, because of the lack of valid justification, they function as such for them.

100. An example of an arguably legitimate exception: I make it a rule in my classes that late written work is penalized, yet I make exceptions when the delay was attributable

Alongside this fuzzy sense of principles' authority, many people subscribe to the belief that a person can either be practical *or* he can adhere to principles. And the pull of practicality inclines people to reject the idea that any principle, free speech included, could be "absolute." This makes it seem all the more reasonable to grant exceptions. For when one operates under a flawed model of principles as inherently authoritative, those principles' instruction will sometimes seem wrong. "Am I really obligated to tell the truth to that *thief*?" "Does sacrifice for others really require that I give up my Sunday? Or that I contribute *that* much money?" Such situations lend credence to the notion that exceptions are the reasonable way out, offering escape from otherwise too-confining principles. A misguided view of principles, in short, supports a distorted view of exceptions, bolstering the idea that exceptions are legitimate and absolutes are for naifs.

Again, these cursory comments merely suggest partial explanations of our conceptual confusions. Skepticism and the authority of principles each warrant much fuller analysis. Because I believe that both play a role in many people's misunderstandings of important free speech concepts, however, they bear notice. Let me turn now, though, to a more central source of the common misuse of these four concepts.

C. Utilitarianism

Utilitarianism, I believe, significantly fosters the conceptual confusions that I have spotlighted. As with skepticism, I refer not to self-identifying advocates of the formal philosophy of Jeremy Bentham, John Stuart Mill, and many contemporary

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to certain types of factors beyond the student's control. Whatever you think of my rule, the exceptions that I grant to a student who broke his leg or had a death in the family are justified, in my thinking, by the same rationale that generates the rule itself, namely, the belief that I should evaluate all students by the same standards and not grant some more time to complete the required work—or more exactly, not grant differing amounts of time for no relevant reason. For more on the possibility of an alternative to subjectivism that is not intrinsicist, see, e.g., LEONARD PEIKOFF, OBJECTIVISM: THE PHILOSOPHY OF AYN RAND 142–46 (1993) (arguing that subjectivism employs arbitrary processes that are not based on reality); TARA SMITH, VIABLE VALUES: A STUDY OF LIFE AS THE ROOT AND REWARD OF MORALITY 25–28 (2000) (critiquing intuitionism as resulting in arbitrary moral outcomes); Gregory Salmieri, *The Act of Valuing (and the Objectivity of Values)*, *in* A COMPANION TO AYN RAND 49 (Allan Gotthelf & Gregory Salmieri eds., 1st ed. 2016); Tara Smith, *The Importance of the Subject in Objective Morality: Distinguishing Objective from Intrinsic Value*, 25 SOC. PHIL. & POL'Y 126, 144 (2008) (arguing that the intrinsicism rationale of morality is equally as arbitrary as subjectivism).

academics.[101] Rather and a little more broadly, I mean the prevalent instrumentalist reasoning that evaluates all claims of rights by the standard of social welfare.[102] (I am also using "social welfare," "utility," and kindred terms somewhat loosely and interchangeably.[103] While committed utilitarians argue about the exact type of good to be sought, those differences are not salient to the target of my analysis.[104])

First, observe how utilitarianism cuts against the absolutism of free speech. For a utilitarian, nothing is absolute except the imperative to maximize utility; every "should" is contingent on its service to that end.[105] To reap maximal utility, the government will sometimes need to restrict a person's speech. The legitimacy of "exceptions," correspondingly, is a no-brainer.[106]

Utilitarianism also nourishes the confusion of "censorship" with private sanction. For when social utility is the ultimate end, the means by which that is achieved—whether those means employ government force or are freely chosen and entirely voluntary, for instance—are immaterial. Results are all; how we reach the results is secondary. And any actions that do not optimize the sought results can be deemed "censorship," insofar as they obstruct the advance of the paramount goal.

Utilitarianism's notion of "freedom" is similarly warped. For by its lights, a person's speech should be only as "free" as social utility dictates. Consider, for example, a familiar phenomenon. Frequently, when a company's products or services (such as those of Microsoft or Google) become massively popular and are very widely used, people demand that that company or service be declared a "public utility" which, as such, should be regulated for

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101. For this reason, I am not capitalizing "utilitarianism."

102. *See* John Broome, *Equality Versus Priority: A Useful Distinction*, 31 ECON. & PHIL. 219, 220 (2015) (summarizing one view of utilitarianism as holding that one distribution to society is better than another if and only if it has a greater total of well-being for the whole).

103. "Social welfare" had numerous rough equivalents, including the "common good," the "greater good," "social good," and "general well-being." *See Social Service*, BLACK'S LAW DICTIONARY (10th ed. 2014) (explaining that "social service" is another term for "social welfare," which means "a service that helps society work better").

104. *See, e.g.*, ROBIN BARROW, UTILITARIANISM: A CONTEMPORARY STATEMENT 39–40 (1991).

105. *See* Broome, *supra* note 102 (observing that utilitarianism prefers a distribution "if and only if it has a *greater total of well-being*" for society as a whole) (emphasis added).

106. Some might try to fiddle with Rule Utilitarianism in an attempt to gain sturdier protections for rights, but no rules can escape the essentially provisional nature of these "rights."

the public interest.[107] The ways in which a company's actions affect that end, in other words, determine how much "freedom" it should enjoy.[108]

Part of what is confusing is that these instrumentalist arguments do not openly renounce concern with freedom, announcing their rejection of it in favor of allegedly higher ideals. Rather, they continue to use the language of "freedom" and "censorship," but they apply these concepts strictly as social utility dictates.

Today, Mill's utilitarian defense of free speech is probably the single most widely invoked set of arguments given on its behalf.[109] World-wide, champions of free speech regularly employ arguments from the well-stocked arsenal that he articulated. *On Liberty* has been a great aid to the cause of free speech—at least, in certain respects. It offers several strong arguments for the value of open dialogue and vigorous debate, explaining the benefits of a person's being challenged and of having to defend his beliefs.[110] Mill exposes the value of forthright airings of clashing opinions and the way in which thorough public examination can keep a person's convictions vibrant and logically grounded, rather than allowing them to ossify into dogma.[111] He observes the multi-faceted nature of

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107. In 2015, for example, the Federal Communications Commission classified internet access as a public utility and a telecommunications service, to be subject to strictures of the Telecommunications Act. Rebecca R. Ruiz & Steve Lohr, *FCC Approves Net Neutrality Rules, Classifying Broadband Internet Service as a Utility*, N.Y. TIMES (Feb. 26, 2015), https://www.nytimes.com/2015/02/27/technology/net-neutrality-fcc-vote-internet-utility.html?mcubz=3 [https://perma.cc/65UT-MHGB].

108. In a related manner, some argue that a certain quality of public discourse is a "public good," the maintenance of which legitimizes government restrictions on speech. *See, e.g.*, Baer, *supra* note 17 (explaining that, "we would do better to focus on a more sophisticated understanding . . . of the necessary conditions for speech to be a common, public good"). However, others have come out to critique this particular point of view. *See, e.g.*, Ted Gup, *Free Speech, but Not for All?*, CHRON. OF HIGHER EDUC. (Apr. 27, 2017), http://www.chronicle.com/article/Free-Speech-but-Not-for-All-/239909 [https://perma.cc/DY3D-VG84] (claiming that, "the history of colleges' banning speech is steeped in their uneasiness with controversy, new ideas, challenges to the status quo, and movements that might undermine their prestige and authority. In short, their reflex is to shut their ears to the very issues of greatest import to the underrepresented, the vulnerable, the disenfranchised.").

109. *See* Jeremy J. Ofseyer, *First Amendment Law: Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 396 (1999) (stating that Mill's work remains the starting point for most philosophical discussions of free speech).

110. *See* JOHN STUART MILL, ON LIBERTY 35–36 (Dover Thrift 2002) (1859) (explaining that the value of an idea comes from its ability to cultivate the intellect of mankind, which is grounded in one's ability to understand and defend his own ideas).

111. *Id.* at 35.

certain truths, which is often best brought out by hearing others' thoughts, and he warns against the danger of assuming infallibility on a subject without having tested one's ideas against others'.[112] Mill's elaboration of these arguments make a compelling case.

Yet all of these blessings to the cause of free speech have also proved a curse. For they have blinded us to the fact that such instrumentalist considerations cannot sustain a *right* to free speech. All that such consequentialist arguments provide a person is a permission. At best, they issue a conditional: "You may speak—as long as you have something useful to say." Such arguments leave a firm foothold for restrictions on speech that the government deems not useful (which it regularly invokes to silence voices that some find offensive or that veer too far from the "mainstream," for instance). (Recall Leiter's contention that speech which is not socially valuable should not enjoy freedom.[113])

The utilitarian defense of free speech actually suffers from one of the confusions over the meaning of "freedom" that I noted earlier: it mistakes the value of *speech* for the propriety of *freedom* of speech.[114] Yet the reasons why speech can be constructive and the reasons why freedom of speech should be respected are not one and the same. The two overlap, but they are not identical. The first is an epistemological issue, concerning the means by which we attain knowledge. Mill makes some excellent points about that, in detailing the benefits of open and frank dialogue.[115] But the second issue is moral, in that it concerns a person's entitlements when in society with others. And on this, Mill's instrumentalism is bankrupt.

The utilitarian defense of free speech has been seductive, I think, largely because it is comparatively easy to make. The principal alternative school of defense, most associated with John Milton and John Locke, seeks to ground the right to free speech

112. *See id.* at 18–21 (stating that all silencing of discussion is an assumption of infallibility, whereas the liberty to contradict and disprove an opinion is the very condition that gives assurances to what we hold to be truths).

113. Leiter, *supra* note 58, at 409.

114. See discussion of confusion (d), *supra* Section II.A ("[P]eople confuse the value of speech with the value of freedom of speech.").

115. *See* MILL, *supra* note 110, at 97 (explaining that an individual's free will is dependent upon his ability to consult with others regarding what is best for himself).

in individual rights to freedom, more broadly.[116] And in defending intellectual freedom, in particular, Milton and Locke explain the futility of force; they address the inability of physical tools to alter a man's beliefs.[117] Both writers emphasize the value of a man's doing his own thinking rather than passively assenting to the views of others (in part, for reasons concerning his relationship to God). The explanation of this kind of argument requires a much deeper investigation into philosophical fundamentals—the nature of reason, of choice, of thought and of belief-formation—than is required by utilitarianism.[118] It is many times simpler to show, with the utilitarians, the practical benefits of open inquiry by pointing to a trail of discoveries, over the centuries, that have been propelled by the candid airing of clashing views.

Significant as these dividends of free speech are, however, they are simply a complement to its fundamental validation. Utilitarians highlight some of the tremendous benefits that flow from respecting free speech. Yet as the justification of freedom of speech, their analysis is superficial. For in order to reap these benefits, we need to know not simply which social arrangements will be most conducive (i.e., which legal rules), but what conditions *of mind* enable the type of thinking that generates fruitful discussion and can lead to genuine knowledge. In other words, while utilitarianism celebrates certain effects of free

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116. *See* JOHN LOCKE, A LETTER CONCERNING TOLERATION 45–46 (Oskar Piest ed., 1950) (stating that the role of government is not to teach truths, but rather to refrain from inhibiting open exchange); JOHN MILTON, AREOPAGITICA AND OF EDUCATION 48 (George H. Sabine ed., 1st ed. 1951) (explaining that the suppression of expression is the suppression of the individual, both of which are antithetical to humane governance). For extended analysis of this view, see Tara Smith, *What Good is Religious Freedom?*, 69 ARK. L. REV. 943, 975 (2017) (arguing that, under Locke's view, individual rights are a logical outgrowth of the inability of physical instruments to achieve intellectual ends).

117. *See* ROGER WILLIAMS, *The Bloudy Tenent of Persecution*, *in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 161–62 (Samuel L. Caldwell ed., 1963) (arguing that the coercive power of government should not be used to advance spiritual affairs); Smith, *supra* note 116, at 947–48 (explaining that the Lockean argument was that "government should not seek to control people's religious beliefs because doing so is impossible. Belief is not the kind of thing that force can manipulate."); JAMES ERNST, ROGER WILLIAMS: NEW ENGLAND FIREBRAND 433–34, 437 (1969). *See also* MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE 40, 55 (2008). *But see* BRIAN LEITER, WHY TOLERATE RELIGION? 10–12 (2012); JEREMY WALDRON, *Locke: Toleration and the Rationality of Persecution*, *in* JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES 61, 61–87 (Susan Mendus ed., 1988).

118. In essence, the reason that freedom of speech should be respected is that freedom is a precondition of reason and reason is a precondition of a man's achieving life-sustaining values. RAND, *supra* note 82, at 108; JUDICIAL REVIEW, *supra* note 8, at 94; MORAL RIGHTS, *supra* note 8, at 33; Smith, *supra* note 116, at 983.

speech, it fails to adequately account for what makes those possible. On this, I believe, the Locke-Milton line of analysis is far more instructive.[119]

The ultimate foundations of free speech fall well beyond the scope of this paper. My immediate purpose is simply to indicate how the utilitarian outlook skews our understanding of pivotal concepts. And from even this brief foray into the utilitarian mindset, we should be able to appreciate its fatal defect. For the more closely one examines the exact utilitarian argument for free speech, the more one realizes that what it offers is actually a case for *some speaking* (namely, speaking that is deemed socially useful), rather than for anyone's *title* to speak.

Defenders of free speech have generally been in thrall to utilitarian arguments because they offer a good defense of speech—of speaking, of dialogue. Yet they do not support rights. Utilitarianism places a person's speech on a leash, which is extended only as far as social utility permits. Consider Mill's own words:

> If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. *Were an opinion a personal possession of no value except to the owner*; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. *But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race*; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[120]

This passage makes many good points, but it also makes plain Mill's elevation of society over the individual. His core concern is not individual well-being or individual liberty, but social good. A "personal possession" does not count for much, in his ledger;

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119. Smith, *supra* note 116, at 950.
120. MILL, *supra* note 110, at 18 (emphasis added).

"the human race" does.[121] In Mill's thinking, accordingly, a person's "right" is merely a form of his duty to society.[122]

The problem is that when rights live by utility, they die by utility.

To recap: utilitarianism's devotion to the primacy of social utility encourages us to embrace "exceptions" to freedom of speech as lubricants of the social good and to reject an "absolute" right as too confining, a hindrance to its consequentialist agenda. Those who react to speech in ways deemed contrary to the public good are guilty of "censoring," and "freedom" simply describes that set of actions that will best advance social good. A person is to be "free" that far, and no farther.

My own view (which I am not defending here, but offer simply as a clarifying contrast) is that an individual's right to free speech does not arise from or depend on the utility of what he says. The ultimate ground of a person's freedom to speak is not social benefit, but his right to his life. The right to free speech is simply a reflection of the fact that a person's life is his. As such, he is entitled to lead it however he pleases—which includes speaking or not speaking, expressing thoughts that are worth listening to or thoughts that are worthless tripe. Speaking is simply one of the ways of exercising one's general freedom of action. Correspondingly, when it comes to the legal freedom of speech, the only question for the government to be concerned with is whether particular speech infringes on others' rights.[123] If it does, the government should restrict it; if it does not, it should protect it.[124]

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121. *See id.* (stating that the loss of personal possession results in a private injury to the owner, whereas a suppressed idea is an injury to the whole human race).

122. *Id.* at 19–20 (explaining that individuals have a duty to form opinions carefully and to not impose them on others unless they are sure of being right, corresponding with the right to form opinions and to test their validity with an open mind to their fallibility). I am grateful to Geert Van Eckert for prompting me to appreciate this more sharply than I had. For an interesting discussion of certain affinities between Mill's understanding of free speech and Kant's, see Van Eckert, "The Public Use of Reason: Freedom of Speech, Enlightenment, and the Social Dimension of Intellectual Independence," paper delivered at Colloquium on Enlightenment and Freedom of Speech, Jagellonian University, Krakow, Poland, May 2017.

123. *See* AYN RAND, *Man's Rights*, *in* THE VIRTUE OF SELFISHNESS 92, 93 (1964) (arguing that an individual is free to take whatever action he pleases so long as it does not violate the rights of others).

124. Again, for more on my view of the role of government, see JUDICIAL REVIEW, *supra* note 8, at 89 (arguing that the proper role of government is to safeguard individual's freedom by banning the initiation of physical force); Smith, *supra* note 8, at

CONCLUSION

To conclude, a few final thoughts.

This paper has urged a conceptual clean-up of four terms that are routinely employed in our debates over the proper boundaries of freedom of speech, but that are frequently used either equivocally or simply inaccurately. I have isolated the confusions, observed deeper beliefs that nourish them, and indicated the damage they inflict. Even while I have insisted on precise usage of these terms to illuminate freedom of speech, I would to underscore the importance of other normative standards that still apply to a person's speech, besides its freedom. Questions of freedom and censorship do not exhaust the field of critical appraisal. We should defend the racist's *freedom* to speak, for instance, on my view, but we should also condemn vehemently and articulately the depravity of his message.

Second, a reminder of the stakes. While the concepts that I have isolated may initially seem peripheral to the more substantial disputes over freedom of speech, their misuse is consequential. For how we categorize things – is this right *absolute*? Is that action *censorship*? – directly determines how the government wields its power and what restrictions we believe that it has the authority to impose. Mislabeling these abstractions, in other words, leads to mistreating individuals. To wit:

If a person's *absolute* right is misunderstood as less than that, its moral claim is punctured and it is ripe for violation. If *exceptions* to a person's rights are mistakenly considered inevitable and thus acceptable, others have a ready-made excuse for ignoring those rights. If *censorship* is misconstrued to encompass private as well as government actions, the individual's right to determine which speech he supports is lost. And if a person's *freedom* of speech demands the elimination of a variety of unpalatable circumstances, then others' freedom will be trampled, to accommodate his palate.

None of this discussion is to deny the serious arguments that need to be thrashed out over the further substantive questions in our debates over the bounds of free speech. It is simply to caution that these seemingly neutral concepts also carry weighty

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337–40; *see also* RAND, *supra* note 82.

implications. If we do not correctly understand the exact referents of an "absolute" and an "exception," of "censorship" and of "freedom," we invite the unwarranted suppression of speech. And by lending the aura of respectability to illegitimate government restrictions, we soften people's resistance and individuals' freedom pays the price.

WITH ALL DUE RESPECT, MR. PRESIDENT, WE'RE NOT GOING TO FOLLOW THAT ORDER: HOW AND WHY STATES DECIDE WHICH FEDERAL MILITARY RULES APPLY TO STATE NATIONAL GUARD PERSONNEL

DWIGHT STIRLING & COREY LOVATO*

With President Trump considering use of state National Guard troops to deport illegal immigrants, it is essential to understand which rules—federal or state—govern the National Guard. While a president can "federalize" National Guard service members, bringing them under his command, the plan under consideration calls for Guard personnel to remain in a state status. This scenario raises the specter of a conflict of law situation. Would the Guard troops have to follow President Trump's and federal military officials' orders? What if a governor issues contrary instructions? Because Guard members can serve in two statuses, state and federal, it is not obvious which jurisdiction's rules are binding at any particular time. Nor is clarity found in the legal literature, a by-product of the sparse scholarly treatment the National Guard has received generally. As a clear chain of command is essential to military effectiveness, this is no trivial matter.

This Article explains why it is state—rather than federal—officials who decide which rules bind state National Guard personnel. In doing so, it describes the complex power-sharing arrangement the Framers created regarding state militias, i.e., National Guard forces. Under the framework contained in the Constitution's Second Militia Clause, states govern National Guard troops assigned to them. The president's role is strictly normative, limited to setting administrative standards and providing equipment. The president's rule-making authority is concurrent with the states', which also can promulgate regulations for their forces. While both can make rules, only state officials possess the power to govern, a power which subsumes the power to decide which rules apply. Accordingly, federally

promulgated rules and orders—even presidential orders—are legally binding only if state officials make them so.

INTRODUCTION

When a governor activates state National Guard service members pursuant to a presidential request, a question arises as to how much command authority the president exercises over the activated National Guard personnel. The scenario raises the specter of a conflict of law situation. When Guard personnel are operating in a state status, can the president order them to engage in, or refrain from engaging in, certain conduct? What if the Guard personnel's governor issues contrary instructions? Which orders are legally binding? Because Guard members can serve in two statuses, state and federal, it is essential that all parties understand the role the federal chain of command plays when Guard personnel serve in a state status. The existing legal literature is not helpful in answering the question, a by-product of the sparse scholarly treatment the National Guard has received generally. As knowing which rules and orders are compulsory and which are merely suggestive is critical to the efficient administration of a military organization, this is no trivial matter.

The answer is that when National Guard personnel are serving in their traditional "Title 32" state status, the president has no command authority over them whatsoever. Neither he nor federal military officials can direct or enjoin their behavior in any way. Under the Constitution's carefully crafted balance between federal and state sovereignty, the president's power over state service members is strictly normative, limited to setting administrative standards, providing equipment, and establishing operational criterion. Neither the president nor any official in the federal military establishment possesses legal authority to dictate the behavior of state National Guard personnel.

State officials possess exclusive and plenary power to govern the Guard forces assigned to them. This power is exercised by state governors, the commanders-in-chief of state Guard troops. State legislatures, for their part, are authorized to make rules for their assigned Guard personnel. The rule-making power is shared with the president, Congress, and federal military officials. Should a state rule and federal rule conflict, state officials determine which one takes precedence. The power to govern a military organization subsumes the power to decide which rules apply to that military organization. Accordingly, federally promulgated rules and orders—even presidential

orders—only apply to state National Guard personnel if state officials say they do. If not, the federal rules and orders can be ignored without legal consequence.

State officials' legal authority over their National Guard personnel flows from Article I of the United States Constitution.[1] Known as the Second Militia Clause, it provides that governance and training of Guard troops, known historically as "the militia," is a state function.[2] "The power of the States over the militia is not taken away," the Supreme Court said in 1820.[3] "[I]t existed in them before the establishment of the constitution, and there being no negative clause prohibiting its exercise by them, it still resides in the States . . . ."[4] Controlled by state officials, Guard personnel are considered "employees of the States" by the Supreme Court.[5]

This Article explores the legal authority states exercise over their assigned Guard personnel. Part I explains the power-sharing arrangement outlined in the Constitutional framework, a set-up where both state and federal jurisdictions possess certain bundles of power. Part II proceeds to describe the structure of the National Guard, a design which faithfully reflects the

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1. *See infra* note 7 and accompanying text.

2. U.S. CONST. art. I, § 8, cl. 16 (providing Congress with the limited power to "govern[] such Part of them as may be employed in the Service of the United States, [and] reserving to the States respectively . . . the Authority of training the Militia"). The "militia" today is defined under 10 U.S.C. § 246, with the National Guard serving as part of the "organized militia."

3. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 9 (1820); *see also* People *ex rel.* Smith v. Hoffman, 60 N.E. 187, 190 (N.Y. 1901) (explaining that "the state militia is organized by statutes of the state, and the [state] legislature, under the limitations of the constitution, has power to regulate the entire subject").

4. *Houston*, 18 U.S. at 9.

5. Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 48 (1965) ("Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States . . . .").

nuanced power-sharing arrangement. Part III examines the concept of "federal recognition" of state Guard personnel, a certification process enabling states to receive federal funding for training and operations. Lacking command authority over state forces, withdrawal of federal recognition—and the federal monies stemming from it—is the primary mode of influence federal military officials have over state military policies. Finally, Part IV sheds light on California's procedure for determining which federal military rules apply to personnel in the California National Guard. Exemplary of the process states utilize, the very fact California has a mechanism for deciding is proof that states are the jurisdictions who wield the decisional power. If California lacked the legal authority to do so, its nearly century-old statutory system would have been invalidated long ago.

I. STATES' CONSTITUTIONAL GRANT OF POWER TO THE UNITED STATES UNDER THE SECOND MILITIA CLAUSE

The power-sharing arrangement between the federal government and the states over National Guard personnel represents a carefully negotiated compromise. The Revolutionary War fresh in the Framers' minds, many colonial leaders were trepidatious about relinquishing governance of their militias, e.g., Guard personnel, to a national government. At the same time, there was a general consensus that the lack of coordination and uniformity amongst state militias were damaging militias' overall efficacy.[6]

The resolution to the dilemma took the form of the Second Militia Clause. States agreed to grant certain aspects of their power over their militias (now called national guards) to the federal government in exchange for federal armaments and pay.[7] The grant of authority was highly qualified, with states

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6. *See, e.g.*, Perpich v. Dep't of Def., 496 U.S. 334, 340 (1990). The Supreme Court described the dilemmas as:

> Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense.

Id.

7. 32 Stat. 775–80; *see also* Jeffrey A. Jacobs, *Reform of the National Guard: A Proposal to*

reserving many powers for themselves. Understanding what was given up and what was retained is central to our inquiry.

A. The Power to Organize, Arm, and Prescribe Discipline

The Second Militia Clause—Article I, Section 8, Clause 16 of the United States Constitution—authorizes Congress

> [t]o provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.[8]

One collection of powers states granted to the federal government was the powers to organize, arm, and prescribe discipline for state militias. Normative in nature, this bundle of powers pertains to specifying the structure of militias (organizing), providing military equipment (arming), setting common military standards across militias (prescribing discipline). States gave the federal government explicit authority to exercise these powers whether militias were in a state or federal status. States also granted conditional authority to the federal government to "govern" the militias. This power was limited, though, to when militias were in a federal status—"governing such part of them as may be employed in the service of the United States."[9] The power to govern militias when in a state status was thus retained by the states.

The terms "organizing," "arming," "discipline," and "governing" are terms of art. Their meanings were given specific effect in the Supreme Court's early jurisprudence:

> "Organizing" refers to the literal organization of the militias into brigades, divisions, and so forth, and the term "arming" includes both the provision of armaments and monies to the militias. "Discipline," in the context of the militias, refers specifically to the substantive Rules and Articles of War

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Strengthen the National Defense, 78 GEO. L.J. 625, 628–29 (1990). The extent of federal control over state militias was unresolved under the Militia Acts of 1792, the federal statute governing federal control of the militia before 1903, but the enactment of The Militia Act of 1903 provided for federal armaments and pay in exchange for the federal government's right to call the militia into active federal duty. This arrangement has continued to the present.

8. U.S. CONST. art. I, § 8, cl. 16.

9. THE FEDERALIST NO. 29 (Alexander Hamilton).

> governing the behavior of militia members, while "governing" is the act of 'subjecting [the militia] to those Rules.'[10]

In Federalist Paper No. 29, entitled "Concerning the Militia," Alexander Hamilton explained why it was necessary for the federal government to possess the powers to organize, arm, and prescribe discipline. His explanation stressed the critical relationship between the promulgation of integrated discipline, i.e., common military rules, and battlefield effectiveness:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they were called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert an advantage of peculiar moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority. It is, therefore, with the most evident propriety, that the plan of the convention proposes to empower the Union "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, RESERVING TO THE STATES RESPECTIVELY THE APPOINTMENT OF THE OFFICERS, AND THE AUTHORITY OF TRAINING THE MILITIA ACCORDING TO THE DISCIPLINE PRESCRIBED BY CONGRESS."[11]

As mentioned above, states did not surrender all authority over their Guard units. Far from it. As the clause's language did not "completely divest" states of authority with regard to the powers they granted the federal government, states retained

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10. Dwight Stirling & Alex Lindgren, *Actually, Sir, I'm* Not *a California Attorney: The California National Guard, the State Bar Act, and the Nature of the Modern Militia*, 43 W. ST. L. REV. 1, 8 n.48 (2015) (citing Houston v. Moore, 18 U.S. (5 Wheat.) 1, 13–14 (1820)).

11. THE FEDERALIST NO. 29 (Alexander Hamilton). Hamilton's use of all caps at the end of the passage is noteworthy—and not simply because it is one of the earliest known instances of all caps in American letters. By emphasizing the latter part of the clause, he underscored what states *were not giving up* as part of the Second Militia Clause, hoping to mollify state leaders who were nervous about the federal government assuming too much control over their militias. The second half of the clause pertains to states' authority to appoint officers and to train and govern their militias when in state status according to federal rules. His point was to underscore the passive nature of the federal government's powers, consisting chiefly of rule-making, contrasting the powers given up with the active nature of the powers the states' retained: the powers to govern and train.

"concurrent" power over organizing, arming, and prescribing discipline. "All powers, which previously existed in the States, and which are not expressly delegated to the United States, are reserved," the Supreme Court wrote in an early decision.[12] The Court reasoned:

> The power of the States over the militia is not taken away; it existed in them before the establishment of the constitution, and there being no negative clause prohibiting its exercise by them, it still resides in the States, so far as an exercise of it by them is not absolutely repugnant to the authority of the Union.[13]

Accordingly, the federal government and the states have concurrent power to make rules for state Guard personnel.

B. The Power to Govern When in Federal Service

The fourth power contained in the states' constitutional grant was the power to govern militias when in a federal status. Here, the federal government assumed the right to exercise dominion over states' militias if and when it placed the militias in federal service, a process now known as "federalizing." In such instances, the power to govern the respective militias transfers from the state(s) to the federal government. Referring to the "employed in the service of" aspect of the Second Militia Clause, the Supreme Court has observed that "[t]he Governor . . . remained in charge of the National Guard in each State except when the Guard was called into active federal service . . . ."[14]

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12. *Houston*, 18 U.S. at 10.

13. *Id.* at 11. The full passage is remarkable in its rhetorical vigor and logical clarity:

> All powers, which previously existed in the States, and which are not expressly delegated to the United States, are reserved. The power of making laws on the subject of the militia is not prohibited to the States, and has always been exercised by them. The necessity of a concurrent jurisdiction in certain cases results from the peculiar division of the powers of sovereignty in our government, and the principle, that all authorities of which the States are not expressly devested in favour of the Union, or the exercise of which, by the States, would be repugnant to those granted to the Union, are reserved. . . . The power of the States over the militia is not taken away; it existed before the establishment of the constitution, and there being no negative clause prohibiting its exercise by them, it still resides in the States, so far as an exercise of it by them is not absolutely repugnant to the authority of the Union. Before the militias are actually employed in the service of the United States, Congress has only a power concurrent with that of the States, to provide for organizing, arming, and disciplining them.

Id. at 10–11.

14. Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 47 (1965); *see also* Perpich v.

When the president federalizes a state National Guard unit or service member, the transfer of governance authority occurs in a precise manner. There is neither confusion nor ambiguity as to when the command authority shifts, leaving no doubt as to whether a particular Guard member is under state or federal control. For the federalization to occur, there must be (1) a federal order (2) by a federal official (3) acting on statutory authority.[15] The moment all three factors are present, a "triggering event" occurs, moving a formal change of status.[16]

C. The Power to Govern Is Indivisible, Unable to be Shared

While both the federal government and the states can govern state National Guard personnel, actual governance cannot be shared. Only one or the other sovereign can exercise this authority at any one time. What it means to "govern" the militia has been interpreted by the Supreme Court, federal circuit courts, and the California Attorney General.

II. THE DISTINCTION BETWEEN STATE NATIONAL GUARDS AND THE FEDERAL MILITARY

In the previous section, we explored the power-sharing arrangement set up by the Framers for governing and regulating the Guard. Specifically, we showed how states' immediate command authority over Guard personnel empowers them to decide which federal rules apply. In this section, we examine the National Guard's structure.

State National Guards and the federal military are very different entities, having distinct chains of command, missions, and structures. Troops in the federal military have a single status (federal) and a single commander-in-chief (the President).[17] Their mission is to protect the nation from foreign threats and therefore most of their real-world operations occur abroad. Guard troops, by contrast, can serve in two statuses (state or

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Dep't of Def., 496 U.S. 334, 348 (1990) ("Notwithstanding the brief periods of federal service, the members of the State Guard unit continue to satisfy this description of a militia.").

15. United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997).

16. *Id.* (citations omitted).

17. U.S. Const. art. II, § 2; *see also* Dwight Stirling & Corey Lovato, *Wait, My Former Lawyer Represents Who? How Lackadaisical Side-Switching in the California National Guard Creates Conflicts of Interest, Imperils Client Confidences, and Erodes Trust in the Militia Legal System*, 25 B.U. PUB. INT. L.J. 427, 435 (2016).

federal) and can be governed by two commanders-in-chief (the governor or the President).[18] They can be moved back-and-forth between state (gubernatorial) and federal (presidential) control, be tasked with a variety of missions, and have both state and federal certifications (called recognitions).

Each of these unique aspects of the Guard structure is a by-product of the Second Militia Clause, the subject of the previous section. Any discussion of which rules bind state service members must necessarily include a treatment of these structural factors. The inquiry reveals a fascinating discovery—the Guard's idiosyncratic structure and states' power to decide are in fact flip sides of the same constitutional coin.

A. The National Guard's Dual Missions and Federal Recognition

"The National Guard is the only reserve component of the United States' military to also have a non-federal mission."[19] The National Guard's unique dual military role has been explained as follows:

> Perhaps the most unique aspect of the National Guard is that it exists as both a federal and state force. As a federal force, the Guard provides ready, trained units as an integral part of America's field forces. In its state role, the National Guard protects life and property and preserves peace, order, and public safety under the direction of state and federal authorities. No other reserve military force in the world has such an arrangement, and the National Guard's dual allegiance to state and nation has often been the subject of much controversy and misunderstanding . . . . National Guard troops serve at the direction of the state governors until the president [sic] of the United States orders them to active duty for either domestic emergencies or overseas service.[20]

Functionally, the National Guard is composed of fifty state guards that may be called into federal service in order to be utilized as part of the federal military.[21] The National Guard is

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18. *Id.*

19. Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia*, ARMY LAWYER, Dec. 2007, at 32, *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/12-2007.pdf [https://perma.cc/XN4D-85ZL].

20. *Id.* (quoting MICHAEL D. DOUBLER & JOHN W. LISTMAN, JR., THE NATIONAL GUARD: AN ILLUSTRATED HISTORY OF AMERICA'S CITIZEN SOLDERS xi (2003)).

21. Washington D.C., Guam, Puerto Rico, and the U.S. Virgin Islands also maintain their own National Guards that may be called into active federal service, bringing the true

thus split between state and federal forces, with the federal National Guard of the United States (NGUS) serving as a component of the federal military and each state's National Guard comprising a state agency, operating under state law and answering to that state's governor as commander-in-chief.[22] National Guard service members maintain membership in both the NGUS and their respective state National Guard while only serving in one or the other at any given time.[23]

The Supreme Court described the NGUS as follows:

> Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as members of a separate State Guard unit.[24]

State National Guards and the NGUS are "overlapping but distinct organizations," with state Guard members required by law to enlist in both, a concept known as "dual enlistment."[25] Dual enlistment, however, does not create an employment relationship with the federal military when service members are in a state status.

Every National Guard service member has federal recognition and state recognition. "[T]he term 'federal recognition' constitutes an 'acknowledgment' by the federal government that a member of the state National Guard meets all the requirements for federal service and therefore qualifies and is eligible for a position in the United States National Guard."[26] A California Attorney General opinion has authoritatively described the term:

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total number of individual National Guard entities to fifty-four. However, these Guards were established by Congress under federal law rather than under the Constitution. Their structure accordingly differs in certain respects, with the President serving as the commander-in-chief of the D.C. Guard as one example.

22. Charles v. Rice, 28 F.3d 1312, 1315–16 (1st Cir. 1994); *see also* 10 U.S.C. §§ 101(c)(1)–(4) and 32 U.S.C. §§ 101(1)–(7) (defining the difference between the Army and Air National Guards of the several states and territories and the federal Army and Air National Guard of the United States).

23. Perpich v. Dep't of Def., 496 U.S. 334, 345 (1990); Stirling & Lindgren, *supra* note 10, at 5.

24. *Perpich*, 496 U.S. at 345.

25. *Id.* at 345–46.

26. Holmes v. Cal. Nat'l Guard, 109 Cal. Rptr. 2d 154, 167 (Cal. Ct. App. 2001).

> "Federal recognition" is described as "the action of the Department of the Army in acknowledging and recording that officers of the National Guard have met the qualifications and requirements prescribed by the National Defense Act, and regulations, and are hereby entitled to receive federal pay and allowances." As a result of federal recognition, a State National Guard unit receives federal aid and qualifies as a unit of the National Guard of the United States subject to being called into the federal service. To be federally recognized, an officer, in addition to having the prescribed qualifications must be assigned to a federally recognized unit in a position provided for in the prescribed tables of organization. Federal recognition determines an officer's right to a federal commission in the National Guard of the United States. The National Guard of the United States is a reserve component of the Army of the United States and is to be distinguished from the National Guard of California, which is part of the active militia of the state.[27]

B. The Two Statuses

Guard personnel serve in one of two statuses at any particular time: (1) federal active duty under Title 10 of the United States Code, or (2) state control under Title 32 of the United States Code.[28]

1. Federal Active Duty Under Title 10

The different duty statuses are summarized efficiently by Major General Lowenberg, a commanding general of a state National Guard:

> The War Powers Clause of the Constitution grants the federal government plenary authority to raise military forces and to employ such forces, including mobilized (sometimes referred to as "federalized") National Guard units, under federal control and at federal expense for national defense purposes.
>
> This is the authority under which the federal government mobilizes and deploys National Guard units and personnel for combat, combat support and combat service support missions at home and throughout the world. Such service is performed under the authority of Title 10 USC; service members performing such duty are therefore commonly said to be in "Title 10 duty status," meaning, among other things, that

27. 11 Ops. Cal. Att'y Gen. 253, 260 (1948) (citations omitted).
28. Martin, *supra* note 19 at 30, 33.

> command and control rests solely with the President and the federal government.
>
> . . . .
>
> When employed at home or abroad in Title 10 status, National Guard forces are stripped of all state control and become indistinguishable elements of the federal military force.[29]

Title 10 is reserved for limited circumstances, such as when Guard troops have been federally mobilized for deployment to fight terrorism.[30] For example, National Guard units were mobilized and deployed to Iraq or assigned to active duty in the NGUS under Title 10.[31] "The typical National Guard member rarely serves in a Title 10 status."[32] While in a Title 10 status, Guard personnel are subject to the Uniform Code of Military Justice (UCMJ), the code of conduct regulating federal military personnel.[33] Service members federalized under Title 10 become "temporarily disassociated" from their respective state National Guards and serve in the federal NGUS.[34] While serving under Title 10 service members are prohibited from enforcing civil laws unless specifically authorized by the Constitution or an Act of Congress, a restriction inapplicable to service members under state control.[35]

2. State Control Under Title 32

Title 32 duty status is authorized by Article I, Section 8 of the U.S. Constitution, under what is known as the First Militia Clause, which authorizes use of the National Guard while under continuing state control to "execute the Laws of the Union,

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29. MAJOR GENERAL TIMOTHY J. LOWENBERG, NAT'L GUARD ASS'N OF THE U.S., THE ROLE OF THE NATIONAL GUARD IN NATIONAL DEFENSE AND HOMELAND SECURITY 3.

30. Martin, *supra* note 19, at 33.

31. *Id.*

32. Major Michael E. Smith, *Federal Representation of National Guard Members in Civil Litigation*, ARMY LAWYER, Dec. 1995, at 44, *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/12-1995.pdf [https://perma.cc/9S87-MN4K].

33. *See id.* ("National Guard members serving in a title 10 status pursuant to valid orders are federal employees."); *see also* 10 U.S.C. § 802(a)(3) (2017) (noting that "members of the Army National Guard of the United States or the Air National Guard of the United States [are subject to Title 10] *only when in Federal service*" (emphasis added)).

34. Perpich v. Dep't of Def., 496 U.S. 334, 347 (1990).

35. Posse Comitatus Act, 18 U.S.C. § 1385 (West 1994); *see also* United States v. Benish, 5 F.3d 20, 26 (3d Cir. 1993); Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service"*, ARMY LAWYER, June 1994, at 35, 42–43.

suppress insurrections and repel Invasions."[36] While serving in a Title 32 status, service members are subject to state control while being paid with federal funds.[37]

"Title 32 status allows use of the National Guard for a federal purpose but leaves command and control authority with the governor. Because the missions executed in Title 32 status serve a federal purpose, the federal government funds it."[38] "Title 32 is a federal status described in the United States Code, although control resides with the state."[39] Service members serving under Title 32 are subject to state military codes and not the UCMJ.[40] "Conduct that would constitute an offense under the UCMJ, but committed while serving in a [state] National Guard status (under Title 32 or while on state active duty) can only be addressed under state law."[41]

The Supreme Court has indicated that state National Guard members, when in a Title 32 status or on state active duty (explained below), are state employees. In *Maryland*,[42] the Supreme Court declared the "state employee" status of state Guard members:

> It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their

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36. U.S. CONST. art. I, § 8, cl. 15.

37. *See* LOWENBERG, *supra* note 29, at 3. As Lowenberg explains:

> National Guard members performing such [domestic military mission] duty are therefore commonly said to be serving in "Title 32 duty status", meaning, among other things, that command and control remains with the Governor and the state or territorial government even though the Guard forces are being employed "in the service of the United States" for a primary federal purpose.

Id.

38. Peter A. Topp, What Should Be the Relationship Between the National Guard and United States Northern Command in Civil Support Operations Following Catastrophic Events 10 (Sept. 2006) (unpublished M.A. thesis, Naval Postgraduate School), *available at* https://calhoun.nps.edu/bitstream/handle/10945/2536/06Sep_Topp.pdf [https://perma.cc/F2W3-AJX8].

39. *Id.*

40. *See* Martin, *supra* note 19, at 32. Martin explains:

> Since the National Guard falls under Title 32 of the United States Code, rather than Title 10, when serving in its state militia status, the UCMJ is not applicable to National Guard members unless called into federal military service. Therefore . . . the authority to discipline Soldiers in a Title 32 status remains with the individual states and territories.

Id.

41. *Id.* at 34.

42. Maryland *ex rel.* Levin v. United States, 381 U.S. 41 (1965).

> appointment by state authorities and the immediate control exercised over them by the States make it apparent that *military members of the Guard are employees of the States*, and so the courts of appeals have uniformly held.[43]

The distinction between federal employees serving under Title 10 and state employees serving under Title 32 is exemplified by the laws applicable to military attorneys, known as Judge Advocates or JAGs. National Guard JAGs serving under Title 32 may be required to be members of their respective state bar while federal JAGs may serve so long as they are licensed in any jurisdiction, a consequence of federal supremacy over state law.[44]

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43. *Maryland*, 381 U.S. at 48 (1965) (emphasis added). Lower courts have expanded upon the notion that state Guard personnel are state employees. In *Gnagy*, a case arising from the California National Guard, the United States Court of Claims said a state National Guard service member is a state employee. Gnagy v. United States, 634 F.2d. 574, 579 n.19 (1980). The Court of Claims summarized *Gnagy*'s holding in a later case, saying "*Gnagy* relied on *Maryland* in holding that a member of the California Army National Guard was a state employee . . . ." Wright v. United States, 19 Cl. Ct. 779, 784 (1990). The *Wright* court reasoned that "[i]t logically follows that the state employs members of the [Air National Guard]. Therefore, the Constitution, a federal statute, and state control over the National Guard all indicate that membership in the National Guard constitutes state, not federal, employment." *Id.* Additionally, in the context of a case involving a National Guard service member, the California Court of Appeals said that "[g]enerally, National Guard personnel who have not been called to active federal duty are considered employees of the state in which they serve." Chester v. California, 26 Cal. Rptr. 2d 575, 577 n.4 (Cal. Ct. App. 1994) (noting that it is an undisputed fact that members of the California National Guard are members of the state militia). State courts have further upheld this principle, with the Supreme Courts of Alaska and Pennsylvania both holding that National Guard members serving under Title 32 are state employees subject to state law. Kise v. Dep't of Military, 574 Pa. 528 (Penn. 2003); State Dep't of Military & Veterans Affairs v. Bowen, 953 P.2d 888 (Alaska 1998).

44. *See* Martin, *supra* note 19, at 43–44. Martin explains:

> Accession into the [federal] Army Judge Advocate General's Corps, whether as an active-duty or reserve component Judge Advocate, requires applicants to "be admitted to practice and have membership in good standing of the bar of the highest court of a state of the United States, the District of Columbia, Commonwealth of Puerto Rico, or a Federal court." It is further required that such bar membership be maintained for continued service as a Judge Advocate. There is no U.S. Army policy requiring a Judge Advocate appointed in the National Guard be admitted to a specific state bar.

Id. Comparatively:

> State military justice actions are purely state law matters and do not constitute federal practice. Unlike UCMJ actions, state military justice proceedings often require bar membership in that particular jurisdiction. Even though not required by Army regulations or policies, many states require that National Guard Judge Advocates be licensed by the bar of their particular state, whether by state law or by policy.

Id.; *see also Bowen*, 953 P.2d 888 (holding that an Alaska National Guard judge advocate serving under 32 U.S.C. § 502 was a state employee and member of state National Guard subject to state National Guard statutes and regulations). The Supreme Court of Oregon has even suspended a former JAG for violating state rules of professional responsibility while in the Oregon National Guard. *In re* Conduct of Lackey, 333 Or. 215 (Oregon

Military judges serving under Title 32 may similarly be required to maintain State Bar membership.[45]

Guard members serving under Title 32 may be ordered into state active duty by their state's governor.[46] When serving in a state active duty status, service members are paid by their respective state governments and do not receive federal funds.[47] In this status, service members are subject to the command and control of the governor and state legislature, which may utilize Guard personnel for state purposes at state expense.[48] While on state active duty, Guard members have no command connection to the federal military or the federal government.[49]

C. Distinguishing between State and Federal Status

There is no ambiguity in the employment status of National Guard service members while moving between state and federal statuses. While serving under Title 10, National Guard forces are "federalized" and under the exclusive control of the president and federal government.[50] By contrast, both Title 32 status and the state active duty constitute state employment in which service members are subject to state law, answerable to their state governor as commander-in-chief, and disciplined according to state statutes and regulations rather than the federal UCMJ.[51]

The federal government may exercise dominion over states' National Guards if and when it places them in federal service

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2002).

45. Martin, *supra* note 19, at 44 (explaining that, "in most states, military judges in the National Guard are required to be members of their state's bar").

46. *Id.* at 34.

47. *Id.*

48. LOWENBERG, *supra* note 29, at 2.

49. Topp, *supra* note 38, at 10.

50. LOWENBERG, *supra* note 29, at 3.

51. *See, e.g.*, *id.* at 2 ("'Title 32 duty status', meaning, among other things, that command and control remains with the Governor . . . ."); *id.* at 3 ("Use of the National Guard under state control (e.g., Title 32) for domestic missions always protects vital state interests . . . ."); Martin, *supra* note 19, at 3 ("National Guard Soldiers (serving under Title 32 or on state active duty) violating the law, state military justice code, or applicable regulations, may be subject to military justice action under state law."); *see also* Topp, *supra* note 38, at 11. Topp explains:

> Because it is under the governor's command in Title 32 status, the National Guard may participate in law enforcement activities consistent with the state laws and Constitution . . . .From the states' perspective, Title 32 is the preferred status for the employment of their National Guard in civil support. It gives the governors the best of all worlds, i.e., governor control of the National Guard with federal funding.

Id.

under Title 10, a term known as "federalizing." In such instances, the power to govern the National Guard service member at issue transfers from the state to the federal government. Referring to the "employed in the service of" aspect of the Second Militia Clause, the Supreme Court has observed that "[t]he Governor . . . remained in charge of the National Guard in each State except when the Guard was called into active federal service . . . ."[52] Functionally, it is at the point of being federalized that a National Guard service member switches from *serving* in his respective state militia, such as the CNG, to serving in the federal NGUS while continuing to retain *membership* in both organizations.

The U.S. Supreme Court has detailed the process through which National Guard service members become federalized, thereby establishing an employment relationship with the federal government. In *Perpich v. Department of Defense*,[53] the Court explained how service members simultaneously *belong* to both the state and federal components but *serve* in only one at any particular time.[54] Using a "three hat" metaphor, the Supreme Court said that militia members, i.e., state National Guard members, "must keep three hats in their closets—a civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time."[55] When the state hat is on, the federal Army, i.e., the NGUS hat, remains in the closet.[56] Likewise, when the federal hat is worn, state employees are "temporarily disassociated" from their state National Guard unit.[57] In this way, state service members "ordered to federal service with the National Guard of the United States lose their status as members of the state militia during their period of active duty," then are automatically reinstated in their state National Guard units when the federal orders end.[58]

When the federal government takes control of a state service member, the federal government's assumption of the power to govern occurs in a precise, exact manner. As case law has

52. Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 47 (1965).
53. Perpich v. Dep't of Def., 496 U.S. 334 (1990).
54. *Id.* at 348.
55. *Id.*
56. *See id.* (explaining that military members are only charged with serving either the federal or the state government at a time).
57. *Id.*
58. *Id.* at 347–48.

indicated, there is neither confusion nor ambiguity as to when the transfer of authority happens, no one left wondering whether or not a certain militia member is under state or federal governance. The necessary components of a transfer of authority to govern from a state to the federal government are (1) a federal order (2) by a federal official (3) acting on statutory authority.[59] The Tenth Circuit emphasized the timing aspect of the process, using the term "triggering event":

> Guardsmen do not become part of the Army itself until such time as they may be ordered into active federal duty by an official acting under a grant of statutory authority from Congress. When that triggering event occurs, a Guardsmen becomes part of the Army and loses his status as a state servicemen. But until a Guardsmen receives orders directing him into federal service, he is a state servicemen, and not a part of the federal Army.[60]

While both the federal government and the states are capable of governing state militias, actual governance cannot be shared concurrently. Only one or the other sovereign can govern at any one time. The D.C. Circuit explained the meaning of "governing":

> [E]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or the Military Establishment of the United States. And this limitation of power was always recognized by the Congress. The United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard, for there must be a State National Guard before there can be a National Guard of the United States, and the primary duty of appointing the officers is one of the powers reserved to the states.[61]

III. WITHDRAWAL OF FEDERAL RECOGNITION: HOW FEDERAL MILITARY CAN INFLUENCE THE BEHAVIOR OF STATES' GUARD PERSONNEL

Unable to govern state Guard members, the most direct power federal military officials can exercise with regard to Guard

59. *See supra* notes 15–16 and accompanying text.

60. United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997).

61. United States *ex rel.* Gillett v. Dern, 74 F.2d 485, 487 (1934) (emphasis added) (citations omitted).

personnel is to withdraw federal recognition or certification.[62] This authority flows from Congress's power to prescribe discipline for the Guard. Federal recognition is "the action of the Department of the Army in acknowledging and recording that officers of the National Guard have met the qualifications and requirement prescribed" by federal law.[63] Commissioned Officers of the National Guard are "appointed by the several States under Article 1, Section 8 of the United States Constitution. These appointments may be federally recognized by the Chief, National Guard Bureau under such regulations as the Secretary of the Army may prescribe and under the provisions of this regulation."[64] The process of withdrawing federal recognition is outlined in National Guard Regulation 635-101.[65]

The National Guard Bureau's power to withdraw federal recognition was considered in *United States v. Dern*.[66] There, the Bureau determined that a New York National Guard officer had violated a federal "double dip" statute, a rule prohibiting state National Guard members from receiving National Guard salary payments and federal disability compensation at the same time.[67] Because he took both monies, the federal government withdrew the officer's federal recognition.[68]

Claiming the withdrawal was illegal, the officer sued, making two arguments. First, he argued that as a federally recognized brigadier general in the New York National Guard, "he [was] an officer of the Army and subject to discipline or removal in accordance with the Article of War," the military code that

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62. John G. Kester, *State Governors and the Federal National Guard*, 11 HARV. J.L. & PUB. POL'Y 177, 204–05 (1988). Kester explains:

> Under the Militia Clause, Congress probably lacks power to demand actual federal conduct of the training of the National Guard, but the authority to prescribe "the discipline" is very broad indeed. The issue is academic as a practical matter, because Congress controls the National Guard's training by the threat of loss of federal recognition and federal funding.

Id.

63. 11 Ops. Cal. Att'y Gen. 253, 260 (1948).

64. U.S. DEP'T OF ARMY, NAT'L GUARD, REG. 600-100, COMMISSIONED OFFICERS – FEDERAL RECOGNITION AND RELATED PERSONNEL ACTIONS para. 2-1 (Apr. 15, 1994), *available at* http://www.ngbpdc.ngb.army.mil/pubs/600/ngr600_100.pdf [https://perma.cc/KEH8-52E2].

65. U.S. DEP'T OF ARMY, NAT'L GUARD, REG. 635-101, EFFICIENCY AND PHYSICAL FITNESS BOARDS (Aug. 1977), *available at* http://www.ngbpdc.ngb.army.mil/pubs/635/ngr635_101.pdf [https://perma.cc/NNQ8-ZXM9].

66. United States *ex rel.* Gillett v. Dern, 74 F.2d 485 (1934).

67. *Dern*, 74 F.2d at 487–88.

68. *Id.* at 486.

preceded the Uniform Code of Military Justice.[69] He said federal military officers were not subject to the double dip statute, a law pertaining only to state National Guard members.[70] Second, he argued that, even if he was subject to the double dip statute, the National Guard Bureau had no authority to withdraw his federal recognition.[71]

The D.C. Circuit rejected both arguments.[72] It said National Guard officers in a state status were members of the state militia, not the federal military.[73] "[E]xcept when employed in the service of the United States, officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States."[74] Secondly, it held that when a state National Guard officer violates a federal statute or a regulation, thereby failing to meet the prescribed criteria, the National Guard Bureau had the inherent authority to withdraw the officer's federal recognition.[75] The power to grant recognition subsumes the power to withdraw recognition. The court said: "As Congress, in the discharge of its constitutional right to organize, arm, and discipline, had an absolute right to determine as well as classify those whom in time of peril it would call to the service of the Nation, *it likewise had a right to limit them* . . . ."[76]

The court's rationale demonstrates that neither the Chief of the National Guard Bureau nor any official of the federal military has the power to "govern" state militia officers. While they can rescind federal privileges such as recognition, federal officials have no command authority over state officers. Ordering, directing, or punishing a Guard troop violates the Second Militia Clause. The court in *Dern* held:

> except when employed in the service of the United States, the whole government of the militia is within the province of the state, and this follows because of the precise limitations of the

69. *Id.* at 487.
70. *Id.*
71. *Id.*
72. *See id.* (stating that, "Congress has the power to withhold federal recognition from all or any part of the militia in its discretion, or to impose the conditions of its acceptance. This power is a *necessary attribute* of the constitutional grant." (emphasis added)).
73. *Dern*, 74 F.2d at 488.
74. *Id.* at 487.
75. *Id.*
76. *Id.* at 488 (emphasis added).

> constitutional grant. The United States may organize, may arm, and discipline, but all of this is in contemplation of, and preparation for, the time when the militia may be called into the national service. Until that event, the government of the militia is committed to the states.[77]

IV. CALIFORNIA'S TWO-PART INCORPORATION TEST

In the previous section we described withdrawal of federal recognition, the primary method the federal military has at its disposal to influence the behavior of Guard personnel. We have also shown that even federal military regulations or orders expressly applicable to the state National Guards *are not* automatically applied. This is because all federal directives must be passed through whatever filter the state has installed to preserve its sovereignty.[78] In this section, we elaborate on the conceptual framework of the filter and then examine one state's nuanced filtration instrument, California's two-step incorporation test,[79] a clever mechanism by which certain categories of federal military rules are brought into state law while others are rejected.

A. State Sovereignty as a Checkpoint

State sovereignty operates as a checkpoint through which federal military regulations and presidential orders must pass before being applicable to a state National Guard service member. Each state can design its process as it sees fit. This right stems from states' plenary power to govern their militias—"The power of the States over the militia is not taken away . . . ."[80]

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77. *Id.* at 487.

78. *See* Printz v. United States, 521 U.S. 898, 935 (1997). The Printz Court held:

> [t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Id.; *see also* MARY BOTTARI & LORI WALLACH, PUB. CITIZEN'S GLOB. TRADE WATCH, STATES' RIGHTS AND INTERNATIONAL TRADE: A LEGISLATOR'S GUIDE TO REINVIGORATING FEDERALISM AND PRESERVING POLICY SPACE IN THE ERA OF GLOBALIZATION 3–4 (2009), https://www.citizen.org/sites/default/files/states_rights_and_trade.pdf [https://perma.cc/839S-CCAN] (explaining resolutions and legislation that states created in an effort to reinvigorate and protect state regulatory authority and policy space).

79. CAL. MIL. & VET. CODE § 101 (West 2017).

80. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 9 (1820).

As explained above, subsumed in the power to govern is the power to decide what federal rules apply. While the federal government has the authority to "prescribe discipline" for the militia, each state must affirmatively incorporate the prescribed discipline into state law before the discipline becomes applicable to state militia members. In other words, a second step is needed before a federal regulation becomes applicable to a state Guard member. Each "state militia is organized by statutes of the state, and the legislature, under the limitations of the constitution, has power to regulate the entire subject."[81] This means that even federal military regulations applicable on their faces to the state Guards are not automatically applicable. Federal military rules are rightly understood as suggestive rather than prescriptive. States have the final say as to federal rules' applicability to the Guard forces under state control.

The federal government can only order Guard members to take certain actions—including ordering them to apply federal regulations—when Guard members are in the service of the United States. "Before the militia[s] are actually employed in the service of the United States," that is, before they are serving in the NGUS, "Congress has only a power concurrent with that of the States, to provide for organizing, arming, and disciplining them."[82] When serving in a state status, Guard personnel take their instructions exclusively from state officials.

B. California's Two-Part Incorporation Test

Under California law, the only federal military regulations which enter into California law and are made applicable "to the government of the militia," i.e., the members of the California Military Department, are those which come in via the California Military & Veterans Code section 101 incorporation scheme.[83]

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81. People *ex rel.* Smith v. Hoffman, 60 N.E. 187, 190 (N.Y. 1901)
82. *Houston*, 18 U.S. at 9.
83. *See* CAL. MIL. & VET. CODE § 101 (West 2017). Section 101 states:

> All acts of the Congress of the United States relating to the control, administration, and government of the Army of the United States and the United States Air Force and relating to the control, administration, and government of the United States Navy, and all rules and regulations adopted by the United States for the government of the national guard and Naval Reserve or Naval Militia, so far as the same are not inconsistent with the rights reserved to this State and guaranteed under the Constitution of this State, constitute the rules and regulations for the government of the militia.

Id.

Under section 101, only the federal military regulations that pass a two-part test are incorporated into state law. In this way, section 101 operationalizes Congress's power to "prescribe discipline" and California's power to "govern" its militia.

The first part of the incorporation test is that the federal military regulation must be the right subject matter.[84] To be the right subject matter, the regulation must pertain to the "control, administration, and government" of the federal military.[85]

> The term "control" refers to the capacity to direct the operations of a military organization. The term "government" similarly refers to specifically "military organization," such as the arrangement of the militia into divisions, brigades, and so forth, and the imposition of military discipline. The final term, "administration," has not been interpreted to have a specialized meaning. Absent specific definition, the intent of the legislature regarding a statutory term is determined by giving the term its "usual and ordinary meaning." Thus, the term "administration" should be construed to mean "the process or activity of running an organization," particularly with regard to the authority of the executive branch.[86]

Federal rules that address topics other than three categories are the wrong subject matter and not incorporated.

The California Attorney General has indicated that incorporation is never self-executing. Review of the pertinent rule for compliance with the incorporation test is always a necessary step. "[W]henever it is suggested that a federal statute has been adopted as State law pursuant to section 101 [of the Military & Veterans Code], each particular statute must be studied with respect to the subject matter involved."[87] As such,

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84. Stirling & Lindgren, *supra* note 10, at 7 (discussing the first prong of the incorporation test).

85. CAL. MIL. & VET. CODE § 101.

86. Stirling & Lindgren, *supra* note 10, at 14 (citations omitted).

87. 22 Ops. Cal. Att'y Gen. 15, 16 (1953); *see also* Att'y Gen. Un. Pub. Ops. IL 65-124 (1965). The California Attorney General concludes:

> Generally, section 101 refers to federal statutes dealing with such matters as functions of command, military organization and administration. The section viewed in its entirety seeks to give the State the same control and administration over the militia as a State force as the Federal Government exercises over its military establishment. Federal statutes providing for benefits and immunity for individual members of the regular army and of reserve components while on active federal duty, do not come within the purview of the section.

22 Ops. Cal. Att'y Gen. 15, 16 (1953).

regardless of whether a federal military regulation purports to be applicable to "all state National Guard personnel," federal regulations are never *automatically* applied to the California National Guard or the California Military Department. Both parts of the section 101 test must be met first.

The second part of the test is the "not inconsistent with" portion. Only federal military regulations that are "not inconsistent with the rights reserved to this State and guaranteed under the Constitution of this State" are incorporated into state law and made applicable to the California National Guard. In interpreting the meaning of this language, the California Attorney General concluded that when a federal military regulation or statute pertains to a topic about which California has enunciated a policy, federal military regulations that pertain to that topic are not incorporated into state law.

In one formal opinion, the California Attorney General said that federal military rules governing "relief from a claim for refund of overpayment of military pay" were inconsistent with a California statute, barring them from application to the Guard.[88] In another, the Attorney General held that a federal regulation regarding dismissal of an officer from a federally recognized position was inconsistent with a California regulation, likewise denying it entry into state law.[89] In a third, the Attorney General concluded that federal military regulations pertaining to the payment of federal employees' moving expenses conflicted with California statutory language, stating "we conclude that sections 100 and 101 do not incorporate federal military law in the areas covered by specific State statutory provisions . . . ."[90]

C. Section 101's Synchronicity with the Second Militia Clause

There is near perfect harmony between section 101 and the Second Militia Clause, fitting together hand in glove. In the language of the *Dern* court, section 101 reflects "the precise limitations of the constitutional grant," encapsulating the states' grant of authority to the federal government relative to "organizing" and "prescribing discipline."[91] Section 101 does this by limiting the subject matter of the federal rules that come into

88. 64 Ops. Cal. Att'y Gen. 750, 753 (1981).
89. 11 Ops. Cal. Att'y Gen. 253, 261 (1948).
90. Att'y Gen. Un. Pub. Opn. IL 65–124 (1965).
91. United States *ex rel.* Gillett v. Dern, 74 F.2d 485, 487 (1934).

state law to those related to the "control, administration, and government" of the National Guard.[92] In this way, the phrase "control, administration, and government" is properly understood as representing California's analog for "organizing" and "prescribing discipline," the "precise limitations of the constitutional grant."[93] As section 101 makes clear, federal regulations that exceed the scope of this subject matter do not "constitute the rules and regulations for the government of the militia."[94]

Similarly, section 101 indicates that California, a sovereign entity, has retained the power to "govern" and "train" its militia when in a state status. The very fact that it exists as statutory law evidences California's power to decide which federal rules apply to California National Guard personnel. A limiting statute such as this would be unconstitutional unless states possessed the power to decide, unless states were the final arbiter on application to their Guard personnel. If section 101 represented an improper burden on the federal government, federal lawyers would have sought to void it years ago—yet it has been part of California's code for nearly a century.

CONCLUSION

States, not the federal government, decide which rules bind Guard personnel in a Title 32 status. Under the framework outlined in the Second Militia Clause, states govern National Guard troops assigned to them. The president's role is entirely normative, limited to setting nationwide training standards and providing equipment. The president's rule-making authority is concurrent with states' authority, which can also promulgate regulations for the Guard forces assigned to them. While both can make rules, states are the only jurisdiction which can govern Guard personnel operating in a Title 32 status, a power that necessarily includes the authority to determine which rules apply.

California's section 101 incorporation test exemplifies how states determine which federal military regulations apply. Unless

92. CAL. MIL. & VET. CODE § 101.

93. *See Dern*, 74 F.2d at 487 (explaining that organizing, arming, and disciplining are express limitations on the constitutional grant, and that it follows that the government of the militias is committed to the states).

94. CAL. MIL. & VET. CODE § 101.

incorporated under state law or adopted by a state's governor, orders from the president and/or federal military rules—even those ostensibly applicable on their face to state National Guards—are only suggestions, having no binding effect. If federal military officials are unhappy with the decision(s) a state makes regarding applicability of a particular federal rule or order, withdrawal of federal recognition is the most severe sanction that can be taken in response. Devoid of any direct command authority over state Guard forces operating in a Title 32 status, federal officials are powerless to overrule a state's decision.

LAW'S NECESSARY VIOLENCE

JOSEPH D'AGOSTINO*

The concept of political positive law necessarily includes coercive physical force. Legal philosophers have erred in this area since Hart's The Concept of Law *(1961) and recent works, such as Frederick Schauer's* The Force of Law *(2015), repeat Hart's mistake by failing to understand that those subject to political positive laws must be able to recognize a coercive intent behind those laws in order to coherently and consistently recognize them as laws. Acknowledgment of this conceptual necessity would combat confusion over law caused by the increasing divergence in legal subjects' fundamental worldviews and ways of personally accessing reality. It could also combat the weakening consensus regarding the authority of political and legal figures while promoting a more libertarian attitude toward the use of law. I employ novel arguments to demonstrate that a refined understanding of the Benthamite–Austinian command theory of law is the correct one. I argue that every law, properly so-called, is a speech act that signals legitimated violence and, unlike previous proponents of the coercive command theory, I clarify that the coercion involved is necessarily physical. My epistemology rests upon a common-sense and naturalistic approach and I use natural-kind concepts, rooted in the causal effects of physical objects, as models for all other concepts while adopting normative thin positivism, thus separating law from morality as much as possible. The necessity of using coercive force to distinguish law from rhetoric, moral suasion, exhortation, guideline, and other social phenomena—and legal persecution from other forms of social disapproval—becomes apparent with this approach. To promote the best understanding of the world, the concepts of law and legal obligation cannot overflow the distinguishing ends and means of political legal authorities, and their distinguishing means is legitimated physical coercion applied through a legal system.*

INTRODUCTION

Political positive law relies upon the socially legitimated authorization of violence. It requires this violence for its existential conviction, which in turn requires the unique demarcation of its clear and distinct essence. After phenomena are examined and conceptual lines most coherently drawn, no political positive law can exist without the socially recognizable intention to employ physical force or the threat of it. This may be a matter of common sense to most legal practitioners and ordinary people, but it is denied by almost all contemporary legal philosophers. Although legal positivists attempt to identify law without reference to morality, they fail to recognize that force—and not abstract persuasion alone—must be a means that every law uses to prompt ordinary subjects of that law to conform their actions to lawmakers' desires. This need is not necessarily because of subjects' fear of negative consequences but because physical force is essential to recognizing the law as law. This conclusion becomes inevitable once we concede that a political positive law remains law even when it has no intrinsic moral force. The epistemological role of force—the connection between knowledge and coercion—drives this article.[1]

My argument is one of general legal philosophy and, hopefully, possesses that scope and timeless application. But for those interested in a possible specific application to our time, I note that it is currently commonplace to observe that we live in an abstracted, simulatory, and ideological age of blurring lines,

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* Associate Professor of Law, Savannah Law School. I wish to thank Frederick Schauer, John Anderson, Judd Sneirson, Caprice Roberts, Vinay Harpalani, Andrew Wright, Eugene Mazo, Michael Morley, Tamara Lave, Larry Alexander, Avidan Cover, and John Finnis for their many invaluable suggestions that have improved this article and for the encouragement they have given me. I also thank participants for their helpful comments after my presentations at the Southeastern Association of Law Schools Annual Conference 2016, a meeting at the University of Auckland of the New Zealand Society for Legal and Social Philosophy in December 2016, and the Federalist Society Annual Faculty Conference 2017. Tia Bailiff, Andrew Zemany, Lexye Shockley, Bryan Smith, Janetta Burch, and Christopher Ventura provided valuable research assistance. I am grateful to the editors of the *Texas Review of Law & Politics* for editing and publishing my work. Any remaining errors are my responsibility. I wish to thank my father, Robert D'Agostino, for the assistance and guidance without which I would not be in a position to write at all. Most importantly, I offer my inadequate gratitude to Christ the Logos from Whom all true knowledge flows.1.See Immanuel Kant, Critique of Pure Reason 660 (Norman Kemp Smith trans., Macmillan 1st ed. 1926) ("It is of the utmost importance to isolate the various modes of knowledge according as they differ in kind and in origin, and to secure that they be not confounded owing to the fact that usually, in our employment of them, they are combined.").

incompatible personal interpretations of truth, and people less and less able to distinguish fantasy from reality. These phenomena create both rational and irrational pluralism in personal perspectives on reality. This is occurring at the same time that proliferating group-worldview pluralism—or put another way, competing religions—is producing growing conflict.[2] Together with a conflicting set of views within legal theory and practice, these two pluralisms—that of personal perspectives and that of ideological worldviews—have created a great deal of the disagreement over the nature of law and its social role. The content of the law both suffers from and contributes to this general trend with its ever-increasing complexities, ambiguities, overcriminalization, and overregulation.[3]

Yet, as always in these cases, the application of a few simple principles can cut through much of the confusion and clarify phenomena, including the one called law. One such principle is the inclusion of *a socially recognizable intent on the part of legal authorities to apply coercive physical force as essential to the conceptual identification of every political positive law and thus to the definition of*

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2. I am unaware of any work that analyzes these evolving and interrelated phenomena in a comprehensive way, but there are accessible modern foundational works on dissolving consensuses that I believe should receive more attention. *See generally* HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE (1986); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (3rd ed. 2007); ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1989); RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (expanded ed. 2013). Additionally, there are accessible contemporary works discussing divergent ways of thinking. *See generally, e.g.*, JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2013). Finally, there are social psychoanalytic works discussing similar themes. *See generally, e.g.*, SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey ed. & trans., 1989); KAREN HORNEY, THE NEUROTIC PERSONALITY OF OUR TIME (1994).

3. *See, e.g.*, RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 2 (2006) ("The New Deal Court thus vindicated both expansive federal powers and limited protection of individual rights of liberty and property. . . . That transformation represents the defining moment in modern American constitutional law: the Court's shift toward the big government model that continues to dominate today."); Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 Vand. L. Rev. 1191, 1223–24 (2015) (Overcriminalization "fuel[s] the *ex ante* rationalizations that allow white collar criminal acts to go forward. Overcriminalization not only causes unnecessary criminal violations through increased and unjustified enforcement and adjudication, but it also causes criminal behavior itself."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 506–07 (2001) ("Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled. The reason is that American criminal law, federal and state, is very broad; it covers far more conduct than any jurisdiction could possibly punish.").

law itself.[4] This principle runs contrary to legal theory's dominant view, which holds that no coercion of any type is essential to the concept of law.[5] In my view, a lawmaker can empower and confer benefits on some only if she threatens force against others and, at times, against those she seeks to benefit. If, as may be the case today, ever-larger numbers of law's subjects hold their political and legal authorities in low regard, clearly identifying law and legal obligation by methods other than moral or social approval or convention alone becomes increasingly important. Yet my argument is universal, true too for societies ruled by the virtuous and respected, should any such societies reappear.

Accepting the reality of coercive force goes a long way toward distinguishing the circumstances of legal disabilities from mere social disabilities and disapproval. This includes social disabilities encouraged by political and legal authorities. Such demarcation is important in a time when a growing number consider any statements they find offensive to be harassment or—by some transmutatory principle—even "violence."[6] It is important in a time when some religious believers consider any governmental decision in violation of their doctrines to be oppression,[7] and when a multiplying number of socially visible minority groups consider any denial of benefits or privileges to be discrimination.[8] Regardless of one's attitude toward such phenomena, the bright line of coercive force can show when law is truly at work and when it is not. It can show both subjects of the law and lawmakers alike when to fear legal restrictions and when to recognize that legal liberties are still intact despite the negative attitudes and actions of others. My epistemological approach clearly distinguishes law from the miasmatic web of supposedly oppressive social forces increasingly decried by so many. My analysis helps reveal when political and legal authorities disguise shame, guilt, and other forms of moral and

4. I use "coercive force" to indicate physical force or the threat of it applied to induce action or inaction rather than out of other motives, such as cruelty or purely retributive punishment.

5. *See generally* H.L.A. HART, THE CONCEPT OF LAW (Paul Craig ed., 3rd ed. 2012).

6. *See generally* BRUCE BAWER, THE VICTIMS' REVOLUTION: THE RISE OF IDENTITY STUDIES AND THE CLOSING OF THE LIBERAL MIND (2012); MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS (2017). Both write from a liberal perspective, but perhaps social media provides the best evidence.

7. *See supra* note 6.

8. *See id.*

psychological pressure as legal duties.[9] Just as importantly, my approach also marks out the moments when political and legal authorities cross into employing genuine legal coercion and thus may encourage a more libertarian approach to law.

To a considerable extent, I respond to Frederick Schauer and his book *The Force of Law*,[10] which continues his attempts to rehabilitate coercion as central to the understanding of law[11] but still fails to recognize its essential nature.[12] I offer novel arguments for the inclusion of intended coercive force in the concept of law and refute examples—advanced by H.L.A. Hart among others—of purportedly noncoercive laws. I do this while formulating a definition of law that includes a basis of coercive force, which I define to include the threat of physical force as well as actual physical force.[13] Previous exponents of theories of coercion-based law failed to define clearly what they meant by coercion.[14] I rectify this omission by identifying *coercive physical force applied against the bodies of legal subjects* as the necessary element.

Political positive law is man's law rather than God's or nature's. As such, despite all the talk of benefit-conferral, power-conferral, law-constitution, and the expressive function of law,

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9. Systematic application of my approach to politically fraught controversies will have to wait for a future article. Here, I will focus on more foundational, theoretical arguments.

10. FREDERICK SCHAUER, THE FORCE OF LAW (2015). Reading the book produced the reaction, so useful to the scholar in me, of: *Here is an excellent argument that is wrong.*

11. Well before this book, Schauer recognized the essential—or almost so—connection between law and coercion in the mind of the typical subject. *See* Frederick Schauer, *The Best Laid Plans*, 120 YALE L. J. 586, 588 (2010) ("And thus to the typical citizen, attempting to understand and explain law without regard to its force would seem scarcely conceivable.").

12. *Contra* SCHAUER, *supra* note 10, at 3 ("It thus appears that noncoercive law both can and does exist.").

13. Threats of violence without physical contact, such as assault, often are considered violent crimes under the law. *See, e.g.*, *Violent Crimes*, NATIONAL INSTITUTE OF JUSTICE, http://www.nij.gov/topics/crime/violent/pages/welcome.aspx [https://perma.cc/647B-3M7D] (last modified Apr. 4, 2017) (describing "violent crime" as crime in which "a victim is harmed by or *threatened with* violence" (emphasis added)).

14. I provide a narrow account of coercion that hopefully avoids one of the criticisms leveled at Schauer's book. *See* Leslie Green, *The Forces of Law: Duty, Coercion, and Power*, 29 RATIO JURIS 164 (2016). Green states:

> One of the more striking features of [Schauer's] book-length defense of the view that coercion is central to law is how little attention is given to the nature of coercion. . . . Punishments and penalties, of course; but sometimes also rewards for compliance, some taxes, and perhaps even the nullification of transactions. The loss of reputation that comes with being a lawbreaker can, he claims, be coercive. Also, locks on doors . . . .

Id. at 172.

political positive law is fundamentally *the socially legitimated licensing of violence for the purpose of ordering temporal society.*[15] The dominant trend away from this view, particularly since the initial 1961 publication of Hart's *The Concept of Law,* is mistaken.[16]

This clarifying principle of force can combat nebulous understandings of social influences and help legal philosophy return to solid ground. This solidification is especially needed as more scholarly and popular attention is paid to the systematically irrational thought patterns and decision-making in modern law as elsewhere.[17] Arguments firmly connected to experienced or realistically experienceable physical realities have more credibility than arguments that remain in mental worlds, and these latter arguments have done much to erode the influence of philosophy over nonphilosophical thinking.[18]

It may appear that I will argue that legal positivists have stripped too much from the concept of law, such as by denuding it of coercion, but I believe that legal positivists have failed to exclude nonlegal social influences and moral suasion from the concept of law. This failure led them, wrongly, to expel coercion instead. These errors contributed to the creation of a quasi-Gnostic idea of law divorced from reality.[19] Certainly, Hart

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15. I say "licensing" rather than "use" because political positive law often allows subjects discretion to use private force in certain legally defined circumstances, such as self-defense. *See, e.g.*, LA. STAT. ANN. §14:20(c) (West 2014) (setting forth when homicide may be justifiable); TEX. PENAL CODE ANN. § 9.31 (West 2011) (establishing self-defense as a justification excluding criminal responsibility); UTAH CODE ANN. § 76-2-402(3) (West 2016) (same).

16. *Contra* HART, *supra* note 5, at 26 ("Surely not all laws order people to do or not to do things.").

17. *See generally, e.g.*, DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010) (identifying systematic, predictable patterns of irrationality in human behavior); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing similarly predictable patterns of seemingly hardwired human irrationality); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (rev. & expanded ed. 2009) (rehearsing numerous studies regarding endemic patterns of human irrationality and drawing out potential policy implications).

18. Thus, among the concepts of law that I reject is that of Max Weber, who included coercion as an essential basis of law but included nonphysical coercion in his definition. *See* MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 5 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) ("An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose.").

19. Philosophical, spiritual, and personal orientations may help explain why, to some, "law as inevitably coercive" has intuitive appeal while to others it very much does not. Perhaps this tracks political divides to some extent, although political labels no longer have the coherence they once did. *See* NORBERTO BOBBIO, LEFT AND RIGHT: THE

recognized that coercion must be part of the typical legal system[20] and that many laws were backed by coercive threats.[21] However, he believed that some laws were not best described this way and I believe his description of such laws is greatly deceptive.[22]

And so I address the debilitating effect of pitting Hart's puzzled man, who cares about compliance with law for its own sake,[23] against Oliver Wendell Holmes, Jr.'s bad man, who cares about obedience[24] to law only insofar as it might punish or reward himself.[25] This led to the most fundamental mistake that positivists have made: the abandonment of any refinement of the Benthamite–Austinian command theory of law and its employment of coercion.[26]

My version of the command theory *reunifies the identification of law for the puzzled man and the bad man.* I do not mean to condemn other aspects of Hart's employment of the puzzled man, such as his ability to highlight the importance of normativity,[27] and other valuable correctives to the use of the bad

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SIGNIFICANCE OF A POLITICAL DISTINCTION 68 (Allan Cameron trans., 1996) ("The harshness of nature is matched by the harshness of society, but on the left there is a general tendency to believe that man is capable of correcting both.").

20. Hart accepts that some positive law must be coercive due to a sort of natural imperative. HART, *supra* note 5, at 199. Hart says:

> [W]e do need to distinguish the place that sanctions must have within a municipal system, if it is to serve the minimum purposes of beings constituted as men are. We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity* . . . .

Id. He suggests that "the minimum forms of protection for person, property, and promises which are similarly indispensable features of municipal law" are natural necessities as well. *Id.* at 199. He treats the system of international law differently and rejects the assertion "every legal system *must* provide for sanctions," thus opening the door to entirely coercion-free legal systems. *Id.*

21. *Id.* at 27 (he identifies criminal law and tort law as areas of "strong," in the case of the former, and "some," in the case of the latter, analogy to John Austin's model of law).

22. *See id.* at 26 ("Is it not misleading so to classify laws [as commands] which confer powers on private individuals to make wills, contracts . . . ?").

23. "The puzzled man is disposed to comply with the law *just because it is the law*, and an account of law that fails to take account of the puzzled man simply does not, Hart said, 'fit the facts.'" SCHAUER, *supra* note 10, at 42.

24. I use "obedience" to imply a choice to follow the law, and "conformity" and "compliance" to include coincidental accordance with law as well as choice.

25. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

26. Although neither held it consistently, Jeremy Bentham and John Austin are the modern writers most identified with the coercion-based command theory of law in the English-speaking world.

27. Many or most laws, even simple and transparently coercive ones such as "those who steal will be incarcerated for a year," do not merely state facts, or predictions, or intentions about future conduct of government officials, but include guides for subjects'

man.[28] By restoring coercion to the concept of law, and with the indicator of physical coercion specifically, we can redraw useful conceptual and practical lines that have valuable benefits not only for abstract intellectual comprehension but for law's practical application.[29] The concept of coercive force promises to resolve some long-standing theoretical disputes with such practical import, the identification of the existence and specific content of international law among them, although extensive exploration of most such topics will have to await a future article.[30] In all cases, a political lawmaker manifests conviction clearly to her subjects *as a lawmaker* only when she signals physically coercive intent and cannot generate a reasonably indisputable legal obligation otherwise.[31]

I find that certain fundamental misunderstandings tend to arise immediately when listeners first confront my thesis. Hence, I will shape my claims with the following clarifications, on which I will elaborate later:

1. Coercion simpliciter is not an essential element of law, nor

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behavior. Typically, a law against stealing does not just inform subjects of the potential penalty for stealing, it lays down a norm for behavior that tells subjects that they *should not* steal. The law does not only impose a price or a tax on the behavior—a year in jail in return for stealing—but means to discourage subjects from stealing at all. Considering all laws as simply exacting a price for certain behavior, as a merchant does for his goods or a professional for his services, misses an important aspect of the law.

28. I do not mean to endorse a minimalist, survival-only view of the proper role of law that might appeal to the bad man. *See* Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47, 49 (1990) ("Even those who take a strictly this-worldly view of human goods are not apt to say that self-preservation is a greater good than self-development, even if it be a persistently necessary condition of self-development."). Promoting the survival of its members should be a goal of any political society but not the only one, and may be a subordinate goal at times just as individuals risk their lives for greater goods. *See id.* at 49–50 ("To say that one or another good is necessary does not tell us how, and under what conditions, to choose it.").

29. Kenneth Himma argues that a coercive enforcement mechanism is conceptually necessary to a legal system. Kenneth Einar Himma, *The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law* 1 (Sept. 14, 2015), https://ssrn.com/abstract=2660468 [https://perma.cc/XM99-C3P4] ("I argue that the authorization of coercive enforcement mechanisms is a conceptually necessary feature of law."). But Himma rejects the notion of coercion as conceptually necessary to law itself and recognizes supposedly noncoercive law. *See id.* at 2. ("[T]o claim that law is coercive is not to claim that there is a coercive enforcement mechanism authorized for every violation of a mandatory legal norm governing the behavior of citizens." Instead, "the claim I defend here is merely that (1) coercive enforcement mechanisms (2) are *authorized* (3) for violations (4) of *some* mandatory legal norms that (5) regulate the acts of citizens.").

30. Hart rejects the traditional "notion of general orders backed by threats" model of law. *See* HART, *supra* note 5, at 26. It is just this model, properly understood and elaborated, that can resolve such theoretical questions.

31. I use "legal obligation" and "legal duty" interchangeably.

is the coercive intent simpliciter of the lawmaker. Rather, a socially recognizable coercive intent behind a legal statement or enactment is essential to every political positive law properly so-called.[32] The coercive intent that is socially recognizable may differ from the subjective intentions of lawmakers. By "political," I mean relating to the ultimate responsibility for the temporal governance of a human community.

2. Coercive intent is not the only essential element of law, nor does a legal obligation subsist solely in what it threatens. Rather, coercive intent is only one of multiple essential elements and conditions needed to constitute a political positive law. Law is emphatically not reducible to only the threat or prediction of penalty or reward. Normativity, authority, and other factors are crucial to law in addition to coercion, but legal normativity cannot be generated without coercive intent.

3. Socially legitimated authority is distinguishable from power and force, and such authority is an essential element of law.[33] Thus, a collection of rules coercively enforced in a legal-system-like manner by the Mafia is not political positive law.[34] I argue that legal authority is not exercised in the absence of coercive intent.[35] The concept of authority often affects subjects' decision-making and actions, and therefore is important in itself regardless of its relationship to coercion.

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32. "Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 21 (W. Rumble ed., 1995).

33. *Cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 232 (2nd ed. 2011). Finnis says:

> There are, in the final analysis, only two ways of making a choice between alternative ways of coordinating action to the common purpose or common good of any group. There must be either unanimity, or authority. There are no other possibilities. Exchange of promises is not a third way; rather, it is a modality of the first way, unanimity.

Id. Perhaps force without authority could be a third way of coordinating action, but not one that could properly be called politically "legal."

34. The right sort of popularly accepted authority behind a legal system may make it into a political legal system, but not necessarily a morally justified one, for "how similar to robbers are kingdoms without justice." "Quam similia sint latrociniis regna absque iustitia." AUGUSTINUS HIPPONENSIS, DE CIVITATE DEI CONTRA PAGANOS, at Lib. IV, http://www.augustinus.it/latino/cdd/index2.htm [https://perma.cc/L9YG-HSRQ] (accessed Aug. 10, 2016) (author's translation).

35. *Contra* LESLIE GREEN, THE AUTHORITY OF THE STATE 75 (1988) ("Coercion secures authority and makes it efficacious, but it does not constitute it."). Of course, coercion is not the only constituent of authority.

4. Anything promulgated by a lawmaker that may seem not to involve coercion, such as a statute containing only definitions of legal terms or which seems exclusively to confer gratuitous benefits, must relate in some way to the intended regulation of subjects' behavior by means of a legal system in order to be properly called law. The distinguishing means of any political legal system is drawn from a monopoly on the socially legitimated licensing of physical force.[36] Some may accept that my argument makes a good case for coercive force as an essential element of *legal obligation*, and perhaps accept that lawmakers cannot create a binding legal obligation without employing coercive intent, but reject my argument concerning law generally—for example, they might say that a statute which includes only definitions of terms is a law but one which, by itself, cannot generate a legal obligation, or that a purely powers-conferring statute is a law that creates no legal obligations. But I go further and say that such enactments are best considered fragments of a law, although not in Hans Kelsen's sense.

Despite my adherence to a partly Augustinian and partly Thomistic form of Catholic natural law theory, I employ a normative thin positivism[37] that best enables accurate description of social phenomena, a description that should be achieved before entering moral waters further than is necessary for discussing any plausible political legal system[38]—and it is debatable, at the very least, whether the contemporary distinctions between natural law and positivist theories are coherent or even generally agreed upon.[39] At a level high

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36. *See* JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 256 (1998) ("Aquinas [states] that it is characteristic of law [de ratione legis] that it be coercive (threatening force against violators). . . . [T]he irreparable character of necessary coercion is central to the rationale of public authority.").

37. On normative positivism, see Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 410 (Jules Coleman ed., 2001).

38. *Contra* John Finnis, *The Nature of Law*, *in* CAMBRIDGE COMPANION TO PHILOSOPHY OF LAW 10 (John Tasioulas ed., 2017) [advance copy provided by author with its own pagination; hereinafter *Finnis Nature*] ("[S]elf-styled 'positivist' definitions of law are more or less arbitrary to the extent that they genuinely precede a moral assessment of the need for law and legal institutions, and try to describe law's nature and characteristic institutions without the benefit of understanding that set of needs . . . ."); John Finnis, *Positivism and "Authority"*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS: VOLUME IV 74, 82 (2011) [hereinafter *Finnis Positivism*] ("*[E]xplanatory descriptive general theory* of law and *the moral justification and critique of law for the guidance of one's own conscience* are radically interdependent intellectual enterprises.").

39. *See* Cristóbal Orrego, *Gains and Losses in Jurisprudence since H.L.A. Hart*, 59 AM. J.

enough, legal philosophy and moral philosophy are inseparable in a way analogous to the inseparability of chemistry and physics, but intelligibility lies in their initial separation.[40] No complete legal or political philosophy can avoid moral questions any more than a complete theory of medicine can,[41] but the questions of whether a certain drug cures a certain disease, and of what a drug even is, are not moral questions and many issues in legal philosophy are of this type.[42] Further, I believe that the question of whether a positive legal obligation generates a moral or other obligation ultimately binding subjects to action or inaction is an inevitably religious one, necessitating the separation of legal and moral analysis all the more.[43] Insofar as it is possible, I am a positivist natural lawyer.[44]

JURIS. 112, 114 (2014) ("Jules Coleman and Brian Leiter also present as their legal positivist challenge to natural law theory the statement that 'there is no necessary connection between law and morality,' to which John Finnis comments that 'classical natural law theory has *always enthusiastically affirmed* that statement." (citation omitted)); *see also* Dan Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 987, 995 (2015) ("Hobbes and Bentham offered a distinct approach to legal theory that is very different from the work of contemporary legal positivists and in a way is much closer in spirit to the approach to the work of their natural law predecessors, whose work they criticized.").

40. For one thing, accurate moral analysis of lawmakers' decisions is much more complicated than concise modern theories of social utility imply. *See* Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47, 47 (1990). As Hittinger writes:

> Neither Hart nor Devlin are willing to deploy a sufficiently rich—or as communitarians today say, thick—model of human well-being, which, I believe, is needed to resolve the questions posed in their debate. I fail to see how any legislator, availing himself only of Devlin and Hart's concepts, could reasonably make a prudential decision about the legislation and enforcement of morality.

Id.

41. Unavoidable moral questions in medicine include: What risk of harm is acceptable when using experimental treatments on sick children? Who is treated first when multiple critically-injured patients simultaneously arrive at a hospital with limited resources? When, if ever, should a doctor perform an abortion?

42. *But cf. Finnis Positivism*, *supra* note 38, at 76 ("Every competent 'natural law theorist' (Plato, Aristotle, Aquinas) can produce a 'positivist' analysis of what is involved in people accepting a rule," but "what would strike these theorists as odd . . . is that some . . . consider such an 'analysis' somehow an interesting and complete topic in its own right."). It is possible that Finnis and I do not disagree, depending on what he means by "complete topic."

43. *Id.* at 77 (discussing the work of Sartorius and asking "[H]ow do facts, simple or complex, 'generate' moral obligations? How does the question of generating moral obligations arise in the course of a 'positivistic' discussion of what counts as acceptance of social rules?").

44. Contrary to what some assert, natural lawyers have long taught that natural law does not translate directly into positive law. *See* FINNIS, *supra* note 33, at 28. Finnis says:

> Now Aquinas indeed asserts that positive law derives its validity from natural law; but in the very same breath he shows how it is not a mere emanation from or copy of natural law, and how the legislator enjoys all the creative freedom of an architect: the analogy is Aquinas's. Aquinas thinks that positive law is needed for two reasons, of which one is that the natural law 'already somehow

Therefore, I do not pursue a kind of Benthamite or comprehensively positivist "stripping away" of supposedly pleasing illusions about law. Law is not simply a prediction of penalty and reward, or only social convention, or irrelevant to morality. I believe in the richness of natural law and the reality of the mental and spiritual aspects of positive law such as its normative force, moral import—including the ability to create moral obligations—and divine sanction. Yet law must ground in some coercive truth to be itself, to demark it from other things, even to distinguish law from grace.

My approach allows me to outline a definition of law after making the nub of my argument in favor of coercive intent's necessity. These are the most crucial parts of that argument:

1. *Superiority of a naturalistic methodology*: Classifying social kinds such as law by their causal effects, as we instinctively do natural kinds such as physical objects, is necessary as a starting point for rendering our experience as intuitively intelligible and useful as possible.

2. *Intent as a necessary effect*: Due to the nature of speech acts directed at beings with free or at least unpredictable wills and the vagaries of actual causal effects, laws and other speech acts must be classified by what reasonable hearers discern as the causal intent behind them, i.e., by what effect on others those speech acts are reasonably perceived to be *meant* to have rather than by their *actual* effects upon behavior or upon the minds of idiosyncratic subjects.

3. *Law as a species of regulation*: An exercise in practical reason, a positive law is a kind of speech act communicated from lawmakers to subjects[45] with the intended effect of regulating the latter's actions by affecting their decision-making processes.[46]

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in existence' does not itself provide all or even most of the solutions to the co-ordination problems of communal life.

Id. What is more, I do not subscribe to the cynicism sometimes attributed to analytic legal positivists. *See* Jeffrey A. Pojanowski, *Legal Thought in Enlightenment's Wake*, 4 JURIS. 158, 170 (2013) (reviewing STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE (2010)) ("This fixation on the conceptualist centre in legal theory has a strong connection, by intellectual affinity if not logical entailment, to the disenchanted forms of discourse that have emerged in Enlightenment's wake.").

45. FINNIS, *supra* note 36, at 256. ("[L]aw needs to be present in the minds not only of those who make it but also of those to whom it is addressed . . . .").

46. *See* Kent Greenawalt, *Criminal Coercion and Freedom of Speech*, 78 NW. U. L. REV. 1081, 1091 (1983) ("Philosophers of language have carefully analyzed a variety of tasks that human communication accomplishes. Words are the main technique by which we convey our ideas about facts and values. Yet, they can also be the medium for doing

This purpose may be a means to another end, such as propagandizing subjects' minds or repaying political campaign donors, but must be present for law to be present.[47] The lawmakers can address themselves and thus be among their own subjects, but a lawmaker cannot address herself exclusively, for then her rule would be neither social nor legally coercive.[48] Since law is an exercise in practical reason, all legal concepts should be formulated as concepts of practical reason, as broadly understood.

4. *Clarity needed for legality*: To clearly and distinctly distinguish law from other regulatory phenomena such as exhortation, including moral suasion, guideline, and advice, and to indicate coherently to subjects what is and is not law, i.e., to satisfy the requirements of legality and settlement, a law must be seen to have physically coercive intent on the part of the lawmaker behind it. Both legal practitioners and ordinary subjects typically act as if this kind of coercive intent is behind every law.

5. *End and means*: To restate some of the above in more Aristotelian language, albeit while using such language analogically rather than precisely: A specific social phenomenon meant to affect practical reasoning is distinguished from other such phenomena primarily by its *end*, purpose, or function (telos) and by its *means* (techne).[49] In classifying man-made

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certain things or attempting to do certain things.").

47. Finnis criticizes Hart for not recognizing that *The Concept of Law* deals with law more as reason for action rather than as a phenomenon. I analyze the phenomenon of law as a reason for action but focus on the best uses of terms and concepts for understanding and communicating rather than evaluations of that reason. John Finnis, *How Persistent are Hart's "Persistent Questions"?*, *in* READING HLA HART'S *THE CONCEPT OF LAW* 227, 231 (Luís Duarte d'Almeida, James Edwards, & Andrea Dolcetti eds., 2013) [hereinafter READING HLA HART] ("First: they [Hart's descriptions of his book's efforts] misdescribe the book's own project, and achievement, which in large measure is, precisely, the consideration and understanding of law as a kind of reason for action.").

48. A legal rule addressed by the lawmaker seemingly to herself alone, but which is enforceable upon that lawmaker by others, is not truly addressed only to herself; it grants to others authority to use coercion. Any rule addressed to herself alone is not a law. It is merely a personal resolution, akin to those made for New Year's Day. The same applies for a group of lawmakers. If they pass a resolution forbidding themselves from taking bribes, but there is no coercive enforcement mechanism, not even expulsion from the legislative body by their fellow lawmakers, then they have set a guideline for themselves rather than enacted a law. As will become clear from my argument, a resolution of censure that carries nothing with it but moral or ethical disapproval is not a form of legal enforcement even if it leads some fellow lawmakers to voluntarily inflict serious, real-world, but nonlegally enforceable coercive consequences on the censured colleague.

49. At least very generally, this approach is the same as that employed both by Hart and by modern natural law theorists. *See, e.g.*, *Finnis Positivism*, *supra* note 38, at 81 ("What, then, is the point of a descriptive general theory? It is, as Hart also taught us . . .

physical objects when reasoning practically, we typically begin with purpose, say "transportation" for a bicycle and an airplane, distinguishing them by this purpose from other artifacts such as a painting and a house. Then we distinguish the items in the class "transportation" by their means, the typical bicycle as a human-powered way to travel along a surface on two wheels and the typical airplane as a motorized way to travel through the air. The socially perceived end and means expressed by a human communication are the first determinants of the mental effect of that communication, at least when the mind affected is engaged in practical reasoning. In taking a positivist approach, I set aside crucial but separate questions of the moral justifications and moral ends of law.[50]

I do not have space to elaborate a complete theory of law and will focus upon justifying the element of coercive intent while concentrating on responding to arguments current among today's scholars rather than recovering and explicating the theories of older authors.

Despite my employment of the language of Cartesian and other philosophical schools when useful, my approach is at root a naturalistic and broadly Aristotelian one.[51] I do not claim that

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to *explain* the *function*, the practical point, of the various aspects and components of law and legal systems . . . .").

50. To a young child just beginning moral deliberation and who has a good moral sense, "the injustice of the bully and the cheat is what cries out for prevention and restitution and penalty." John Finnis, *Describing Law Normatively*, *in* 4 PHILOSOPHY OF LAW: COLLECTED ESSAYS 23, 27 (2011). For law to have more than mere power and have ultimate binding authority—that is, authority that goes beyond the legal sphere and still binds after all practical and moral matters are considered—upon potentially disobedient subjects, it must have some moral justification for its coercive aspects, whether the restraint of bullies and cheats or something else. The child will conclude that "(to put it as H.L.A. Hart did), we need rules (of school, town, and country) promulgated to restrict the free use of violence, theft, and fraud" because "we need them *for the sake above all of justice*." *Id.* at 27.

51. I owe part of my understanding to the work of Brian Leiter and find the following to be a useful summary of his position. As I leave myself open to nonmaterial but still-natural aspects of existence and also take a strong view of the limits to the scientific method in uncovering truth, I call myself a believer in naturalism as a method rather than scientism. BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 3 (1st ed. 2007). Leiter writes:

> 'Scientism' as noted, is the epithet often applied to those, like Quine, who continue to take the Enlightenment seriously, which means taking seriously the epistemological and metaphysical consequences of the practical and, then, theoretical triumph of the sciences as our most reliable guide to what we can know and what there is. As Quine famously put it, 'science is self-conscious common sense,' which is to say that the epistemic standards of the sciences are merely formal extensions of the standards of evidence and justification that all of us employ all the time: we are all *practical* naturalists, and the only question

any strictly *a priori* argument demands that coercion must be part of the concept of law because I do not accept any strictly *a priori* arguments about law, and there are self-consistent and vaguely reality-describing theories of law that do not include coercion as an essential element. Indeed, other elements often thought to be essential to law could be excluded as well, such as a rule-like nature—a theory of a "legal system" that included only a series of isolated, nongeneralizable commands from an authority can be built, but such a theory would hinder our comprehension of the world when compared to legal theories that require the concept of rules.[52] Instead, I claim that including coercive intent as an essential element enables the *most useful understanding of and communication about law and its concept when contrasting them with other phenomena and their concepts*, and that this usefulness is the correct standard for judging the proper formulations of concepts and their essences. This usefulness is not a matter of mere convention but is rooted in objective truths about the world.

Separately, I believe that such inclusion has the further pragmatic values of promoting greater reluctance to use law and of clarifying law's proper place in human societies, particularly at a historical stage in which social respect for political and legal authorities and for the moral claims of law appears to be in long-term decline.

In Part I, I briefly compare concepts of physical objects and substances to those of social phenomena such as law. In Part II, I discuss the concepts of legal form, legal matter, and legal substance and offer a definition of law. Part III expands my argument through the refutation of common objections, particularly examples of supposedly noncoercive laws. My argument may seem abstract—even uncertain—until the examples of Part III, where its implications become much more concrete.

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is whether we are prepared to follow out the import of the epistemic norms that make human life possible.

Id.; *see generally* THOMAS NAGEL, MIND AND COSMOS: WHY THE MATERIALIST NEO-DARWINIAN CONCEPTION OF NATURE IS ALMOST CERTAINLY FALSE (2012) (presenting an interesting, yet not quite confident, argument toward a return to Aristotle from a prominent contemporary philosopher).

52. As "law" is used from the legal to the mathematical to the religious, "The word is used in all these contexts to refer to rules of some permanence and generality, giving rise to one kind of necessity or another." Joseph Raz, *Can There Be a Theory of Law?*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, 325 (Martin P. Golding & William A. Edmundson eds., 2004).

I. LAW AS SOCIAL KIND AND THE NECESSARY INCLUSION OF COERCIVE INTENT

A. Natural Kinds versus Social Kinds

1. Objective Qualities of Natural Kinds

Natural kinds such as physical substances have objective qualities that can be detected through empirical observation and inference, and these include color, electrical conductivity, and in the case of elements such as gold, atomic number. Those who talk of gold can be objectively correct or incorrect about it, at least in some clear cases. Although equivocation over terms can create confusion—if gold is yellow, then is white gold truly gold?—with adequate definition, natural kinds have some certainly identifiable, invariant qualities. These invariant qualities, wholly independent of our thoughts and desires, make natural kinds the first and most fundamental standards for finding truth, a method universally intuitive.

Some dispute this characterization of natural kinds.[53] These may wish to imagine the difference between striking themselves forcefully in the head with a pillow and then with a rock in order to correct themselves; failing this, there is an alternative approach. It is sufficient to acknowledge that we best serve the intelligibility of the world and rational communication by accepting certain qualities of natural kinds as essentially characteristic, such as the yellowness in sunlight and unvarying atomic number of pure gold, in both ordinary speech and general philosophical discussion. If this seems doubtful, consider how we could communicate with one another if we could not use terms such as "gold" as referencing certain unvarying qualities depending only upon which definition of the word is referenced. Every fluent English speaker knows both what "this is a bar of gold" and what "she has a heart of gold" mean.

2. Objective Classification of Social Kinds

Law, a social kind, may seem entirely different from the physical substance of gold. Physical "gold" refers to something

53. For an introduction to natural kind concepts, see Alexander Bird & Emma Tobin, *Natural Kinds*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Spring 2016), http://plato.stanford.edu/entries/natural-kinds/ [https://perma.cc/Q9C7-5DNA]. For an anti-essentialist view, see D.H. Mellor, *Natural Kinds*, 28 BRITISH J. FOR PHIL. SCI. 299 (1977).

objective about which any and all observers can be wrong and corrected. A woman who takes up a ring of fool's gold thinking it to be gold would be mistaken even if all the world agreed with her, and if she took up a cup of hemlock thinking it to be wine, she would experience an unpleasant surprise even if all the world thought it wine with her. Since "law," at least political positive law, refers to something that ultimately does not exist in the world outside of our minds and is created by them, how can a speaker be wrong—and be corrected—concerning its definition except perhaps to say that his fellow speakers use the term differently?[54] As a human creation without independent physical existence, positive law is what men think it to be—at least within the bounds of possible categories—from the highest level of conceptual abstraction down to the smallest detail of regulation. In this, law differs from some other categories of concepts such as that of natural kinds.

Yet since all of our knowledge is based upon our sensory experience and our mental interpretations of that experience, and natural kinds are the most basic and easily understood generators of that experience, I believe that we profit most when we hew as closely to the naturalistic model as possible. In fact, only by analogy to natural kinds can we use concepts of man-made artificial kinds coherently.[55] We should use social-kind terms in a way that maximizes our ability to understand and communicate concerning ourselves and our social phenomena—and despite existing only in human minds, political positive law is a social kind, not a purely individual mental kind, and must be consistently recognizable socially to many subjective perceptions of a society's members in order to exist at all.[56] A political

54. Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism*, 31 OXFORD J. LEGAL STUD. 663, 666 (2011) ("The concept of law is the concept of an *artifact*, that is, something that necessarily owes its existence to human activities intended to create that artifact. Even John Finnis, our leading natural law theorist, does not deny this point."). (I think it would be odd for Finnis to deny it since natural law theorists have taught it for centuries.)

55. I more or less accept the Kripke-Putnam theory of reference, understood as arguing that names refer to phenomena of the world rather than to descriptions of them; thus, names are meant to refer to real things rather than to possibly faulty understandings of those things. *See, e.g.*, SAUL KRIPKE, NAMING AND NECESSITY 60 (1981) ("[S]ome things called definitions really intend to fix a reference rather than to give the meaning of a phrase, to give a synonym.").

56. We must separate what is essential to things from what is essential to understand those things. Flight is not essential to birds, nor grapes to wine, but no one can have a good understanding of birds or wine without knowledge of the connection to flight or grapes. *See* SCHAUER, *supra* note 10, at 36. Schauer writes:

positive law not recognizable to subjects could not be a law, that is, a certain kind of authoritative rule for regulating behavior.

B. Three Criteria for Nonnatural-Kind Terms

Three criteria should be employed in determining the correct philosophical meaning of a term not referring to a natural kind:

1. How do experts in the relevant field use the term? I write from a default Anglosphere perspective but believe that my argument applies wherever anything that plausibly can be considered law is found.[57] I accept Hart's argument that a legal system, to be a legal system in the fullest sense,[58] must include substantive first-order rules of some generality—one-time commands are not laws—and procedural second-order rules detailing methods of validly altering the first-order rules as well as support from nonlegal social rules of recognition outlining what is positive law or at least who may determine what is positive law.[59] Thus, I believe that the socially cognizable intent to apply coercive force is a necessary, though insufficient, condition for constituting political positive law.

2. How do ordinary speakers use the term?

3. What must the term be considered to mean if it is to

> It may be that most birds fly, for example, but because some creatures are clearly birds and just as clearly cannot fly—penguins and ostriches, for example—it is a mistake to understand flying as an essential property of birdness. And because most people understand pineapple wine as wine, even if it is very poor wine, it is similarly mistaken to include grapes as part of the concept of wine.

Id. I do not believe that coercion is to law as flight is to birds, but rather more as feathers are to birds. *See* Robert W. Storer, Frank Gill & Austin L. Rand, *Bird*, ENCYCLOPÆDIA BRITANNICA (Nov. 2, 2017), https://www.britannica.com/animal/bird-animal [https://perma.cc/5AQN-W8Z5] ("Bird (class Aves), any of the more than 10,400 living species unique in having feathers, the major characteristic that distinguishes them from all other animals.").

57. Raz, *supra* note 52, at 332 ("While *the concept* of law is parochial, [i.e.,] not all societies have it, our inquiry is universal in that it explores *the nature* of law, wherever it is to be found.").

58. *See* HART, *supra* note 5, at 81. Hart writes:

> We shall not indeed claim that wherever the word 'law' is 'properly' used this combination of primary and secondary rules is to be found . . . . We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought.

Id.

59. *See id.* at 79–99 (making no assertion that second-order rules are essential to law, thus indicating that the best interpretation of *The Concept of Law* may be anti-essentialist in general); *see generally* Frederick Schauer, *Hart's Anti-Essentialism*, *in* READING H.L.A. HART, *supra* note 47, at 237.

distinguish best the referent's effects on the typical conscious human mind upon which the referent acts from those of the referents of other terms? Typically, this is the decisive criterion for philosophy.[60]

The first two criteria assist my argument and the third solidifies it.

1. How Experts Use "Law"

Although some experts, particularly legal philosophers, do not take "law" always to include a coercive command of some sort, the overwhelming use of the term by lawyers, jurists, legislators, and legal scholars implies a coercive aspect in all or almost all cases. Talk of the law generally includes phrases and attitudes such as: "what the law requires," "what one must do to comply with the law," "what the law allows," "the penalties attached to violations of the law," and so on. This creates the understanding that undesirable real-world consequences, ultimately realizable through force, could flow from failure to meet the law's requirements. Many lawyers spend their days helping clients avoid these harmful law-determined consequences. Other lawyers toil to instruct their clients on how to obtain law-determined benefits which would otherwise be kept from them, forcibly, if they did not meet the law's specifications.

Experts commonly judge offenses by the type and severity of the sanctions imposed or imposable for them. They generally consider offenses that can lead to imprisonment worse than those that cannot, a felony is often defined as a criminal offense punishable by over one year's imprisonment or by death, and so on. Some maxims depend upon coercion in law, such as "there is no right without a remedy," and insofar as rights extend beyond the legal remedies for their violation, they extend into the nonlegal moral and other realms.[61] Ideas such as the Coase

60. I inquire into semantics in order to better describe social typologies. *But cf.* Raz, *supra* note 52, at 330 ("But the essential properties of law which legal theory is trying to give an account of are not invoked to account for the meaning of any term or class of terms. We are inquiring into the typology of social institutions, not into the semantics of terms.").

61. Even constitutional rights not enforced by the law will gradually be lost. *See* Caprice L. Roberts, *Teaching Remedies from Theory to Practice*, 57 ST. LOUIS U. L.J. 713, 722 (2013) ("[T]he contours of a right may shrink if the remedy is narrowed or illusive. I argue remedies that appear available, but in fact are not, are illusive. To the extent that remedies remain illusive despite a proven right, the lack of remedy eviscerates the underlying right."); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*,

Theorem depend upon the presence of coercion: a party will only incur the transaction costs of negotiation if an effective legal obstacle prevents that party from unilaterally achieving its goals. Of course, in the minds of the speakers, these common ways of speaking do not necessarily exclude marginal cases in which law without coercion could be thought to exist.

2. How Ordinary Subjects Use "Law"

a. Typical Effects on Subjects

Whether Holmes's bad man, Hart's puzzled man, or a man of another sort, the ordinary subject overwhelmingly thinks of law as something that makes him and others perform actions that they otherwise might not perform or refrain from actions that they might otherwise perform.[62] Although most subjects might behave consistently with the law most of the time even without penalties, such as by refraining from murder for law-independent reasons including moral imperative[63] or fear of retribution from victims' relatives, they think of laws against murder as containing a coercive element. I believe that the typical subject in our society—and so far as I can discern, in most or all other political societies—would consider any lawmaker's informal public statement or formal enactment[64] that is devoid of any coercive element to be no real law at all or, if he did consider it law, as one that did not demand obedience in the

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99 COLUM. L. REV. 857, 858 (1999) ("[Constitutional] rights and remedies are inextricably intertwined. Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.").

62. Like Dworkin, I find any legal theory that denies ingrained, common-sense understandings of widespread social phenomena to be questionable, but I do not find such denial a decisive argument against the theory. *See* RONALD DWORKIN, LAW'S EMPIRE 92 (1988) ("We also have legal paradigms, propositions of law like the traffic code that we take to be true if any are; an interpretation that denies these will be for that reason deeply suspect.").

63. A broad but serviceable definition of moral imperative, understood as decisive whenever it applies, is the following: "We start with the premise that morality, at least morality as we conceive of it, is the domain of practical reason that asks what one ought to do, all reasons considered." Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1580 (2007). Except to limit the range of options, morality typically does not decide questions such as what one should have for dinner or what career one should pursue.

64. I use "statement" to mean any writing, speech, or meaningful visual communicated informally to legal subjects by a legal authority, and "enactment" to mean any statement communicated with at least a minimum of procedural legal formalities.

face of any substantial reason to disobey—which I will say means it is no law at all.[65]

Regardless of what he might call it, the typical subject would not treat it as law, but consciously or unconsciously place it into the category of exhortation, of an attempt to persuade without threatening to impose a penalty, for exhortation would be the type of effect it naturally would have and that a reasonable lawmaker would expect it to have—and thus that she should have intended it to have. If a lawmaker were to enact formally, "Murder is a crime, but no penalties attach to it" or, "It is legally required to pay income taxes, but there is no penalty for not doing so," I believe that the typical subject would think, as a matter of common sense, that murder and income tax evasion were no longer truly illegal. Regardless of the label, the *mental effect upon subjects of such a law naturally would be one of exhortation, guideline, or advice, and any reasonable lawmaker would intend this effect in such a case*, and thus the "law" should be classified as nonlaw, as I will explain further below.[66]

I doubt many would pay income taxes under the new regime. I would not.

b. Coercion Needed for Recognition by All Reasonable Subjects

A more Hartian way of putting the above: Rational nonlegal rules of recognition mandate coercive intent's inclusion behind any positive law for it to be recognized as law by all reasonable subjects,[67] and this inclusion accurately reflects divisions among phenomena, such as the one separating laws from mere exhortations delivered by political and legal authorities.[68] Even

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65. I believe that the examination of unreflective beliefs and usages can take us only so far and should serve as a starting point for more precise analysis. LEITER, *supra* note 51, at 133 ("Philosophy becomes unsatisfying, though, when it turns into intuition-mongering and armchair sociology about what is really fundamental to 'our' concepts.").

66. The exhortation may achieve voluntary compliance, but it is not law because it has not been enforced. *See* Joshua Kleinfeld, *Enforcement and the Concept of Law*, 121 YALE L.J. ONLINE 293, 297–98 (2011) (providing the example of an art lover who persuades a thief to return a stolen painting voluntarily; the law was complied with but not enforced).

67. Hart and Fuller agree on the need for nonlegal rules of recognition, a concept more specific than Kelsen's basic norm, but I will not go into "[a] full exploration of all the problems that result when we recognize that law becomes possible only by virtue of rules that are not law" because nonlaw rules need not be coercive. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 642 (1958).

68. This understanding of coercion's role is fundamental to a society's common concept of law, part of what makes laws, including constitutions, possible as intelligible social realities. This mental acceptance of coercion by subjects partially constitutes the indispensable background that makes constitutional and legal governance feasible and

those who accepted noncoercive "law" would have difficulty in convincing dissenting but reasonable, generally law-abiding subjects of any binding obligation to obey such "law."[69] I will elaborate on this argument below.

3. Distinguishing Law from Other Phenomena

a. Legal Formalities Alone Cannot Demark Law or Satisfy Legality

Kings, presidents, legislators, judges, and regulators frequently give exhortations or advice, in informal statements or formal enactments, to subjects that are not coercive and often are not meant to be, such as a presidential proclamation encouraging Americans to express gratitude to God on Thanksgiving, Congress's passage of a coercion-free resolution urging employers to pay their employees a living wage, or a judge's speech to a young defendant, "Find yourself a good woman to keep you out of trouble and marry her."[70] Without the element of coercive intent, law cannot be distinguished[71] consistently from other phenomena[72] such as these kinds of exhortation, guideline, and advice.[73]

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distinguishable from other guides to action. *See* Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175, 192 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) ("[W]e discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the preconstitutional understandings that make constitutionalism possible.").

69. The *means* employed can signal what the *objective* or purpose truly is. *Cf.* FINNIS, *supra* note 33, at 3 ("[A]ction, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them . . . .").

70. *See* JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 2 (2009). Writes Raz:

> [Judges] are people whose decisions are legally binding partly because they render them intending that they be binding. Legislators are not merely people whose pronouncements make law. They make law only when they act with the intention to set binding rules. . . . Indeed many ordinary transactions have legal effect only if the people involved intend them to have the relevant normative effects: marriages are not legally valid unless the married contracted the marriage intending to do so; wills are not legally valid unless the testators intended them to determine the disposition of their property after their death; and so on.

Id.

71. The clarification of words does not have to be just a matter of semantics, but a way of clarifying the world. This has a long pedigree in legal positivism. *See* LEITER, *supra* note 51, at 197 ("'We are using a sharpened awareness of words to sharpen our perception of phenomena.'" (quoting H.L.A. HART, THE CONCEPT OF LAW 33–35 (2nd ed. 2004)).

72. *See* Jules L. Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 257, 269 (Brian Bix ed., 1999) ("The question

Legal formalities alone cannot distinguish law from exhortation and other phenomena, for obvious cases of exhortation could be, and sometimes are, enacted with solemn legal procedures identical to those of coercive laws.[74] Equally, coercive statutes and executive orders promulgated with procedural defects sometimes become enforced and understood far and wide as valid law confirmed as such by the highest courts, and to deny these enactments the status of law would be to advocate a useless quibble.[75] To illustrate this, imagine if the decades-old laws of a state against murder and rape were discovered to suffer from serious defects in the procedures used by the legislature in enacting them. Would the courts in that state order the release of every imprisoned murderer and rapist, or would they instead find that those laws were indeed valid laws?

The latter would be far more likely, and the pedant who refused to accept the courts' decision would be wrong about what is law, whose causal intent of its makers—including judges and regulatory officials when they act as lawmakers—and mental effect on its subjects define it more clearly than its procedures and formalities.[76] The same would hold true of any new law,

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positivists ask is: how is law distinguishable from other action-guiding institutions?").

73. SCHAUER, *supra* note 10, at 10 ("But what distinguishes those norms that have the force of law from other norms? . . . Or is it, at least in part, because norms that have the force of law, in one sense, have law's force, in another sense, behind them?").

74. Olivecrona rejects the notion that "[f]rom the moment of promulgation the text is an expression of the legislative will." Karl Olivecrona, *The Imperative Element in the Law*, 18 RUTGERS L. REV. 794, 806 (1964). Instead, he mistakenly substitutes the concept of formalities for the concept of legislative will or intent:

> [I]t is evident that the decisive element that makes the difference between the law and the draft consists not in a declaration of will, but in certain formalities ending with the signing of the text under appropriate circumstances by a person appointed to this task. The formalities play the role of an imperative sign.

Id. We take the formalities as an imperative sign because they signal the will of the legislature; if we thought they signaled only the will of the person doing the signing, we would not accept the text as law. And if, despite the formalities, the enactment is not applied by the legal system to regulate subjects' behavior—if legal authorities do not will to use it—then it does not become law.

75. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892). One manifestation of the Courts' refusal to investigate possible procedural defects in the enactment of statutes is the enrolled bill rule, which prompts the federal courts to accept as valid any bill authenticated by the presiding officers of both houses of Congress and accepted as authentic by the President.

76. The general rules of higher-level authorities are always made more specific—or contradicted, deliberately or not—when lower-level authorities apply them to specific cases. *See* HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY: A TRANSLATION OF THE FIRST EDITION OF THE REINE RECHTSLEHRE OR PURE THEORY OF LAW 78 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992) ("[E]very legal act

including one that created only *mala prohibita* offenses such as violations of business licensing requirements, upheld by the courts despite its theoretically fatal procedural defects.[77] Denying such an enactment the status of law, either at the time of its upholding, two decades later, or two centuries later, would make little sense and have no effect on subjects' causally relevant obligations and rights enforced by the legal system—nor would claiming that a statute, mistakenly struck down due to nonexistent procedural defects, was the real law after its nonenforcement had become settled. All this remains true if, ultimately, it is executive officials who decide whether or not to enforce a law in any particular case.

Just as rules must have certain qualities to distinguish them as rules, legal rules must have certain qualities to distinguish them as *legal* rules, and rules emanating from a legal authority are not necessarily legal rules. The President proclaiming, however formally, that "all Americans must exercise at least three days a week" would be an example. A legal rule must be intended to affect subjects' decision-making in a certain way in order to be a legal rule.[78] Affecting decision-making as exhortation means a "legal" rule does not have a legal effect any more than a man's consistent in-the-moment decisions not to drink, because he does not care to, mean he is guided by a rule. Rather, he makes a series of decisions that happen to be the same over time. He *is not* guided by a rule at all in that case, but *is* if he has *decided* never to drink again.[79]

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applying a norm—be it an act of law creation or of pure implementation—is determined only in part by this norm and remains indeterminate for the rest.").

77. *Mala prohibita* offenses are those that are wrong only because the law says so, such as failing to pay sales taxes. *Malum prohibitum*, BLACK'S LAW DICTIONARY (10th ed. 2014). There is no imperative to pay the government a tax unless the government says so. *Mala in se* offenses, such as murder, are wrong regardless of whether the government or law says so. *Malum in se*, BLACK'S LAW DICTIONARY (10th ed. 2014).

78. *See* KELSEN, *supra* note 76, at 91 ("If one recognizes that the essential function of the legal norm is to impose on a human being an obligation to behave a certain way (in that it links the opposite behaviour with a coercive act . . .).").

79. *Cf.* Scott J. Shapiro, *The Difference That Rules Make*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 33, 34 (Brian Bix ed., 1998). Shapiro writes:

> Conduct may be said to be guided by a rule only when the rule does affect, in some way, the output of the agent's practical reasoning. That John's rule [against drinking] has this effect is clear: had he not adopted his rule, he might still be drinking. If we take seriously the idea that rules must be practically relevant, then certain views about the nature of rules must be rejected.

Id.

Similarly, the reason for the adoption of the rule is important: If the subject is persuaded by the President's argument or his moral authority or his social popularity, that is different from being persuaded at least partly because the President laid down a rule enforceable by the legal system. The former is legally voluntary and the subject is free to decide to act as he chooses, but the latter is not and the subject is legally obliged to act in a certain way.

b. Law is What Regulates

A scholar or lawyer could make an abstract case that a legal-system-enforced rule lacking legal formalities was not truly a law, but because law is an exercise in practical reason—meant to guide action rather than engage in abstraction—instead of theoretical reason,[80] the *rules that actually are used by legal authorities to regulate subjects' behavior constitute the law* rather than theories of what those rules are or should be, even if those theories are extremely well-grounded in principles or history. The Constitution may lay down one rule, but if courts and other law-enforcers consistently apply a contradictory rule to subjects, it is the latter rule that is the law—and there are many properly enacted rules laid down in legal documents that have been ignored for decades, even centuries, by political and legal authorities. Calling the contradicted rules in the books the "real law" would be foolish and nigh irrelevant to the societies in which law operates,[81] as would denying legal status to settled and enforced rules lacking formalities, and any theory of law that cannot account for this kind of legal evolution cannot describe the world usefully. The method of considering effects first can.

Law is what, in the enforceable-by-the-legal-system opinion of legal authorities, subjects should do, and so Holmes would have been more or less correct if he had said, "Law is indicated by what a court will do"—his actual formulations are often taken to

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80. *Cf.* FINNIS, *supra* note 33, at 3 ("There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only these institutions can satisfy.").

81. Strictly speaking, it would not be irrelevant if, by making the argument that the old ignored rule were the real law, the arguer had a realistic chance of modifying the currently enforced contradictory rule. The latter rule remains the law unless and until changed. And, strictly speaking, it also would not be completely irrelevant, but only legally irrelevant, if the arguer failed to change the law but succeeded in altering views toward it.

leave out the needs for and effects of legitimated authority and normativity.[82] *A legal norm is foremost a species of coercive regulatory norm intended to be applied rather than a pragmatically-inert theoretical norm derived from documents or superseded tradition.*[83]

The law need not be what is written in statutes or precedential judicial opinions, for judges and regulatory officials sometimes innovate and make law whether or not authorized and whether they acknowledge it or not—and even whether they know it or not. *The law as actually applied to subjects by the totality of legal authorities, i.e., by the legal system,* as discerned by reasonable observers, is the law; who makes the law is secondary, as is what statute books say.[84] When judges with the assistance of police and others consistently enforce a rule, that rule is the law even if a statute in a code says otherwise, because *the judges' rule is what is used to regulate subjects' actions by means of the legal system.* In fact, legislators, among others, often deliberately tolerate their edicts' modification by officials and sometimes plan for it, skewing their writing of the law so that it will be applied not as written, but as they expect it will. Setting a speed limit at 55 miles per hour with the intention of limiting drivers' speed to 64 is an everyday example.[85] Yet it could be plausibly said that driving at 56 miles

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82. *See* Holmes, *supra* note 25, at 457. Holmes writes:

> People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

Id.

83. *See* KELSEN, *supra* note 76, at 26 ("Nineteenth-century legal theory agreed for the most part that the legal norm is a coercive norm (a norm providing for coercion), and that precisely thereby the legal norm is distinguished from other norms. Here the Pure Theory of Law continues in the tradition of nineteenth-century positivist legal theory.").

84. *See* Nashville, C. & St. L. Ry. v Browning, 310 U.S. 362, 369 (1940) ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books. . . . Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law."). The Court even suggests that practices, rather than statutes, can be the actual law. *See id.* at 369 ("Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text.").

85. *See* Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185, 2187 (2015). Gilbert observes:

> Prominent scholars decry "the legislative habit of writing statutes that overshoot." More generally, the law in books—in just about all settings at just about all times—deviates from the law in action. All of this is consistent with the strategic use of insincere rules: By making the law in books wrong, lawmakers can get the law in action right.

Id.

per hour is still illegal, for it seems that the legislature granted discretionary authority to police to ticket at that speed—and such discretionary authority, even if rarely exercised, is coercive because reasonable subjects must consider the possibility of penalty whenever they exceed the posted limit.

Natural law and other theories that require law to be administered for the common good in order to be law, or at least require that political and legal authorities must claim to be administering law for the common good, fail in my view.[86] Political positive law must regulate social behavior in certain ways—but not necessarily for the common good—in order to be law. The Communist Soviet Union and Nazi Germany had legal systems whether they served the common good or not, as does sharia-based Saudi Arabia, and authoritarian regimes that do not bother to pretend to rule for any purpose other than the gratification of the rulers can still have legal systems even if they do not claim legitimacy. Labeling such well-developed systems of government "not legal" because they do not pursue the common good or claim legitimacy is disingenuous.[87] Regulating the polity does not imply regulating it for an overarching good purpose, and my concept of legitimacy depends not at all upon such claims of morality. Even a political legal system that outlawed both child-bearing and immigration, and thus decreed its polity's own eventual extinction, would remain a legal system as long as it continued to operate.

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86. *But see Finnis Nature*, *supra* note 38, at 11 ("Law has its existence primarily in the mind (conceptions and assent) of the person or persons who accept responsibility for serving the common good of a community capable in principle of meeting all the kinds of this-worldly needs."). Finnis focuses on central cases of a legal system in this essay and thus it is possible that he and I do not truly disagree here.

87. "[M]any alleged legal systems of many alleged countries claim nothing or little more than the power to do bad things to their subjects in the event of disobedience. Consider, for example, those nation-states focused only on accumulating wealth and power for the leaders. . . ." SCHAUER, *supra* note 10, at 95. He lists "the Philippines under Marcos, Zaire under Mobutu," among others. *Id.* at 95. Schauer continues:

> These nations . . . rarely claim to have moral goals. . . . And rarely do the kleptocracies even claim legitimacy, other than the legitimacy that comes from raw power. . . . [I]t is hardly clear that we would want to conclude that large numbers of state-based and organized rule-based systems of social control are not law at all . . . .

Id. at 96. So those who believe that a legal system must claim "legitimate authority" or "moral aims" turn out to seem "to exclude too much." *Id.* at 95.

c. Legislative Intent as Socially Constructed Through Objective Evidence

Some have a peculiar notion that a lawmaker can have no intent, or that a lawmaker's intent is indeterminable, or at least that a legislative body's intent either does not exist or is indeterminable. It is true that different legislators often have different intentions in drafting and voting for legislation and that these individual intentions are often undiscoverable. Some may have no idea of what they voted for, but voted yes because party bosses told them to—but they did choose to vote yes and approve the legislation.[88] Yet the concept of law from such a multimember legislature necessarily depends upon the concept of legislative intent.

This intent must be socially constructed from external signs and then imputed to a group as a whole despite its differing minds and is, therefore, at least to some extent very artificial—but those external signs can have socially objective meanings that are typically sound guides to constructing an intent that at least approximates the intent of the legislators acting as a group, just as sensory signs signal to us what physical objects and substances are present with greater and lesser degrees of accuracy and specificity depending on the clarity of the signs and our own knowledge. We must deduce from signs who signaled approval of an alleged statute and why in order to decide what is law at all. Individual legislators and groups of legislators draft statutes with the intent that they become law; we are confident that they have indeed become law when we can confidently interpret signs that the legislature intended the drafts to become law. How else could we know what is law and what is not? How could we tell if a document was a statute unless we were confident that the legislature, treated as a corporate personality, intended us to consider that document a statute?[89]

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88. *See* KELSEN, *supra* note 76, at 110. Kelsen notes:

> The reasons why a member of the diet casts his vote in favor of a proposal may be of many different kinds. . . . [I]t is also quite possible that he has formed no personal opinion in the matter. . . . The proposed legislation may be actually distasteful to the member who votes for it.

Id.

89. Some theorists of interpretation reject legislative intent, thus seemingly rendering anything from the legislature as inessential or indeterminable. Larry Alexander, *Fancy Theories of Interpretation Aren't*, 73 WASH U. L. Q. 1081, 1082 (1995). Alexander writes:

We cannot rely on formalities unless we know that the legislature intends us to, and on what formalities the legislature intends us to, i.e., we must know that the formalities convey the legislature's intention to demark law. When the clerk of a legislature publishes an enacted statute, we must conclude that the legislature intended such publication to treat it as a law. If we discovered that the clerk published the language with full formalities on his own initiative, or even that the leaders of the legislature ordered it to be published without first holding a vote, we would understand it not to be law because we can distinguish between the intentions of an individual or group of individuals and the intentions of the specific corporate personality called the legislature. When we read a legislative enactment called a nonbinding resolution, we know we need not obey it because the legislature used the sign of "nonbinding" to indicate its intention that the enactment not be binding. Law is not discovered lying around and then obeyed; we know what is and what is not law by interpreting the signs that indicate whether or not it was intended to be law.[90] If we do not, then the legislature is not among our lawmakers.[91]

Further, we must use intent to interpret the substance of the law. If a statute says, "Failure to observe the requirements of section 100 is a felony," we understand that the legislature intended to criminalize such failure with all the real-world

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> The statute, in short, is dispensable. But if it's dispensable, how can I be interpreting it? The fancy theories are internally inconsistent because they never really let go of legislative intent at the same time they are denying its existence. What marks count as 'the statute'? Why, those the legislature intended.

Id.

90. Those who fail to see the crucial nature of intent in lawmaking seem to have a static view of the law. *See* KELSEN, *supra* note 76, at 91. Kelsen observes:

> The doctrine of the hierarchical structure of the legal system comprehends the law in motion. . . . It is a dynamic theory of law—in contradistinction to a static theory, which seeks to comprehend the law . . . apart from the process of its creation, and simply as a system already created.

Id.

91. Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 540 (2013). Alexander writes:

> The meaning of the norm that the legislative person or body has chosen and communicated symbolically is the meaning that person or body intends those symbols to communicate. . . . Any meaning it is given other than its authorially intended meaning renders nonsensical the idea of designating its authors as having the authority to determine the norms to govern us.

Id.

consequences that entails. Saying "the law intended to criminalize such failure" or "the law criminalizes such failure" is like saying that the letters on the page "intended" to do something or somehow "did" something. Written law has operation, in fact has meaning, because it is an expression of the intent of minds capable of intent.[92] True, the legislature has no literal collective mind, but presumably a majority of the voting legislators chose to approve something as law and communicate it to others—that was their shared intention, to promulgate an enactment whose intentionality then would be interpreted by others *as the intentionality of the legislators corporately,* even if their intentions may have otherwise differed.[93] This is surely less artificial than ascribing intention to marks on paper.

Although some legislators may have voted against passage or interpreted their own enactment in conflicting ways, this is similar to an individual who communicates an instruction with which he disagrees, or in which he is only mostly confident, or whose instruction is worded ambiguously by accident or by design. Certainly, we typically infer the legislature's intent from what the law says, and mistakes can occur in that process—and we can use legislative history and a dictionary to discern legislative intent as well, because we know a law came from a certain institution populated by the legislators who decided upon this particular law using a certain language. If the law in question is a Georgia one, we know that the legislative debate of the Georgia legislators who voted on it is likely to be a better

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92. *See* VERONICA RODRIGUEZ-BLANCO, LAW AND AUTHORITY UNDER THE GUISE OF THE GOOD 128 (2014). According to Rodriguez-Blanco:

> [T]he contexts in which authorities make claims become unintelligible if claims are reduced to their propositional content. Officials claim legal authority or moral correctness in the context of giving rules and directives with the intention that the addressees perform actions according to the rules or directives. Officials aim at a goal, [i.e.,] that the addressees perform the action.

Id. Without the concept of intention, "the directiveness towards the addressees' actions is lost." *Id.*

93. Otherwise, interpretation cannot occur, and those theories of supposed interpretation that do not acknowledge this are not theories of interpretation at all. Those who reject the idea of intended meaning often want to substitute their own policies for the legislature's. *See* Alexander, *supra* note 89, at 1082. Alexander writes of such theories:

> They are not theories of interpretation because they impose what the interpreter wants the statute to mean on the statute qua words (or marks). If I know what the legislature should have determined . . . the fancy theories let me claim that the statute in fact means what it should have meant.

Id.

guide to the law's intended meaning than debate in the Colorado legislature even if we believe that legislative debate is usually a poor guide to interpreting legislation in general—we know which one we would use if we had to use one.[94]

If we were struggling to determine the meaning of a new term that appeared in a Georgia statute but nowhere else in the law, and learned that the term was popular in the speech of Georgia legislators, we could look to see how the term was used verbally by the legislators precisely because we would know there was a likely connection between what legislators intended to communicate with the term verbally and what they intended to communicate with it in the statute—especially *if they said verbally that they intended to mean the same thing in the statute as they did verbally.* We perform similar processes when we interpret what an individual instructs and are subject to the same errors, even when that individual stands before us; we attempt to construct artificially the interior mental intentions of the other via the external signs of words, body language, and the like.

d. Intent as Socially Objective Effect

Regardless of whether the lawmaker is one or many, an objective external standard[95] must be used for the purpose of identifying law. Coercive intent should be considered to exist when a reasonable observer would find it to exist when determining the subjective intentions of the lawmakers.[96] This may be more akin to a method found in contract law rather than

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94. Dworkin's Judge Hercules "takes note of the statements the legislators made in the process of enacting [a statute], but he treats them as political events important in themselves, not as evidence of any mental state behind them." DWORKIN, *supra* note 62, at 356. I do not know what value the statements can have unless we believe or assume that they accurately reflect the interior intentions of the legislators as lawmakers. *Id.* ("So he has no need for precise views about which legislators' mental states are in question, or what mental states these are, or how he should combine them into some super-mental state of the statute or institution itself."). Without ascribing mental states to legislatures, we cannot treat them as lawmakers.

95. This concerns the deduction of human intent from inanimate objects such as law books but also from the external signs of speakers in the flesh. No direct meeting of the minds takes place, but only the interpretation of objects of sound—typically spoken language—and sight—facial expressions and body language. In my view, John Searle's theories apply to both categories. *See* JOHN R. SEARLE, INTENTIONALITY, AN ESSAY IN THE PHILOSOPHY OF MIND viii (1983) (discussing "how people impose Intentionality on entities that are not intrinsically Intentional, how they get mere objects to represent").

96. Raz, *supra* note 52, at 335 ("[I]t is of the essence of law that it expects people to be aware of its existence and, when appropriate, to be guided by it . . . ."). This condition cannot be well-satisfied if the elements that constitute law were not easily identifiable.

to the intentionalism or original public meaning doctrines often found in constitutional interpretation.[97] The objective observer standard comports with law as a social institution that must rely on the intention communicated rather than what may be subjectively, undiscoverably intended[98] and with law's purpose in having an effect on its subjects, who cannot have direct access to the mental states of others, including those of their lawmakers. Thus, the effect of the objectively perceivable aspects of the lawmakers' coercive intent upon reasonable subjects gives us the law rather than the subjective intentions of lawmakers, although over time that effect may change if lawmakers implement their intentions with greater social clarity.

This standard has much in common with the Aristotelian deduction of essence from accidents. Our minds have no direct perception of natural kinds, only of their sensorially detectable physical qualities such as size, shape, color, sound, and so forth. We distinguish gold from silver and dog from cat by these qualities, not by any direct and unmediated mental perception, and so it is with law. We must discern a law's essence, the causal intent behind it as a communicated exercise in practical reason, by signs.

Additionally, using a subjective, observer-by-observer standard rather than a reasonable observer standard would make a statement or enactment into a law for some and not others, or one law for some and another law for others based on their own

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97. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 91–131 (2004); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 116–53 (2013); Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12–41 (Grant Huscroft & Bradley W. Miller eds., 2011) (presenting an interpretation based on original intent versus original public meaning).

98. The observer constructs, through indirect means, the lawmaker's intention as best he can—by relying upon the lawmaker's communications if he wishes to effect the law of the lawmaker. Thus, I reject Dworkin's view that the observer imposes his own purpose upon the communications, or at least he does not if he is following the law rather than doing something else. For Dworkin's view, see DWORKIN, *supra* note 62, at 54. Dworkin writes:

> I shall defend a different solution: that creative interpretation is not conversational but constructive. Interpretation of works of art and social practices, I shall argue, is indeed essentially concerned with purpose not cause. But the purposes in play are not (fundamentally) those of some author but of the interpreter. Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.

Id.

idiosyncratic perceptions.[99] This would effectively undo the purpose of law in any serious case. This is one reason developed political systems have well-defined formalities for making laws,[100] even if such formalities embrace the substantively arbitrary edicts of tyrants. These formalities render it more difficult for reasonable observers to disagree over what statements and enactments are meant to be law. The interpretation of those enactments must rely on an objective observer standard for the lawmaker's communication to be the law rather than the observer's wishes or judgments, just as the natural kinds that we typically encounter are the way they are regardless of observers' wishes. Otherwise, fundamentally, the law would not be a law at all, because it would not be generally binding on others regardless of their personal views or inclinations. At times, judges and regulators interpret a law one way when another way would be just as reasonable, if not more so, and in such circumstances they act as lawmakers.[101] In these cases, they both create and communicate the law to subjects, at least in part.[102]

This does not call into question legal provisions that excuse mistakes of law or judicial decisions that, based upon constitutional principles,[103] hold harmless violators of a particular law due to that law's ambiguity or some other defect. These are examples of one law telling officials when actual or potential violations of other laws may be excused. I refer only to

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99. *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 56 (1989) ("A law which may be different for each man under 'it' is not a law at all. . . ." (quoting MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 281 (1977) (discussing Hobbes's view))).

100. "Reason is too large. Find me a precedent and I will accept it." *Id.* at 60 (quoting James I). The King's command could not be followed reliably if precedents could not be identified with confidence.

101. It is even possible that a constitution or other such device could grant the judiciary this authority rather than the legislature, in which case I would say that the constitution directly granted some lawmaking power to what is typically termed the judicial branch. The lawmaking power of the judicial branch is no strange thing in a common-law system.

102. In a famous instance, Congress appeared to intend to delegate what must be classified as broad lawmaking authority when it passed the extremely vague Sherman Antitrust Act. One of its primary operative sentences now embodied in statute reads, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Antitrust Act, 15 U.S.C § 1 (2014). Yet using the Act to justify the judicial outlawing of certain drugs, to choose a random example, would be new lawmaking, not interpretation.

103. I do not necessarily mean principles derived from a written constitution, but the general overarching principles that constitute the background to the law of a particular political system.

the broad issue of determining law in general, which must rest on an objective understanding that can bind all subjects or else the law becomes what each subject thinks or claims it is, which would mean that the law, a shared social phenomenon, did not exist.

The objective observer standard assists in explaining judicial decisions that choose to enforce the actual words of an ill-drafted statute when those words contradict the lawmakers' intentions as clearly expressed in legislative history or by other means. It can be unfair and unreasonable to expect subjects to discern laws different from what reasonably can be deduced concerning the lawmakers' intent from the text of statutes. It also could be unreasonable to expect judges to sift through large volumes of legislative history in order to piece together the lawmakers' true intent. What the lawmaker spoke, even if she misspoke, is the law in this view, even if it is judges who have decided to make it the law and thus have participated in the lawmaking process with their own intentions.[104] If both judges and subjects efficiently and consistently could determine the true intent of lawmakers despite the poor wording of such statutes, then such judicial decisions would be unreasonable.[105]

e. Theorists Need a Precise Concept of Law

Noncoercive "law" cannot be true law even if experts and ordinary subjects in a certain society consider it to be so and even if the dominant moral system in that society commands that coercionless law be obeyed. The reason lies in the precision needed by the theorist and, at times, by ordinary subjects. The distinction between coercion-based true law and exhortation emanating from political or legal authorities, for instance, would remain important even in a society in which subjects and legal practitioners did not make such distinctions in their terms, and surely an effective legal practitioner would distinguish those cases of what was called law in which his clients would face penalties for noncompliance and those in which they would not, just as canny subjects would do on their own when capable.

To draw an analogy to natural kinds, a society in which

104. It is also possible that legislators wish judges to apply the text of statutes even when poorly worded.

105. In fact, judges at times do correct obvious errors in statute-drafting to the detriment of the interests of some subjects.

ordinary subjects and even most experts, such as jewelers, generally did not distinguish between gold and fool's gold could exist, but the scientist, among others at times, still would need to make the distinction, for the two substances behave differently, physically and chemically, in certain causally significant ways.[106]

f. The Essential as the Useful

Following the naturalistic methodology, *an element is essential to a concept if it is needed for most usefully distinguishing that concept from other concepts*, and concepts are meant to correspond to our experiences of the world and thus to classify mentally those experiences for us.

g. Concepts Can Change When Words Do Not

Some speculate concerning the nature of law in a world in which coercion were no longer needed to maintain a society and to conceptualize law in a way that would fit both that world and the real one—the "if men were angels" notion. I believe that if men such as Holmes's bad man and Hart's puzzled man—for both need coercion to demark law[107]—were to change so that coercion were no longer necessary to maintain political society, it would be more accurate to say that law would no longer be necessary rather than that the nature of law would change. Instead, what we now call exhortation, guideline,[108] or advice would order that world politically. To say that law could change so fundamentally that noncoercive law would be possible is akin to saying that in the future, gold could have an atomic number of seven. No, for in that case, it would be nitrogen.[109] Even if the

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106. *How are pyrite and gold different?*, UCSB SCIENCELINE (Apr. 30, 2002), http://scienceline.ucsb.edu/getkey.php?key=118 [https://perma.cc/WW2F-UWTX].

107. I believe that the puzzled man deserves an answer to the question, "What is the law?", just as much as the bad man, but believe that both starting points lead to the same place. This does not mean that identifying law tells us everything that is important to know about law or the legal system. *See* HART, *supra* note 5, at 40. Hart writes:

> It is sometimes urged in favour of theories like the one under consideration that, by recasting the law in a form of a direction to apply sanctions, an advance in clarity is made, since this form makes plain all that the 'bad man' wants to know about the law. This may be true but it seems an inadequate defence for the theory. Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is?

Id.

108. As I use it, "guideline" can include custom not backed by legal sanctions.

109. H. Steffen Peiser & Edward Wichers, *Atomic Weight*, ENCYCLOPÆDIA BRITANNICA

written English word "gold" and the sounds accompanying it were applied to what we now call nitrogen, it would not be what we now call gold. The meaning of the symbols and sounds of the word would change nothing about the natural world or concepts accurately reflecting that world.

In the same way, the current common-sense concept of law would not change but rather would be abandoned in favor of a fundamentally different concept based on different causal intent and effect, a concept now labeled by a different term such as exhortation or moral suasion, even if the same word came to be applied to both. Calling both "law" would be deceptive just as calling both gold and nitrogen "gold" would be deceptive—as calling both gold and fool's gold "gold" is even more deceptive.[110] Certainly, both concepts and the meanings of words can change in minor ways over time and remain fundamentally unaltered, but here we have an example of an essential difference of which usefulness in reasoning and communication demands recognition in the same way that gold and fool's gold do, or dog and cat do. Knowledge of when semantic continuity disguises concept discontinuity is crucial for rational thinking, particularly in law and politics where words' definitions are muddled surreptitiously to suit powerful interests.

h. Coercion is Essential in All Realistic Worlds

Yet this thought experiment is of limited value, for I am confident that short of an eschatological event, human political societies always will need coercion to maintain law and order.[111] Practically, no political state in the real world can be maintained without coercion any more than gold can have an atomic number other than it has, which is why political positive law exists in the first place and is coercive—and why there is no need to redefine law to mean something else just in case coercion were to cease to be necessary any more than biologists need to plan for the possibility of dogs ceasing to have mammary glands in formulating their definition of "dog," currently classified as a

(Mar. 29, 2016), https://www.britannica.com/science/atomic-weight [https://perma.cc/M49R-PJ9M].

110. "Words, as is well known, are the great foes of reality." JOSEPH CONRAD, UNDER WESTERN EYES 5 (Penguin Books 2007).

111. *See generally* THOMAS MORE, THE UTOPIA OF SIR THOMAS MORE INCLUDING ROPER'S LIFE OF MORE AND LETTERS OF MORE AND HIS DAUGHTER MARGARET (Ralph Robinson trans., 1947).

mammal but which could not be so classified if biologists were to take into account the possibility of dogs without mammary glands, since the possession of such glands is essential to the definition of mammal.[112] It seems plausible to say that if dogs remained the same as they are except that they came to feed their young by regurgitation, they would still be recognizable as dogs from a common-sense perspective, yet major scientific reclassification would have to result. Should biologists consider this possibility and remove dogs from the "mammal" classification now? *Most definitions and concepts would become useless or near-useless if unrealistic but imaginable hypothetical alterations to the universe had to be accounted for.*

Yet I believe the argument for including coercion in political positive law is stronger than including mammal in dog, for unlike dogs without mammary glands, I believe that "law" without coercion is unrecognizable as law from a thoughtful common-sense perspective—or at least is not consistently recognizable as law by all reasonable observers. Similarly, "money" that cannot be typically exchanged for goods or services in the real world is not correctly termed money. Monopoly Money is categorically different from real money and is money only by analogy. Just as political positive law can have effects upon behavior other than via physical coercion, such as by pricking moral conscience or coordinating voluntary choices, money can have effects other than increasing one's ability to purchase goods and services—wealth often brings social respect that leads to concrete consequences that have nothing to do with purchasing power. Yet ten million "dollars" acquired in a computer fantasy game, with all the social respect[113] and other effects it might have, is not money properly so-called even if, occasionally, such play money can be exchanged for real-world benefits.[114] Or, alternatively, if both can be properly considered money, some other fundamental distinction in concepts must be made between the two in order to comprehend their roles in the

112. A dog is a mammal. Constance B. Vanacaore, *Dog*, ENCYCLOPÆDIA BRITANNICA (Aug. 27, 2017), https://www.britannica.com/animal/dog [https://perma.cc/7ACQ-XF78]. A mammal is characterized by having mammary glands. David M. Armstrong, Don E. Wilson & J. Knox Jones, *Mammal*, ENCYCLOPÆDIA BRITANNICA (Oct. 25, 2017), https://www.britannica.com/animal/mammal [https://perma.cc/5XUW-7FHP].

113. Or social ridicule.

114. Such as giving a fellow gamer $1,000 in play money in return for his physical Star Wars figurine, or for washing a real unicycle.

world just as legal philosophers distinguish political positive law from other kinds of law—I believe coercive force is a crucial distinguishing element just as exchangeability for real-world goods and services is for real money.

Then there is the matter of convincing law-abiding subjects to obey a law that they see others disobeying without penalties imposed upon them by the authorities. Without coercion applied to those inclined to disobey law, the law-abiding who initially accepted the concept of coercion-free "law" might come to see law-abidingness—as least in the case of a coercion-free law—as unprofitable and, further, as seeing legal authorities as unserious about truly creating a law in the first place.[115] They might conclude, fairly in my view, that no law was truly created since the legal authorities were unserious about affecting potentially disobedient subjects' decision-making *using the legitimate and characteristic tools specifically available to those authorities.* This potential disobedience, like so much of disobedience to law, could be based on true moral principle or practical imperative, especially when the law in question is unjust or forbids merely *mala prohibita* offenses.[116] If coercion-free "law" became widespread enough, even those strongly inclined to law-abidingness might begin to disobey as they saw others doing so with impunity[117]—not necessarily because they decided to disobey the law as well, but because they reasonably decided that the law did not truly exist in the first place.[118] Subjects might well

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115. *See* HART, *supra* note 5, at 198 ("'Sanctions' are therefore required . . . as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. . . . [W]hat reason demands is *voluntary* cooperation in a *coercive* system.").

116. *See* FINNIS, *supra* note 33, at 260 ("[Aristotle] suggested that need for coercion arises from the recalcitrance of the selfish [only]. . . . But . . . recalcitrance . . . can be rooted not only in obstinate self-centredness, or in careless indifference to common goods . . . but also in high-minded, conscientious opposition. . . . "). This conscientiousness can be good, but Finnis notes that it could also be "conscientious terrorism" that needs to be "suppressed." *Id.* at 261.

117. *See id.* at 262. Finnis writes:

> And there is the need to give the law-abiding the encouragement of knowing . . . that the lawless are not being left to the peaceful enjoyment of ill-gotten gains, and that to comply with the law is not to be a mere sucker: for without this support and assurance the indispensable co-operation of the law-abiding is not likely to be continued.

Id.

118. *Cf. id.* at 263 ("If those in authority allowed the retention of unfairly gained advantages they would not only lose the allegiance of the disadvantaged law-abiding but indeed forfeit their title, in reason, to that allegiance."). I go further than Finnis and say that without coercive intent, legal authorities never, in reason, truly claimed the allegiance of subjects, at least not when making coercion-free "laws."

internalize the duty to obey the law as a rational rule to guide their behavior in accordance with the common good or socially legitimated authority, i.e., obey out of principle rather than obey out of fear of penalty or expectation of benefit, but only after recognizing that the lawmaker has unambiguously created a law and indicated a minimum of official seriousness about subjects' obedience to it—indeed, this socially communicated seriousness is necessary for the creation of a law.[119]

i. Conceptual Essentialism as Necessary for Legal Reasoning

We can imagine away almost everything about Creation—gravity might cease to operate and thus cease to be a property of matter, gold might suddenly turn dull violet and cease to be malleable,[120] or objects might abandon the scientific definition of "mass" by losing their inertia, assuming the last is logically possible.[121] Theoretically, perhaps philosophers can debate endlessly what is essential to any given concept and what is not, or if anything is essential at all, but those engaged in practical reasoning do not have that luxury.[122]

The way of thinking that refrains from the idea of essence, in whatever form it may take, would render impossible almost all firm conclusions about the world. Law enforces conclusions on sometimes-unwilling subjects whether lawmakers or theorists call them firm or not. From a practical-reasoning perspective law is often very firm indeed. It is firm enough to threaten subjects with arrest, imprisonment, fines, pecuniary judgments, and occasionally death. Any legal system, even a supposedly coercion-less one or one with some supposedly coercion-less laws, that commands or authoritatively advises subjects to "do this" and "do

119. *See* FINNIS, *supra* note 36, at 257 ("One 'internalizes' the law when one willingly, promptly, readily . . . complies with its requirements . . . primarily according to the lawmaker's intention and plan for common good.").

120. In which case, it might cease to be a metal. "Metal, any of a class of substances characterized by high electrical and thermal conductivity as well as by malleability, ductility, and high reflectivity of light." The Editors of the Encyclopædia Britannica, *Metal*, ENCYCLOPÆDIA BRITANNICA (Apr. 24, 2008), https://www.britannica.com/science/metal-chemistry [https://perma.cc/U6JF-PTJW].

121. "Mass, in physics, quantitative measure of inertia, a fundamental property of all matter. It is, in effect, the resistance that a body of matter offers to a change in its speed or position upon the application of a force." The Editors of the Encyclopædia Britannica, *Mass*, ENCYCLOPÆDIA BRITANNICA (Jun. 1, 2006), https://www.britannica.com/science/mass-physics [https://perma.cc/6ZWJ-TNXW].

122. *See* HART, *supra* note 5, at 199 (We must "serve the minimum purposes of beings constituted as men are.").

not that" must have come to firm conclusions about what should be done and have ways of consistently recognizing those conclusions and communicating them from some minds to others.

The belief that some can and should instruct others to perform actions depends unavoidably—and therefore essentially—on the concepts of instructors, instructees, and instructions. All three of these have their own essential qualities necessary for subjectively cognizing them and for their objective social recognition. Normativity, not just description, is essential as well.[123] This legal normativity is not invoked without coercion but then *goes beyond the mere threat or prediction of a sanction to include the notion of an imperative to obey*, and can go beyond law entirely and include a nonlegal social or moral duty to obey the law, depending upon social and moral attitudes.

j. Dangers of Thought Experiments

If this remains unconvincing, note that other theories of law can be negated by unrealistic thought experiments or by emptying the concept of law of enough content as to render it *indistinguishable from other concepts when it comes to practical reasoning*. For example, some believe that the essence of law is planning and that coercion is inessential. They say we need authorities to lay down guidelines for our social cooperation but not necessarily to force us to follow them.[124] But we can imagine it possible that one day, subjects could dispense with the need for guidelines entirely and be able to cooperate spontaneously with sufficient effectiveness. They could make decisions moment-by-moment with no need for social rules. They could have sufficient knowledge and rationality to make those in-the-moment decisions, considering all the evidence before them

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123. *See* Olivecrona, *supra* note 74, at 800. Olivecrona writes:

> Legal rules say that people *shall* act in certain ways in such and such circumstances. Similar reasoning should also make it clear that legal rules cannot correctly be described as declarations (propositions or judgments in the logical sense) concerning the future actions of state organs. It is evident that their sense is missed with such an interpretation.

Id.

124. *See* SCOTT SHAPIRO, LEGALITY 176 (2011) ("Although I disagree with this claim that the law necessarily uses force, I agree that, when the law does use force, it is always organized. Both to maximize its effect and control its power, the law organizes a coercive response to social deviance through an interlocking set of social plans.").

each time, and still have a functioning human society. Sufficient consistency would arise naturally from the harmonious separate decisions of such rational and knowledgeable beings.

These general consistencies, perhaps even if violated occasionally, could be called "laws" if we wished, in a way similar to the way regularities of nature are called the "laws of nature."[125] Or future subjects could live by voluntary social rules that develop from the bottom up, with no need for authorities to formulate, alter, or enforce them, and these rules be said to make up the "legal system." In today's world, perhaps small, highly homogenous communities can survive for a period through such governance alone, but no self-governing political state durable enough to last a substantial time could possibly do so.

The distinctions between the features of law that would exist in a theorized perfect world and those which must exist in the real world are simply irrelevant and, more, arbitrary. As indicated above, in a world perfect enough, social rules resembling political positive law might not be necessary since each thoroughly rational and knowledgeable individual could come to the same conclusion about what course of action to take in every situation—and if they could not, they could deliberate in each situation and, given all the specifics of the relevant circumstances, agree on the best course of action rather than rely upon social rules. After all, if we can posit a world of perfectly good men who need no coercion to regulate their behavior, we can posit one in which there is always time and inclination for rational deliberation before taking action. Perhaps there would then be no law in such a world, or perhaps we could rescue the need for law by calling the shared rules of practical thought that such beings would use in their deliberations "laws," for it would be these interior deliberative rules of thought that would indirectly guide their social behavior. We could label as "law" a great many things in imaginary worlds.[126] I do not say that such a world could exist, but only that

125. Even if there are exceptions to the laws of nature, such as miracles, we could still call them laws. In fact, the concept of a miracle depends upon acceptance of the laws or at least regularities of nature. *Contra* DAVID HUME, *Of Miracles*, *in* AN ENQUIRY CONCERNING HUMAN UNDERSTANDING §10 (Eric Steinberg ed., 2nd ed., Hackett Publishing 1993).

126. If the law in question is not considered political, then perhaps it could govern a society of saints without contradicting my theory, which is about political positive law. *See*

we can imagine it just as we can imagine other unrealistic worlds, and that the imaginings largely determine the concept of law then manufactured rather than any rational principle determining the concept.[127] If we can argue by imagining away the need for coercion, we can argue by imagining away the need for social rules or the need for lawmakers, or indeed imagine away any or all of the concerns that prompt us to use law here and now, thus allowing us to redefine law to mean anything we like as we redraw conceptual lines to divide up this new world.

After transmuting concepts' subject matter—the real world—into something else via thought, the choice among fundamentally different versions of most concepts becomes arbitrary and thus irrational and useless. Instead, *we must use, as our subject matter for concepts, the world as it exists and as we can imagine it could realistically exist based upon our experience rather than speculation, especially for those concepts relevant to practical reasoning, and make those concepts as useful for understanding and communication as possible.* If the world changes radically and unexpectedly, perhaps then we must revise our concepts in response—but not in response to the near-infinite number of changes that we can fantasize. This is not to say that thought experiments cannot be useful, only that they should not be used

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FINNIS, *supra* note 36, at 248. Finnis says:

> Aquinas is clear that in such a paradise there would still be need for 'government and direction of free people,' since social unity requires some unity of social action . . . . But he does not say that in such a state of affairs there would be need for specifically *political* government or law . . . .

Id. Finnis refers to the view that Aquinas ascribes to Aristotle. *Id.* at 248 n.149 ("[I]f people were disposed well enough to comply with parental admonitions there would be 'no need for kings and judges'. . . ."). Accordingly, the law in question appears to be nonphysically coercive parental law. I claim that a world in which all obeyed their parents well enough to need no political law, or even in which such consistent obedience to parents were a good thing, can never realistically exist this side of the Apocalypse.

127. Thus, to me the justification of law's existence in a coercion-free world, law that is a matter of noncoercive solutions to coordination problems and the like, has no real relevance, including the following conclusion made after describing a noncoercive legal system: "All this, then, stands as a sufficiently distinctive, self-contained, intelligible, and practically significant social arrangement which would have a completely adequate rationale in a world of saints." FINNIS, *supra* note 33, at 269. Only a world of saints could find such a concept useful for practical reasoning, and there is no reason to require the five features of legal order that Finnis identifies as needed in a world of saints if we make the saints into beings who do not need rules at all: "In the world as it is, these five constellated formal features of legal order [needed by saints] are amplified and elaborated in order to meet the problems of fraud and abuse of power, and are supplemented by the law of wrongs and of offences, criminal procedure, and punishment." *Id.* at 269–70. These problems of fraud and abuse of power are just as real and unavoidable as the other realities with which a political legal system must grapple.

to draw conclusions that should not be drawn when all aspects of the real world are considered.

We could imagine a world in which consuming water from time to time is no longer essential by nature for survival—perhaps the human body comes to retain and recycle water for decades as some Eastern spiritual masters are said to be able to do for weeks. Then we could conclude that although it appears so to us now, consuming water is not essential for human survival. Of what value is this conclusion to anyone seeking to maintain or optimize human life and health?

"As the matter is sometimes put, law without sanctions is *logically*–but not *humanly*–possible, human nature being what it is. . . . But why think that the appropriate concept of interest is one that reaches so far beyond what we can expect in the very world in which beings like us create the practices that construct *our* concept of law?"[128] That overreaching concept is of no value to the practical reasoner, but rather deceives.[129]

k. Legal Coercion Must Be Physical

Ultimately, all other coercive legal consequences threatened by lawmakers depend upon physical coercion. For example, when the government assesses a fine against a subject, it does not send the subject a notice and leave it at that. If the subject does not pay, eventually he is incarcerated or his property taken. If he tries to stop the taking or to regain his property without paying, he is forcibly prevented. The physical coercion may not be applied to the fined subject. Instead, the government may require the subject's employer to garnish his wages or his bank's managers to hand over the money, and if they refuse, eventually those natural persons responsible will face physical coercion.

Financial and other penalties need hold no terror without the threat of physical consequences. A notice that one's car now belongs to the government is not coercive if that notice can never be physically enforced. Some human person, somewhere, faces physical coercion—defined broadly to include physically-

128. Kenneth Einar Himma, *The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law*, 3 JURIS. 7 (2015).

129. *See id.* ("... Raz consistently overlooks that the practices constructing our concept of law are concerned with what *beings like us do in circumstances of material scarcity that create our need for the social institution of law.*").

enforceable restrictions on access to material resources—as the result of any true law's existence.

l. No Law by Moral Fiat or Nonlegal Social Authority

The dominant moral system in a society could command obedience to all enactments, coercion-based or no, of legal authorities, and the concepts of exhortation, guideline, and advice from a legal authority might not exist.[130] I believe that such a moral system would require obedience to wishes as well as commands and true law. If a legal system, to exist completely, must include elements beyond one-time commands and wishes from rulers and include more sophisticated aspects such as first-order rules of some generality and Hart's second-order rules,[131] then not everything that emanates from a ruler or lawmaker is necessarily law. This is true even if everything that emanates from her is morally supposed to be obeyed.[132] The criteria for the existence or content of positive law, whether those of Hart or other positivists,[133] do not change based on the moral systems of a society's rulers or subjects.[134]

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130. "Most commonly today, in a world of bureaucratic armies and institutionalized religions, when kings are few in number and the line of prophets has run out, authority is granted to those who occupy official positions." R.P. Wolff, *The Conflict between Authority and Autonomy*, *in* AUTHORITY 20, 22 (Joseph Raz ed., 1990).

131. HART, *supra* note 5, at 99 ("The union of primary and secondary rules is at the centre of a legal system . . . .").

132. *See* KELSEN, *supra* note 76, at 26. Kelsen argues:

> What makes certain human behavior illegal—a delict (in the broadest sense of the word)—is neither some sort of immanent quality nor some sort of connection to a metalegal norm, to a moral value, a value transcending the positive law. Rather, what makes certain behaviour a delict is simply and solely that this behaviour is set in the reconstructed legal norm as the condition of a specific consequence, it is simply and solely that the positive legal system responds to this behavior with a coercive act.

Id.

133. The legal language that we use, relatively neutral relative to morality and other nonlegal factors, has its roots in Austin. *See* Philip Schofield, *John Stuart Mill on John Austin (and Jeremy Bentham)*, *in* THE LEGACY OF JOHN AUSTIN'S JURISPRUDENCE 237, 242 (Michael Freeman & Patricia Mindus eds., 2013). Schofield writes:

> The practical result of Austin's science of jurisprudence was to devise a legal terminology in which any system of law might be expressed, and a general scheme of arrangement according to which any system of law might be distributed. Jurisprudence, as thus understood, noted Mill, was not so much a science of law, but the application of logic to law.

Id.

134. Possibly, though not necessarily, contra natural law theorists who critique Schauer. *See, e.g.*, Jeffrey A. Pojanowski, *The Place of Force in General Jurisprudence*, 21 LEG. THEORY 242, 249 (2015). Pojanowski writes:

> An evaluative approach, by contrast, can avoid the charge of arbitrariness *and*

The same holds for social authority separate from moral authority.[135] Religious leaders, activists, and celebrities may have social authority resting upon respect, popularity, practicality, or expertise, and when legal authorities use these same qualities by themselves, they use nonlegal forms of social authority rather than legal authority even if their nonlegal social authority flows from their legal authority and even if negative consequences for subjects follow after the use of that social authority—and it is perfectly possible for legal authority to be correlated instead with *decreased or nonexistent nonlegal social authority* among populaces with a dim or narrow view of the legal system.[136] This decreased or nonexistent nonlegal social authority *need not affect the legal authorities' specifically legal authority or decrease obedience to the law or to those authorities' legal-system-enforceable decisions.* Subjects could continue to respect legal authorities' legal acumen or obey due to fear of punishment or out of moral duty. Even if legal authorities have reverse nonlegal social authority, i.e., subjects are likely to do the opposite of the authorities' nonlegal urgings, their legal authority may remain intact in much the same way that I may follow my computer expert friend's instructions regarding computers but tend to believe his advice on other matters to be counterproductive.

> explain the importance of the litany of 'necessary' features in the positivist pantheon in a way that Schauer's clustering approach cannot. Those features stand out because they cohere with a reasonable understanding of law's moral purposes. If the ideal type of law is, say, an ordinance of reason for the common good promulgated by those with responsibility for the community, claims of legitimate authority and uncoerced obedience stand out as central features of the practice.

Id.

135. A thorough examination of nonmoral social authority can rest upon empirical facts, but such an examination of moral authority requires more. *See* FINNIS, *supra* note 33, at 33–34. Says Finnis:

> Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil . . . are *per se nota* (self-evident) and indemonstrable. They are not inferred from speculative principles. They are not inferred from facts . . . . [And so,] [t]hey are not inferred or derived from anything. They are underived (though not innate).

Id.

136. *See* Kleinfeld, *supra* note 66, at 302. Kleinfeld states:

> Not just any consequences for violation whatsoever can qualify a normative system as a legal system. The problem with Hathaway and Shapiro's insistence on a broad conception of enforcement is that they offer no principle of limitation, no principle for distinguishing enforcement of a legal sort from other kinds of sanction, cost, or consequence.

Id.

When a lawmaker urges subjects to action regarding prayer, or diet, or even legal matters in a nonphysically-coercive manner, she exercises moral or social authority, as religious leaders and experts do, and does not exercise distinctively legal authority. That remains true if her exhortation is put into a formal enactment labeled a statute. Her use of nonphysical social coercion does not suffice, as religious authorities, corporate executives, celebrities, and experts employ such social coercion to order society as well, often in thoroughly political areas.[137]

An enactment that says, "Any subject who exceeds the speed limit by more than ten miles per hour must be asked to pay a $1,000 fine, but there are no consequences for not paying," is not a law upon speeders[138] and does not refer to a fine despite using the word. It asks for a contribution, donation, or other *legally voluntary* payment. Stretching the meaning of "fine" to include purely voluntary payments does too much violence to the concept for it to survive, and if the meaning of the word were stretched that far, we would need a new term to refer to the current concept of fine if we wished to think clearly and communicate efficiently.

Determining when stretching goes too far and fundamentally alters concepts sometimes can be a line-drawing problem with uncertain solutions—does a country club truly "fine" its members on pain of expulsion for breaking its rules or must a legal authority do the fining for the term to be used properly?—but here, there are clear cases of fundamental difference, based on causal intent and effect, highly relevant to real subjects' decision-making.[139]

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137. Social disapproval is often, perhaps usually, based on morality, although sometimes it is based upon the nonmoral personal preferences of society members. Ihering takes a thoroughly binary view. RUDOLF VON IHERING, LAW AS A MEANS TO AN END 178 (Isaac Husik trans., 1913) ("In addition to *political* coercion, there is still another, unorganized, which historically everywhere preceded the other, and asserted itself everywhere along with it. I call this the *social.* Political coercion has for its object the realization of *law,* social coercion has for its object the realization of morality.").

138. It could be a law upon those who must do the asking.

139. We cannot allow the inability to draw precise lines to destroy our ability to categorize or else we could not engage in practical reasoning. At what point do reasonably safe speeds for driving on an interstate under good conditions cross over into unsafe? 55 MPH? 70? 170? The precise speed cannot be identified, yet we know that some speeds are reasonably safe and others clearly unsafe. When should a subject be considered an adult? Even a maturity test for adulthood would raise the question of, "How mature is mature enough?" Exactly how hot must weather be to be hot weather? When is a collection of individual grains a "heap" of grain? *See* Dominic Hyde, *Sorites Paradox,* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014),

A religious leader may succeed in persuading subjects to boycott a certain business for nonreligious reasons—perhaps he simply does not like the business owner and publicly states this personal dislike as the sole reason for the boycott while sincerely disclaiming any religious reason, with his followers accepting the disclaimer as true—but even if his social standing to persuade in this case was derived from his position as a religious authority, he *did not exercise religious authority* in promoting the boycott. This distinction is even clearer when legal authorities engage in the same sort of behavior, for a religious authority may employ pure moral suasion when acting as a religious authority but a legal authority must act through the law in acting as a legal authority.

m. Expressive Value of Law

Formal noncoercive enactments from legal authorities can have expressive value as exhortations, even as socially unique and perhaps exceptionally high- or low-value exhortations from either respected or despised legal authorities respectively, but do not employ any expressive quality of law itself. The legal system cannot enforce them—or if it can, then they are not noncoercive after all. If these formal noncoercive enactments affect the enforcement of law in a vague, highly indirect way, they are less like law and more like background to law such as *Black's Law Dictionary*, an influential legal treatise, or the Bible.

Such enactments may have no social value. In fact, rather than signal serious expressive intent, such formal exhortations masquerading as law—with the refusal of the lawmaker to use her legitimate coercive power—more likely express lack of seriousness.

II. LEGAL FORM, LEGAL MATTER, AND LEGAL SUBSTANCE

A. Substance as Necessarily Including a Legally Enforceable Consequence

1. Nonlegally Enforceable Consequences as Legally Voluntary

a. Law-Like Effects

Depending on subjects' legally voluntary reactions, what might seem to be a law can have a law-like mental effect and can be

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http://plato.stanford.edu/archives/win2014/entries/sorites-paradox/ [https://perma.cc/6ZPV-3VYS].

intended to, just as an enactment from a religious authority can have a political positive law-like effect. Subjects might spend more time with their families in response to the legislature's noncoercive urging. Some may pray in response to the presidential proclamation at Thanksgiving. Employers might pay their employees a living wage at the suggestion of a legislature. They conform, not because these enactments are laws, but because they respect these authorities' advice, because the authorities' reasons are persuasive to them, or for some other reason such as good public relations. The few who may take these enactments as legal err by doing so, and no legal duty or obligation[140] would be created even if the nonlegally required social coercion created by these exhortations from the President or legislature were great—and equally great social coercion can be generated by nonlegal religious and other authorities.[141]

Despite such great social or moral coercion[142] on which legal authorities might rely for obedience to their wishes, there would be *no legally enforceable consequences* for noncompliance and thus *no legal substance to violate even if a legal form existed.* Further, any social or moral coercion would depend upon the voluntary reactions of subjects, who may or may not conform to the legal authorities' expectations of their attitudes—and without a legally enforceable consequence for conformity or lack thereof with the legal authorities' wishes, it is impossible to consistently distinguish between exhortations from legal authorities and laws.

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140. I do not use the absence of legal duty or obligation to imply the absence of any other kind of duty.

141. It is possible that a society could rely exclusively upon the voluntary employment by subjects of force against other subjects to ensure compliance with legal authorities' supposedly noncoercive pronouncements, but if the legal authorities tolerate this use of force, then their pronouncements indeed rely on coercive force and *legally so* even if such force were formally illegal. If they did not tolerate it, then of course such force would be illegal and could not be part of the legal system. More fundamentally, any reliance upon extralegal coercive force on the part of a legal authority would be, by definition, employing her nonlegal social or other influence in the same way that religious, media, organized crime, or other authorities could have their exhortations enforced by extralegal physical coercion by subjects.

142. Recall that social coercion need not be based on morality, but on other factors such as preferences—there can be pressure to dress in a certain style, for example, or observe certain customs without moral import.

b. Reasonable Recognition of Legal Obligation and Law's Settlement Function

As mentioned above, there is no way other than specifying legally enforceable consequences that can clearly and distinctly distinguish law from other phenomena emanating from legal authorities, nor any other way to clearly and distinctly demonstrate to all reasonable subjects when they have legal obligations to obey. At least some reasonable subjects could conclude in good faith that legal authority was not exercised if a lawmaker did not specify a coercive consequence and that *legality was not satisfied by the statement or enactment in question*—or at least might not have been. The action of the lawmaker lacked the conviction to bind, they might conclude, especially if they had a good and substantial reason to disobey the "law" in question. Some reasonable subjects might be convinced by arguments in favor of a legal obligation to obey a seemingly exhortation-only law while others might not *while remaining reasonable.* Insofar as law's ability to bind all reasonable subjects is essential to it, so is coercion—not because of the fear of the coercion, but because of the signaling and distinguishing value of the coercion.

Thus, insofar as law's *settlement function* is essential to it, so is coercion. In any serious dispute, law cannot settle what reasonable, law-abiding subjects should do if they can reasonably dispute what the law is or what legal obligations apply to them. Further, when coercion is not involved, it is much easier for political and legal authorities to issue vague and contradictory directives that subjects cannot consistently follow even if they wished to—but multiple conflicting coercive pressures generate strong incentives to move toward consistency.[143]

This can be compatible with theories of law that have requirements for the generation of legal obligation that include elements such as a regulatory purpose, an exercise of legal authority, or a potentially reasonable relation to the common good. Understood properly, the coercion requirement can be

143. Following coercion to find law assists in shrinking the necessary sphere of knowledge by leaving out political and legal authorities' noncoercive rules, commands, moral demands, and exhortations, which are often vague and poor guides to decision-making in any case. *See* Alexander & Schauer, *supra* note 63, at 1585 ("In the decidedly real world in which the commands of morality are both uncertain and contested, law provides much-needed practical guidance by greatly reducing the amount of knowledge required to make practical decisions.").

seen as necessary to constitute one or more of these elements.

For example, John Finnis argues that "the question whether lawgivers can withhold moral obligation from their stipulations, or modify the extent or degree of the obligations' moral force, is not to be settled by asking what moral obligations they can or do intend or 'will' to impose."[144] Instead, we should ask what "is the significance, for practical reasonableness, of certain facts—in this case, the fact that an authoritative lawgiver has decided and stipulated that [an act] is 'legally obligatory.'"[145] I argue that just as what the lawmaker says or wills does not necessarily determine moral obligation, nor does what the lawmaker says or wills necessarily determine legal obligation—what the lawmaker says or wills must fit into a rational socially recognized framework for perceiving legal obligations. The President saying during a campaign speech, "I hereby will to create a legal obligation for every civil plaintiff filing in a federal court to pay an additional $1,000 in court fees" typically will create no legal obligation, no matter how subjectively sincere the President may be.

Finnis recognizes that "the lawgiver's acts of will have their significance for the practical reason of other people only because they can take their place in a normative framework *which is not of the lawgiver's making*" and further sees "the importance of law as a specific way of realizing a fundamental element of the common good, i.e. a fair, predictable, positively collaborative, and flexibly stable order of human interrelationships."[146] I see coercion as necessary both for an optimally rational and socially recognizable normative framework and as necessary to create a fair and predictable order, given the reasonable tendency of some to treat noncoercive law as nonlaw.[147] Finnis says that a lawmaker's attempt to withhold moral obligation from legal obligation

> would seriously weaken the clarity, certainty and uniformity of application which are the very bases of law's utility as a specific way of realizing the common good. Therefore, *these* intentions

144. FINNIS, *supra* note 33, at 335.

145. *Id.*

146. *Id.*

147. The irrational and the incorrigibly law-breaking will think or act as they might. I speak of reasonable, generally law-abiding subjects and what a reasonable lawmaker must do to bind their actions.

> or acts of will are of no effect, i.e. are irrelevant to moral reasoning about one's obligations as a citizen.[148]

I argue that, for the same reasons among others, any attempts to argue in favor of noncoercive legal obligations must fail.

c. Coercive Force Rather Than Moral Force

Indeed, when a lawmaker seems to withhold moral obligation because she does not want to forbid an act but simply to impose a choice upon subjects—"refrain from this or pay a fine," as a sort of fee for a privilege, rather than "I command you to refrain from this and I will use a fine to promote compliance"—Finnis says that at times "such legislative acts should be regarded by lawyers and citizens alike as muddled and abusive attempts to impose a tax on the doing of [the act]. They impose *no* form of obligation not to do [the act]."[149] Not only that, but such legislative acts

> are to be treated rather like a legislator's exhortations not to do [the act]. Though such exhortations have some relevance to the citizen's own assessment of the requirements of the common good, they have *no* legal effect and hence do not create *any* degree of legal obligation in either the legal or the moral sense.[150]

I believe that similarly, attempts to create noncoercive legal obligations are exhortations that have no legal effect and do not create any degree of legal obligation.

Perhaps, for some, the concept of noncoercive "law" rests on some idea that law can command attitudes or that subjects inevitably have respect for things labeled law by legal authorities or others. Happily, interior attitudes are beyond the naked command of legal authorities—even in the fictional *1984*, the authorities have to employ physical coercion in order to change interior attitudes[151]—and subjects, for good or ill, choose whether to respect legal authorities' pronouncements or to recognize them as law. In order to make a persuasive and rational case for the clear existence of a claim of a positive legal obligation, a case independent of the moral beliefs and personal

148. FINNIS, *supra* note 33, at 335–36.
149. *Id.* at 336.
150. *Id.*
151. GEORGE ORWELL, 1984 (Nachdr. ed. 1961).

attitudes of subjects, coercive intent must be included—only then can no reasonable subject make a plausible claim that no legal obligation was laid upon him.

Only after the existence of a legal obligation is clearly established can subjects then have an obligation to apply their personal moral calculi to that legal obligation and decide whether they should obey the law. Given the diversities in moral systems and psychologies, such clarity is essential to the concept of legal obligation *in the absence of a universal, nonpositivist theory* marrying positive legal obligation to moral obligation or some other phenomenon that objectively determines, independently of ambiguity in lawmakers' actions and for all reasonable subjects, when a legal obligation exists.

2. Legal Form and Legal Matter Constitute Legal Substance

a. Formalities and Consequences

To create a complete legal substance reasonably recognizable to all, a law must have a legal form together with legal matter. The *legal form* consists of aspects such as a statement or enactment by a socially recognized legal authority *that makes something recognizable as a communication from a lawmaker purportedly acting as a lawmaker.* The *legal matter* must include a *potentially legally enforceable real-world consequence, as made potentially relevant to subjects' practical reasoning, specified in a communication and possibly included by reference to things external to that communication.* The plausible existence of that consequence, or multiple consequences, must flow from the recognition by the reasonable subject of the intent of the lawmaker—or, rather, of the legal system generally with all of its lawmakers together—to affect subjects' behavior, i.e., *the effect upon the subjects' minds* of the manifestations of the intent. This need for a legally enforceable consequence leads to the requirement for coercive intent as a constituent of any law properly so-called *rather than as a constituent of legal obligation alone.*[152]

I say "of the legal system generally" because it could be, for example, that the legislature does not intend a certain nonbinding provision to affect subjects, but judges use it to regulate subjects' behavior anyway; this becomes a binding law

152. *But see* HART, *supra* note 5, at 49 ("[T]he model of orders backed by threats obscures more of law than it reveals.").

although it may be that the judges are the true lawmakers in this case. It is the judges' communications that then constitute the legal form, at least in necessary part. If bailiffs or police officers do not obey the judges but rather apply their own rules to subjects, and this happens consistently over time, then they indeed are the lawmakers but only if the higher authorities tolerate this situation and thus signal to subjects their acquiescence to it—*the law lies at the locus of the whole legal system's ultimately applied physical coercion.* Of course, typically the law's rules originate with legislators, senior executive and regulatory officials, and judges, who are the lawmakers while other officials merely execute the laws. If a reasonable subject perceives that inferior officials violate the rules laid down by the superior ones and that the superior ones have not indicated acceptance of this state of affairs, at least passively, he perceives that the inferior violate the law.

Further, customs that give rise to legal rules can be said to do so only if they affect the coercion applied through the legal system. Subjects may not know or need to know that a custom has done so, but only what the final rule became.[153]

The above is a simple analogical use of the Platonic–Aristotelian or Thomistic ideas of form and matter.[154] Regardless of the ontological status of form, matter, and substance, these categories best describe our mental understanding *when perceiving something actually existing outside of ourselves,* with the possible exception of some spiritual experiences. Things are made intelligible through form and matter together. Just as our *sensory perceptions* of a dog's shape, size, color, movement, bark, and the like make up the *matter* of the concept of dog, our *mental template* of the idea of a dog makes up the *form* of the concept of dog.[155] Those with no concept form of dog in their minds would

153. Custom becomes part of law when it is integrated into or affects in some way the rules and commands applied to subjects by legal authorities. Thus, it then becomes part of some kind of order to subjects, consciously or unconsciously. Hart appears to think that the use of custom must be conscious, perhaps even part of a conscious law-creating act, to fit the Austinian command model. *Id.* at 48 (explaining that "some rules of law originate in custom and do not owe their legal status to any such conscious law-creating act [including passage of a statute]" and terming this an "objection" to the "theory of law as coercive orders").

154. *Cf.* ST. THOMAS AQUINAS, SUMMA THEOLOGIAE: THE UNION OF BODY AND SOUL (PRIMA PARS, Q. 76) (Fathers of the English Dominican Province trans., 2nd ed., 1920), http://www.newadvent.org/summa/1076.htm [https://perma.cc/2UR4-LFXT].

155. Again, with the possible exception of some spiritual experiences, I believe sensory data to be necessary for the human mind to form a concept of anything. Even

perceive the sensory perceptions generated by a dog as meaningless sense data, or at most as something of which they did have a concept form, such as "generic animal," and thus could not identify a dog in front of them as a dog. Those who have the concept form of dog in their minds but are unable to perceive anything through their senses, i.e., could not detect the matter of a dog, also could not mentally perceive a physically existing dog or, of course, anything else outside of themselves except, perhaps, through spiritual means.

b. Aristotle on Intent

It may be that Aristotle was so dedicated to implementing the intent of legislators that the best reading of his doctrine of equity indicates that it allows judges to implement the intent of the legislator at the expense of the written law—rather than that it allows judges to choose justice over the legislator's intent:

> . . . Aristotle maintains that judges may realize the actual intentions of the legislators rather than their intentions as literally expressed in the legislation. The role of equity in law, then, is to realize the intentions of the legislator not captured by the general principles expressed in the legislation. As we would say, equity directs attention to the spirit rather than to the letter of the law. Note that this does not mean that judges have the power to interpret statutes in the light of absolute justice. Aristotle's claim is only that judges may attempt to realize the intent of the legislator, given that that intent will not and cannot be captured in the form that legislation must take. This, then, is far from the view that equity is justice's rebellion against law.[156]

Aristotle says that "when the law states a general rule, and a case arises under this that is exceptional" and "where the legislator owing to the generality of his language has erred in not covering that case," a judge should give a "ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances."[157] Clearly, Aristotle recognizes the intent of the

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when we hear descriptions of things we never have experienced directly, we rely on the analogical use of our pre-existing sensory experiences to create new concepts.

156. Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 LEG. THEORY 33, 43 (2004). This interpretation of Aristotle is far from universal.

157. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 199 (J.A.K. Thomson trans., 1976).

legislator as paramount in finding law, and I believe that if a judge deviates from that intent in order to implement his own rule, he becomes a lawmaker himself using his own intent.

3. No Legal Consequences by Mere Saying-So

a. Missing Legal Matter

Legal authorities can label noncoercive requirements "legal" and assert that subjects violate the law when they do not comply with these requirements, which could be considered the legal matter necessary to make up a legal substance. They might claim that the penalties for noncompliance, such as the excommunication or shunning of offenders by their fellow subjects, can be legally required and legally specified even though they are not enforced coercively by the legal system, or they might claim that acts can be illegal even if there are no consequences of any kind specified for them or perhaps even resultant from them.

Instead, there is no legal matter here with which the legal form can unite in order to constitute a law any more than the form of dog can join with stone to constitute a dog—except in a metaphorical sense, of course, such as a sculpture of a dog as a work of art. The alternative conception of law treats positive law as if the form of it, by itself, can have inherent alchemical power to transform any matter, or at least any matter that could affect decision-making concerning action, into political positive law, as if declaring something "legal" or "illegal" matters in itself and has distinctive consequences relevant to subjects—or as if positive law had intrinsic and unavoidable moral force or were an exercise in pure theoretical reason such as much of philosophy.

Many positivists are formalists at times, treating a claim or appearance of something as proof of that something. Instead, political positive law must specify and make legally enforceable practical-reasoning-relevant consequences in the real physical world to distinguish itself from moral law, religious law, exhortation, rhetoric, and the like.[158]

158. As opposed to Kleinfeld, who rejects an essentialist definition of law. Kleinfeld, *supra* note 66, at 311 ("Enforcement as efficacy is constitutive of law's nature and properly asked of something that purports to be law. But it is not strictly necessary for legality.").

When a President thunders against the press, denouncing it for lies and distortions, he imposes no legal consequences upon it even if newspapers lose subscribers, television channels lose viewers, and reporters are shouted at on the street as a result of the President's criticism. If he succeeds in making a small change to defamation law, he has imposed legal consequences even if those consequences are minor compared to those generated by his criticism.

b. Regulative Force as Legal Matter

When political and legal authorities do not rely on the licensing of physical force, they rely on something other than political positive law—and indeed, they frequently do rely on exhortation, moral suasion, and other nonlegal methods of ordering society just as private property owners rely partially upon laws against trespass and theft in ordering their relationships with other private persons.

4. Coercion Simpliciter versus Coercive Intent

a. The Internal View and Perceived Intent as Effect

Hart turned attention to the internal point of view in legal theory and thus enhanced our understanding of law as a social institution by highlighting the importance of interior attitudes such as intent, which can be crucial in classifying the nature of social phenomena. Some subjects of clearly coercive laws are not coerced away from illegal acts or indeed into any behavioral or attitudinal changes, and some such as Holmes's bad man feel no obligation to obey the law. But it would make little sense to say that a law is not a law because it failed to coerce. Rather, the perceived causal intent behind the law, which is a form of human communication, is key.[159] Intent as an effect—that is, the

159. If I were to try to fit, as well as I might, my approach into the classifications used by Ronald Dworkin, I would say that I employ "creative scientific social practice interpretation" even though this would traduce his categories. DWORKIN, *supra* note 62, at 50–52. Dworkin writes:

> The form of interpretation we are studying—the interpretation of a social practice—is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation. I shall capitalize on that similarity between artistic interpretation and the interpretation of social practice; I shall call them both forms of "creative" interpretation to distinguish them from conversational

intent of the lawmaker as socially perceived by reasonable subjects and potentially affecting those subjects' decision-making processes—rather than actual effect on behavior must be used when classifying the speech acts of self-willed creatures addressed to other self-willed creatures, who do not react with the consistency of inanimate objects.[160]

The social or moral opprobrium attached to a legal violation need not correspond to the level of coercion attached to it. Some highly reprehensible acts are penalized mildly by the law and some, such as adultery, often are not penalized at all. A tax and a fine may have the same monetary value and otherwise have the same legally enforceable coercive effects,[161] but the labels applied to them may be intended to have differing nonlegal effects because of the moral beliefs of those upon whom they are imposed, or because of the differing social effects of paying taxes and paying fines, with the latter often thought to express a condemnatory note. These *nonlegal, in that they are not enforceable by the legal system,* effects are still real, and can cost those fined financial opportunities and other real-world advantages due to social opprobrium that those taxed would not suffer, but this is

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> and scientific interpretation . . . . It assigns meaning in the light of the motives and purposes and concerns it supposes the speaker to have, and it reports its conclusions as statements about his "intention" in saying what he did. May we say that all forms of interpretation aim at purposive explanation in that way, and that this aim distinguishes interpretation, as a type of explanation, from causal explanation more generally?

Id.

160. My approach has the advantage of allowing for mistakes of law, i.e., cases of the incorrect application of the lawmaker's intention. Such mistakes, even if consistent over time, are not applications of the law but violations of it if not tolerated by the legal system as a whole, although implicit toleration counts as toleration in my view. When judges collectively depart from a legislature's intent in supposedly interpreting the latter's laws and this new "interpretation" is the standard used by the legal system, they make new law rather than violate the law, but when an individual official or judge—or small group of them—applies his own contradictory interpretation of law that is subject to correction by higher legal authorities if brought to their official attention, he mistakes the law rather than creates it. My view is consistent with that of Kelsen depending upon the interpretation of the latter. *Cf.* KELSEN, *supra* note 76, at 26–27. According to Kelsen:

> What is dispositive for the concept of the unlawful act is not the legislator's motive, not the circumstances that a material fact is undesirable to the norm-issuing authority . . . . Rather, what is dispositive is simply and solely the position that the material fact in question has in the reconstructed legal norm, namely, its position as the condition for the specific response of the law, for the coercive act (the action that the state takes).

Id.

161. This is often not true because those who must pay fines often face other consequences such as exclusion from certain tangible legal benefits later on, or harsher punishments if charged with new offenses.

due to the *legally voluntary choices* of a society's members who could just as easily reward those fined if they chose.[162] This remains true if a judge chooses, at his sole discretion, to impose a harsher sentence on a defendant because that defendant had been fined in an unrelated case; it is the same as if the judge had discovered that the defendant had cheated on his wife, and thus imposed a harsher sentence, for in both cases the harsher sentence flows from the judge's legally voluntary attitudes and action.[163] Political and legal authorities use social and moral opprobrium as tools of their rule on a regular basis.

b. Ineffective Laws as Effects

The penalties specified by the lawmaker do not need to be effective in order to constitute a law. In any given society, some subjects may not be coerced away from murder by the law against it—perhaps none are and the few who wish to commit murder do so—and some or all businesses may view fines meant to coerce them away from polluting as just another business expense to pay regularly—or perhaps they evade detection and pay no fines at all. Even if the lawmaker clearly signals her lack of intent to coerce anyone away from the supposedly forbidden conduct, a law with a specified coercive consequence is still a law. A law fining large corporations $100 annually for polluting a certain river might not fairly be called a law forbidding the pollution even if the lawmaker characterizes it as such, but it is still a law coercively requiring the payment of $100.

A wealthy subject may not be at all coerced away from illegal parking by fines, yet the parking laws remain true law even though the lawmaker's intention may be to prevent illegal parking. Coercion can be found here, however, since the wealthy bad man is likely coerced to pay the fines for fear of impoundment of his vehicle and other inconveniences.[164]

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162. Perhaps the subject was fined for civil disobedience, and his fellow subjects thought this a badge of honor. Or, perhaps he was fined for fraudulent business practices but his fellows were impressed by his audacity.

163. This assumes that the judge allowed the knowledge of the fine or the adultery to influence his discretionary sentencing authority at his sole initiative. If the law mandated or specifically authorized him to consider the earlier fine in his sentencing decision, then the law used the fine coercively in this later case.

164. The idea of penalties as simply prices for offenses, carrying no opprobrium in the same way that efficient breaches of contract need not be viewed as in any way wrong, fits my theory perfectly well—but so does the idea that offenses and efficient breaches do carry opprobrium, but this opprobrium cannot be based on a legal violation unless the

A clearer sort of example favored by legal philosophers is that of residents in a remote desert area with a speed limit on a certain road. The residents know the police never patrol the road and, additionally, the flat barren terrain does not allow for speed traps. They speed without fear of penalty.[165] Though no one is actually coerced by it, the speed limit qualifies as a law because of the coercive intent behind it on the part of the lawmaker—intent reasonably knowable to subjects and thus affecting their minds. It is possible that without any further action on her part, police officers may enforce the speed limit in the future.[166] The law, ineffective in this locality in changing subjects' behavior, *does have an effect* upon their minds—informing them that the lawmaker wishes them not to speed.

Only if subjects reasonably perceive that coercive intent of the legal system as a whole is absent does the law cease to be a law. That said, it is perfectly reasonable for them to realize that the legal authorities generally have not abandoned their coercive intent but that only the local police have. Thus, ineffective laws that do not alter subjects' behavior or decisions about behavior are still laws if they have the effect of communicating socially recognizable coercive intent—"ineffective" refers only to their failure to affect subjects' behavior. Thus, inconsistent enforcement, including deliberately inconsistent enforcement,

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statement or enactment from the lawmaker had the existential conviction to employ coercion and thus to create a law. No less a natural lawyer than Blackstone viewed *mala prohibita* offenses as offering a legitimate choice between compliance and satisfying the penalty. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: BOOK 1. 57–58 (1765). Blackstone writes:

> But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se* but *mala prohibita* merely, annexing a penalty to noncompliance, here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws . . . . But in these cases the alternative is offered to every man; 'either abstain from this, or submit to such a penalty;' and his conscience will be clear, whichever side of the alternative he thinks proper to embrace.

Id.

165. Subjects might still have reasons to avoid speeding, such as to avoid the miniscule chance of a sanction (likely irrational under the conditions of the hypothetical), to avoid the increased risk of an accident or the harm from any possible accident, to avoid the increased risk of liability for a possible accident, to set a good example for others such as the young, to avoid possible social disapproval, to keep in good driving habits, and to keep in good law-abiding habits. They also might have an unreflective habit of not speeding that might change were they to ponder it.

166. If judges rule that the speed limit is no longer enforceable due to desuetude, they either make new law or enforce the overall lawmaking intent of the legislature, which may have enacted or tacitly accepted rules concerning desuetude.

does not vitiate a law. It continues to live in those instances when it is enforced by legal authorities with the legitimation of the law, even if an inconsistently enforced law is best thought of as one that grants discretionary authority to law enforcers regardless of whether it formally requires law enforcers to enforce it consistently.

If enforcement of a law is so universally rare or so impractical that violators face no realistic chance of having coercive consequences imposed upon them, but reasonable subjects still can perceive coercive intent on the part of the lawmaker behind that law, the law exists. If the status of the coercive intent is uncertain, then so is the law's existence in the same way that the existence of a mother's rule that her daughter must be home by 10 p.m. each night or wear an embarrassing outfit to school depends on whether the parent truly intends to enforce it—and the adolescent in question may not discover her parent's intention until there is a test case. Even the mother may not settle on her own intention unless and until a test case arises, just as the law is sometimes not settled until an appropriate test case makes its way through the courts.

B. A Definition of Law

1. What a Political Positive Law Is

The above, especially the inclusion of coercive force, assists in formulating a coherent and pragmatically useful definition of law. I focus on explaining the aspects of this definition that are directly relevant to coercive force's necessity:

A political positive law is a statement or enactment, from a socially recognized legal authority of a political state, that contains or supports a regulatory rule, i.e., one that is relevant to decision-making concerning action, that is reasonably recognizable as intended to create a self-regarding interest for a subject to obey it that is specified by the law and enforceable by the legal system—that is, the interest exists because an intrinsically nonnatural, nonsocial, nonpsychological, and nonmoral[167]

167. Using nonmoral in a broad sense, as rooted in psychological states separate from ones driven by morality. I recognize that the psychological or moral effect of the threatened physical penalty is often the decisive factor in a great many cases rather than the physical penalty itself, which often does not have to be used or even specifically threatened.

physically rooted consequence attaches to violating the rule. If no such interest is created, then no law is created.[168]

1. *Political law*: This definition fits any reasonable understanding of what constitutes a political authority.[169]

2. *Socially recognized legal authority*: This is in the realm of Hart's concept of the rule of recognition. A legal authority is one that *initially nonlegal* social acquiescence has granted such authority and legitimacy, however indirectly, although I leave aside the description of some necessary aspects of legal authority. By "acquiescence," I mean that the populace over which the legal authority claims to rule acts as the ruled, i.e., the claimed legal authority has the general effect of a legal authority upon the behavior of the ruled; whether the populace generally believes in the legal, social, or moral legitimacy of the authority is irrelevant.

3. *Contains or supports*: A law that contains no rules but, for example, defines terms used in other laws that contain rules is law or, more precisely, is part of a law. Anything that has no direct or indirect relationship to the coercive regulation of subjects cannot be part of law. For how this differs from Kelsen's conception of law criticized by Hart, see my discussion of administrative laws below.[170]

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168. Although I talk only of necessary or essential qualities here, I reject the notion that only necessary truths about law reveal law's nature any more than necessary truths about birds—which do not include the ability to fly—reveal birds' nature. *Contra* RAZ, *supra* note 70, at 24 (2009) ("A theory consists of necessary truths, for only necessary truths about the law reveal the nature of the law.").

169. *See* Wolff, *supra* note 130, at 20, 20–21. Wolff provides a partial formulation: "Authority is the right to command, and correlatively, the right to be obeyed. It must be distinguished from power, which is the ability to compel compliance, either through the use or the threat of force." *Id.* Yet I believe that a plausible claim to power either in the present or in the foreseeable future is a necessary component of a plausible claim to legal authority. "To *claim* authority is to claim the right to be obeyed. Wolff writes:

> To *have* authority is then—what? It may mean to have that right, or it may mean to have one's claim acknowledged and accepted by those at whom it is directed. The term 'authority' is ambiguous, having both a descriptive and a normative sense."

Id.

170. Put broadly, as Shapiro does Kelsen's view, I see power-conferring rules as parts of networks of rules whose causal action rests on coercion. For example, the *legal powers* of a will, as opposed to any purely indicative powers such as informing one's relatives of the desired disposition of one's property after death, are the powers to coerce others. I do not believe that the rules in question are directed only at officials, but at ordinary subjects as well. *Cf.* SHAPIRO, *supra* note 124, at 66 ("On Kelsen's view, power-conferring rules are mere fragments of complete legal norms. What appears to be a whole rule conferring a power is really only part of a much larger rule that ultimately directs a legal official to impose a sanction.").

4. *Self-regarding*: A subject must have an interest created or, rather, the legal authority must be *reasonably recognizable as having intended* to create such an interest. That interest may be the welfare of others, such as his children, but it cannot be meant to be purely abstract to the subject. Strictly speaking, a lawmaker need not have the subjective intention of coercion when creating the self-regarding interest, but that interest must be reasonably viewable as coercive although the typical subject may not experience it as coercive, such as with laws against murder. A lawmaker cannot impose a legal duty upon herself unless other legal authorities can coercively enforce that duty.[171]

5. *Nonnatural, nonsocial, nonpsychological, and nonmoral*: Many violations of the law carry their own consequences with them separate from the law. Use of some illegal drugs can lead to ill health, social ostracism, and feelings of shame, none of which have any necessary connection to the law and all of which easily might remain were those drugs legalized because they are either a natural, intrinsic consequence of drug abuse—in the case of ill health—or a social or psychological consequence. Here, the consequence attached must be (1) enforceable by the legal system, and thus extrinsic to nonlegally enforceable natural, social, psychological, and moral consequences, and (2) have some connection to a physically enforceable interest of the subject. This is where the coercive intent of the lawmaker must lie, at least partially, in generating consequences for compliance or noncompliance with law independent from any consequences that may or may not result from nonlegal phenomena.

2. A Possible Use by a Real Court

Courts and others have used standards along the lines of the above in order to distinguish law from other phenomena. For example, in charting the vast realm of administrative law and regulation, the U.S. Supreme Court has not accepted government agencies' classification of their own regulations at face value and instead has used the criterion of "affecting

171. Thus, I do not see a law's ability to impose duties on its own lawmakers as an objection to the coercive command theory of law, as Hart does. In my view, that imposition of duties must involve a *command to others* from the lawmaker that imposes coercive duties on the lawmaker. *Contra* HART, *supra* note 5, at 48 (listing such laws among the types of laws that do not fit "[t]he theory of law as coercive orders . . . for such a law may impose duties on those who make it as well as on others").

individual rights and obligations" to assist in distinguishing "legislative-type rule[s]" that have the "force of law" from nonlegislative-type rules that do not.[172] And by the "force of law," the court appeared to mean "binding":

> [I]n *Morton v. Ruiz*, [415 U.S. 199 (1974)], we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule—or a "legislative-type rule"—as one "affecting individual rights and obligations." This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law."[173]

3. Sample Application of the Definition: Toleration of Formally Illegal Acts

a. Coercion Against the Disfavored

In certain times and places, subjects employ coercive force against disfavored groups with the tacit approval of the authorities even if such violence is formally labeled illegal. The use of coercive intent resolves the question of whether such force is truly illegal. It is not, for the coercive intent of the legal authorities is more useful in finding law than procedural or appellative niceties. If legal authorities from top to bottom generally have no socially recognizable intent to coercively deter or redress such force and act accordingly by, for example, never prosecuting offenders, they have made such private force legal and no longer a violation of law just as force in self-defense is often legal. If legal authorities are substantially split or their intent uncertain, then the legality of such private force is uncertain.

Therefore, in my view, legal authorities who tolerate such violence should face the moral and social sanctions, if any, of having legalized and officially permitted it, rather than be able to hide behind unused words written in statutes and face the potentially lesser moral and social sanctions accompanying nonenforcement of the law.

b. The Existence of International Law

In the same vein, anything labeled international law that has no perceivable intended coercive force behind it is not law, and

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172. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).
173. *Id.* (internal citations omitted).

when authorities routinely issue denunciations of "violations of international law" but do nothing else, they lecture rather than law-enforce.[174] Of course, it would take a great deal of space to elaborate this argument and deal with objections, which I hope to do in the future.

4. Possible Exclusions of Core Instances of Law

A critic might reply that whatever value my approach and my definition have, they exclude some core instances of law. Instead of clarifying the concept of law into something optimally useful, the critic might say, I have muddled matters by leaving outside of the legal sphere some common and intuitively understood examples of the existence of noncoercive law and legal obligation. I turn to addressing some of those examples.

III. OBJECTIONS AND REPLIES

A. Rewards-Only Argument

1. Coercion in Obtaining a Reward

What of laws that prescribe no punishments but only offer simple, straightforward rewards, such as a law that offers $500 to every subject who submits a design for a new flag? Can this law be characterized as depending upon coercive force in anything other than a trivial way?

The law has its causal operation where the lawmaker's desire clashes with that of a subject: If a subject wants the reward, he must comply with the lawmaker's will. If he attempts to obtain the reward without complying with the lawmaker's will, he will be prevented or punished. His will is subject to forcible conformity to her will. The *operation of the positive law as law* is to attempt to coerce those who desire the reward to do certain things, such as either to enter the contest according to its rules or to not act on their desire for the reward. Even if the reward is merely a declaration that a certain contestant is the winner, with no financial gain, contestants must jump through the hoops of the contest rules in order to obtain the declaration.

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174. This is certainly far from a rare view. Jeremy Waldron, *International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?*, *in* READING HLA HART, *supra* note 47, at 209, 211–12 ("The argument is often heard—both today and in Hart's time—that the norms embodied in the international order cannot really be described as law because they are not backed up with organized sanctions, regularly enforced and imposed.").

2. Both Rewards-Only Laws and Laws Against Murder as Coercive

It is true that those who do not desire the reward are not coerced, and since no one has a right to the reward without performing certain actions, forcing subjects to do something in order to receive it cannot be viewed as unjust coercion.[175] Subjects can go about their business unconcerned about the reward and the law granting it. Yet the same is true of the coercion accompanying the law against murder. The vast majority of subjects in a typical society are not coerced by the law against murder since they do not wish to commit murder in any case, nor do they have a right in any sense to commit murder or to avoid the consequences that accompany a conviction for murder, assuming that the definition of murder and the consequences for the crime are just. Generally, only those who wish to commit murder must contemplate the coercive fear of punishment, just as only those who wish to obtain the reward must contemplate both the coercive fear of punishment from attempting to obtain it contrary to law and the fear of failure to gain the reward after competing.[176] Those who argue that supposed rewards-only laws are not coercive must say the same of laws against murder.

When private organizations offer rewards, they also rely upon the force of the state. If a civic group held the same design competition, it would likely rely on state law enforcement lurking in the background to prevent those who wished to receive the reward from doing so without meeting the group's requirements. If it did not so rely, then political positive law is not involved.

3. Unconditional Rewards, Administrative Laws, and Laws Against Murder

Yet it is possible to imagine a government offering a reward unconditionally. Congress could pass a law that required the

175. I set aside unusual moral systems that might make such claims as a right to the reward or even a legal right to the reward without having to meet the contest requirements.

176. Strictly speaking, those who do not wish to commit murder but fear that some action may create the false impression that they have committed murder also may concern themselves with the punishment for murder, but this does not affect my argument.

granting of $500 to every subject of the United States. Subjects would not have to do anything at all, but rather would be found by government officials and given their rewards.

This $500 law is an *administrative law* whose force is directed exclusively at officials, who must face consequences for failing to carry it out if this is a law at all. Because *only officials must act and law is an exercise in practical reason*, the law is a law binding upon them only and is *not a law binding upon the mass of subjects who need perform no action.* It is the officials who are the subjects of the law, not the ordinary people. To a critic who says that it is disingenuous to characterize a law whose overwhelming aim and effect is a gratuitous benefit to subjects as being based necessarily on force applied to a small number of officials, I reply that just as with the law against murder, its primary goal and its primary effect are the benefit of many at the expense of applying force to a few—and that force is essential to the process as a distinctly legal process.

Note that this understanding differs from Kelsen's conception of law as criticized by Hart.[177] I view laws that threaten consequences to subjects as laws upon those subjects, not laws purely upon the officials meant to mete out the consequences. It is the coercive intent of the lawmaker, directed toward those whose decision-making processes she wishes to affect, that determines who the subjects of the law are. She may wish to coerce officials into deterring and punishing murderers, but she also wishes to deter and punish ordinary citizens who may commit or do commit murder.[178]

B. Officials as the Subjects of Administrative Laws

Further, many administrative laws directed purely at officials, and which coerce only officials, have as their aim and effect benefitting the public. Many laws direct officials to serve subjects

177. Kelsen sees legal obligations as applying only to officials, who have duties to coercively regulate subjects' behavior, and not to subjects. KELSEN, *supra* note 76, at 102 ("[D]irect state administration is brought about in the same way, legally speaking, as the socially desired behavior of citizens: namely, as a legal obligation of state officials.").

178. Thus, I reject the understanding of law that Hart ascribes to Kelsen. Of course, if the socially perceivable coercive intent of the lawmaker could most reasonably be interpreted as not wishing to deter citizens from or punish them for murder, but only to spur officials into deterring or punishing murder, then Kelsen's would be the correct view of the law. *See* HART, *supra* note 5, at 35–36 ("There is no law prohibiting murder: there is only a law directing officials to apply certain sanctions in certain circumstances to those who do murder.").

in some way, including by granting them unearned benefits. Even laws that require fire departments to put out fires in private residences at no charge to the homeowners fall into this category, as does the hypothetical $500 law. Though such $500 windfalls may be rare, supposed rewards-only laws are not rare but common. They do not coerce the beneficiaries but coerce only the administrators, or providers of the benefits, and thus are law upon the latter category only.[179] They simply do not apply to most subjects any more than the laws regulating the practices of medicine and law do. Everyday examples include laws providing for fire protection, police protection, some residential building inspections, distribution of some government benefits such as disability, national defense and national security generally, and street cleaning and repair.[180]

At the same time, the laws exclusively binding officials, doctors, and lawyers can have an indirect coercive effect on subjects in general by preventing them from receiving the governmental, medical, or legal assistance they desire—and perhaps should receive for objective law-independent reasons. Certainly, laws often render these services more expensive, coercing the less affluent away from them. These indirect coercive effects may support my argument that coercion is an essential element of law but are not necessary to the argument, for they are not necessarily present in the case of the $500 windfall.

Administrative and analogous laws also direct the behavior of those whose behavior cannot be directed directly, such as that of the insane, very young children, and animals. Officials, caretakers, and others are the true subjects of laws seemingly directed at those who cannot understand them, as in a tort law that holds some of the insane liable for their torts but that truly

179. It could be argued that even such a law as this is coercive upon the general population because anyone who wishes to become a bureaucrat in the department responsible for administering the $500 windfall must then assist in distributing that windfall. Anyone who wishes to join the fire department might find some of the laws regulating their decision to join coercive. This is a widespread phenomenon. Those who wish to operate a business must conform to certain laws not applicable to the general population, those who wish to operate a dairy farm have certain additional legal duties, and so on. These laws are coercive upon the general population although relatively few may feel the coercion of any one set of these laws. It is felt once a subject wishes to engage in a certain activity.

180. This is all the more true when the beneficiaries do not pay for the benefits through taxation, but I do not use the coercive power of general taxation to justify my theory despite taxation's thorny implications.

affects the behavior of insane persons' guardians, who act to keep their unfortunate relatives—and those relatives' inheritable wealth—out of legal trouble. Of course, many laws are directed at both those whose harmful behavior is in question as well as those in charge of them, since the insane, children, and the like often have at least some understanding and agency. A law, "dogs may not enter the park," or, "bicycles may not enter the park," is, of course, not directed at dogs or bicycles but at dog- or bicycle-owners and possessors, whereas "children may not enter the park" is likely directed at both children and parents.

Those who deny that the law directing officials to distribute the $500 windfall should be thought of as a law upon the officials only, and not upon the subjects receiving the windfall as well, must explain why the law banning dogs from the park is binding upon dogs and not just dog owners—surely even adding the possibility that dogs found in the park may be euthanized does not justify saying that the law, as a rational communication, is binding upon dogs as well as upon the euthanizers? If it is, is the law binding upon bicycles that are destroyed when found in the park? Even if this is so, it can be only because the law has a coercive effect upon the dogs and the bicycles.[181]

C. Coercion, Not Incentive

By now, it should be clear that law necessarily involves coercion, not incentive more broadly speaking,[182] although certainly the incentive structure created by the law is a matter important not only for pragmatic reasons but also for justice.[183]

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181. A dog, at least, can be trained to follow a rule—do not enter the park—even without understanding the concept of a rule. I do not think the dog can be said to be obeying the law any more than a Japanese bonsai tree, constrained by wires, can be said to be obeying a law that decrees a maximum height for it.

182. A certain kind of coercion can accompany incentives that seem purely positive, but I do not use this form of coercion to support my argument. *See* Virginia Held, *Coercion and Coercive Offers*, *in* COERCION 49, 59 (J. Roland Pennock & John W. Chapman eds., 1972) (explaining that "a higher degree of coercion through inducement may be worse than a lower degree of coercion though constraint," showing that "sometimes a social arrangement that smothers the citizen with irresistible offers with regard to a wide range of actions is worse than a law that enforces his submission with regard to a limited and particular kind of action," and likening this situation to one created by "a parent whose offers repeatedly put a child into emotional debt" and who then "may be more reproachably coercive than one who sometimes threatens physical restraint").

183. *See, e.g.*, Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 AM. J. JURIS. 105, 118 (1999). Bradley says:

> The central point of sentencing criminals is to restore the order of justice disturbed to the extent of the criminal's unfair appropriation of liberty. The

The government officials who fail to distribute $500 to each subject at the direction of the lawmaker must be understood to have done something wrong and thus be subject to a penalty. The use of a positive incentive, by itself, to induce the officials to conform—something extra and beyond what they deserve for performing their duties—would not be part of inducing them to perform their duties. Only denying them something they would earn or preserve by performing their duties, such as their full salaries or even their employment itself, suffices. A law offering them an entirely undeserved benefit would be a law, not upon them, but upon those required to distribute the benefit. It would not be a violation of law for the officials to decline the extra effort and its accompanying benefit—and thus at least some subjects might not receive the $500—whereas it would be a violation of law for them to refuse to perform their duties.

At times, coercion may not work as lawmakers intend because something that lawmakers intend to be a penalty might be perceived as a reward by some. The homeless may perceive incarceration as a reward or benefit. A government official fired for not discharging his legal duties might be pleased to have a reason to enter into early retirement and may even have deliberately provoked his own dismissal, perhaps with the connivance of the supervisor who initiated the dismissal. Thus again, law as a communication relies on the basis of *what the reasonable subject perceives as the intent* of the lawmaker, and even if the fired official is pleased at his firing, he knows—if he is reasonable—that the firing was intended to be a penalty by the lawmaker who made the rules.

D. Decision Rules versus Conduct Rules

Both what have been called decision rules,[184] addressed to officials and commanding them to treat subjects in certain ways such as "incarcerate those convicted of tax evasion," and conduct

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point of the restoration is to ensure that over a period of time, a fair pattern of restraint and liberty is maintained across society, so that being law-abiding does not work to one's disadvantage.

Id.

184. Coercive decision rules may be the same as what I call administrative laws or may be a subset of the latter, but my argument is identical either way. I will treat them as a subset that concerns only how officials are to treat ordinary subjects. Thus, a command to officials, "do not take government-purchased paper clips home or your employment will be terminated," is an administrative law but not a decision rule.

rules, addressed to subjects and including commands such as "pay all applicable taxes in full," must be coercive in order to be *legal rules* rather than social norms, legal practice norms—i.e., nonphysically coercive social norms within a legal system setting such as a courtroom—or something else.[185] An official must potentially face legally enforceable consequences for disobedience to a decision rule for that rule to be law.[186]

The coercion element does not answer the question of whether conduct rules are merely deductions from decision rules or deductions from decision rules and legal practice norms taken together. I believe they are not such deductions, for the two types of rules are addressed to different groups for different reasons, require different types of behavior,[187] and imply different types of norms—coercion or the lack thereof is not the only distinction among norms.[188]

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185. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984) (popularizing this terminology in the 1980s).

186. Bentham, sometimes a proponent of the command theory of law, understood the decision rule-conduct rule distinction, though he was probably not the first to do so. *See* BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 331 (Dover 2012) ("A law confining itself to the creation of an offence, and a law commanding a punishment to be administered in case of the commission of such an offence, are two distinct laws; not parts (as they seem to have been generally accounted hitherto) of one and the same law.").

187. *See id.* ("The acts they command are altogether different; the persons they are addressed to are altogether different. Instance, *Let no man steal*; and, *Let the judge cause whoever is convicted of stealing to be hanged.*").

188. Dan-Cohen, *supra* note 185, at 628. Dan-Cohen writes:

> [W]hen . . . the judge, in imposing punishment on the thief, "applies" the rule forbidding stealing . . . the judge is not guided or bound by that rule: he is not, in his capacity as judge, one of the rule's norm-subjects, nor does his act (that of imposing punishment) correspond to the norm-act (that is, not stealing) specified by the rule.

Id. Not only does the law impose a coercive norm upon subjects who might steal, it imposes a different norm upon judges. *Cf. id.* ("We can successfully account for the normative constraints that the law imposes on judicial decision-making only if we impute to the legal system an additional relevant norm whose norm-subject is the judge and whose norm-act is the act of judging or imposing punishment."). Examined from the other direction, from decision rules to conduct rules, the same decision rule for violations of different conduct rules—let us say "incarcerate for three years"—does not allow us to fully understand the normative and social differences between the conduct rules "pay applicable taxes in full" and "do not rob people on the street," whether in the minds of lawmakers or of subjects. For that matter, neither does the wording of statutes necessarily do so. Insofar as legal authority and its effects go beyond coercion and beyond law—recall that coercion applied through a law-like process such as a "legal system" set up by the Mafia is not enough to constitute true law—the bare tracing of coercion applied through decision rules is not enough to tell us everything significant about the conduct rules that such tracing can reveal.

Further, decision rules that grant purely discretionary authority, assuming such rules are properly classified as decision rules, cannot allow for deduction of conduct rules. For example, a law that grants purely discretionary authority to police officers to punish jaywalkers will not tell us if there is a conduct rule against jaywalking—perhaps the police never ticket jaywalkers and legal authorities as a whole acquiesce in this. Decision rules that grant partial discretion to officials also may not reveal to us the real conduct rules; a law may allow officers to ticket those who "drive while distracted," thus leaving officers to decide what counts as "distracted." They may decide that eating while driving is always distracted driving, never distracted driving in itself, or sometimes distracted driving.[189] Further, decision rules may be and often are ignored. The law may require officers to ticket all jaywalkers that they see, but if the police have ignored that law for 30 years and subjects in that jurisdiction jaywalk freely, it cannot truly be said that there is a conduct rule against jaywalking.

At times, decision rules must be deduced from conduct rules. A decision rule that directs courts to impose incarceration for "all crimes that involve violence" may rely unavoidably upon the substance of criminal law conduct rules to classify crimes as violent and perhaps upon interpretations of them—is purse-snatching that involves no bodily contact or harm a crime involving violence? The classifications and interpretations matter only when coercive legal consequences flow from them.

E. "Law-Constituted" Forms as Causally Preexisting Their Law Constitution

1. Wills and Contracts

Wills are often cited as an example of noncoercive law. Yet, descent of property from deceased to beneficiary preexists law

189. When decision rules constrain officials' behavior, it can be because other officials enforce those rules rather than because the public demands it or even knows what the rules are. This may depend upon precisely written rules. Dan-Cohen, *supra* note 185, at 668 ("The ability of decision rules to guide decisions effectively and thus to limit official discretion and arbitrariness does not depend on broad dissemination or easy accessibility of those rules to the general public."). In fact, opacity to the public may be a byproduct of the most effectively constraining decision rules. *Id.* ("[T]he clarity and specificity of decision rules, and hence their effectiveness as guidelines, may be enhanced by the use of a technical, esoteric terminology that is incomprehensible to the public at large.").

conceptually and likely preexisted law, or at least legal regulation of descent at death, historically,[190] nor is there any reason to think that practical ownership of land and chattels would not pass from one generation to the next according to the wishes of the elder, at least at times, if the legal system were to disappear. The law of wills formalizes the procedure legally.[191] A legally informal document easily could instruct others as to whom the testator wished to receive his property, and his relatives or other private actors could enforce his wishes; all that a will adds as a *legal device* is the use of state coercion or at least legal authorization for someone, such as a relative, to enforce those wishes by using physical coercion if necessary. Any nonlegal social or moral gravitas granted to the will by legal recognition is entirely dependent on legally voluntary and changeable social attitudes toward such legal recognition and, in addition, could easily be supplied by nonlegal means, such as endorsement by a religious authority, endorsement by respected members of the community, or the signatures of the testator's relations—or even the legally irrelevant personal endorsement of legal authorities. A legally recognized will's only unique real-world aspect is its enlistment of legally approved coercion against those who might or do take the late testator's property in violation of his perceived desires.

The same is true of contracts generally. Subjects form contracts precisely to have legal coercion available to them, if necessary, to enforce the contract or to redress breaches of the contract—or at least to intimidate the other party with the threat of the possibility of such coercion.[192] Otherwise, nonlegally binding documents would suffice in the place of contracts, for they can serve all of the other purposes of legal contracts.[193]

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190. *See* HENRY SUMNER MAINE, ANCIENT LAW 167 (1906) ("The barbarians were confessedly strangers to any such conception as that of a will. The best authorities agree that there is no trace of it in those parts of their written codes which comprise the customs practiced by them . . . .").

191. *See* SCHAUER, *supra* note 10, at 29 ("A will is a creature of law, but leaving one's property upon death to designated individuals is not.").

192. *See* KELSEN, *supra* note 76, at 94 ("[B]oth the private law transaction and the authoritative directive are perceived as acts of the state, that is, as material facts of law creation that are imputable to the unity of the legal system.").

193. Contracts and their breaches can have consequences beyond those of legally informal documents, radiating through the law, which can make them even more coercive than my claims so far. For example, a subject found responsible for breaches of contracts could be barred from certain licensed professions. *See* FINNIS, *supra* note 33, at 283 (critiquing Hooker and rejecting the idea "that what the positive law on murder adds

Hart believes that laws allowing for contracts, wills, and marriages "provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create . . . structures of rights and duties within the coercive framework of the law."[194] Thus, the "analogy with orders backed by threats altogether fails,"[195] and "[r]ules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them" and "appear then as an additional element introduced by the law into social life over and above that of coercive control."[196]

This seems to me clearly misleading; rather, the private exerciser of those facilities *receives some power to direct the coercive control of the state* if he chooses. The director of the coercive control and those on the receiving end of it may change, but the fact of it does not. If Hart means that the receivers of these powers do not typically experience them as coercive but as empowering, that may be true, but they are empowering precisely and only because they can be used to coerce others. Thinking of them as noncoercive does not make any more sense than thinking of laws that grant discretionary authority to police officers to fine or arrest those who jaywalk as noncoercive—although it is not coercive upon the officers, its legal force comes from its coerciveness upon jaywalkers and potential jaywalkers. This is not changed if neither the will-maker nor the officer is required to exercise the power the law offers, because the coercion of the law was not directed at them in the first place.

The same is true of laws against murder. Surely, even if public officials face no legal coercion for failing to enforce the laws against murder but do so out of moral duty or social pressure, these laws are coercive even though no one has a right to commit murder. No one experiences these laws as coercive except for the small proportion of people who might murder—people who have no right to engage in that act—and almost

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to the permanent rule of reason [derived from natural law] is merely the punitive sanction"). Two more additions result: " . . . (i) a precise elaboration of many other legal (and therefore social) consequences of the act and (ii) a distinct new motive for the law-abiding citizen, who acts on the principle of avoiding legal offences as such, to abstain from the stipulated class of action." *Id.* I believe that the second addition depends upon the moral beliefs of citizens.

194. HART, *supra* note 5, at 27.

195. *Id.*

196. *Id.* at 40.

everyone experiences them as empowering, from ordinary subjects who feel safer in public to the officials who can prosecute murderers if they wish.[197]

Strictly speaking, Hart and I may not disagree that coercion must be involved at some point, but his choice of emphasis seems to obscure the operation and primary effect of law in some cases. Even the direct effect of legal marriage rights is coercive—they require government officials, private business owners, and others to treat in certain ways subjects that they otherwise might treat differently such as by withholding benefits.

2. Purely Rule-Constituted Phenomena, Chess, and Corporations

a. Chess as Purely Rule-Constituted

Some argue that law sometimes creates rule systems that create concepts and benefits that would not exist without the law, just as the rules of chess create chess.[198] Unlike descent from deceased to beneficiary, which empirically existed without legal rules and could continue to exist if legal rules disappeared, chess did not exist until its rules created it and would cease to exist if its rules disappeared. If one cheats at chess by breaking the rules, it makes no strict sense to say, "I won the chess game," because what was done was not chess by definition. This is different from the obtaining of property by illegal means; chess cannot be played or won by breaking the rules because chess has no objective existence separate from the rules, but property and its factual possession do have existence separate from legal rules.

b. Playing Law as Not Optional

Part of the difference with law is that playing is not optional.[199] If obeying the political positive law as a whole were optional, as

197. I leave aside those with moral systems that demand a right to murder.

198. SCHAUER, *supra* note 10, at 27 ("But now consider those rules or rule systems that *create* possibilities that would otherwise not exist. To recall an earlier example, it is simply not possible to engage in castling without the rules that constitute the game of chess.").

199. There is no staying outside this game. *Id.* at 30. Schauer again:

> And so nullity may be best understood as part of a constitutive rule rather than a conceptually distinct enforcement of an independent requirement. But once one is inside the game, whether that game be judging or contracts or football, the rules lose some of their constitutive power and appear regulative and coercive. The coercive aspect of constitutive rules thus becomes a

playing chess is optional, it would not be political positive law. A subject may sit at a chess board and move a bishop directly forward along a file. Though, by definition, he does not play chess if he does so, he typically does not have to play chess if he does not wish, and no agent of the state will punish him for moving the bishop in this way.

c. Coercive Formation Rules

Although a legally recognized corporation could not exist without law, a subject must form a legal corporation according to the way, or range of ways, that the law allows in order to receive the benefits of forming a corporation even if he thinks there should be a different way.[200] The same is true of will-formation. In contrast, a subject could change the rules of chess and play without punishment if he liked and could obtain the benefits intrinsic to playing such a game. Then, if he persuaded enough people to join him voluntarily, the game called "chess" would be redefined in popular understanding to include his rule changes. Even obtaining the consent of the World Chess Federation[201] would not be necessary. In fact, the rules of chess have changed over historical time.[202] The subject may play what he calls "chess" whether the federation likes it or not—unless the law forbids him, as it does makers of whiskey from calling their products "Scotch" unless produced in Scotland, and in such case, it is the political law that ultimately matters, not anything regarding the federation in itself.

Further, if enough people followed this subject's redefined chess, the federation would shrink to near-irrelevance, causing it to bear a similar relationship to chess as flat-Earthers currently do to geography. The term "chess" would come to mean his game even if the concept were to become completely different—minor changes to chess's rules might leave the concept

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phenomenological matter . . . .

Id.

200. *Id.* at 28 ("Sometimes . . . coercion exists when it tells people that what they want to do must be done in one way and not another. When law creates the very possibility of engaging in an activity, it often supplants a similar and law-independent one.").

201. *See generally* FIDE - WORLD CHESS FEDERATION, https://www.fide.com/ [https://perma.cc/RA66-ZE34] (last visited Oct. 21, 2017).

202. Andrew E. Soltis, *Chess*, ENCYCLOPÆDIA BRITANNICA (Feb. 15, 2007), https://www.britannica.com/topic/chess [https://perma.cc/GZL6-J68E] ("Rules and set design slowly evolved until both reached today's standard in the early 19th century.").

fundamentally unaltered, but if "chess" came to mean rugby, the word would no longer refer to today's concept of chess. There is an important distinction—chess is defined socially whereas geography rests on objective and discoverable natural facts independent of possibly erroneous beliefs about it—but the social phenomenon of relevance is similar. The argument is stronger for chess because as an abstract human construct, it is difficult or impossible to prove that the rules of chess must be a certain way whereas if flat-Earth theories were to become dominant, they could be proved wrong through objective evidence.

The prospective incorporator cannot follow the same path to change the rules of corporation formation, i.e., he is coerced away from it. He cannot form a legal corporation his way, obtain the benefits intrinsic to it, and show other people that his way is best, facing only possible social, psychological, and moral coercion from those fellow subjects who dislike his project. Instead, to change the rules of legal corporation formation, he must persuade the makers of the law to change the rules or else he will face legally enforceable coercive threats. If he created a business organization and attempted to operate it as a corporation without following the legal rules of corporate creation and operation, he would not obtain the legally enforceable benefits he sought, and also might face fines and possibly incarceration.

d. Corporation-Formation Laws and Laws Against Murder as Both Coercive

Of course, no subject who does not wish to form a corporation faces the coercive rules governing corporation formation.[203] True enough, but as soon as a subject wishes to form one, he faces coercion just as readily as when he wishes to engage in murder or embezzlement, yet no one claims that laws against murder and embezzlement are not coercive. That murder and embezzlement may be immoral, whereas corporation formation may not be, does not alter the existence of coercion in all three cases, and in fact would render coercion more onerous in the

203. SCHAUER, *supra* note 10, at 28 ("The law is hardly coercing anything or anyone, at least in the sense of requiring people to engage or not to engage in any of these law-constituted activities.").

case of the incorporator.

3. "Law-Constituted" Forms as Preexisting Their Law Constitution

a. Corporate Form as Preexisting Its Legal Form

My critic will object that unlike murder—which had and has a social and moral concept separate from its legal one—the corporate form *per se* would not exist at all without law, which I deny.[204] Family members and business partners acted corporately and were treated as corporate entities socially by others who had dealings with them before the law gave such forms attention,[205] and there is nothing conceptually or empirically impossible about corporate forms continuing to have distinctive social effects if legal recognition of them vanished.[206] In the Middle

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204. *Cf. id.* at 27–28. Schauer writes:

> A group of people can run a business together without the law, but they can only create a corporation by virtue of legal rules that establish the very idea of a corporation. And the same is true of trusts, wills, pleadings, and countless other law-constituted and thus law-dependent institutions and practices.

Id.

205. In fact, socially speaking, families may have been natural persons before individuals were:

> The archaic Indo-European family was, Maine tells us, a corporation, of which the patriarch for the time being was the representative or public officer—or at most, we may add, managing director. Evidently we are not meant to take this statement as if a definite legal doctrine of persons, much less artificial persons, was to be ascribed to the patriarchal stage of society. For in that stage, as Maine also says, a man was not yet regarded as an individual, but only as a member of his family and class; and this is still true to a great extent in Hindu law. Now the modern doctrine of corporations assumes that the "natural person" or individual, considered as a subject of rights and duties, or "lawful man," as our English books say, is the normal unit of legal institutions, and that the collective personality of a group of men acting in a common interest or duty and behaving like an individual is something which needs to be explained. But, for archaic society, the collective body and not the individual is the natural person. We find the same conditions existing in full force among the German tribes in a much later period of time than that which Maine is directly considering in this chapter.

SIR FREDERICK POLLOCK, *Note* to MAINE, *supra* note 190, at 425–26.

206. *See* James A. Burkhardt, *The History of the Development of the Law of Corporations*, 4 NOTRE DAME L. REV. 221, 221 (1929) ("In the beginning it must be pointed out that corporation law came after the formation of corporations, for until they were in existence there was no need for their regulation."); Andreas M. Fleckner, *Roman Business Associations*, WORK. PAP. MAX PLANCK INST. TAX LAW PUBLIC FINANCE NO. 2015–10, 10 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472598 [https://perma.cc/Q5VZ-86BJ] (examining the corporate form in Roman law and the importance of social attitudes over legal ones ("But why, then, the modern observer wonders, did Roman businessmen refrain from establishing shareholder companies or other large capital associations? An interdisciplinary analysis of Roman society suggests that the main obstacles are to be found in the social and political rather than in the

Ages, a creditor could and did understand that a monastery, rather than any particular monk, to which he delivered goods or services owed him payment.[207] The law recognized and began regulating these preexistent corporate forms, and though that regulation may now shape those forms somewhat away from what they would otherwise be, the same could be said of the automobile, which is surely not a law-constituted form despite safety and other laws dictating some aspects of its design and manufacture by various entities.[208] If a corporation has members who behave like members and who are treated by others as members—if the association has the effect in the real world of a corporation—then, as a matter of common sense, it is a corporation regardless of whether the law recognizes it and regardless of whether a different meaning of the same word, "corporation" as a legal term of art, is applied to it.

If my critic defines, as necessary to the concept of a corporation in any sense, law-specific effects such as recognition by legal authorities or certain legal liability arrangements, I reply that this understanding is inferior to one based on definitions of natural kinds: Its effects in the world are more fundamental than legal qualifications. It could be that the law declares a car not an "automobile" or a "car" if it does not sport the safety devices required to certify it as legal to drive on public roads, yet in common parlance and in sensible philosophical discourse, a car with its airbags removed does not cease to be an automobile or a car. Elevating a legal term of art, such as "automobile" within legal texts, out of its narrow realm so as to declare that automobiles without airbags do not exist would be foolish conceptual sleight of hand, and the same is true of the corporate form which, although not a physical artifact like an automobile,

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economic or legal setting.")).

207. *See* Jocelin de Brakelond, CHRONICLE OF THE ABBEY OF ST. EDMUND'S (1173–1202), http://sourcebooks.fordham.edu/basis/jocelin.asp#table [https://perma.cc/P649-HX9W] (showing the distinction between the abbey owing and the abbot owing even though the abbot had control of the abbey's resources in the section labeled "How the creditors of the abbey demanded payment, and how the abbot took his manors into his own hand").

208. The functions of both laws and cars are essential to their definitions. LEITER, *supra* note 51, at 268 ("Perhaps for non-moral terms in law, their essential characteristics are *functional* ones, rather than *constitutional*: e.g., since cars can be made out of all kinds of materials, what is essential to 'carhood' is not its molecular constitution but its distinctive *functions*." (responding to Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 188, 207–08 (Robert P. George ed., 1994))).

centuries ago did and today still could have social existence with distinguishing effects, separate from any legal recognition.

After all, law matters only insofar as it affects the real world. A legal benefit, right, or remedy that did not affect the real-world distribution of resources, or freedom to speak or act, or ability to direct others' behavior, and so on would be irrelevant to any real person except as a game. The law cannot constitute real benefits or penalties, but only channel independently existing ones, including by channeling them with the intellectual means of the corporate form.

This differs in no relevant way from family. If legal recognition of the family were to disappear, if spouses no longer had special legal rights and duties toward each other or even any legal status at all, if children were not legally presumed to inherit their parents' property, and so on, the concept and reality of family would not thereby disappear so long as, socially, they continued to have sufficiently distinctive effects. If the social effects disappeared, only then could we say that the family had disappeared as a social institution—biological connections alone are not enough to constitute social institutions. Similarly, if the law began to recognize and regulate friendships, which now it typically does not, friendship would not become a law-constituted form.

b. Corporate Law as Coercing Nonincorporators

Another example of corporate law's coercive nature: Suppose a subject were injured by a defective product that he purchased at a store owned by a large manufacturing and retail corporation. Typically, he could not sue the cashier who sold him the product, the store manager, or the chief executive officer of the corporation. The law requires him to recover his damages from the corporation if at all, and if the subject says that he prefers to deal directly with the real natural persons involved, the law says no. It continues to say no even if the subject believes that corporations have no existence as persons in any way and that only human persons do—or if he denies that there are such things as corporations with which human persons can truly interact at all. If the corporation is insolvent and cannot compensate the subject, typically he cannot recover from the personal wealth of the cashier, manager, or chief executive even though the last's, at least, is likely to be considerable and

considerably derived from the corporation's activities. Corporate law coerces subjects as well as government officials into treating corporations, and corporate owners and employees, in ways they otherwise might not, even when those subjects never have incorporated anything. The concepts of social or moral obligation of owing victims compensation for injury can and do exist independently of law, as can the enforcement of such obligations through private action—but the law coercively channels them into the lawmakers' desired ways and at times denies relief entirely.

If my critic argues that it is the law that creates the legal concepts of the obligation to avoid harm to others and the obligation to compensate when such harm occurs, and thus how the law chooses to employ them cannot be coercive, I reply that then such must be true of murder. The law creates the legal concept of murder and decides when the killing of a human being is legally considered murder—which may not mirror social or moral concepts of murder[209]—and what penalties attach to it, and what obligations may exist to compensate survivors in wrongful death lawsuits.[210] Yet, again, it would be odd to claim that laws against murder are not coercive.

F. Canons of Interpretation Argument

Some theorists argue that the canons of interpretation typically followed by judges stand as a clear example of coercion-free law.[211] No one forces judges to follow them, they say, and the only coercion applied is the fear of disapprobation of others,

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209. Many consider killing an unborn child to be murder and many do not. Many consider the killing of a home invader who has yet to attack a person to be murder and many do not.

210. The law may choose *not* to create a legal concept of murder. Some argue that the ancient Roman Republic did not have a legal concept of murder or at least no crime of murder. *See, e.g.*, JUDY E. GAUGHAN, MURDER WAS NOT A CRIME: HOMICIDE AND POWER IN THE ROMAN REPUBLIC (2009).

211. *See* SCHAUER, *supra* note 10, at 24. Schauer observes this analysis in the work of Roscoe Pound:

> For Pound, the canons of statutory interpretation—the second-order rules prescribing the methods for interpreting statutes—were obviously part of law. So too, by implication, were all the other rules (and principles, canons, maxims, standards, and other similar prescriptions) that did not directly tell citizens how to behave but instead were directed to judges and specified the manner in which *they* were to perform their tasks. Yet these rules, while plainly *legal* rules, seem to have no sanctions behind them.

Id.

which might be manifested in reversals on appeal and in lost chances at appointment to higher courts, among other such negative effects. Yet, they say, it would be disingenuous to assert that the canons are not part of law.

Aside from those canons of interpretation mandated by statute or appeals court decision with coercive intent involving the possibility of force, perhaps including removal from office, I do assert that the canons of interpretation are not law. They are *legal practice norms* akin to social norms.[212] They are no more part of law than judges' practice of wearing black robes and are just as subject to changes in fashion without a need for any authority to approve the changes, nor is there any authority other than a social one attempting to coerce their preservation.[213] Certainly, the canons of interpretation affect the causally efficacious application of law, but so do the doctrines in a legal hornbook when consulted by judges. The hornbook is not law, and this would remain true even if it were the sole one used by judges and its use became widespread and reinforced by social pressure. The cessation of its use by some or all would not be a violation of law since the law specified no consequences for such cessation—legal authorities would apply no coercive rules to judges through the legal system in order to maintain the hornbook's use. *Black's Law Dictionary* is not law, nor is a glossary of terms informally drawn up by a judge and widely relied upon by his colleagues, nor the Bible, nor the Encyclopædia Britannica. Rather, they are sources on which law or its interpretation is based just like the rules of grammar and the canons of interpretation.

If this remains unclear, then ask: Is failure to follow the canons of interpretation illegal?

G. Laws Directed at Judges and Jurors Argument

1. Not Legal Subjects, But Law-Enforcers

Some rules direct judges and jurors to follow certain principles in applying the law but exhibit no coercive intent against them of the type I describe. The law may seem to command judges to interpret laws in a certain way, but there is

212. I believe that most legal practitioners consider legal practice norms to be often just as powerful as laws, if not more so, in determining legal outcomes.

213. This assumes there is no enforceable legal requirement for judges to wear black robes.

no penalty for violation. The law may seem to command jurors to convict defendants of murder if the cases against them are proven beyond a reasonable doubt, yet if the jurors choose to acquit for supposedly impermissible reasons, no consequence is imposed upon them.

These rules are much like the reverse of administrative laws since they have no binding force upon those meant to apply them, nor do there exist other laws that provide penalties for failure to comply. Thus, *judges and jurors have no legal obligations to follow the law in their rulings and decisions,*[214] and regardless of his interpretative perspective, just about every informed observer of the American legal system is certain that judges fail to follow the law in prominent cases from time to time, and I suspect this is true in all nations.[215] Executive officials typically face penalties for failure to enforce laws that do not apply to them directly, but here that does not exist. Yet the laws remain laws because they do apply to some, most typically defendants and litigants and potential defendants and litigants, with *judges and jurors as law-enforcers.*

2. Law for Some, Guideline for Others

Most substantive criminal laws can be viewed as voluntary instructions or guidelines for jurors, at least so long as defendants have a right to jury trials. The directions to juries on when to convict have *real coercive effect on defendants and potential defendants and are intended to* because reasonable defendants and

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214. *Contra* D.N. MacCormick, *Legal Obligation and the Imperative Fallacy, in* OXFORD ESSAYS IN JURISPRUDENCE, SECOND SERIES 100, 127 (A.W.B. Simpson ed., 1973). MacCormick argues:

> Whether or not a sanction may be directed against a judge who wrongfully acquits or convicts, or who imposes a sentence less or more than that for which the law provides in case of some specific offense, surely it is proper to say that judges have an obligation to apply the law honestly to the disputes which are brought before them. Surely it is proper to call that obligation a "legal obligation."

Id.

215. For example, in the Article 50 decision in Britain, the Prime Minister claimed she had the prerogative to trigger the United Kingdom's exit from the European Union, but the U.K. Supreme Court decided that this would be unconstitutional. *See* Gordon Rayner, *Article 50 ruling: What does it mean for Brexit—and what happens next?*, TELEGRAPH (Jan. 24, 2017), http://www.telegraph.co.uk/news/0/article-50-ruling-does-mean-brexit-happens-next/ [https://perma.cc/Q44W-8M6T] ("Supreme Court justices ruled, by a majority of eight to three, that Prime Minister Theresa May cannot lawfully bypass MPs and peers by using the royal prerogative to trigger Article 50 of the Lisbon Treaty and start the two-year process of negotiating the UK's divorce from its EU partners.").

potential defendants know that jurors likely will, or at least might, follow those directions. These laws have defendants and potential defendants as their subjects in these circumstances—as civil law does civil litigants and potential litigants—not judges and jurors *acting as such*, although judges and jurors remain subject to the same laws—those against murder, theft, and so on—in general. To judges and jurors *acting as judges and jurors rather than in some other role such as defendant or potential defendant*, these laws, such as the law directing jurors to convict defendants if the cases against them are proven beyond a reasonable doubt, fall into the category of exhortation or guideline unless, in fact, legal coercion may be applied to them—which can occur in some areas such as a judge's prosecution for bribery or removal from office for a series of disgraceful decisions. Therefore, some laws do coerce judges' and jurors' decision-making, but insofar as judges and jurors are immune to legally enforceable coercion, they are not subject to legal obligation.

It follows from the above that a law may act as law in some circumstances and as exhortation or guideline in others. The idea that laws addressed to some—in this example, judges and jurors—have others as their subjects is embodied in other areas of law enforcement. A law instructing police officers to arrest reckless drivers has the drivers as its subjects, although if the officers face coercion for not obeying the law's instructions, they are also subjects of the law.

3. The Constitution as Guideline

The same goes for U.S. Supreme Court Justices. When they interpret the Constitution, aside from laws against bribery and such, they are immune and suffer no legal penalty even when they legislate through decisions clearly unconstitutional according to any reasonable reading of the Constitution.[216] The law of the Constitution does not apply to them *when they interpret*

216. Different observers have different lists of unconstitutional decisions, but almost every informed observer has such a list. *See, e.g.*, John Finnis, *Introduction*, *in* PHILOSOPHY OF LAW: COLLECTED ESSAYS: VOLUME IV 1, 15–16 (2011). According to Finnis, "Most of the plainly erroneous decisions of great courts, such as the High Court of Australia's . . . *Wheat Case* (1915), or the House of Lords' decision in the *Belmarsh Prisoners' Case* (2003), or the US Supreme Court's decisions in *Dred Scott* (1856), and *Roe v Wade* (1973), and *Romer v Evans* (1996)" rested upon "extra-legal beliefs" even though legislative action based on "more or less contrary beliefs" apparently held by lawmakers did not truly violate "the constitutional framework." *Id.*

it, but acts merely as guideline, though of course it applies to them in other contexts and so remains law for them in those contexts as well as for ordinary subjects in all typical contexts. The same goes for members of Congress when they pass laws, even when they pass clearly unconstitutional ones.[217]

Strictly speaking, Supreme Court Justices can be impeached and removed for high crimes and misdemeanors, and it may be arguable that those high crimes and misdemeanors include blatantly unconstitutional decisions, but as impeachment and removal of Justices is a difficult process that never has occurred in American history, the effect of this theoretical possibility appears to be nonexistent. Presidents have been more subject to policing by the impeachment power, but modestly. Since intention is key, we might ask if the Framers intended the impeachment power to coerce Justices into refraining from unconstitutional rulings before deciding whether there is a real law, applicable to justices, against unconstitutional decisions. But we also must ask the intentions of Congress in not using this power and compare this state of affairs to the doctrine of desuetude that can render a law null if it has not been enforced for a long period.[218] If legal authorities refrain from or tolerate

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217. Constitutions protect unconstitutional statutes and judicial decisions as well as constitutional ones unless and until legal authorities abrogate them. KELSEN, *supra* note 76, at 72 (explaining that a constitution protects "the validity of the so-called unconstitutional statute" because "if a statute was created other than in the prescribed way or has other than the prescribed content, it is to be valid until it is invalidated by the designated authority . . . in a procedure governed by the constitution.").

218. *See, e.g.*, Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 727 (W. Va. 1992) ("Accordingly, we find *W.Va.Code,* 61-5-19 [1923], to the extent that it prohibits a victim or his agent from seeking restitution in lieu of a criminal prosecution, void under the doctrine of desuetude."). Even if desuetude is not invoked to declare a law no longer existent, a long record of nonenforcement can prompt the courts to refuse to consider challenges to the law and thus treat the law as de facto nonexistent. Poe v. Ullman, 367 U.S. 497, 508 (1961) ("The fact that Connecticut has not chosen to press the enforcement of this statute [for decades] deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows."). When classifying by effect, a subject can make little distinction between a nonexistent law and one that is a harmless, empty shadow whose possible violation of subjects' constitutional rights is not worth the Supreme Court's consideration. Although subsequent to this case a prosecutor brought charges under the anticontraception law in question, apparently without the legislature acting, given the decades long and systematic ignoring of this statute by both authorities and subjects—who long had easy access to contraceptives in Connecticut drug stores—this was more like new lawmaking than enforcing existing law *when effect upon subjects is used as the standard. Id.* at 502 (explaining the common availability of contraceptives in Connecticut and that "[t]he undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis."); *see* Griswold v. Connecticut, 381 U.S. 479

the lack of enforcement of a law long enough, the reasonable observer could conclude that whatever coercive intent that once may have existed has since dissipated, and thus so has the law—even one contained in the Constitution.[219]

The same is true of provisions never enforced, or enforced in ways greatly contrary to their plain meanings. I heard it said that the old Stalinist Soviet constitution contained language guaranteeing freedom of speech and of religion—yet what did it matter for how the Soviet legal system actually operated and for Soviet subjects?[220]

This helps explain to subjects why, decade after decade, judges and others "get away with" not following the law or the Constitution in their decisions.[221] It is not that there are legal duties that are, disgracefully, not being enforced upon them by neglectful legal authorities, but rather that there are no legal duties here at all, only moral and social ones—and thus perhaps it is up to subjects to demand that such authorities follow the written rules in legal documents.[222] The belief that judges and other political and legal authorities have legal duties when they do not induces passivity on the part of subjects, who may think the system should or will "right itself" when, in fact, they must right it.

4. Law-Enforcers and De Facto Lawmakers

Another way to think of these situations is to consider that de facto, from an effects perspective, judges and jurors as well as presidents act as lawmakers, rather than law-followers or law-enforcers, when making decisions in certain circumstances regardless of whether this is what they believe they are doing.

(1965) (describing the end result of the subsequent prosecution).

219. *Cf.* HART, *supra* note 5, at 39. Hart writes:

> Conversely the fines payable for some criminal offence may, because of the depreciation of money, become so small that they are cheerfully paid. They are then perhaps felt to be "mere taxes", and "offences" are frequent, precisely because in these circumstances the sense is lost that the rule is, like the bulk of the criminal law, meant to be taken seriously as a standard of behaviour.

Id. What is this but the felt loss of coercive intent? Yet, here, a law still remains as a small fine still remains.

220. U.S.S.R. CONST., CH. X, (1936) ("[T]he citizens of the U.S.S.R. are guaranteed by law: freedom of speech . . . freedom of the press . . . [t]he inviolability of [their] homes and privacy of correspondence.").

221. I leave it to the reader to choose which instances irritate, but almost every educated reader will have at least one example in mind.

222. Or demand that legal duties be created and enforced.

When jurors acquit a defendant whom they know to be legally guilty from an objective perspective, they implicitly act as lawmakers creating an exception within the law—as self-defense is an exception within the law to the prohibition on the private killing of others—assuming they believe they are rationally justified in acting as they do.[223] When a President issues an executive order, with coercive intent, that he believes is authorized by the Constitution or statute but is not, he lawmakes—at least unless and until the courts overrule him. When the Supreme Court lays down a legal rule contrary to the Constitution, it makes new law.

Far from violating nonexistent "noncoercive legal duties," judges, jurors, presidents, and others *create new legal duties that the rest of us must subsequently satisfy for years, decades, or centuries to come* when they apply rules contrary to existing law or the Constitution, assuming the new rules become established rather than are overturned or otherwise altered. They change the law, assuming they are reasoning, however poorly, for they must be laying down new socially recognizable rules in order to create law. In a typical case with any serious matter at stake, a subject who behaves in accordance with, say, the text of the Constitution in contradiction to a Supreme Court decision will be taught by the legal system just how wrong he is.

When legal rules have been enforced in a settled way and then an old statute or judicial decision is used to return to enforcing older rules instead, it is truer to call this an instance of new lawmaking than to label it a restoration of the law as it always was—for during the enforcement of the newer rules, it wasn't.

H. Structural Provisions, Underenforced Norms, and Legal Rights

Structural and similar provisions of a constitution are typically coercive, as are the legal rights that they guarantee. If a state

223. They could be acting nihilistically with no concern for justification and thus with no rational implications for the law's content. Moral issues may remain, but not in the minds of those who do not believe in morality. *Cf.* John Gardner, *How Law Claims, What Law Claims*, *in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 29, 42 (Matthias Klatt ed., 2012) ("Every legal issue, however superficially technical, is a moral issue, for its resolution inevitably has important consequences for someone."). The doctrine of jury nullification, in various forms, is undergoing a revival, even for grand juries. *See, e.g.*, Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 321 (2012) ("What I have in mind is a misdemeanor grand jury that would address the normative—or extralegal—question of whether a public-order charge is equitably appropriate in the particular case.").

attempted to send four senators to Congress, at least two of them presumably would face physical force, if necessary, to prevent them from taking seats in the Senate chamber and voting on legislation. If the winner of the popular vote but loser of the Electoral College in a presidential election attempted to occupy the White House and govern, physical force would prevent her. When a President usurps legislative power and a court declares his order null and void, executive officials who enforce his order will eventually face force themselves—or, if not, and the President's new power endures, then the law has changed, and indeed historically and in many countries it has changed in much this way many times, nor does it avail to say that the "real law" is what bound executives decades or centuries ago.[224] When a court, relying on the First Amendment, orders a public university to allow a politically incorrect speaker to speak, physical coercion in some form ultimately backs the order. A constitutional right, if it has anything more than an exhortatory effect, either shapes the coercion lawmakers and government officials can use or authorizes coercion to be used against those who violate the right, or both.

The legal status of underenforced legal provisions, including constitutional ones, remains indeterminate insofar as the intent of lawmakers remains socially indeterminable. If the legal system enforces a narrow view of a constitutional provision without at least implicitly excluding the possibility of broadening its enforcement in the future, then the broader view may be the law until such time that the legal system's refusal to expand its enforcement must be viewed as definitive by reasonable subjects—usually after the court system has rejected a clear

224. At times, the legislature formally ratifies the executive's new powers and at times the new powers simply become accepted. In crises, through what German theorist Carl Schmitt called "the exception," modern executives often acquire new powers that are ratified afterward by *debilitated* legislatures. The old Madisonian concept of a *deliberative* legislature does not apply in such circumstances, and perhaps not in usual circumstances in our days. *See* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1652 (2009) (explaining that in a Schmittian emergency, "the initial administrative response will inevitably take place under old statutes of dubious relevance, or under vague emergency statutes that impose guidelines that the executive ignores and that Congress lacks the political will to enforce, or under claims of inherent executive authority" and further explaining that "the executive seeks a massive new delegation of authority and almost always obtains some or most of what it seeks" and thus "while Congress can shape and constrain the executive's response at the margins, it is fundamentally driven by events and by executive proposals for coping with those events, rather than seizing control of them").

chance to broaden enforcement.[225] But restrained federal judicial enforcement of the scope of a constitutional provision, including a federal constitutional provision, need not determine that legal scope overall, for regulatory and state court enforcement conceivably can expand the scope.[226]

It is not that descriptions of what a law, including a constitutional provision, truly is must always wait until the scope and nature of enforcement have become clear. For example, many new statutes are written clearly enough and fit well enough within existing legal structures, including caselaw, that informed observers can reasonably say what the fresh, untested law requires and can predict with reasonable certainty how that law will be enforced by regulatory officials, courts, and others. They behave no more prematurely than those who describe law based on long-standing precedent and enforcement, but turn out to be wrong because a court unexpectedly overrules precedent and interprets the law differently.

Some national constitutions contain explicitly unenforceable provisions. These are not law, but typically are exhortations and at most background to law.[227]

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225. I agree with the conventional view if it is understood to mean that the enforcement by the legal system as whole and not just judges, insofar as the parameters of that enforcement have been reasonably settled, determines the scope of a constitutional norm. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978) ("Conventional analysis does not distinguish between fully enforced and underenforced constitutional norms; as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement.").

226. *But cf. id.* at 1221 ("[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm . . . ."). Insofar as the scope of the legal system's enforcement is unclear, perhaps because the federal courts have made the scope of their enforcement clear but left open the possibility of broader enforcement by other authorities, so are the legally valid conceptual limits of the constitutional norm in question.

227. *See, e.g.*, CONST. OF IR., DIRECTIVE PRINCIPLES OF SOCIAL POLICY, ART. 45. The Constitution of Ireland declares that:

> The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [national legislature]. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.

Id. The policies include the promotion of "justice and charity" and having "ownership and control of the material resources" serve the "common good." *Id.*

I. "No Legal Duty for Judges to Apply the Law" as Counterintuitive

1. Ruling Out Some Purported Legal Obligations to Follow the Law

My critic will say that the contention that judges have no legal duty to follow the law in their rulings—assuming they face no legally enforceable coercion if they do not—is counterintuitive and that any theory of law that rules out the existence of such a legal duty thereby fails to take into account a core instance of law's existence. Whenever the legislature commands a judge to do something in the performance of his office, surely it is illegal for him not to, assuming the command is within the legislature's proper competence. If judges as a group disobey the legislature and consistently apply a different rule, perhaps the judges' rule may indeed become the law because that is the rule actually applied to subjects by the apparatus of the state—but this argument cannot avail in the case of an idiosyncratic judge who applies his own rule while his colleagues apply the legislature's rule. The naturalistic methodology of classifying social forces by effect is faulty, or at least my application of it has been faulty.

On the contrary, I believe this is a clear instance of law's nonexistence.[228] When a judge makes a ruling regarding the proper burden of proof in a lawsuit, the plaintiff and the defendant typically suffer all the potential legal consequences, not the judge, and thus the law instructing the judge on selecting the burden is binding upon the litigants rather than the judge even if formally addressed to the judge. The judge acts as law-enforcer just as police officers and other executive agents do.

The rule for judges regarding selecting burdens is the same as another, also promulgated by a lawmaker, for police officers: "Arrest all nongovernment employees who carry knives into police stations, for it is illegal for them to do so." This is a rule truly meant to regulate the actions of everyday citizens *by means of* a rule to regulate the actions of police officers, and in the event that the lawmaker ensured that officers faced no coercion for failing to obey the rule, the rule would create no legal duty incumbent upon those officers but rather would grant *discretionary authority and legal power* to the officers even if the rule is worded as a command to those officers. It would also implicitly

228. *See* SCHAUER, *supra* note 10, at 31 ("For Bentham and especially Austin, sanctions were essential to the idea of legal obligation.").

command others not to impede or penalize officers who arrest those who carry knives into police stations—the law's coercion is directed not only at those who might carry knives but also against those who might interfere with the arrests. The officers would face no legally enforceable consequences for arresting or not arresting—the essence of thoroughly discretionary authority. For clear thinking, the wording of a rule should not trump its effect.

If the lawmaker amended the rule to "officers have a legal duty to arrest all . . ." but still ensured that officers faced no coercion in failing to obey, nothing would change.[229] Examine the differences among the following statute wordings:

1. "Arrest all . . ."
2. "Officers must arrest all . . ."
3. "Officers have a legal duty to arrest all . . ."
4. "Officers may arrest any or all . . ."
5. "Officers have discretionary authority to arrest any or all . . ."

In the absence of coercion against the officers, they are all the same. The last is worded most clearly, for all the versions grant officers discretionary authority.[230] To my critic who says that the stronger wording of the first three indicates something different, an intention to create something different from the last two, I reply that such formalism indicates much less than the lawmaker's choice to refrain from coercion—and if the first three create a genuine duty that the last two do not, it must be a nonlegal one, apparently an exhortatory moral or ethical one meant to be enforced, if at all, through social or professional norms.[231] Such norms can be important in various ways, including by affecting behavior, but are not thereby legal norms.

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229. Efforts would likely be needed to prevent officers' supervisors from coercively enforcing the rule in pursuit of the lawmaker's seemingly clear intention to create a law otherwise. If the lawmaker's intent were unclear, then the status of the rule as law would be unclear, at least until something settled it, such as supervisors' consistent decisions to enforce or not enforce the rule—which would render the supervisors lawmakers in this case together with the ostensible lawmaker.

230. The same would be true if we deduced a decision rule for officers from a conduct rule addressed to ordinary subjects such as, "Do not carry a knife into a police station unless you are a government employee, or else you will be arrested." *See* Dan-Cohen, *supra* note 185, at 631 ("Any given rule may be a conduct rule, a decision rule, or both. The mere linguistic form in which a legal rule is cast does not determine the category to which it belongs.").

231. Olivecrona, *supra* note 74, at 800 (arguing that, regarding the detection of imperatives, "it makes no difference if the traffic regulations say: 'The driver shall keep to the right' or, 'The driver keeps to the right.' Rules are understood in the same way,

Although the grant of "discretionary authority" may suggest that the law is a powers-conferring one and thus should not be conceptualized as coercion-based, like all such laws it *authoritatively confers the power to coerce others and typically puts those others on notice concerning the possible legally authorized consequences for certain actions.* Such laws, like many other laws, additionally often carry a normative force forbidding the penalizable conduct. A law granting a private property owner the right to erect a billboard receives the benefit of state coercion used against those who would take the billboard down, including government officials who might wish to take it down—or else he has not received a legal right at all.

2. Nonlaw Professionals and Nonlaw Sources

In my earlier hypothetical, the judge faces no legally enforceable consequence for the deliberate or accidental choice of a legally incorrect burden of proof, assuming of course that impeachment and other coercive consequences are not realistic possibilities as a result of his deviation. The law acts as law upon the litigants and as guideline upon the judge—the judge can make a ruling that is *illegal in the sense that it is legally incorrect*, but the ruling is *not illegal in the sense that he violated a legal duty in so ruling*, for no legal duty was imposed upon him. This is akin to a nonprofessional giving, without compensation, faulty legal advice—the advice is legally incorrect, but the nonprofessional typically violated no legal duty by communicating the false information.

My critic will argue that the judge is a professional acting squarely within his office in my hypothetical and that thus a legal duty exists, especially if the legislature says that a legal duty exists. I reply that as mentioned above, a duty may exist according to a nonlegal *social* norm such as a legal practice norm, and such norms also can include using *Black's Law Dictionary* rather than another legal dictionary—assuming the jurisdiction has only a practice and not a legal rule of using *Black's*—or as a *moral* duty, but no distinctively *legal* duty can exist. For a legal duty to exist, the duty must be traceable back to the distinctive regulatory functions and methods—the ends and means—of political positive law.

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whatever form of language is used").

3. The Alternative View as Inferior in Reality-Conformity

Saying that something is a "violation of law" in only some purely and abstractly formal way renders law either a practical nothingness or indistinguishable from ingrained nonlaw concepts such as exhortation and guideline, which can be backed by as much—or more—social or moral sanction and efficacy in regulating behavior as law can. Declaring something "legal" by the *ipse dixit* of a legal authority treats law as an intellectual game and has no greater purchase than a scientific authority declaring a religious doctrine "scientific" or a religious authority declaring a political law "religious." Instead, it is the effect, particularly the reasonably-discerned-by-the-legal-subject intent behind a pronouncement of a legal authority, that most coherently classifies social forces for real people.

This is not to say that it is logically inconsistent to consider the bald assertion by a legal authority of the existence of a legal duty to thereby create one—some theories of law can do this without self-contradiction—but rather to say that this is an inferior way to make sense of the world. Indeed, if coercion-less methods could order political states, the concept of political positive law would not be necessary, or at least would not be distinguishable from political positive guideline. Treating the naked Gnostic assertion of a legal duty's existence as proof of such gives a legal duty some kind of inherent impulse, making it a species of moral duty. I cannot discern what possible force an entirely abstract claim of legal duty by itself can have unless it be a moral force—which does not comport with a positivist approach.

And so, calling noncoercive guidelines "law" as long as they are meant to order polities is not necessarily self-contradictory nor directly opposed to reality—it is not as fully descriptive of reality or as thoroughly conforming to it.

4. Nonmoral Practical, Not Theoretical or Moral

The construction of thought systems not tightly bound to experience can produce results that are arbitrary from the perspective of those who experience, including those who experience law, and thus what is and what is not considered a legal duty or a violation of a legal duty can be arbitrary from that perspective as well. Such thought systems have less usefulness for practical reason than those tightly bound to experience; the latter should be systematically preferred for the guidance of

practical reason, including in the understanding of political positive law.

J. Illustrations

1. Academic Requirements

If law professor says to her students, "It is an academic requirement of this course that you attend at least 80% of class sessions, but there is no penalty or reward that will be administered by any authority based on your class attendance record, and the final exam will constitute 100% of your final course grade," has that professor made class attendance an academic requirement? Of course she has not, and reasonable students would come to that conclusion—they would come to the same conclusion even if the professor did not inform them of the lack of penalty or reward, assuming they knew of that lack in another way. The same would go for a "required" midterm exam that, if students failed to take it, would not affect their grades. It does not matter if the professor sincerely believes she has made attendance or the midterm an academic requirement. It does not matter if class attendance is as important to the good functioning of the course, or of the school in which she teaches, as application of the legislature's will is in a judge's courtroom. Attendance is not an academic requirement for the students. Similarly, application of the law according to the legislature is not a legal requirement for the judge, *for he suffers no legal consequences for disobedience any more than the students suffer academic consequences for theirs.*[232] If a polity wishes to impose a legal duty upon a judge, it must impose legally enforceable coercive consequences upon him for his failure to apply the law. This would show the lawmakers' *conviction in creating law* as nothing else can, just as the professor must impose coercive consequences—penalties or withheld rewards—to create academic requirements.

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232. Of course, students may—or may not—perform worse on the final exam due to nonattendance, but that is not what I mean by academic consequences, which I restrict to those imposed by the actions of the relevant authority (the professor, for example)—the students can also do worse by drinking the night before the exam rather than studying. The judge may suffer no legal consequences for his rulings but could suffer social ones such as exclusion from his fellow judges' weekly golf game, which I understand is a social penalty of the highest order.

The same holds true for a requirement against cheating. If students face no penalty for cheating even though cheating is labeled a violation of academic course requirements, then it truly is no violation, and the professor's urgings against cheating are merely reminders of a social or moral duty not to cheat.

2. Immunities of Kings, Governments, and Officials

My critic might say that there are good reasons for not imposing coercive consequences upon judges making rulings, most prominently because any coercers might intimidate judges improperly—after all, the coercers might distort the law just as much or more than judges do—and we benefit overall when we grant judges independence in such matters. We allow judges to make the judgments about the law in these instances and, of course, someone must have the final say. I reply that we guarantee their independence in this area by not imposing a legal duty upon them, just as kings and national governments have sovereign immunity. At least in one traditional view, it is not claimed that kings and governments have legal duties binding upon them, albeit unenforceably, but rather, and more honestly, that they have no legal duties and can do no legal wrong.[233] They have a great many social and moral duties, and are supposed to follow and to apply the law, but they have no legal duties aside from any they choose to create if indeed they so choose, and thus there is ample precedent for my contention that legal authorities sometimes have grave nonlegal duties to follow the law while not having any legal ones.[234]

Some consider legal duties to be incumbent upon those with sovereign immunity even though there is no way to redress any violation of those duties. Since there can be no legal right without a legal remedy of some kind, even if the remedy does not entirely shape or explain the right as a whole, it is small

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233. Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 396 (2004) ("The maxim ['the king can do no wrong'] has actually stood for four different propositions at various points in English legal history. The first is that the king is literally above the law and cannot do wrong by definition.").

234. *The Queen and Law*, THE ROYAL FAMILY, https://www.royal.uk/queen-and-law [https://perma.cc/J3UU-JSTB] ("Although civil and criminal proceedings cannot be taken against the Sovereign as a person under UK law, The Queen is careful to ensure that all her activities in her personal capacity are carried out in strict accordance with the law.").

comfort to any subject injured by government action to hear that, technically, a legal duty was violated, but no penalty will be inflicted upon the wrongdoer and no restitution granted. These effects are indistinguishable from those of no legal duty. Official immunity, including the immunity granted to judges acting in their official capacities, is another example of the sometime lack of legal duties to underlie grave social and moral duties to follow the law.

Those who consider the idea that there are no legal duties upon judges, and occasionally other authorities, to follow the law to be a demoralizing and destabilizing one—an idea that would lead judges to apply the law less often, for example—might consider the pharisaical nature of their belief. This attitude suggests that anything not formally written into a system of rules is not socially or morally required, thus giving leave to judges and others to ignore grave but legally unwritten duties and, further, perhaps to twist the written ones to their liking rather than follow general moral sense. No written rules can be so effective as to prevent those who wish to misinterpret them from doing so, rendering reliance upon extralegal principle a necessity for just application of the law—and sometimes, justice requires that the written law be violated, or so says the common theory of equity.

The existence of a grave duty outside but affecting a given system of rules does not lessen that duty's gravity, and regardless of what the rules say or how the duties are classified, they will be subverted by those without good moral sense and sufficient practical wisdom—and again, good moral sense and practical wisdom require that the rules be set aside from time to time and indeed are required to determine when such setting-aside should occur.[235] The recognition of the need for this moral sense and practical wisdom in our rulers—rather than reliance upon what rules say or unenforceable "legal" duties—is a much greater step toward good government than attempts to fit all obligations relevant to governance under the legal umbrella. Even if judges' duties to apply the law in their rulings are considered "legal," we have to consider the still unavoidable need for judges and others

235. Lawrence B. Solum, *The Virtues and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 SOUTHERN CAL. L. REV. 1735, 1753 (1987) (explaining Aristotle's view that "[i]n order to do equity and depart from the general rule when the circumstances demand, the judge must possess practical wisdom.").

to believe in and follow an extralegal belief system that requires them to conform to those unenforceable legal duties when they might wish to do otherwise—the practical problem of inducing judges to apply the law when they face no coercive consequences is merely pushed back a step. This is deceptive, and any attitude that those without unambiguously demonstrated moral sense and practical wisdom should be placed in authority due to their learning or other factors—because they will understand and supposedly follow the rules—is a foolish one. It is far better to recognize the crucial role of noncoercive, nonlegal duties and their dependence upon judges' personal characters for their voluntary fulfillment.

3. Police Officers' Excessive Force

Let us imagine that a legislature enacts the following and assume it has the competence to do so: "Police officers have a legal duty to avoid excessive force when dealing with suspects." That said, the legislature then ensured that there would be no penalty or reward for violating or complying with this duty. Reasonable observers would conclude that the legislature abolished the legal duty to avoid excessive force. Who would believe legislators' protestations that they expressly disapproved of excessive force and in fact had outlawed it? After all, just as there are good arguments in favor of not punishing judges when they fail to apply the law, there are good arguments in favor of not punishing police officers for the use of excessive force, such as that they must make split-second decisions in dangerous circumstances and that we should not seek to second-guess them, that we depend upon them for protection and should give them wide latitude in performing their duties, that they are the experts in policing and the rest of us should allow them to set their own standards, that any punishment incentivizes suspects to provoke officers, and so on.

There is no relevant difference between this lack of a legal duty upon the police officer to avoid excessive force in the course of his work and the lack of a legal duty upon the judge to avoid legally erroneous rulings in the course of his. The biases of legal scholars may lead them to feel greater affinity for and trust in judges, but this does not alter the argument, and I have read many judicial opinions with arguments no more cogent in favor

of their judgments than those of police officers in justifying the use of deadly force in certain egregious cases.

My critic might say, "The proper way to think of this is that, technically, a legal duty is incumbent upon officers to avoid excessive force even though it may be that the lawmaker indicated a complete lack of sincerity in wishing this duty observed." On the contrary, this duty has no legal effect, even though the language of the legislature might encourage social condemnation of excessive force—or might not, and might foster approval of such force, either because subjects took the legislature to tacitly approve of excessive force or because subjects tend to adopt attitudes opposite to those of the legislature, including those expressed without apparent sincerity. Any effect of this new law would be in the same class as that of the exhortatory effect of nonlegal pronouncements from legal authorities—the same as if the legislature had passed a nonbinding resolution disapproving of excessive force—and lack any distinctively legal effect. Of course, subjects could treat the enactment with more seriousness because it was a formal law rather than a nonbinding resolution—or treat the law no differently, or with less seriousness, because such attitudinal effect is purely social and dependent on variable nonlegal social attitudes and is not specified or enforceable by the law.

4. Legal Practitioners: The Bad Lawyer and The Puzzled Lawyer

As removed as we legal philosophers may be from legal practice, it is always useful to consider what real lawyers engaged in the practice of law *do* and *should* do. Let us suppose, as sometimes happens, that Congress passes a statute within its competence—the statute is not unconstitutional, contrary to treaty, or anything else along that line—clearly requiring subjects to do one thing in their business practices, but that the relevant administrative agency has disingenuously interpreted it to require something contrary. After court challenges, judges have deferred to the agency interpretation. Let us also suppose, as is often the case in business regulation, that there are no moral or other imperatives involved other than those possibly created by the law, but that *mala prohibita* offenses alone are specified.

Would a practicing attorney advise his clients to obey the "real law" of the statute or the agency interpretation? What *should* he do? Does the attorney have a legal or ethical duty to advise his

clients to obey the legislature, or does he have a duty to advise his clients to conform to the rule actually used by the agents of the state who can apply coercion to those clients? Do his clients, as good law-abiding citizens, have a legal or other duty to obey their legislature at the cost of sanctions applied to them by regulators? After all, if they obey the regulators, they will violate the clearly expressed requirements of Congress.

Imagine that there have been no court challenges, but rather that the major players in the regulated industry in question prefer the agency interpretation to Congress's rule and thus have accepted that interpretation. Thus, the courts have never ruled on the agency interpretation and the interpretation has come to firmly guide business practices in that industry. Would it be wrong for an attorney to tell his clients, "You should conform to the regulators' requirements in order to avoid heavy fines and possibly incarceration. The alternative is to file an expensive, years-long court challenge to the agency interpretation that you may not win"? If the congressional statute is the real law, then has the attorney advised his clients to break the law, or at least presented law-breaking as a legitimate option? If clients follow the agency interpretation, are they now guilty of law-breaking, and of violating a legal duty? Does it matter if the law clearly says that congressional statutes must be obeyed regardless of contrary administrative interpretations?

It could be argued that although subjects, and perhaps their attorneys, violate the law when they follow regulators rather than legislatures, such a violation is morally justified—this depends on moral views and, of course, still leaves a legal violation with all the social and other opprobrium that implies, with the moral opprobrium varying depending on one's moral system. Such a view still would mean that subjects broke the law and capitulated to the illegal coercion of lawless state actors. I believe the better view is that the subjects obeyed a legal duty imposed upon them by the state.

What the typical good attorney would do is advise his clients on the basis of penalty and reward, not abstraction—this we could call the Holmesian bad lawyer. I believe that the typical Hartian puzzled lawyer should do the same, for the tracing of the penalties and rewards through the rules applied by legal authorities yields the real law in my view. If he did not, he would be a bad lawyer from the perspective of his clients and, I believe,

a bad lawyer pure and simple. Tracing coercion does not reveal all that needs to be known about law, but it uncovers law's bones.

5. Other Examples

Examples could be multiplied. A lawmaker could decree that her subjects have a legal duty to obey validly executed wills but that no legal punishment will come upon anyone who takes property against the testator's wishes, that murder is illegal but there is no punishment for murderers, and the like. Using common sense and rationality, the proper conclusion is that the lawmaker chose not to create or preserve legal duties in these cases, for this is the natural effect of such decisions and the effect that any reasonable lawmaker would have intended them to have—and this is the intention that reasonable subjects would likely perceive, or at least could while still remaining reasonable.

CONCLUSION

A. Illustration: Mother Superior

If all residents of a town always follow the advice of the Mother Superior of a local convent because they believe her to be wise and that they would benefit by conforming to her counsel, they may internalize obedience to her wishes as an imperative, but that would not make her coercion-less wishes into commands or laws even if she issued a systematic written set of first-order and second-order rules and otherwise satisfied the structural and procedural requirements of a complete legal system. Town residents would not be, nor necessarily feel themselves to be, under any obligation to obey her in the way they might the local government even if they always obeyed her despite occasionally believing her advice to be inferior to their own judgments.[236] If the local government disappeared and she became the only widely- recognized social and moral authority, her word still could not be law in the absence of perceived coercive intent—and that coercive intent would have to be socially legitimated as political—even if invariably obeyed in fact. This would remain true if she were granted the influence of being the only person recognized to give authoritative advice that should, due to

236. Some medieval abbesses and other monastic women had considerable influence over temporal affairs. *See, e.g.*, SIGRID UNDSET, CATHERINE OF SIENA (2009); *see also* FIONA MADDOCKS, HILDEGARD OF BINGEN: THE WOMAN OF HER AGE (2003).

internalized imperatives and perhaps social norms, be followed. She would remain a revered wise woman and not a lawgiver in the strict sense.[237]

B. Naturalism, Violence, and Conviction

The most basic insight of this article: To best understand the world, beginning from a positivist perspective, the concepts of law and legal obligation cannot be allowed to overflow the distinguishing ends and means employed by political legal authorities, and their distinguishing means is legitimated physical coercion applied through a legal system. Mischief has been done to the understanding of law and of a great many other phenomena by the blurring of categories after detaching them from physicality—and once such blurring begins, it is often hard to find a rationally justifiable limit to the blur. It is better to choose the optimally useful lines instead of stretching concepts to include whatever might be put inside them.

The employment in jurisprudence of a naturalistic epistemology based on causality provides a common-sense way of clarifying our understanding of law. Although, as a social kind, law can have no indisputable *a priori* meaning, some approaches necessarily facilitate intelligibility and communication better than others, especially by enabling the distinguishability of social phenomena by exterior causal effect and interiorly intended effect.

I do not contend that regulative force is the most important method of ordering society or even the most important method used by political authorities. Influence over self-conceptions, stories or narratives, voluntary desires—leading subjects to want what their rulers want them to want—are more important than force *per se*, though force and law play a prominent role in them. Propaganda is more important than force, and thus exhortations can be more important than force. But they are not political positive laws.

The essentiality of coercive force is one device for cutting through convoluted notions of law and of social influences in general, planting law's nature and operation in a specific ground during a time of metastasizing pluralisms that make social regulation increasingly difficult, especially when virtual

237. Mother Superior is not a ruler unless she and her nuns use rulers.

realities—created partly through word-magic by politicians, propagandists, and programmers—possess growing holds over the minds of subjects who adhere to divergent philosophies as well as conflicting personal methods of determining reality. The consistent ability of both lawmakers and subjects to separate specifically legal coercion from other coercive and noncoercive effects is essential for a well-ordered society and also, I believe, for individual psychological and spiritual health.[238] Indistinct lines may lead some to blame law for contributing to their feelings of social disability when they should not—and sometimes to absolve law when they should not.

The recognition that all laws have a coercive element and, in fact, that all laws are acts of authorized and legitimated violence may have a libertarian valence, influencing lawmakers to use law less often than if they believed that some laws are purely benefits-conferring or constitutive. Laws viewed as beneficial may be viewed as the opposite once their coercive element is better understood. The recognition of law's necessary coercive intent also can cabin subjects' respect for it, reinforcing the understanding that law is never an exercise only in reason or morality but in force as well.

None of this is to say that law cannot, overall, reduce the amount of coercion in society.[239] Law restrains ordinary subjects, powerful subjects, officials, and authorities in salutary and predictable ways as nothing else can. Law, government, and the state are more gift than curse even when used only half-properly.

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238. *See* CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS (1st ed. 1991) (explaining the negative effects of the everyday inability to distinguish differing aspects of reality, even if that inability does not rise to the level of mental illness).

239. In addition to suppressing ordinary criminals' coercive acts against ordinary subjects, even in the worst systems law tends to promote consistency, which enables subjects to predict what will expose them to penalties rather than leaving them in random fear. *See* RUDOLF VON IHERING, LAW AS A MEANS TO AN END 264 (Isaac Husik trans., 1913) ("[A]nd this is the point where the moral element of the legal norm makes itself felt for the first time in the shape of fear of open contradiction with itself, and of self-condemnation; where the thought occurs to its author of respecting the law for its own sake."). This fear of open contradiction assists law in disciplining force. *Id.* Von Ihering writes:

> At the moment when force invites the law to announce its commands, it opens its own house up to the law, and there at once commences a reaction of law upon force. For the law brings with it, as its inseparable companions, order and equality; and whilst at first merely a scullion in the house of force it becomes in the course of time the major-domo.

Id.

Yet law's requirements should face evaluation on the part of every thinking subject upon whom truly violent demands for obedience are placed. For all reasonable subjects to discern and honor these demands and for these demands to exist distinctly and have effect in a distinguishably legal way, every law must have the existential conviction granted and manifested uniquely by coercive force.


TEXAS REVIEW OF
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